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Volume II
Part One

Documents of the thirty-fifth session

UNITED NATIONS

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NOTE

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

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

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

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

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

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The reports of the special rapporteurs and other documents considered by the Commission during its thirty-fifth session, which were originally issued in mimeographed form, are reproduced in the present volume, incorporating the corrigenda issued by the Secretariat and the editorial changes required for the presentation of the final text.

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CONTENTS

ABBREVIATIONS

IAEA	International Atomic Energy Agency
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ILA	International Law Association
ILO	International Labour Organisation
IMCO	Inter-Governmental Maritime Consultative Organization (now IMO)
IMO	International Maritime Organization
OAS	Organization of American States
PCIJ	Permanent Court of International Justice
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNITAR	United Nations Institute for Training and Research
UPU	Universal Postal Union

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I.C.J. Reports	ICJ, *Reports of Judgments, Advisory Opinions and Orders*
P.C.I.J., Series A	PCIJ, *Collection of Judgments* (Nos. 1-24: up to and including 1930)
P.C.I.J., Series A/B	PCIJ, *Judgments, Orders and Advisory Opinions* (beginning in 1931)

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NOTE CONCERNING QUOTATIONS

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

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

STATE RESPONSIBILITY

[Agenda item 1]

DOCUMENT A/CN.4/362

Comments and observations of Governments on part 1 of the draft articles on State responsibility for internationally wrongful acts*

[*Original: English*]
[*3 January 1983*]

CONTENTS

Introduction

1. The International Law Commission, having completed at its thirty-second session, in 1980, the first reading of part 1 of the draft articles on State responsibility for internationally wrongful acts as a whole, decided to renew the request it had made to Governments in 1978[1] to transmit their comments and observations on the provisions of chapters I, II and III of part 1 of the draft articles, asking them to do so before 1 March 1981. At the same time, the Commission decided, in conformity with articles 16 and 21 of its statute, to communicate the provisions of chapters IV and V of part 1, through the Secretary-General, to the Governments of Member States, requesting them to transmit their comments and observations on those provisions by March 1982. The Commission stated that the comments and observations of Governments on the provisions of the various chapters of part 1 of the draft would enable it, when the time came, to embark on the second reading of that part of the draft without undue delay.[2]

2. The General Assembly, in paragraph 6 of its resolution 35/163 of 15 December 1980, endorsed the Commission's decision. In paragraph 4 (*c*) of the same resolution, the General Assembly recommended that the Commission, at its thirty-third session, should:

> Continue its work on State responsibility with the aim of beginning the preparation of draft articles concerning part 2 of the draft on responsibility of States for internationally wrongful acts, bearing in mind the need for a second reading of the draft articles constituting part 1 of the draft;

A similar recommendation to the Commission was made by the General Assembly in paragraph 3 (*b*) of its resolution 36/114 of 10 December 1981. In paragraph 3 of its resolution 37/111 of 16 December 1982, the General Assembly recommended that, taking into account the comments of Governments, whether in writing or expressed orally in debates in the General Assembly, the Commission should continue its work aimed at the preparation of drafts on all the topics in its current programme.

3. Pursuant to the decision of the Commission, the Secretary-General, by means of a letter dated 8 October 1980 from the Legal Counsel, requested Governments of Member States which had not already done so to transmit their comments and observations on the above-mentioned provisions of chapters I, II and III of part 1 of the draft not later than 1 March 1981, and also requested them to transmit their comments and observa-

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* The text of part 1 of the draft articles on State responsibility appears in *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

[1] At its thirtieth session, in 1978, the Commission decided to request Governments to transmit their comments and observations on chapters I, II and III of part 1 of the draft (*Yearbook ... 1978*, vol. II (Part Two), p. 78, para. 92). The comments and observations received pursuant to that request are reproduced in *Yearbook ... 1980*, vol. II (Part One), p. 87, document A/CN.4/328 and Add.1-4.

[2] *Yearbook ... 1980*, vol. II (Part Two), pp. 29-30, para. 31.

tions on the provisions of chapters IV and V of part 1 of the draft not later than 1 March 1982. The comments and observations of five Member States in reply to the Legal Counsel's letter received by the end of the Commission's thirty-third session, on 24 July 1981, and those received between that date and May 1982 from the Governments of five other Member States, have been published.[3] Comments and observations received subsequently are reproduced below.

[3] *Yearbook ... 1981*, vol. II (Part One), p. 71, document A/CN.4/342 and Add.1-4, and *Yearbook ... 1982*, vol. II (Part One), p. 14, document A/CN.4/351 and Add.1-3, respectively.

Comments and observations on chapters IV and V of part 1 of the draft articles

Czechoslovakia

[*Original: English*]
[*21 July 1982*]

The draft articles contained in chapters IV and V of part 1 of the draft adopted by the Commission and submitted for comment to States Members of the United Nations represent, on the whole, a contribution to the progressive development and codification of international law and a good starting-point for further codification work.

In view of the continued codification work, Czechoslovakia's comments on the draft articles of chapters IV and V are to be considered preliminary.

1. While taking into account the fact that the final objective of the present codification work is to strengthen international peace and security, chapters IV and V may on the whole be considered acceptable, provided that some provisions are somewhat amended for the sake of precision, in order to avoid different interpretations that might occur in practice.

2. Among the provisions of chapter IV, it is necessary, in view of the wording of article 28, to emphasize the principle of the sovereign equality of States as well as the principle contained in draft article 1, which provides that "every internationally wrongful act of a State entails the international responsibility of that State". Although paragraph 3 of that article states that the provisions on the international responsibility of States which have committed internationally wrongful acts remain unaffected, there is no justification for considering coercion, which in itself is wrongful and entails international responsibility, as a factor which releases a State from international responsibility.

3. As for the provisions of chapter V, it must be noted that article 29, which provides that consent is one of the factors precluding wrongfulness, requires a more precise wording to eliminate doubts that might arise with regard to the giving of consent, including the fact that consent must be given in advance and not subsequently, that it must be specific, free, given expressly, and given by the competent authority of the State in question. In that connection, however, doubts may arise in a certain light as to consent being a factor precluding wrongfulness. The consent of State A that State B should not fulfil an obligation that it has in respect of State A constitutes an agreement (whether oral or written), which cancels the original obligation of State B in respect of State A. In this light, however, one can hardly speak of wrongfulness or, consequently, of State responsibility.

4. In the case of article 33, relating to a "state of necessity", it must be kept in mind that, proceeding from the requirement of maintaining international peace and security, its practical application will be connected with difficulties. The inclusion of this article raises serious doubts, since, with reference to safeguarding an "essential interest", it actually enables States to violate their international obligations. If chapter V is drafted as a summary of exceptions to the four first chapters of the draft, its articles must be formulated precisely to eliminate the possibility of any misuse. But article 33 contains unclear formulations, such as "essential interest" and "grave and imminent peril", and it even extends the concept of the state of necessity to cases where there is no immediate threat to the existence of a State as a sovereign and independent entity. The wording of article 33 is also disputable with regard to the principle of sovereign equality, which prohibits a State to decide unilaterally which interests it can consider to be an "essential interest" of another State.

5. With regard to article 34, it must be pointed out that self-defence is the natural right of every State; consequently, the wording relating to the behaviour of States which is not in conformity with international law should be deleted.

DOCUMENT A/CN.4/366 and Add.1*

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

[*Original: English*]
[*14 and 15 April 1983*]

CONTENTS

Introduction

1. The present report is the fourth relating to the topic of State responsibility (part 2 of the draft articles), submitted by the Special Rapporteur for consideration by the International Law Commission at its thirty-fifth session. The Special Rapporteur submitted a preliminary report[1] to the Commission at its thirty-second session, in 1980, a second report[2] at its thirty-third session, in 1981, and a third report[3] at its thirty-fourth session, in 1982.

2. The general structure of the draft was described at length in the Commission's report on the work of its twenty-seventh session, in 1975.[4] Under the general plan adopted by the Commission, part 1 of the draft deals with the origin of international responsibility, that is to say, "with determining on what grounds and under what circumstances a State may be held to have committed an internationally wrongful act which, as such, is a source of international responsibility".[5]

3. Part 2 of the draft, according to the general plan, deals with the content, forms and degrees of international responsibility, that is to say, with determining "what consequences an internationally wrongful act of a State may have under international law in different hypothetical cases, in order to arrive at a definition of the content, forms and degrees of international responsibility". More specifically, these questions relate to "the establishment of a distinction between internationally wrongful acts giving rise only to an obligation to make reparation and internationally wrongful acts incurring a penalty; the possible basis for such a distinction; and the relationship between the reparative and the punitive consequences of an internationally wrongful act ...".[6]

* Incorporating document A/CN.4/366/Add.1/Corr.1.

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

[2] *Yearbook ... 1981*, vol. II (Part One), p. 79, document A/CN.4/344.

[3] *Yearbook ... 1982*, vol. II (Part One), p. 21, document A/CN.4/354 and Add.1 and 2.

[4] *Yearbook ... 1975*, vol. II, pp. 55-56, document A/10010/Rev.1, paras. 38-44.

[5] *Ibid.*, p. 56, para. 42.

[6] *Ibid.*, para. 43.

4. Under its general plan, the Commission held open the possibility of including in the draft a part 3 concerning the settlement of disputes and the "implementation" (*mise en œuvre*) of international responsibility.[7]

[7] *Ibid.*, para. 44.

CHAPTER I

Status of the work on the topic

A. Part 1 of the draft articles: origin of international responsibility

5. At its thirty-second session, in 1980, the Commission completed its first reading of part 1 of the draft articles.[8] Part 1 consists of 35 draft articles, divided into five chapters. Chapter I (General principles) is devoted to the definition of a set of fundamental principles, including the principle that every internationally wrongful act of a State entails the international responsibility of that State, and the principle that an internationally wrongful act comprises two elements, one subjective, the other objective. Chapter II (The "act of the State" under international law) is concerned with the subjective element of the internationally wrongful act, that is to say, with determination of the conditions in which particular conduct must be considered as an "act of the State" under international law. Chapter III (Breach of an international obligation) deals with the various aspects of the objective element of the internationally wrongful act constituted by the breach of an international obligation. Chapter IV (Implication of a State in the internationally wrongful act of another State) covers cases in which a State participates in the commission by another State of an international offence and cases in which responsibility is placed on a State other than the State which committed the internationally wrongful act. Lastly, chapter V (Circumstances precluding wrongfulness) defines the circumstances which may have the effect of precluding the wrongfulness of an act of a State not in conformity with an international obligation: prior consent of the injured State; legitimate application of countermeasures in respect of an internationally wrongful act; *force majeure* and fortuitous event; distress; state of emergency; and self-defence. Part 1 of the draft articles, which the Commission provisionally adopted in 1980, was discussed in the Sixth Committee of the General Assembly at its thirty-fifth session.[9]

6. The 35 draft articles of part 1 have been referred to Member States for their comments and observations. In paragraph 6 of resolution 35/163 of 15 December 1980, the General Assembly endorsed the decision of the Commission to request observations and comments on the provisions adopted on first reading of the draft articles constituting part 1. Earlier comments on chapters I, II and III were reproduced in documents submitted to the Commission at its thirty-second session[10] and at its thirty-third session.[11] Observations and comments received subsequently, including those on chapters IV and V, were submitted to the Commission at its thirty-fourth session.[12] The Commission hopes to receive further comments and observations from Governments of Member States before proceeding, as recommended in paragraph 4 (*c*) of the aforementioned resolution of the General Assembly, to a second reading of part 1 of the draft articles.

B. Part 2 of the draft articles: content, forms and degrees of international responsibility

7. Pursuant to the recommendation in paragraph 4 (*b*) of General Assembly resolution 34/141 of 17 December 1979, the Commission commenced its consideration of part 2 of the draft articles at its thirty-second session, in 1980.[13]

1. THE SPECIAL RAPPORTEUR'S FIRST REPORT: IDENTIFICATION OF THREE PARAMETERS

8. In his preliminary report,[14] the Special Rapporteur analysed in a general way the various possible new legal relationships (i.e. new rights and corresponding obligations) arising from an internationally wrongful act of a State as determined by part 1 of the draft articles.

9. Having noted at the outset a number of circumstances which were, in principle, irrelevant for the application of part 1 but relevant for part 2, the report made a distinction between three parameters of the new legal relationship that might be established by international law as a consequence of a State's wrongful act. The first parameter was the new obligations of the author State whose act was internationally wrongful, the second parameter was the new rights of the "in-

[8] For the text, see *Yearbook ... 1980*, vol. II (Part Two), pp. 26 *et seq.*

[9] See "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-fifth session of the General Assembly" (A/CN.4/L.326), paras. 96-144.

[10] A/CN.4/328 and Add.1-4, reproduced in *Yearbook ... 1980*, vol. II (Part One), p. 87.

[11] A/CN.4/342 and Add.1-4, reproduced in *Yearbook ... 1981*, vol. II, Part One, p. 71.

[12] A/CN.4/351 and Add.1-3, reproduced in *Yearbook ... 1982*, vol. II (Part One).

[13] *Yearbook ... 1980*, vol. II (Part Two), pp. 62-63, paras. 35-48.

[14] See footnote 1 above.

jured" State and the third parameter was the position of the third State in respect of the situation created by an internationally wrongful act. On that basis, the report drew up a catalogue of possible new legal relationships established by a State's wrongful act, including the duty to make reparation in its various forms (first parameter), non-recognition, *exceptio non adimpleti contractus,* and other countermeasures (second parameter), and the right—possibly even the duty—of third States to take a non-neutral position (third parameter).

10. The report then turned to the problem of "proportionality" between the wrongful act and the response thereto, and in that connection discussed normal limitations of allowable responses: limitations by virtue of the particular protection given by a rule of international law to the object of the response, by virtue of a linkage under a rule of international law between the object of the breach and the object of the response, and by virtue of the existence of a form of international organization *lato sensu.*

11. Finally, the report addressed the question of loss of the right to invoke the new legal relationship established by the rules of international law as a consequence of a wrongful act and suggested that that matter be dealt with rather within the framework of part 3 of the draft articles (implementation of international responsibility).

12. The Special Rapporteur's preliminary report was considered by the Commission at its thirty-second session,[15] and by the Sixth Committee of the General Assembly at its thirty-fifth session.[16] In paragraph 4 (*c*) of its resolution 35/163 of 15 December 1980, the General Assembly recommended that the Commission should "continue its work on State responsibility with the aim of beginning the preparation of draft articles concerning part 2 of the draft on responsibility of States for internationally wrongful acts".

2. The Special Rapporteur's second report: general framework for the three parameters and focus on the first parameter

13. In his second report,[17] the Special Rapporteur discussed a general framework for the three parameters and focused in particular upon the first parameter.

14. In chapter II of the report, the Special Rapporteur proposed five draft articles on content, forms and degrees of international responsibiity. Articles 1 to 3 were intended to deal with the general framework of the three parameters of the legal consequences of an internationally wrongful act, while articles 4 and 5 were intended to deal with the first parameter, i.e. the new obligations of the author State which is held to have committed an internationally wrongful act entailing its international responsibility. The draft articles were consequently divided into two chapters, as set out below.

Chapter I
GENERAL PRINCIPLES

Article 1

A breach of an international obligation by a State does not, as such and for that State, affect [the force of] that obligation.

Article 2

A rule of international law, whether of customary, conventional or other origin, imposing an obligation on a State, may explicitly or implicitly determine also the legal consequences of the breach of such obligation.

Article 3

A breach of an international obligation by a State does not, in itself, deprive that State of its rights under international law.

Chapter II
OBLIGATIONS OF THE STATE WHICH HAS COMMITTED AN INTERNATIONALLY WRONGFUL ACT

Article 4

Without prejudice to the provisions of article 5:

1. A State which has committed an internationally wrongful act shall:

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

(*b*) subject to article 22 of part 1 of the present articles, apply such remedies as are provided for in, or admitted under, its internal law; and

(*c*) re-establish the situation as it existed before the breach.

2. To the extent that it is materially impossible for the State to act in conformity with the provisions of paragraph 1 of the present article, it shall pay a sum of money to the injured State, corresponding to the value which a fulfilment of those obligations would bear.

3. In the case mentioned in paragraph 2 of the present article, the State shall, in addition, provide satisfaction to the injured State in the form of an apology and of appropriate guarantees against repetition of the breach.

Article 5

1. If the internationally wrongful act is a breach of an international obligation concerning the treatment to be accorded by a State [within its jurisdiction] to aliens, whether natural or juridical persons, the State which has committed the breach has the option either to fulfil the obligation mentioned in article 4, paragraph 1, under (*c*), or to act in accordance with article 4, paragraph 2.

2. However, if, in the case mentioned in paragraph 1 of the present article,

(*a*) the wrongful act was committed with the intent to cause direct damage to the injured State, or

(*b*) the remedies, referred to in article 4, paragraph 1, under (*b*), are not in conformity with an international obligation of the State to provide effective remedies, and the State concerned exercises the option to act in conformity with article 4, paragraph 2,

paragraph 3 of that article shall apply.

15. The report suggested the advisability of starting the draft articles of part 2 with three preliminary rules

[15] *Yearbook ... 1980,* vol. I, pp. 73-98, 1597th to 1601st meetings. A record of the discussion in the Commission appears in the Commission's report on its thirty-second session (*Yearbook ... 1980,* vol. II (Part Two), pp. 62-63, paras. 35-48), and a brief summary in the Special Rapporteur's second report (see footnote 2 above), paras. 11-18.

[16] See "Topical summary ..." (A/CN.4/L.326), paras. 145-154.

[17] See footnote 2 above.

(arts. 1 to 3), providing a general framework for the following chapters of part 2, which would deal separately with each of the three parameters outlined in the preliminary report. By way of introduction to those preliminary rules, the report noted the fundamental structural difference between international law and any system of internal law, and the interrelationship between—and essential unity of purpose of—the rules relating to the methodologically separate items of "primary rules", "rules relating to the origin of international responsibility", "rules relating to the content, forms and degrees of international responsibility" and "rules relating to the implementation of international responsibility". The report also noted that the "rule of proportionality" underlying the responses of international law to a breach of its primary rules should be understood rather in a negative sense, precluding particular responses to particular breaches.

16. The report then stated the reasons for including the three preliminary rules, namely, articles 1 and 3, dealing with the continuing force, notwithstanding the breach, of the primary obligations and rights of the States concerned, and article 2, referring to possible special, self-contained régimes of legal consequences attached to the non-performance of obligations in a specific field.

17. The report went on to analyse the three steps associated with the first parameter: the obligation to stop the breach, the obligation of reparation, and the obligations of *restitutio in integrum stricto sensu* and "satisfaction" in the form of an apology and guarantee against repetition of the breach. That analysis, after being confronted with State practice, and with judicial and arbitral decisions and doctrine, led up to the proposed articles 4 and 5.

18. The Special Rapporteur's second report was considered by the Commission at its thirty-third session. At the conclusion of the debate, the Commission decided to send draft articles 1 to 5 to the Drafting Committee, which did not, however, have time to consider them during the session.[18] Part 2 of the draft and the articles proposed by the Special Rapporteur, as a whole, were also discussed in the Sixth Committee of the General Assembly at its thirty-sixth session.[19] Paragraph 3 (*b*) (i) of General Assembly resolution 36/114 of 10 December 1981 recommends that the Commission should continue its work aimed at the preparation of draft articles on part 2 of the draft.

3. The Special Rapporteur's third report: re-evaluation of the approach to part 2

19. In his third report,[20] the Special Rapporteur set out by revising the draft articles submitted in the second report. In case the Commission should wish to confirm the earlier decision to let the Drafting Committee consider those articles, he suggested that the Drafting Committee take as a basis of discussion the following wording:

Article ... [replacing articles 1 and 3 as suggested in the second report]

A breach of an international obligation by a State affects the international rights and obligations of that State, of injured States and of third States *only* as provided in this part.

Article ... [replacing article 2 as suggested in the second report]

The provisions of this part apply to every breach by a State of an international obligation, except to the extent that the legal consequences of such a breach are prescribed by the rule or rules of international law establishing the obligation or by other applicable rules of international law.

20. Turning to draft articles 4 and 5 as proposed in the second report, and referring to remarks made in both the Commission and the Sixth Committee to the effect that those articles should rather be drafted in the form of what the "injured" State—and possibly "third" States—was or were entitled to require from the "author" State, the Special Rapporteur suggested as possible neutral formulation of the *chapeau* of the articles, as follows:

Article ...

An internationally wrongful act of a State entails for that State the obligation:

...

21. In chapter VI of the third report, the Special Rapporteur proposed a set of six draft articles for inclusion in part 2 of the draft, reading as follows:

Article 1

An internationally wrongful act of a State entails obligations for that State and rights for other States in conformity with the provisions of the present part 2.

Article 2

The performance of the obligations entailed for a State by its internationally wrongful act and the exercise of the rights for other States entailed by such act should not, in their effects, be manifestly disproportional to the seriousness of the internationally wrongful act.

Article 3

The provisions of this part apply to every breach by a State of an international obligation, except to the extent that the legal consequences of such a breach are prescribed by the rule or rules of international law establishing the obligation or by other applicable rules of international law.

Article 4

An internationally wrongful act of a State does not entail an obligation for that State or a right for another State to the extent that the

[18] *Yearbook ... 1981*, vol. I, pp. 124-144, 1666th to 1670th meetings, and pp. 206-217, 1682nd to 1684th meetings. The record of the discussion in the Commission appears in the Commission's report on its thirty-third session (*Yearbook ... 1981*, vol. II (Part Two), pp. 143-145, paras. 145-161), and a brief summary in the Special Rapporteur's third report (see footnote 3 above), paras. 17-24.

[19] See "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-sixth session of the General Assembly" (A/CN.4/L.339), paras. 111-130.

[20] See footnote 3 above.

performance of that obligation or the exercise of that right would be incompatible with a peremptory norm of general international law unless the same or another peremptory norm of general international law permits such performance or exercise in that case.

Article 5

The performance of the obligations entailed for a State by its internationally wrongful act, and the exercise of the rights for other States entailed by such act, are subject to the provisions and procedures embodied in the Charter of the United Nations.

Article 6

1. An internationally wrongful act of a State which constitutes an international crime entails an obligation for every other State:

(*a*) not to recognize as legal the situation created by such act; and

(*b*) not to render aid or assistance to the author State in maintaining the situation created by such act; and

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

2. Unless otherwise provided for by an applicable rule of international law, the performance of the obligations mentioned in paragraph 1 is subject *mutatis mutandis* to the procedures embodied in the United Nations Charter with respect to the maintenance of international peace and security.

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

22. Article 1 as proposed in the third report is intended to serve as a formal link between the articles in part 1 and those to be drafted in part 2; article 2 enunciates the requirement of "quantitative proportionality" between breach and legal consequences, but a further elaboration must be left to the States, international organizations or organs for the peaceful settlement of disputes which may be called to apply this principle; article 3 relates to the residual character of the rules of part 2 other than articles 4, 5 and 6 ("the peremptory subsystems"); articles 4, 5 and 6 deal respectively with *jus cogens*, the United Nations system, and international crimes.

23. The Special Rapporteur recalled that the Commission had already, in 1976, recognized that contemporary international law contained a multitude of different régimes of State responsibility. Accordingly, the report noted the link between "primary" rules imposing obligations, "secondary" rules dealing with the determination of the existence of an internationally wrongful act and of its legal consequences, and the rules concerning the implementation of State responsibility, those three sets of rules together forming a "subsystem" of international law for each particular field of relationship between States.

24. The report also indicated that the source (general customary law, multilateral treaties, bilateral treaties, decisions of international organizations, judgments of international tribunals, etc.), the content, and the object and purpose of an obligation could not but influence the legal consequences entailed by its breach ("qualitative proportionality").

25. The report recalled that, within each field of relationship between States, the circumstances of each individual case in which an internationally wrongful act had been committed must be taken into account in determining the reaction thereto ("quantitative proportionality"). In that connection, reference was made to "aggravating" and "extenuating" circumstances and, more generally, to the requirement of a degree of equivalence between the actual effect of the internationally wrongful act and the actual effects of the legal consequences thereof.

26. Furthermore, the report stressed the necessity to provide, in the total set of draft articles on State responsibility, for a general clause on a procedure of settlement of disputes relating to the interpretation of those articles.

27. The third report also analysed various "subsystems" of international law and their interrelationship. On the basis of that analysis a catalogue of legal consequences was discussed. A distinction was made between "self-enforcement by the author State", "enforcement by the injured State" and "international enforcement" (the three parameters). In that connection, the notion of "injured" State was analysed, as well as the "scale of gravity" of the various legal consequences within each parameter.

28. As to the link between an internationally wrongful act and its legal consequences, it was noted that, in the process of international law, from the formation of its rules to their enforcement, State responsibility was only one phase and had to take into account the earlier and later phases of that process. In view of the great variety of situations, it was suggested that part 2 could not contain an exhaustive set of rules, but should concentrate on a number of cases in which one or more legal consequences mentioned in the catalogue were temporarily or definitely excluded, and cases in which the failure of a "subsystem", as a whole, might entail a shift to another "subsystem".

29. The Special Rapporteur's third report was considered by the Commission at its thirty-fourth session. At the end of the debate, the Commission decided to refer articles 1 to 6 as proposed in the third report, and confirm the referral of articles 1 to 3 as proposed in the second report, to the Drafting Committee, on the understanding that the latter would prepare framework provisions and consider whether an article along the lines of the new article 6 should have a place in those provisions.[21] Comments on the draft articles as a whole and on the articles proposed by the Special Rapporteur in his second and third reports were made by the Sixth Committee of the General Assembly at its thirty-seventh

[21] *Yearbook ... 1982*, vol. I, pp. 199-224, 1731st to 1734th meetings, and pp. 230-242, 1736th to 1738th meetings. A record of the discussion in the Commission appears in the Commission's report on its thirty-fourth session (*Yearbook ... 1982*, vol. II (Part Two), pp. 81-82, paras. 88-103).

session.[22] In paragraph 3 of its resolution 37/111 of 16 December 1982, the General Assembly recommended that the Commission "should continue its work aimed at the preparation of drafts on all the topics in its current programme".

[22] See "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-seventh session of the General Assembly" (A/CN.4/L.352), paras. 36-131.

C. Possible part 3 of the draft: settlement of disputes and implementation of international responsibility

30. As stated above (para. 4), the Commission, under its general plan relating to the topic of State responsibility, has held open the possibility of including in the draft a part 3 concerning the settlement of disputes and the implementation of international responsibility.

CHAPTER II

Survey of the possible content of parts 2 and 3 of the draft articles

31. In view of the fact that the draft articles proposed by the Special Rapporteur in his second and third reports were referred to the Drafting Committee for consideration during the thirty-fifth session, the Special Rapporteur does not intend, in the present report, beyond the historical summary contained in chapter I, to return to the matters dealt with in those draft articles, although, of course, in the meetings of the Drafting Committee, he intends to try to adapt those drafts to the criticism voiced during the debate at previous sessions of the Commission.

32. In response to a widespread demand from members of the Commission as well as from representatives in the Sixth Committee of the General Assembly, the present report intends to concentrate on an outline of the possible content of parts 2 and 3 of the draft articles on State responsibility and discuss the admittedly difficult choices with which the Commission is faced.

33. Every single legal rule expresses an "ought to be". As such, it cannot escape the question what should happen in case of non-conformity with the legal rule, nor the question how what should happen in that case is to be realized in actual fact. Without attaching an exaggerated importance to the distinction, one could therefore distinguish "primary" rules of conduct, "secondary" rules concerning the legal consequences of acts or omissions not in conformity with those "primary" rules of conduct, and "tertiary" rules concerning the implementation of the "secondary" rules. Broadly speaking—and that is why no too great importance should be attached to the distinction—the three types of rules have the same object and purpose.

34. The legal consequences of acts or omissions not in conformity with certain legal rules may also appear in a form which is not immediately related to other conduct. Thus certain acts or omissions, quite apart from whether they are as such prohibited or not, may entail the loss or non-acquisition of a "status", and non-conformity with certain rules of procedure may entail the "nullity", in some form, of a legal act. In both cases, of course, the lack of "status" or the "nullity" are normally relevant for other rules of conduct. For the moment, it would seem, we can leave this complication aside.

35. Applying the simple scheme defined in paragraph 33 above to international law, we observe an abundance of primary rules of conduct but a relative scarcity of secondary rules and a virtual absence of tertiary rules. Indeed, the absence of tertiary rules has a distinct influence on the content of such secondary rules as can be found and creates a tendency not to be too specific on the differences, in themselves rather obvious, between the functions of the various primary rules. Hence a certain tendency of States to keep open the option of considering a breach of an international obligation as a violation of their sovereignty, entitling them in principle to any sort of demand and any sort of countermeasure. Even though, in practice, States exert considerable self-restraint, it is difficult to translate this practice into hard and fast legal rules. Nevertheless, this is exactly the task with which the Commission is confronted when trying to elaborate rules concerning State responsibility.

36. Part 1 of the draft articles, concentrating on the author State, i.e. the conditions under which an act of a State exists and constitutes a breach of an international obligation of that State, was relatively—indeed very relatively—easy to elaborate, although one may still have some doubts whether it takes sufficiently into account the differences between the functions of the various primary rules. But that is a matter possibly to be addressed in the second reading of part 1. Part 2 has to concentrate on *injury* (to a particular State, to several States, to the community of States), because it deals with new rights and obligations arising out of the fact that there has been an act or omission not in conformity with the primary rule, and not arising out of the time-honoured basis of the consent of States.

37. Actually, in most cases, a State will deny, on the grounds of the facts or of the interpretation of the applicable primary rules, that there has been on its side a non-conformity with a legal rule, an internationally wrongful act for which it bears responsibility. Obviously other States are not bound to leave the matter there. They can maintain their interpretations of fact

and law and act accordingly. In fact, they can hardly do otherwise. But the point is that the unsettled dispute may give rise to an escalation of the conflict and that each move and countermove cannot be definitively appreciated legally otherwise than on the basis of a settlement of the original dispute of fact and law relating to the primary rules. This uncertainty is a good reason for self-restraint, but here again it is difficult to translate this restraint into hard and fast legal secondary rules if there are no applicable tertiary rules.

38. Obviously, this situation of uncertainty does not preclude secondary rules of the type: "even if such or such an internationally wrongful act is established, it cannot entail more or other than such and such legal consequences". These are rules of quantitative and of qualitative proportionality. But since these legal consequences include, in any case, a deviation from previous legal relationships (new rights and obligations), the question of conduct not in conformity with the new relationship necessarily comes up again. The change —by the force of law—from the "old" to the "new" relationship necessarily presupposes an established and legally appreciated fact.

39. In other words, it is hardly worth while to talk about secondary rules unless one knows the content of the applicable tertiary rules; indeed, the secondary rules are only a transition from the primary to the tertiary rules. No State can accept demands and countermeasures of another State based on the establishment by the other State alone of the existence of an internationally wrongful act of the first-mentioned State. No State can accept either that its demands and countermeasures in relation to another State should be based only on the agreement of the other State as to the existence of an internationally wrongful act of that other State.[23]

40. In his third report,[24] the Special Rapporteur more or less incidentally suggested that part 3 might contain "a meaningful procedure for dispute settlement" limited to a particular legal question, namely, what legal consequences are entailed by an allegedly internationally wrongful act of a State, assuming that the alleged act did in fact occur. Such limited dispute settlement would then refer only to the interpretation of such rules as part 2 might contain relating to quantitative and qualitative proportionality (see para. 38 above). One could envisage extending this still limited procedure for dispute settlement to the interpretation of chapter II of part 1 of the draft articles, i.e. to the question whether the facts, as alleged, establish conduct which is attributable to the State under international law.

41. But, as the Special Rapporteur hinted in this third report,

> Such an isolation of one of many legal questions which may be relevant in a given situation surely has its disadvantages and its inherent difficulties of application...[25]

This may now be illustrated by pointing to the interpretation of chapter III of part 1 of the draft articles, which can hardly be performed without the interpretation and application of the primary rules involved. The same is true for the interpretation of chapter IV and, *a fortiori*, chapter V.

42. Still, from the purely legal point of view, the isolation of some legal questions dealt with in the articles on State responsibility is technically feasible and there are precedents in other fields for such limited procedures for the settlement of disputes. But the Special Rapporteur has considerable doubts as to the willingness of States generally to accept, in this particular field of State responsibility, the isolation of questions relating to the interpretation and application of secondary rules from those relating to the interpretation and application of the primary rules concerned.

43. The foregoing applies in the perspective of a general convention on State responsibility comparable with the Vienna Convention on the Law of Treaties of 1969.[26] [27] One might envisage another final outcome of the Commission's work on State responsibility, such as a form of endorsement of the rules on State responsibility as "guidance" for States and international bodies confronted with the questions dealt with in those rules.

44. An intermediary solution would be the acceptance of those rules by States in a convention, but only to the extent that a dispute between them (which necessarily involves the interpretation and application of primary rules) is submitted to an international procedure for settlement of disputes.[28]

45. The Special Rapporteur submits that the Commission should give early consideration to the question of the settlement of disputes, in other words to the possible content of part 3 of the draft articles. It is his view that the prospects for part 3 decisively influence the way in which part 2 is to be elaborated.

46. It cannot be denied that both in judicial decisions and in the teachings of the most highly qualified publicists of the various nations there is little inclination to go into the details of the legal consequences of an internationally wrongful act. Judicial decisions often, by the very nature of the claims made before the inter-

[23] Cf. the situation in respect of *jus cogens* under the Vienna Convention on the Law of Treaties: some States cannot accept that another State should invoke *jus cogens* as a ground for invalidity of the treaty between them unless the other State accepts that, in case of dispute, the International Court of Justice is competent to decide whether there is a rule of *jus cogens* and whether the treaty is incompatible with that rule. *Tertium datur*?

[24] Document A/CN.4/354 and Add.1 and 2 (see footnote 3 above), paras. 57-62.

[25] *Ibid.*, para. 58.

[26] Hereinafter referred to as the "Vienna Convention". For the text, see United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), p. 140.

[27] Actually, it was the draft articles on the invalidity of treaties that prompted the decision of the United Nations Conference on the Law of Treaties to deal with the question of settlement of disputes (cf. para. 34 above).

[28] The convention would then be one of the "international conventions ... establishing rules expressly recognized by the contesting States" in the sense of Article 38, para. 1 *a*, of the Statute of the ICJ.

national court or tribunal involved, concentrate on reparation as a legal consequence.[29]

47. Publicists, if they deal at all with the matter of State responsibility outside the field of breach of an obligation relating to the treatment of aliens, are in general reluctant to relate the catalogue of legal consequences they then enumerate to the variety of internationally wrongful acts, in other words, to elaborate on qualitative proportionality. It is also significant that, in the Covenant of the League of Nations, there was no international legal qualification of the type of dispute that might eventually lead Member States "to take such an action as they shall consider necessary for the maintenance of right and justice" (Art. 15, para. 7).

48. An attempt to relate specific types of legal consequences to specific types of internationally wrongful acts is undertaken by Graefrath and Steiniger in a "draft convention on State responsibility". The authors distinguish three categories of internationally wrongful acts: (*a*) aggression and threat to the peace by forceful maintenance of a racist or a colonial régime (*das Verbrechen der Aggression, dem als Sonderfall ... die Friedensgefährdung durch gewaltsame Aufrechterhaltung eines rassistischen Regimes oder Kolonialregimes zugeordnet ist* (arts. 7 and 8); (*b*) other violations of sovereignty (*Souveranitätsverletzungen die nicht Aggression sind* (art. 9); (*c*) violations of other conventional or customary law obligations (*Verletzungen vertraglicher oder gewohnheitsrechtlicher Verpflichtungen, die nicht unter die Art. 7 bis 9 fallen*) (art. 10).[30]

49. Starting from the assumption that the question which entity or entities are on the other side of the new legal relationships entailed by the internationally wrongful act is an element of the legal consequences of such an act, Graefrath and Steiniger make further distinctions. Thus "aggression" and "forceful maintenance of racist or colonial régimes" are distinguished inasmuch as, in the second case, "the people" is one of the other entities in the new legal relationship. Furthermore, and in conformity with the Vienna Convention, multilateral and bilateral treaties are distinguished in respect of the legal consequences of their termination or suspension. Finally—but only in respect of primary obligations of the third category—the authors recognize the possibility of "measures and legal consequences specifically agreed" (*besonders vereinbarten Rechtsmassnahmen und Rechtsfolgen*) (art. 10). It is to be noted that the draft convention also deals with the tertiary rules, i.e. with the rules on implementation of State responsibility, albeit mostly by reference to "principles and methods of international law" (*entsprechend den Prinzipien and Methoden des Völkerrechts*) (art. 11).

50. A "categorization" of internationally wrongful acts for the purpose of distinguishing between their legal consequences is of course also to be found, in various degrees, in the publications of other writers on international law.[31] In particular, a category of "international crimes" is recognized as having an *erga omnes* character. In itself, this character is a legal ground only for the rights of States other than the author State. The duties of those other States are rather duties as between those other States and as such have another legal ground. Such duties may include the duty not to support the wrongful act *ex post,* by recognizing its result as legal or rendering aid or assistance in maintaining such result; the duty to support measures taken by the State or States "specially affected by the breach" (art. 60, para. 2 (*b*) of the Vienna Convention), and the duty to participate in collective action for the protection of the fundamental interests of the international community as a whole (cf. Articles 48, para. 1, 49 and 50 of the United Nations Charter).

51. The *erga omnes* character of international crimes does not in itself determine the other elements of the legal consequences of such crimes, as distinguished from the legal consequences of an international delict. Indeed, the Commission, in 1976, already considered it very unlikely that all international crimes would entail the same legal consequences. But perhaps one might at least establish a minimum common element in those legal consequences, applicable to all crimes and based on the ground of the mutual solidarity of all States other than the author State. This is the thought underlying draft article 6 as proposed by the Special Rapporteur in his third report (see para. 21 above).

52. The legal consequences of one category of international crimes, to wit, aggression, are dealt with in the United Nations Charter, admittedly in a way which leaves room for divergent interpretations. But one legal consequence, the inherent right of individual or collective self-defence, is not disputed. And in any case there is in this field, in part 3 of the draft, a procedure of implementation of State responsibility resulting from aggression. At the previous session, members of the Commission were divided in respect of the question whether the Commission should undertake to elaborate on the notion of self-defence.[32] As to the question which measures the Security Council should take for "the maintenance of international peace and security" and the consequences of failure to take effective measures, no suggestion was made to let the Commission undertake the drafting of rules in that respect. The Special Rapporteur continues to feel that no useful purpose could be served by the Commission taking up any of those points.

[29] Article 36, para. 2 *d*, of the Statute of the ICJ stresses "the nature or extent of the reparation to be made for the breach of an international obligation".

[30] B. Graefrath and P. A. Steiniger, "Kodifikation del völkerrechtlichen Verantwortlichkeit", *Neue Justiz* (Berlin), vol. 27, No. 8, 1973, p. 226; see also, by the same authors and E. Oeser, *Völkerrechtliche Veranwortlichkeit der Staaten* (Berlin, Staatsverlag der Deutschen Demokratischen Republik, 1977), pp. 231 *et seq.* (text of the draft convention).

[31] See the publications cited in the Commission's commentary to article 19 of part 1 of the draft articles on State responsibility (*Yearbook ... 1976,* vol. II (Part Two), pp. 96 *et seq.*).

[32] See *Yearbook ... 1982,* vol. II (Part Two), p. 81, paras. 91 and 92.

53. In their draft convention on State responsibility, Graefrath and Steiniger suggest the codification of other legal consequences of aggression, not dealt with in the United Nations Charter,[33] such as the termination of bilateral treaties concluded between the aggressor State and the victim State; suspension of other bilateral and multilateral treaties; sequestration of property of the aggressor State; internment of its nationals; guarantees against repetition of aggression; reparation of all damage; non-recognition of any result of aggression as legal; permanent and universal penal jurisdiction over persons responsible for the planning or waging of aggression; duty to extradite such persons on request to the victim State.

54. In the opinion of the Special Rapporteur, most of these topics fall outside the scope of the draft articles under consideration. The effect of war on treaties is actually a matter which the Commission has left aside in dealing with the law of treaties. It would seem that the topic is not so much related to the international wrongful act of aggression as to the resulting state of war. The same applies in regard to the sequestration of enemy property and the internment of enemy nationals. Guarantees against repetition of aggression, reparation and non-recognition of the result of an internationally wrongful act as legal, on the other hand, are general topics of State responsibility, not limited to aggression or international crimes in general. Finally, although penal jurisdiction over persons and extradition are matters dealt with by obligations under international law, and acts of State not in conformity with those obligations may be legitimate countermeasures in case of aggression or other internationally wrongful acts, the matter would seem to be so closely connected with another topic under the Commission's consideration, namely, the draft Code of Offences against the Peace and Security of Mankind, as to foreclose their being treated within the framework of the draft articles on State responsibility. There is, of course, also a link with the topic of State immunity.

55. The conclusion to be drawn from the foregoing paragraphs seems to be that there is no place in part 2 for an article or articles on the special legal consequences of the category of internationally wrongful acts called acts of aggression. In fact, the failure of the most fundamental primary rule prohibiting such acts creates a situation which, subject to the application of the United Nations machinery for the maintenance of international peace and security, justifies any demand and any countermeasure; only the rule of quantitative proportionality and the protection of *jus cogens* (particularly provisions of a humanitarian character relating to the protection of the human person in armed conflicts) remain. Those three limitations are already intended to be covered by articles 2, 4 and 5, as proposed by the Special Rapporteur in his third report (see para. 21 above).

56. Aggression is an international crime in the field of the maintenance of international peace and security. Article 19 of part 1 of the draft articles presupposes the existence of other fields of "fundamental interests of the international community" protected by primary rules of international law in such a way that a "serious" breach of an obligation imposed by such rules constitutes an international crime. The *erga omnes* character of such wrongful acts does not, of course, necessarily imply that all other States than the author State have the same rights and duties as a legal consequence of that act. Neither, as noted before (para. 51 above), does the qualification as international crime imply that the other elements of its legal consequences are the same as those of other international crimes, such as aggression.

57. The question arises whether and to what extent the Commission should try to indicate the legal consequences of those other international crimes, in particular to try to define the content of the new rights and obligations of States other than the author State. In article 8 of their draft convention on State responsibility,[34] Graefrath and Steiniger assimilate to a large extent the forceful maintenance of a racist régime (such as *apartheid*) or of a colonial régime to aggression, in particular by declaring Chapter VII of the United Nations Charter (including Article 51) applicable to such a situation.

58. The difficulty here is that, while the international community as a whole may well recognize certain acts of a State as international crimes, there seems to be less consensus as regards the punishment to be meted out. Indeed, in fields of "fundamental interests of the international community", such as "the safeguarding and preservation of the human environment" or "safeguarding the human being" or, for that matter, "safeguarding the right of self-determination of peoples", the progressive development of international law has brought about primary rules, and even sometimes tertiary rules, at least some machinery of implementation; but as to special secondary rules, different from those applying to internationally wrongful acts in general, there is little evidence of generally accepted legal consequences of serious breaches. This, no doubt, is connected with the fact that in those fields the primary rules involve entities other than States, whereas the secondary rules, by definition, involve States as such. Nevertheless, as previously indicated (para. 51 above), there are elements of special legal consequences common to all international crimes.

59. One such element, already mentioned, is the *erga omnes* character of the breach. Every other State has the right to require from the author State its "self-enforcement" of the obligation breached (reparation *ex nunc, ex tunc* and *ex ante*).

60. Another common element seems to be that the organized international community, i.e. the United Nations, has jurisdiction over the situation. This does

[33] Paras. 1 and 2 of article 7 of that draft deal with self-defence, the powers of the Security Council and possible expulsion from the Organization under Article 6 of the Charter (see footnote 30 above).

[34] See footnote 30 above.

not mean that an international crime is necessarily a "threat to the peace, breach of the peace, or act of aggression" in the sense of Article 39 of the Charter. Which organ of the United Nations can take what action remains a matter of Charter interpretation and application. In essence it means that, in case an international crime has been committed, this cannot be a matter which is "essentially within the jurisdiction of any State" in the sense of Article 2, paragraph 7, of the Charter. Furthermore, it is conceivable that "the international community ... as a whole", in qualifying certain internationally wrongful acts as international crimes, by means of establishing a primary rule at the same time, establishes the corresponding secondary and tertiary rules.

61. A third common element would be that the principle of international law "concerning the duty not to intervene in matters within the domestic jurisdiction of any State", as formulated 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, [35] does not apply in a case in which an international crime has been committed. This would mean that every State or group of States other than the author State has the right to take countermeasures against the author State which would otherwise be prohibited by the aforementioned principle. It does not mean, however, that every other State or group of States would have the right to take measures which are specifically prohibited by other rules of international law, either general rules of customary law, or treaties governing the relationship between the author State and the other State or group of States.

62. A fourth common element already referred to (paras. 50 and 51 above), deals with the relationships between States other than the author State. A legal consequence of an international crime is that it creates duties of solidarity for and between all other States. The duty not to lend support *ex post facto* to the crime of the author State seems to be self-evident. The duty to lend support to legitimate countermeasures of other States is less clearly defined. Indeed, this duty cannot in itself entail for the supporting State a right vis-à-vis the author State to which the supporting State was not already entitled by the third common element of legal consequences as mentioned in paragraph 61 above. What is meant by "support" here concerns the relationship between the other States and as such presupposes a form of common appreciation of the existence of a right to take countermeasures and of the usefulness of its exercise.[36] This is even more the case as regards the duty to participate in collective countermeasures against the author State. After all, in the other field of maintenance of international peace and security, Article 48 of the United Nations Charter empowers the Security Council to designate some of the United Nations Members to take action, while Article 49 obliges to "mutual assistance" only in respect of carrying out the measures decided upon by the Security Council, and Article 50 envisages a "solution" of "special economic problems arising from the carrying out of those measures" of any State. In short, the duty to support countermeasures is valid only within the framework of some form of international decision-making machinery.

63. It has already been noted (para. 60 above) that the United Nations has jurisdiction if an international crime has been committed and that it is conceivable that the international community as a whole, when it establishes a primary rule qualifying certain acts as international crimes, at the same time empowers specific organs of the United Nations to decide on specific countermeasures against the author State of such a crime. It is of course also conceivable that such countermeasures might then go beyond those already mentioned (para. 61 above) and encompass measures otherwise specifically prohibited by other rules of international law, and impose duties for all States to support the measures decided upon and even to participate in collective measures; in such cases those duties would have to prevail over the duties under the other rules of international law.[37]

64. But are there actually such secondary and tertiary rules in force at the present stage of international law (apart from Chapter VII of the Charter)? Would it, within the framework of progressive development of international law, be appropriate for the Commission to draft, for example, a proposal stating that the General Assembly of the United Nations, by a two-thirds majority, may decide what measures not involving the use of armed force are to be employed (cf. Article 41 of the Charter) if the International Court of Justice has established, on request of any State, that an international crime was committed by another State?

65. The Special Rapporteur is of the opinion that there is little chance that States generally will accept a legal rule along the lines of article 19 of part 1 of the draft articles without a legal guarantee that they will not be charged by any or all other States with having committed an international crime, and be faced with demands and countermeasures by any or all other States without an independent and authoritative establishment of the facts and the applicable law. In this respect there is a clear analogy with what happened in respect of the *jus cogens* clause in the Vienna Convention.

66. On the other hand, the international community of States will not accept, if there is such an independent and authoritative establishment of the facts and the ap-

[35] General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

[36] If the countermeasure taken by a State A against the author State B is a boycott, other States may well have objections to extending a primary boycott (refusal of direct economic relations between State A and State B) to a secondary boycott (refusal of economic relations between State A and State C, which maintains economic relations with State B) or even a tertiary boycott (refusal of economic relations with State D, which maintains economic relations with State C).

[37] Cf. paras. (17)-(19) of the commentary to article 6 submitted in the Special Rapporteur's third report (document A/CN.4/354 and Add.1 and 2 (see footnote 3 above), para. 150).

plicable law and if the conclusion thereof is that an international crime was committed, that the matter of sanctions be left to the willingness of each individual State to make the sacrifices inevitably involved. And, finally, the individual States will not accept a duty to support countermeasures taken by another State, or a duty to participate in collective countermeasures, without such an independent and authoritative statement and a collective discussion and decision on the sharing of the burden of implementation.

67. All this leads the Special Rapporteur to the conclusion that the Commission, having recognized the progressive development of international law by provisionally adopting article 19 of part 1 of the draft, should carry this development to its logical conclusion by proposing secondary and tertiary rules in this respect.

68. In the foregoing paragraphs a first "categorization" of internationally wrongful acts was made with a view to distinguishing their legal consequences; aggression was distinguished from other international crimes, in view of, *inter alia,* the inadmissibility of the use of armed force in self-defence by States in the case of international delicts. We leave aside here the case of *concursus,* i.e. the possibility that an international crime which is not an act of aggression may nevertheless create a "threat to the peace" in the sense of Article 39 of the United Nations Charter.

69. Admittedly, this distinction conceals two important controversies. The first relates to the implications of the right of self-determination of peoples; the second refers to the meaning of "the use of armed force" within the context of a response to an internationally wrongful act. Actually, both controversies relate clearly to the scope and interpretation of primary rules of international law. Thus, for example, the following questions arise. Does the right of self-determination of peoples imply a right, and possibly even a duty, of every individual State to render assistance to a people which is the victim of the maintenance by force of colonial domination, even to the extent of the threat or use of armed force against the territorial integrity and political independence of another State? Is the temporary use of armed force by a State within the territory of another State, for the sole purpose of liberating its nationals brought into or held in that territory by an internationally wrongful act, to be assimilated to the use of armed force against the territorial integrity and political independence of that other State?

70. The Special Rapporteur submits that these and other "borderline" questions inevitably arise in any attempt at categorization of internationally wrongful acts for the purpose of differentiating their legal consequences. The whole idea underlying State responsibility is the change in legal relationships between States brought about by the internationally wrongful act of a State. Defining that change inevitably involves a determination of what the legal relationship was in the first place. Nevertheless, the whole endeavour of the Commission in drafting rules of State responsibility had been to avoid as much as possible prejudging the scope and interpretation of primary rules, in particular where international experience shows controversies which cannot at present be resolved by consensus. In the present case, it would seem that the Commission can hardly expect to improve on the Declaration on Principles of International Law, adopted in 1970, or on the Definition of Aggression, adopted in 1974, by answering questions deliberately left open in those texts.[38]

71. Passing now to the legal consequences of internationally wrongful acts which are neither acts of aggression nor other international crimes, the question arises what further categorizations of wrongful acts and of legal consequences (the "catalogue") can be made.

72. As to the legal consequences of an international delict, one may distinguish three elements or aspects:

(*a*) As to the delict creating new legal relationships between the author State and the injured State, the question arises, which State or States can be considered injured by the delict;

(*b*) The content of the new legal relationships;

(*c*) The question of a possible "phasing" in the content of the new legal relationships.

This question includes *inter alia* the question whether immediate countermeasures are allowed before any attempt is made to settle the original dispute.

73. Normally, international obligations—whether "requiring the adoption of a particular course of conduct" or "requiring the achievement of a specified result" or "to prevent a given event"—are obligations towards a specific State. Even if more than one other specific State is involved, the bilateral relationships created by a rule of international law can normally be treated separately. The same applies to the new legal relationships created by a breach of an obligation, i.e. the relationships between the author State and the injured State or States. In principle, it makes no difference whether the obligation is one of customary law or one resulting from a treaty.[39] There are, however, exceptions to the separability of the bilateral relationships.[40] But it would seem that, beyond the case of international crimes, there are no internationally wrongful acts having an *erga omnes* character. This does not exclude the possibility that a State or States which have an interest in the matter may, through diplomatic or other official channels, indicate that interest to the author State of an internationally wrongful act. Such *démarches* or appeals may be made even before the internationally wrongful act has actually been committed. The admissibility of such

[38] See, in particular, paragraph 2 "General part", of the Declaration of Principles of International Law (see footnote 35 above); and articles 7 and 8 of the Definition of Aggression (General Assembly resolution 3314 (XXIX) of 14 December 1974, annex).

[39] If a particular coastal State denies a vessel of a particular flag State innocent passage through its territorial sea, this is an internationally wrongful act which creates a new legal relationship as between that coastal and that flag State only.

[40] Cf. the Special Rapporteur's preliminary report, document A/CN.4/330 (see footnote 1 above), paras. 62 *et seq.*

steps is not a legal consequence of the internationally wrongful act.[41] This is, of course, without prejudice to the duty not to intervene in the internal or external affairs of another State.

74. Whether the interest of a State is adversely affected by the act of another State is a matter of fact. For State responsibility—i.e. new legal relationships between States—to arise, it is obviously necessary to qualify both the act and the interest; in other words, to determine the parties to the breach. Parties to the breach can only be those States between which the primary relationship exists. The question therefore is a matter of interpretation of primary rules: whose interests a given primary rule is intended to protect? But even if it is established that a given primary rule is—possibly also—intended to protect the interests of a given State, that State is not necessarily a party to the breach.[42]

75. In many cases of internationally wrongful acts there is no problem in legally identifying the injured State. The States which are parties to the creation of the rule of international law (or, in the terminology of part 1, of the "obligation") are also parties to the primary legal relationships under that rule and, at the same time, parties to the breach, i.e. parties to the new, secondary, legal relationships; the three "levels" coincide. This is normally the case with obligations imposed in a bilateral treaty. It should be noted here, however, that even in such a case a similar problem may arise as to the identification of the "passive" side of the new legal relationship, as indeed of the "active" side. Actually, if the direct victim of the act is not a State but another entity, one still has to establish a link between that entity and a State in order to identify the injured State. Such a link may be established by another (primary) rule of international law, such as the rules relating to what is often called "the nationality of claims". Indeed, one might consider the rule of international law qualifying an internationally wrongful act as an international crime as being also such another primary rule, inasmuch as and to the extent that it links the fundamental interests of the community of States as a whole to each individual State (which thereby becomes an injured State).

76. In fact, by another rule of international law, the same phenomenon of linkage exists on the active side, where the author of the act (cf. art. 32, para. 1, of part 1 of the draft articles on State responsibility) is not a person or a group of persons "acting on behalf of the State", in the sense of article 11, paragraph 1, of part 1 of the draft; according to paragraph 2 of that article, there may then be related conduct of the State which may entail State responsibility. (In a sense, the rule of exhaustion of local remedies also serves to "identify" the author State.) Articles 27 and 28 of part 1 of the draft are also such other rules of international law, this time identifying a third State as a party to the breach. Incidentally, the problem of identifying another State as an injured State also arises within the context of liability for the injurious consequences of acts not prohibited by international law.[43]

77. Of course, if, in a bilateral treaty, the only obligations imposed are obligations relating to a specific conduct at a specified time (such as paying an amount of money at a specific date), there can be no problem at all in identifying the injured State in the case of non-performance. The physical act of (non-)performance, the concrete legal relationship and the rule of international law created by the treaty coincide completely. The same applies, normally, to obligations arising for States out of a decision in settlement of a dispute. But, as already remarked in the third report,[44] the bulk of international obligations are formulated in abstract terms, and then the question of identifying the injured State arises. This is particularly the case if a multilateral treaty is the source of the obligation breached. In between the case of a bilateral treaty and a multilateral treaty lies the case of the position of third States vis-à-vis a treaty under articles 35 and 36 of the Vienna Convention . In reality, this is rather a case of primary legal relationships, arising out of a treaty to which the third State is not a party, as between those parties and the third State. As already remarked in the preliminary report,[45] there does not seem to be any reason to treat—for the purposes of determining the legal consequences of a breach—this primary legal relationship differently from the legal relationship between the parties to the treaty. This seems also to be valid for the case dealt with in article 36 *bis*[46] of the draft articles on the law of treaties between States and international organizations or between international organizations.[47] In both cases, however, the third States are not parties to the treaty; therefore the question arises whether they

[41] Cf. the Judgment of the ICJ of 5 February 1970 in the *Barcelona Traction, Light and Power Company Limited* case, second phase (*I.C.J. Reports 1970*, p. 46, paras. 86-87).

[42] It is certainly also in the interests of the States to, from, or on behalf of which cargoes are carried by ships that the innocent passage of ships should not be hampered by a coastal State, in accordance with article 24, paragraph 1 *b*, of the United Nations Convention on the Law of the Sea (*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), document A/CONF.62/122); nevertheless, such hampering is an internationally wrongful act only as against the flag State. If, according to the same Convention, the interests of the "the international community as a whole" are involved in the resolution of a conflict between a coastal State and a flag State as regards their respective rights in an exclusive economic zone, this does not of course mean that an internationally wrongful act of a coastal State in this field is a breach *erga omnes*. Cf. also the preliminary report, document A/CN.4/330 (see footnote 1 above), paras. 41, 70 and 96.

[43] See in this connection the statement made on 16 November 1982 by the representative of the Netherlands in the Sixth Committee of the General Assembly (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 46th meeting, paras. 44-50).

[44] Document A/CN.4/354 and Add.1 and 2 (see footnote 3 above), para. 32, footnotes 15 and 16; cf. also paras. 123-124.

[45] Document A/CN.4/330 (see footnote 1 above), para. 38.

[46] For the text, see *Yearbook ... 1982*, vol. II (Part Two), p. 43.

[47] Cf. the comments made on 9 November 1982 by the representative of the Netherlands in the Sixth Committee of the General Assembly (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 40th meeting, paras. 52-59).

can invoke a material breach as a ground for a termination or suspension of the treaty, a matter which will be dealt with later in the present report.

78. The identification of the injured state is only one element of the determination of the legal consequences of an internationally wrongful act. As such, it is closely related to the other two elements mentioned above (para. 72). Indeed, the three "parameters" of the legal consequences may involve different States[48] and may correspond to different "phases". Thus, for example, the question whether, in respect of an internationally wrongful act of a State, another State has a "separate self-contained right"[49] to claim reparation is not necessarily answered in the same way as the question whether a State is entitled to take countermeasures; application of Article 94 of the United Nations Charter may involve still other States in the legal consequences of an international delict. Incidentally, other legal consequences of "status" and "procedure" may also involve other States than those entitled to reparation (cf. art. 61, para. 2, and art. 62, para. 2 (*b*), of the Vienna Convention); which State can invoke the nullity of a legal act is also a question separate from the direct injury suffered. Before pursuing the matter of identification of the injured State, an analysis of the two other elements seems indicated.

79. As to the content of the new legal relationships, three types can be distinguished, namely: (*a*) reparation; (*b*) suspension or termination of existing relationships at the international level; and (*c*) measures of self-help to ensure the maintenance of rights. Again, the division between the three types is not a sharp one; they relate roughly to modifications in the three fields of jurisdiction: the jurisdiction of the author State; the international jurisdiction and the jurisdiction of other States. Indeed, the three fields of jurisdiction are interrelated through rules of international law.

80. Within the framework of qualitative proportionality, the admissibility of measures of self-help is obviously the most dubious, since such measures necessarily involve an infringement of rights of the author State. Accordingly, reprisals are generally considered as allowed only in limited forms and in limited cases. The nature of the internationally wrongful act and the nature of the rights of the author State infringed by the reprisal are relevant here.

81. The first limitation of the admissibility of reprisals concerns reprisals involving the use of force. The Declaration on Principles of International Law[50] proclaims that "States have a duty to refrain from acts of reprisal involving the use of force". Article 4 of the resolution on the régime of reprisals in time of peace, adopted by the Institute of International Law in 1934, stipulates that "armed reprisals are prohibited to the same extent as resort to war" (*les représailles armées sont interdites dans les mêmes conditions que le recours à la guerre*).[51] The draft convention of Graefrath and Steiniger[52] excludes reprisals which amount to the threat or use of force against the territorial integrity or political independence of the State (arts. 9 and 10) and military action outside the territory (art. 9, para. 1). However, the Declaration on Principles of International Law also contains the clause:

> Nothing in the foregoing paragraphs [including the one just cited] shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful.

and article 2 of the resolution of the Institute of International Law excludes "self-defence" from the scope of that resolution. In this field, the Commission is then again confronted with the lack of consensus referred to above (paras. 52-54). In any case, to the extent that armed reprisals are prohibited, that prohibition would be covered by articles 4 and 5, as proposed by the Special Rapporteur in his third report (see para. 21 above). Furthermore, in the case of most internationally wrongful acts, "armed reprisals" would be manifestly disproportional in the sense of article 2 as there proposed.

82. The next question is whether in contemporary international law there are other limitations set to the admissibility of reprisals other than "armed reprisals". As stated in paragraph 80 above, the nature of the internationally wrongful act and the nature of the right of the author State, infringed by the reprisal, seem to be relevant here. Neither the resolution of the Institute of International Law, however, nor the draft convention of Graefrath and Steiniger, make any explicit distinctions in this respect. Articles 9 and 10 of that draft convention, dealing with the legal consequences of internationally wrongful acts which are neither military aggression nor forceful maintenance of a racist or colonial régime, have exactly the same provision relating to reprisals: "the character and scope of such reprisals must be limited to what is necessary" (*sie sind nach Art und Umfang auf das Erforderliche zu beschränken*), a clause which seems rather related to the requirement of quantitative proportionality, formulated in article 6 of the resolution of the Institute of International Law, which obliges the State which takes reprisals "to make the coercion applied proportional to the gravity of the act denounced as wrongful and to the extent of the damage suffered". Nevertheless, there are instances of qualitative proportionality, even outside the case of peremptory norms of general international law covered by article 4 as proposed in the third report.

83. The question dealt with here has some analogy with the problem of "state of necessity" dealt with in article 33 of part 1 of the draft articles on State responsibility. Paragraph 2 (*b*) of that article provides that a state of necessity may not be invoked "if the international obligation with which the act of the State is not in conformity is laid down in a treaty which, explicitly or

[48] See the preliminary report, A/CN.4/330 (see footnote 1 above), para. 62 *in fine* and para. 42.

[49] *Ibid.*, para. 41.

[50] See footnote 35 above.

[51] *Annuaire de l'Institut de droit international, 1934*, pp. 708-711.

[52] See footnote 30 above.

implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation". Now the possibility that the legal consequences of a breach (including the exclusion of certain legal consequences such as reprisals) are "prescribed by the rule or rules of international law establishing the obligation or by other applicable rules of international law" is already covered by draft article 3 as proposed in the third report (see para. 21 above). However, in view of the obvious disadvantages of too wide a formulation of this draft article, and without prejudice to the eventual adoption of a general draft article recognizing the—limited—possibility of derogation from the legal consequences to be defined in part 2, there seems to be room for a special draft article dealing with reprisals only.

84. Leaving aside the international crime of aggression, it seems obvious that a reprisal which is in itself another international crime can never be justified even in response to an international crime committed by another State. Conceptually, there are two grounds for this obvious truth. The first is that the protection of the fundamental interests of the international community is involved; the second is that the directly injured entities are not individual States. Both grounds may *mutatis mutandis* be applicable to reprisals which, although by definition breaches of international obligations, are not international crimes. Actually, they apply to other objective régimes as well, which may be universal, regional or even bilateral.

85. The concept of "objective régime" is admittedly somewhat nebulous.[53] This is perhaps due to the fact that the legal relevance of the concept is considered in a wide variety of contexts. In particular, the context of implied acceptance of the objective régime by third States seems to have been the reason why the concept was not as such envisaged in the Vienna Convention. The present context of admissibility of reprisals could, it seems, be separated from that other context. For the moment, the question is not which States, not being parties to the creation of the objective régime, derive rights and obligations from such a régime, but rather whether, given the existence of primary legal relationships between States under such a régime, one of those States may, by way of reprisal, act in a manner not in conformity with its obligations under such regime (which is not necessarily created by a treaty; in so far, the formulation adopted for article 33, paragraph 2 (*b*), of part 1 of the draft—a different context—is too narrow for the present purpose).

86. Two provisions of article 6 of the resolution of the Institute of International Law[54] seem to be relevant here. Point 3 of that article obliges a State which exercises reprisals "to limit the effects of such reprisals to the State against which they are directed and respect, to the extent possible, the rights of private persons and those of third States". Point 4 prohibits "any rigorous measure contrary to the laws of humanity and the dictates of public conscience". The first mentioned provision raises the question of international obligations essential for the protection of interests common to a group of States, to the extent that a breach of such obligation cannot but adversely affect such common interest and, thereby, cannot be limited to the single member of the group which has committed an internationally wrongful act. The other provision evokes the existence of international obligations protecting entities other than individual States, particularly human beings as such.

87. From the point of view of logic, the fact that the existence of common interests makes it impossible to single out the author State may lead to two answers: either the reprisal—action not in conformity with the obligation under the objective régime—is not admissible, or the reprisal is admissible and the members of the group of States other than the author State must accept the adverse consequences for them. Actually, the choice between the two answers should be made by a collective decision, but the difficulty here is that not all objective régimes provide for a machinery for such collective decisions. Accordingly, some writers make a distinction according to the internationally wrongful act to which the reprisal is directed: if the breach is a breach of an obligation under the objective régime, the reprisal is admissible; if the internationally wrongful act is not connected with the objective régime, the reprisal is not admissible.[55] The latter rule is no doubt correct (in the absence of a machinery of collective decision-making as regards the reprisal). The former rule may correspond to the words "to the extent possible" in article 6, point 3, of the aforementioned resolution of the Institute of International Law. Its unfortunate result—the reprisal adds another breach of the objective régime of the one committed by the author State—can be justified only by the absence of a collective decision-making machinery, together with the fact that, even though a common interest of the group of States is affected, a State member of the group is especially affected by the breach which entails the reprisal. All this is, of course, without prejudice to the possibility that the original breach of an international obligation creates a situation in which a fundamental change of circumstances, a state of necessity or the requirement of reciprocity can be invoked as a justification for the non-performance of a primary obligation by an affected State. Indeed, the common interest of the group of States does not preclude the possibility that a breach by one member of the group of an obligation established in the common interest may affect another member more directly. On the other hand, the common interest requires some form of collective management of such interest. It is significant in this respect that article 8 of the resolution of the Institute of International Law declares that "The use of

[53] Cf. E. Klein, *Statusverträge im Völkerrecht. Rechtsfragen territorialer Sonderregime* (Berlin, Springer, 1980).

[54] See footnote 51 above.

[55] See B. Simma "Reflections on article 60 of the Vienna Convention on the Law of Treaties and the background in general international law", *Österreichische Zeitschrift für öffentliches Recht* (Vienna), vol. XX (1970), p. 5; and Klein, *op. cit.*, and the numerous authors there cited.

reprisals is always subject to international surveillance. It can in no case be immune from discussion by other States or, as between Members of the League of Nations, be exempt from appraisal by the organs of the League", while article 9 contains a general clause on the settlement of disputes by the Permanent Court of International Justice.

88. The case of objective régimes protecting entities other than States is somewhat different, indeed rather the opposite. Article 6, point 4, of the resolution of the Institute of International Law obviously refers in particular to what would now be called the rules of international law relating to the protection or respect of human rights in armed conflicts. In this particular field of international law, the relevant rules in general deal specifically with the (in)admissibility of reprisals. Actually, if reprisals are permitted, it is because the State interest involved prevails over humanitarian considerations. It would seem to the Special Rapporteur that this particular field should be left to its own development and that part 2 of the draft articles on State responsibility should not deal with it.

89. But there are other objective régimes which impose on States the respect of human rights, whatever the nationality of the person affected, and whatever the circumstances. Reprisals in breach of such rules are obviously inadmissible, even if they do not amount to an international crime. It would seem, however, that this inadmissibility is already covered by the general article 4 proposed by the Special Rapporteur in his third report (see para. 21 above). A state of necessity and a fundamental change of circumstances are already envisaged in such rules, and the requirement of reciprocity is definitely not part of those rules.

90. Another entity protected by primary rules of international law, and not allocated to a particular State, is the human environment as a shared resource. In this field, again, reprisals consisting in breach of such rules seem to be inadmissible even in response to an earlier breach by another State. But in this field it is particularly necessary to distinguish reprisals from other grounds of non-performance of obligations. The breach of an obligation relating to the protection of the human environment may be of such a kind that the resulting situation constitutes a fundamental change of circumstances in respect of the corresponding obligation of other States. Furthermore, in particular if the primary rule of international law is a bilateral one, or valid only as between the members of a group of States, it may well provide for special obligations of mutual abstention and as such express a requirement of reciprocity. Again, to the extent that the international obligation is a universal and absolute one, the prohibition of its breach by way of reprisal seems to be covered by draft article 4 as proposed in the third report.

91. Apart from the exclusion of specific reprisals by a universal rule of *jus cogens,* and the exclusion of specific reprisals by an objective régime (otherwise than in case of a breach of such objective régime), there may be cases of exclusion of specific reprisals even where no extra-State interests are involved. A typical example is the case of diplomatic immunities. It would seem, however, that this is a case which does not lend itself to generalization within the context of the inadmissibility of specific reprisals. Indeed, the case seems rather within the scope of a deviation from the general rules concerning the legal consequences of internationally wrongful acts, implicitly provided for at the time the primary relationship is established. As such, it would fall under the rule intended to admit such deviation, i.e. article 3 as proposed in the third report.

92. Under the terms of article 30 of part 1 of the draft articles on State responsibility, the reprisal is a legitimate countermeasure which precludes the wrongfulness of the act otherwise not in conformity with an international obligation. As such, it is clearly distinguished from the unilateral termination or suspension of the operation of a treaty as a consequence of its breach, even though some of the considerations leading to a limitation of reprisals are also valid for the limitation of the unilateral termination or suspension of the operation of a treaty under article 60 of the Vienna Convention. Indeed, article 60 is clearly inspired by the wish to keep alive the treaty as such, although it recognizes that the requirement of reciprocity and/or a fundamental change of circumstances may not admit this result.

93. The unilateral termination or suspension of the operation of a treaty does not, of course, necessarily imply that an act in breach of the treaty will actually be committed by the State which has proceeded to such termination or suspension. On the other hand, the termination or suspension of the operation of the treaty necessarily implies that the primary obligations under the treaty of the State which has committed the material breach are also terminated or suspended in respect of the terminating or suspending State.

94. Indeed, there are different stages in the total process of international law: the creation (including modification and termination) of the rule and its enforcement may be separated by primary, secondary and tertiary legal relationships. Self-help, being a measure of enforcement, must be distinguished from the termination of the rule. Of course, some of the stages may be missing or may coincide. Thus, for example, treaties do not necessarily embody abstract rules at all; but their operation always involves other rules of international law outside the treaty, if only for the purpose of their interpretation (art. 31, para. 3 (*c*) of the Vienna Convention). Other rules which may also apply are the rule relating to the effect of a fundamental change of circumstances on obligations and the rule of reciprocity.

95. Reprisals as measures of enforcement must also be distinguished from the operation of two other rules of international law: the rule concerning the effect of a fundamental change of circumstances on international obligations and the rule of reciprocity of obligations. This is not to say that those rules always apply to all international obligations; on the contrary, they may or

may not apply. But the point is that if and to the extent that they apply, the conduct not in conformity with the otherwise existing obligation is not a reprisal.

96. In this connection, one may doubt whether the opinion, referred to in paragraph 87 above, that a reprisal consisting in a breach of an obligation under an objective régime is admissible if it is a response to a breach by another State of that objective régime, is really correct. The main argument seems to be twofold:[56] first, that, at least in treaty relationships, there is always an element of *do ut des*; secondly, that the fear of reprisals is one of the main reasons for voluntary performance of international obligations. Both arguments are realistic in the sense that, no doubt, considerations of this nature may enter into the minds of Governments when they negotiate, when they decide to become or not to become party to a treaty and when they decide on their conduct in concrete circumstances. But the point is that there are other legal means or techniques than the admissibility of individual reprisals which can cover these considerations, to the extent that they are justified. First, reciprocity, in the sense that an obligation is to be performed by a State only if the same or another obligation is performed by another State, is a legal link which can be established by the parties at the time those obligations are negotiated or entered into. Secondly, a situation resulting from the non-performance of an obligation may constitute a fundamental change of circumstances or, for that matter, create a state of necessity for other States. A fundamental change of circumstances and a state of necessity cannot be invoked if they are the result of a breach, by the party invoking them, of an international obligation. On the other hand, a breach of an international obligation by a State may well contribute to a situation involving a fundamental change of circumstances or a state of necessity for another State. Thirdly, account has to be taken of the possible separability of obligations within the same field. Fourthly, there may be other means of enforcement than individual self-help. And, finally, the failure of performance of an obligation is to be distinguished from the total failure of the régime as such.

97. The Special Rapporteur submits that the common or collective interest created by the group of States parties to an objective régime does indeed exclude the admissibility of reprisals consisting in the non-performance of an obligation under that régime, otherwise than in consequence of a collective decision to that effect of such group of States. Actually, this is nothing else than the transposition, at the regional level, of the idea underlying the universal régimes: the United Nations system, *jus cogens* and international crimes. In a way one might even consider the self-contained régime of diplomatic law as a borderline case of a *bilateral* objective régime (however, cf. para. 21 above). There is, of course, a difference from those universal objective régimes inasmuch as the regional objective régime may itself expressly admit specific reprisals in specific circumstances.

98. If a provision to this effect is embodied in part 2 of the draft articles, it will be necessary to include, in some place, a clause stating that the inadmissibility of the reprisal is without prejudice to any question relating to the termination and suspension of the operation of treaties. Such a clause would be the counterpart of article 73 of the Vienna Convention in so far as that article relates to "the international responsibility of a State". This, it would seem, would cover some of the cases of reciprocity of treaty obligations. Non-universal objective régimes not based on a treaty but solely on regional customary law would not be covered, but could be excluded by the definition of objective régimes from the scope of the rule on non-admissibility of reprisals, and are in any case unlikely to occur. It may be recalled here that the resolution of the Institute of International Law[57] also excludes from its scope "measures resulting from the general principles of law in the field of obligations, applicable to international relations" (art. 2, point 2). Since article 60 of the Vienna Convention applies only to material breaches, it would be necessary to cover other cases of reciprocity of the performance of treaty obligations. Indeed, if it appears from the treaty or is otherwise established that the performance of an obligation by a State party is the counterpart (quid pro quo) of the performance of the same or another obligation by another State party, the non-performance by the first mentioned State need not be a material breach in order to justify non-performance by the other State. It is also recalled that article 60, paragraph 2 (*a*) of the Vienna Convention envisages a collective decision of the "other parties" to a multilateral treaty (albeit in combination with individual measures taken by the "party specially affected by the breach". But article 60 is not limited to objective régimes and applies only to "material" breaches, narrowly defined in paragraph 3 of that article.

99. If it is accepted that reprisals consisting in a breach of an obligation under an objective régime are inadmissible, the question of defining objective régime arises. In essence it is the "normative" character—in contradistinction to both the quid pro quo character and the "co-operative procedure" character—of the rule of international law which determines its objectivity in the present context. The parties to the régime create the collective interest which requires that each of them fulfil its obligations irrespective of the fulfilment of the obligations by another party. In this sense the objective régime is the opposite of a *si omnes* clause. Perhaps the simplest way to describe such régimes would be to refer to the "object and purpose" of a treaty as requiring just that. This would also allow for a separation between obligations resulting from one and the same treaty and constitute a counterpart to the definition of a material breach in article 60 of the Vienna Convention. The normative character of the régime may be a consequence of

[56] Cf. Klein, *op. cit.*, pp. 229 *et seq.*; and Simma, *loc. cit.*, pp. 70 *et seq.*

[57] See footnote 51 above.

the fact that the non-fulfilment of an obligation under the régime in respect of the author State does "affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations" (art. 58, para. 1 (*b*) (*i*), of the Vienna Convention). In a sense the presence within the objective régime of machinery for the effective settlement of disputes or, *a fortiori,* of decision-making machinery for the management of the collective interest, underpins the normative character of the objective régime.

100. As stated in paragraph 87 above, the presence of a collective interest in objective régimes should imply a collective decision-making machinery as regards reprisals consisting in a breach of obligations under that régime. The treaty establishing the objective régime may provide for such machinery. In the absence of specific provisions to this effect, there remains the possibility that the other States parties to the treaty, in case of a breach of an obligation under that régime by one of them, take a decision allowing by way of reprisal a conduct, by one or more of them, that is not in conformity with obligations under the régime. Unless otherwise provided for in the treaty, such a decision could be taken only unanimously.

101. Quite apart from the inadmissibility of a reprisal resulting from the content of the rule which would be breached by such reprisal, there are other limitations to self-help. Article 6, point 1, of the resolution of the Institute of International Law[58] requires that the author State of the internationally wrongful act must first be given the opportunity to stop the breach and offer reparation. Articles 9 and 10 of the draft convention of Graefrath and Steiniger require a prior notification (*Ankündigung*) to the author State of the intent to take countermeasures,[59] presumably for the same purpose. It is to be noted that, in respect of termination or suspension of the operation of a treaty, no prior notification is required under article 65, paragraph 5, of the Vienna Convention.

102. Far more important in the matter of phasing (see para. 72 (*c*) above) is the question of the inadmissibility of reprisals if other means of enforcement are available, in particular, procedures for the peaceful settlement of disputes.[60] Actually, means of peaceful settlement of disputes are always available in the sense that the parties to the dispute may at any time agree to such a procedure. But does this mean that the alleged author State of an internationally wrongful act, by offering to submit the dispute to a settlement procedure, can avoid reprisals? Or that the other State can apply reprisals only if it offers at the same time to submit the dispute to a settlement procedure?

103. In itself, there seems to be much merit in the statement that self-help should not be allowed, or at least be suspended, if the alleged author State accepts that the questions of fact and law which underlie the allegation of an internationally wrongful act be decided by an impartial body. Indeed, reprisals are meant to bring about a return to conduct in conformity with an international obligation, including the substitute performance of reparation. If the alleged author State disputes the points of fact and/or law involved in the allegation, it can really not be required to do more than accept third party settlement of the claim. The point is made, however, that, in the mean time, i.e. up to the moment that the author State fulfils its obligation under the award or judgment, the injured State continues to be injured. Now, this may of course be avoided if the court or tribunal is empowered to order interim measures of protection. Furthermore, as stated above (para. 98), the inadmissibility of a reprisal does not exclude a suspension of the operation of a treaty or the non-fulfilment of an obligation by way of reciprocity if the obligations under the treaty are of such a kind that reciprocity applies. In the *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France,* the tribunal noted that:

> The scope of the United States action could be assessed in very different ways according to the object pursued; does it bear on a simple principle of reciprocity measured in economic terms? Was it pressure aiming at achieving a quicker procedure of settlement? Did such action have, beyond the French case, an exemplary character directed at other countries and, if so, did it have to some degree the character of a sanction? It is not certain that those responsible for the measures taken made very refined studies of that point; ...[61]

Neither did the tribunal find it necessary to answer those questions, since in any case it held that

> ... the measures taken by the United States do not appear to be clearly disproportionate when compared to those taken by France.[62]

Actually, State practice in respect of the conclusion of bilateral air services agreements generally rather tends to be based on very detailed quid pro quo considerations.

104. On the other hand, neither the alleged author State nor the alleged injured State can force the other State to accept a third party settlement procedure unless there is a basis of pre-existing consent for such procedure. In other words, the parties to the dispute must, before the dispute arises, have agreed in principle that such disputes shall be settled in this way. Even then, reprisals may be applied in order to arrive at an actual settlement of the dispute which has arisen.

105. Does this imply that reprisals may not be maintained after the moment that the case is *sub judice*? In the *Air Service Agreement* case referred to above, the tribunal stated:

> The situation changes once the tribunal is in a position to act. To the extent that the tribunal has the necessary means to achieve the objectives justifying the countermeasures, it must be admitted that the right of the parties to initiate such measures disappears. In other words, the power of a tribunal to decide on interim measures of pro-

[58] *Idem.*

[59] See footnote 30 above.

[60] Cf. art. 5 of the resolution of the Institute of International Law, and preliminary report, document A/CN.4/330 (see footnote 1 above), paras. 86 *et seq.*

[61] United Nations, *Reports of International Arbitral Awards,* vol. XVIII (Sales No. E/F.80/V.7), p. 442, para. 78.

[62] *Ibid.,* p. 444, para. 83.

tection, regardless of whether this power is expressly mentioned or implied in its statute (at least as the power to formulate recommendations to this effect) leads to the disappearance of the power to initiate countermeasures and may lead to an elimination of existing countermeasures to the extent that the tribunal so provides as an interim measure of protection. As the object and scope of the power of the tribunal to decide on interim measures of protection may be defined quite narrowly, however, the power of the parties to initiate or maintain countermeasures, too, may not disappear completely.[63]

Article 5 of the resolution of the Institute of International Law points in the same direction; it presupposes that reprisals may be applied even if a means of settlement is available, including a power of the court or tribunal to order interim measures, and then leaves the decision on the maintenance of such reprisals to the court or tribunal. It is to be noted that this article starts with the general statement that reprisals are prohibited "if respect for the law can be effectively ensured by procedures of peaceful settlement", and then gives examples of situations in which reprisals are prohibited in particular (*notamment**).

106. The Special Rapporteur submits that, if the Commission, as suggested above (paras. 95-96), makes an express distinction between measures of reciprocity and reprisals, one could go a step further and exclude the initiation or maintenance of reprisals from the moment the dispute is *sub judice,* in accordance with a pre-existing agreement between the parties that such dispute shall be submitted to third party settlement, unless that agreement specifically excludes interim measures of protection to be indicated by the court or tribunal at the request of either party to the dispute. This, of course, would imply that the reprisal could be initiated or again applied if a party to the dispute fails to comply with the decision of the court or tribunal indicating the interim measures of protection.

107. If it is accepted that the pre-existing agreement on settlement of disputes precludes reprisals after the actual submission of the dispute, it should also be admitted that reprisals are not permitted if the claimant State refuses to take the necessary steps for the actual submission of the dispute. Of course, no such refusal is implied in case the actual submission does not take place because the parties fail to agree on the arbitrator(s) they have to appoint in common agreement.

108. It seems arguable that the foregoing also applies if the pre-existing agreement on settlement of disputes does not provide for a binding final decision of a court or tribunal. The point is that unilateral self-help should also be excluded if there is a dispute as to the facts of the case and a pre-existing agreement on recourse to impartial fact-finding in case of such a dispute. Here again, the prior exhaustion of available international remedies would seem to be required.

109. On the other hand, one has to allow for the possibility that an internationally wrongful act is in fact so manifest and at the same time in law so serious as to destroy the object and purpose of the whole body of rules to which the obligation breached by that wrongful act belongs. In such an extreme case, where "reciprocity", "fundamental change of circumstances" and "state of necessity" meet, even the prior exhaustion of available international remedies cannot be required. Actually, in such a case the matter is beyond reprisals and settlement of disputes as a means to obtain a return to legitimacy. This case is to be distinguished from an incidental breach of a rule by the irreversible character of the situation created by the destruction of the object and purpose of the body of rules involved. It has been correctly remarked[64] that, for example, the obligations of States to maintain certain standards of working conditions or to prohibit certain practices in consequence of ILO conventions, even though not dependent on the fulfilment by other States of the same obligation, contain an element of reciprocity, inasmuch as the preamble to the ILO Constitution declares: "Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries ...". But it seems clear that this kind of reciprocity comes in to play only in case of a "serious and widespread" failure. The same is true of common standards in the field of protection of the environment.

110. Apart from quid pro quo and objective régimes, there are nowadays many international obligations of States to undertake common action in a particular field. Often such obligations leave it entirely to the States concerned to determine together which common action shall be taken. Failure to agree on a common action is, then, certainly not an internationally wrongful act. But failure to negotiate in good faith is, strictly speaking, an internationally wrongful act. Consequently, the question arises whether such failure may be justified as a legal consequence of an internationally wrongful act of another State, either in the same field or in another field of rules of international law. This question is relevant because the failure to negotiate may normally have legal consequences in respect of liability for the injurious consequences of acts not prohibited by international law. It would seem that indeed such "active intergovernmental co-operation" may be suspended as a legal consequence of an internationally wrongful act, subject, of course, to the applicable rules of the international organization—if the duty to co-operate is placed within the framework of such organization—and subject to the rule of proportionality. Although the establishment of diplomatic relations between States takes place "by mutual consent", they may be "broken off" (in view of article 45 of the Vienna Convention on Diplomatic Relations,[65] "suspended" may be a better

[63] *Ibid.*, pp. 445-446, para. 96. It should be noted that in this case the parties, after the dispute had arisen, had concluded a compromise expressly authorizing the tribunal to decide on interim measures, at the request of either party. At the same time, this compromise substituted agreed interim arrangements for both the measures taken by France and the countermeasures taken by the United States of America. In fact, neither party requested the tribunal to decide on interim measures of protection.

[64] Simma, *loc. cit.*, pp. 70-71.

[65] United Nations, *Treaty Series,* vol. 500, p. 122.

word) unilaterally. While the functions of a diplomatic mission comprise—apart from the protection of the interests of the sending State and its nationals in the receiving State and the ascertaining of and reporting on conditions and developments in the receiving State—negotiating with the Government of the receiving State and promoting friendly relations, there is no positive legal duty to co-operate in this way. The suspension of diplomatic relations—like the refusal of *agrément* and the declaration of *persona non grata* by the receiving State—is not an internationally wrongful act and cannot therefore constitute a reprisal or an act otherwise not in conformity with an international obligation. Nevertheless, such action may well be a response to an international wrongful act.

111. As regards the obligation of the author State to make reparation, reference may be made to the second report, and in particular to articles 4 and 5 as proposed therein (see para. 14 above). Since those articles were referred to the Drafting Committee, the Special Rapporteur will suggest improvements of the drafting in that Committee.

112. Returning now to the question, left in abeyance above, of the determination of the "injured" State, i.e. the other State or States involved in the new legal relationships entailed by an internationally wrongful act, it would seem clear *a priori* that distinctions must be made in respect of the various contents of those new legal relationships, which, in their turn, are dependent upon the nature and content of the old or primary relationships, the rights under which have been infringed and the obligations under which have been breached. This is particularly clear where the new legal relationships entailed by the internationally wrongful act comprise an obligation of a State other than the author State.

113. Whether a particular State has an interest in the performance of its international obligations by another State is a matter of fact. In the long run every State has an interest in the observance of any rule of international law, including the rule of *pacta sunt servanda*. But this by no means authorizes—let alone obliges—every State to demand the performance by every other State of its international obligations, let alone to take countermeasures in case of non-performance of those obligations. Actually, as we have seen, there are several stages in the process of international law, and the participation of a State in one of those stages does not necessarily imply its participation (including possibly its duty to participate) in all other stages of the process. As already remarked (para. 73 above), the duty under general international law not to intervene in the internal or external affairs of another State—whatever may be the exact scope of and possible exceptions to this duty—is relevant in this context. On the contrary, while it is possible to construe every single international right and obligation as resulting from rules of international law, in the total process of international law, from the establishment of its rules to their enforcement, a channelling on both the "active" and the "passive" side of the participation of States takes place in the transition from one stage to another.

In the opinion of the Special Rapporteur, both the approach adopted by the Commission in the elaboration of part 1 of the draft articles on State responsibility and the treatment of "liability for the injurious consequences of acts not prohibited by international law" as a separate and distinct topic, exclude the construction of an "international law of tort", analogous to municipal law of tort. The insistence, in international law, even in its present-day stage of development, on the international right of sovereignty of States and on international obligations of a State as resulting, in the final analysis, from the consent of that State, seems to exclude the construction of a (primary) rule of general international law, to the effect that the fault of one State, causing damage to another State, entails a duty of the first State to make reparation to the second. At any rate it is significant that, in municipal law systems which contain such a rule for private law relationships, the courts feel the need for a legal analysis of its three elements—"fault", "cause", and "damage"—which, apart from liability for injurious consequences of acts not prohibited by law, comes close to stipulating rights and obligations.

114. In most cases the question which State is entitled to claim reparation, to invoke reciprocity, to suspend active governmental co-operation or to take reprisals as regards the author State of an internationally wrongful act, is an easy one to answer. While the rule or obligation may be in abstract terms, the breach is always concrete and the injury therefore easily allocated to a particular State. Thus most obligations under general customary international law are simply a reflection of the right of sovereignty of another State, and the breach of an obligation under a bilateral treaty clearly injures the other State party to that treaty. Problems arise, however, when a primary rule of international law is clearly established for the protection of extra-State interests, and where a secondary rule of international law permits or even obliges other States to participate, actively or passively, in the enforcement of a primary rule. Both cases are exceptional.[66] The main rule seems to be that only the State whose sovereign right under general international law has been infringed, or which is a party to a treaty stipulating in its favour the obligation breached, is entitled to claim reparation, to invoke reciprocity, to suspend active governmental co-operation or to take reprisals.

115. Exceptions to this main rule are implied by the United Nations Charter, by the notion of international crimes and by other objective régimes. Indeed, it is precisely because, within such an objective régime, i.e. in respect of the obligations flowing from that régime, a

[66] Akehurst mentions three main categories of circumstances in which third States have claimed a power to take reprisals: (*a*) enforcement of judicial decisions; (*b*) article 60, para. 2 (*b*), of the Vienna Convention; and (*c*) violation of rules prohibiting or regulating the use of force. See M. Akehurst, "Reprisals by third States", *The British Year Book of International Law, 1970* (London), vol. 44, p. 15.

breach cannot be adequately redressed by the bilateral means just mentioned, that collective measures are required for its enforcement, including measures taken by States not "specially affected" by the breach and relating to rights and obligations outside the régime. Neither the rules of general customary international law nor the provisions of multilateral treaties necessarily create objective régimes; on the contrary, in most cases they create bilateral legal relationships (corresponding obligations and rights) between "pairs" of States, the relationships of which are not interconnected. The parallel rights of sovereignty are seldom matched by parallel (i.e. *erga omnes*) obligations.

116. Universal objective régimes are created by the United Nations Charter, by the recognition by the international community as a whole that some internationally wrongful acts constitute international crimes, and by some peremptory norms of general international *jus cogens*. As remarked above (para. 65), it would hardly seem likely that States would accept the international crime régime and the *jus cogens* régime as objective régimes, in the sense used in the present report, without collective machinery for the implementation of those régimes, including machinery for the compulsory settlement of disputes. Regional objective régimes may be created by a multilateral treaty, adding legal consequences to a breach of obligations under the treaty to the otherwise purely bilateral consequences.[67] As noted above (para. 97), one could regard the self-contained régime of diplomatic law as a bilateral objective régime.

117. If it is accepted that, as between the States parties to a treaty, such treaty—or a treaty connected with it—may itself determine the legal consequences of a breach of an obligation stipulated by it, in other words may itself add secondary and tertiary rules to the primary rules it contains, it would be possible not to deal with regional and bilateral objective régimes in parts 2 and 3 of the draft articles. Such an approach would, however, present serious drawbacks. First, there is the drawback already mentioned above that too wide a clause on deviation from the articles to be incorporated in part 2 would take away much of the practical importance of those articles. More important, perhaps, is that deviation, by adding to or excluding normal legal consequences, is often only implied in the objective régime. But, above all, there is the drawback that objective régimes by their very nature tend to exclude deviation. Thus it would seem clear that, for example, two or more States cannot, with legal effect, agree that the breach of a primary obligation under a specific treaty entitles one or more other States to occupy the territory of the author State. Nor can two or more States parties to a multilateral treaty creating an objective régime agree that the legal consequences of a breach of an obligation under that régime will, as between those States, be more restricted than provided for by the objective régime.

[67] Cf. article 60, para. 4, of the Vienna Convention. To a certain extent articles 41 and 58 of that Convention envisage the possibility of "regional" *jus cogens*.

118. While the universal objective régimes are all peremptory, there are various types of regional objective régimes, excluding, or adding, different legal consequences from or to those provided for by the bilateral régimes. The breach of an international obligation under a bilateral legal relationship (other than the bilateral objective régime of diplomatic law) entails such new bilateral legal rights as a claim for reparation (as a substitute performance of the primary obligation), the suspension of bilateral active governmental co-operation, and the application of reciprocity *stricto sensu* (i.e. a non-performance of the same obligation, or directly connected obligation, as in the case of an exchange of different "prestations" on the part of the injured State). Furthermore, the injured State may, by way of reprisal, and subject to the exhaustion of available international remedies, as dealt with above, not perform other obligations towards the author State (subject to the rule of proportionality and without prejudice to the obligations under objective régimes) and, within the framework of article 60 of the Vienna Convention, terminate or suspend the operation of the relevant treaty. This "nullification" of the treaty is actually a "procedural" legal consequence of an internationally wrongful act, just as invoking a fundamental change of circumstances or a state of necessity, on the grounds of the existence of a situation created by an internationally wrongful act, is a "status" legal consequence of such act (cf. para. 34 above).

119. If it is established that the primary bilateral legal relationship involved in the breach is connected with primary legal relationships between other pairs of States through a multilateral treaty, in such a way that the breach of a primary obligation under that treaty by one State party necessarily affects the exercise of the rights or the performance of the obligations of all other States parties under that multilateral treaty, the individual suspension of active governmental co-operation, the individual application of reciprocity *stricto sensu* and the individual non-performance, by way of reprisal, by the injured State of its obligations under that multilateral treaty, are excluded. Bilateral reparations in terms of money made by the author State to all other States parties may remain possible depending on the feasibility of quantifying the damage of each of those States separately. (*Restitutio in integrum stricto sensu* is not bilateral, being by definition a reparation *erga omnes*.) Individual reprisals outside the field of obligations under the multilateral treaty remain allowed for all parties other than the author State. The termination or suspension of the operation of the relevant multilateral treaty itself is governed by article 60 of the Vienna Convention.

120. A second type of objective régime is created by a treaty which provides for parallel obligations of each party to the treaty, either for the protection of collective interests of the group of States involved (such as shared resources) or for the protection of individuals, irrespective of their nationality, within the jurisdiction of such party (such as human rights and fundamental free-

doms). In objective régimes of a "common market" type, the protection of the free trade interests of individuals may be recognized, *inter alia*, in the direct effect of the treaty provisions and their priority over rules of municipal law. In the European Communities, this protection is furthermore implemented by the power of the European Court of Justice to decide on prejudicial questions of the interpretation and application of community law arising in cases brought before municipal courts. Thus, in a sense, a *restitutio in integrum stricto sensu* is also ensured, albeit within the limits of the remedies provided by Community law and, in the absence of such remedies, by domestic law. The consequences of this type of objective régime are the same as those of the first type. In addition, bilateral reparations between States in terms of money are normally not applicable.

121. The third type of objective régime is a régime that combines the first and/or second type of régime with a machinery for the collective management of the interests concerned. In this type of régime individual bilateral measures are excluded (unless the relevant treaty otherwise provides) and the relevant treaty may provide for an obligation of States parties other than the author State to participate actively or passively in the collective enforcement of the régime by measures which may then even deviate from obligations under the régime.

122. Summing up, it would seem that, since the draft articles on State responsibility are intended to cover the legal consequences of all acts or omissions of States not in conformity with what is required of that State by an international obligation, irrespective of the content and source of such obligation, part 2 of the draft articles must take as its starting point the normal situation, i.e. that the internationally wrongful act entails new bilateral legal relationships between the author State and the injured State only.

123. The injured State is: (*a*) the State whose right under a customary rule of international law is infringed by the breach; or (*b*) if the breach is a breach of an obligation imposed by a treaty, the State party to that treaty, if it is established that the obligation was stipulated in its favour; or (*c*) if the breach is a breach of an obligation under a judgment or other binding decision in settlement of a dispute by an international institution, the State party to the dispute. The injured State is entitled: (*a*) to claim reparation; (*b*) to suspend the performance of its obligation towards the author State, which corresponds to or is directly connected with the obligation breached; and (*c*) after exhaustion of the international legal remedies available, to suspend, by way of reprisal, the performance of its other obligations towards the author State (subject to the prohibition of manifestly disproportional measures). It may be noted here in passing that both in the *Naulilaa* case (1928)[68] and in the *Air Service Agreement* case[69] the arbitral tribunal, rather than requiring "proportionality", applied the test of "not clearly disproportionate" (... *hors de toute proportion avec l'acte qui les a motivées*).

124. However, the injured State is not entitled to suspend the performance of its obligations towards the author State to the extent that such obligations are stipulated in a multilateral treaty and it is established that: (*a*) the non-performance of the obligation by one State party necessarily affects the exercise of the rights or the performance of the obligations of all other States parties; or (*b*) the obligation is stipulated for the protection of collective interests of the States parties to the treaty, or for the protection of individual persons irrespective of their nationality; or (*c*) the multilateral treaty imposing the obligation provides for a procedure of collective decisions relating to the enforcement of such obligations. This is without prejudice to the draft articles relating to the United Nations Charter, *jus cogens*, and international crimes.

125. In the case mentioned in the preceding paragraph, all other States parties to the multilateral treaty are considered to be injured States in respect of the breach of those obligations by one of them. In the case mentioned under (*c*) of that paragraph, the multilateral treaty may provide for the obligation of the injured States to participate in the colelctive enforcement. This obligation may go beyond the minimum obligation of non-support of the internationally wrongful act of the author State and of support of the legitimate countermeasures of an injured State, as referred to in article 6 as proposed in the third report (see para. 21 above). Actually, the minimum obligation of non-support is rather in the nature of a "status" legal consequence, while the obligation of support of countermeasures legitimately taken by another State or States is more in the nature of an obligation to cooperate with those other States, or a "procedural" legal consequence.

126. The "procedural" legal consequences of a material breach of a treaty obligation, as regards the termination or suspension of the operation of the treaty itself within the framework of the substantive and procedural provisions of the Vienna Convention, should not be dealt with in the draft articles on State responsibility. The same applies to the "status" legal consequences of the situation, created by the internationally wrongful act, to the extent that such situation may justify an injured State in invoking a fundamental change of circumstances or a state of necessity as a ground for non-performance of its obligations (not necessarily treaty obligations) towards the author State. Both types of legal consequences could be reserved by a clause corresponding to article 73 of the Vienna Convention.

127. It would seem advisable also to reserve the special régimes of (*a*) diplomatic law, and (*b*) belligerent

[68] *Responsabilité de l'Allemagne à raison des dommages causés dans les colonies portugaises du Sud de l'Afrique* (United Nations, *Reports of International Arbitral Awards*, vol. II (Sales No. 1949.V.1), p. 1028, para. 2).

[69] See para. 103 above, *in fine*, and footnotes 61 and 62.

reprisals. Both régimes have special characteristics. Looking at them in one way they are objective régimes, inasmuch as they provide for parallel obligations. On the other hand, they are also reciprocal. In the case of diplomatic law, the availability at all times, to the State injured by the abuse of diplomatic privileges and immunities, of the measures of declaration of *persona non grata* and the breaking off of diplomatic relations, takes away the necessity for determining other legal consequences. In the case of belligerent reprisals, the parallellism of the obligations to respect human rights even in the case of armed conflict is limited by the requirement of "military necessity"

128. The peremptory and universal objective régimes of international crimes and of *jus cogens* may add to or delete some of the legal consequences of internationally wrongful acts, as described in part 2 of the draft articles; that depends on the international community as a whole. The same is valid for the multilateral treaties establishing "regional" objective régimes, provided of course that in doing so their provisions do not deviate from the peremptory universal objective régimes.

129. The general prohibition of manifest disproportionality would seem to be sufficient to cover adequately the influence of aggravating and extenuating circumstances on the admissibility and application of legal consequences. In this connection it should be noted, however, that several publicists require fault to exist on the part of the author State for reprisals to be admissible on the part of the injured State. In view of the—non-exhaustive—list of circumstances precluding wrongfulness in part 1 of the draft articles, and taking into account the inherent difficulties of fact-finding in respect of this subjective element, the Special Rapporteur suggests that no such general requirement should be incorporated in the draft articles.

130. On the other hand, the Special Rapporteur feels inclined to suggest that it might be useful to include in the draft articles a clause providing that, in the case of a manifest violation of an international obligation, which destroys the object and purpose of the objective régime involved, the inadmissibility of certain measures resulting from the existence of such régime no longer applies.

JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

[Agenda item 2]

DOCUMENT A/CN.4/363 and Add.1*

Fifth report on jurisdictional immunities of States and their property, by Mr. Sompong Sucharitkul, Special Rapporteur

[*Original: English*]
[*22 March and 11 April 1983*]

CONTENTS

* Incorporating documents A/CN.4/363/Corr.1 and A/CN.4/363/Add.1/Corr.1.

Introductory note

1. The introductory note in the fourth report on jurisdictional immunities of States and their property may still serve as a useful introduction to the present report, which is the fifth in the series of reports[1] prepared by the Special Rapporteur on the topic and submitted to the International Law Commission for consideration.[2] This fifth report is also foreshadowed by the general considerations of the scope of part III (art. 11), set out in the fourth report.[3]

A. Consideration of draft articles in progress

2. It may be useful at this juncture to give a very brief account of the general structure of the draft articles, to indicate the extent of progress achieved so far and what is envisaged for the remainder of the study. The four previous reports have covered the first two parts, namely part I (Introduction) and part II (General principles), as well as the initial articles of Part III (Exceptions to State immunity).

1. Part I. Introduction

3. Part I (Introduction) comprises five articles. Article 1 (Scope of the present articles) was revised and provisionally adopted by the Commission at its thirty-fourth session.[4] Article 2 (Use of terms) has in part been discussed: a definition has been adopted for the term "court"; some terms have been withdrawn and others are yet to be discussed and revised.[5] Article 3 (Inter-

[1] This series of reports was preceded by an exploratory report prepared in 1978 by the Working Group on the topic (A/CN.4/L.279/Rev.1), reproduced in part in *Yearbook ... 1978*, vol. II (Part Two), pp. 153-155.

[2] The previous reports were: (*a*) preliminary report, *Yearbook ... 1979*, vol. II (Part One), p. 227, document A/CN.4/323; (*b*) second report, *Yearbook ... 1980*, vol. II (Part One), p. 199, document A/CN.4/331 and Add.1; (*c*) third report, *Yearbook ... 1981*, vol. II (Part One), p. 125, document A/CN.4/340 and Add.1; (*d*) fourth report, *Yearbook ... 1982*, vol. II (Part One), p. 199, document A/CN.4/357.

[3] Document A/CN.4/357 (see footnote 2 (*d*) above), paras. 10-28.

[4] Article 1 as revised reads as follows:

"*Article 1. Scope of the present articles*

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

See *Yearbook ... 1982*, vol. II (Part Two), p. 99.

[5] For the original text of article 2, *ibid.*, p. 95, footnote 224. The definition adopted (para. 1 (*a*)) is as follows:

"1. For the purposes of the present articles:

"(*a*) 'court' means any organ of a State, however named, entitled to exercise judicial functions;" (*Ibid.*, p. 100.)

The definitions of the terms "territorial State" (para. 1 (*c*)) and "foreign State" (para. 1 (*d*)) have been withdrawn. The term "trading or commercial activity" (para. 1 (*f*)) is yet to be considered by the Drafting Committee, in connection with article 12.

pretative provisions) has been partly abandoned, while paragraph 2 remains to be discussed in connection with the criterion for determining the commercial character of trading or commercial activity as defined in article 2, para. 1 (*f*).[6] Article 4 (Jurisdictional immunities not within the scope of the present articles) and article 5 (Non-retroactivity of the present articles)[7] have been presented to facilitate consideration of the draft articles and, as customary, will be discussed by the Commission after the remaining draft articles have been completed. Thus, of the five articles constituting part I,[8] only article 1 has been provisionally adopted, while the other provisions await further discussion and action by the Commission.

2. Part II. General principles

4. Part II (General principles) contains a series of five more articles, all of which have been fully discussed by the Commission. Draft article 6 (State immunity), provisionally adopted by the Commission at its thirty-second session,[9] is currently under review in the Drafting Committee, which is expected to propose an improved version for reconsideration by the Commission.[10] Articles 7, 8 and 9 were provisionally adopted by the Commission at its thirty-fourth session, while article 10, which for lack of time is still with the Drafting Committee, is not expected to present insuperable difficulties.[11]

5. Article 6 attempts to state the general principle of State immunity as a sovereign right from the point of view of a State claiming immunity from the jurisdiction of the courts of another State. On the other hand, article 7, now entitled "Modalities for giving effect to State immunity",[12] endeavours to restate, in paragraph 1, the corresponding obligation on the part of the other State to accord immunity or give effect to State immunity by refraining from exercising the jurisdiction of its otherwise competent judicial authority in a given case involving a foreign State. Paragraph 2 identifies what may be considered to be proceedings against another State, even when it is not named as a party, while paragraph 3 gives a general classification of what constitutes a State for the purposes of jurisdictional immunities, namely an organ of the State, an agency or instrumentality of the State in respect of "an act performed in the exercise of governmental authority", or "one of the representatives of that State in respect of an act performed in his capacity as a representative". A State is also impleaded when the proceeding is designed to deprive that State of its property or of the use of property in its possession or control. Article 7 is, indeed, a central provision of part II of the draft articles. Together with article 6, which is to be revised, it contains the main general principles of State immunity.[13]

6. Article 8 (Express consent to the exercise of jurisdiction)[14] constitutes an important qualification by stipulating that absence of consent is a prerequisite for a successful claim of State immunity. It also spells out the various ways in which consent may be expressly given.[15]

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[6] For the text of article 3, *ibid.*, p. 96, footnote 225. Paragraph 1 (*a*), which deals in detail with what is meant by the expression "foreign State" for the purposes of the jurisdictional immunities of States, is to be examined later; paragraph 1 (*b*) is no longer required in view of the adoption of draft article 7, and the definition of the term "jurisdiction" has been replaced by that of the term "court" (see footnote 5 above).

[7] For the texts of articles 4 and 5, see *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnotes 226 and 227, respectively.

[8] Articles 1 to 5 were first presented in the second report of the Special Rapporteur (see footnote 2 (*b*) above), which was considered by the Commission at its thirty-second session (*Yearbook ... 1980*, vol. II (Part Two), pp. 138 *et seq.*, paras. 111-122) and by the Sixth Committee of the General Assembly at its thirty-fifth session (see "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-fifth session of the General Assembly" (A/CN.4/L.326), paras. 311-326).

[9] Article 6 as provisionally adopted by the Commission at its thirty-second session reads as follows:

"*Article 6. State immunity*

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

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

See *Yearbook ... 1982*, vol. II (Part Two), p. 100, footnote 239.

[10] Several revisions have been proposed, such as:

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

[11] Articles 7 to 10 were considered by the Commission at its thirty-third and thirty-fourth sessions: see *Yearbook ... 1981*, vol. II (Part Two), pp. 154 *et seq.*, paras. 208-227; and *Yearbook ... 1982*, vol. II (Part Two), pp. 97-98, paras. 185-192. See also the observations made by the Sixth Committee of the General Assembly in "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-seventh session of the General Assembly" (A/CN.4/L.352), paras. 171-178.

[12] "*Article 7. Modalities for giving effect to State immunity*

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

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

"3. In particular, a proceeding before a court of a State shall be considered to have been instituted against another State when the proceeding is instituted against one of the organs of that State, or against one of its agencies or instrumentalities in respect of an act performed in the exercise of governmental authority, or against one of the representatives of that State in respect of an act performed in his capacity as a representative, or when the proceeding is designed to deprive that other State of its property or of the use of property in its possession or control." (*Yearbook ... 1982*, vol. II (Part Two), p. 100.)

[13] See the commentary to article 7, *ibid.*, pp. 100 *et seq.*

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

"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." (*Ibid.*, p. 107.)

[15] See the commentary to article 8, *ibid.*, pp. 107 *et seq.*

7. Article 9 (Effect of participation in a proceeding before a court)[16] specifies the conditions for giving consent by conduct and defines the extent to which a State is considered to have consented by participating in a proceeding before a court, and, by so limiting the scope of its effect, also serves to indicate the circumstances in which a State can intervene or take a step in a proceeding without being considered to have consented to the exercise of jurisdiction by that court.[17]

8. Article 10 (Counter-claims), as revised by the Special Rapporteur,[18] is still under consideration by the Drafting Committee. It deals with the extent of the effect of counter-claims against a State which has itself instituted a legal proceeding in a court of another State, as well as counter-claims by a State.[19]

3. Part III. Exceptions to State immunity

9. Articles 11 (Scope of the present part) and 12 (Trading or commercial activity), presented by the Special Rapporteur in his fourth report,[20] were the subject of extensive preliminary discussion during the thirty-fourth session of the Commission. The drafts of these articles in their original form, as well as the revised versions[21] prepared in the light of the discussion in the Commission,[22] are still with the Drafting Committee. The Commission has resolved to appoint and convene the next Drafting Committee at the beginning of the forthcoming session, so as to allow it to complete its work on the draft articles referred to its predecessor and to itself.

10. Article 11 (Scope of the present part), in its revised form,[23] may still have a useful role to play as a link between part II (General principles) and part III (Exceptions to State immunity) and as warning sign announcing the approach to a "grey zone".

11. Article 12 (Trading or commercial activity), both in its original version and as slightly revised by the Special Rapporteur,[24] represents the first entry into a "controversial area". The Commission has had an interesting round of discussion on this subject and the draft will be examined by the Drafting Committee in 1983.

B. Debate in the Sixth Committee of the General Assembly

12. As the thirty-seventh session of the General Assembly, the debate of the Sixth Committee on the substance of the topic of jurisdictional immunities of States and their property was particularly rich. More than 40 representatives spoke on one aspect or another of State immunity and commented on the draft articles provisionally adopted by the Commission on those still under consideration by the Drafting Committee and on the methods of approach.[25] The Special Rapporteur has been encouraged by the constructive observations from representatives of Member States and ventures to think that it would be useful to clarify some of the points raised so as to make them crystal clear, beyond any reasonable shadow of doubt, especially regarding the methods, objectives and structure of the work undertaken on the topic and to be progressively continued.

1. The inductive method

13. Despite certain criticism from outside the Commission and the Sixth Committee of the seeming indifference and relatively inactive role of developing nations

[16] "*Article 9. Effect of participation in a proceeding before a court*

"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." (*Ibid.*, p. 109.)

[17] See the commentary to article 9, *ibid.*, pp. 109 *et seq.*

[18] "*Article 10. Counter-claims*

"1. In any legal proceedings instituted by a State, or in which a State has taken part or a step relating to the merit, in a court of another State, jurisdiction may be exercised in respect of any counter-claim arising out of the same legal relationship or facts as the principal claim, or if, in accordance with the provisions of the present articles, jurisdiction could be exercised, had separate proceedings been instituted before that court.

"2. A State making a counter-claim in proceedings before a court of another State is deemed to have given consent to the exercise of jurisdiction by that court with respect not only to the counter-claim but also to the principal claim, arising out of the same legal relationship or facts [as the counter-claim]." (*Ibid.*, p. 95, footnote 218.)

[19] Certain doubts were expressed in the general discussion in the Commission at its thirty-fourth session as to the usefulness of paragraph 2. On balance, it appears to have an independent purpose. It is useful to know precisely the extent to which a State making a counter-claim may be said to have consented to the exercise of jurisdiction by the court in respect of the principal claim and none other.

[20] For the texts of articles 11 and 12 as originally presented by the Special Rapporteur, *ibid.*, p. 95, footnotes 220 and 221, respectively.

[21] The revised texts of articles 11 and 12 were presented to the Drafting Committee as document A/CN.4/L.351 (see footnotes 23 and 24 below).

[22] *Yearbook ... 1982*, vol. II (Part Two), pp. 98-99, paras. 193-197.

[23] "*Article 11. Scope of the present part*

"The application of the exceptions provided in part III of the present articles may be subject to a condition of reciprocity or any other condition as mutually agreed between the States concerned." (*Ibid.*, p. 99, footnote 237.)

[24] "*Article 12. Trading or commercial activity*

"1. Unless otherwise agreed, a State is not immune from the jurisdiction of the courts of another State in respect of proceedings relating to any trading or commercial activity conducted, partly or wholly, in the territory of that other State, by the State itself or by one of its organs or agencies whether or not organized as a separate legal entity.

"2. Paragraph 1 does not apply to transactions or contracts concluded between States or on a government-to-government basis." (*Ibid.*)

[25] See "Topical summary ... " (A/CN.4/L.352), paras. 157-185.

in the process of international law-making,[26] it is reassuring to hear comments in the Sixth Committee highlighting the practical importance of the topic and its extreme complexities, notwithstanding its assignment for the first time to an Asian Special Rapporteur from a developing country of very great antiquity. It is also most reassuring to this Special Rapporteur to hear confirmation of his finding, through the inductive method as proposed by Mr. Tsuruoka[27]—another Asian jurist of profound traditional legal background—that State immunity is based on fundamental principles of international law, among which have been mentioned, unchallenged, the sovereignty and sovereign equality of States. The inductive method has not been the primary approach used in the study of all topics but is highly recommended for the present topic and has become the selected and respected method.[28]

14. According to this inductive method, as the Special Rapporteur has pointed out time and again, no *deus ex machina* is used. Rather, reference is made in the study to the existing practice of all States, large and small, rich and poor, developing or industrially more advanced, before reaching any conclusion. The search is concentrated first and foremost on judicial practice, or judicial decisions, but not necessarily confined to them. It covers also national legislations as evidence of State practice and opinions of writers on the practice as well as the principles. It does not omit or overlook the views of Governments on all relevant questions. The treaty practice of all States has also been examined, as well as bilateral treaties and multilateral or regional conventions.

15. Indeed, the search for basic materials has been very thorough and, from the start of its study of the topic, the Commission decided, on the recommendation of the Special Rapporteur, to ask all Member States to lend their support by communicating information, materials concerning judicial decisions, case-law, national legislation and opinions of Governments, as well as replies to the questionnaire prepared by the Secretariat in co-operation with the Special Rapporteur.[29] Neither he nor those States which have not provided information concerning judicial and government practice can be justly accused of omission or neglect, since practice is to evolve and cannot be fabricated. Nevertheless, neither the Special Rapporteur, nor the Commission, nor the Sixth Committee can belittle the significance of existing practice as is prevalent the world over and which remains unopposed by other silent States in the absence of opposing practice.

2. Contradictions and divergences in State practice

16. On the other hand, it should also be observed that, in the study of the present topic, resort to the inductive method has proved most disconcerting. To begin with, not all States have developed or even started to develop a judicial practice on this or indeed on any topic of public or private international law. Within the Commission, the question has been raised whether it could be said that the principle of State immunity was ever truly established in State practice, when the Commission has had before it the judicial practice of only a handful of States. The Special Rapporteur was at pains to explain that all the available evidence of existing State practice on State immunity had been presented to the Commission. It was not at random or by a selective method that the practice of only 25 countries had been used in the preparation of earlier reports and that not all examples had been individually presented for examination and comments in the study of each and every aspect of State immunity, to which some were in any event not really pertinent.

17. It is not unnatural that contradictions and divergences abound in the judicial practice of the various nations examined, and indeed in the practice of the same legal system or even of the same court of law over the same period of time. If the Special Rapporteur had been shy to expose such inconsistencies, he would have been guilty of further distorting the already much distorted practice of States. It is distorted in that its development has followed a somewhat zigzagging and tortuous path, almost like the mighty Asian river, the Mekong, which has its source in the highest mountains in the world, the Himalayas, and whose water is derived from unrecorded rainfall and melting snow, flowing from endless tributaries through the rapids of Tibet and converging into the Mekong's main stream between Burma, Laos and Thailand, rushing through Kampuchea with added momentum from the Great Lake, forming countless islands and precipices, disfiguring landscapes and finally diverging into a gushing delta before plunging into the absorbing Gulf of Thailand.

3. Emergence of converging principles and practice

18. A bird's-eye view of the tortuous path taken by legal developments, comparable to that of the Mekong River, is bound to give a picture that appears twisted and distorted, with the exception of some relatively straighter stretches. Just as it does not appear humanly possible to straighten the course of the Mekong, so it seems impossible to unbend every twist and turn in the path of development of the law. As the Thames flows through many bends and brooks before reaching its estuary and the North Sea, so British practice concerning trading or commercial activity of State-owned or State-operated vessels cannot be said to have finally

[26] See UNITAR, *The International Law Commission. The Need for a New Direction* (United Nations publication, Sales No. E.81.XV.PE/1), especially pp. 13-15.

[27] See *Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee*, 48th meeting, para. 40.

[28] See, on this question, the fourth report of the Special Rapporteur (see footnote 2 (*d*) above), para. 10.

[29] The materials submitted by Governments, as well as their replies to the questionnaire, appear in the volume of the United Nations Legislative Series entitled *Materials on Jurisdictional Immunities of States and their Property* (Sales No. E/F.81.V.10).

been settled until the long overdue decision of the House of Lords in the "*I Congreso del Partido*" case (1981),[30] and not without legislative initiatives and judicial hesitations. A study of the judicial practice of States does not lend itself to a facile restatement of ready-made law of any country. On the contrary, it shows an intensified process of judicial reasoning which is dialectic and empirical rather than dogmatic or dictatorial.

19. The Sixth Committee concurred with the finding of the Commission that the general principle of State immunity was established in the practice of States. It should be added that, when State immunity was considered to have been firmly established, the world was not so divided into socialist and non-socialist, or developing and industrially advanced countries. Indeed, when the principles of an international law of State immunity were widely accepted, there were no socialist States, nor so-called advanced countries. The first pronouncement of the law was by the highest authority of the world's youngest nation at the time, the United States of America, in *The Schooner "Exchange" v. McFaddon and others* (1812),[31] and it was from the start based on existing customary international law, not on United States law, nor on American law. Indeed, the United States was only an infant nation compared with aged Thailand and old Japan; it was like a child just starting to talk and walk, having just won its national independence. The process of decolonization took more than a few decades. It was during the height of the Napoleonic Wars (1812), with Europe torn by serious conflicts in the north, the east and the south, that State immunity was recognized. The law on the subject came to be settled in that young, revolutionary and thriving nation even before it had to undergo a national convulsion, the unsettling experience of the Civil War.

20. International law on State immunity was established in Belgium[32] and Italy[33]—equally young and newly independent States of Europe—in a very restrictive sense. Egyptian practice[34] followed suit. Although its mixed courts were somewhat international, Egypt, itself an old nation, belongs to Africa and the Mediterranean rather than to central Europe. Practice did not start developing all at once in every country at the same time.

21. The Commission and subsequently the Sixth Committee of the General Assembly were able to recognize the existence of a general principle of State immunity on the basis of an examination of the judicial practice of a few States in the nineteenth century, although of course the extent of State immunity was by no means uniform. The practice of major European Powers such as the United Kingdom,[35] France[36] and Germany[37] was full of uncertainties and surprises. Nevertheless, out of this utter confusion it was possible to identify the emergence of a clear general rule of State immunity.

4. Absence of practice in some States

22. Doubts have been raised as to the correctness of identifying as international law the customary law as developed through the practice of only 25 countries and applying it to the rest of the community of nations, as if the Commission had deliberately omitted to examine the practice of any State. The truth is the opposite. Each and every State has been consulted. The examination of State practice has been thorough and exhaustive. None was left out. There are no other decisions or outside experts to be consulted, no extraterrestrial beings to inform us of what the law is in such and such a country at such and such a time. The fact remains that, of the existing and available practice of States, the Commission has taken occasion to consider all, without fear or favour.

23. The conclusion that is emerging is clear enough. State immunity was never considered to be an absolute principle in any sense of the term. At no time was it viewed as a *jus cogens* or an imperative norm. The rule was from the beginning subject to various qualifications, limitations and exceptions. This is recognized even in the recent legislation adopted in certain socialist countries.[38] The differences of opinion seem to linger only in the areas where exceptions and limitations are put into application. That is why part III of the draft articles, "Exceptions to State immunity", has already given rise to some controversies. But the argument should apply *a fortiori*, or at least with equal force, that the evolutionary process of the law does not require the positive or active participation of all States. While it cannot exclude any State from participation, absence of practice is no ground for liability for neglect or negligence on the part of States. However, such absence cannot be invoked to invalidate or otherwise downgrade

[30] *The All England Law Reports, 1981*, vol. 2, p. 1064; see the judgment pronounced by Lord Wilberforce (pp. 1066-1078), as well as the concurring opinion of Lord Edmund-Davies in favour of dismissing the appeal in the *"Marble Islands"* case (pp. 1080-1082), and the dissenting opinions of Lord Diplock (pp. 1078-1080) and of Lord Keith and Lord Bridge (pp. 1082-1083), in favour of allowing an appeal in both cases.

[31] W. Cranch, *Reports of Cases argued and adjudged in the Supreme Court of the United States* (New York, 1911), vol. VII (3rd ed.), p. 116.

[32] See, for example, *Etat du Pérou* v. *Kreglinger* (1857) (*Pasicrisie belge, 1857* (Brussels), part 2, p. 348); see also the decision of the Court of Appeal of Brussels of 30 December 1840 (*ibid., 1841*, part 2, p. 33), and the cases cited in the fourth report of the Special Rapporteur (see footnote 2 (*d*) above), paras. 58-59.

[33] See, for example, *Morellet v. Governo Danese* (1882) (*Giurisprudenza Italiana* (Turin), vol. XXXV, part 1 (1883), pp. 125 and 130-131), and the cases cited in the fourth report of the Special Rapporteur (see footnote 2 (*d*) above), paras. 56-57.

[34] See, for example, the *S.S. "Sumatra"* case (1920) (*Bulletin de législation et de jurisprudence égyptiennes* (Alexandria), vol. 33 (1920-1921), p. 25; *Journal du droit international* (Clunet) (Paris), vol. 48 (1921), p. 270), and the cases cited in the fourth report of the Special Rapporteur (see footnote 2 (*d*) above), paras. 60-61.

[35] See, for example, the cases cited in the fourth report of the Special Rapporteur (see footnote 2 (*d*) above), paras. 80-87.

[36] *Idem*, paras. 62-66.

[37] *Idem*, paras. 67-68.

[38] See, for example, article 61 of the Fundamentals of Civil Procedure of the Union of Soviet Socialist Republics and the Union Republics, reproduced in United Nations, *Materials on Jurisdictional Immunities* ... , p. 40.

the existing and prevailing practice of which abundant evidence is available elsewhere. If once it was admissible that there was a law of State immunity, it should be equally admissible to define and identify its contents and examine its application in controversial areas. That is precisely the purpose of part III.

C. Advancement of work on preparation of the draft articles

24. Encouraged by the substantial support voiced in the Sixth Committee for the existing structure of the draft articles, and bearing in mind the words of caution and wise advice pronounced by so many well-wishers, as well as the constructive proposals for drafting improvements which will be taken into consideration at or before the second reading of the draft articles, the Special Rapporteur is ready to proceed along the path that has been charted with the approval of the Commission and the endorsement of the Sixth Committee. Without prejudice to his future findings, the Special Rapporteur heartily and gratefully accepts the reminder that, in his approach to the "grey zone", the paramount interests of humanity must be recognized, and that consideration should equally be given to safeguarding the vital interests of all States, including the socialist States, the developing States and the least developed countries, whatever their denomination, size, location or ideology, and of all nations of whatever social, political or economic structure.

25. At this juncture, the Special Rapporteur begs to lodge a caveat in the same co-operative and constructive spirit: it is easy to say, in the absence of State practice in a given country or without reference thereto, that the law as developed in the practice of so wide a region as Asia, Africa or Latin America points in a definite direction, or is the opposite of the prevailing practice in Western Europe, or is in any way similar to the practice of socialist countries. Nothing could be further from the truth. Nothing could be nearly so dangerous as such a sweeping statement, which the Special Rapporteur, in all earnestness and good conscience, feels compelled to implore representatives of States to avoid. A glance at the judicial practice and national legislations of Pakistan, India, Singapore or Japan will reveal a strong trend away from any absolute doctrine. Neither Pakistan nor Singapore can be said not to be Asian, nor to be no longer thriving and developing nations. A brief examination of their legislation and practice will suffice to silence any sweeping statements about Asian practice being identified with that of socialist or capitalist countries. There is no such thing as practice which could be said to be the common law of Asia, Africa or Latin America, nor are the interests of developing nations identical or necessarily alike on every issue. Indeed, each area of controversy should be examined on its own merits. No predetermined dogma nor any amount of absolutism should be allowed to dictate or disturb any serious study of relevant progressive legal developments. The Special Rapporteur continues to benefit from the lessons to be learned from the inductive method and craves the indulgence of representatives of Governments to continue to be patient so that the process of sedimentation and crystallization of the law may proceed unimpeded.

26. As planned, therefore, the draft articles dealing with specified areas in which limitations or exceptions to State immunity may be recognized and applied will be as follows:

Article 13 "Contracts of employment";
Article 14 "Personal injuries and damage to property";
Article 15 "Ownership, possession and use of property";
Article 16 "Patents, trade marks and other intellectual properties";
Article 17 "Fiscal liabilities and customs duties";
Article 18 "Shareholdings and membership of bodies corporate";
Article 19 "Ships employed in commercial service";
Article 20 "Arbitration".

27. It is no accident that the specified areas of controversy under examination in part III have been the subject of some regulation in a multilateral convention[39] and have partially received legislative ratification in some countries, both signatories and indeed non-signatories to this Convention. Such an investigation does not imply endorsement or disapproval of the proposals contained in the Convention or in any other bilateral agreements in particular, or as revised and modified by a number of national legislations.[40]

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[39] See Council of Europe, *European Convention on State Immunity and Additional Protocol* (1972), European Treaty Series (Strasbourg), No. 74 (1972); reproduced in United Nations, *Materials on Jurisdictional Immunities* ... , pp. 156 *et seq.* See also the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels (Brussels, 1926) and Additional Protocol (Brussels, 1934) (League of Nations, *Treaty Series*, vol. CLXXVI, pp. 199 and 215; reproduced in United Nations, *Materials on Jurisdictional Immunities* ... , pp. 173 *et seq.*).

[40] See, for example, the United States *Foreign Sovereign Immunities Act of 1976* (see footnote 66 below), the United Kingdom *State Immunity Act 1978* (see footnote 65 below), the Pakistan *State Immunity Ordinance, 1981* (see footnote 69 below) and Singapore's *State Immunity Act, 1979* (see footnote 68 below).

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

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

ARTICLE 13 (Contracts of employment)

A. General considerations

1. Scope of "contracts of employment" as an exception to State immunity

28. The purpose of draft article 13 is to define the scope of the area specified as "contracts of employment" as a possible exception to the general principle of State immunity. Many questions are immediately relevant to the general considerations in this specific area which concerns primarily "contracts of employment" between individuals and a State for the performance of services within the territory of another State.

29. "Contracts of employment" between individuals and a corporation or an agency not attributable to a State, nor to an organ of a State, nor to one of its agencies or instrumentalities acting in the exercise of the governmental authority of the State as stipulated in article 7, paragraph 3,[41] of the present draft articles, will lie outside the scope of the current study. Only "contracts of employment" concluded by or on behalf of a State as employer would come under the purview of article 13. The first element is therefore employment by a State, as the area of investigation is confined to the contractual relationship between individuals and a State for the performance of services in the territory of another State.

30. The second element appears to be the services to be rendered by the employees of that State within the territory or the territorial jurisdiction of another State. The cause of action or the dispute in question would relate to the contractual relationship with the State as an employer before the courts of another State.

31. The third element is the possibility or justiciability of proceedings brought before the courts of another State against the employer State by an employee seeking redress in respect of a breach of a term of the contract of employment, based on an existing contractual relationship binding on the State in respect of services rendered or performed in the territory of another State. The subject-matter of the dispute may be classified as labour relations or the terms and conditions of employment, covering compensation, social security, pensions, and so on. In other words, the gist of this specified area of exceptions to State immunity covers the actionability of obligations undertaken by, or binding on, a State and arising out of contracts of employment of individuals for the performance of services in another State. Excluded from the scope of this article are questions of vicarious responsibility or employer's liability in respect of acts performed by its employees, even in the territory of another State. Such liability may be relevant in a different context, but the present question is concerned exclusively with proceedings based on the relationship between individual employees and an employer which is a foreign State or foreign Government from the point of view of the State of the forum.

[41] See footnote 12 above.

2. The question of jurisdiction

32. In an examination of the extent of State immunity in any specified area of activity, the question of jurisdiction is not altogether irrelevant, since, in any event, it is the jurisdictional immunity of a foreign State that is at stake. State immunity, in the area of "contracts of employment" under examination, necessarily presupposes the existence of jurisdiction, the non-exercise of which is required by application of State immunity. For this reason, the scope of "contracts of employment" in the present study is confined to the employment by a State of individuals for a service to be rendered or performed in the territory of another State, that is in the territory of the forum—in other words, within the jurisdiction of the courts of that other State.

33. Jurisdiction is therefore presupposed in any question of State immunity. The closest connection should exist with the court trying the dispute arising out of the contract of employment. This is translatable in terms of the territory where the service is performed under the contract of employment, namely within the territory of another State, and therefore within the jurisdiction of the courts of that other State. Without this intimate link to the territory of that other State, the question of State immunity could be confused with other questions or other grounds for non-justiciability of the dispute, for lack of jurisdiction, either because of the absence of a territorial connection or because of the nature of the subject-matter of the dispute, or for any other reason, such as the "act of State" doctrine. Since jurisdiction of a court is a matter of local or national law, it is not for this study to lay down a set of uniform rules regarding the qualifications for jurisdiction of a court of law or a labour court in a given country. Jurisdiction may, in any event, be initially presumed to exist once there is prima facie proof of sufficient territorial connection with the trial court through performance of the employment within the territory of the State of the forum. The rules to be proposed in respect of the extent of State immunity in this specified area should preclude circumstances in which the courts of a State would have jurisdiction in a case concerning a contract of employment performed outside its territory or, regardless of the place of performance, on account of a special arrangement or régime, such as that governing civil servants or government employees in active service at an embassy or consulate or a comparable office accredited

in another country. In such circumstances, the administrative tribunal or the civil service commission or any other analogous institution of the State employing the individual could still have an operable jurisdiction, and the applicable law is still the administrative law or the law governing the civil servants of the employing State as distinct from the labour law of the country in which the service is to be performed.

3. The question of applicable law

34. In private international law as well as in the borderland where it overlaps with public international law, the choice of applicable law is often indicative if not determinative of the preferred jurisdiction among the competing or concurrent competent authorities. The question of applicable law may accordingly be highly pertinent, especially when it is a specialized branch of the law peculiar to a special régime or system, such as the regulations regarding the staff of the Secretariat of the United Nations and the specialized agencies. The Administrative Tribunal of the United Nations is probably considered the chosen forum for disputes regarding administrative matters (pensions, promotion, leave, etc.) affecting members of the staff of the United Nations Secretariat. It is probably a preferred jurisdiction compared with other competent local or territorial courts of law or a labour tribunal. The same could be said of the regulations applying to State employees, at least the higher-ranking officials, or the international staff in the case of international organizations.

35. The choice of law may be expressed by the parties, which tends to suggest almost exclusively the choice of jurisdiction. With regard to civil servants and high-ranking State employees, it is presumed that it is the administrative law of the employer State that governs labour relations and that the court of law or administrative tribunal of the employer State or sending State is the chosen forum, if not indeed the *forum pro rogatum*, alone competent to decide the issue. Territorial courts or local labour courts, however substantively competent to deal with such disputes, would likely be less conversant with the applicable labour laws of the sending State or the employer State. The question of applicable law in a given case must therefore be properly considered in this particular connection.

36. Concurrence of jurisdiction exercisable by the territorial court or the State of the forum and by the national court or the court of the sending State is further complicated by the concurrence of their respective applicable laws. In a clear case of applicable administrative law of the sending State, because of the high offices of the civil servants or government employees in question, for example, the local labour court or even the territorial administrative tribunal or authorities may feel inclined to yield to the application of foreign administrative law and therefore may decline jurisdiction in favour of a more proper or more convenient forum, on the grounds perhaps of *forum non conveniens*, because of the special relationship or the special nature of the foreign administrative law. If, on the other hand, the case concerns local staff of lower rank and does not call for the application of foreign administrative law, but more appropriately the applicable local labour law or the law governing contracts of employment in the State of the forum, then the territorial court would not hesitate to exercise its competent jurisdiction, being more certain of the application of its own substantive law relating to the operation of contracts of employment, working conditions, terms of compensation, and so on. The question may appropriately be asked whether and how far the territorial State wishes to impose its own labour laws and regulations on all employment of services within its territory.

4. The question of State immunity

37. Only when the court in the State in which services under the contract of employment are to be performed considers that it has jurisdiction and that it is competent will it proceed to apply its own substantive law regarding labour disputes and labour relations. Where the employer happens to be a foreign State or Government, the question of immunity comes into play. But, of course, in actual practice the foreign State being proceeded against does not normally wait until the court reaches that finding, but would be expected to raise a plea of State immunity in any event. Thus the court is called upon to decide the issue of State immunity quite often when there is not yet any necessity to do so, since, without the question of State immunity, the court could have easily declined jurisdiction on any of the grounds mentioned, such as lack of competence, *forum non conveniens* or choice of jurisdiction and choice of applicable law, for reasons of public policy, or because of the "act of State" doctrine.

38. However, when the court is faced with the question of State immunity in this specified area of "contracts of employment", the first essential point which may determine the exercise or non-exercise of its jurisdiction relates to the existence of the governmental authority of the State,[42] in the exercise of which a cause of action has arisen. If, for instance, the dispute concerns the appointment or non-appointment of an officer by a foreign State or by one of its organs, agencies or instrumentalities, then there is a clear case for State immunity because such appointment or non-appointment would have to result from an act in the exercise of the governmental authority of that foreign State or Government. The same is true of the dismissal or suspension of an employee by a State or governmental agency, which could never be compelled to re-employ or reinstate an employee thus dismissed as a result of an act done in the exercise of governmental authority. It does not follow, however, that the legal consequences of dismissal in breach of a contract of employment are necessarily a result of an act done in the exercise of governmental authority. There appears to be an area, therefore, where the local courts can still exercise jurisdiction in proceedings against a foreign State as employer of a worker for services rendered in the territory of the State of the

[42] See article 7, para. 3, in footnote 12 above.

forum and unconnected with the exercise of governmental authority by the employer State. To put it differently, the question could be phrased: how far is the sending State required to conform to local labour laws and regulations of the territorial State?

B. The current practice of States

1. General observations

39. In contrast to the superabundance of judicial and governmental practice of States in the area of trading or commercial activity covered by article 12,[43] there have been relatively fewer judicial decisions and little evidence of State practice in regard to contracts of employment. Yet the adoption of the inductive method implies a search for guidance from State practice. None the less, a glance at State practice reveals an equally startling number of inconsistencies and contradictions, while the paucity of decisions precludes any reference to practice on a State-by-State basis. If the treatment of the exception of trading or commercial activity has been criticized for not covering the practice of all 165 countries, or for distorting it in some cases, the current practice of States with regard to contracts of employment can offer no greater comfort nor absolute proof approaching a universal or uniform State practice. It only indicates a deeper intrusion into a darker or greyer zone of greater controversy, and, if article 13 is to be at all meaningful, greater care and prudence must be applied: wild or sweeping statements would not be helpful.

40. State practice in the specified area of contracts of employment appears to be comparatively recent, unlike the rich State practice concerning trading or commercial activities. This contrast is attributable to the fact that States have engaged in trading or commercial activities across or beyond their borders for a long time, resulting in litigations and judicial decisions in several jurisdictions. On the other hand, the employment abroad of local personnel by an organ of State or one of its agencies or instrumentalities in the exercise of its governmental authority has been a matter of relatively recent practice. Disputes concerning relations between servants and masters, or employees and foreign State employers, have not been too frequent. It is even more uncommon to find a recorded settlement by local judicial decision or other administrative adjudication.

41. The stages of development of a separate branch of civil law or of the law of contract governing labour relations and labour disputes are far from being uniform. Indeed, many countries do not have a labour code or special labour courts or tribunals for the settlement of labour disputes. Some systems have administrative tribunals to determine questions or to hear grievances from employees of their own Government but are not specifically equipped to apply foreign administrative laws or to extend their own administrative laws for the benefit of employees of foreign Governments. The current enquiry is, however, limited to existing practice and does not investigate the causes of its scarcity.

2. Judicial practice

42. Owing to the uneven stages of development of different internal laws governing the specified area of "contracts of employment", jurisprudence or case-law cannot be presented on a country-by-country basis; rather, the content may be treated topic by topic or by subtopic. However, a meaningful analysis of practice as evidence of the progress of legal developments will still have to be based on the inductive method, difficult as it may seem.

(a) Appointment or employment by a State

43. There appears to have developed a relatively more consistent trend in the case-law of States that the question of appointment or employment of personnel of an office by a State or one of its organs, agencies or instrumentalities is immune from the jurisdiction of the territorial judicial authorities, provided of course that the activities of such agencies or instrumentalities are performed in the exercise of governmental authority.[44]

44. Italian jurisprudence is rich in examples of clear judicial pronouncements to the effect that the act of appointment or non-appointment of an employee, or the decision to employ or not to employ a person, by a foreign State agency is an act of public law essentially exempt from local jurisdiction. The act of appointment is often said to be performed in the exercise of governmental functions.[45] Thus, in a decision rendered by the United Sections of the Supreme Court of Cassation in 1947,[46] the Soviet Trade Delegation was held to be exempt from jurisdiction in matters of employment of an Italian citizen, being *acta jure imperii*, notwithstanding the fact that the appointing authority was a separate legal entity, or for that matter a foreign corporation established by a State. Similarly, in a more recent case decided in 1955,[47] the Court of Cassation declined jurisdiction in an action brought by an Italian citizen in respect of his employment by a United States military

[43] See the fourth report of the Special Rapporteur (see footnote 2 (*d*) above), paras. 49-107.

[44] See article 7, para. 3, and the commentary thereto (see footnotes 12 and 13 above); see also paras. 5-6 of the present report.

[45] The distinction between the "functions of the State in the exercise of its sovereign power, and its activity as a subject of rights of property" was restated afresh in the judgment of the Court of Appeal of Genoa in *Canale* v. *Governo Francese* (1937) (*Rivista di diritto internazionale* (Rome), 29th year (1937), p. 81, with a critical note by C. Cereti; *ibid.*, 30th year (1938), p. 226; *Annual Digest and Reports of Public International Law Cases, 1935-1937* (London), vol. 8 (1941), p. 237).

[46] *Tani* v. *Rappresentanza commerciale in Italia dell'U.R.S.S.* (1947) (*Il Foro Italiano* (Rome), vol. LXXI (1948), p. 855; *Annual Digest ... , 1948* (London), vol. 15 (1953), case No. 45, p. 141).

[47] *Department of the Army of the United States of America* v. *Gori Savellini* (1955) (*Rivista di diritto internazionale* (Milan), vol. XXXIX (1956), pp. 91-92; *International Law Reports, 1956* (London), vol. 23 (1960), p. 201). See also *Alexeef* v. *Rappresentanza commerciale dell'U.R.S.S.* (1932) (*Giurisprudenza Italiana* (Turin), vol. I (1933), p. 489), where no distinction was made between diplomatic and commercial activities of the Trade Agency.

base established in Italy in accordance with the North Atlantic Treaty, this being an *attività pubblicistica* connected with the *funzioni pubbliche o politiche* of the United States Government.[48] The act of appointment was necessarily performed in the exercise of governmental authority, and as such considered to be an *atto di sovranità*.

45. In a different context, the French Conseil d'Etat regarded appointment of a French national to a position in UNESCO, as well as failure of the French Government to support the claims of an ex-official of the Institute of Intellectual Co-operation and his entitlement to a UNESCO position, as being outside the competence of the French authorities.[49]

(b) *Cases of dismissal*

46. Dismissal cases are more abundant in State practice and point to the conclusion that the courts do not have competence. The act of dismissal has been regarded as an exercise of sovereign power or governmental authority rather than a breach of an ordinary commercial or private contract. Italian case-law may be cited in support of this proposition. It is all the more conclusive that Italian jurisprudence appears, from its very early days, to be the most restrictive of all State practice.

47. Thus immunity was upheld in an action for wrongful dismissal brought by an ex-employee of the Milan branch of the Soviet Trade Delegation in the *Kazmann* case, decided by the Italian Supreme Court in 1933.[50] This decision became a leading precedent followed by other Italian courts.[51] A later decision by the United Sections of the Supreme Court of Cassation in the *Tani* case in 1947[52] must be regarded as final and decisive on this point. It also confirmed the decision of the Appellate Court of Milan rejecting the action brought by an employee of the Soviet Trade Delegation for wrongful dismissal. A decision of the French Conseil d'Etat in 1929 in another context also took the same line.[53]

(c) *Employment or labour relations*

48. In spite of earlier hesitancy in the case-law,[54] recent State practice appears to consider questions of labour relations or contracts of employment in substance as matters in regard to which foreign State agencies are entitled to immunity, as long as it is established that the agencies in question performed activities in the exercise of governmental authority.[55] Contracts of employment were conceived by Italian judicial authorities as exceptions to the normal transactions between a foreign State and local citizens amenable to the jurisdiction of Italian courts.[56] Viewed as *atti di sovranità*, contracts of employment of employees of foreign Governments were exempted from the jurisdiction of the Italian courts which applied the most restrictive principle of State immunity. Thus, in 1956,[57] an action brought by Gori Savellini against a United States military base established in Italy was dismissed. In two more recent cases, judicial pronouncements were even more explicit. Thus, in *De Ritis* v. *Governo degli Stati Uniti d'America* (1971),[58] immunity was upheld in an action brought by De Ritis, a librarian with the United States Information Service (USIS) in Italy, having regard to the substantive and objective contents of the employment or service to be performed, however modest. The Supreme Court considered USIS to be an overseas office of the United States Information Agency, *un ente od ufficio statale americano ... che agisce all'estero sotto la direzione ed il controllo del Segretario di Stato ... per la persecuzione di fini pubblici sovrani dello Stato americano come tale.*[59] The Court held De Ritis to be an "employee of the United States Government" and *secondo concetti propri del nostro diritto pubblico ma indubbiamente applicabili anche alla fattispecie ... perchè l'impiegato di uno Stato è per definizione impiegato pubblico.*[60] Although the contract of employment was undoubtedly *un rapporto di lavoro*, it

[48] Cf. *De Ritis* v. *Governo degli Stati Uniti d'America* (1971) (*Rivista ...*, vol. LV (1972), p. 483) and *Luna* v. *Repubblica socialista di Romania* (1974) (*ibid.*, vol. LVIII (1975), p. 597). Contrast, however, the decisions in *De Semenoff* v. *Amministrazione delle Ferrovie dello Stato della Norvegia* (1935, 1936) (*ibid.*, 29th year (1937), p. 224; *Annual Digest ... , 1935-1937, op. cit.*, case No. 92, p. 234), concerning a case of employment by the State railways of a foreign Government operating in Italy, and in *Slomnitzky* v. *Rappresentanza commerciale dell'U.R.S.S.* (1932) (*Annual Digest ... , 1931-1932* (London) vol. 6 (1938), case No. 86, p. 169).

[49] *Weiss* v. *Institute of Intellectual Co-operation* (1953) (*Journal du droit international* (Clunet) (Paris), vol. 81 (1954), p. 745, with a note by P. Huet).

[50] *Rappresentanza commerciale dell'U.R.S.S.* v. *Kazmann* (1933) (*Rivista ...*, 25th year (1933), p. 240; *Annual Digest ... , 1933-1934* (London), vol. 7 (1940), case No. 69, p. 178).

[51] See, for example, *Little* v. *Riccio e Fischer* (Court of Appeal of Naples, 1933) (*Rivista ...*, 26th year (1934), p. 110), (Court of Cassation, 1934) (*Annual Digest ... , 1933-1934, op. cit.*, case No. 68, p. 177); the Court of Appeal of Naples and the Court of Cassation disclaimed jurisdiction in this action for wrongful dismissal by Riccio, an employee in a cemetery the property of the British Crown and "maintained by Great Britain *jure imperii* for the benefit of her nationals as such, and not for them as individuals". Cf. *Mazzucchi* v. *Consolato Americano* (1931) (*Annual Digest ... , 1931-1932, op. cit.*, case No. 186, p. 336).

[52] See footnote 46 above; an illuminating judgment may be found in *Annual Digest ... , 1948*, pp. 145-146.

[53] The *Marthoud* case (1929) (*Recueil des arrêts du Conseil d'Etat* (Paris, Sirey, 1929), vol. 99, p. 409).

[54] Earlier decisions by Italian courts denied immunity on the grounds that contracts of employment were private-law transactions, while the act of dismissing or appointing a government employee or a civil servant was invariably regarded as an exercise of sovereign authority. See, for example, *De Semenoff* v. *Amministrazione delle Ferrovie dello Stato della Norvegia* (1935, 1936) (footnote 48 above). Cf. also *Ferrovie Federali Svizzere* v. *Commune di Tronzano* (1929) (*Il Foro Italiano*, vol. LIV (1929), p. 1146; *Annual Digest ... , 1929-1930* (London), vol. 5 (1935), p. 124), where immunity was denied to the Swiss Federal Railways.

[55] See S. Sucharitkul, *State Immunities and Trading Activities in International Law* (London, Stevens, 1959), pp. 239-242.

[56] See Sucharitkul, "Immunities of foreign States before national authorities", *Collected Courses of The Hague Academy of International Law, 1976-I* (Leyden, Sijthoff, 1977), vol. 149, pp. 130-132.

[57] See footnote 47 above.

[58] See footnote 48 above.

[59] *Rivista ...*, vol. LV (1972), p. 485.

[60] *Ibid.*, p. 486.

was not *un rapporto di diritto privato.*[61] In another case, *Luna* v. *Repubblica socialista di Romania* (1974),[62] concerning an employment contract concluded by an economic agency forming part of the Romanian Embassy in Rome, immunity of the Socialist Republic of Romania was upheld. The Supreme Court dismissed Luna's claim for 7,799,212 lire as compensation for remuneration based on the employment contract. The court regarded such labour relations as being outside Italian jurisdiction, *qualora lo Stato abbia agito come soggetto di diritto internazionale, la giurisdizione italiana non può sussistere, in virtù della norma consuetudinaria di diritto internazionale, generalmente riconosciuta, sull'immunità giurisdizionale degli Stati esteri* ... .[63] Looking at the objective elements, the Court held that *il rapporto d'impiego in contestazione va senz'altro inquadrato nell'ambito dell'attività che lo Stato romeno (quale soggetto di diritto internazionale) svolge in Italia per propri fini istituzionali* ... .[64]

(d) *Absence of jurisdiction*

49. There appears, therefore, to be no consistent case-law anywhere pointing to the conclusion that contracts of employment or any aspect thereof could constitute an exception to State immunity. On the contrary, even in the most limited application of the principle of State immunity, as in the case-law of Italy, immunity is recognized and fairly consistently applied in all cases, covering appointment, dismissal and actions for compensation or for breach of other terms of the employment or service contract. There appears to be a general absence of jurisdiction or reluctance to exercise jurisdiction in the field of labour relations.

3. Governmental practice

50. Further examination is warranted to see whether, outside the case-law, there is anywhere any support for restricting immunity in regard to employment contracts.

(a) *National legislation*

51. In the absence of judicial decisions indicating acceptance of "contracts of employment" as an exception to State immunity, it is only possible to conjecture that, in the countries which have adopted national legislation restricting immunity in this specified area of "contracts of employment" or "labour relations", the courts will in future have to apply their national legislation.

52. On the basis of this assumption, it is interesting to note that section 4 of the United Kingdom *State Immunity Act 1978*[65] contains such a provision. It reads:

Exceptions from immunity

...

4. (1) A State is not immune as respects proceedings relating to a contract of employment between the State and an individual where the contract was made in the United Kingdom or the work is to be wholly or partly performed there.

(2) Subject to subsections (3) and (4) below, this section does not apply if:

(*a*) at the time when the proceedings are brought the individual is a national of the State concerned; or

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

(*c*) the parties to the contract have otherwise agreed in writing.

(3) Where the work is for an office, agency or establishment maintained by the State in the United Kingdom for commercial purposes, subsection (2) (*a*) and (*b*) above do not exclude the application of this section unless the individual was, at the time when the contract was made, habitually resident in that State.

(4) Subsection (2) (*c*) above does not exclude the application of this section where the law of the United Kingdom requires the proceedings to be brought before a court of the United Kingdom.

(5) In subsection (2) (*b*) above "national of the United Kingdom" means a citizen of the United Kingdom and Colonies, a person who is a British subject by virtue of section 2, 13 or 16 of the British Nationality Act 1948 or by virtue of the British Nationality Act 1965, a British protected person within the meaning of the said Act of 1948 or a citizen of Southern Rhodesia.

(6) In this section "proceedings relating to a contract of employment" includes proceedings between the parties to such a contract in respect of any statutory rights or duties to which they are entitled or subject as employer or employee.

53. While this provision has no equivalent in the United States *Foreign Sovereign Immunities Act of 1976*,[66] nor in Canada's *State Immunity Act* of 1982,[67] it appears to have been followed very closely in section 6 of Singapore's *State Immunity Act, 1979*,[68] in section 6 of the *State Immunity Ordinance, 1981* of Pakistan,[69] and in section 5 of the South African *Foreign States Immunities Act, 1981*.[70] Since the practice of English courts has, in the past, been associated with a more absolute principle of State immunity, this change of attitude, which as been followed in a number of important Commonwealth countries applying common law, is bound to have far-reaching influence in the development of future practice, not only in common-law jurisdictions. The restrictive practice in this particular area of "contracts of employment" is capable of gathering momentum.[71]

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[61] *Ibid.*, p. 485. See also, in regard to employment cases, judgment No. 467 of 1964 concerning the United States Army—Southern European Task Force, and judgment No. 3160 of 1959 concerning a Venezuelan naval mission (*ibid.*).

[62] See footnote 48 above.

[63] *Rivista* ... , vol. LVIII (1975), p. 599.

[64] *Ibid.*

[65] United Kingdom, *The Public General Acts, 1978*, part 1, chap. 33, p. 715 (reproduced in United Nations, *Materials on Jurisdictional Immunities* ... , pp. 41 *et seq.*).

[66] *United States Code, 1976 Edition*, vol. 8, title 28, chap. 97, p. 206 (*idem*, pp. 55 *et seq.*).

[67] "Act to provide for State immunity in Canadian courts", which came into force on 15 July 1982 (*The Canada Gazette, Part III* (Ottawa), vol. 6, No. 15 (22 June 1982), p. 2949, chap. 95).

[68] Entitled "Act to make provision with respect to proceedings in Singapore by or against other States, and for purposes connected therewith", of 26 October 1979 (reproduced in United Nations, *Materials on Jurisdictional Immunities* ..., pp. 28 *et seq.*).

[69] *The Gazette of Pakistan* (Islamabad), 11 March 1981 (*idem*, pp. 20 *et seq.*).

[70] The Act came into force on 6 October 1981 (*idem*, pp. 34 *et seq.*).

[71] There is a distinct possibility that other countries, in the Caribbean and elsewhere, such as St. Kitts and Trinidad and Tobago, will follow this tendency.

54. It is also to be assumed that the practice of the States which have ratified the 1972 European Convention on State Immunity,[72] such as Austria,[73] Belgium[74] and Cyprus,[75] like the United Kingdom, will be restrictive in this area.

(b) *International conventions*

(i) *1972 European Convention on State Immunity*

55. The 1972 European Convention on State Immunity came into force in accordance with article 36, paragraph 2, between Austria, Belgium and Cyprus on 11 June 1976. Article 5 of the Convention contains virtually the same provisions as section 4 of the United Kingdom *State Immunity Act 1978* intended to give effect to the Convention[76] and reads as follows.

Article 5

1. A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate to a contract of employment between the State and an individual where the work has to be performed on the territory of the State of the forum.

2. Paragraph 1 shall not apply where:

(*a*) the individual is a national of the employing State at the time when the proceedings are brought;

(*b*) at the time when the contract was entered into the individual was neither a national of the State of the forum nor habitually resident in that State; or

(*c*) the parties to the contract have otherwise agreed in writing, unless, in accordance with the law of the State of the forum, the courts of that State have exclusive jurisdiction by reason of the subject-matter.

3. Where the work is done for an office, agency or other establishment referred to in Article 7, paragaphs 2 (*a*) and (*b*) of the present article apply only if, at the time the contract was entered into, the individual had his habitual residence in the Contracting State which employs him.

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

56. While the fullest implications of such a provision cannot yet be assessed, its snowballing effect is reflected in an increasing amount of legislation in various countries, albeit not always uniform. Worthy of notice at this juncture is the recent, Inter-American Draft Convention on Jurisdictional Immunity of States (1983).[77] Article 6 contains the following provision restricting immunity:

Article 6

States shall not claim immunity from jurisdiction either:

(*a*) in labour affairs or employment contracts between any State and one or more individuals, when the work is performed in the forum State;

...

4. International opinion

57. Opinions of writers on the question of contracts of employment have been very scanty. Traditionally, this specific area has been regarded as more exclusively within the scope of the administrative law of the employing State and therefore more properly pertaining to the jurisdiction of that State.[78] Commentaries by individual writers on national legislation and international conventions have been somewhat varied. The critique has centred upon the wording of the texts, which are unnecessarily complex and difficult of appreciation.[79] It is, of course, the sovereign right of any State to legislate on the subject-matter by prescribing the conditions under which foreign States are allowed to engage in certain activities within its territory. Each State has the inherent power, subject to treaty obligations, to exclude from its territory foreign public agencies, including even diplomatic representation.[80]

58. It is not surprising to see a restrictive trend reflected in the draft articles for a convention on State immunity proposed by the International Committee on State Immunity and adopted by the International Law Association at Montreal in 1982.[81] This draft contains the following provision:

Article III. Exceptions to immunity from adjudication

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

...

C. Where the foreign State enters into a contract for employment in the forum State, or where work under such a contract is to be performed wholly or partly in the forum State and the proceedings relate to the contract. This provision shall not apply if:

1. At the time proceedings are brought the employee is a national of the foreign State; or

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[72] See footnote 39 above.

[73] See the declarations by Austria giving effect to the provisions of the Convention, in United Nations, *Materials on Jurisdictional Immunities* ... , p. 5. Austria ratified the Convention on 10 July 1974.

[74] Belgium ratified the Convention on 27 July 1975.

[75] Cyprus ratified the Convention on 10 March 1976.

[76] See also the almost identical formulations in the corresponding provisions of national legislation.

[77] Draft approved by the Inter-American Juridical Committee, Rio de Janeiro, on 21 January 1983 (OEA/Ser.G-CP/doc.1352/83, of 30 March 1983). See also *International Legal Materials* (Washington, D.C.), vol. XXII, No. 2 (March 1983), p. 292.

[78] On this question, see, for example, F. Seyersted, "Jurisdiction over organs and officials of States, the Holy See and intergovernmental organizations", *The International and Comparative Law Quarterly* (London), vol. 14 (1965), pp. 31-82 and 493-527.

[79] See, for example, F. A. Mann, "The State Immunity Act 1978", *The British Year Book of International Law, 1979* (London), vol. 50, p. 54.

[80] See, for example, I. Brownlie, *Principles of Public International Law* (3rd ed.) (Oxford, Clarendon Press, 1979), p. 334:
"If a State chooses, it could enact a law governing immunities of foreign States which would enumerate those acts which would involve acceptance of the local jurisdiction. ... States would thus be given a licence to operate within the jurisdiction with express conditions and the basis of sovereign immunity, as explained in *The Schooner 'Exchange'*, would be observed." See also I. Sinclair, "The law of sovereign immunity: Recent developments", *Collected Courses* ... , *1980-II* (Alphen aan den Rijn, Sijthoff and Noordhoff, 1981), vol. 167, pp. 214-216.

[81] See ILA, *Report of the Sixtieth Conference, Montreal, 1982* (London, 1983), pp. 5-10, resolution No. 6: "State Immunity".

2. At the time the contract for employment was made the employee was neither a national nor a permanent resident of the forum State; or

3. The employer and employee have otherwise agreed in writing.[82]

...

5. An emerging trend

59. While the current practice of States is relatively silent on contracts of employment as a possible area of exceptions to State immunity, there appears to be an emerging trend in favour of limitation in this darkest area of the "grey zones". The choices available depend on the eventual outcome of legal developments in labour affairs and labour relations. In an endeavour to restate the law in the process of its progressive development, utmost care should be taken to avoid interference with the application of foreign administrative law, while maintaining reasonable standards of labour conditions in employment contracts within the State of the forum. At the same time, nothing should be attempted that would aggravate existing problems of unemployment in a given society.

60. All things considered, an emerging trend appears to favour the application of local labour law in regard to recruitment of the available labour force within a country, and consequently to encourage the exercise of territorial jurisdiction at the expense of jurisdictional immunities of foreign States. It is not unnatural in such endeavours to adopt national legislation which tends to prescribe also the scope and limits of exercisable jurisdiction in addition to the restriction of State immunity in this specified area. It is clear that private-law jurisdiction has to be firmly established before the question of jurisdictional immunity arises to be resolved. Regional conventions tend to draw also on national jurisdiction, which should be established in a uniform manner so as to avoid any unnecessary vacuum or overlapping of competence.

C. Formulation of draft article 13

61. The principle to be incorporated in the draft article should reflect the fluid state of legal developments. Flexibility and balanced considerations should guide any effort to formulate a draft article on "contracts of employment". The possibility should be left open for this exception to assert itself in State practice. On the other hand, this should not constitute any intrusion into the sphere of administrative law or the administrative functions of government officials. Rather, a mild incentive could be introduced to encourage conformity with local labour law and improve social conditions, labour relations and the employment outlook. Two criteria are eligible for support. First, the nationality of the employee could be taken into consideration as an element in favour of the application of the administrative law of the employing State or, as the case may be, of the application of the labour law of the territorial State. The second criterion is residence in the State of the forum, which could be qualified as regular, habitual or permanent, not so much as the basis for jurisdiction in private international law, but more exactly as justification for the exercise of existing territorial jurisdiction or predilection in favour of the territorial connections, to ensure protection of the nationals and alien residents of the forum State.

62. Article 13 might read as follows:

Article 13. Contracts of employment

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

2. Paragraph 1 does not apply if:

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

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

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

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

ARTICLE 14 (Personal injuries and damage to property)

A. General considerations

1. Scope of "personal injuries and damage to property" as an exception to State immunity

63. The purpose of draft article 14 is to examine possible limitations of State immunity in the area of "personal injuries and damage to property". This area covers the liability of a State or one of its organs, agencies or instrumentalities to pay damages or monetary compensation in respect of an act or omission attributable to the State, resulting in personal injury (physical damage) to a natural person or physical damage to property as distinct from depreciation of its value. In common-law jurisdictions, such causes of action may be included under the heading of tortious liability. For the purposes of jurisdictional immunity, they may be categorized as non-commercial tort. In civil-law and other jurisdictions, a similar heading may be entitled civil responsibility for physical damage to persons resulting in bodily harm, personal injuries or death, and physical damage to tangible movable or immovable property as opposed to infringements of property rights, or libel or other forms of defamation.

[82] *Ibid.*, pp. 7-8. An interesting commentary on this provision may be found in the final report (24 June 1982) of the International Committee on State Immunity, chaired by Mr. M. Leigh; see ILA, *The ILA Montreal Draft Convention on State Immunity* (London, 1983), pp. 51-52, para. 25.

64. Without further inquiry into the niceties of various internal laws on the subject, which may cover a wide area of civil liability for physical damage to persons and property, one could mention, for example, negligence or nuisance in the common-law system, where damage is occasioned by an act or omission, or cases of stricter liability for occupation of land and premises, or liability for dangerous animals or for possession and transport of dangerous substances. In the strictest application of liability without fault, an action may lie not only for malfeasance or misfeasance or, indeed, for non-feasance but also for failure to prevent the occurrence of damage. The duty of care may vary in standard and quality depending on the strictness of liability and the degree of protection provided by the internal law for the injured party, be it physical injury to the person or damage to property. The damage could be the result of a wilful act, neglect, omission or negligence, or, indeed, it could be unintended or even accidental. The causes of action under this heading or possible remedies for damage grouped under "personal injuries and damage to property" include a wide variety of circumstances giving rise to legal relief for the injured party, including not only the persons injured, but also, in the event of consequent death, their heirs and dependants. As for damage to property, similar causes of action may be available to the owner, user or possessor or the combination of such right-holders.

65. The purpose of article 14 is therefore to limit the application of jurisdictional immunity in respect of personal injuries and damage to property caused by an act or omission attributable to a foreign State or to one of its organs, agencies or instrumentalities. The restriction operates where there is State immunity, that is to say even where the agency or instrumentality of a foreign State has been acting in the exercise of governmental power, so long only as the personal injury or damage to property occurred in the territory of the State of the forum. The extent of damage or remoteness thereof and the types of available redress in various internal laws lie outside the ambit of the present study.

2. The legal basis for jurisdiction

66. The exception of "personal injuries and physical damage to property" is not an issue, or does not arise, where there is no question of State immunity from the jurisdiction of the courts of another State. By the same token, the question of State immunity should not be raised, or indeed need not be raised, when the causes of action are outside the jurisdiction of the courts, or when the courts before which proceedings have been brought have no jurisdiction, because of the subject-matter or for territorial reasons, or are otherwise not competent to consider and decide the case in question. It is significant to note at this juncture that, in order to avoid unnecessary inquiry into the grounds or legal bases for jurisdiction in respect of tort or civil liability for personal injuries and damage to property, whether wilful, malicious or merely accidental, an agreed basis or an unchallenged or undoubted basis for jurisdiction is obviously the *locus delicti commissi*.

67. Of course, under the rules of private international law, there are possible competing criteria for the existence or foundation of jurisdiction in the circumstances under examination, such as the nationality of the injured person, the place where the plaintiff suffered injury as opposed to or distinct from the place where the act or omission occurred. As regards damage to property, jurisdiction may be founded on the basis of the physical situation (*situs*) of the immovable or movable property damaged, as opposed to or distinct from the place where the wrongful act or omission was committed or where negligence or neglect of the required duty of care occurred. It will be seen, quite correctly and not without well-founded reason, that national legislation and regional conventions containing provisions on this particular exception invariably specify the pre-existence of legitimate jurisdiction based on the *locus delicti commissi* and the eventual and justifiable exercise of such jurisdiction, even in respect of damage resulting from activities normally categorized as *acta jure imperii*, and also, in any event, from activities of a non-commercial character, whether or not classified as *acta jure gestionis*. The distinction between *jus imperii* and *jus gestionis*, or the two types of activities attributable to the State, appears to have little or no bearing in regard to this exception, which is designed to allow normal proceedings to lie and to provide relief for the individual who has suffered an otherwise actionable physical damage to his own person or his deceased ancestor or to his property. The cause of action relates to the occurrence or infliction of physical damage for which a foreign State is answerable, although local judicial authorities have hitherto been reluctant to exercise jurisdiction.

3. The basis for the exercise of jurisdiction or non-immunity

68. It should be stated at the outset that, whatever the legal basis for the existence or assumption of jurisdiction by the *forum loci delicti commissi* or the application of the *lex loci delicti commissi*, which may not be challenged by other competing jurisdictions or the choice of other applicable laws, the basis for actual exercise of jurisdiction when the act or omission complained of is attributable to a foreign State cannot be found in customary international law. It will be seen that the exercise of jurisdiction in proceedings involving a foreign State as a defendant is not warranted in the traditional practice of States. There appear, nevertheless, to be impelling reasons for an emerging trend in the recent case-law of countries which have adopted national legislation restricting immunity in this specified area to apply a restrictive doctrine whereby the courts may exercise jurisdiction in cases involving personal injuries or damage to property in the territory of the State of the forum.

69. Many theoretical justifications could be advanced in support of the exercise of jurisdiction, or for the absence of State immunity, in such circumstances. Whatever the activities of a State giving rise to personal injuries or damage to property within the territory of

another State, whether in connection with *acta jure imperii* or *acta jure gestionis*, the fact remains that injuries have been inflicted upon and suffered by innocent persons, whether the act or omission was deliberate or unintentional or, indeed, negligent or accidental. The exercise of jurisdiction by the court of the place where the damage has occurred is probably the best guarantee of sound and swift justice. Adequate relief can be expected as the court is in reality a *forum conveniens* or, indeed, a most practical and convenient judicial authority with an unchallenged claim to exercise jurisdiction and facilities to establish or disprove evidence of liability and to assess compensation. Questions of causation or remoteness of damage as well as the quantum of retribution of measure of damages can best be determined by the competent forum of the place where the damage occurred and in accordance with the law of that place (*lex loci*).

70. It goes without saying that the reverse is equally convincing. Non-exercise of jurisdiction in such a case may result in a vacuum. Not only will there be a shortage of a more appropriate law to be applied, but also a more suitable court of competence will not easily be found to try the case, which may be falling between two stools. The absence of competent judicial authority and lack of applicable law would leave the injured party remediless and without adequate relief or possible recourse, except at the mercy of the foreign State, which might or might not feel obliged to pay compensation, either on a voluntary basis or *ex gratia*. In the interests of the rule of law and of justice, normal legal remedies should continue to be available, regardless of the public or private character of the defendant. This is easier said than done, for, in actual practice, as will be seen below, the courts have tried hard to restrict immunity in this specific area, basing their restriction on the type of activities carried on by the State agencies or instrumentalities concerned, or the direct connection with State activities which may be said to be genuinely *acta jure imperii* as opposed to *acta jure gestionis*. The results have been not altogether clear and apparently far from certain. The practice of States remains to be closely consulted on this particular point.

71. Whatever the emerging trend in State practice, the restrictive theories have sought to qualify or limit State immunity on the grounds, *inter alia*, that the tortious liability of a foreign State should be locally justiciable if the damage to property, death or personal injuries have occurred in the territory of the forum. The main purpose is the protection of the injured parties, whether they happen to be nationals or residents of the State of the forum, or indeed aliens or tourists temporarily in the territory, which is nevertheless bound to afford a reasonable measure of legal protection for the safety and security of their persons as well as their tangible belongings.

72. The sovereignty of the State responsible or liable for the damage incurred by the injured individual is not directly at stake in most cases. A State conducting activities in the territory of another State is obliged to respect local laws and regulations and to abide by all ground rules. In case of infraction or violation of local laws, with or without intent, the liability to pay compensation for damage should be accompanied by actual payment. In particular, the primary liability of the State in most cases of road accidents would be replaced or absorbed by insurance coverage under the existing requirements of most local traffic regulations. Payment of compensation by an insurance company on behalf of a foreign State is no longer regarded as an affront to anyone, neither to the foreign State nor to the host Government. All parties should be satisfied, especially the aggrieved individuals who have been injured in a motor accident.

73. The areas specified as personal injuries and damage to property are mainly concerned with accidental death, personal injuries or damage to property such as vehicles or fixed objects involved in a highway collision. Their scope is none the less somewhat wider, covering also cases such as assault and battery, malicious damage to property, arson and even murder or political assassination. Justice should not only be done but should also be seen to be done.

74. In an eagerness to mete out justice, care should be taken lest a fundamental principle of international law, namely the principle of State immunity, be made an object of sacrifice without sufficient cause or true justification. While, in general, it is possible to conceive of day-to-day activities of States which could be covered by an insurance policy in case of fire or accident or other natural disaster or calamity attributable to an agency or instrumentality of a State, the possibility that State immunity is still needed should not be precluded, particularly in cases where the State has performed an act exclusively in the domain of the laws of war, such as in military operations or military exercises or manœuvres, or indeed in operations to quell riots, disturbances, civil war or civil strife, which are not generally covered by peacetime insurance.

75. The sovereignty or governmental authority of a foreign State is not being challenged when, like any other responsible party, the State answerable for the physical damage to persons or property is called upon to come to the aid and assistance of the injured party. To be humane and merciful is not inconsistent with statehood or sovereignty. Humanity also deserves the protection of international law. To protect the integrity and security of the individual and his property is the duty of every territorial State. To allow an insurance company to settle claims against a foreign Government is not a derogation of any sovereign right or governmental power. Social welfare requires that every person should be safe and secure and that personal injuries be accorded the necessary remedies. Damage to tangible property should also be made good by the responsible party, whoever that may be. A State is a highly respectable and very responsible party in this context. No question of sovereign equality is really involved.

B. The practice of States

1. Judicial practice prior to national legislation

76. Before the intervention by legislatures in the 1970s and, indeed, prior to the adoption and ratification of international conventions on State immunities, the practice of States had been neither uniform nor consistent. The exception of "personal injuries and damage to property" is relatively unknown in those jurisdictions applying a more "absolute" principle of immunity, mainly the common-law countries, such as the United Kingdom, the United States of America, Canada, Australia, New Zealand and other members of the Commonwealth. The practice of socialist countries in this area is virtually unknown. On the whole, there has been very little evidence of State practice allowing or disallowing State immunity in respect of proceedings for "personal injuries and damage to property".

77. It is noteworthy, nevertheless, that in a number of countries where judicial practice has tended to favour a less absolute or a more restrictive principle of State immunity, attempts have been made to justify the exercise of jurisdiction by competent courts on the grounds that the act or omission in question relates to State acts *jure gestionis* or, at any rate, not to acts *jure imperii*. On the other hand, in the same "restrictive" jurisdictions, immunity has been upheld wherever the courts have found the activities giving rise to damage to property or personal injuries to have been conducted *jure imperii*.

78. Thus, in a Belgian case, *S.A. "Eau, gaz, électricité et applications"* v. *Office d'aide mutuelle* (1956),[83] the Court of Appeal of Brussels upheld a plea of immunity in proceedings arising out of a motor accident which had occurred in March 1945 involving a British military truck carrying troops back from leave. At the time of the accident, the troops were engaged in belligerent operations in Belgium. The court decided that:

> As far as allied belligerents who carry out operations of war on Belgian territory are concerned, the immunity from jurisdiction of foreign States acting *jure imperii* prevents their being sued in Belgian courts.[84]

79. The Court of Appeal of Schleswig in the Federal Republic of Germany adopted this general approach and granted jurisdictional immunity in a 1957 case involving the immunity from jurisdiction of the United Kingdom.[85] The plaintiff, a haulage contractor, claimed to have suffered injury to his health when performing his part of the contract for the recovery of certain arms and military plans in the Soviet zone. The court found a close link between the events giving rise to the plaintiff's claim and the performance of sovereign functions by the British Army.

80. In this connection, following the restrictive trend in the practice of many States, Egyptian courts have consistently allowed immunity from jurisdiction in repect of acts *jure imperii*. There have been a number of cases concerning acts of members of armed forces of a foreign State in Egypt. The courts have frequently allowed immunity in cases of tort-accident or collision between private cars and army vehicles being driven by officials of a foreign State in the exercise of their public duty.[86] On the other hand, Egyptian courts have denied immunity in respect of crimes committed by members of foreign armed forces when not "on duty".[87] Thus, in *Guebali* v. *Colonel Mei*,[88] it was held that the French Army had no immunity from civil jurisdiction even in matters relating to a military mission.[89]

81. In a more recent decision involving a motor accident caused by negligent driving of a car owned by a foreign Government, the Austrian Supreme Court delivered an illuminating judgment based on interesting analysis of the crucial acts. Thus, in *Holubek* v. *Government of the United States* (1961),[90] it was argued for the defendant that the carriage of mail for and on behalf of the United States Embassy constituted the performance of a "sovereign act" by the United States Government. The Austrian Supreme Court, applying a distinction between *acta jure imperii* and *acta jure gestionis*,[91] ruled that the act on which the plaintiff

[83] *Pasicrisie belge* (Brussels), vol. 144 (1957), part 2, p. 88; *International Law Reports, 1956* (London), vol. 23 (1960), p. 205.

[84] *Ibid.*, p. 207.

[85] *Immunity of United Kingdom from jurisdiction (Germany)* (1957) (*International Law Reports, 1957* (London), vol. 24 (1961), p. 207).

[86] See, for example, *Dame Galila Bassionni Amrane* v. *G. S. John Esq.* (1932) (*Journal du droit international* (Clunet) (Paris), vol. 62 (1935), p. 195; *Annual Digest ... , 1931-1932, op. cit.*, case No. 90, p. 174; *Annual Digest ... , 1933-1934, op. cit.*, case No. 74, p. 187); cf. the later case of *Joseph Abouteboul* v. *Etat hellénique* (1948) (*The American Journal of International Law* (Washington, D.C.), vol. 44 (1950), p. 420), where immunity appears to have been correctly recognized with regard to acts performed by State agents not only while on duty or on mission, but also in the exercise of a public duty.

[87] See, for example, *Ministère public* v. *Constantin Tsoukharis* (1943) (*Bulletin de législation et de jurisprudence égyptiennes* (Alexandria), vol. 55 (1942-1943), p. 89; *Annual Digest ... , 1943-1945* (London), vol. 12 (1949), case No. 40, p. 150); *Efstratios Gounaris* v. *Ministère public* (1943) (*Bulletin de législation et de jurisprudence égyptiennes* ... (1942-1943), p. 156; *Annual Digest ... , 1943-1945, op. cit.*, case No. 41, p. 152); *Manuel Malero* v. Ministère public (1943) (*Bulletin de législation et de jurisprudence égyptiennes* ... (1942-1943), pp. 41 and 125; *Annual Digest ... , 1943-1945, op. cit.*, case No. 42, p. 154). See also *Georges Triandafilou* v. *Ministère public* (1942) (*The American Journal of International Law* (Washington, D.C.), vol. 39 (1945), p. 345).

[88] *Dame Safia Guebali* v. *Colonel Mei* (1943) (*Bulletin de législation et de jurisprudence égyptiennes* ... (1942-1943), p. 120; *Annual Digest ... , 1943-1945, op. cit.*, case No. 44, p. 164).

[89] Cf. *Hénon* v. *Gouvernement égyptien* (1947) (*Bulletin de législation et de jurisprudence égyptiennes* (Alexandria), vol. 59 (1946-1947), p. 225; *Annual Digest ... , 1947* (London), vol. 14 (1951), case No. 28, p. 78), where it was held that agents of a foreign Government were immune from jurisdiction with regard to the requisition of a villa by order of a foreign government department.

[90] *Juristische Blätter* (Vienna), vol. 84 (1962), p. 43; *International Law Reports* (London), vol. 40 (1970), p. 73; the judgment of the Supreme Court is reproduced in English in United Nations, *Materials on Jurisdictional Immunities* ... , pp. 203-207.

[91] The court declared:

> "... an act must be deemed to be a private act where the State acts through its agencies in the same way as a private individual can act. An act must be deemed to be a sovereign act where the State, on the basis of its sovereignty, performs an act of legislation or administration (makes a binding decision). Sovereign acts are those in respect of which equality between the parties is lacking and where the place of equality is taken by subordination of one party to the other." (United Nations, *Materials* ... , p. 205.)

based his claim for damages was not the collection of mail, but the operation of a motor vehicle by the defendant and the latter's action as a road user. The plea of immunity was rejected. Thus, the court said,

> ... we must always look at the act itself which is performed by State organs and not at its motive or purpose. We must always investigate the act of the State from which the claim is derived. Whether an act is of a private or sovereign nature must always be deduced from the nature of the legal transaction, viz. the inherent nature of the action taken or of the legal relationship which arises.[92]

82. Without at this stage commenting on the general applicability of such a test or the criterion of the "nature of the act" as the basis for a distinction to be drawn between acts for which there is jurisdictional immunity of States and acts for which there is not, it is apparent that the complexity of the different facets of an act, such as the operation of a motor vehicle, the collection of mail or the transport of diplomatic bags, could be viewed differently from different angles and standpoints, with varying results and even diametrically opposite conclusions.

2. Judicial practice following adoption of restrictive national legislation

83. Following the adoption of national legislation on State immunity in a number of countries in the past decade or so, it is now to be expected that the judicial practice in those countries will be guided by such legislation. As will be seen below (paras. 86-95), the case-law of several jurisdictions, such as the United States of America, the United Kingdom, Austria, Cyprus, Pakistan, Canada, Singapore and South Africa, which almost invariably had tended in the past to adhere to a more absolute doctrine of State immunity, might appear, since the introduction of more restrictive legislation on immunity, to follow the restrictive trend in this area.

84. A case directly in point which deserves mention in this connection is the decision of the United States District Court for the District of Columbia in *Letelier* v. *Republic of Chile* (1980).[93] In September 1976, former Chilean Ambassador and Foreign Minister Orlando Letelier and his associate Ronni Moffitt were killed in Washington, D.C., when the car in which they were travelling was destroyed by an explosive device. Two years later, their survivors and personal representatives brought a civil action against Chile, seeking compensation for tortious injuries connected with the deaths.[94] Plaintiffs alleged that the bomb which destroyed Letelier's car was detonated by certain individual defendants acting under the direction and with the aid of defendants the Republic of Chile, its intelligence service, Centro Nacional de Inteligencia (CNI), and certain individual CNI agents and officers.[95] In a preliminary opinion, the court held that it had subject-matter jurisdiction[96] and also ruled that the *Foreign Sovereign Immunities Act of 1976*,[97] which permits a foreign State to claim immunity for certain enumerated non-commercial torts and for acts based on "discretionary functions", does not provide a defence against liability where a foreign State has ordered its agents to conduct an assassination or other acts of political terrorism in the United States.[98] In its judgment of 5 November 1980, the court awarded approximately $US 4.9 million in pecuniary damages for the survivors and personal representatives of the victims.[99] The decisions in this case constitute a clear precedent for the award of pecuniary damages against a foreign State in connection with proven acts of political violence in the United States. Future determination of questions of State immunity will probably be made with reference to the terms of the *Foreign Sovereign Immunities Act* as the "sole and exclusive standards", and not on the basis of the more customary notions of "public acts" or acts *jure imperii*, such as those developed prior to 1976. Foreign States can no longer claim immunity on the grounds that assassinations or other acts of officially sanctioned violence against targets in the United States are public acts.[100] In other words, the *Foreign Sovereign Immunities Act* does not purport to give foreign States licence or discretion to commit assassinations or other illegal acts in the United States.[101]

85. On the other hand, in other cases in which they might have applied the exception of non-commercial torts under section 1605, paragraph (*a*) (5), of the *Foreign Sovereign Immunities Act*, the courts have declined to find jurisdiction. Thus jurisdiction was found to be lacking in *Yessenin-Volpin* v. *Novosti Press Agency, Tass Agency and the Daily World* (1978),[102] where a libel action was brought against two Soviet press services for defamation in connection with articles printed abroad but circulated in the United States. The

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[92] *Ibid.*

[93] United States of America, *Federal Supplement*, vol. 488 (1980), p. 665. See, on this question, the interesting articles by H. D. Collums, "The *Letelier* case: Foreign sovereign liability for acts of political assassination", *Virginia Journal of International Law* (Charlottesville, Va.), vol. 21 (1981), p. 251.

[94] The plaintiffs set forth five causes of action: (1) conspiracy to deprive decedents of their constitutional rights, in violation of section 1985 of title 42 of the *United States Code* (1976); (2) assault and battery resulting in death; (3) negligent transportation and detonation of explosives; (4) assassination of decedents in violation of international law; (5) assault upon Letelier, an "internationally protected person" pursuant to section 112 of title 18 of the *United States Code* (1976), which proximately resulted in this death and that of Moffitt (*Federal Supplement*, vol. 488, p. 666).

[95] For the names of the defendants, *ibid.*, pp. 665-666. For the criminal actions instituted at the same time: *United States* v. *Sepulveda* (1 August 1978), *United States* v. *Sampol* (2 April 1979 and 23 March 1979), *United States* v. *Diaz* (2 April 1979), *ibid.*, p. 666, footnote 1.

[96] In accordance with sections 1330, 1332, para. (*a*), 1391, para. (*f*), 1441, para. (*d*), and 1602-1611 of title 28 of the *United States Code* (1976).

[97] Section 1605, para. (*a*) (5) (A) (see para. 87 below).

[98] *Federal Supplement*, vol. 488, p. 673.

[99] See *Federal Supplement*, vol. 502 (1981), p. 259.

[100] Concerning other cases of political assassination and acts of international terrorism, see, for example, *Time*, vol. 116, No. 5 (4 August 1980), p. 36; and *Newsweek*, 19 May 1980, p. 38.

[101] See footnote 98 above.

[102] *Federal Supplement*, vol. 443 (1978), p. 849.

court found the Novosti press service to be an "agency or instrumentality" of the Soviet State entitled to immunity.[103] An exception to immunity was not available because libel actions are specifically excluded from this area of general exception.[104] Again, in *Upton et al.* v. *Empire of Iran* (1978),[105] the court declined to assume jurisdiction because the incident concerned, namely the collapse of the roof of a building at Tehran airport, belonging to the Iranian State, in 1974, occurred outside the United States.[106] In *Carey* v. *National Oil Corporation* (1978),[107] the court declined jurisdiction on the grounds that the exception to immunity for tort actions does not apply to claims involving interference with contract rights.[108] The Letelier case was therefore the first of a kind, with a clean slate for application of the exception of "personal injuries and damage to property", resulting in "non-immunity" for an act of political assassination. The far-reaching implications of the decision in this case are still to be seen in the future practice of United States courts.[109]

3. Governmental practice

(a) *National legislation*

86. Since legal developments in the case-law of States are foreshadowed to a large extent by the adoption of recent national legislation on State immunity recognizing the general exception of "personal injuries and damage to property", it is necessary and desirable to examine the pertinent provisions of these statutory enactments.

87. As has been clearly illustrated by the example of judicial decisions in the United States of America, the *Foreign Sovereign Immunities Act of 1976*[110] contains an interesting and sweeping provision, which reads:

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

(*a*) A foreign State shall not be immune from the jurisdiction of courts of the United States or of the States in any case:

...

(5) not otherwise encompassed in paragraph (2) above,[111] in which money damages are sought against a foreign State for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign State or of any official or employee of that foreign State while acting within the scope of his office or employment; except this paragraph shall not apply to:

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

88. The United Kingdom *State Immunity Act 1978*[112] contains a shorter and less detailed provision. Section 5 of the Act provides:

Exceptions from immunity

...

5. A State is not immune as respects proceedings in respect of:

(*a*) death or personal injury; or

(*b*) damage to or loss of tangible property, caused by an act or omission in the United Kingdom.

89. A closely similar if not identical provision can be found in the more recent legislation of several common-law or Commonwealth countries in Asia, southern Africa and North America, in particular in section 7 of Singapore's *State Immunity Act, 1979*,[113] in section 6 of the *Foreign States Immunities Act, 1981* of South Africa[114] and in section 6 of Canada's *State Immunity Act* of 1982.[115] It is interesting to observe that the Canadian Act follows closely the wording of the United Kingdom Act in this connection, while in regard to "contracts of employment" it has not chosen to adopt the United Kingdom solution. On the other hand, Pakistan's *State Immunity Ordinance, 1981*[116] does not include "death, personal injury and damage to property" as a general exception to State immunity. Since the common-law practice, especially that of the United Kingdom, had been considered to favour a most unqualified principle of State immunity, this relatively sudden change of heart is causing extensive reflection in the legislation and judicial practice of other common-law jurisdictions the world over.

[103] *Ibid.*, p. 854 (citing section 1603, para. (*b*), of the *Foreign Sovereign Immunities Act*).

[104] *Ibid.*, p. 855. The court also held that the provisions of section 1605, para. (*a*) (2), concerning "commercial activities" as an exception to immunity, did not apply because the activities in question were of a "public or governmental" and not a commercial nature.

[105] *Federal Supplement*, vol. 459 (1979), p. 264.

[106] The court observed that, even if there had been negligence on the part of the defendants, it had not caused a "direct" effect in the United States (*ibid.*, pp. 265-266). Judgment affirmed on appeal in 1979 (*Federal Reporter, 2nd Series*, vol. 607 (1980), p. 494).

[107] *Federal Supplement*, vol. 453 (1978), p. 1097.

[108] This case concerned an action brought by a New York corporation against the Libyan Government and the Libyan National Oil Corporation. The New York corporation sought damages for the cancellation of supply contracts by the Libyan corporation during the 1973-1974 Arab oil embargo, involving highly visible "political" acts by the Libyan State (*ibid.*, pp. 1099-1100). The judgment of the district court was affirmed on other grounds by the Court of Appeals of the Second Circuit in 1979 (*per curiam*) (*Federal Reporter, 2nd Series*, vol. 592 (1979), p. 673).

[109] See Collums, *loc. cit.* (see footnote 93 above), pp. 263-266. The five categories of strictly political or public acts as noted in *Victory Transport Inc.* v. *Comisaría General de Abastecimientos y Transportes* (1964) (*Federal Reporter, 2nd Series*, vol. 336 (1965), p. 354, at p. 360; *International Law Reports* (London), vol. 35 (1967), p. 110) may be open to doubts.

[110] See footnote 66 above.

[111] "(2) in which the action is based upon a commercial activity carried on in the United States by the foreign State; or upon an act performed in the United States in connection with a commercial activity of the foreign State elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign State elsewhere and that act causes a direct effect in the United States;"

[112] See footnote 65 above.

[113] See footnote 68 above.

[114] See footnote 70 above. The expression "tangible property" is also used.

[115] See footnote 67 above.

[116] See footnote 69 above.

90. It should be further noted that national legislation dealing with State immunity invariably touches upon the question of scope and extent of subject-matter jurisdiction. Thus, while the United Kingdom Act of 1978 bases jurisdiction on the *locus delicti commissi*, its counterparts in other common-law jurisdictions contain more than slight variations. Singapore's Act of 1979 and South Africa's Act of 1981 appear to follow this principle, with reference to the place of occurrence of the act or omission being in the territory of the State of the forum. The Canadian Act, on the other hand, bases jurisdiction on the place of occurrence of loss of life or property, or damage to person and property, being in Canada. The United States legislation, more akin to the Canadian, seems to place greater emphasis on the occurrence of the "personal injury or death, or damage to or loss of property" in the United States, caused by an act or omission of a "foreign State or of any official or employee of that foreign State while acting within the scope of his office or employment". The United States legislation in a way defines the attribution of liability to the foreign State for the act or omission of its official or employee. This general exception is, in turn, subject to many exceptions with regard to the causes of action, which in other jurisdictions would appear unlikely to derive from physical damage to person or property or the loss of life or property. The end results would appear to be broadly similar, if not the same, as it is difficult to imagine the possibility of physical injury to person or property caused by an act or omission other than intentional, negligent or accidental. The area under consideration covers physical damage to the person which may cause death or disability or other bodily harm, and physical damage to tangible property or corporeal hereditament as opposed to intangible rights, and indeed total loss or destruction of such tangible property. By definition, this area excludes defamation—libel and slander—but probably includes stricter liability attributable to occupiers of premises, holders of dangerous chattels and keepers of animals, at least in respect of physical injuries or damage to property resulting from breach of a strict duty of care.

91. While the current practice of States which have adopted legislation restricting immunity in this specified area is still in its infancy and awaiting further developments, it is to be assumed that other States which have ratified an international convention containing a similar restriction will also be bound to adopt a restrictive practice in this area. Thus Austria, Belgium and Cyprus may be presumed to have opted for limitation of State immunity in this particular area.[117]

(b) *International conventions*

(i) *1972 European Convention on State Immunity*

92. The 1972 European Convention on State Immunity,[118] which came into force on 11 June 1976 in accordance with article 36, paragraph 2, between Austria, Belgium and Cyprus, contains the following provision:

Article 11

A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred.

93. This provision also serves to identify or delimit the scope of the causes of action, which are confined to physical damage to person or tangible property, with the *locus delicti commissi* being within the territory of the State of the forum. Territorial jurisdiction with respect to the occurrence of the facts which occasioned the injury or damage is reinforced by a further territorial requirement that the author of the act or omission, be it an official or employee of a foreign State to which liability is attributable, must have been physically present in the territory at the time those facts occurred. This double requirement ensures the solid grounds on which the State of the forum may found universally recognized jurisdiction and exercise it even in proceedings involving a foreign State.

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

94. While the fullest implications of article 11 of the 1972 European Convention have not yet been assessed in relation to the practice of States which have ratified and applied it, national legislation already abounds in States sympathetic to a restrictive principle in this area. The recent Inter-American Draft Convention on Jurisdictional Immunity of States (1983)[119] may be cited as an example of regional efforts in pursuit of this restrictive trend. The draft provides:

Article 6

States shall not claim immunity from jurisdiction ... :

...

(*e*) In proceedings for losses and damages or tort liabilities arising from the activities mentioned in article 5, paragraph one;

...

95. The first paragraph of article 5 of the inter-American draft convention provides: "States shall not invoke immunity against claims relative to trade or commercial activities undertaken in the State of the forum." This provision also bases subject-matter jurisdiction on the place of occurrence of losses and damage being within the forum State. It further confines grounds for action to tort liabilities arising from trade or commercial activities undertaken by the foreign State within the territory of the State of the forum. In some more or less precise way, the *locus delicti commissi* appears to afford an internationally accepted criterion for the assumption of jurisdiction and a sound basis for its exercise, if ever a general exception to State immunity is to become universally recognized in future State practice.

[117] States having ratified the 1972 European Convention on State Immunity (see footnotes 73 to 75 above).

[118] See footnote 39 above.

[119] See footnote 77 above.

4. International opinion

96. While it is still too early to monitor opinions of writers with regard to this particular area of "personal injuries and damage to property" as an exception to State immunity, there appears to be a growing sympathy in the thinking of contemporary authors, who are invariably supporters of a restrictive trend. In this as well as in other specified areas where there have been legislative enactments and regional conventions restricting State immunity, writers can readily find justification for such restriction. If a State so chooses, it could enact a law governing immunities of foreign States which would enumerate those acts requiring acceptance of the local jurisdiction.[120] There appears to be danger that legal developments may not follow the same or a similar pattern if States are encouraged to adopt their own national legislation without regard for evolving international standards. Even regional conventions applicable exclusively among the contracting States could generate restrictive principles for third States, once participating countries proceed to implement their regional treaty obligations by enacting national legislation which would in any event be applicable to foreign States alike in regard to the exercise of territorial jurisdiction or subject-matter jurisdiction, closely linked to the territory of the forum State or with substantial contacts with the territorial State.

97. This restrictive trend finds unmistaken expression in the draft articles for a convention on State immunity prepared at the 1982 conference of the International Law Association,[121] which groups international lawyers from all walks of life and from the various legal systems the world over. It is the collective support for a restrictive trend in this particular area that deserves mindful attention. Thus the draft provides:

Article III. Exceptions to immunity from adjudication

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

...

F. Where the cause of action relates to:

1. Death or personal injury; or
2. Damage to or loss of property.

Subsections 1 and 2 shall not apply unless the act or omission which caused the death, injury or damage occurred wholly or partly in the forum State.

...

98. Subject-matter jurisdiction is therefore unmistakably tied to the *locus delicti commissi*. This provision is not necessarily intended to regulate questions of conflict of laws or of jurisdictions in private international law, but rather to suggest a sound foundation in public international law and an acceptable international standard for the exercise of territorial jurisdiction by the State of the forum in proceedings against foreign States in this specified area.

5. An emerging trend

99. In the light of the growing opinion of writers and the increasing practice of States favouring the exercise of jurisdiction, where there is sound subject-matter jurisdiction, in proceedings against foreign States for personal injuries and damage to property, an emerging trend is becoming more readily discernible in favour of relief being granted to individuals for the personal injury suffered or for the loss of or damage to their property. The problem confronting the international community is not so much whether or not to limit or restrict the application of State immunity, but rather how to allow the exercise of territorial jurisdiction in a generally accepted area. The emerging trend could lead to confusion and disorder if the international community fails to intervene at this stage by giving whatever advice and guidance may be needed to harmonize and reorient the emerging trend towards to healthier direction and achieve more salutary results for all concerned, the foreign sovereign States as well as the aggrieved individuals.

C. Formulation of draft article 14

100. In an endeavour to formulate a draft article containing this general exception, adequate expression should be given to the emerging trend in international legal opinion reflecting the mounting practice of States—judicial and legislative as well as governmental. Some basic elements appear to require precise specification. The area under review unequivocally covers "personal injury", including loss of life or physical injury to the person, as well as "damage to property", including loss or total destruction of tangible property. It is clear from the type of physical damage inflicted upon the person or property that the causes of action could arise from any activities undertaken by a foreign State or one of its organs, agencies or instrumentalities within the State of the forum. It is equally clear that the infliction of personal injury or physical damage to property could be intentional or accidental or the result of negligent or reckless conduct, for which the foreign State is liable, either in tort as is commonly understood in common-law jurisdictions, such as for assault, battery, negligence or a traffic accident, or in any other type of civil action for personal injury or damage to property. Damage to reputation or defamation is not personal injury in the physical sense, nor can interference with contract rights or any rights, including economic or social rights, be viewed as damage to tangible property. Of course, the territorial connection should also be expressly mentioned so as not to confer extraterritorial jurisdiction or otherwise un-overreachable subject-matter jurisdiction on the State of the forum simply to provide a remedy for redressing personal injury or damage to property where none would in any event exist within the forum State.

[120] See, for example, the authors cited above: Mann (footnote 79), Brownlie (footnote 80) and Sinclair (*ibid.*).

[121] See footnote 81 above.

101. Article 14 might read as follows:

Article 14. Personal injuries and damage to property

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

ARTICLE 15 (Ownership, possession and use of property)

A. General considerations

1. Scope of "ownership, possession and use of property" as an exception to State immunity

102. As has been seen in connection with part II, "General principles", under article 7, paragraph 3, "a proceeding before a court of a State shall be considered to have been instituted against another State ... when the proceeding is designed to deprive that other State of its property or of the use of property in its possession or control".[122] State immunity could thus be invoked even though the proceeding is not brought directly against a foreign State but is merely aimed at depriving that State of its property or of the use of property in its possession or control. Without, at this stage, touching on the question of State immunity in respect of attachment and execution of its property, it will suffice to recall that a State is immune when a proceeding affects its ownership of property, or when the use of property in its possession or control is thereby affected.

103. Jurisdictional immunity of a State in respect of its ownership or use of property in its possession or control is recognized as a general principle. It is the purpose of the present draft article to define and delineate the scope of its application. Admittedly, as a general rule, a proceeding seeking to deprive a foreign State of its property or the use of property in its possession or control will be disallowed on application of the principle of State immunity. There are, however, various categories of circumstances or cases in which a proceeding will be permitted even though it may involve ownership of property contested by a foreign State or the use of property in the possession or control of that State.

104. In the first place, a proceeding may be brought which relates to the property of a foreign State or to the use of property in its possession or control situated in the territory of the State of the forum if it does not seek to deprive the foreign State of its ownership of that property or of its use but merely, for instance, to have the transfer of title deeds properly registered or to establish the existence or compel registration of easements or mortgage or other charges connected with the property.

105. In order to invoke State immunity in a proceeding relating to ownership of its property or the use of property in its possession or control, the State may have to assert its claim of interest, which could cover either ownership of the right to use the property, or its actual possession or effective control. Mere assertion will nowadays not suffice to establish jurisdictional immunity in such a case, unless ownership by the State or its right to use is admitted by the parties to the litigation, or unless the State can provide prima facie evidence of title or proof of its claims of interest. Unless and until such claims of interest are established, the court may exercise jurisdiction; but once ownership by the State is established or its right to use the property is proven, then the general principle of State immunity comes into play and the proceeding may only be resumed if it still falls within one of the exceptions in part III. With regard to property, there is a clear exception to be embodied in draft article 15. The scope and application of this important, time-honoured exception will become more apparent upon closer study and analysis of certain essential questions.

2. Predominant authority of the State of the *situs* a decisive factor

106. An important aspect of the principle *par in parem imperium non habet* is reflected in the proposition that an extraterritorial authority cannot be vested with the power to exercise *imperium* within the *territorium* of another sovereign State, unless of course the territorial sovereign expressly consents to such exercise, which will have to be very limited in time as well as in scope. An unlimited concession of the exercise of extraterritorial sovereign authority would have a destructive effect upon the very existence of territorial sovereignty. The generally recognized sovereign authority over persons and things situated or present within the territory of a State must therefore be vested in the territorial State itself. Thus the authority of the territorial State to administer or to legislate or decide disputes relating to persons or property within the confines of its territory can be challenged by no other State. No one may contest the exercise of territorial jurisdiction over persons and property within the recognized framework and consistently with other principles of international law, such as the treatment of aliens, the principle of non-discrimination or human rights.

107. As far as property is concerned, especially immovable property, the State of the *situs* exercises supreme authority as part and parcel of its sovereignty. Indeed, the concept of ownership and other proprietary rights or interests can only exist within the framework of the legal system of the *situs*, and such a concept is bound to be inherently absorbed within the notion of territorial sovereignty of the State of the *situs* itself. This appears to constitute a sound proposition of international law, as the inductive approach adopted in the present study will later reveal (paras. 116-137 below).

[122] See footnote 12 above.

108. While a State may conceivably exercise its sovereign authority over its nationals and its officials, agencies or instrumentalities in the conduct of their activities abroad or in the territory of another State, such control or authority based on the national character or personal nature is eminently absent in so far as property situated outside its territorial boundary is concerned, especially if the property in question, whether movable or immovable, is situated within the territory of another State. A State has the authority to require its nationals to pay taxes or to perform traditional national services, but it cannot hope to extend similar authority, whether legislative, administrative or even judicial, over property situated outside its territorial authority; much less if the property is situated in the territory of another sovereign authority; far less also if it is an immovable property, subject to the *lex situs* and the territorial sovereignty of the local sovereign authority. The predominant authority of the State of the *situs* is a decisive factor in determining the question of available jurisdiction.

3. Priority of the *lex situs* a determinative element

109. If the authority of the State of the *situs* should prevail in any event or in most cases where there appears to be overlapping or concurrence, if not conflict, of jurisdictions, there seems to be an added reason for the predominance or primacy of the territorial authority. The applicable law is unmistakably the *lex situs* as no other law can be more proper than the law of the place where the property itself is situated. *A fortiori* the régime or legal relationship with regard to land or immovable property, with its peculiar history, niceties and complexities, has developed in response to the needs of the territorial society, its traditions, usages and customs. Every system of land law or law concerning immovable property is unique in itself. Its exclusive applicability cannot be disputed, since ownership and other proprietary rights or interests in property do not and cannot exist except within the framework and purview of the *lex situs*. The supremacy of the *lex situs* and its sole authority in regard to property have rendered the assumption and exercise of territorial jurisdiction by the *forum rei sitae* all the more inevitable; in the absence of any alternative or competitive system of law, neither the *lex patriae* nor the *lex fori* of an extraterritorial authority could qualify to replace or supplant either the jurisdiction of the *forum rei sitae* or the exclusive applicability of the *lex situs*.

110. Faced with the decisive priority of the territorial jurisdiction and the exclusive application of its internal law governing legal relations with regard to property, especially immovable and to a large extent also movable property, a kind of exception has long been recognized and admitted in the practice of States. A State is not immune from the jurisdiction of the courts of another State in respect of proceedings relating to a series of classes or categories of cases involving the application of the internal law of the State of the *situs*. In any event, the *forum rei sitae* is a most convenient court competent to apply the internal law of the State of the *situs*. The rights and interests of the foreign State or the extraterritorial State with regard to property situated within the territory of the State of the *situs* can only be recognized under the internal law of the territorial State. When it comes to the authority of the internal law and a foreign State may derive rights and interests only by virtue of the application of the internal law of the *situs* and with the aid and assistance of the judicial authority of the *situs*, then the only sensible solution is to recognize the determinative authority or the deciding power of the territorial State. The extraterritorial State may be said to have waived immunity or to have itself invoked the jurisdiction of the territorial State when questions of property rights within the State of the *situs* have to be determined by the judicial authority or the local sovereign and with its internal law, the *lex situs*, being the only applicable law.

111. An alternative solution or sheer insistence on the principle of State immunity would only lead to chaos and absurdity. There would be a legal vacuum, as the rights and interests of the extraterritorial authority itself would be without legal foundation, failing its own recognition of and respect for the internal law of the territorial State. In fact, this is an accurate and orderly application of the maxim *par in parem jurisdictionem non habet*. It is the extraterritorial State that has no authority to introduce a new legal system within the territorial framework of another sovereign State. It follows that the only internal law that prevails in the circumstances is that of the State of the *situs*. If need be, such an exceptional situation could be viewed from the standpoint of the outside State or extraterritorial authority as an exception to its otherwise available jurisdictional immunity.

4. Possibility of acquisition of proprietary rights by a foreign State under the internal law of the State of the *situs*

112. If a State acquires property in the form of ownership or other proprietary rights and the property, whether immovable or movable, is situated in the territory of another State, the acquisition of such property is made possible only by virtue of the application of the internal law or private law of the State of the *situs*. The outside State or extraterritorial State as an outsider must, from the start, fully recognize and respect the local or territorial internal law which unquestionably governs the legal relationship between the foreign State and the property so acquired. To disobey the rules of the internal law of the *situs* is to forfeit, abandon or relinquish legal rights to property under the prevailing system. This is particularly true of immovable property which cannot change its location, while movable property could be transported out of the territory of its former *situs* and be subjected to a different system of internal law. Whatever the case, internal law of the *situs* governs the questions of acquisition and loss of property, including title and other proprietary rights.

113. Under the internal law of the *situs*, there may be several methods of acquiring property, such as by sale

or purchase, by *usucapio longi temporis* or prescription, by testate or intestate succession, or by devolution or transfer as *bona vacantia*. Thus it is pre-eminently by virtue of the internal law of the *situs* that questions of title, ownership and other proprietary rights are to be determined.

114. It is also the judicial authority of the *situs* that appears to be omnicompetent to apply the *lex situs*, and it is by the grace and authority of the *forum rei sitae* that questions or disputes relating to titles, ownership or acquisition of property are adjudicated. In proceedings concerning the ascertainment of ownership or other rights to property, such as trust funds, real estate or bank accounts, parties interested in the determination of their rights or their *portio legitima* do come to court of their own free will. There is no element of compulsion or, to use an old English term, "no impleading of a foreign sovereign against his will". If the foreign State intervenes or interpleads, it does so on a voluntary basis, for such proceedings are often not against any party, but merely to determine the nature and extent of the legal interests of all the parties concerned. If the foreign State chooses to seek the judicial determination of its rights and titles under the internal law of the *situs*, it is free to do so or to be represented before the court of competence. If, however, the foreign State does not feel so inclined or obliged, it may decline at the risk of forfeiting its rightful title or property.

115. With regard to movable property, there may be different types of property that can enter and leave the territory of another State. It is no longer enough that the foreign State merely asserts its title; it may be required to give evidence to prove title or to establish its ownership or possession or the right to use. This is all the more significant if the property in question is a seagoing vessel, an aircraft, a hovercraft or a spaceship, or indeed a communications satellite or a space laboratory. While there are special régimes of public international law regulating many of the questions involved, such as the responsibility of the launching State for damage caused and the obligation to return the space object,[123] the more mundane and fundamental questions of title, rights and interests in property under the internal law remain to be adjudged, in each instance, by the court of recognized competence which, in most cases, even for movable property, still happens to be the *forum rei sitae*, namely the court of the State in whose territory the property is situated or to be found at the time of the proceedings.

B. The practice of States

1. Judicial practice

116. The judicial practice of States in this area of "ownership, possession and use of property" as an exception to State immunity is not unknown. If there is an area which is less grey as an exception to State immunity, it is this one. For reasons that are apparent from the general considerations above, State practice seems to bear out the absence of immunity for proceedings involving determination of ownership of property and its acquisition or title under the internal law of the State of the *situs* by the territorial court.

117. A decision by the District Court of Tokyo in *Limbin Hteik Tin Lat* v. *Union of Burma* (1954)[124] is a case directly in point. The proceedings related to a dispute as to title to a piece of land in Tokyo. The court ruled that Japan had jurisdiction and that the court had competence over the proceedings, in which the respondent was a foreign State. The court declared:

> A State is not subject to the exercise of power by another State, and therefore is not subject to the jurisdiction of another State in the matter of civil proceedings. This is to be admitted as a principle of international law recognized in general. ... However ... in an action concerning immovables, it is widely admitted that jurisdiction belongs exclusively to the State of the *situs*, and consequently it must be said that a foreign State may be subject to the jurisdiction of another State.[125]

118. The case-law of the United Kingdom has been accurately summarized by Lord Denning, Master of the Rolls, in *Thai-Europe Tapioca Service Ltd.* v. *Government of Pakistan, Ministry of Food and Agriculture, Directorate of Agricultural Supplies* (1975),[126] in his judgment confirming a restrictive view he had earlier proposed in *Rahimtoola* v. *Nizam of Hyderabad* (1957).[127] Accepting the general principle that "except by consent, the courts of this country will not issue their process so as to entertain a claim against a foreign sovereign for debt or damages", Lord Denning then outlined four existing exceptions in English case-law:

> First, [there is] no immunity in respect of land situate in England. ...
>
> Second ... in respect of trust funds here or money lodged for the payment of creditors. ...
>
> Third ... in respect of debts incurred here for services rendered to ... property here. ...
>
> Fourth, [when] a foreign sovereign ... enters into a commercial transaction with a trader here and a dispute arises which is properly within the territorial jurisdiction of [English] courts.[128]

119. Lord Denning's dicta and observations have been found to have compelling reasons even outside the

[123] See Convention on International Liability for Damage Caused by Space Objects (United Nations, *Treaty Series*, vol. 961, p. 187).

[124] *International Law Reports* (London), vol. 32 (1966), p. 124; text reproduced in United Nations, *Materials on Jurisdictional Immunities* ... , pp. 339-340.

[125] The court added:

"... an immovable is an object *par excellence* of territorial sovereignty of the State of its *situs* and this fact has been regarded as worthy of respect as a matter of international comity; hence it has come to be recognized for a long time that an action directly concerning immovables comes within the exclusive jurisdiction of the State of the *situs*. It has to be admitted, therefore, that ... this principle has been recognized as applicable in actions in which a foreign State is a party, as well as where a private person is a party."

[126] *The All England Law Reports, 1975*, vol. 3, p. 961.

[127] United Kingdom, *The Law Reports, House of Lords, 1958*, p. 379.

[128] *Loc. cit.* (footnote 126 above), pp. 965-966. See also the judgment of the Supreme Court of Ontario in *Harold W. M. Smith* v. *United States Securities and Exchange Commission* (1976) (*International Legal Materials* (Washington, D.C.), vol. XV, No. 2 (1976), p. 319).

United Kingdom.[129] With regard to the exception of trading or commercial activities considered earlier, the position was reaffirmed by the House of Lords in the *"I Congreso del Partido"* case (1981).[130] The first three exceptions fall within the specified area of the present draft article, viz. immovable and movable property, including trust funds.

120. The doctrine of "trust" as conceived by the Chancery and other courts of equitable jurisdiction has long been recognized in English practice as an exception to immunity. Actions may proceed in spite of the fact that a foreign Government may have an interest in the trust fund. In *Duke of Brunswick* v. *King of Hanover* (1844),[131] Lord Langdale, Master of the Rolls, considered it possible to make a foreign sovereign a party to administration proceedings, since doing so did not "compel" him to take part in them, it merely gave him "an opportunity to come in to ... establish his interest". Similarly it was said by Justice Maugham in the *Russian Bank for Foreign Trade* case (1933)[132] that the fact that the proceedings related to funds in which the Soviet Government had an interest could not prevent the Chancery Division from performing its duty.

121. This notion of trust has also provided the Chancery courts with a new basis for exercising jurisdiction in actions against third parties in respect of State-owned property in their hands, whenever it is possible to regard the property as trust funds in the custody of the trustees. This was actually decided by Lord Hatherley in *Larivière* v. *Morgan* (1872),[133] concerning the supply of cartridges to the French Government during the Franco-Prussian war. Morgan opened a bank account in England on behalf of the French Government for settlement of the latter's contractual obligations. The Court of Appeal denied immunity, treating the bank account as trust property and the action as one against Morgan, not as a foreign State agent, but as a trustee. The House of Lords appears to have approved of this doctrine of trust.[134] The same principle has been applied in subsequent cases.[135]

122. Reference to English case-law recognizing the exception under consideration is not without significance in view of the traditional association of English judicial practice with an almost unqualified principle of sovereign immunity. It is not surprising that a similar exception is recognized in other case-laws, such as in Italy, where the jurisprudence distinguishes between the State as *potere politico* and as *persona civile*. Thus, as early as 1882, the dual personality of the State was recognized in *Morellet* v. *Governo Danese*,[136] where the Court of Cassation of Turin distinguished between the State as a political entity and as a *corpo morale* and observed that, in the latter capacity, the State must "acquire and own property, it must contract, it must sue and be sued, and in a word, it must exercise civil rights in like manner as any other juristic person or private individual (*un altro corpo morale o privato individuo qualunque*)".[137]

123. The case-law of the States applying a restrictive principle of State immunity invariably allows actions to proceed which may involve titles or interests of a foreign Government or transactions concerning immovable property situated in the territory of the State of the forum.[138]

2. Governmental practice

124. Judicial practice in this particular area appears to be more settled and consistent in support of an established exception to State immunity, although there is no prototype judicial decision on every point at issue in every existing case-law. It would be neither desirable nor practical to expect that every judicial system must have litigation on any given point. The practice of States in this connection amply supplements judicial practice in a number of ways, notably by way of replies to the Secretariat's questionnaire and by adoption of specific national legislation on the precise point under consideration.

(a) *Views of Governments*

125. In the replies to the questionnaire,[139] it is possible to gather interesting evidence of governmental opinion

[129] See, for example, Justice Owen in the Court of Appeal of Quebec in *Venne* v. *Democratic Republic of the Congo* (1969) (Canada, *The Dominion Law Reports, Third Series* (Toronto), vol. 5 (1969), p. 128).

[130] See footnote 30 above.

[131] *House of Lords Cases* (London), vol. II (1848-1850) (1851), p. 1; see also Lord Radcliffe in the "gold bars" case, *United States of America and Republic of France* v. *Dollfus Mieg et Cie S.A. and Bank of England* (1952) (*The All England Law Reports, 1952*, vol. 1, p. 572, at p. 589).

[132] United Kingdom, *The Law Reports, Chancery Division, 1933*, p. 745. The court assumed jurisdiction despite the fact that the Soviet Government might possibly intervene to establish a claim to some part of the assets.

[133] United Kingdom, *The Law Reports, Chancery Appeal Cases*, vol. VII (1872), p. 550.

[134] *Morgan* v. *Larivière* (1875) (*The Law Reports, English and Irish Appeal Cases*, vol. VII (1875), p. 423).

[135] See, for example, *Haile Selassie* v. *Cable and Wireless Limited* (1937) (*The Law Reports, Chancery Division, 1938*, p. 545), on appeal (1938) (*ibid.*, p. 839); *Nizam of Hyderabad and another* v. *Jung and others* (1956) (*The All England Law Reports, 1957*, vol. 1, p. 257); and *Rahimtoola* v. *Nizam of Hyderabad* (1957) (*loc. cit.* (footnote 127 above), pp. 392-398 (Viscount Simonds)).

[136] *Loc. cit.* (footnote 33 above), pp. 130-131.

[137] *Idem*; cited in Harvard Law School, *Research in International Law*, part III, "Competence of Courts in regard to Foreign States" (Cambridge, Mass., 1932), published as *Supplement to The American Journal of International Law* (Washington, D.C.), vol. 26 (1932), pp. 481-482.

[138] See, for example, *S.E. Echref Badnjević ès qualité de Ministre de Yougoslavie en Egypte* v. *W. R. Fanner* (1947) (*Journal du droit international* (Clunet) (Paris), vols. 73-76 (1946-1949), p. 113), where the Mixed Court of Cairo denied immunity for the purchase of an immovable property by a foreign legation to be used as a *hôtel diplomatique*. Cf. the *Republic of Latvia* case (1955) (*International Law Reports, 1955* (London), vol. 22 (1958), p. 230), where the Court of Appeal of West Berlin confirmed the decision of the Restitution Chamber (1953) on the grounds that "that principle does not apply if the foreign State enters into property relations with other States or their citizens, and acts not as the holder of sovereign powers but exclusively as the holder of private rights and liabilities in the field of private law, being active in the field of civil-law and especially commercial-law transactions."

[139] See footnote 29 above.

and practice in support of the exception under review. Thus, in Hungary, a socialist country, State immunity is regulated by item (*a*) of section 56 of Law Decree No. 13 of 1979, under which a foreign State is exempt from the jurisdiction of a court or other public authority of the Hungarian State.[140] The landed property of a foreign State in Hungary, however, belongs to the exclusive jurisdiction of a Hungarian court of law or other public authority.[141]

126. Madagascar adopted the same restrictive view. Under article 29 of Ordinance No. 62-041 of 19 September 1962:

"Property is governed by the law of the place where it is situated.

"In particular, immovable property situated in Madagascar, even when foreign-owned, is governed by Malagasy law."

Under this provision, if movable or immovable property is situated in Madagascar, the foreign State's title to that property or other property rights are governed by Malagasy law.

As to testate succession:

If the property is immovable, it is governed by the law applicable where it is situated;

If the property is movable, it is governed by the law applicable where the deceased was domiciled (art. 31 of Ordinance No. 62-041 of 19 September 1962).[142]

127. Similar views were expressed by other Governments in their replies to the questionnaire, including Togo, Portugal and Trinidad and Tobago. Thus, in the view of Togo:

If a foreign State owns or succeeds to an immovable or movable property situated in Togo, that State is subject to the régime of proof established by Togolese law for determining title to property. However, if the immovable or movable property is for diplomatic or similar uses, it enjoys extraterritoriality and immunity from distraint.[143]

128. Giving a list of exceptions to State immunity, the Portuguese reply contained the following:

Relying on what might be described as a universally accepted doctrine, the Portuguese courts agree that such immunity ceases only if:

The proceedings relate to immovable property;

There is an express or tacit waiver of immunity;

The *forum hereditatis* exception is allowed.[144]

129. The views expressed by Trinidad and Tobago are equally revealing:

The exceptions or limitations provided by the common law of Trinidad and Tobago and those recognized by governmental practice in Trinidad and Tobago with respect to jurisdictional immunities of foreign States and their property relate to:

(i) Actions relating to land within the jurisdiction (e.g. actions to recover rent from mortgage interest);

(ii) Actions by a local beneficiary relating to a trust fund within the jurisdiction.[145]

[140] Text reproduced in United Nations, *Materials on Jurisdictional Immunities* ... , p. 17.

[141] See the reply of Hungary to question 1, *ibid.*, p. 575.

[142] Reply of Madagascar to question 14, *ibid.*, p. 583.

[143] Reply of Togo to question 14, *ibid.*, p. 609.

[144] Reply of Portugal to question 3, *ibid.*, p. 592.

[145] Reply of Trinidad and Tobago to question 11, *ibid.*, p. 612.

(b) *National legislation*

130. An increasing amount of national legislation has been adopted in the past 10 years or so, recognizing or confirming the existence of an exception in regard to property situated in the State of the forum. These provisions are far from identical and do not always deal with the same subject-matter.

131. Thus, in the United States *Foreign Sovereign Immunities Act of 1976*,[146] there are two unrelated provisions concerning property:

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

(*a*) A foreign State shall not be immune from the jurisdiction of courts of the United States ... in any case:

...

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign State; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign State and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

...

132. The United Kingdom *State Immunity Act 1978*[147] contains a provision analogous to that cited above, but which is more detailed. Section 6 of the Act reads:

Exceptions from immunity

...

6. (1) A State is not immune as respects proceedings relating to:

(*a*) any interest of the State in, or its possession or use of, immovable property in the United Kingdom; or

(*b*) any obligation of the State arising out of its interest in, or its possession or use of, any such property.

(2) A State is not immune as respects proceedings relating to any interest of the State in movable or immovable property, being an interest arising by way of succession, gift or *bona vacantia*.

(3) The fact that a State has or claims an interest in any property shall not preclude any court from exercising in respect of it any jurisdiction relating to the estates of deceased persons or persons of unsound mind or to insolvency, the winding up of companies or the administration of trusts.

(4) A court may entertain proceedings against a person other than a State notwithstanding that the proceedings relate to property:

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

(*b*) in which a State claims an interest,

if the State would not have been immune had the proceedings been brought against it or, in a case within paragraph (*b*) above, if the claim is neither admitted nor supported by prima facie evidence.

133. It should be further noted that a corresponding provision is also included in section 8 of Singapore's *State Immunity Act, 1979*,[148] in section 7 of Pakistan's

[146] See footnote 66 above.

[147] See footnote 65 above.

[148] See footnote 68 above. Section 8 is a verbatim reproduction of section 6 of the United Kingdom model.

State Immunity Ordinance, 1981,[149] in section 7 of the *Foreign States Immunities Act, 1981* of South Africa,[150] and in section 8 of Canada's *State Immunity Act* of 1982.[151]

(c) *International conventions*

(i) *1972 European Convention on State Immunity*

134. The 1972 European Convention on State Immunity[152] contains two relevant provisions:

Article 9

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

(*a*) its rights or interests in, or its use or possession of, immovable property; or

(*b*) its obligations arising out of its rights or interests in, or use or possession of, immovable property

and the property is situated in the territory of the State of the forum.

Article 10

A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate to a right in movable or immovable property arising by way of succession, gift or *bona vacantia*.

135. Article 9 provides for non-immunity in proceedings concerning the rights and obligations of a State in, or in connection with, immovable property situated in the territory of the forum State. "Possession" is not always regarded as a right in the sense attributed to that term in certain legal systems. The expressions "right", "use" and "possession" should be interpreted broadly. This article covers proceedings concerning the rights of a foreign State in immovable property in the forum State, including mortgages, nuisance, trespass or other unauthorized use, lease or tenancy agreements, possession or eviction, rents or payments for use of the property and liabilities of the occupier of immovable property. Article 10 provides for non-immunity in proceedings relating to a right arising by way of succession, gift or *bona vacantia*, which in some legal systems is considered as a right of succession, and in others as a right of forfeiture of goods without ownership.

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

136. The recent Inter-American Draft Convention on Jurisdictional Immunity of States (1983)[153] contains a brief provision on this exception:

Article 6

States shall not claim immunity from jurisdiction ... :

...

(*b*) In proceedings for the distribution of assets, be they of a civil, trade or commercial nature;

(*c*) In actions involving real property located in the State of the forum with the exceptions contained in international treaties or in diplomatic or consular practices;

...

137. Paragraph (*c*) also bases the assumption of jurisdiction on the location or geographical situation of the immovable property, subject to the limitations contained in bilateral or multilateral agreements, or in diplomatic or consular practice. It does not include movable property. Paragraph (*b*) deals with another type of proceedings, namely distribution of assets of a civil, trade or commercial nature.

3. International opinion

138. In this particular field of proceedings relating to rights to property, especially immovable property, situated in the State of the forum, opinions of writers are practically uniform in favour of the assumption and exercise of jurisdiction by the competent judicial authority of the forum State. This relatively clear trend of legal opinions has reflected the less controversial practice of States in upholding jurisdiction and rejection of immunity in the interest of administration of justice. The opinions of lawyers may be gathered from international meetings such as that of the Institute of International Law in 1952,[154] and more recently that of the International Law Association in 1982.

139. The draft articles for a convention on State immunity adopted by the International Law Association in 1982[155] contain the following provision:

Article III. Exceptions to immunity from adjudication

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

...

D. Where the cause of action relates to:

1. The foreign State's rights or interests in, or its possession or use of, immovable property in the forum State; or
2. Obligations of the foreign State arising out of its rights or interests in, or its possession or use of, immovable property in the forum State; or
3. Rights or interests of the foreign State in movable or immovable property in the forum State arising by way of succession, gift or *bona vacantia*.

...

4. An established exception

140. In a far less controversial area such as that of "ownership, possession and use of property" by States,

[149] See footnote 69 above. Section 7 of the Pakistan Ordinance is entitled "Ownership, possession and use of property".

[150] See footnote 70 above. Subsection (2) of section 7 exempts from the jurisdiction of South African courts proceedings relating to a foreign State's title to, or its use or possession of, property used for a diplomatic mission or a consular post.

[151] See footnote 67 above. Section 8 is confined to proceedings relating to a State's interest in property arising by way of succession, gift or *bona vacantia*.

[152] See footnote 39 above.

[153] See footnote 77 above.

[154] See, for example, the views expressed by members of the Institute on the report and final draft resolutions presented by E. Lémonon on "L'immunité de jurisdiction et d'exécution forcée des Etats étrangers" (*Annuaire de l'Institut de droit international, 1952* (Basel), vol. 44, part I, pp. 5 *et seq.*). See also P. Jessup, rapporteur for the Harvard Law School draft on "Competence of Courts in regard to Foreign States", *op. cit.* (footnote 137 above).

[155] See footnote 81 above.

currently under examination, it is possible to conclude, after having analysed the judicial, governmental and legislative practice of States, that there is an established general exception to State immunity. International legal opinion lends credence to such a proposition. The problem is not to overcome a political or psychological barrier, but rather to define, delimit and possibly demarcate the scope of the application of this general exception and its ramifications. Further analysis may be needed in an endeavour to formulate an appropriate provision for this draft article.

C. Formulation of draft article 15

141. The contents of this draft article should cover immovable as well as movable property of a State or in which a State has or claims an interest. It should also cover the use of property in the possession or control of a foreign State. Proceedings may relate to rights as well as obligations of the foreign State in regard to property situated in the State of the forum. They may also relate to rights and interests of a foreign State arising within the State of the forum by way of succession, gift or *bona vacantia*. The provision should also deal with the possibility of a foreign State asserting ownership or any other claims of interest in a property in issue[156] and with the borderline between the various cases in which the court rejects or recognizes such claims of interest, and in which it could thereby deny or uphold immunity and decline to exercise further jurisdiction after having examined or established prima facie evidence of title or proof of possession or effective control of property in issue or the use of which is in dispute. There are also reasons for excluding from this exception the special status of diplomatic and consular premises.

142. Article 15 might read as follows:

Article 15. Ownership, possession and use of property

1. Unless otherwise agreed, a State is not immune from the jurisdiction of the courts of another State in respect of proceedings relating to:

(*a*) 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, any immovable property situated in the State of the forum; or

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

(*c*) the distribution of assets in connection with the estates of deceased persons or persons of unsound mind or insolvency, the winding up of companies or the administration of trusts, in which a State has or claims a right or interest in any property; or

(*d*) any property in the possession or control of a State or in which a State claims a right or interest, if the claim is neither admitted nor supported by prima facie evidence, and the proceedings have been brought against a person other than a State, if the State itself would not have been immune had the proceedings been brought against it.

2. Paragraph 1 is without prejudice to the immunities of States in respect of their property from attachment and execution, or the inviolability of premises of diplomatic or special missions or consular premises.

[156] See, for example, the "gold bars" case (1952) (see footnote 131 above); *Hong Kong Aircraft: Civil Air Transport Inc.* v. *Central Air Transport Corp.* (1953) (United Kingdom, *The Law Reports, House of Lords, 1953*, p. 70), cf. the judgment in first instance by Sir Leslie Gibson (1950) (*International Law Reports, 1950* (London), vol. 17 (1956), p. 173, case No. 45); and *Juan Ysmael & Co.* v. *Government of the Republic of Indonesia* (1954) (*The Law Reports, House of Lords, 1955*, p. 72).

DOCUMENT A/CN.4/371

Memorandum presented by Mr. Nikolai A. Ushakov

[*Original: Russian*]
[*11 May 1983*]

The International Law Commission has made a substantial contribution to the codification and progressive development of international law. As its many years of experience testify, successful solutions to the tasks before the Commission call for thorough and all-round examination of the problems under consideration and for the identification of universally recognized norms of international law, the codification of which must be based on international State practice, decisions of international judicial bodies, and international legal writings. It is also indispensable to take due account of the fundamental principles of contemporary international law, in particular those embodied in the Charter of the United Nations, inasmuch as these are predominantly of a peremptory character.

All this, of course, also applies to the topic of jurisdictional immunities of States and their property, since the questions considered in connection with this topic touch upon the fundamentals of international law.

Between 1979 and 1982, the Special Rapporteur, Mr. Sucharitkul, submitted to the Commission four reports[1] in which he endeavoured to follow the Commission's customary approach to the problem under consideration. These reports are of substantial interest and contain a wealth of material.

However, a number of the Special Rapporteur's conclusions do not seem to us to be well-founded. More particularly, this applies to the Special Rapporteur's view concerning an emerging general trend in favour of the concept of "limited" or "functional" State immunity.

This concept or theory runs counter to the basic principles of international law and is rejected by many States, a fact to which we have repeatedly drawn the attention of members of the Commission in our statements. Consequently it cannot, in our view, form the basis for the codification of rules on the immunities of States and their property. Our opinion is based on the following considerations.

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

I

1. The principle of the immunity of the State from foreign jurisdiction is a universally recognized principle of international law. This proposition is so firmly rooted in international law that it is unreservedly recognized by all States without exception, *inter alia* in the practice of their judicial organs as well as in the international legal doctrine of all countries without exception.

Even States that have recently espoused the theory of "functional immunity" recognize and affirm the principle of State immunity from foreign jurisdiction. Where the theory of "functional immunity" is applied, a waiver of immunity is based on the assumption that in that particular case the State was not acting as a State (sovereign, invested with State power), but as a private individual.

2. It is no less universally recognized that State immunity is based on fundamental principles of international law, in particular the principles of the sovereignty and sovereign equality of States.

From State sovereignty as the inalienable attribute of every State, and from the sovereign equality and independence of States in their mutual relations, it unquestionably follows that no State can exercise its jurisdiction, i.e. its power, over other States. That is what is meant in international law by the principle of State immunity, the essence of which is precisely the non-subordination of one State to the power of another State.

Thus State immunity subsists as a consequence of State sovereignty for as long as a State remains sovereign. It is not dependent upon any transitory condition or circumstance, including any development in the functions of States.

3. In the context of the principle of the immunity of the State from foreign jurisdiction, the term "jurisdiction" signifies, in our opinion, the sphere of sovereign power of the State—legislative, executive, judicial or other. This is also the meaning of the term as employed in the majority of international multilateral conventions.

The principle of State immunity from foreign jurisdiction is today the basis of many multilateral codification conventions relating to various spheres of

international relations. All these conventions are in a sense interrelated.

4. At the present stage in its work, the Commission has decided to limit its task to "jurisdictional immunities of States and their property", a limitation that is entirely admissible. However, the Commission cannot disregard the way in which this problem is resolved in existing conventions.

In particular, article 31 of the 1961 Vienna Convention on Diplomatic Relations[2] provides that a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction in all cases where he is acting on behalf of the sending State. In other words, the Convention recognizes the principle of full State immunity, in particular with regard to the courts of another State. Similar provisions are to be found in other conventions, and are well known.

By mentioning them, we wish to emphasize that the principle of State immunity does not lend itself to differing applications or interpretations.

II

5. As already mentioned, the principle of State immunity is an undisputed and universally recognized principle of international law that expresses and affirms the sovereignty of States in international relations.

However, the question is sometimes raised whether the granting of immunity to a foreign State does not lead to a limitation of the sovereignty of the State granting such immunity. The Special Rapporteur, too, has raised such a question with respect to the jurisdictional immunity of States.

But such a question can be raised only from the point of view of the concept of so-called "absolute sovereignty", upheld in the past by certain authors who proceeded from the principle that a State was not bound by anything in its relations with other States and organized its relations with other States exclusively as it deemed fit.

Such a view of sovereignty leads quite logically to the conclusion that only one State can be recognized as sovereign, since the sovereignty of any other State, by the mere fact of its existence, implies a limitation of the absolute sovereignty of the first State.

Such a concept leads, in fact, to recognizing the sovereignty of only the most powerful State, to reducing sovereignty to relations of force, and to denying the sovereignty of all other States.

6. In reality, State sovereignty must be regarded as an inalienable attribute of every State. The limits of effective sovereignty lie in the sovereignty of all other States. The international obligation, voluntarily and mutually undertaken by States, to respect the sovereignty of other States, including the obligation of every State to respect the immunity of other States within the sphere of its jurisdiction, is not a limitation on sovereignty but an affirmation of such sovereignty as a fundamental universal principle of inter-State relations.

That is precisely why strict observance of the principle of State immunity from foreign jurisdiction is so important in ensuring respect for the sovereignty of all States and of each and every State.

By respecting the immunity of other States, each State expects that those other States will respect its own immunity.

7. It should also be noted that immunity from foreign jurisdiction by no means signifies that the State enjoying immunity may ignore the law of another State within that other State's sphere of jurisdiction. On the contrary, it is under an obligation strictly to abide by the other State's internal law. In particular, it may engage, within the sphere of jurisdiction of another State, only in such activities as are permitted by the latter. Each State is also under an obligation not to interfere in another State's domestic affairs.

III

8. As pointed out above, all States without exception, as well as international legal doctrine in all countries, unreservedly recognize the principle of State immunity from foreign jurisdiction.

9. However, certain States, through their judicial organs, have in a number of cases, especially in recent decades, begun to base their activities on the concept known as "functional immunity". Essentially, this concept is tantamount to the affirmation that the State, depending upon the functions it performs, may act in different capacities, and accordingly may either enjoy or not enjoy immunity. This theory is sometimes also described as the theory of "limited" or "relative" immunity.

In recent years, certain States have also adopted legislation derived from this concept. In particular, this obviously applies to the *Foreign Sovereign Immunities Act of 1976* of the United States of America.[3]

10. According to the concept of "functional immunity", a distinction should be drawn between State acts that are manifestations of public power (*jure imperii*) and State acts that are of a private or commercial nature (*jure gestionis*). In other words, the distinction is between State activity of a public law nature and State activity of a private law nature.

However, this concept is clearly unsound, for many reasons.

11. First of all, it is not in keeping with prevailing international law, which is based on the sovereignty and sovereign equality of States in all spheres of their

[2] United Nations, *Treaty Series*, vol. 500, p. 112.

[3] *United States Code, 1976 Edition*, vol. 8, title 28, chap. 97, p. 206.

mutual relations—political, economic (commercial), social, scientific, technical, cultural and other. In its foreign relations, the State always acts as *imperium* (sovereign power), that is, as invested with public power.

12. The State is a single entity; it cannot be split up; and State power is likewise a single entity. All State organs and representatives act on behalf of public power within the limits of their rights and obligations as established by the State. No single State organ can be excluded from the general system or treated in isolation from or in opposition to other organs. The joint competence of State organs covers all powers required for the performance of the State's functions.

Thus, in particular, a State's trade missions, where they exist, act, as do other organs of the State, on behalf of the State and enjoy immunity from foreign jurisdiction.

The economic activity or economic function of a State, including what may be called State commercial activity, is no less important to any State, including States with a capitalist economy, than its other functions. The State engages in economic activities not as does a private individual, but precisely as a State, sovereign, invested with public power.

A State sector of the economy now exists in every country. In socialist countries, the State sector of the national economy is predominant. For these States, the economic function of the State (in the USSR it is described as the economic and organizational function) has become one of the most important. In many newly independent States, which have thrown off the colonial yoke, the State sector of the economy is being developed more and more.

There are thus absolutely no grounds for isolating State commercial activity and considering it apart, as something unrelated to State activity.

13. The same may be said, with equal certainty, of the distinction between State activities under public law and under private law.

So far as the socialist countries are concerned, it is altogether meaningless to speak of their activities under private law.

Even in the case of capitalist States, there are no norms or criteria on the basis of which a distinction can be made between the State's public law and private law activities. For this reason, the judicial practice of States that attempt to apply the theory of functional immunity is extremely variable, contradictory and inconsistent.

14. Furthermore, it is altogether inadmissible that a court should examine the activities of a foreign State and should qualify them in one way or another contrary to the views of that State itself. This represents inadmissible interference in the domestic and external affairs of States.

15. Lastly, in certain respects, the concept of functional immunity likens the State to natural persons, yet denying the State immunity with regard to activities that may be exercised by private individuals. This too is a radically erroneous proposition.

In concluding a transaction in civil law, a State acts not as a juridical person but as a special subject of civil law. And in this case it acts not in the interests of the personal profit of any private individual but in the interests of the State, of the economic and social development of its society, its people. Hence there are no grounds whatsoever for likening State acts to the acts of juridical persons.

16. Consequently, the theory of functional immunity is in our view manifestly unsound. It is directed towards the subordination of one State to the judicial power of another State—which radically contravenes the principles of the sovereignty and sovereign equality of States and of non-interference in their domestic and foreign affairs.

IV

17. As for the position of States, it appears to us to be incorrectly reflected or interpreted in the Special Rapporteur's reports.

Many States, possibly a majority, do not subscribe to, or reject, the concept of functional immunity. Hence it is clearly mistaken to speak of any general trend emerging in favour of that concept.

Thus, of the 29 States which, in accordance with the Commission's request, sent information and documentation in reply to the questionnaire,[4] 14 grant full immunity and four have no legislation or practice in this area.

The same is apparent from the discussion on the pertinent sections of the Commission's reports in the Sixth Committee of the General Assembly, which shows that a large group of States are opposed to the abovementioned concept.

18. As we have pointed out in the Commission, reference may be made to the judicial practice of certain States only in cases where the State whose immunity is not recognized by the court consents thereto. It seems to us that in the majority of such cases States have lodged protests. In any event, the reaction of States to court decisions is not reflected in the Special Rapporteur's reports.

19. In particular, the Special Rapporteur is clearly mistaken when he interprets the practice of the USSR and other socialist countries in regard to contracts as testifying to the fact that immunity does not apply to State commercial activity.

The practice of the USSR in regard to contracts testifies to the contrary. Under many trade agreements, the USSR has voluntarily consented to its trade missions being placed under foreign jurisdiction in connection

[4] See United Nations, *Materials on Jurisdictional Immunities of States and their Property* (Sales No. E/F.81.V.10), pp. 555 *et seq.*, sect. V.

with transactions concluded or guaranteed by the trade mission in the country concerned. But beyond the limits of such voluntary consent on the part of the USSR, its trade missions enjoy the immunity from foreign jurisdiction to which they are entitled as representatives of the State.

Again, generally speaking, since the 1930s the Soviet Union has not, in practice, concluded trade transactions with foreign natural or juridical persons. Such transactions are concluded by Soviet foreign trade associations and other juridical persons under national law, which as such enjoy no immunity from foreign jurisdiction.

20. The position and practice of States are thus by no means uniform. No conclusion whatsoever can be drawn from them as to an emerging trend in favour of the concept of limited immunity. At the very least, the matter calls for further in-depth study.

V

21. The Special Rapporteur's view that, among contemporary authors, there are no adherents of absolute or complete State immunity and that the opinion of specialists is unanimously in favour of a limitation on the immunity of States in respect of their trading or commercial activity, is to our mind also erroneous.

22. First of all, Soviet international legal writings are firmly and unanimously in favour of full State immunity from foreign jurisdiction, on the grounds of the sovereignty, independence and equality of States. The concept of functional immunity and other theories of limited immunity are subjected to thorough criticism that reveals their theoretical unsoundness. We ourselves have devoted some attention to this subject in a work published in 1963.[5] The situation is the same, we believe, in international legal writings in other socialist countries.

23. International law specialists in Western countries are also far from unanimous on this matter. Many Western authors have opposed or currently oppose the concept of functional immunity and other theories of limited sovereignty. Allow me to refer to just one example—a work by Ian Brownlie, entitled *Principles of Public International Law*.[6]

After referring to the arguments of some authors in favour of the concept of limited immunity, I. Brownlie states:

> These arguments have some force, but on closer examination they are seen to be in varying degrees inconclusive. In the first place the approach of many jurists to the "sovereign in the market place" is based on conceptions concerning the role of the State and the significance of State ownership which are inapplicable even to many modern capitalist economies. It is this political aspect which makes it difficult to find a rationale for a restrictive principle: as it has been pointed out, economic activity of the State remains State activity. Indeed, from this point of view it would be more logical to do away with the immunity.[7]

A little further on, the author writes:

> Neither the evidence of State practice nor the arguments from principle justify the replacement of the wider principle of immunity by some other principle, and in fact the search for an alternative has so far failed.[8]

This is the situation with regard to legal writings.

VI

24. It is sufficiently obvious that attempts to subordinate one State to the judicial power of another State lead merely to unnecessary contradictions and friction between States. At the same time, respect for the immunity of foreign States is in no sense an obstacle to the development of mutually advantageous international trade relations, *inter alia* between States with different social systems.

25. Every State has opportunities to protect its interests adequately, *inter alia* in the sphere of its jurisdiction.

First, a State may prohibit its nationals, natural or juridical persons, from concluding transactions with foreign Governments.

Secondly, it may obtain by agreement the consent of the other State to submission to local jurisdiction in a specific category of matters.

Thirdly, it may stipulate that its nationals, natural or juridical persons, may conclude transactions only on condition that their contract with the foreign Government includes a provision concerning the settlement of disputes by a court or by commercial arbitration.

The State reserves the right of diplomatic protection of its nationals, natural or juridical persons, in appropriate cases. Other possibilities are also available.

VII

26. The foregoing demonstrates that codification based on concepts of limited sovereignty would be clearly unsound and unfruitful.

The problem requires, at the very least, further study in greater depth.

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[5] N. A. Ushakov, *Suverenitet v sovremennom mejdunarodnom prave* [Sovereignty in contemporary international law] (Moscow, Institute of International Relations, 1963).

[6] Second ed. (Oxford, Clarendon Press, 1973).

[7] *Ibid.*, p. 325.

[8] *Ibid.*, p. 326.

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

[Agenda item 3]

DOCUMENT A/CN.4/372 and Add.1 and 2

Information received from Governments

[*Original: English, French, Russian, Spanish*]
[*13 May, 2 and 9 June 1983*]

CONTENTS

NOTE

Multilateral conventions referred to in the present document:

	Source
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961) Hereinafter referred to as the 1961 Vienna Convention	United Nations, *Treaty Series*, vol. 500, p. 95.
Vienna Convention on Consular Relations (Vienna, 24 April 1963) Hereinafter referred to as the 1963 Vienna Convention	*Ibid.*, vol. 596, p. 261.
Convention on Special Missions (New York, 8 December 1969)	United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), p. 125.
Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975) Hereinafter referred to as the 1975 Vienna Convention	*Ibid., 1975* (Sales No. E.77.V.3), p. 87.

Introduction

1. The International Law Commission, at its thirty-fourth session, in 1982, upon the suggestion of the Special Rapporteur, requested the Secretariat to renew the request addressed to States by the Secretary-General to provide further information on national laws and regulations and other administrative acts, as well as procedures and recommended practices, judicial decisions, arbitral awards and diplomatic correspondence in the fields of diplomatic law with respect to the treatment of couriers and bags.[1] Pursuant to the Commission's request, the Legal Counsel of the United Nations addressed a circular letter, dated 21 September 1982, to the Governments of States, inviting them to submit relevant information or to bring up to date the information submitted earlier, not later than 20 January 1983.

2. The replies received by the beginning of June 1983 from the Governments of 12 Member States are reproduced below.

[1] *Yearbook ... 1982*, vol. II (Part Two), p. 120, para. 248.

Austria

[*Original: English*]
[*17 January 1983*]

... concerning the request for information with respect to the treatment of diplomatic couriers and bags, [the Permanent Mission of Austria to the United Nations] has the honour to state that, since the last information transmitted by Austria, in 1982,[1] there has been no further relevant legislation and no change in the administrative regulations.

[1] See *Yearbook ... 1982*, vol. II (Part One), pp. 232 *et seq.*, document A/CN.4/356 and Add.1-3.

Colombia

[*Original: Spanish*]
[*18 February 1983*]

1. With regard to the treatment of diplomatic couriers and bags, the 1961 Vienna Convention, and specifically article 27 and article 40, paragraph 3, are applicable in Colombia. These matters are also governed by article 33 of Decree No. 2017 of 1968 (Organic Statute of the Ministry of Foreign Affairs),[1] and by articles 49 to 54 of Decree No. 3135 of 1956 "specifying the privileges and prerogatives of diplomatic agents in Colombia".[2]

2. In addition, a contract between the Ministry of Foreign Affairs and the airline *Avianca* provides for the transport of couriers and bags on the routes served by that airline.

3. Colombian law contains no special regulations, administrative acts, procedures, judicial decisions or arbitral awards concerning the topic of the inquiry.

[1] Republic of Colombia, *Diario Oficial* (Bogotá), 5 August 1964, No. 32568.

[2] Pan American Union, *Documents and Notes on Privileges and Immunities, with special reference to the Organization of American States* (Washington, D.C.), p. 264.

Cyprus

[*Original: English*]
[*3 February 1983*]

In Cyprus, all diplomatic pouches are sent by air and they are not accompanied by diplomatic courier. With regard to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, the Government of Cyprus believes that the protection provided by articles 27-40 of the 1961 Vienna Convention is sufficient and that there is no real need to elaborate additional or more detailed new rules. In the view of the Government, the present rules are sufficiently comprehensive and precise to cover the needs and, if properly applied, to guarantee the functioning of diplomatic relations between States.

Egypt

[*Original: English*]
[*1 December 1982*]

With regard to the treatment of diplomatic couriers and diplomatic bags, the Government of Egypt applies paragraphs 1, 2, 4, 5, 6 and 7 of article 27 of the 1961 Vienna Convention, which has been an integral part of Egyptian law since Egypt's accession to the Convention on 9 July 1964. This is in conformity with article 151 of the Egyptian Constitution.

Federal Republic of Germany

[Original: English]
[29 November 1982]

The pertinent instructions contained in the circular addressed by the Federal Minister of the Interior to the federal and Länder agencies concerned, which was submitted together with the permanent representative's note No. 127 of 23 March 1982, continue to apply. No new regulations relating to the status of the courier have been issued.

Indonesia

[Original: English]
[28 February 1983]

1. The Government of the Republic of Indonesia ratified the 1961 Vienna Convention and the 1963 Vienna Convention by Indonesian Law/1982 of 25 June 1982. Indonesia treats the diplomatic courier and the diplomatic bag in accordance with the provisions of those Conventions and customary international law, taking into account the principle of reciprocity.

2. The Indonesian Government grants a "multiple entry visa", which is valid for six months, to the appointed diplomatic courier.

3. Circular notes No. D.0433/78/44 of 11 April 1978 and No. 1201/80/41 of 2 October 1980 of the Department of Foreign Affairs of the Republic of Indonesia stipulate that the diplomatic bag which has been sealed is exempted from inspection and can be picked up from the airport platform on arrival.

4. If the diplomatic bag is not picked up immediately and is kept in storage, the issuance procedures are as stated in Government Regulation No. 8 of 1957, relating to the issuance of diplomatic materials.

5. A decision of the Director of Perum Angkasa Pura,* No. SKEP. DU 106/K.U. 2013/81 of 12 November 1981, stipulates that the diplomatic bag of foreign representatives can be picked up by the appointed officer of the representative concerned upon showing a special pass that is issued by Perum Angkasa Pura.

6. In connection with the special pass described in paragraph 5 above, circular note No. D.0260/82/44 of 24 February 1982 of the Department of Foreign Affairs stipulates that any foreign representative can be issued a maximum of two special passes.

7. In the event that the officer responsible for picking up the diplomatic bag is not in the possession of the special pass, he should report to or contact the airport officials.

8. An official diplomatic courier of the Republic of Indonesia is an official bearing a diplomatic passport who is also in possession of identification indicating that the said official is a diplomatic courier and of a document describing the content of the materials being carried.

9. A diplomatic bag which is sent by the Indonesian Government is marked with the signs stipulated in the 1961 Vienna Convention.

* Mixed national airport company.

Kenya

[Original: English]
[16 March 1983]

1. Kenya is a party to the two conventions on diplomatic and consular relations and has given them force of law in Kenya in the manner provided for in the two instruments.

2. Kenya welcomes any measures that would enhance the inviolability of bags sent unaccompanied, which is the most commonly used method of communication by developing countries.

Malawi

[Original: English]
[18 January 1983]

1. The rules followed by the Government of Malawi on this matter are those contained in the 1961 Vienna Convention, in particular in its article 27, although these have not yet been expressly incorporated in the country's legislation. The legislation on diplomatic relations and consular relations which is still applied in Malawi was enacted in January 1964. At that time, the above-mentioned Convention was not yet applicable as law either to Nyasaland or to the United Kingdom. Upon independence, Malawi became a party to that Convention by way of accession on 19 May 1965. But, as stated above, the provisions of the Convention have not as yet been directly published in accordance with the national legislation, notwithstanding the fact that they are generally applied as law in Malawi's relations with other countries.

2. The present position is that Malawi's 1964 legislation on diplomatic and consular relations is in most respects out of date and efforts are under way (at Ministry level) to request the Government to repeal it and replace it by new legislation. The new legislation, which it is hoped will be in effect by 1984, will consolidate the provisions of the 1961 and 1963 Vienna Conventions, together with their respective protocols.

3. On the precise issue of the "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier", the following is Government practice, based upon article 27 of the 1961 Vienna Convention:

Treatment accorded to the Government of Malawi by other Governments

All diplomatic bags of Malawi are dispatched to and from the Malawian missions abroad unaccompanied by diplomatic couriers. It is understood that they are accorded immunity from any kind of search. Thus they are neither opened nor otherwise dealt with by way of inspection. As the Government of Malawi has never dispatched diplomatic couriers for this purpose, it has no experience to communicate on this subject. Thus it cannot say how other countries would have treated its couriers were such couriers to carry its bags through their respective territories on their way to and from its missions abroad. The specific countries in point are Kenya, Ethiopia, Zambia, Zimbabwe, the United Kingdom, the United States of America, South Africa, Mozambique and the Federal Republic of Germany, where Malawi has missions and where its diplomatic couriers would have carried its diplomatic bags were these to be accompanied by courier.

Treatment accorded to other Governments by the Government of Malawi

The Government of Malawi accords the full treatment provided for in article 27, paragraphs 3, 5 and 7, of the 1961 Vienna Convention to all missions accredited to Malawi. Thus diplomatic bags, whether accompanied or unaccompanied by diplomatic courier, are not opened or detained upon their entry into Malawi. Diplomatic couriers are protected by the Government upon their entry into Malawi; they are treated as important persons at the airport and enjoy personal inviolability, that is, they are not liable to any form of arrest or detention if they confine themselves to the performance of their duties. Where diplomatic bags are unaccompanied by a diplomatic courier, but are entrusted to the captain of a commercial aircraft scheduled to land at Malawian international airports (Kamuzu airport or Chileka airport), the missions are free to send their members to take possession of the diplomatic bag directly and freely from the captain of the aircraft.

4. The matter currently before the United Nations is an on-going one, since it has been on the agenda of the Sixth Committee of the General Assembly since 1978. It is the wish of most countries that the international rules contained in article 27 of the 1961 Vienna Convention should be amended to provide for detailed rules on the treatment to be accorded to diplomatic bags where such bags are not accompanied by diplomatic couriers, and also to give more specific immunities to such couriers.

5. The Malawian Government believes that it should meanwhile merely observe the developments. Once the new law has been adopted by Parliament, the Government will make any necessary amendments to it and, if so required, harmonize its provisions with any substantive changes in the existing rules on this topic eventually to emerge from current United Nations negotiations.

Romania

[*Original: French*]
[*23 May 1983*]

1. The Socialist Republic of Romania is a party to most of the international conventions and treaties governing the status of the diplomatic courier and the diplomatic bag: the 1946 Convention on the Privileges and Immunities of the United Nations,[1] the 1947 Convention on the Privileges and Immunities of the Specialized Agencies,[2] the 1961 Vienna Convention, the 1963 Vienna Convention, and the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.[3]

Furthermore, it should be noted that the provisions of Romanian national legislation were drafted in the light of the treaty provisions to which the Socialist Republic of Romania had subscribed and to international practice recognized by States in that field. Thus articles 186 to 191 of chapter VI of the Customs Regulations (approved by Decree No. 337 of the Council of State, dated 26 November 1981),[4] on the introduction of property into the country and its removal therefrom by diplomatic missions and consular offices accredited to the Socialist Republic of Romania, as well as by their members, regulate the status of the diplomatic bag and the consular bag, the conditions that have to be satisfied for the recognition and use of the diplomatic or consular bag, as well as exemption of those bags from customs control on entry into or departure from the country, the possibility of the diplomatic or consular bag being transported by the captain of a commercial aircraft, etc.

2. The Romanian Government is in favour of the continuation by the Commission of the study of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, with a view to formulating draft articles that may serve as a basis for the preparation and adoption of an appropriate international legal instrument. The Romanian Government considers that comprehensive and unified rules could thus be provided to govern the status of the diplomatic courier and the unaccompanied diplomatic bag in the light of the acquired practice of States in that field, which would have a favourable effect on the climate of the establishment and maintenance of good relations between States. A solution to the question of the status of the diplomatic courier and the diplomatic bag, by standardizing and generalizing existing practice could prevent confusion and misunderstandings, with the result of ensuring that States would behave in a manner likely to guarantee the legality and stability so necessary for the maintenance of confidence and co-operation

[1] United Nations, *Treaty Series*, vol. 1, p. 15.

[2] *Ibid.*, vol. 33, p. 261.

[3] General Assembly resolution 3166 (XXVIII) of 14 December 1973, annex; see also United Nations, *Juridical Yearbook, 1973* (Sales No. E.75.V.1), p. 74.

[4] Romania, Chamber of Commerce and Industry (Bucharest, Publicom, 1982), pp. 140-142.

among them. In that way, the Commission would perform a useful task of codification in a highly sensitive area of inter-State relations.

3. In the practice of the Socialist Republic of Romania, the system whereby the same person is appointed as diplomatic courier by two or more States is unknown.

Sweden

[*Original: English*]
[*24 January 1983*]

Note of 17 January 1973 concerning the opening of diplomatic bags by a receiving State[1]

The Royal Swedish Embassy presents its compliments to the Ministry of External Affairs of the Republic of ... and has the honour, with reference to the Ministry's Note No. 5/73 of 3 January 1973, concerning certain measures to be taken to combat trafficking in ... currency during the present currency exchange in ... , to state the following:

While understanding the problems facing the ... authorities in the present situation, the Embassy must express its deep concern at the measures stipulated in the Ministry's communication, which might be taken to impugn the integrity not only of this Embassy but also of the Government which it has the honour to represent.

In particular, the Embassy invites the attention of the Ministry to the gravity of the measures relating to official correspondence and diplomatic bags, which conflicts with customary international law as well as with article 27 of the Vienna Convention on Diplomatic Relations to which the Republic of ... is also a party. International law governing diplomatic relations prohibits any interference with official correspondence and diplomatic bags, whether sent to or from a Foreign Ministry or between its missions. Consequently the Embassy, on the instructions of its Government, has the honour to inform the Ministry that it is unable to acquiesce in the opening and inspecting of official correspondence and diplomatic bags.

Moreover, in keeping with the provisions of articles 29 and 36 of the same Vienna Convention, the Embassy is confident that the ... authorities will also refrain from searching and inspecting either the person or the personal baggage of diplomatic members of this Embassy who may enter ... during the six-week period of currency conversion.

[1] Communicated in a note verbale from the Permanent Mission of Sweden to the United Nations.

Union of Soviet Socialist Republics

[*Original: Russian*]
[*28 February 1983*]

The information below is submitted as a follow-up to that previously transmitted to the United Nations Secretariat.[1]

1. On 24 November 1982, the Supreme Soviet of the USSR adopted the USSR State Frontier Act and a resolution on its implementation.[2]

2. Article 12 of the USSR State Frontier Act provides:

Permission to cross the USSR State frontier shall be granted by border guards to persons holding valid documents authorizing them to enter or leave the USSR.

Means of transport, goods and other property shall be permitted to cross the Soviet frontier in accordance with the legislation of the Soviet Union and international treaties to which it is a party.

In accordance with international treaties to which the Soviet Union is a party, simplified procedures may be established for authorizing persons, means of transport, goods and other property to cross the Soviet frontier.

3. With the adoption of the aforementioned legislation, the Statute of 5 August 1960 governing the protection of the Soviet frontiers, which was referred to in information submitted previously,[3] ceased to have effect on 1 March 1983.

[1] *Yearbook... 1982*, vol. II (Part One), p. 240, document A/CN.4/356 and Add.1-3.

[2] *Pravda* (Moscow), 26 November 1982, No. 330 (23491).

[3] Document A/CN.4/356 and Add.1-3 (see footnote 1 above), Union of Soviet Socialist Republics, sect. I, para. 4.

Venezuela

[*Original: Spanish*]
[*2 June 1983*]

...

With regard to the proposal made by the Special Rapporteur concerning laws, regulations, procedures and practices, as well as judicial decisions, arbitral awards and diplomatic correspondence with respect to the treatment of couriers and bags, the Government of Venezuela points out that the only applicable legal instrument in the country is the 1961 Vienna Convention.

Furthermore, the Government of Venezuela has no information on any judicial decision or arbitral award relating to the treatment in the country of the diplomatic courier and the diplomatic bag.

...

DOCUMENT A/CN.4/374 and Add.1-4*

Fourth report on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, by Mr. Alexander Yankov, Special Rapporteur

[*Original: English*]
[*18 May, 1, 10, 16 and 28 June 1984*]

CONTENTS

* Incorporating documents A/CN.4/374/Corr.1, A/CN.4/374/Add.1/Corr.1, A/CN.4/374/Add.2/Corr.1, A/CN.4/374/Add.3/Corr.1 and A/CN.4/374/Add.4/Corr.1 and 2.

Conventions and agreements cited in the present report

MULTILATERAL CONVENTIONS

	Source
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961) Hereinafter referred to as the 1961 Vienna Convention	United Nations, *Treaty Series*, vol. 500, p. 95
Vienna Convention on Consular Relations (Vienna, 24 April 1963) Hereinafter referred to as the 1963 Vienna Convention	*Ibid.*, vol. 596, p. 261
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), p. 140
Convention on Special Missions (New York, 8 December 1969)	*Ibid.*, p. 125
Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal character (Vienna, 14 March 1975) Hereinafter referred to as the 1975 Vienna Convention	*Ibid., 1975* (Sales No. E.77.V.3), p. 87

CONSULAR CONVENTIONS

*Contracting parties**	*Date of signature*	*Published in Treaty Series or registration No.*
Austria - Romania	24 September 1970	vol. 848, p. 69
Belgium - Czechoslovakia	15 June 1976	17139
Belgium - Hungary	9 July 1976	17197
Belgium - Poland	11 February 1972	vol. 950, p. 21
Belgium - Turkey	28 April 1972	vol. 1029, p. 183
Belgium - USSR	12 July 1972	vol. 981, p. 279
Belgium - United Kingdom	8 March 1961	vol. 523, p. 17
Belgium - United States of America	2 September 1969	vol. 924, p. 71
Bulgaria - Austria	14 May 1975	15660
Czechoslovakia - Cyprus	12 May 1976	17836
Czechoslovakia - German Democratic Republic	24 May 1957	vol. 292, p. 327
Czechoslovakia - Italy	10 October 1975	17905
Czechoslovakia - Yugoslavia	24 June 1963	vol. 496, p. 3
Finland - Hungary	24 August 1971	vol. 859, p. 3
Finland - Poland	2 June 1971	vol. 858, p. 97
Finland - Romania	30 June 1971	vol. 897, p. 3
France - Algeria	24 May 1974	18952
France - Bulgaria	22 July 1968	vol. 747, p. 375
France - Cameroon	13 November 1960	vol. 741, p. 65
France - Cameroon (United Republic of)	21 February 1974	vol. 999, p. 49
France - Czechoslovakia	22 January 1969	vol. 771, p. 61
France - Poland	20 February 1976	vol. 1054, p. 35
France - Romania	18 May 1968	vol. 747, p. 203
France - Senegal	29 March 1974	16158
France - Tunisia	28 June 1972	vol. 939, p. 219
Greece - Bulgaria	31 May 1973	vol. 965, p. 245
Greece - Hungary	18 March 1977	17962
Greece - Poland	30 August 1977	17871
Greece - United Kingdom	17 April 1953	vol. 191, p. 151
Hungary - Bulgaria	26 November 1971	vol. 902, p. 123
Hungary - Cuba	24 July 1969	vol. 892, p. 13
Hungary - Czechoslovakia	17 May 1973	vol. 986, p. 117
Hungary - Democratic People's Republic of Korea	5 October 1970	vol. 892, p. 69
Hungary - German Democratic Republic	28 June 1972	vol. 902, p. 37
Hungary - United States of America	7 July 1972	vol. 902, p. 177
Japan - United States of America	22 March 1963	vol. 518, p. 179
Mongolia - Czechoslovakia	3 June 1976	vol. 1055, p. 259
Mongolia - German Democratic Republic	12 October 1973	vol. 949, p. 3
Mongolia - United Kingdom	21 November 1975	15183
Poland - Austria	2 October 1974	16848
Poland - Cuba	12 May 1972	16845
Poland - Mongolia	31 May 1973	16855
Poland - Romania	24 March 1973	16583

* The first Member State mentioned is the registering State.

*Contracting parties**	*Date of signature*	*Published in* Treaty Series *or registration No.*
Poland - USSR	27 May 1971	vol. 831, p. 3
Romania - Belgium	1 July 1970	vol. 931, p. 63
Romania - Cuba	31 May 1971	vol. 881, p. 101
Romania - Democratic People's Republic of Korea	2 November 1971	vol. 889, p. 31
Romania - German Democratic Republic	15 July 1958	vol. 387, p. 133
Romania - Hungary	18 March 1959	vol. 417, p. 3
Romania - Italy	8 August 1967	vol. 847, p. 3
Romania - Mongolia	29 April 1967	vol. 710, p. 237
Romania - Spain	5 January 1967	vol. 642, p. 103
Romania - USSR	14 March 1972	vol. 881, p. 153
Romania - United Kingdom	11 September 1968	vol. 789, p. 3
Romania - United States of America	5 July 1972	vol. 890, p. 109
Sweden - Romania	12 February 1974	20537
Sweden - United Kingdom	14 March 1952	vol. 202, p. 157
USSR - Angola	26 May 1976	17921
USSR - Benin	16 December 1976	19287
USSR - Bulgaria	12 December 1957	vol. 302, p. 21
USSR - Bulgaria	6 May 1971	vol. 897, p. 147
USSR - Cape Verde	27 November 1976	17844
USSR - Cuba	15 June 1972	vol. 897, p. 301
USSR - Cyprus	8 February 1978	18121
USSR - Czechoslovakia	27 April 1972	vol. 897, p. 249
USSR - Ethiopia	6 May 1977	17918
USSR - German Democratic Republic	10 May 1957	vol. 285, p. 135
USSR - Guinea	23 April 1976	16479
USSR - Guinea-Bissau	16 April 1976	16477
USSR - Hungary	24 August 1957	vol. 318, p. 3
USSR - Hungary	20 March 1971	vol. 897, p. 91
USSR - India	29 November 1973	15037
USSR - Italy	16 May 1967	vol. 936, p. 35
USSR - Japan	29 July 1966	vol. 608, p. 93
USSR - Mexico	18 May 1978	18206
USSR - Mongolia	5 April 1972	vol. 914, p. 129
USSR - Mozambique	31 March 1977	18119
USSR - Norway	7 December 1971	vol. 941, p. 33
USSR - Romania	4 September 1957	vol. 318, p. 55
USSR - Somalia	19 November 1971	vol. 897, p. 205
USSR - Syrian Arab Republic	3 June 1976	17917
USSR - United Kingdom	2 December 1965	vol. 655, p. 259
United Kingdom - Bulgaria	13 March 1968	vol. 681, p. 273
United Kingdom - Czechoslovakia	3 April 1975	vol. 1037, p. 319
United Kingdom - Denmark	27 June 1962	vol. 562, p. 75
United Kingdom - France	31 December 1951	vol. 330, p. 143
United Kingdom - German Democratic Republic	4 May 1976	vol. 1038, p. 53
United Kingdom - Hungary	12 March 1971	vol. 824, p. 3
United Kingdom - Japan	4 May 1964	vol. 561, p. 25
United Kingdom - Mexico	20 March 1954	vol. 331, p. 21
United Kingdom - Mongolia	21 November 1975	15183
United Kingdom - Norway	22 February 1951	vol. 326, p. 209
United Kingdom - Poland	23 February 1967	vol. 813, p. 261
United Kingdom - Spain	30 May 1961	vol. 562, p. 169
United States of America - Bulgaria	15 April 1974	vol. 998, p. 99
United States of America - China	17 September 1980	not registered**
United States of America - France	18 July 1966	vol. 700, p. 257
United States of America - Ireland	1 May 1950	vol. 222, p. 107
United States of America - Poland	31 May 1972	vol. 925, p. 31
United States of America - Republic of Korea	8 January 1963	vol. 493, p. 105
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Australia - China	18 September 1978	19630
Brazil - Argentina	6 July 1961	vol. 657, p. 117
Brazil - Uruguay	16 December 1944	vol. 65, p. 305
Brazil - Venezuela	30 January 1946	vol. 65, p. 107
Ecuador - Brazil	15 November 1946	vol. 72, p. 25
United Kingdom - Dominican Republic	1 and 9 August 1956	vol. 252, p. 121
United Kingdom - Mexico	27 September 1946	vol. 91, p. 161
United Kingdom - Netherlands	30 November 1951	vol. 123, p. 177
United Kingdom - Norway	23 December 1946	vol. 70, p. 269
United Kingdom - Norway	15 January 1947	vol. 11, p. 187

** Text published in *International Legal Materials* (Washington, D.C.), vol. XIX, No. 5 (September 1980), p. 1119.

Introduction

1. The fourth report on the topic under consideration follows the structure of the draft articles proposed by the Special Rapporteur in his three previous reports.[1] The structure tentatively agreed by the Commission consists of four parts: *Part I.* General provisions; *Part II.* Status of the diplomatic courier, the diplomatic courier *ad hoc* and the captain of a commercial aircraft or the master of a ship carrying a diplomatic bag; *Part III.* Status of the diplomatic bag; *Part IV.* Miscellaneous provisions, including those on the obligations of the third State in cases of *force majeure* or fortuitous events, and the relationship between the present draft articles and existing multilateral conventions in the field of diplomatic law, and other provisions.[2]

2. The second report contained draft articles 1-6, constituting part I of the draft (General provisions).[3] Those draft articles (with the exception of articles 2 and 6), as revised by the Special Rapporteur in his third report,[4] were referred to the Drafting Committee.[5]

3. The third report concentrated on some issues relating to the status of the diplomatic courier. As was pointed out in that report,[6] the status of the diplomatic courier, conceived in a more restrictive sense, would entail provisions relating to proof of status, appointment, nationality and functions. It was further indicated that the notion of the status of the courier could also have a broader meaning, which would entail provisions relating to the rights and obligations of the diplomatic courier, including the facilities, privileges and immunities accorded to him for the performance of his functions. The draft articles in the third report were confined to the status of the diplomatic courier in its restrictive sense, and therefore dealt with proof of status (art. 7), appointment of a diplomatic courier (art. 8), appointment of the same person by two or more States as a diplomatic courier (art. 9), nationality of the diplomatic courier (art. 10), functions (art. 11), commencement of functions (art. 12), end of functions (art. 13), and persons declared *non grata* or not acceptable (art. 14). These draft articles were also referred to the Drafting Committee.[7]

4. The present report is designed: (*a*) to complete the examination of part II of the draft articles on the status of the diplomatic courier by submitting for consideration draft articles on the facilities, privileges and immunities of the diplomatic courier as well as on the status of the captain of a commercial aircraft or the master of a ship; (*b*) to examine the status of the diplomatic bag, whether or not accompanied by diplomatic courier, and to propose draft articles pertaining thereto, which constitute part III of the draft; (*c*) to propose draft articles on part IV of the draft (Miscellaneous provisions), concerning: (i) the obligations of third States in cases of *force majeure* and fortuitous events; (ii) treatment of the diplomatic courier and the diplomatic bag in case of non-recognition by States or Governments or in the absence of diplomatic or consular relations; (iii) relationship between these draft articles and other conventions and international agreements on diplomatic law dealing with the status of the diplomatic courier and the diplomatic bag. Consequently, the whole set of draft articles on the status of the diplomatic courier and the diplomatic bag, as contemplated by the Special Rapporteur, will be submitted for first reading.

5. The issues relating to the status of the diplomatic courier and the diplomatic bag will be examined in the present report from the same functional point of view as before. Taking into account the multipurpose service of the courier and the bag with respect to all kinds of official missions—permanent diplomatic missions and consular posts, special missions, permanent missions to international organizations and delegations to international conferences—it is suggested that the same comprehensive and uniform approach be applied to all kinds of couriers and bags. Since the previous reports contained an extensive analytical survey of the *travaux préparatoires* of the four codification conventions[8] adopted under the auspices of the United Nations pertaining to the status of the diplomatic courier and the

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[1] The three previous reports of the Special Rapporteur were:

(*a*) preliminary report, submitted to the Commission at its thirty-second session, in 1980 (*Yearbook ... 1980*, vol. II (Part One), p. 231, document A/CN.4/335);

(*b*) second report, submitted to the Commission at its thirty-third session, in 1981 (*Yearbook ... 1981*, vol. II (Part One), p. 151, document A/CN.4/347 and Add.1 and 2);

(*c*) third report, submitted to the Commission at its thirty-fourth session, in 1982 (*Yearbook ... 1982*, vol. II (Part One), p. 247, document A/CN.4/359 and Add.1).

On the structure of the draft articles, see preliminary report para. 60; second report, para. 7; third report, para. 10.

[2] Structure approved by the Commission after examination of the Special Rapporteur's proposals at its thirty-second session (*Yearbook ... 1980*, vol. II (Part Two), p. 165, para. 170). See also the observations or suggestions made by members of the Commission at that session (*Yearbook ... 1980*, vol. I, p. 264, 1634th meeting, para. 38 (Mr. Reuter); p. 276, 1636th meeting, para. 19 (Mr. Evensen); pp. 282-284, 1637th meeting, para. 7 (Mr. Francis), para. 16 (Mr. Thiam), paras. 24-26 (Mr. Riphagen), para. 29 (Sir Francis Vallat)).

[3] Document A/CN.4/347 and Add.1 and 2 (see footnote 1 above), paras. 49, 211, 217, 225, 231.

[4] Document A/CN.4/359 and Add.1 (see footnote 1 above), paras. 19, 42, 56.

[5] *Yearbook ... 1982*, vol. II (Part Two), p. 120, para. 249.

[6] Document A/CN.4/359 and Add.1 (see footnote 1 above), para. 61.

[7] See footnote 5 above.

[8] The 1961 Vienna Convention, the 1963 Vienna Convention, the Convention on Special Missions and the 1975 Vienna Convention, referred to hereinafter as "codification conventions" or "conventions codifying diplomatic law" (see p. 57 above for references to these instruments).

diplomatic bag,[9] the present report would place greater emphasis on the examination of State practice, including national legislation and international agreements. In this connection special attention will be attached to an inquiry into the recent treaties on the subject matter under consideration. In many instances it would be necessary to go beyond the existing rules in an attempt to overcome certain loopholes and suggest new provisions which would more adequately correspond to the dynamics of contemporary official communications. In this work of codification and progressive development of the rules governing the status of the diplomatic courier and the diplomatic bag, it is proposed to follow an empirical and pragmatic approach, as has been the case with the draft articles submitted so far.

[9] See in particular the second report (see footnote 1 above), which contained on the one hand an analytical survey of the four conventions as the legal basis for a uniform régime governing the status of diplomatic and consular couriers, of couriers of special missions and permanent missions and of couriers of delegations to international organizations and, on the other hand, an extensive history of the concepts of diplomatic bag, consular bag and bags of special missions, permanent missions and delegations to international conferences.

I. Consideration by the Sixth Committee of the General Assembly of the draft articles on general provisions and on the status of the diplomatic courier

A. Debate on the topic as a whole

6. The debate on the status of the diplomatic courier and the diplomatic bag in the Sixth Committee, at the thirty-seventh session of the General Assembly, was very indicative of the attention attached to this topic by Member States. It may be pointed out that well over 40 representatives in their statements on the work of the Commission expressed their views on the topic as a whole and made comments on various draft articles under consideration. There were many useful observations and critical remarks which deserve careful consideration.

7. Most of the speakers who referred to the status of the diplomatic courier and the diplomatic bag noted the importance of freedom of communication between States and their missions abroad, as a fundamental principle of international law and a prerequisite for the normal functioning of those missions. In that connection, it was indicated that the current work on the status of the diplomatic courier and the diplomatic bag had practical significance, especially in the light of the technological development of the means of official communications. Several representatives indicated that the growing abuse of the privileges and immunities of the courier and the bag made existing international agreements in that field inadequate and thus justified the formulation and adoption of an international legal instrument codifying the rules on the topic. They suggested that the Commission should continue its work on the topic more actively and on a priority basis, with a view to a speedy and successful conclusion.[10]

8. At the same time, some representatives expressed reservations about the need for immediate attention to the codification of the matter, since the existing law was reasonably determined. It was also pointed out that it was not the proliferation of legal rules but the will to respect them that guaranteed their implementation.[11]

9. Several representatives indicated that they would postpone their specific comments until the Commission had finalized the draft articles on the topic. It was also stated that more detailed comments could be made when the Commission had considered the status of the diplomatic bag and its possible abuses.[12]

10. Among the various views expressed on the significance and the feasibility of codifying the topic of the status of the diplomatic courier and the diplomatic bag, the prevailing trend was recognition of the practical importance of and the need for codification of specific rules on the topic. The debate which took place in the Sixth Committee at the thirty-eighth session of the General Assembly provided further evidence to that effect.

11. The general comments referred also to various aspects of the topic as a whole, including its scope and the methodology to be applied in the work in progress. Several representatives maintained that the draft articles should also cover couriers and bags used for official purposes by international organizations.[13] The view was expressed that the scope of the draft articles should be further extended to include also the communications of recognized national liberation movements.[14] At the

[10] See "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-seventh session of the General Assembly" (A/CN.4/L.352), paras. 186, 187, 189.

[11] *Ibid.*, para. 188.

[12] *Ibid.*, para. 186.

[13] *Ibid.*, para. 193. See also the statements of the representatives of Brazil (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 47th meeting, para. 4); Algeria (*ibid.*, 48th meeting, para. 39); Iraq (*ibid.*, 50th meeting, para. 60); and Zaire (*ibid.*, 51st meeting, para. 28).

[14] See "Topical summary ... " (A/CN.4/L.352), para. 193, and also the statements of the representatives of the German Democratic Republic (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 40th meeting, para. 73); the Libyan Arab Jamahiriya (*ibid.*, 49th meeting, para. 55); and Zaire (*ibid.*, 51st meeting, para. 30). See also the opposing view expressed by the representative of Israel (*ibid.*, 47th meeting, para. 18).

same time, some representatives emphasized that the extension of the scope of the draft articles was not justified and would not make them generally acceptable.[15]

12. Taking into consideration the views expressed in the Sixth Committee and in the Commission, the special Rapporteur suggests that, at this stage of the work on the topic, its scope should be confined to couriers and bags used by States, as proposed in the third report,[16] and recalls that draft article 2 contains safeguard provisions, particularly with regard to couriers and bags used by international organizations, so that the interests of those organizations are not overlooked.

13. The comprehensive and uniform approach applied to all kinds of couriers and bags used by States was commended. However, the view was expressed by one delegation that

> ... at least for some purposes, the applicable standards for the protection of those communications were treated separately in the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations [and that the] recognized different standards of treatment should not be undermined by their treatment in a draft on the status of the diplomatic bag.[17]

That statement referred to the problem of the inviolability of the diplomatic bag and the consular bag as provided for respectively in article 27, paragraph 3, of the 1961 Vienna Convention and in article 35, paragraph 3, of the 1963 Vienna Convention. The matter was considered in some detail by the Special Rapporteur in his second report,[18] and will be dealt with again in the present report in connection with the draft articles on the inviolability of the diplomatic bag and its exemption from checking by electronic or other mechanical devices.

14. Several representatives commended the endeavour of the Commission to achieve a fair balance between the requirements for secrecy of the bag and the security and other legitimate interests of the receiving and the transit States.[19] It is the intention of the Special Rapporteur to proceed from this basic prerequisite for harmony of interests to the examination of the status of the diplomatic bag, and in particular its inviolability.

15. There were some other general comments and suggestions which will be considered further in the present report in connection with specific issues relating to the draft articles.

B. Comments on the various draft articles submitted by the Special Rapporteur

16. The 14 draft articles submitted by the Special Rapporteur were generally commended as a basis for a legal instrument codifying the rules on the topic. One representative, however, held the view that the draft articles were sometimes too detailed,[20] while another thought that the draft articles on the status of the diplomatic courier (arts. 7-14) were perhaps excessively based on an assimilation of the diplomatic courier to the staff of the diplomatic mission.[21] These critical remarks, expressed in general terms, will be taken into account by the Special Rapporteur in his work on the draft articles to follow.

17. Some comments on specific draft articles referred mainly to merely drafting matters, which should be brought to the attention of the Drafting Committee when considering the pertinent draft articles prepared by the Special Rapporteur. They will therefore not be dealt with in this report. This is the case with comments made on draft articles 1-4, 6, 8, 12 and 14, or on some aspects of the provisions contained in those articles.[22]

18. Some comments on specific draft articles were of an interpretative nature and could be considered more appropriately in the commentary to them. This is the case with the remark made by one representative on the term "diplomatic courier", to the effect that this term should apply to persons entrusted with the transportation of the bag not only to the missions of the sending State but also from those missions back to the sending State.[23] Indeed, this is the meaning of draft article 1, which rerefers to "communications *of States ... with** their diplomatic missions, consular posts ...", and to "official communications of these missions ... *with** the sending State or *with** each other, by employing dipomatic couriers and diplomatic bags ...". The idea of *two way communications*, in our view, is obvious. Another comment of an interpretative nature concerned the content of draft article 4 with respect to communications with special missions, permanent missions

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[15] For example, the representative of France stated:

> "... any attempt to extend the provisions beyond the diplomatic courier and the unaccompanied diplomatic bag *stricto sensu* might jeopardize the success of an undertaking which his delegation viewed with great favour." (*Ibid.*, 38th meeting, para. 21).

Several representatives expressed in more general terms their agreement as to the scope and structure of the draft articles as submitted by the Special Rapporteur.

[16] Document A/CN.4/359 and Add.1 (see footnote 1 above), paras. 16-18, setting out the main reasons for maintaining the scope of the draft articles as formulated in revised draft article 1.

[17] Statement by the representative of the United States of America (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 52nd meeting, para. 37).

[18] Document A/CN.4/347 and Add.1 and 2 (see footnote 1 above), paras. 168-173.

[19] See "Topical summary ... " (A/CN.4/L.352), para. 192. See also the statements of the representatives of the Libyan Arab Jamahiriya (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 49th meeting, para. 55); Pakistan (*ibid.*, 51st meeting, para. 80); and Sri Lanka (*ibid.*, para. 86).

[20] See the statement of the representative of the German Democratic Republic (*ibid.*, 40th meeting, para. 72); see also "Topical summary ... " (A/CN.4/L.352), para. 190.

[21] See the statement of the representative of Spain (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 48th meeting, para. 102); see also "Topical summary ... " (A/CN.4/L.352), para. 197.

[22] See "Topical summary ... " (A/CN.4/L.352), paras. 198-202, 204, 207, 209.

[23] See the statement of the representative of Jamaica (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 40th meeting, para. 39); see also "Topical summary ... " (A/CN.4/L.352), para. 198.

to international organizations and delegations to international conferences when there were no diplomatic relations between the sending and the receiving or transit States.[24] Draft article 4 contains a formulation of the general principle of freedom of communication through diplomatic couriers and diplomatic bags, and therefore stipulates the general obligations of the receiving and the transit States to permit and protect on their territory free communications without any conditions. Nevertheless, it should be mentioned that, within part IV (Miscellaneous provisions), a specific draft article is contemplated on that matter. A comment made on paragraph 2 (*b*) of article 6 also could be qualified as one of interpretation, which may be included in the commentary. It referred to the interpretation of the term "third State"; that term was considered inappropriate since the provision concerned "other States which were parties to the instrument".[25] The term "third State", as used in paragraph 2 (*b*) of draft article 6, refers to States that are not parties to the agreement concluded between two or more States *to modify among themselves* the extent of the facilities, privileges and immunities for their diplomatic couriers and diplomatic bags. Perhaps this clarification should be included in the commentary to draft article 6.

19. Several comments were made on the commencement and the end of the functions of the diplomatic courier (draft articles 12 and 13). It was stated that the function of the diplomatic courier did not begin when he crossed the frontier of the transit or receiving State but when he started his journey within the receiving State, and that he should be protected from that moment.[26] It is obvious that, as was pointed out in the third report, the official function of the diplomatic courier is assumed at the moment of his appointment or assignment, but for the receiving or the transit State the commencement of the functions of the diplomatic courier should be considered from the moment he enters its territory. From that moment he enjoys the facilities, privileges and immunities accorded to him by these States for the performance of his official functions.[27] Perhaps it should be made clear that, while the functions of the courier begin when he is entrusted with the custody, transportation and delivery of the bag, with regard to the receiving and the transit States his functions shall be recognized from the moment he enters their territories. As to the end of the function of the diplomatic courier, it was considered that further clarification was necessary in respect of draft article 13, paragraphs (*a*) and (*b*). With reference to paragraph (*a*), on the end of the function of the courier upon completion of his task, it was stated that, even though the courier had delivered the diplomatic bag, his status should not abruptly change to that of a mere alien in the receiving State and that he should continue to receive the necessary protection.[28] In this connection it should be made clear that the function of the diplomatic courier comes to an end upon delivery of the bag to its final destination or his return to the country of origin. It should further be made clear that paragraph (*b*) of article 13 refers to notification by the sending State to the receiving State that the function of the diplomatic courier has been terminated in the case of recall or dismissal, as was pointed out in the third report.[29] In normal circumstances, therefore, when the courier's mission is completed, notification to this effect is not necessary, and was not contemplated in the draft article prepared by the Special Rapporteur. Such a clarification may be included in the commentary in order to avoid any confusion.

20. It was considered by one representative that paragraph 2 of draft article 14 was out of place and superfluous, since the decision to appoint or to send another diplomatic courier in cases where the previous one was declared *persona non grata*, or not acceptable, was at the discretion of the sending State. It was argued that, as it stood, the draft article might be interpreted as imposing an obligation on the sending State to replace a diplomatic courier who had been declared *persona non grata* or not acceptable.[30] The replacement of the diplomatic courier in this case is inevitable for the normal functioning of official communications between the States concerned. The explicit reference to this effect in draft article 14, paragraph 2, is of a consequential nature. It is also an indication that the diplomatic courier can perform his functions in the territory of the receiving State only with the consent of that State.

21. There were some comments relating to the status of the diplomatic bag, particularly with respect to its content and preventive measures against possible abuses.[31] They can be dealt with further in this report in connection with the relevant draft articles to be submitted for consideration.

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[24] See the statement of the representative of Israel (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 47th meeting, para. 19); see also "Topical summary ... " (A/CN.4/L.352), para. 201.

[25] See "Topical summary ... " (A/CN.4/L.352), para. 202.

[26] See the statements of the representatives of Spain (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 48th meeting, para. 103); and Israel (*ibid.*, 47th meeting, para. 19); see also "Topical summary ... " (A/CN.4/L.352), para. 207.

[27] Document A/CN.4/359 and Add.1 (see footnote 1 above), para. 112.

[28] See the statement of the representative of Chile (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 44th meeting, para. 92); see also "Topical summary ... " (A/CN.4/L.352), para. 208.

[29] Document A/CN.4/359 and Add.1 (see footnote 1 above), para. 122.

[30] See "Topical summary ... " (A/CN.4/L.352), para. 209.

[31] See the statements of the representatives of India (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 46th meeting, para. 92); and Zaire (*ibid.*, 51st meeting, para. 29).

II. Draft articles on the facilities, privileges and immunities accorded to the diplomatic courier and the diplomatic courier *ad hoc*

22. The nature and scope of the facilities, privileges and immunities accorded to the diplomatic courier for the performance of his functions constitute the core of his legal status. They have always been considered as the essential legal means for the protection of freedom of communication between the sending State and its official missions abroad. The significance of this problem has to be considered also in close connection with the facilities, privileges and immunities which the diplomatic bag should enjoy as the main instrument of official communications. For it is obvious that the protection of the person of the diplomatic courier is indeed a prerequisite for the inviolability and safety of the diplomatic bag entrusted to him.

23. Since the initial stages of the drafting of the 1961 Vienna Convention until the most recent treaty practice of States, this matter has always been considered as the central question relating to the whole legal framework of diplomatic intercourse in general, and the status of any kind of official courier in particular. It was evidently assumed by the drafters of the four codification conventions that the courier, whatever kind of courier he might be, should be protected by the receiving and the transit States and that he should enjoy certain rights in the performance of his functions. This principle has been further attested in the consular and other agreements concluded by a large number of States. Taken as a whole, the scope of this principle seems to comprise the following implications:

First, the States concerned should allow the entrance and free movement of the diplomatic courier in their territories and his communications with the sending State and its missions, when necessary, and should offer him other facilities required for his function.

Secondly, the States concerned should treat the courier with due respect and should take all appropriate measures to protect him and the diplomatic bag entrusted to him and prevent any infringement of his person, freedom and official function.

Thirdly, the courier should enjoy certain immunities and exemptions accorded to him in the performance of his functions.

Fourthly, the facilities, privileges and immunities accorded to the diplomatic courier should be the same as those of consular and the other official couriers.

24. The draft articles on the status of the diplomatic courier submitted in the present report follow from these basic considerations. Accordingly, this part of the report consists of the following main sections:

1. *Facilities*, including general facilities, entry into the territory of the receiving or the transit State, freedom of movement and communication and facilities for temporary accommodation of the diplomatic courier.

2. *Privileges and immunities*, including inviolability of the courier and of his temporary accommodation and means of transport, immunity from jurisdiction and various exemptions accorded to him in the performance of his functions.

3. *Duration of facilities*, privileges and immunities, as well as the question of waiver of immunity.

25. The examination of the facilities, privileges and immunities should be carried out in accordance with the already established concept of a comprehensive and uniform treatment of all kinds of couriers and couriers *ad hoc*. Of course, in the case of couriers *ad hoc*, certain specific characteristics of the status of this kind of diplomatic courier should be taken into consideration, as indicated in the second report.[32]

A. Facilities accorded to the diplomatic courier

1. General facilities

26. The diplomatic courier, as an official of the sending State, while exercising his function in the territory of the receiving or the transit State, may need some assistance in connection with his journey. The facilities that he may need include various forms of help or co-operation offered by the authorities of the receiving or the transit State in order to enable him to perform his duties expeditiously and without undue difficulties. Some of these facilities could be conceived well in advance due to their essential and repetitive character, while others might be very circumstantial, unpredictable or peculiar in nature, so that their explicit formulation in a draft article is very difficult. Moreover, it would not be advisable to introduce any exhaustive list of facilities rendered to the courier.

27. This approach, presenting a general provision on facilities along with separate provisions on certain facilities, was followed by the four codification conventions. Article 25 of the 1961 Vienna Convention refers to the obligation of the receiving State to "accord full facilities for the performance of the functions of the mission". Article 28 of the 1963 Vienna Convention is modelled upon this provision and uses the same expression. So is article 22 of the Convention on Special Missions, which refers to "the facilities required", and articles 20 and 51 of the 1975 Vienna Convention, which use the expression "all necessary facilities". The main requirement with respect to the nature and scope of the general facilities is their close dependence upon the need for the proper performance of the functions of the courier. The facilities could be granted by the central or the local authorities, as the case may be. They may be of

[32] Document A/CN.4/347 and Add.1 and 2 (see footnote 1 above), paras. 111-115

a technical or administrative nature, relating to admission or entry into the territory of the receiving or the transit State, or help in procuring transportation or other similar facilities connected with the carrying of the diplomatic bag and the securing of its safety.

28. Reference to the general facilities offered to the diplomatic courier may be found in the *travaux préparatoires* of the codification conventions which resulted in the above-mentioned articles. In this connection, it should be recalled that draft article 16, paragraph 1, submitted to the Commission at its ninth session, in 1957, by the Special Rapporteur on the topic of diplomatic intercourse and immunities, stated that:

> 1. The receiving State shall accord all necessary facilities for the performance of the work of the mission. In particular, it shall permit and protect communications by whatever means, including messengers provided with passports *ad hoc* and written messages in code or cipher, between the mission and the ministry of foreign affairs of the sending State or its consulates and nationals in the territory of the receiving State.[33]

29. No other draft article contains specific provisions on the general facilities to be accorded to the diplomatic courier in the performance of his functions, and there have therefore been no other discussions on this matter. In the *travaux préparatoires* of the other codification conventions, there were no difficulties in adopting provisions on general facilities identical with or similar in their wording to article 25 of the 1961 Vienna Convention.

30. In State practice, as evidenced by national legislation or international agreements, attention is as a rule focused on certain specific facilities. In most instances the granting of general facilities is presumed, although there are some examples of their explicit mention.[34] The consular conventions reviewed by the Special Rapporteur do not specifically address themselves to this matter.

31. Taking into consideration the need for a provision on general facilities to be accorded to the diplomatic courier for practical reasons, and the fact that there are no such provisions in existing treaties, the Special Rapporteur submits the following draft article for examination and approval:

Article 15. General facilities

The receiving State and the transit State shall accord to the diplomatic courier the facilities required for the performance of this official functions.

2. Entry into the territories of the receiving and the transit States and freedom of movement and communication of the diplomatic courier

32. Admission of the diplomatic courier to the territory of the receiving State or crossing of the territory of the transit State is an indispensable condition for him to perform his functions. The facilities for entry or transit rendered to the courier by the receiving or the transit State constitute an essential prerequisite for the fulfilment of the task with which the courier is entrusted: transportation and delivery of the diplomatic bag. Therefore the obligation of States to permit the entry into their territories of diplomatic couriers has been well established in international law and State practice as an essential element of the principle of freedom of communication for official purposes effected through diplomatic couriers and diplomatic bags. It is obvious that, if a diplomatic courier is refused entry into the territory of the receiving State, then he is prevented from performing his function.

33. The facilities for entry into the territory of the receiving or the transit State rendered by those States to the diplomatic courier depend very much upon the régime established by them for admission across their frontiers of foreigners in general, and members of the foreign diplomatic and other missions and official delegations in particular. The main purpose of those facilities is to ensure unimpeded and expeditious passage through the immigration and other checking offices at the frontier. Where the régime for admission requires entry or transit visas for all foreign visitors or for nationals of some countries, such visas should be granted to the diplomatic courier by the competent authorities of the receiving or the transit State as quickly as possible, and ultimately with reduced formalities. There has been abundant State practice established through national regulations and international agreements or simplified procedures for the issuance of special visas to diplomatic couriers valid for multiple journeys and for long periods of time.[35]

34. Freedom of movement and travel within the territory of the receiving or the transit State is another essential condition for the proper performance of the functions of the diplomatic courier. It also constitutes an important element of the general principle of freedom of diplomatic communication. Any impediment to the exercise of free movement and travel inevitably leads to retardation of the delivery of diplomatic correspondence and thus adversely affects official communications. In an article on personal im-

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[33] *Yearbook...1957*, vol. I, p. 74, 398th meeting, para. 27.

[34] See e.g. the Regulations concerning diplomatic and consular missions of foreign States in the territory of the USSR (reproduced in *Yearbook ... 1982*, vol. II (Part One), p.241, document A/CN.4/356 and Add.1-3), article 9 of which provides:

"...

"The appropriate organs of the USSR and the Union republics shall afford every assistance to diplomatic couriers in order to ensure their unimpeded passage to the destination and place of safekeeping of the diplomatic bag conveyed by them.

"..."

[35] Among the many examples, mention may be made of the practice of the Indonesian Government to grant a "multiple entry visa" valid for six months, to diplomatic couriers (see p. 59 above, document A/CN.4/372 and Add.1 and 2). It may also be pointed out that the 1975 Vienna Convention contains a special provision (art. 79) on entry into the territory of the host State of members of permanent missions and delegations as well as of members of their families forming part of their respective households. The same article (art. 79, para. 2) stipulates that visas, when required, shall be granted as promptly as possible to any of the aforementioned persons.

munities of diplomatic agents, Lyons writes, in respect of the freedom of movement of the diplomatic courier:

> ... the courier must enjoy a degree of freedom of movement similar to that of the ambassador himself. The privilege is in fact that of the ambassador, and it attaches to his messenger because it is necessary for the interest or convenience of the ambassador that his messages pass freely and without delay.[36]

35. The facilities granted by the receiving or the transit State to the diplomatic courier in order to assist him in his journey through their respective territories may be of an administrative or of a purely technical character. The authorities of the receiving or the transit State have the obligation to render the necessary aid to the diplomatic courier to overcome possible difficulties and obstacles that could be caused by routine police, customs or other inspections or control during his travel. It is also assumed that the courier should rely on the help and co-operation of the authorities of the receiving or the transit State, when requested by him, to obtain appropriate means of transportation. Normally, the diplomatic courier has to make all the necessary travel arrangements for his journey in the exercise of his tasks. He may however be compelled to address a request for assistance to the authorities of the receiving State in special circumstances, if he has to face obstacles that might delay his journey and that could be overcome with the help or co-operation of the local authorities.

36. Freedom of movement and travel entails the right of the diplomatic courier to use all available means of transportation, and access to any appropriate itinerary on the territory of the receiving or the transit State. However, with respect to access to some parts of the territory of those States, certain limitations could be established. Such restrictions on freedom of movement and travel have been generally recognized by international law and State practice with regard to foreign nationals, including members of diplomatic and other missions. Thus, article 26 of the 1961 Vienna Convention states:

> Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State shall ensure to all members of the mission freedom of movement and travel in its territory.

Similar provisions on freedom of movement and travel are contained in article 34 of the 1963 Vienna Convention, article 27 of the Convention on Special Missions and article 26 of the 1975 Vienna Convention.

37. Restrictions under national laws and regulations are usually established on a reciprocal basis between the States concerned. Such rules and regulations regarding zones to which access is prohibited or regulated for reasons of national security should apply to diplomatic couriers as well. Moreover, having in mind the fact that the freedom of movement and travel of the diplomatic courier is subordinated to his function of carrying the diplomatic bag, it should be assumed that he has to follow the most appropriate itinerary, which usually should be the most convenient journey for the safe, speedy and economical delivery of the bag to its destination.

38. The facilities rendered by the receiving or the transit State to the diplomatic courier should also comprise an obligation to assist him, when necessary, to communicate with the authorities of the sending State or its missions situated on his route or referred to in his waybill. This right or communication of the diplomatic courier derives from the rule of freedom of communication of the sending State through diplomatic couriers and diplomatic bags provided in the four codification conventions and generally recognized in international law and State practice. The commentary to article 35 (Freedom of communication) of the draft articles on consular intercourse and immunities, adopted by the Commission at its thirteenth session, in 1961, contains the following relevant points:

> (3) As regards the means of communication, the article specifies that the consulate may employ all appropriate means, including diplomatic or consular couriers, the diplomatic or consular bag, and messages in code or cipher. In drafting this article, the Commission based itself on existing practice, which is as a rule to make use of the diplomatic courier service, i.e. of the couriers dispatched by the Ministry for Foreign Affairs of the sending State or by a diplomatic mission of the latter. Such diplomatic couriers maintain the consulate's communications with the diplomatic mission of the sending State, or with an intermediate post acting as a collecting and distributing centre for diplomatic mail; with the authorities of the sending State; or even with the sending State's diplomatic missions and consulates in third States. In all such cases, the rules governing the dispatch of diplomatic couriers, and defining their legal status, are applicable. The consular bag may either be part of the diplomatic bag or may be carried as a separate bag shown on the diplomatic courier's waybill. This last procedure is preferred where the consular bag has to be transmitted to a consulate *en route*.[37]

39. The scope and content of the facilities that should be rendered for the exercise of freedom of communication by the diplomatic courier may differ from case to case. However, there are some essential features that have to be taken into consideration. First of all, freedom of communication should be conceived in direct connection with the functions of the courier. This might be the case when the diplomatic courier *en route*, or at a certain point during a stopover, might need to communicate directly with the competent authorities of the sending State or its missions abroad, in order to seek instructions, to inform them about delays or deviation from the original waybill, or to convey any other information in connection with the performance of his functions. Secondly, the freedom of communication granted to the diplomatic courier should entail an obligation of the receiving or the transit State to facilitate, when necessary, the use by the courier of all appropriate public means of communication, including telephone, telegraph, telex and other services available. It is obvious that the aid of the receiving or the transit State should not be requested in normal circumstances, when the means of communication are generally accessible.

[36] A. B. Lyons, "Personal immunities of diplomatic agents", *The British Year Book of International Law, 1954* (London), vol. 31, p. 334, cited in M. Whiteman, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1970), vol. 7, p. 179.

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

The request for assistance has therefore to be justified on the grounds that difficulties or obstacles exist which the courier cannot overcome without the direct help or co-operation of the authorities of the receiving or the transit State. It is obvious that such exceptional instances would in practice be limited, but this fact alone does not make the need for assistance unwarranted.

40. Freedom of communication in its broader sense has been provided for, as a general rule, in the bilateral consular conventions concluded prior to and after the entry into force of the codification conventions adopted under the auspices of the United Nations. It is to be noted that in recent treaty practice the provision on freedom of communication has acquired a prominent place. A consular post shall have the right to communicate with its government or with the diplomatic mission of the sending State and with other consulates of the sending State. For example, article 16, paragraph 1, of the Consular Convention between Czechoslovakia and Cyprus (1976) reads as follows:

> 1. A consulate shall be entitled to exchange communications with its Government, with the diplomatic missions of the sending State and with other consulates of the sending State wherever they may be. ...

41. Several bilateral agreements explicitly state that a receiving State shall permit and protect freedom of communication for all official purposes.[38] One agreement indicates that the receiving State shall permit and protect freedom of communication on the part of the consular post for all official purposes in accordance with accepted international practice,[39] while another simply states that the receiving State recognizes the right of a consulate to communicate and renders assistance to this effect.[40] Most of the agreements, with few exceptions,[41] stipulate that, when ordinary means of communication are used, the same rates shall apply to a consulate as to the diplomatic mission.

42. Within the scope of the practical facilities that may be accorded by the receiving or the transit State to the diplomatic courier for the performance of his functions on its territory, reference may be made to the assistance rendered to him in obtaining temporary accommodation when requested under certain circumstances. Normally, the diplomatic courier has to resolve all the practical problems that may arise during his journey. However, in some special situations the diplomatic courier may not be able to find suitable temporary accommodation for himself and for the protection of the diplomatic bag, in which case he would be compelled either to change his original itinerary or to make a stopover in a certain place. In that exceptional case, the receiving State or the transit State may be requested to assist him in obtaining temporary accommodation. It is of paramount importance that the diplomatic courier and the diplomatic bag carried by him be housed in a safe and secure place, protected against any intrusion or access by unauthorized persons who might endanger the safety and integrity of the diplomatic bag. Hence a provision providing for facilities to be rendered by the receiving or the transit State for the proper performance of the functions of the diplomatic courier may be justified.

43. In the light of the above considerations regarding the various facilities that should be accorded to the diplomatic courier, the Special Rapporteur submits the following draft articles for examination and approval:

Article 16. Entry into the territory of the receiving State and the transit State

1. The receiving State and the transit State shall allow the diplomatic courier to enter their territory in the performance of his official functions.

2. Entry or transit visas, if required, shall be granted by the receiving or the transit State to the diplomatic courier as quickly as possible.

Article 17. Freedom of movement

Subject to the laws and regulations concerning zones where access is prohibited or regulated for reasons of national security, the receiving State and the transit State shall ensure freedom of movement in their respective territories to the diplomatic courier in the performance of his official functions or when returning to the sending State.

Article 18. Freedom of communication

The receiving and the transit State shall facilitate, when necessary, the communications of the diplomatic courier by all appropriate means with the sending State and its missions, as referred to in article 1, situated in the territory of the receiving State or in that of the transit State, as applicable.

Article 19. Temporary accommodation

The receiving and the transit State shall, when requested, assist the diplomatic courier in obtaining temporary accommodation in connection with the performance of his official functions.

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[38] See e.g. the consular conventions concluded between the following States: Belgium and Turkey (1972), France and Bulgaria (1968), Greece and Hungary (1977), Greece and Poland (1977), Poland and Cuba (1972), Sweden and United Kingdom (1952), USSR and German Democratic Republic (1957), USSR and India (1973), USSR and Italy (1967), USSR and Mozambique (1977), USSR and Norway (1971), USSR and Syrian Arab Republic (1976), United Kingdom and Czechoslovakia (1975), United Kingdom and France (1951), United States of America and China (1980), United States of America and Ireland (1950), United States of America and Republic of Korea (1963); and the Exchange of Notes between the Government of Australia and the Government of the People's Republic of China concerning the establishment of consulates-general (1978).

[39] Exchange of Notes between the Government of Australia and the Government of the People's Republic of China (1978).

[40] See the Consular Convention between the USSR and Cape Verde (1976).

[41] See the consular conventions between Greece and Hungary (1977), Greece and Poland (1977), USSR and Syrian Arab Republic (1976), and the Exchange of Notes between the Government of Australia and the Government of the People's Republic of China (1978).

B. Privileges and immunities accorded to the diplomatic courier

1. Inviolability of the diplomatic courier

44. The inviolability of the diplomatic courier in its broader sense includes his personal inviolability, as well as the inviolability of his temporary accommodation or the individual means of transport used by him in the performance of his functions. Since these main kinds of inviolability have specific features and legal implications, the Special Rapporteur proposes to examine them individually and to submit separate draft articles. However, it should be emphasized at the outset that the common denominator that unites them is the protection of the person of the courier and the underlying concept of their functional nature and close connection with the inviolability of diplomatic correspondence.

45. Inviolability thus conceived should be considered as a focal point within the whole framework of rules governing the legal status of the diplomatic courier. Consequently, the inviolability of the diplomatic courier has to be seen in its relationship with all the facilites, privileges and immunities granted to the courier for the discharge of his official functions. Inviolability, therefore, which constitutes a system of rules, has to be placed in its proper relationship with other rules, such as immunity from jurisdiction and the exemptions accorded to the courier from personal examination, control and inspection, as well as from personal services and social security.

46. Taking into account these general considerations on the specific features of the problem of inviolability and its close connection with the other facilities, privileges and immunities accorded to the diplomatic courier, it is suggested that the following main aspects of inviolability be examined, namely:

(*a*) Personal inviolability of the diplomatic courier;

(*b*) Inviolability of the temporary accommodation and the individual means of transport used by the courier in the performance of his official functions.

(a) *Personal inviolability*

47. The rules on the personal inviolability of the diplomatic courier have been greatly influenced by the principle of the inviolability of the diplomatic agent generally recognized in international law and State practice. In accordance with this principle, the diplomatic agent enjoys personal immunity and is under the legal protection of the receiving and the transit States. The main constituent elements of the status of personal inviolability may be identified as follows:

(1) The person enjoying personal inviolability is not liable to arrest, detention or any other form of restriction on his freedom;

(2) The receiving State shall treat such a person with due respect and take all appropriate measures to prevent any attack on his person, freedom or dignity;

(3) Persons who have committed such attacks shall be prosecuted and punished by the receiving or the transit State.

48. The principle of personal inviolability was applied with regard to diplomatic couriers prior of the adoption of the 1961 Vienna Convention and the other conventions codifying diplomatic law adopted under the auspices of the United Nations. Undoubtedly, the entry into force of the 1961 Vienna Convention and the 1963 Vienna Convention have provided the legal grounds for a comprehensive and precise formulation of that principle, in all its aspects, including its relevance to the status of diplomatic and consular couriers. In this connection, a brief survey of the history of the provisions of the 1961 Vienna Convention relating to the personal inviolability of the diplomatic courier might be appropriate for the purpose of the present study.[42]

49. The initial draft article on the personal inviolability of the diplomatic courier was draft article 16, prepared in 1955 by the Special Rapporteur on the question of diplomatic intercourse and immunities. That text provided that the "messenger carrying the dispatches" should be protected by the receiving State as well as by third States.[43] The revised draft article 16 was considered by the Commission at its ninth session, in 1957. Upon the proposal of one member of the Commission, a provisional text was adopted at the same session, reading as follows:

> The diplomatic courier shall be protected by the receiving State. He shall enjoy personal inviolability and shall not be liable to arrest or detention, whether administrative or judicial.[44]

Article 25, paragraph 5, of the final draft submitted by the Commission at its tenth session, in 1958, remained virtually unchanged, expect that the words "shall not be liable to arrest or detention, whether administrative or judicial" were replaced by the simplified expression "shall not be liable to any form of arrest or detention".[45] Article 39, paragraph 3, of the text also provided that third States "shall accord to diplomatic couriers in transit the same inviolability and protection as the receiving State is bound to accord".[46]

50. The United Nations Conference on Diplomatic Intercourse and Immunities of 1961 did not add anything new to the Commission's final draft as far as the basic principle of the courier's personal inviolability was concerned. The United States of America proposed an amendment to the Commission's draft article 25 replacing the words "and shall not be liable to any form of arrest or detention" by the words "to the same extent as a member of the administrative and technical staff of the

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[42] See also the second report of the Special Rapporteur, document A/CN.4/347 and Add.1 and 2 (see footnote 1 above), paras. 63-70.

[43] *Yearbook ... 1955*, vol. II, p. 11, document A/CN.4/91.

[44] Art. 21, para. 4; see *Yearbook ... 1957*, vol. II, p. 138, document A/3623, chap. II, sect. II.

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

[46] *Ibid.*, p. 103.

mission".[47] This amendment, however, was not adopted by the Committee of the Conference. Switzerland and France introduced a joint amendment, which was adopted, to the effect that the diplomatic courier should be protected by the receiving State only "in the performance of his functions".[48] Thus article 27, paragraph 5, of the Vienna Convention on Diplomatic Relations, as adopted by the Conference in 1961, reads as follows:

> The diplomatic courier ... shall be protected by the receiving State in the performance of his functions. He shall enjoy personal inviolabilty and shall not be liable to any form of arrest or detention.

51. The obligation of transit States to accord to diplomatic couriers the same inviolability and protection as the receiving State is bound to accord was provided for in article 40, paragraph 3, of the 1961 Vienna Convention Each of the other three conventions incorporated similar language providing for obligations for the receiving and the transit States, namely: article 35, paragraph 5, and article 54, paragraph 3, of the 1963 Vienna Convention with regard to the consular courier; article 28, paragraph 6, and article 42, paragraph 3, of the Convention on Special Missions concerning the courier of the special mission; and article 27, paragraph 5, of the 1975 Vienna Convention with respect to the courier of the mission, and article 57, paragraph 6, of the same Convention with respect to the courier of the delegation.[49]

52. It was evidently assumed by the drafters of these conventions that the courier, of whatever kind he might be, should be protected by the receiving State as well as by the third State in transit and that he should enjoy personal inviolability. Accordingly, the courier shall not be liable to arrest, detention or any other form of restriction on his person and shall be treated by the receiving or the transit State with due respect by reason of his official functions.

53. Thus the personal inviolability of the diplomatic courier in its scope and legal implications comes very close to that of a diplomatic agent, owing primarily to the function of the courier concerning the custody, transportation and delivery of the diplomatic bag and the legal protection of the confidential character of official correspondence. In this connection it may be recalled that, at the United Nations Conference on Consular Relations, in 1963, the representative of the United Kingdom opposed the Japanese proposal to the effect that a consular courier should be treated simply as a consular official. That proposal provided that the courier should be accorded the limited inviolability and immunities accorded to a consular official. The United Kingdom representative, opposing the Japanese proposal, stated that "it was essential for courier to receive complete inviolability and not to have the limited inviolability given to consular officials".[50] This concept of complete personal inviolability of the consular courier was agreed by the Conference and adhered to by the other codification conventions adopted in 1969 and 1975.

54. State practice in this matter, as evidenced by national legislation and international agreements, has set out as a general rule the personal inviolability of the diplomatic courier. All consular conventions provide for the personal inviolability of consular couriers. Most of them grant the same rights, privileges and immunities to consular couriers as those granted to diplomatic couriers, which include, first of all, personal inviolability.

55. Many pertinent examples of equality of treatment of diplomatic and consular couriers in general, and of their personal inviolability in particular, are reflected in bilateral agreements. For example, the Consular Convention between the USSR and the United Kingdom (1965) provides in article 16, paragraph 3, that:

> Persons charged with the conveyance of consular pouches, bags and other containers shall be accorded the same rights, privileges and immunities as are accorded by the receiving State to the diplomatic couriers of the sending State.[51]

Similar or even identical formulae are used in several consular conventions. Some of them state that "consular couriers of the sending State shall enjoy in the territory of the receiving State the same rights, privileges and immunities as diplomatic couriers".[52] Others state the principle thus: "Persons conveying consular bags—consular couriers—shall be accorded the same rights, privileges and immunities as diplomatic couriers of the sending State."[53]

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[47] *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. II (United Nations publication, Sales No. 62.X.1), p. 23, document A/CONF.20/C.1/L.154, para. 6.

[48] *Ibid.*, p. 39, document A/CONF.20/C.1/L.286, para. 2. For the discussion in the Conference on the two proposed amendments, *ibid.* vol. I (United Nations publication, Sales No. 61.X.2), p. 181, *Committee of the Whole*, 29th meeting, paras. 82 and 85-88.

[49] See the Special Rapporteur's second report, document A/CN.4/347 and Add.1 and 2 (see footnote 1 above), paras. 74-104.

[50] *Official Records of the United Nations Conference on Consular Relations*, vol. 1 (United Nations publication, Sales No. 63.X.2), p. 320, *Second Committee*, 13th meeting, para. 15.

[51] See also the consular conventions concluded between the following States: Belgium and Hungary (1976), art. 15, para. 5; Czechoslovakia and Cyprus (1976), art. 16, para. 4; Czechoslovakia and Yugoslavia (1963), art. 15, para. 2; Hungary and Czechoslovakia (1973), art. 15, para. 2; Mongolia and Czechoslovakia (1976), art. 14, para. 3; USSR and Angola (1976), art. 13, para. 3; USSR and Benin (1976), art. 14, para. 3; USSR and Cape Verde (1976), art. 13, para. 3; USSR and Cyprus (1978), art. 13, para. 3; USSR and Guinea (1976), art. 14, para. 3; USSR and Guinea-Bissau (1976), art. 13, para. 3; USSR and Japan (1966), art. 17, para. 3; USSR and Mozambique (1977), art. 13, para. 3; USSR and Syrian Arab Republic (1976), art. 14, para. 3; United Kingdom and Bulgaria (1968), art. 19, para. 4.

[52] See the consular conventions concluded between the following States: Hungary and United States of America (1972), art. 14, para. 4; Poland and Mongolia (1973), art. 17, para. 3; USSR and Cuba (1972), art. 13; USSR and Czecoslovakia (1972), art. 13; USSR and Hungary (1971), art. 14, para. 3; USSR and Mongolia (1972), art. 13, para. 3; USSR and Somalia (1971), art. 14, para. 3.

[53] See the consular conventions concluded between the following States: Greece and Bulgaria (1973), art. 13, para. 3; Hungary and German Democratic Republic (1972), art. 14, para. 3; Mongolia and German Democratic Republic (1973), art. 14, para. 3; USSR and

56. While a presumption may be made that these provisions also apply to diplomatic or consular couriers *ad hoc*, the Consular Convention between the United Kingdom and the German Democratic Republic (1976) specifically provides, in article 17, paragraph 4, that the rights, privileges and immunities accorded to diplomatic and consular couriers of the sending State shall apply also to a consular courier *ad hoc*, whose rights, privileges and immunities as such shall, however, cease to apply upon the handing over of the consular bag to the recipient.[54] The Rules concerning passage across the State frontier of the USSR of the diplomatic bag of the USSR and of foreign States and of the personal belongings of diplomatic couriers also provide that, when the diplomatic bag is entrusted to a temporary (*ad hoc*) diplomatic courier,

> the provisions of these Rules shall apply, except that his entitlement to the privileges and immunities enjoyed by diplomatic couriers in the execution of their duties shall cease as soon as the diplomatic bag entrusted to him has been delivered to its destination.[55]

57. Most bilateral consular conventions, when referring to the personal inviolability of the diplomatic or consular courier, explicitly stipulate that couriers are not liable to any form of arrest or detention and that their personal liberty may not be restricted. Mention may be made by way of illustration of several conventions which, although using various expressions, indicate the content of the term "personal inviolability" of the courier.

58. The Convention between Romania and Spain (1967) states simply, in article VII, paragraph 4, that, "in the performance of their functions, the couriers of the consular and trade mission shall enjoy inviolability, shall not be liable to any form of arrest or detention and shall be protected by the receiving State".[56] The Consular Convention between Romania and the United States of America (1972) also states, in article 21, paragraph 5, that: "In the exercise of his functions, the consular courier is protected by the receiving State. He enjoys personal inviolability."[57] The Consular Convention between Poland and Cuba (1972) uses the term "deprivation of freedom" instead of "arrest". It provides in article 16, paragraph 5, that, "in the performance of his functions, the courier shall be protected by the receiving State, shall enjoy personal inviolability and shall not be subject to deprivation of freedom". The Consular Convention between the USSR and Mexico (1978) employs the following formula in article 14, paragraph 5:

> The receiving State shall grant consular couriers the same protection as that afforded to diplomatic couriers. They shall enjoy personal inviolability and shall not be subject to any form of detention or arrest.

59. National legislation, although not as abundant as treaty practice on this subject, is nevertheless very clear about recognition of the status of personal inviolability of the diplomatic courier. Some States simply apply the rule of inviolability on the basis of their treaty obligations under the multilateral or bilateral agreements to which they are parties, or recognize it as a part of general international law, while others have embodied this rule in their national legislation and regulations. The latter case may be illustrated by some typical examples of specific provisions contained in certain laws dealing with the régime of foreign diplomatic agents, including diplomatic couriers. Thus the Regulations concerning the diplomatic and consular missions of foreign States in the territory of the Soviet Union provide:

> The diplomatic courier shall enjoy personal inviolability in the performance of his duties, he shall not be liable to arrest or detention.[58]

Similarly, the Foreign Service Regulations of the United States of America provide in respect of immunities accorded to bearers of dispatches:

> Consular couriers and bearers of dispatches employed by a diplomatic representative in the service of his Government are privileged persons, so far as is necessary for their particular service, whether in the State to which the representative is accredited or in the territory of a third State with which the Government is at peace.[59]

60. The Rules issued by the Government of the Federal Republic of Germany add a further dimension to the question of personal inviolability of couriers to include the time when they are in transit. The relevant provision reads:

> Couriers and bags also enjoy inviolability and protection in transit from the sending State.[60]

61. According to a book by G. Perrenoud published in 1949, the Swiss Political Department had classified the personnel of diplomatic missions accredited to the Federal Government into four categories. Diplomatic couriers belong to the fourth category, which does not enjoy diplomatic privileges and immunities in their entirety. However, in 1931 the Political Department stated:

> We have arrived at the conclusion that, although the courier does not form a part of the diplomatic personnel in the strict sense of the

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Bulgaria (1971), art. 14, para. 3; USSR and Italy (1967), art. 28, para. 3; United Kingdom and Czechoslovakia (1975), art. 16, para. 3; United Kingdom and Mongolia (1975), art. 16, para. 3; United States of America and China (1980), art. 12, para. 4.

[54] See also the consular conventions between Belgium and Czechoslovakia (1976), art. 18, paras. 5 and 6; and between France and Algeria (1974), art. 13, paras. 5 and 6.

[55] Para. 5 of the Rules, reproduced in *Yearbook ... 1982*, vol. II (Part One), p. 242, document A/CN.4/356 and Add.1-3.

[56] See also the consular conventions between France and Romania (1968), art. 25, para. 5; and between the USSR and India (1973), art. 14, para. 5.

[57] See also in this connection the Consular Convention between Hungary and the Democratic People's Republic of Korea (1970), art. 19, para. 3.

[58] Art. 9 of the Regulations (see footnote 34 above).

[59] *Foreign Service Regulations of the United States of America* (Washington, D.C., U.S. Government Printing Office, January 1941), chap. III.1, footnote 5. See also G. H. Hackworth, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1942), vol. IV, p. 621.

[60] Para. 5 of the Rules concerning the Courier Service (text reproduced in *Yearbook ... 1982*, vol. II (Part One), p. 237, document A/CN.4/356 and Add.1-3).

term, he must, in the interests above all of the free performance of his mission, be considered inviolable in the exercise of his functions.[61]

62. Case law on the question of the inviolability of the diplomatic courier provides some precedents of settlement through ordinary diplomatic channels. Most of those that are known are previous to the Vienna Conventions of 1961 and 1963. They refer to acts of detention or unjustified impediments and delays to which diplomatic couriers have been subjected.[62]

63. It may follow from the recognition of the principle of the inviolability of the diplomatic courier that the receiving and transit States are under the obligation to prosecute and punish persons who violate the diplomatic courier's person. Some precedents attest to the right of the sending State to request the prosecution and punishment of persons under the jurisdiction of the receiving or the transit State who have committed abuses against the personal inviolability of the diplomatic courier. This was the case, for example, in the incident occurring in 1943 when diplomatic couriers of the United States of America were detained by the Spanish authorities in the Spanish zone of Morocco. In a note of 4 June 1943 to the Spanish Minister for Foreign Affairs, the Ambassador of the United States requested that "measures ... be taken to punish the officials or employees responsible for the incident referred to".[63]

64. Another case occurred 50 years earlier between France and Spain, in 1893. The Spanish customs officers at Irun seized the bag and correspondence of the courier of the French Embassy at Madrid and detained him for 24 hours. Upon the strong and immediate protest of the French Government, the Spanish authorities released the courier and transferred the customs officer involved in the incident and responsible for the detention of the French courier.[64]

65. The responsibility of the receiving or the transit State may be invoked in other instances of violation of rules international customary or conventional law with respect to their obligations to protect the diplomatic courier and the diplomatic bag. The wrongful act of the State concerned which entails its international responsibility may be attributed to that State for the conduct of any State organ of any character or of persons acting on behalf of the State. The receiving or the transit State may be liable for taking measures of a preventive and enforcement nature, including prosecution and punishment, against persons under its jurisdiction who have committed acts constituting infringement of the personal inviolability of the diplomatic courier. For this purpose, it would be under the obligation to enact relevant domestic laws and regulations to that effect.

66. This obligation of the receiving or the transit State is a new element of protective measures which was not embodied in the four codification conventions adopted under the auspices of the United Nations. The appropriate measures of a preventive or punitive nature may be legislative or administrative, such as laws, regulations, instructions, orders, procedures or other action taken by the competent authorities of the receiving or the transit State for the protection of the diplomatic courier, and more particularly for the protection of his personal inviolability. It is obvious that an obligation of this kind is first of all in conformity with the general principles underlying the responsibility of the State for securing proper conditions for the normal functioning of diplomatic communications and for the wrongdoing of its organs and of persons acting on its behalf. This obligation has also to be regarded as a legal requirement and as a means of ensuring the efficient protection of the inviolability of the diplomatic courier. Thus the additional obligation for the receiving or the transit State to take all appropriate measures, including enactment and implementation of national laws and regulations for the prosecution and punishment of persons under its jurisdiction responsible for violation of an international obligation, constitutes a legal consequence of the international responsibility of the State concerned; at the same time, it has practical significance for the efficient protection of the personal inviolability of the diplomatic courier.

67. The same obligation of the receiving or transit State has to be considered also in connection with the status of the diplomatic bag, namely, with regard to abuses against the inviolability of the diplomatic bag. On the question of abuses of the status of the bag, however, there may also be liability on the part of the

[61] G. Perrenoud, *Régime des privilèges et immunités des missions diplomatiques étrangères et des organisations internationales* (Lausanne, Librairie de l'Université, F. Rouge, 1949), p. 68 (quotation from the administrative report of the Federal Council for 1931).

[62] See e.g. the protest lodged in 1943 by the United States of America with the Spanish Foreign Minister against the detention of United States diplomatic couriers by Spanish customs officials in the Spanish zone of Morocco. This incident led to an exchange of notes between the Ambassador of the United States and the Spanish Foreign Minister in June 1943. In his note of protest, the Ambassador requested "formal and firm assurances that in the future such couriers will be unmolested and will not be delayed in any way". He also requested that "measures ... be taken to punish the officials or employees responsible for the incident referred to". In his reply, the Spanish Minister maintained that the couriers had "endeavoured to cover as official materials two large brief-cases which had not been closed and sealed by the legation, nor included in the certificate covering the five pouches mentioned". At the end, the Minister assured the United States that official sacks duly sealed and included in the certification customarily delivered by the representation of the United States in Tangier had at all times been respected and would continue to be respected. See telegram No. 1251 of 2 June 1943 from United States Secretary of State, Hull, to the United States Ambassador to Madrid, Hayes (MS. Department of State, file 121.67/3579); dispatch No. 1026 of 24 June 1943 from the United States Ambassador to Madrid, Hayes, to the United States Secretary of State, Hull (*ibid.*, 3686); note No. 1014 of 4 June 1943 from the United States Ambassador to Madrid, Hayes, to the Spanish Foreign Minister, Jordana (*ibid.*, enclosure No. 1); note of 16 June 1943 from the Spanish Foreign Minister, Jordana, to the United States Ambassador to Madrid, Hayes (*ibid.*, enclosure No. 2) (texts published in *Foreign Relations of the United States, 1943*, vol. IV (Washington, D.C., U.S. Government Printing Office, 1964), pp. 726-729; cited in Whiteman, *op. cit.* (see footnote 36 above), pp. 214-216).

[63] See preceding footnote.

[64] See *Revue générale de droit international public* (Paris), vol. I (1894), p. 50.

sending State in case of violation of the rules concerning the content of the diplomatic bag by its officials. These specific problems relating to the status of the diplomatic bag and its protection will accordingly be dealt with further in this report.

68. In the light of the above considerations with respect to the personal inviolability of the diplomatic courier, the Special Rapporteur submits the following draft article for examination and approval:

Article 20. Personal inviolability

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

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

(b) *Inviolability of temporary accommodation and personal means of transport*

69. The personal inviolability of the diplomatic courier in the performance of his official functions and the inviolability of the diplomatic bag carried by him require certain safety conditions during his journey. It has been pointed out above (para. 42) that it is of paramount importance for the inviolability of the courier and the bag that the courier should be housed in a safe and secure place, and protected from any intrusion or access by unauthorized persons who might endanger the safety and integrity of the diplomatic bag.

70. This requirement of inviolability of the temporary accommodation of the diplomatic courier should be considered as a rule deriving from the official function of the diplomatic courier. It should be regarded as one of the important components of the privileges and immunities accorded to the courier only by reason of his duty to take care of the diplomatic bag and ensure its safe and speedy delivery to its destination. This functional approach in respect of the inviolability of the temporary accommodation is determined by the general concept of the functional nature of all the facilities, privileges and immunities granted to the diplomatic courier for the proper performance of his official functions.

71. There is no specific rule regarding the inviolability of the temporary accommodation of the diplomatic courier in any of the four codification conventions or in other international agreements in the field of diplomatic or consular law. However, it may be quite relevant to infer such a rule from similar provisions in those conventions relating to the status of the private residence of a diplomatic agent, and the private accommodation of members of special missions, permanent missions to international organizations or members of delegations to international conferences. Article 30 of the 1961 Vienna Convention, which is the model provision on this matter, followed by the other multilateral conventions, provides:

> 1. The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.
>
> 2. His papers, correspondence and, except as provided in paragraph 3 of article 31,[64] his property, shall likewise enjoy inviolability.

Modelled upon the above provision are article 30 of the Convention on Special Missions relating to the inviolability of the private accommodation of representatives of the sending State in the special mission and of members of its diplomatic staff, as well as articles 29 and 59 of the 1975 Vienna Convention regarding, respectively, the inviolability of "the private residence of the head of mission and of the members of the diplomatic staff of the mission" and of "the private accommodation of the head of delegation and of other delegates and members of the diplomatic staff of the delegation".

72. Having in mind the fact that the diplomatic courier is performing an official duty of practical significance for the normal functioning of the diplomatic or other missions of the sending State in the territory of the receiving or the transit State, his accommodation, although temporary, should enjoy similar protection. This would be the case whether the courier stops over at an intermediate station or arrives at the final point of his official journey. Normally, couriers are housed on the premises of the mission, in private apartments owned or used by the mission or in the private accommodation of a member of the mission. In such instances, the inviolability of the temporary accommodation of the diplomatic courier will be protected under the relevant provisions of the above-mentioned conventions or customary international law. When the temporary accommodation of the diplomatic courier happens to be in hotels, motels, guest houses, private apartments or similar common facilities for lodging visitors on temporary stay, then the special rules or the inviolability of the temporary accommodation of the diplomatic courier should apply.

73. The rule of inviolability of the temporary accommodation of the courier should comprise several essential elements. *First*, it should contain a provision stipulating that access by officials of the receiving or the transit State to the room or apartment used by the courier may be allowed only with his consent. *Secondly*, the receiving or the transit State is under the obligation to take the appropriate measures, legislative, administrative or other, to protect the diplomatic courier

[64] Paragraph 3 of article 31 deals with the applicability of measures of execution in cases of exceptions to immunity from civil and administrative jurisdiction in the case of (*a*) a real action relating to private immovable property situated in the territory of the receiving State which is not held for the official purposes of the mission; (*b*) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State; (*c*) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

and the bag entrusted to him. It should secure the inviolability of his temporary accommodation from any intrusion by unauthorized persons. Such protective measures regarding the privacy, personal security and safety of the property of guests in hotels and other housing facilities open to visitors are common to places of this kind. They are considered to be the main features of law and order in establishments accessible to the general public. However, the official function of the courier, and more particularly the protection of the diplomatic bag carried by him, would justify the taking of special measures of protection. *Thirdly*, the inviolability of the temporary accommodation of the diplomatic courier entails immunity from inspection, search and other measures of execution.

74. However, this rule could be applied with some exceptions and limitations under certain conditions. Accordingly, inspection or search of the temporary accommodation could be undertaken when there are serious grounds for believing that there are, in the room or apartment used by the courier, apart from the sealed diplomatic bag, articles whose import or export is prohibited by law or controlled by the quarantine regulations of the receiving or the transit State. In such cases, the inspection may be conducted only in the presence of the diplomatic courier and shall not affect in any way the inviolability of the diplomatic bag. A provision of this kind is aimed, on the one hand, at observing the laws and regulations of the receiving or the transit State and respecting that State's legitimate interests and, on the other hand, at protecting the inviolability of the diplomatic bag. It may be added that the application of the exceptions to the inviolability of the temporary accommodation of the diplomatic courier should not cause any unreasonable impediments or delays in the dispatch of the diplomatic bag.

75. The rules suggested in respect of the protection of the inviolability of the temporary accommodation could be applied accordingly to the inviolability of the personal means of transport used by the diplomatic courier in the discharge of his official function. Such protection accorded to the diplomatic courier, while functional in nature, may be deduced from the principle of freedom of movement and travel embodied in the relevant provisions of article 26 of the 1961 Vienna Convention, article 34 of the 1963 Vienna Convention, article 27 of the Convention on Special Missions and articles 26 and 56 of the 1975 Vienna Convention.

76. The rule of protection of the inviolability of the individual means of transport used by the diplomatic courier may be further inferred from the relevant provisions of the codification conventions regarding protection of the means of transport of the diplomatic mission, consular post, and other missions or delegations to international organizations.[66]

77. The field of application of the rule on the protection of personal means of transport is relatively limited, when applied to diplomatic couriers. Usually, couriers employ public means of transportation in their long-distance journeys. When they make use of personal motor vehicles between cities within the same country, e.g. between Geneva and Berne, New York City and Washington, Rome and Milan, Paris and Marseilles, where the sending State may have diplomatic missions and consular posts or other missions, couriers normally utilize the transport means of those missions. In such cases, the protection of that vehicle is covered by the relevant provisions of the multilateral conventions or other agreements. Thus only in instances when the courier employs his own individual means of transport in the exercise of his functions would the question arise of the application of a special rule with regard to the inviolability of the individual means of transport. The basic requirement for the application of the rule of inviolability would be the use of individual means of transport during the journey of the courier carrying diplomatic correspondence. In such a case, the individual means of transport used by the diplomatic courier in the performance of his official duty shall not be liable to inspection, search, requisition, seizure or other measures of execution. The grounds for such immunity would be the use of the means of transport for official communications of the sending State with its missions in the territory of the receiving or the transit State. Moreover, any inspection, search, requisition, seizure or other measures of execution may lead either to retardation of delivery of the diplomatic bag or to serious danger to its safety. Therefore the general rule applies to the inviolability of the individual means of transport used by the diplomatic courier only in the performance of his official functions, and not when on private trips.

78. However, as in the rule on the inviolability of the temporary accommodation used by the courier, there are some exceptions that should be applied under certain conditions. The conditions set out for the inspection conducted by the competent authorities of the receiving or the transit State would be the same as those required for the inspection of the temporary accommodation, namely, (*a*) serious grounds for presuming that the individual vehicle used by the courier carries not only the diplomatic bag and the personal baggage of the courier, but also articles whose import and export is prohibited or controlled by the laws and quarantine regulations of the receiving or the transit State; (*b*) the inspection or other measures of execution should be conducted in the presence of the diplomatic courier and, when possible, also in the presence of a representative of the diplomatic mission or consular post of the sending State in the territory of the receiving or the transit State; (*c*) such inspection and measures of execution should not affect the inviolability of the diplomatic courier and the diplomatic bag entrusted to him, nor should they cause unreasonable delays and impediments to the safe and timely delivery of the diplomatic bag.

[66] See the 1961 Vienna Convention, art. 22, para. 3; the 1963 Vienna Convention, art. 31, para. 4; the Convention on Special Missions, art. 25, para. 3; the 1975 Vienna Convention, art. 23, para. 3.

79. Provisions on the inviolability of the temporay accommodation and of the individual means of transport used by the diplomatic courier would have practical significance as privileges and immunities of a functional character. They may contribute to the further elaboration of the legal framework of rules governing the status of the diplomatic courier.

80. Taking into consideration the comments and suggestions on the inviolability of the temporary accommodation and individual means of transport used by the diplomatic courier in the performance of his official functions, the Special Rapporteur submits the following draft articles for examination and provisional approval:

Article 21. Inviolability of temporary accommodation

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

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

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

Article 22. Inviolability of the means of transport

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

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

2. Immunity from jurisdiction

81. It may be pointed out, at the outset, that the Commission was briefly seized of the general question of the jurisdictional immunities of States under diplomatic law, and in particular under the four codification conventions, in connection with the submission of the second report of Mr. Sucharitkul, Special Rapporteur on the topic "Jurisdictional immunities of States and their property"[67] In that report, the Special Rapporteur submitted a draft article 4 (Jurisdictional immunities not within the scope of the present articles),[68] in connection with which he pointed out that, in State practice, jurisdictional immunities recognized and accorded to diplomatic missions, consular posts and other official missions and delegations, as well as to visiting forces were "regulated by international or bilateral conventions or prevailing rules of customary international law", and that for that reason jurisdictional immunities under diplomatic law "should be excluded from the scope of the present articles" [the articles on the jurisdictional immunities of States and their property].[69] He emphasized, however, that the immunities accorded to diplomatic and other missions, their members, various categories of staff and premises, including archives, means of transport and communication, which were inviolable, formed the subject of separate conventions treated earlier,[70] i.e. the four codification conventions.

82. The report of the Commission on the work of its thirty-second session, in 1980, noted:

> On the suggestion of the Special Rapporteur, the Commission agreed to defer consideration, *inter alia*, of those articles [articles 4 and 5] until it was in a position to examine the remainder of the draft articles to be proposed on the topic.[71]

83. It might be useful to refer to the work of the Commission on the much wider topic of the jurisdictional immunities of States, for two reasons: first, in order to make use as much as possible of any comments or conclusions that might have relevance to the jurisdictional immunities accorded to the diplomatic courier, including the question of waiver of immunities; secondly, when appropriate, to harmonize the views on the same issues concerning two distinct but somewhat connected topics included in the current programme of the Commission.

84. The examination of the question of the jursidictional immunities accorded to the diplomatic courier and the elaboration of relevant draft articles on this matter seems to be of some practical significance, for there are no such provisions in existing multilateral or bilateral treaties. On the other hand, the practice of States proves that, although not frequent, there have been instances when it has been necessary to define the

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

[68] *Ibid.*, p. 213, para. 54.

[69] *Ibid.*, p. 212, para. 49.

[70] *Ibid.*, para. 51.

[71] *Yearbook ... 1980*, vol. II (Part Two), p. 140, para. 117.

legal scope and implications of the immunity from jurisdiction of the receiving State in respect of diplomatic couriers.

85. In this field again, it might be advisable to explore the legal background of the provisions of the four codification conventions relating to immunity from jurisdiction,[72] in order to ascertain to what extent these provisions could be applied to the status of the diplomatic courier. Article 31 of the 1961 Vienna Convention[73] has served as a model for the articles dealing with jurisdictional immunities embodied in the other three conventions.[74] Of course there are certain adjustments deriving from the specific status of consular officers and consular employees, members of special missions, members of the diplomatic staff of permanent missions to international organizations and members of the diplomatic staff of delegations to international organizations, who enjoy immunity from the criminal, civil and administrative jurisdiction of the receiving or the host State.

86. The basic rule set out in article 31 of the 1961 Vienna Convention stipulates that diplomatic agents shall enjoy immunities from the criminal, administrative and civil jurisdiction of the receiving State. In the case of civil and administrative jurisdiction, immunity is restricted by three exceptions: (a) in the case of a real action relating to private immovable property situated in the territory of the receiving State which is not held on behalf of the sending State for the official purposes of the mission; (*b*) in the case of an action relating to succession in which the diplomatic agent is involved as a private person; (*c*) in the case an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions. This basic rule underlies the relevant provisions of the other multilateral conventions in respect of the diplomatic staff of special missions and permanent missions to international organizations.[75]

87. Members of the administrative and technical staff of diplomatic missions, special missions and permanent missions to international organizations, if they are not nationals or permanent residents of the receiving State, shall enjoy the same immunity from the jurisdiction of that State, except that immunity from civil and administrative jurisdiction shall not extend to acts performed outside the course of their duties. Thus, according to this rule, as expressed in the relevant provisions of the codification conventions,[76] the immunity from the criminal jurisdiction of the receiving State accorded to the administrative and technical staff is the same as that accorded to the diplomatic agents and the diplomatic staff of the missions concerned. On the other hand, the immunity from civil and administrative jurisdiction of the administrative and technical staff of the missions is confined to their official functions.

88. In this case, the functional conception of the nature and scope of the jurisdictional immunities accorded to the administrative and technical staff is applied also to all kinds of jurisdiction—criminal, administrative and civil—with respect to consular officers and consular employees. In conformity with article 43, paragraph 1, of the 1963 Vienna Convention:

> Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions.

Hence no distinction is made between the nature and scope of the jurisdictional immunities granted to the consular officer as a person exercising consular functions and those of the consular employee who is engaged in the administrative or technical service of the consular post. Consequently, the immunity of the consular officer from the criminal jurisdiction of the receiving State should be related to his official functions.

89. There is another similar solution to the question of jurisdictional immunities of members of the administrative and technical staff of delegations to international conferences. According to article 66, paragraph 2, of the 1975 Vienna Convention:

> Members of the administrative and technical staff of the delegation shall, if they are not nationals of or permanently resident in the host State, enjoy the privileges and immunities specified in articles 58, 59, 60, 62, 63 and 64 ...

The articles referred to in the above provision deal with the question of the immunity from the criminal, administrative and civil jurisdiction of the host State, granted to the head of delegation and other delegates and members of the diplomatic staff of the delegation in respect of all acts performed by them in the exercise of their official functions.

[72] See the 1961 Vienna Convention, art. 31; the 1963 Vienna Convention, art. 43; the Convention on Special Missions, art. 31, and the 1975 Vienna Convention, arts. 30 and 60.

[73] Article 31 of the 1961 Vienna Convention reads as follows:

"*Article 31*

"1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

"(*a*) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;

"(*b*) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

"(*c*) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

"2. A diplomatic agent is not obliged to give evidence as a witness.

"3. No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under subparagraphs (*a*), (*b*) and (*c*) of paragraph 1 of this article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

"4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State."

[74] See footnote 8 above.

[75] See the Convention on Special Missions, art. 31, and the 1975 Vienna Convention, art. 30.

[76] See the 1961 Vienna Convention, art. 37, para. 2; the Convention on Special Missions, art. 36; and the 1975 Vienna Convention, art. 36, para. 2.

90. Having indicated briefly the scope of the jurisdictional immunities accorded to members of diplomatic missions, consular posts and other missions and delegations, it is suggested that it should be ascertained to what extent, *ratione personae* and *ratione materiae*, similar immunities could be granted to the diplomatic courier. This question has to be examined with caution and prudence in order to avoid unwarranted analogies or complete assimilation of the status of the diplomatic courier to that of diplomatic staff. The basis for the essential distinction in this case should be the nature of the courier's status and his official functions. First, the diplomatic courier is a person whose task is to take care of the diplomatic bag, and its transport and delivery to the diplomatic or other missions of the sending State and back from these missions to the capital of the sending State. Secondly, owing to the short sojourn of the diplomatic courier in the territory of the receiving or the transit State, the duration of his functions in a given State is limited, and thus the privileges and immunities accorded to him, including jurisdictional immunities, are temporary. In fact, the contractual or other relations that the diplomatic courier could enter into in the receiving or the transit State concerning property rights, commercial or financial undertakings or professional activities are very limited in scope and legal implications. Moreover, considering the strictly limited character of his official function, the diplomatic courier, like the members of the diplomatic missions, consular posts and other missions of the sending State, is not allowed to undertake professional or other lucrative activities which by nature are outside and even incompatible with his official functions. There are specific provisions in the four codification conventions providing that members of diplomatic and other missions shall not practise for personal profit any professional or commercial activity in the receiving or host State.[77] These essential features of the functions of the diplomatic courier—limited in scope and duration—have definite practical significance regarding the extent of the privileges and immunities accorded to him, including jurisdictional immunities.

91. Taking into account these specific features of the functions of the diplomatic courier, namely, their limited scope and especially their relatively short duration, the most comparable of the jurisdictional immunities would be those accorded to the staff of special missions. Perhaps an even closer example might be the jurisdictional immunites accorded to members of delegations under articles 60 and 66 of the 1975 Vienna Convention. These two articles are modelled on articles 31 and 37 of the 1961 Vienna Convention, with the appropriate adjustments required by the particular characteristics of the status of a delegation to an international conference.

92. Bearing in mind the reservations made above (para. 90) concerning the similarities between the jurisdictional immunities granted to members of the staff of diplomatic missions and those granted to the diplomatic courier, it seems that article 60 of the 1975 Vienna Convention contains most of the esential elements of the immunity from jurisdiction applicable to the status of the diplomatic courier. Article 60 provides:

Article 60. Immunity from jurisdiction

1. The head of delegation and other delegates and members of the diplomatic staff of the delegation shall enjoy immunity from the criminal jurisdiction of the host State and immunity from its civil and administrative jurisdiction in respect of all acts performed in the exercise of their official functions.

2. No measures of execution may be taken in respect of such persons unless they can be taken without infringing their rights under articles 58 and 59.

3. Such persons are not obliged to give evidence as witnesses.

4. Nothing in this article shall exempt such persons from the civil and administrative jurisdiction of the host State in relation to an action for damages arising from an accident caused by a vehicle, vessel or aircraft used or owned by the persons in question, where those damages are not recoverable from insurance.

5. Any immunity of such persons from the jurisdiction of the host State does not exempt them from the jurisdiction of the sending State.

93. As has already been pointed out (para. 89), article 66, paragraph 2, of that Convention grants to members of the administrative and technical staff of a delegation the same immunities from criminal, administrative and civil jurisdiction as those enjoyed by the head of delegation, other delegates and members of the diplomatic staff of the delegation. It would then be logical to maintain the view that, if jurisdictional immunities are accorded to members of the administrative and technical staff of a delegation, they should also be granted to the diplomatic courier by reason of his official functions. The rationale is that a diplomatic courier, entrusted with the custody, transportation and delivery of diplomatic mail, has access to State secrets and performs important confidential duties that are directly related to the normal functioning of diplomatic communications. Thus his functional capacity may be of even higher significance than that of many other members of the diplomatic mission. It is therefore obvious that the diplomatic courier should enjoy immunities from local jurisdiction of the same nature and scope as are accorded to the members of diplomatic missions, special missions, permanent missions or delegations to international conferences.

94. Of course, such a general conclusion ought to be sustained on the basis of an appropriate study of international law and State practice. It is suggested that the Commission examine first of all the question of immunity from local criminal jurisdiction, and then explore the nature and scope of immunity from local civil and administrative jurisdiction. The study would cover the legal implications of the question of immunity from execution and of civil liablity for damages arising from an accident caused by a means of transport used by a person enjoying jurisdictional immunities in respect of acts performed in the exercise of his official functions in the territory of the receiving or the transit State. Some

[77] See the 1961 Vienna Convention, art. 42; the Convention on Special Missions, art. 48; and the 1975 Vienna Convention, art. 39.

other aspects of jurisdictional immunities reflected in the provisions of article 60 of the 1975 Vienna Convention, quoted above, are also relevant to the question of the jurisdictional immunities that may be granted to the diplomatic courier.

95. The granting of immunity from the criminal jurisdiction of the receiving or host State to members of the diplomatic mission has been a long-standing principle in international customary and conventional law, previous to the 1961 Vienna Convention. Article 31 of that Convention codified this basic tenet as a rule forming part of modern international law and reflected in multilateral and bilateral treaties. The underlying concept of this rule is complete immunity from the criminal jurisdiction of the receiving or the transit State. There are no specific exceptions from local criminal jurisdiction. However, it has always been assumed that, by an equally important legal principle, persons enjoying such immunity are bound to respect the laws and regulations of the receiving or the transit State. Article 37 of the 1961 Vienna Convention extended the rule of complete immunity from local criminal jurisdiction to members of the family of the diplomatic agent and members of the administrative and technical staff together with their families, if they are not nationals or permanently resident in the receiving State. This rule has been generally accepted and was not challenged throughout the preparatory work on the codification conventions in the field of diplomatic law. It was incorporated in almost the same language in the Convention on Special Missions and in the 1975 Vienna Convention. The 1963 Vienna Convention, in article 43, stipulates that:

> Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions.

Thus the jurisdictional immunities accorded to members of the consular post, including immunity from local criminal jurisdiction, are subordinated to the exercise of their consular functions. All the other codification conventions adhere firmly to the concept of full immunity from criminal jurisdiction.

96. The rule of absolute immunity from the criminal jurisdiction of the receiving State is based on the general recognition of the fundamental principle of the sovereignty and sovereign equality of States. The exercise of freedom of communication for all official purposes by the State is one of the attributes of its sovereignty. Therefore the granting of immunity from local criminal jurisdiction to the diplomatic agents and other members of the diplomatic mission is an essential element of the jurisdictional immunities of the sending State from the jurisdiction of the receiving State.

97. The diplomatic courier, who is so instrumental in the exercise by the State of its right to official communication, should be placed among the officials of the sending State who are entitled to full immunity from criminal jurisdiction by reason of their confidential duties in the service of that State. Such immunity granted to the diplomatic courier would be in conformity with the provisions of articles 31 and 37 of the 1961 Vienna Convention and the similar provisions embodied in the other conventions codifying diplomatic law. The complete immunity of the diplomatic courier from the local criminal jurisdiction of the receiving or the transit State should also be regarded as a right closely connected with the rule of his personal inviolability. It is a basic requirement for the protection of the person of the courier so that he may appropriately perform his official functions. The immunity from local criminal jurisdiction of the diplomatic courier should naturally be viewed in conjunction with his duty to respect international law and the laws and regulations of the receiving and the transit States, as provided in draft article 5 present draft articles.

98. The question of the immunities from the civil and administrative jurisdiction of the receiving State granted to members of the diplomatic or other missions of the sending State is much more complex, owing primarily to the legal nature and scope of these immunities. While as a rule immunity from local criminal jurisdiction is absolute, immunities from local civil and administrative jurisdiction are restricted through a system of specific exceptions or by a general formula expressing the principle of functional immunity. The method of restrictive application of the general principle of jurisdictional immunities, based on the dependence of such immunity on the character of the activity of the person enjoying it, or on a direct connection therewith, inevitably raises several difficult questions. First, it would be necessary to draw a distinction between acts performed in the exercise of official functions and private acts performed outside the course of such functions. Determination of the nature and scope of exceptions to immunities from local civil and administrative jurisdiction, in order to identify the official functions that are excluded from such jurisdiction, may very often produce difficult problems of interpretation. Secondly, in such instances the need would inevitably arise of deciding who would be entitled to determine the nature of the act in question and the applicability of the immunity from local jurisdiction. There might be other related matters as well, such as measures of execution for the enforcement of a judicial decision, on civil liability for damages resulting from traffic accidents. All these problems are very relevant to the immunity from the civil and administrative jurisdiction of the receiving or the transit State granted to the diplomatic courier in respect of acts performed in the exercise of his official functions. A brief analytical survey of the legislative background of the relevant provisions of the conventions codifying diplomatic law, reflecting the functional method applied to immunities from civil and administrative jurisdiction, may be useful for the purposes of the present draft articles.

99. It should be pointed out, at the outset, that the four conventions codifying diplomatic law reflect the functional approach in respect of immunities from the civil and administrative jurisdiction of the receiving State accorded to members of diplomatic missions, con-

sular posts and other missions or delegations. Some of the conventions contain provisions identifying the specific exceptions to immunity from local civil and administrative jurisdiction;[78] others are not explicit on the kind of exceptions, but use a more general formula stipulating that the persons concerned shall enjoy immunity from the civil and administrative jurisdiction of the receiving or host State "in respect of all acts performed in the exercise of their official functions".[79] The functional approach is applied with regard to members of the administrative and technical staff of diplomatic and special missions, as well as to consular employees of the consular post. In this case, the exceptions to immunity from local civil and administrative jurisdiction are not specific. They are expressed in a general formula, stipulating that immunity from the civil and administrative jurisdiction of the receiving State accorded to these persons "shall not extend to acts performed outside the course of their duties".[80] It may be added that this expression was introduced by the delegation of the United Kingdom at the United Nations Conference on Diplomatic Intercourse and Immunities in 1961, as a compromise according to which "administrative and technical staff should have full immunity from criminal jurisdiction, but their immunity from civil jurisdiction should not extend to acts performed outside the course of their duties".[81] That provision is incorporated in article 37, paragraph 2, of the 1961 Vienna Convention, and has ever since been followed by the corresponding articles of the other conventions in the field of diplomatic law.

100. For the purpose of the present study, it might be of some significance to present an analytical survey of the legislative background of article 60 of the 1975 Vienna Convention. This article, in its content and format, might well serve as a model for the draft article on immunity from the civil and administrative jurisdiction of the receiving or the transit State accorded to the diplomatic courier in respect of acts performed in the exercise of his official functions.

101. The question of formulating exceptions to immunity from the civil and administrative jurisdiction of the host State accorded to representatives at international conferences was the subject of lengthy discussions in the Commission during its work at its twenty-second and twenty-third sessions, in 1970 and 1971, on the preparation of draft articles on the privileges and immunities of members of delegations to international organizations. At the twenty-second session of the Commission, the Drafting Committee proposed two alternative texts, A and B, for draft article 73 on immunity from jurisdiction.[82]

102. Alternative A was modelled on article 31 of the 1961 Vienna Convention and followed almost *verbatim* the text of article 31 of the Convention on Special Missions, adapted to a delegation to an international conference. It contained four exceptions to immunity from the civil and administrative jurisdiction of the receiving State accorded to representatives in a delegation to an organ or to a conference and to members of the diplomatic staff of the sending State in the case of:

(*a*) a real action relating to private immovable property situated in the territory of the host State, unless the person concerned holds it on behalf of the sending State for the purposes of the delegation;

(*b*) an action relating to succession in which the person concerned is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(*c*) an action relating to any professional or commercial activity exercised by the person concerned in the host State outside his official functions;

(*d*) an action for damages arising out of an accident caused by a vehicle used outside the official functions of the person concerned.

In accordance with draft article 77, paragraph 2, on privileges and immunities of other persons, also proposed by the Drafting Committee, the same jurisdictional immunity was acorded to members of the administrative and technical staff of the delegation.[83]

103. Alternative B did not contain specific exceptions to immunity from the civil and administrative jurisdiction of the host State. Instead, it stipulated in general terms that the representatives and members of the diplomatic staff of the delegation should "enjoy immunity from the civil and administrative jurisdiction of the host State in respect of all acts performed in the exercise of their official functions". The Chairman of the Drafting Committee, when presenting that text, pointed out that "alternative B was a somewhat more restrictive proposal".[84] That alternative was based on article IV, section 11, of the Convention on the Privileges and Immunities of the United Nations.[85] However, as was rightly explained in the commentary of the Commission,

[78] See, for example, the 1961 Vienna Convention, art. 31, para. 1 (*a*), (*b*) and (*c*); the Convention on Special Missions, art. 31, para. 2 (*a*), (*b*), (*c*) and (*d*); the 1975 Vienna Convention, art. 30, para. 1 (*a*), (*b*) and (*c*).

[79] The 1963 Vienna Convention, art. 43, para. 1, uses the expression: "in respect of acts performed in the exercise of consular functions", and the 1975 Vienna Convention, art. 60, para. 1, the expression: "in respect of all acts performed in the exercise of their official functions".

[80] With regard to immunities granted to members of the service staff of the delegation "in respect of acts performed in the course of their duties", see the 1961 Vienna Convention, art. 37, para. 3, and the 1975 Vienna Convention, art. 66, para. 3.

[81] E. Denza, *Diplomatic Law. Commentary on the Vienna Convention on Diplomatic Relations* (Dobbs Ferry, N.Y., Oceana Publications, 1976), p. 229. For the discussion at the Conference on the United Kingdom amendment (A/CONF.20/L.20) and on the joint amendment submitted by the United Kingdom and nine other countries (A/CONF.20/L.21 and Add.2), see *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. I, pp. 36-37 and 39-41, 10th plenary meeting, paras. 1-6 and 30-56; and pp. 47-49, 12th plenary meeting, paras. 1-24. For the text of the above-mentioned amendments, *ibid.*, vol. II, pp. 77-78.

[82] *Yearbook ... 1970*, vol. I, pp. 198-199, 1077th meeting, para. 93. At the same session, the Commission adopted the two versions of draft article 73, renumbered article 100 (see *Yearbook ... 1970*, vol. II, pp. 294-295, document A/8010/Rev.1, chap. II, sect. B).

[83] *Yearbook ... 1970*, vol. I, p. 202, 1078th meeting, para. 2.

[84] *Ibid.*, p. 199, 1077th meeting, para. 95.

[85] United Nations, *Treaty Series*, vol. 1, pp. 20-22.

... it follows that section in limiting immunity from the civil and administrative jurisdiction to acts performed in the exercise of official functions but goes beyond it in providing, as in alternative A, for full immunity from the criminal jurisdiction of the host State.[86]

104. In his sixth report on relations between States and international organizations, submitted to the Commission at its twenty-third session, in 1971, the Special Rapporteur again proposed two alternative versions of article 100, A and B,[87] which were identical with draft article 100 provisionally adopted by the Commission.[88] As the members of the Commission were divided in their preference for one or other alternative, the two versions were submitted to Governments and international organizations for their consideration.

105. Those who opted for alternative A maintained the view that it provided greater protection to delegations and was more precise owing to the specific formulation of exceptions, which would make the operation of the provision more efficient. They also argued that alternative A was based directly on the corresponding article of the Convention on Special Missions and thus closely reflected current thinking on the subject and the ever-growing importance of multilateral diplomacy.[89] One member of the Commission expressed the view that, in civil matters, the exercise of jurisdiction by the local courts was a useful remedy only if the defendant was likely to stay a long time in the host State; the same remedy was of little use against a person who spent short periods in the country, so that the claimant would simply not have the time to take effective action in the civil courts.[90]

106. Other members of the Commission expressed preference for alternative B, emphasizing its merits and suggesting that it was more likely to be accepted by Governments. They thought that the extension of privileges and immunities outside the permanent diplomatic mission was not advisable. Some members considered that alternative B was closer to existing practice and more consistent with the 1946 Convention on the Privileges and Immunities of the United Nations and the 1947 Convention on the Privileges and Immunities of the Specialized Agencies.[91] It was also argued that alternative B in fact set out all the safeguards that were necessary for the functioning of a delegation. A member of the Commission said, in support of alternative B:

Alternative B merely laid down a more general principle, but it was difficult to see what acts other than those listed in paragraph 2 of alternative A could be regarded as being outside official functions. Alternative B was therefore more restrictive in its effect, because in case of doubt it provided for the application of a principle which was not contained in alternative A but which, basically, was subject to the same exceptions.[92]

It was also contended that alternative B constituted a "compromise between those who favoured extensive immunities and those who wished to adhere to the pattern of the existing instruments".[93]

107. The comments and observations of Governments and international organizations on the matter, as well as the debate in the Sixth Committee of the General Assembly, were focused on the same issues. The positions taken on the subject were not conclusive. In its commentary to article 61 (Immunity from jurisdiction)[94] of the draft articles submitted to the United Nations Conference on the Representation of States in their Relations with International Organizations, in 1975, the Commission pointed out that it had re-examined the text of article 100 of the provisional draft in the light of the observations made by certain Governments. While stating that some Member States had expressed a preference for alternative B, the Commission noted that the majority of its members nevertheless preferred alternative A. The Commission had therefore included in the final draft an article on immunity from jurisdiction accorded to delegations, which reproduced the substance of alternative A of the provisional draft. That decision was in accordance with the position taken by the Commission that the privileges and immunities of members of delegations "should be based upon a selective merger of the pertinent provisions of the Convention on Special Missions and the provisions regarding missions to international organizations provided for in part II" of the draft. It went on to explain that that position reflected the evolution of the institution of permanent missions to international organizations and the assimilation of their status and immunities to diplomatic status and immunities. The Commission further expressed the view that, "owing to the temporary character of their task, delegation to organs of international organizations and to conferences convened by international organizations [occupied], in the system of diplomatic law of international organizations, a position similar to that of special missions within the framework of bilateral diplomacy".[95]

108. The debate on the legal nature and scope of the immunity from civil and administrative jurisdiction accorded to members of delegations was pursued at the United Nations Conference on the Representation of States. Three amendments were submitted to article 61

[86] *Yearbook ... 1970*, vol. II, p. 295, document A/8010/Rev.1, chap. II, sect. B, commentary to art. 100, para. (1).

[87] *Yearbook ... 1971*, vol. II (Part One), pp. 132-133, document A/CN.4/241 and Add.1-6.

[88] See footnote 82 above.

[89] For the discussion in the Commission on the subject, see *Yearbook ... 1970*, vol. I, pp. 198-201, 1077th meeting, paras. 93-130; and *Yearbook ... 1971*, vol. I, pp. 147-150, 1108th meeting, paras. 51-88, and pp. 151-152, 1109th meeting, paras. 1-17.

[90] *Yearbook ... 1971*, vol. I, p. 150, 1108th meeting, para. 84 (Mr. Ustor).

[91] *Ibid.*, p. 148, para. 55 (Mr. Castrén), and p. 149, para. 70 (Sir Humphrey Waldock).

[92] *Yearbook ... 1970*, vol. I, p. 199, 1077th meeting, para. 103 (Mr. Eustathiades).

[93] *Yearbook ... 1971*, vol. I, p. 148, 1108th meeting, para. 58 (Mr. Kearney).

[94] Article 61 reproduced the substance of alternative A of article 100 of the provisional draft.

[95] See *Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations*, vol. II (United Nations publication, Sales No. E.75.V.12), p. 41, commentary to art. 61 para. (4).

(Immunity from jurisdiction).[96] Only the amendment proposed by the Netherlands, providing that draft article 61 be replaced by a text based on alternative B of article 100 of the provisional draft articles, was extensively discussed and ultimately put to a vote.[97] After lengthy and intensive debate, this proposal, as orally amended, was adopted by the Conference[98] and became the present article 60 of the 1975 Vienna Convention.

109. An analytical survey of the legislative history of the provisions on jurisdictional immunities, and particularly immunity from the civil and administrative jurisdiction of the receiving or host State, could provide the basis for the examination and elucidation of some important aspects of this problem with direct relevance to the status of the diplomatic courier. For the purpose of the present study it might be more appropriate, for the reasons already indicated (see paras. 90, 91, 93 and 97 above) to consider the main aspects of article 60 of the 1975 Vienna Convention.

110. The key to the interpretation of the expression "in respect of all acts performed in the exercise of their official functions" by persons enjoying immunity from local, civil and administrative jurisdiction, lies in the determination of the legal nature and scope of the official act, which should be distinguished from the private activity of the person concerned. The functional approach in this case presupposes that the immunity is accorded to that person not *in propria persona*, but as a recognized immunity of the sending State, and is therefore limited to official acts of that State performed on its behalf by its authorized official. The official character of such acts could be determined either by international treaty or customary international law, or by the internal laws and regulations of States. Usually, the main functions of the foreign mission and its members are defined in bilateral or multilateral treaties. The four codification conventions, as well as the 1946 Convention on the Privileges and Immunities of the United Nations[99] and the 1947 Convention on the Privileges and Immunities of the Specialized Agencies,[100] contain special provisions to this effect.[101]

111. There is another method of determining the distinction between an official act *per se* and an act, although performed by an official of the sending State in the territory of the receiving State, that is not within the scope of his official functions. According to such a method, acts that are outside the official functions of the person concerned are specifically identified and listed as exceptions from the immunity accorded to this person. As has already been pointed out, some of the codification conventions apply this method (see paras. 85, 86, 87, 101 and 102 above).

112. The exceptions to immunity from local civil and administrative jurisdiction specified in article 31, paragraph 1 (*a*), (*b*) and (*c*) of the 1961 Vienna Convention, and in paragraph 2 (*a*), (*b*), (*c*) and (*d*) of the corresponding article 31 of the Convention of Special Missions, refer to personal rights in respect of private immovable property; private involvement in succession; action relating to any professional or commercial activity exercised outside official functions; and an action for damages arising out of an accident caused by a vehicle used outside the official functions of the person concerned.[102] However, other acts could be contemplated as being performed by the person enjoying immunity from local civil jurisdiction, such as contracts concluded by him that were neither expressly nor implicitly concluded as an official act of the sending State. Such acts include renting a hotel room, renting a car, making use of services for cartage and storage or concluding a contract of lease or purchase entered into by a diplomatic courier during his journey. The obligation of payment of the hotel bill or of other purchases made and services rendered to the diplomatic courier, although arising during and even in connection with the exercise of his official functions, is not exempted from local laws and regulations. The main reason for such a conclusion is that in all these instances the purchases and services are of a general commercial nature rendered to the person concerned, which have to be paid by anyone who is their beneficiary. The same rule applies also the charges levied for specific services rendered, as provided for in article 34 (*e*) of the 1961 Vienna Convention and the corresponding articles in the other conventions codifying diplomatic law. Consequently, acts relating to such purchases or services cannot be considered *per se* as acts performed in the exercise of the official functions of the courier covered by immunity from local civil and administrative jurisdiction.

113. The next important question is who is entitled to draw the distinction between an official act, exempted from local civil and administrative jurisdiction, and a private act attributed to an official of the sending State *in propria persona*. On this point, uniform solutions have not been offered by State practice or legal doctrine. As a matter of fact, case law on this matter is

[96] Amendments submitted by: (*a*) Pakistan (A/CONF.67/C.1/L.69), for the deletion of subparagraph (*d*) of paragraph 1 of article 61, concerning an action for damages arising from a traffic accident; the amendment was not put to the vote; (*b*) France (A/CONF.67/C.1/L.86), for the addition of the following words at the end of the first sentence of paragraph 1, concerning immunity from criminal jurisdiction: "except in the case of *flagrante delicto*"; the amendment was withdrawn before consideration of the article; (*c*) Netherlands (A/CONF.67/C.1/L.95, as revised orally); the amendment was adopted (*ibid.*, p. 127, paras. 524-525).

[97] Paragraph 1, on jurisdictional immunities, of the Netherlands amendment was adopted by 29 votes to 23, with 15 abstentions (*ibid.*, p. 128, para. 527 (*a*)).

[98] *Ibid.*, p. 128, paras. 526-530; and *ibid.*, vol. I (United Nations publication, Sales No. E.75.V.11), pp. 259-262, *Committee of the Whole*, 32nd meeting and 33rd meeting, paras. 1-10.

[99] United Nations, *Treaty Series*, vol. 1, p. 15.

[100] *Ibid.*, vol. 33, p. 261.

[101] See e.g. the 1961 Vienna Convention, arts. 1, 3, 27, 39, 41 and others; the 1963 Vienna Convention, arts. 1, 3, 5-8, 15, 17, 25, 35-38, 55 and others; the Convention on Special Missions, arts. 1, 3, 13, 20, 28, 47 and others; the 1975 Vienna Convention, arts. 1, 6, 7, 16, 27, 40, 57, 69, 77 and others; the Convention on the Privileges and Immunities of the United Nations, arts. III, IV and V.

[102] The question of liability for damages caused by traffic accidents will be discussed later (see paras. 128-136 below).

relatively limited, although there have been cases in which the main issue was the determination of the official nature of the act subject to the dispute.[103]

114. According to one doctrine, it is the receiving State that is entitled to determine the nature of the act. This view was advanced in the draft convention of the Harvard Law School on the legal position and functions of consuls, in which it was stated that "the receiving State decides, subject to diplomatic recourse by the sending State, whether the act was done in the performance of such functions".[104]

115. According to another doctrine, both the sending and the receiving States are entitled to ascertain whether an act is performed in the exercise of official functions, on the basis of the merits and circumstances of each case. This view was reflected in the third report of the Special Rapporteur on consular intercourse and immunities, submitted to the Commission at its thirteenth session, in 1961.[105] Some authors, while adhering to this opinion, consider that an act is an official act *per se* only if both the sending and the receiving States recognize it as such, on the basis of a treaty to which they are parties and of customary international international law or of the laws and regulations of those States.[106]

116. On the same question, namely who is entitled to determine the legal nature of the act performed by the official of the sending State in the territory of the receiving State, the Special Rapporteur on the topic of the representation of States in their relations with international organizations, in his capacity as an expert consultant at the United Nations Conference on the Representation of States, in 1975, considered it preferable that the host State should determine the official character of the act. Replying to a question on this point, he stated that:

> ... it was indeed difficult to give practical examples [of the distinction] ... because there were no specific criteria for determining exactly when the member of the delegation was acting in his official capacity and when he was not. It would therefore be necessary for the courts of the host State to decide on that matter according to the particular circumstances of the case.[107]

117. In State practice in this matter, however limited it may be, both doctrines have been followed, i.e. that the decision on the distinction should be made by both the sending and the receiving State, or by the receiving State alone. It may be submitted that, in case of dispute between the sending and the receiving States, the most appropriate practical manner to resolve a problem of this kind would be by arriving at an amicable solution through diplomatic channels.

118. The next problem concerning immunity from local, civil and administrative jurisdiction relates to measures of execution. As a consequence of the functional immunity of the person concerned, measures of execution can be taken only in cases that are not related to acts performed in the exercise of official functions, i.e. cases that are not covered by the immunity accorded by the receiving State. This is a standard provision, which is incorporated in article 31, paragraph 3 of the 1961 Vienna Convention and in the corresponding articles in the other conventions codifying diplomatic law. The most relevant provision reflecting the specific features of the legal status and functions of the diplomatic courier would be article 60, paragraph 2, of the 1975 Vienna Convention.

119. The rule on immunity from execution granted to diplomats was established in international law long before the 1961 Vienna Convention. It has been considered not only as an important aspect of immunity from local civil and administrative jurisdiction, but also as a consequence of the principle of the inviolability of the person, residence and property of a diplomatic agent.

120. Immunity from execution, therefore, by its nature and scope, reflects a functional approach to immunity from local civil jurisdiction. This characteristic of measures of execution is emphasized by the explicit provision of paragraph 3 of article 31 of the 1961 Vienna Convention, which states that "no measures of execution may be taken in respect of a diplomatic agent except in the cases coming under subparagraphs (*a*), (*b*) and (*c*) of paragraph 1 of this article", i.e. in the case of an action relating to private immovable property, private involvement in a succession, and professional and commercial activity exercised outside official func-

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[103] See, for example, the cases referred to in Whiteman, *op. cit.* (see footnote 36 above), p. 213: *Laterrade* v. *Sangro y Torrès* (1951) (*Recueil Sirey, Jurisprudence, 1951* (Paris), p. 155); and *Juan Ysmael & CO.* v. *S.S. "Tasikmalaja"* (1952) (*International Law Reports, 1952* (London), vol. 19 (1957), case No. 94, p. 400, at p. 408). See also *Arcaya* v. *Paéz* (1956) (*ibid., 1956* (London), 1960 (vol. 23), p. 436); *Maas* v. *Seelheim* (1936) (*Annual Digest and Reports of Public International Law Cases, 1935-1937* (London), vol. 8 (1941), p. 404); *Bigelow* v. *Princess Zizianoff and others* (1928) (*La Gazette du Palais* (Paris), 1st sem. 1928, No. 125, p. 726). Most of these cases relate to the distinction between "official" or "consular" functions and private acts performed by consular officers and employees; in this connection, see L. T. Lee, *Vienna Convention on Consular Relations* (Leyden, Sijthoff, 1966), pp. 115-146, where several cases are mentioned.

[104] Art. 21 of the draft convention. See Harvard Law School, *Research in International Law*, sect. II, "Legal Position and Functions of Consuls" (Cambridge, Mass., 1932), published as *Supplement to the American Journal of International Law* (Washington, D.C.), vol. 26 (1932), p. 198.

[105] *Yearbook ... 1961*, vol. II, p. 69, document A/CN.4/137, "Observations and proposals by the Special Rapporteur" concerning article 41 (Immunity from jurisdiction).

[106] Lee, *op. cit.* (see footnote 103 *in fine*), p. 121. The author states further:

> " ... In other or borderline cases, however, the express or implied admission by both States that the act is "official" would be necessary. Such admission by the sending State may take the form of reaffirmation by its diplomatic mission in the receiving State that a particular act performed by its consul is "official", or of mere silence in the face of the assertion to this effect by the head of the consular post. With respect to the receiving State, its admission may be a matter for determination by the appropriate court." (*Ibid.*)

[107] *Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations*, vol. 1, p. 263, *Committee of the Whole*, 32nd meeting, para. 35.

tions. The same provision is contained in paragraph 4 of article 31 of the Convention on Special Missions.

121. The close intrinsic relation between measures of execution and immunity from civil jurisdiction is also reflected in the provisions on immunity from civil jurisdiction which, instead of listing specific exceptions, use general formulae defining the functional nature of that immunity. This is the case with article 60, paragraph 2 of the 1975 Vienna Convention, which simply provides that "no measures of execution may be taken in respect of such persons", i.e. the head of delegation and other delegates and members of the diplomatic staff of the delegation. Through the operation of article 66, paragraph 2, such immunity from execution is also accorded to members of the administrative and technical staff of the delegation.

122. The only other requirement in respect of measures of execution is that such measures are admitted only if they do not infringe the inviolability of the person or the residence of the official concerned. This, in fact, confirms that the position concerning measures of execution follows from the principle of inviolability. The practical significance of this rule is that, if by a decision of the local court a person enjoying immunity from execution loses his rights or titles to immovable property in the territory of the receiving State, such a person or a member of his family may not be evicted, no other measure of execution may be taken that might affect the personal freedom of the protected person, and no search or examination of himself or his residence may be undertaken.

123. The rule on immunity from execution should be applicable to a diplomatic courier as well. First, by virtue of his official functions, he is entitled to enjoy immunity from local civil and administrative jurisdiction, at least on the same level as members of the administrative and technical staff. Secondly, all the codification conventions explicitly provide for the personal inviolability of the courier, which means that he is not liable to any form of arrest and detention. Thirdly, it is obvious that measures of execution would lead inevitably to impediments to the normal performance of the official functions of the courier.

124. Another element of immunity from local jurisdiction is the exemption of a diplomatic agent from the obligation to give evidence as a witness. This rule is incorporated in article 31, paragraph 2, of the 1961 Vienna Convention and in the corresponding provisions in the other conventions codifying diplomatic law, with the exception of the 1963 Vienna Convention, according to which the operation of this rule is subject to certain modalities. Exemption from the obligation of giving evidence as a witness has also been considered in the framework of the principle of inviolability, in the sense that there is no legal obligation to give evidence. This means that a diplomatic agent, or a person enjoying jurisdictional immunity by reason of his official functions, if he so wishes, or has the necessary permission from the sending State,[108] may testify in respect of matters that are outside his official functions. Exemption from the obligation of giving evidence as a witness is not limited by exceptions to immunity from civil jurisdiction. The same régime applies to members of the administrative and technical staff.

125. It is obvious that a diplomatic courier, by the confidential nature of his duties and the need to perform his functions as expeditiously as possible, should be exempt from the obligation to give evidence as witness before judicial or administrative institutions of the receiving or the transit State. Such an exemption is justified on grounds of principle and by reason of his legal status, as well as by the practical requirements of his official functions of ensuring the rapid delivery of diplomatic mail.

126. Case law in this matter is very scarce, perhaps because the authorities of the receiving or the transit State recognize the special character of the status and functions of the courier and therefore avoid instances when he might be called upon to testify.

127. By way of illustration of the attitude of States on this matter, the case of *Juan Ysmael & Co.* v. *S.S. "Tasikmalaja"* (1952) may be mentioned, when a Hong Kong court issued an order requiring a professional diplomatic courier of the Indonesian Government to appear in court for cross-examination on an affidavit he had filed. The courier claimed immunity from process on the grounds that he was a diplomatic courier, with a diplomatic passport and, as such, must hold himself in readiness to carry official communications for his Government at a moment's notice. The Court ruled:

> ... A courier is in an altogether different position from that of a consul. He has no official recognition and is granted exemption from civil and criminal jurisdiction and afforded special protection only during the exercise of his office. I can see no reason why Mr. Pamoerhardjo should be exempted from attending to be cross-examined and I cannot anticipate any situation arising as a result of his attending the court to be cross-examined which could possibly conflict with his duty as a courier. His application is refused and he is ordered to attend the court for cross-examination.[109]

The court however acknowledged, later in the proceedings, that "... diplomatic couriers cannot be compelled to give evidence about matters within the scope of their official duties".[110]

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[108] In the practice of some States, diplomats are not permitted to decide on their own, without instructions, to testify as witnesses before foreign courts. Some States have specific regulations on this matter. Such regulations apply not only in cases where the diplomatic agent is called upon to give evidence on matters related to his functions but also in cases of matters unrelated to his official functions or to the activities of the mission. This is the practice in the United States of America, the United Kingdom and other States; see e.g. J. B. Moore, *A Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1906), vol. IV, p. 642. See also in United Nations, Legislative Series, vol. VII, *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities* (Sales No. 58.V.3), the laws and regulations of Austria (pp. 13-16), Colombia (p. 65), Ecuador (p. 106), Guatemala (p. 145), Honduras (p. 152), Nicaragua (p. 22), USSR (p. 337).

[109] *Loc. cit.* (footnote 103 above), p. 408.

[110] *Idem*, p. 410.

128. One of the exceptions to immunity from the local civil and administrative jurisdiction of the host State listed in article 31, paragraph 2 (*d*), of the Convention on Special Missions, and in article 60, paragraph 4, of the 1975 Vienna Convention, relates to an action for damages arising from accidents caused by a motor vehicle, vessel or aircraft used or owned by the person enjoying immunity from local jurisdiction. The use of motor vehicles for personal or professional purposes has become part of daily life. Traffic accidents and offences have inevitably increased, giving rise to a growing number of claims. The need to regulate questions of liability for personal injuries and damages to property arising from traffic accidents in which diplomatic agents and other persons enjoying diplomatic immunities are involved has become obvious. Nevertheless, it has taken some time for the proper codification of international law to take place in this field. In this connection a very brief survey of the legislative history of the rules mentioned above is quite indicative of the rapid developments on this matter in the course of the last two decades.

129. At the United Nations Conference on Diplomatic Intercourse and Immunities, in 1961, the delegation of the Netherlands submitted a proposal providing that local courts should have jurisdiction in respect of claims for damages arising out of an accident caused by a motor vehicle, unless a direct right of action existed in the receiving State against an insurance company.[111] This proposal was viewed by many delegations as constituting a significant departure from the other exceptions to immunity from civil and administrative jurisdiction, which were definitely of a private character, having no connection with the official functions of the person concerned.[112] The use of a motor vehicle, on the other hand, was considered to be closely related to the official activity of such a person. On those grounds the Netherlands amendment was not accepted.

130. However, only two years later, at the United Nations Conference on Consular Relations, the discussion on the same matter took a different course. Two special provisions were incorporated in the Convention on Consular Relations adopted by the Conference. One of them is in the form of an exception, listed in article 43, paragraph 2 (*b*), to the jurisdictional immunities accorded to consular officers and employees, to the effect that such immunity shall not apply in respect of a civil action "by a third party for damage arising from an accident in the receiving State caused by a vehicle, vessel or aircraft", it being understood that these means of transport belong to or are used by consular officers or consular employees. The other provision relating to liability for damage caused by traffic accidents is contained in article 56, which states that members of the consular post must comply with any requirement imposed by the laws and regulations of the receiving State in respect of insurance against third party risks arising from the use of any vehicle, vessel or aircraft.

131. The exception to immunity from local civil and administrative jurisdiction in respect of claims for damages arising from traffic accidents was thereafter included in international agreements and has become almost a standard provision. Following this trend, some States have introduced in their internal laws and regulations a requirement for mandatory insurance with full coverage.

132. This trend found its further confirmation in article 31 of the Convention on Special Missions. Among the four specific exceptions to immunity from civil and administrative jurisdiction, paragraph 2 (*d*) lists "an action for damages arising out of an accident caused by a vehicle used outside the official functions of the person concerned". While the 1963 Vienna Convention does not provide for any limitations on the exception in the case of civil action for damages caused by a vehicle, vessel or aircraft, the Convention on Special Missions takes a more restrictive approach to the scope of the exception. According to article 31, paragraph 2 (*d*), of the Convention, the exception to immunity from civil and administrative jurisdiction applies only in the case of an action for damages arising out of an accident caused by a vehicle used *outside the official functions* of the person concerned. Thus the exception would not apply to traffic accidents involving persons *during the exercise of their official duties.*

133. On the same matter the 1975 Vienna Convention takes a somewhat different approach. Article 60, paragraph 4, relating to liability for damages arising from traffic accidents, in our submission, contains some new elements. First, it does not confine the exception to immunity from local civil and administrative jurisdiction to accidents occurring outside the exercise of official functions. Secondly, it specifically provides that the exemption includes in its scope *ratione personae* both the user and the owner of the vehicle. In this case, better protection of the victim of the accident is ensured. The special reference to liability for damages that are not recoverable from insurance is yet another remedy to prevent any injustice to the injured party. This position is further strengthened by the provision of article 78 of the same Convention relating to insurance against third party risks, similar to article 56 of the 1963 Vienna Convention mentioned above (para. 130). Here again, the broader formula is used with regard to the vehicle involved in the accident used or owned by a person enjoying immunity. Thus, where a vehicle owned by a person enjoying immunity from local jurisdiction but which at the time of the accident was being used by another person, there is no exemption from civil action. Moreover, a diplomatic agent is answerable to local jurisdiction if he causes damage in a rented motor vehicle.

134. Taking into consideration all these aspects of the problem of liability for damages arising out of traffic

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[111] *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. II, p. 27, document A/CONF.20/C.1/L.186/Rev.1.

[112] *Ibid.*, vol. I, pp. 166-172, *Committee of the Whole*, 27th meeting, paras. 19-65, and 28th meeting, paras. 1-27.

accidents, it seems only logical that the same régime should apply to diplomatic couriers when exercising their official duties. Although the practice of States and related case law on this matter is very limited, there are enough reasons in favour of a special provision on exception to immunity from the local civil and administrative jurisdiction of the receiving or the transit State granted to the diplomatic courier during the performance of his official duties. State practice on this matter in itself is not conclusive. Most cases that are known occurred prior to the 1961 Vienna Convention and the other conventions codifying diplomatic law. It is submitted that most cases involving claims for damages caused by members of diplomatic missions and, in rare instances, diplomatic couriers, have been resolved through diplomatic channels.

135. The few cases brought before the courts occurred prior to the codification conventions. For example, in *Laterrade* v. *Sangro y Torres* (1951), the defendant claimed diplomatic immunity from the court's jurisdiction in an action arising out of an automobile accident. He argued that, as Spanish Consul, he enjoyed immunity from civil jurisdiction, and that at the time of the accident he was transporting the Spanish diplomatic bag as representative of the Government of Spain and with the agreement of the French authorities. The Paris Court of Appeals held that the plea must be rejected. It concluded:

> The transport of the diplomatic bag is not part of the normal functions of a consul. The plea to the jurisdiction, in so far as it is based on this act, cannot be upheld by the court.[113]

However, it is not clear from this decision how the court would have reacted in the case of a professional diplomatic courier, since the main argument in the decision was that, in the view of the court, the carrying of a diplomatic bag was not part of the normal functions of the consul. The question arises whether a courier *ad hoc*, as in that case, should not be accorded the same protection as an ordinary diplomatic courier. In any case, the limited case law on the subject matter seems to suggest that diplomatic couriers are granted immunity from local civil and administrative jurisdiction and afforded special protection during the exercise of their official duties. For practical reasons, however, States tend to settle any disputes in this area through diplomatic channels.

136. The last point to be considered in connection with the immunity from local jurisdiction accorded to the diplomatic courier by the receiving or the transit State relates to the rule that such immunity shall not exempt the courier from the jurisdiction of the sending State. This rule is incorporated in article 31, paragraph 4, of the 1961 Vienna Convention and in the corresponding articles of the other codification conventions.[114] This rule is well established in international customary law and in internal laws, and has not been questioned in State practice. The effective jurisdiction of the sending State over its officials abroad is a rule designed to enhance justice and legal order. It gives the sending State the opportunity of offering such a procedure as a legal remedy in favour of a claimant in the receiving State whose rights could not be otherwise protected, owing to the immunity of the diplomatic agent. This rule also derives from the permanent legal relationship between a person and the State of which he is a national, even when the person is abroad.

137. This matter was discussed by the Commission during its work at its ninth session, in 1957, on the draft articles on diplomatic relations and immunities. The main problem being the justiciability of the diplomatic agent in the courts of the sending State, one member of the Commission proposed that this rule should be further elaborated to provide that the competent court should be that of the seat of the Government of the sending State, unless some other tribunal were designated under the law of that State.[115] This question was further discussed in the Commission at its tenth session, in 1958,[116] and at the United Nations Conference on Diplomatic Intercourse and Immunities, in 1961.[117]

138. Although it cannot be claimed that recourse by a plaintiff to judicial procedure against a diplomat before the court of his own State would be an efficient remedy, nevertheless an action of this kind cannot be ruled out altogether. It is true that cases of this kind are usually better settled by more pragmatic and less formal ways, through diplomatic or political channels. However, since such a rule exists in the conventions codifying diplomatic law, there is no reason why a similar provision should not be provided with regard to the status of the diplomatic courier.

139. In the light of all these considerations on the immunity from jurisdiction to be accorded to the diplomatic courier, the Special Rapporteur submits the following draft article for examination and provisional approval:

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[113] *Loc. cit.* (footnote 103 above), p. 157.

[114] See, for example, the Convention on Special Missions, art. 31, para. 5; the 1975 Vienna Convention, art. 30, para. 4 and art. 60, para. 5.

[115] *Yearbook ... 1957*, vol. I, p. 105, 404th meeting, para. 29 (Mr. François). Cf. the 1929 resolution of the Institute of International Law on diplomatic immunities, article 9 of which provides:

> "The head of mission, the members of the mission officially recognized as such and the members of their families residing in the same household shall not lose their former domicile." (*Annuaire de l'Institut de droit international, 1929*, vol. II, p. 309.)

Text cited in Ph. Cahier, *Le droit diplomatique contemporain* (Geneva, Droz, 1962), p. 459, and Harvard Law School, *op. cit.* (footnote 104 above), p. 187.

[116] *Yearbook ... 1958*, vol. I, pp. 153-154, 460th meeting, paras. 47-63.

[117] See the discussion at the Conference on the amendments to article 29 (Immunity from jurisdiction) submitted by Spain (A/CONF.20/C.1/L.221), Netherlands (A/CONF.20/C.1/L.186) and Venezuela (A/CONF.20/C.1/L.229) (*Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. I, pp. 166-172, *Committee of the Whole*, 27th meeting, paras. 18-65, and 28th meeting, paras. 1-27).

Article 23. Immunity from jurisdiction

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

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

3. No measures of execution may be taken against the diplomatic courier, except in cases not covered by paragraph 2 of this article and provided that the measures concerned can be taken without infringing the inviolability of his person, temporary accommodation or the diplomatic bag entrusted to him.

4. The diplomatic courier is not obliged to give evidence as witness.

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

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

3. Exemptions accorded to the diplomatic courier and the diplomatic courier *ad hoc*

145. As has been pointed out above (para. 24 (*b*)), the privileges and immunities accorded to the diplomatic courier include recognition of the *inviolability* of his person, of his temporary accommodation and of his means of transport, as well as *immunity from local jurisdiction* and the granting of various *exemptions* in the performance of his functions. The first two components of the privileges and immunities, namely, inviolability and immunity from jurisdiction, were considered together with the corresponding draft articles 20, 21, 22 and 23 (paras. 68, 80 and 139 above). The Special Rapporteur proposes to proceed with the examination of the exemptions to be accorded to the diplomatic courier and to submit for consideration the relevant draft articles.

141. The four codification conventions contain no legal definition of the general notion of *facilities, privileges,* and *immunities,* nor do they attempt to draw a distinction between *privileges, immunities* and *exemptions.* The 1961, Vienna Convention, which sets the pattern on this matter, prefers to use either the aggregate term "privileges and immunities", or the terms "rights", "facilities", "immunities" or "exemptions", for each specific provision, according to its subject matter. The 1963 Vienna Convention, in its chapter II, entitled "Facilities, privileges and immunities relating to consular posts, career consular officers and other members of a consular post", while following the same approach, uses as titles of certain articles the terms "facilities", "inviolability", "exemptions", along with the cumulative term "privileges and immunities". The other conventions, namely, the Convention on Special Missions and the 1975 Vienna Convention, conform to this pattern. This inductive and pragmatic method is well justified, for it leads to more precise provisions with a specific legal content.

142. Following this methodology, the view could be maintained that there might be some nuances inherent in the legal notions of *immunity* or *exemption*, expressed in the form of a rule providing for certain rights and obligations. Nevertheless, the practical legal implications and results are the same. It is true that under customary international law diplomatic immunity constitutes a legal shelter against local jurisdiction and enforcement measures of a judicial or administrative character. *Diplomatic immunity* provides the legal basis for the inviolability of the person concerned, including inviolability of his person, correspondence, accommodation and property. *Exemption* means that the person to whom it is granted is relieved of certain legally binding duties otherwise applicable in regard to all. Thus exemption entails special rights, accorded by the receiving State to diplomatic agents and other officials of the sending State, which create a privileged régime of treatment resulting in the non-application of local laws or regulations in respect of the persons concerned.

143. The functional approach is equally applicable to the various kinds of privileges, immunities and exemptions accorded to the diplomatic courier. In some instances, the functional necessity is more manifest in the direct relation between the special right accorded to the member of a diplomatic mission and the performance of his official function. In other instances, such a special right may be identified within a general framework of stipulations which are propitious to the proper exercise of official functions. However, in both instances, the exemptions accorded to a diplomatic agent or a member of the diplomatic mission, as well as to a diplomatic courier, have to be viewed in connection with their impact, either directly on the performance of the official duties of the persons concerned, or as measures of hospitality which would create favourable conditions for the exercise of these duties.

144. The exemptions granted to a diplomatic agent from personal examination, customs duties and inspection, from dues and taxes, and from local personal and public services or social security, have been qualified in some publications on international law as "immunities" or "privileges". It may be noted that some authors have used both terms with no differentiation whatsoever,[118]

[118] See, for example, Cahier, *op. cit.* (footnote 115 above), p. 277, where exemptions from local dues and taxes are considered as "*privilèges fiscaux*" or "*immunité fiscale*". See also Lee, *op. cit.* (footnote 103 above), p. 149, where the term "financial privileges" is used for exemption from taxation, also termed "exemptions". Some writers, like E. M. Satow, *A Guide to Diplomatic Practice,* 4th ed. (London, Longmans, Green, 1957), p. 228, use only the term "ex-

or have even gone so far as to define them as facilities based on diplomatic courtesy.[119]

145. Exemptions from customs duties and inspections, as well as from taxes, dues or charges and other exemptions, were considered by customary international law not as legally binding obligations but rather as a matter of courtesy, usually applied on a basis of reciprocity. This concept was substantiated by State practice, as evidenced by national legislation and bilateral agreements. The prevailing legal doctrine until the turn of the century, and up to a few decades ago, reflected this concept of the legal nature of the exemptions as that of comity. However, the evolving process of the codification of diplomatic law has brought about significant conceptual modifications with practical implications. This evolution in the development of international law has affected the legal foundations of the exemptions granted to diplomatic missions and their personnel. Customs and other fiscal exemptions, and the rules determining their scope and operation *ratione materiae* and *ratione personae*, are within the jurisdiction of every State, based upon its laws and regulations. The most common practice relates to the free admission without customs duties or examination of articles for official use. This rule has been further extended to cover also articles for the personal use of members of diplomatic missions and their families. This type of exemption has been applied in some other fields, outside the framework of customs and fiscal regulations, such as personal and public services.

146. The most significant event in the codification and devlopment of diplomatic law in general, and of the rules governing diplomatic privileges and immunities in particular, was the United Nations Conference on Diplomatic Intercourse and Immunities, in 1961. The draft articles on diplomatic intercourse and immunities prepared by the Commission at its ninth and tenth sessions, in 1957 and 1958, already included provisions relating to various exemptions. Some were based on the comments or proposals submitted by Governments on the draft articles elaborated by the Commission,[120] prior to the Conference, while others were presented as amendments at the Conference itself.[121] It may be added that consideration of these draft articles, both in the Commission and later in the Conference, in general did not give rise to extensive discussions or difficulties. Some of them were adopted unanimously[122] or with little disagreement.[123]

147. The significant developments that deserve to be indicated with respect to the legal nature and scope of the exemptions, in our submission, are the following: (*a*) prior to the 1961 Vienna Convention, fiscal and other exemptions were generally considered as privileges deriving from comity and based upon reciprocity; (*b*) some of the exceptions, such as exemption from social security, were viewed as domestic law which did not give rise to obligations under international law; (*c*) exemption from taxation granted to members of diplomatic missions, although recognized in State practice, lacked the necessary uniformity and precision. Therefore it may be reasonably maintained that the 1961 Vienna Convention, with all its loopholes and ambiguities, constituted an important step forward in the codification and progressive development of diplomatic law. It set in motion a process which affected the other codification conferences in the field of diplomatic law and is still going on. This achievement of the 1961 Vienna Convention is most noteworthy in respect of the transformation of the exemptions accorded to diplomatic missions and their personnel from privileges of courtesy based on reciprocity into legally binding rules of modern international law. It is suggested that this development be borne in mind when examining the specific exemptions granted to members of diplomatic and other missions, which could also be accorded to diplomatic couriers.

148. Among the exemptions established as legal rules by the 1961 Vienna Convention and followed by the other codification conventions, there are four that have a certain relevance in respect of the status of the diplomatic courier. These are exemptions from: (*a*) personal examination, customs duties and inspection; (*b*) dues and taxes; (*c*) personal and public services; (*d*) social security provisions in force in the receiving State. The Special Rapporteur proposes to consider those exemptions in that order and to present corresponding draft articles.

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emption". Most of the works on the subject published in the USSR use the term "fiscal immunity" for exemptions from all taxes, dues and charges, personal or real, and the term "customs privileges" for exemptions from all customs duties, taxes and related charges on the import and export of articles for the official or personal use of members of the diplomatic mission. See G. I Tunkin, ed., *Mezhdunarodnoe Pravo* [International Law] (Moscow, 1982), p. 276.

[119] See Perrenoud, *op. cit.* (footnote 61 above), p. 197, where exemption from taxation is termed a "*facilité de simple courtoisie*". It is obvious that, since the adoption of the 1961 Vienna Convention, at least for the over 140 States that are parties to that Convention, the exemptions from all dues and taxes provided for in articles 28, 34, 36 and 37 cannot be considered as a "simple courtesy" but as legal obligations.

[120] See, for example, in "Comments by Governments on the draft articles concerning diplomatic intercourse and immunities adopted by the International Law Commission at its ninth session in 1957" (*Yearbook ... 1958*, vol. II, p. 111, document A/3859, annex), the proposals of Luxembourg, on exemption from social security provisions (present article 33) (*ibid.*, p. 123); of the Netherlands, on exemption of dues and charges levied by the mission (present article 28) (*ibid.*, p. 125); and of the USSR, on exemption from personal services (present article 35) (*ibid.* p. 131). See also articles 26, 31, 32, 33 and 34 of the draft adopted by the Commission at its tenth session, in 1958 (*ibid.* pp. 97, 99, 100).

[121] See *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. I, pp. 153-154 and 182-193, *Committee of the Whole*, 25th meeting, paras. 1-11; 30th meeting; 31st meeting, paras. 1-87; 32nd meeting, paras. 1-13.

[122] This was the case with draft article 26 (art. 28 of the Convention) on tax exemption of charges levied by the mission, which was adopted unanimously and without amendment (*ibid.*, p. 152, 24th meeting, para. 56).

[123] This was the case with the provision on exemption from customs duties (draft art. 34) as a legally binding rule, which was incorporated in article 36 of the Convention. The discussion bore essentially on the application of this rule within the framework of national laws and regulations (*ibid.*, pp. 188-191, 31st meeting, paras. 34-87).

149. The elaboration of draft articles on such exemptions to be granted to the diplomatic courier has a practical significance. Having in mind the fact that there are no specific provisions in this field with special reference to the status of the courier, the adoption of certain rules on this matter may provide a sound legal basis for the prevention of possible abuses of the privileges and immunities granted to the diplomatic courier without diminishing the legal protection he enjoys or impeding the proper performance of his official functions. It is well known that customs and fiscal privileges and immunities are most likely to be misused. On the other hand, unwarranted and excessive measures of inspection and other restrictions might also be used as a pretext for infringement of the inviolability of the person of the courier and the safety and confidential nature of the diplomatic bag entrusted to him. Futhermore, a reasonable legal framework of exceptions, justified by functional necessity, can create favourable conditions for the discharge of the official duties of the courier. Consequently, the draft articles in this field should be based on a viable balance between the legitimate rights and interests of the receiving and the transit States on the one hand and the sending State on the other hand.

(a) *Exemption from personal examination, customs duties and inspection*

150. Exemptions from personal search or examination and from customs duties and inspection are connected with the regulations relating to entry or exit procedures applied at frontier check points. There are in fact two kinds of interrelated problems: (*a*) exemption from personal inspection, i.e. a search of the person effected through the examination of everything on him, including his papers and personal effects; and (*b*) exemption from customs regulations relating to customs inspection of personal baggage and permission for entry of articles for personal use free of customs duties, taxes and related charges.

151. Laws and regulations on admission of persons and goods across the frontier, including immigration, customs and public health control at frontier check points, are within the national jurisdiction of the State. They are aimed at protecting the security and the economic, fiscal and other legitimate interests of the State. Therefore the exemptions from the application of these laws and regulations accorded to diplomatic agents and other officials of the sending State, deriving from the principles of State immunity and freedom of communications for official purposes, should be as specific as possible and in conformity with the laws and regulations of the receiving or the transit State.

152. These basic considerations have acquired particular significance nowadays when illicit traffic in foreign currency, narcotic drugs, arms and other goods has reached alarming dimensions. Thus the spread of international terrorism and the unlawful seizure of aircraft and other forms of air piracy have justified special measures of increased scrutiny of passengers and their baggage, including the regular use of electronic and mechanical devices for examination and screening.

153. The status of the diplomatic courier, as a person entrusted with a highly confidential task by the sending State, has to be examined in the light of these basic considerations, as far as the conditions for his admission into the territory of the receiving or the transit State are concerned. The problem is whether he should be exempt from personal inspection, including examination carried out at a distance by means of electronic or other mechanical devices. State practice in this matter, so far, has not been very uniform. According to the preliminary and limited information available, in most instances diplomatic couriers have been exempted from personal examination at entry or exit check points upon their request and proof of status. This practice has usually been established on a reciprocal basis.

154. The main reason behind the exemption of a diplomatic courier from personal examination has been the recognition of his official functions, deriving from the fundamental principles of freedom of communication of States for official purposes and of the inviolability of the person entrusted with the carrying out of these functions. Exemption from personal search has also been considered as a courtesy accorded to a State official and as an expression of good faith and legitimate presumption that such an official would not be involved in illicit acts endangering the safety of civil aviation or in other offences against the receiving or the transit State. It may thus be suggested that, without overlooking the rationale of the measures against illicit traffic and other abuses, it would not be warranted by practical considerations to apply such measures in regard to the diplomatic courier in the performance of his official functions. Otherwise, suspicion on the part of the sending State that the means of examination, including the use of sophisticated mechanical devices, are designed to penetrate matters considered to be of a confidential nature might not be alleviated.

155. Exemption from all customs duties, taxes and related charges on articles for the official use of the diplomatic mission, and for the personal use of a diplomatic agent or members of his family, formed part of international law long before the adoption of the 1961 Vienna Convention. As has already been pointed out (paras. 145-147 above), they were considered as customs privileges accorded to members of the diplomatic mission on the basis of courtesy and by way of reciprocity. Article 36 of the 1961 Vienna Convention has transformed them into conventional rules of modern international law by stipulating that the receiving State shall, in accordance with its laws and regulations, permit entry of the aforementioned articles and grant them exemption from all customs duties and taxes. Article 36 also provides that the personal baggage of a diplomatic agent shall be exempt from inspection. While providing that the exemptions are granted within the framework of the laws and regulations of the receiving State, article 36 explicitly stipulates two exceptions to their operation. The first exception relates to charges

for storage, cartage and similar services rendered, which are not exempt from payment. The second exception provides that the personal baggage of a diplomatic agent may be examined where there are serious grounds for presuming that it contains articles not for official or personal use, but for lucrative purposes, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State. However, an important requirement is specifically stipulated in this case, namely, that the inspection shall be conducted only in the presence of the diplomatic agent or of an authorized representative of the sending State.

156. Taken together, the provisions of article 36 in respect of permission for the entry and exemption from customs duties and taxes of articles for official and personal use, as well as exemption from inspection of personal baggage, constitute a privileged customs régime. At the same time, it should be emphasized that this régime operates within the laws and regulations of the receiving State and is subject to certain exceptions and restrictions. Although the reference to the laws and regulations of the receiving State is not specified, it is understood that they permit the operation of the régime and that the formalities and other procedural requirements are basically aimed at preventing possible abuses in connection with the import of articles duty free or other exemptions.

157. Article 36 of the 1961 Vienna Convention established model rules on this matter, which were followed by the other conventions codifying diplomatic law.[124] The provisions contained in article 36 regarding the free entry of articles for official or personal use and the granting of exemptions from all customs duties, taxes and related charges on such articles, as well as from inspection of personal baggage, could be applicable in regard to the diplomatic courier when performing his official functions. This assertion is supported by State practice, as evidenced by national laws and regulations, international agreements and diplomatic correspondence.

158. Most national laws and regulations refer to the customs privileges and immunities accorded to the personal baggage of the diplomatic courier. Some were enacted prior to the adoption of the 1961 Vienna Convention and explicitly provided for reciprocal treatment.[125] The laws and regulations adopted since the adoption of the Convention simply state that exemption from customs inspection shall also apply to the personal baggage of the diplomatic courier.[126] However, there are national laws and regulations which do not contain specific provisions relating to the customs régime of the diplomatic courier. In rare cases it has been explicitly indicated that the personal baggage of the courier should not be exempt from customs inspection.[127]

159. There has been a distinct trend in State practice to accord to diplomatic couriers the same customs privileges and immunities as those granted to members of diplomatic missions. As has been pointed out, this practice was established long before the adoption of the 1961 Vienna Convention and has been confirmed ever since. By way of illustration, we could mention the national legislation on this matter of several States. The Code of Federal Regulations of the United States of America specifically states: "The accompanied personal baggage of diplomatic couriers of foreign countries shall be accorded customs privileges and immunites extended to foreign personnel of diplomatic rank under paragraph (*c*), except in cases provided for by special instructions from the Commissioner of Customs."[128] Article 9 of the Rules adopted by the Soviet Union in 1967 concerning the personal belongings of diplomatic couriers stipulates that "the personal belongings of diplomatic couriers which are imported for their personal use shall be admitted without customs inspection".[129] Similar regulations with regard to exemption from customs inspection of the personal baggage of the courier are incorporated in the national legislation of the Netherlands, Belgium and other States.[130] The order issued by the Federal Ministry of Foreign Trade of Czechoslovakia for the implementation of Customs Act No. 44/1974 provides that exemption from customs inspection shall also apply to the baggage of diplomatic and consular couriers, even if it is imported or exported by a means of transport other than that used by such persons.[131]

160. Case-law on this matter is relatively limited. However, most of the cases on which information is available, with few exceptions, support the rule of exemption from customs duties, taxes and inspection accorded to diplomatic couriers. In this connection, the experience of the United States and some other coun-

[124] See, for example, the 1963 Vienna Convention, art. 50; the Convention on Special Missions, art. 35; and the 1975 Vienna Convention, arts. 35 and 65.

[125] See, for example, the customs regulations of the Netherlands and the USSR, reported by Satow, *op. cit.* (footnote 118 above), pp. 236-239. There are also laws and regulations on customs exemption accorded to diplomatic couriers that were adopted prior to the 1961 Vienna Convention, in which no special reference is made to the principle of reciprocity. This is the case with the regulations of Belgium contained in the "Instruction du Ministère des finances concernant les immunités diplomatiques, 1955 (Administration des douanes et accises)", paras. 86-90, reproduced in United Nations, Legislative Series, vol. VII ... , pp. 45-46.

[126] See article 29 of Customs Act No. 44/1974 of 24 April 1974 of Czechoslovakia, and articles 5 and 6 of the order of the Federal Ministry of Foreign Trade of 25 November 1974 implementing that Act (reproduced in *Yearbook ... 1982*, vol. II (Part One), pp. 235-236, document A/CN.4/356 and Add.1-3). See also *Code of Federal Regulations, Title 19, Customs Duties (Revised as of January 1, 1968)* (Washington, D.C., 1968), p. 269, sect. 10.29.

[127] See, in the case of Switzerland, article IV, para. 3, of the "Règles appliquées par le Département politique fédéral en matière d'immunités et privilèges diplomatiques et consulaires", reproduced in United Nations, Legislative Series, vol. VII ... , p. 307.

[128] Section 10.29, para. (*f*) of title 19 of the Code (see footnote 126 above).

[129] See *Yearbook ... 1982*, vol. II (Part One), p. 243, document A/CN.4/356 and Add.1-3.

[130] See footnote 125 above.

[131] Art. 6 of the order (see footnote 126 above).

tries provides grounds for such a conclusion. By way of example, the following diplomatic correspondence on this subject might be appropriate.

161. In a telegram addressed by the Secretary of State of the United States of America to the Ambassador of Turkey, it was stated:

> As regards customs immunity of diplomatic couriers it appears that diplomatic couriers are not mentioned in article 425 (a) (1) of the Customs Regulations of 1931 and that they are therefore not entitled to the privilege of having their baggage and effects passed without customs examination in the absence of specific authorization. According to a ruling of the Treasury Department, however, that Department has signified its willingness to instruct the Collector of Customs at the appropriate port of entry to admit free of duty the baggage and effects of diplomatic couriers upon request from the Department of State *in each instance*. The making of such a request by this Department would, of course, be conditioned on the assurance that reciprocal courtesies would be extended.[132]

Again, in a communication from the Chief of the Division of Near Eastern Affairs of the United States Department of State to the Persian Minister, it was stated:

> ... they [diplomatic couriers] receive free entry, without examination, for their official papers and documents, and expeditious passage through the customs for themselves and their effects.
>
> In other words, the exemptions accorded him are for the documents he carries rather than for himself. Once he has finished his mission and delivered his bag to his Ambassador or Minister he is not entitled to any diplomatic privileges.[133]

162. On the same issue, the diplomatic correspondence between the Government of the USSR and the United States Embassy in Moscow could also be mentioned. The United States Ambassador to the Soviet Union informed the Department of State, in August 1935, that it was the practice of the Soviet Government to pass without examination the personal baggage of United States diplomatic couriers in the Soviet Union and suggested that the same courtesy should be extended to Soviet diplomatic couriers in the United States. The Department of State accordingly wrote to the Secretary of the Treasury asking that the customs authorities at New York be informed of the practice of the Soviet Government and instructed to accord Soviet couriers all possible facilities upon their arrival in the United States.[134]

163. The above-mentioned cases occurred prior to the adoption and entry into force of the 1961 Vienna Convention. Therefore the principle of reciprocity had a prominent role. The situation has changed since the incorporation in the 1961 Vienna Convention of special provisions on customs duties and inspection, which constitute a rule of modern diplomatic law. This should not lead to the conclusion that the principle of reciprocity in such matters has lost its significance. Having in mind the fact that exemptions from all customs duties, taxes and inspection operate within the framework of national laws and regulations and thus have a permissive character, reciprocal treatment would be in many instances the *modus operandi* of the general rules of diplomatic law incorporated in the 1961 Vienna Convention.

164. National laws contain few provisions regarding the customs régime applicable to the diplomatic courier. Hence the status of the diplomatic courier in relation to customs matters remains uncertain. It would therefore be advisable to provide some specific rules governing the personal examination, customs duties and inspection applicable to the status of the courier. The same provisions should apply *mutatis mutandis* to the diplomatic courier *ad hoc*, when his own status does not give him better legal protection.

165. In the light of the above considerations regarding personal examination, customs duties and inspection of baggage applicable to the diplomatic courier, the Special Rapporteur submits the following draft article for examination and provisional approval:

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

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

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

3. The personal baggage of the diplomatic courier shall be exempt from inspection, unless there are serious grounds for believing that it contains articles not covered by the exemptions referred to in paragraph 2 of this article, or articles the import or export of which is prohibited by law or controlled by the quarantine regulations of the receiving State or the transit State. In such cases inspection shall be carried out only in the presence of the diplomatic courier.

(b) *Exemption from dues and taxes*

166. Exemption from taxation falls within the broader scope of financial privileges and immunities accorded to diplomatic missions and their members. Like some of the other exemptions, particularly from customs duties and inspection, exemption from taxation, prior to the 1961 Vienna Convention, was applied on the basis of reciprocity. The operation of this rule was influenced by national tax systems and there was therefore a great diversity of régimes. With the adoption of article 34 of the 1961 Vienna Convention, the general rule was

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[132] Telegram dated 24 August 1937 (MS. Department of State, file 811.111 Diplomatic/10667), cited in Hackworth, *op. cit.* (footnote 59 above), p. 622.

[133] Communication dated 16 January 1930 (MS. Department of State, file 701/159a), *idem.*

[134] Telegram No. 353 of 16 August 1935 addressed by the Ambassador of the United States, Bullitt, to the Secretary of State, Hull; and letter of 23 August 1935 addressed by the Assistant Secretary of State, Moore, to the Secretary of the Treasury (MS. Department of State, file 701.6111/841), *idem.*

established according to which diplomatic agents should be exempt from all dues and taxes, personal or real, national, regional or municipal, with several specific exceptions. These exceptions from taxation relate to indirect taxes incorporated in the price of goods or services, dues and taxes levied on private immovable property situated in the receiving State, inheritance duties, private commercial or other lucrative activities, as well as charges levied for specific services rendered, including various kinds of registration, court or record fees. The provisions contained in article 34 served as a model for the corresponding articles in the other codification conventions.[135]

167. Considering the specific features of the official functions of the diplomatic courier, his short sojourn in the territory of the receiving or the transit State and the very limited scope of his contractual or other relations concerning property rights, it is obvious that the exemptions from taxation would also be limited. This aspect of the status of the courier has been repeatedly emphasized in connection with the privileges and immunities which he could enjoy (see paras. 90-91 above). Thus, of the six specific exceptions listed in article 34 of the 1961 Vienna Convention, only the exception concerning indirect taxes incorporated in the price of goods or services and the exception concerning charges levied for specific services rendered would be of practical significance for the diplomatic courier. The short stay of the diplomatic courier in a given country would prevent him from having the practical opportunity to exercise private rights relating to immovable property or to taxable private income. In any event, if such cases should arise, the diplomatic courier should comply with all the rules applicable to members of the diplomatic mission. Thus in practice the granting of tax privileges to the diplomatic courier will not lead to any tangible limitation of the fiscal jurisdiction of the receiving State, but will provide him with a treatment corresponding to his status as a person exercising official functions.

168. The basic rule that would be relevant in respect of exemptions from taxation granted to the diplomatic courier should not be more restrictive than the standard provisions applicable in this regard to members of the diplomatic mission. The operation of this rule should exempt the diplomatic courier from all dues, taxes and charges, personal or real, levied at the national, regional or municipal level. The only exception to this rule should be in respect of indirect taxes such as those that are normally incorporated in the price of goods, such as sales tax, value added tax, or any other taxes, dues or charges levied for specific services rendered.

169. In the light of these considerations it is suggested that the following draft article should be considered:

Article 25. Exemption from dues and taxes

The diplomatic courier shall be exempt from taxes, dues and charges, personal or real, national, regional and municipal, except for indirect taxes of a kind which are normally incorporated in the price of goods or services and charges levied for specific services rendered.

(c) *Exemption from personal and public services*

170. Exemption from personal and public services such as those required in emergency situations, as well as from military obligatons, such as requisitioning, or various kinds of military contributions, including billeting, has been a long-standing rule of customary law. In order to give effect to this rule, some States have enacted national legislation providing for exemption of diplomatic agents from specific personal and public services.[136]

171. The Soviet Union initiated the inclusion of a special provision on this matter in the draft articles on diplomatic intercourse and immunities prepared by the Commission. In its written comments, the Soviet Government proposed the inclusion of an article on exemption from personal and public services.[137] Following the proposal, the Special Rapporteur presented a draft article which was considered by the Commission at its tenth session, in 1958.[138] At the United Nations Conference on Diplomatic Intercourse and Immunities, in 1961, Belgium submitted an amendment to the draft article, which was adopted with some drafting changes as article 35 of the Vienna Convention on Diplomatic Relations. This article provides that the receiving State shall exempt diplomatic agents from all personal and public services, including military and other obligations connected with requisitioning, military contributions and billeting. By virtue of article 37, paragraph 2, this rule, which was supported by State practice and was in conformity with the official status of diplomatic agents. was applied also in regard to the administrative and technical staff of the diplomatic mission. The corresponding provisions in the other codification conventions[139] were modelled on article 35 of the 1961 Vienna Convention.

172. The application of exemption from personal and public services in respect of the diplomatic courier would be well justified, taking into account his official functions. The duty of the courier is to ensure the safe and speedy delivery of the diplomatic bag to its destination. By the nature of his functions, the courier is a per-

[135] See the 1963 Vienna Convention, art. 49; the Convention on Special Missions, art. 33; and the 1975 Vienna Convention, arts. 33 and 63.

[136] See, for example, in United Nations, Legislative Series, vol. VII ... , the laws and regulations of Czechoslovakia (pp. 83-85), Denmark (p. 101), Greece (pp. 136-137), Netherlands (p. 199), Poland (pp. 269-275), Portugal (p. 288) and other countries.

[137] See footnote 120 above.

[138] *Yearbook ... 1958*, vol. I, pp. 157-158, 461st meeting, paras. 19-28.

[139] See the 1963 Vienna Convention, art. 52; the Convention on Special Missions, art. 34; and the 1975 Vienna Convention, arts. 34 and 64.

son whose stay in a given country is very limited, and the proper discharge of his duties requires rapid delivery of the bag. Thus any delays that may be caused by the performance of personal or other civic duties would make it impossible for the courier to deliver the diplomatic bag in time. The functional necessity underlying the exemption from personal and public services to be accorded to the diplomatic courier is obvious. This applies to both the receiving State and the transit State, and to all types of diplomatic couriers, including the diplomatic courier *ad hoc*.

173. The formulation of the rule that the receiving or transit State shall exempt the diplomatic courier from all personal and public services need not be so detailed and specific as article 35 of the 1961 Vienna Convention. The rationale of such an approach would above all be the short sojourn of the courier, which in practice restricts the probabilities of a courier being called upon to perform military and other similar obligations connected with requisitioning, military contributions of any kind or to provide board and lodging to military personnel.

174. In the light of these considerations on exemption from personal and public services, the Special Rapporteur submits the following draft article for examination and provisional approval:

Article 26. Exemption from personal and public services

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

(d) *Exemption from social security provisions*

175. The rule according to which diplomatic agents shall be exempt from the social security provisions of the receiving State in respect of services rendered for the sending State is of relatively recent origin. Because this rule was initially incorporated in domestic legislation, as has been pointed out above (para. 147), it was viewed as not entailing international obligations.

176. The decisive element in the adoption of this rule was the proposal made by Luxembourg in its written comments on the draft articles on diplomatic intercourse and immunities,[140] which the Commission considered at its tenth session, in 1958.[141] The draft article subsequently adopted by the Commission provided for exemption from the social security legislation of the receiving State for all members of the diplomatic mission and members of their families, with the exception of employees who are nationals of the receiving State. At the United Nations Conference in 1961, the draft article was adopted with an amendment submitted by Austria,[142] and became article 33 of the Convention. The corresponding articles of the other codification conventions were modelled on that article.[143]

177. Exemption from the social security provisions of the receiving or the transit State would have practical significance for the status of the diplomatic courier owing to the specific features inherent in his official duties. The granting of such an exemption to a diplomatic courier would be well justified, since he constantly moves from one locality to another in the performance of his official functions. It would therefore be inexpedient for the receiving or the transit State to request the courier to make contributions to its social security system. The diplomatic courier, who presumably contributes to social security in the sending State (for example, to health insurance, old-age insurance or disability insurance), would find it extremely difficult to start contributing in the receiving State, only to withdraw from the scheme when he has to move to other places in connection with his official functions. Furthermore, it would be absolutely in conformity with established State practice to accord such an exception to all members of the diplomatic mission, including the private servants employed by a diplomatic agent, on condition that they are not nationals of or permanently resident in the receiving State and are covered by the social security provisions that may be in force in the sending State. The diplomatic courier, therefore, by reason of his official functions and his status, has all the qualifications for being accorded exemption from the social security legislation of the receiving or the transit State. The rule in respect of the courier could be formulated in more concise form, having in mind the special circumstances under which the courier performs his duties, and more specifically the nature and duration of his functions.

178. In the light of these considerations regarding exemption from the social security provisions in force in the receiving or the transit State, the Special Rapporteur presents the following draft article for examination and provisional adoption:

Article 27. Exemption from social security provisions

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

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[140] See footnote 120 above.

[141] *Yearbook ... 1958*, vol. I, p. 198, 467th meeting, paras. 52-56.

[142] *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. I, pp. 153-154, 182-183, and 193, *Committee of the Whole*, 25th meeting, paras. 1-11; 30th meeting, paras. 1-27; 32nd meeting, paras. 1-14. For the text of the Austrian amendment, *ibid.*, vol. II, p. 35, document A/CONF.20/C.1/L.265.

[143] See the 1963 Vienna Convention, art. 48; the Convention on Special Missions, art 32; and the 1975 Vienna Convention, arts. 32 and 62.

C. Duration of facilities, privileges and immunites

1. Duration

179. Under the general heading of duration of facilities, privileges and immunities accorded to the diplomatic courier, the examination is suggested of two interrelated problems dealing with the commencement and the end of those facilities, privileges and immunities, namely, duration proper and waiver of immunity from jurisdiction, as a special case of suspending the operation of such immunity.

180. The problems relating to the duration of the facilities, privileges and immunities accorded to the diplomatic courier are closely connected with the duration of his functions. Since this aspect is of particular significance for the practical implementation of the relevant rules pertaining to individual facilities, privileges and immunities, it might be advisable to have a closer look at their relation with the functions of the courier. In this connection, it is proposed to examine the *travaux préparatoires* on article 27, paragraph 5, of the 1961 Vienna Convention, on the immunity of the diplomatic courier, and also, to some extent, those on article 39 of the same Convention, on the duration of diplomatic privileges and immunities.

181. During the drafting of a provision on the diplomatic courier to be included in a convention on diplomatic relations, the Commission, at its ninth session, in 1957, assumed that the duration of the courier's privileges and immunities should correspond to the periods during which he performed his functions as a courier. There was, however, a conflict of views as to exactly how to prescribe the duration. One member of the Commission took the view that "the privilege of inviolability was enjoyed by diplomatic couriers only as long as they were carrying the diplomatic bag".[144] In the opinion of another member, however, it would be

> inadvisable to limit the inviolability of diplomatic couriers strictly to the periods during which they were carrying diplomatic bags. Diplomatic couriers usually moved from capital to capital, spending a short time in each, and it would only create confusion if they were inviolable for part of the time and not for the rest.[145]

182. In 1958, the Special Rapporteur for the topic on diplomatic intercourse and immunities presented a revised draft on the diplomatic courier (art. 21, para. 3), in which he had inserted the following phrase: "If such a person is travelling exclusively as a diplomatic courier he shall enjoy personal inviolability during the journey ..."[146] One member of the Commission made a critical remark thereon:

> ... the phrase "during his journey" in the new text might be interpreted to mean that the courier should not enjoy personal inviolability and immunity from arrest or detention in the intervals between his journeys. Such intervals might be short or long, according to the remoteness of the post to which the courier was sent; but, unless he went on leave during the interval, his inviolability and immunity should not be interrupted.[147]

While it was the Special Rapporteur's intention that the word "journey" meant "both the outward and the return journey, and also the interval between them", it was generally felt among the members of the Commission that the words "during his journey" might give rise to an excessively restrictive interpretation. Accordingly, the Special Rapporteur's amendment was withdrawn.[148]

183. The United Nations Conference in 1961 did not elaborate on this point. The joint amendment by France and Switzerland, however, which became article 27, paragraph 5, of the Vienna Convention on Diplomatic Relations, provided in general terms that the diplomatic courier should be protected "in the performance of his functions".[149] The basic assumption that the duration of the diplomatic courier's privileges and immunities was subject to "the performance of his functions" was thus expressly confirmed.

184. The three other conventions, each of which contains a provision identical with the above, did not add anything to the results arrived at in the 1961 Vienna Convention. The only exception was the question regarding the duration of the privileges and immunities of the courier *ad hoc*, provided for in article 27, paragraph 6, which stipulates that the immunities accorded to him shall cease to apply when such a courier has delivered to the consignee the diplomatic bag in his charge. The main features of the legal status of the diplomatic courier *ad hoc* have already been considered in the second report presented by the Special Rapporteur.[150]

185. Some of the provisions of article 39 of the 1961 Vienna Convention and of the corresponding articles of the other codification conventions are very relevant to the problems relating to the commencement and the end of the facilities, privileges and immunities accorded to the diplomatic courier. This is the main reason for a brief analytical survey of the legislative history of article 39, especially in regard to the critical moments of entitlement and end of diplomatic privileges and immunities. This survey should also confirm the close relationship between diplomatic functions and diplomatic privileges and immunities.

186. Prior to the 1961 Vienna Convention, there were no uniform rules governing the commencement and the end of diplomatic privileges and immunities. A great deal of diversity prevailed in State practice and legal

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[144] *Yearbook ... 1957*, vol. I, p. 84, 400th meeting, para. 5 (Mr. François).

[145] *Ibid.*, para. 6 (M. Tunkin).

[146] *Yearbook ... 1958*, vol. II, p. 17, document A/CN.4/116/Add.1.

[147] *Yearbook ... 1958*, vol. I, p. 140, 458th meeting, para. 2 (Sir Gerald Fitzmaurice).

[148] *Ibid.*, pp. 140-141, paras. 3-15.

[149] *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. II, pp. 38-39, document A/CONF.20/C.1/L.286

[150] Document A/CN.4/347 and Add.1 and 2 (see footnote 1 above), paras. 111-115.

doctrine.[151] The Commission, at its ninth and tenth sessions and later the United Nations Conference on Diplomatic Intercourse and Immunities, decided that the moment at which the diplomatic courier entered the territory of the receiving State on proceeding to take up his post or, if already on its territory, the moment at which his appointment was communicated to the competent authorities of the receiving State, was the moment at which a diplomatic agent was entitled to privileges and immunities.[152]

187. The rules relating to the end of diplomatic privileges and immunities had been well established in State practice and recognized by customary international law. Those rules are expressed in more precise terms in paragraphs 2 and 3 of article 39 of the 1961 Vienna Convention, in which it is provided that, when the functions of the person concerned have come to an end, the privileges and immunities he was accorded shall normally cease at the moment when he leaves the territory of the receiving State, or on expiry of a reasonable period in which to do so. However, with respect to acts performed by such a person in the exercise of his official functions, immunity shall continue to subsist, i.e. it will not be affected by the termination of his functions and subsequent departure from the country. The reason for this exception is the official nature of the acts, attributable to the State and enjoying the immunity granted to that State by virtue of its sovereignty. Another important aspect of the duration of diplomatic privileges and immunities relates to the privileges and immunities granted to members of the family of a member of the mission. In the case of death of a member of the diplomatic mission, the members of his family are entitled to enjoy the privileges and immunities until the expiry of a reasonable period in which to leave the country. This provision was modelled on article 24 of the Convention regarding Diplomatic Officers, signed at Havana on 20 February 1928,[153] and reproduced in an amendment submitted by Mexico at the 1961 Vienna Conference.[154]

188. The conventions codifying diplomatic law do not contain special provisions regarding the duration of the facilities, privileges and immunities accorded to the diplomatic courier. The *travaux préparatoires* relating to article 27 of the 1961 Vienna Convention examined above (paras. 181-183) offer only very general guidance on this issue. That is sufficient reason for attempting to suggest certain rules concerning the commencement and end of the privileges and immunities accorded to diplomatic couriers. Considering the limited State practice in this area, a draft article clarifying the duration of the privileges and immunities of the diplomatic courier may be useful.

189. In the light of the above considerations, the Special Rapporteur presents the following draft article for examination and provisional adoption:

Article 28. Duration of privileges and immunities

1. The diplomatic courier shall enjoy privileges and immunities from the moment he enters the territory of the receiving State or the transit State in order to perform his official functions.

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

2. Waiver of immunity

190. Waiver of jurisdictional immunity as a method of renunciation of or voluntary submission to the jurisdiction of the receiving State directly affects the duration of such immunity accorded to the diplomatic mission of the sending State and its members. From this point of view, waiver of jurisdictional immunity could be regarded as one form of suspension or termination of diplomatic immunities. It is however obvious that waiver constitutes only one specific case within the broader scope of problems relating to the end of the facilities, privileges and immunities accorded by the receiving State to foreign diplomatic missions and their members. Waiver of jurisdictional immunity is thus considered in this report under the heading of duration of facilities, privileges and immunities that may be granted to the diplomatic courier in the performance of his official functions.

191. For the purposes of the present study, reference is made to the general doctrine of waiver of jurisdictional immunity as it emerges from State practice. Moreover, as in the case of the problem of jurisdictional immunity (see paras. 81-83 above), the work which has been done by the Commission on the topic of jurisdictional immunities of States and their property has to be taken into consideration.[155] The Special Rapporteur proposes to examine briefly the problem of waiver of jurisdictional

[151] The main trends were to consider that a diplomat enjoyed privileges and immunities from the moment at which he received notification of his appointment, at which he crossed the frontier of the receiving State, at which he presented his credentials, etc.

[152] See *Yearbook ... 1957*, vol. II, p. 142, document A/3623, draft article 31; *Yearbook ... 1958*, vol. II, p. 103, document A/3859, draft article 38; *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. I, p. 37, 10th plenary meeting, paras. 8-14, and pp. 207-209, *Committee of the Whole*, 35th meeting, paras. 1-24; and *ibid.*, vol. II, p. 33, document A/CONF.20/C.1/L.251, and p. 37, document A/CONF.20/C.1/L.275/Rev.1.

[153] League of Nations, *Treaty Series*, vol. CLV, p. 271.

[154] See *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. I, p. 208, *Committee of the Whole*, 35th meeting, paras. 11-12; *ibid.*, vol. II, p. 26, document A/CONF.20/C.1/L.181.

[155] See the third report on jurisdictional immunities of States and their property submitted to the Commission at its thirty-third session (*Yearbook ... 1981*, vol. II (Part One), pp. 125 *et seq.*, document A/CN.4/340 and Add.1, paras. 50-71 (voluntary submission), paras. 72-81 (counter-claims), and paras. 82-92 (waiver)).

immunities, with special reference to the status of the diplomatic courier, on the basis of an analytical survey of the main provisions of article 32 of the 1961 Vienna Convention, which served as the model for the corresponding articles in the other codification conventions.[156] It might be advisable also to examine article 31, paragraph 5, and article 61, paragraph 5, of the 1975 Vienna Convention, for they contain in addition a provision on amicable settlement of a dispute in a case where the sending State does not waive its immunity.

192. It may pointed out that article 32 of the 1961 Vienna Convention, on waiver of jurisdictional immunity, is based on the fundamental concept of such immunity as an expression of the principle of sovereignty and sovereign equality of States. At the same time, in its scope and operation, article 32 reflects the underlying idea embodied in the preamble to the Convention that

> ... the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States.

These two basic concepts should be taken into account in the examination of the main legal features of the renunciation of jurisdictional immunity in general and of the status of the diplomatic courier in particular.

193. The main problems within the limited objectives of the present study may be confined to the following: (*a*) who is entitled to waive immunity; (*b*) how the waiver should be exercised; and (*c*) what is the scope of the waiver.

194. On the first question, relating to competence for renunciation of jurisdictional immunity, article 32, paragraph 1, of the 1961 Vienna Convention and the corresponding articles of all the other codification conventions stipulate in general terms that immunity from jurisdiction of the members of the diplomatic mission "may be waived by the sending State". Such a provision is in conformity with the doctrine of the jurisdictional immunities of States, as an attribute of their sovereignty. There has, however, been a great deal of diversity in State practice and doctrinal views regarding the authority entitled to exercise the right of waiver. The most significant difference in practice has been whether in all cases the central authority, for example the Ministry for Foreign Affairs, or the head of the mission, another diplomatic agent, or the member of the mission involved in a particular case, should have the right to waive jurisdictional immunity. The possible solutions to this problem depend essentially upon domestic laws and regulations, where such laws and regulations have been enacted, or upon established practices and procedures, where no formal legislation exists. Some States confer the power to waive jurisdictional immunity to heads of missions or their members, but only on instructions from the Ministry given prior to a specific case.[157] In such instances heads of diplomatic and other missions or members of such missions are required to seek instructions before making a statement of waiver.

195. The problem of entitlement to exercise waiver should be considered also in connection with the procedural rules of the local judicial authority where proceedings against a member of a diplomatic mission have been instituted. These rules may relate to the requirements for competence to renounce jurisdictional immunity or to other conditions for proof of validity of the waiver. Therefore an efficient and smooth operation of waiver of jurisdictional immunity may require not only a greater degree of uniformity with regard to the power to waive such immunity but also harmonization of national rules and regulations regarding evidence of validity of the waiver before the court.

196. Another important element of the legal effect of waiver is that, once exercised by the sending State, it cannot be revoked. Consequently, a waiver made in accordance with the relevant requirements, and recognized or accepted by the court concerned, precludes the right to plead immunity either before the judgment is pronounced by that court or on appeal. This conclusion is supported by extensive State practice and was elucidated in the Commission's commentary to article 30 of its final draft on diplomatic intercourse and immunities,[158] which was to become article 32 of the 1961 Vienna Convention.

197. These requirements for the exercise of the right to waive jurisdictional immunity could be applied also in respect of cases where a diplomatic courier is involved. Considering the specific features inherent in the functions of the diplomatic courier and his short sojourn in the State where proceedings have been instituted, the addition of some specific elements to the general rule of article 32 might be advisable. It may be stressed that the power of the sending State to waive jurisdictional immunity may be exercised on its behalf by the head or an authorized member of the diplomatic mission, consular post, special mission, permanent mission or delegation of that State in the territory of the receiving or the transit State.

198. The methods of waiver contemplated in the provisions of paragraphs 2 and 3 of article 32 of the 1961 Vienna Convention follow the pattern established in State practice. First, it is explicitly stated that waiver may take two forms: an express waiver during the court's proceedings, in *facie curiae*, or an express undertaking to waive immunity, set out in an agrement or con-

[156] See the 1963 Vienna Convention, art. 45; the Convention on Special Missions, art. 41; and the 1975 Vienna Convention, arts. 31 and 61. While the aforementioned articles of the first two conventions are indentical with article 32 of the 1961 Vienna Convention, articles 31 and 61 of the 1975 Vienna Convention contain an additional paragraph (para. 5) on settlement of a case where the sending State does not waive immunity.

[157] See, for example, Denza, *op. cit.* (footnote 81 above), p. 184, where reference is made to the rules applied in the matter by the Government of the United Kingdom, which requires that its diplomatic missions abroad seek instructions.

[158] *Yearbook ... 1958*, vol. II, p. 99, document A/3859, chap. III, sect. II.

tract to submit to jurisdiction.[159] Secondly, paragraph 3 of article 32 provides for an *implied waiver* through the initiation of proceedings by a person enjoying jurisdictional immunity in respect of any counter-claim directly connected with the principal claim. This may be effected either by instituting or intervening in proceedings without pleading jurisdictional immunity or by submitting a counter-claim.[160]

199. The question of the legal effect of *express* or *implied* waiver was extensively discussed by the Commission during the preparation of the draft articles on diplomatic intercourse and immunities. The main problem was whether the express waiver should be accepted as the only way of renunciation of immunity and to what extent an implied waiver during the court's proceedings would be valid.[161] In article 30, paragraph 3, of its final draft, the Commission adopted the following position:

> 3. In civil ... proceedings, waiver may be express or implied. A waiver is presumed to have occurred if a diplomatic agent appears as defendant without claiming any immunity.[162]

At the United Nations Conference in 1961, however, it was argued that an express waiver would be preferable in practice. This approach was expressed in the language of paragraph 2 of article 32, which stipulates that "waiver must *always** be express".[163] However, as has already been pointed out, paragraph 3 of the same rule sets out the rule that a person enjoying jurisdictional immunity, who has initiated proceedings, shall be precluded from invoking immunity in respect of any counter-claim directly connected with the principal claim. It is thought by some that this rule is inconsistent with the concept of express waiver.[164] However, it is generally agreed, and follows from article 32, that in criminal proceedings waiver of immunity from jurisdiction should always be express.

200. It should be further pointed out that, in the case of express waiver or in the case of initiation of proceedings in respect of a counter-claim, the requirements for the validity of a waiver and the other procedural rules should be in accordance with the laws and regulations of the State of the forum.[165]

201. The next problem area is the *scope* of the waiver of jurisdictional immunities and the *implications* of such a waiver in respect of exception from execution of a judgment resulting from civil or administrative proceedings.

202. The scope of the waiver, as provided for in article 32 of the 1961 Vienna Convention and in the corresponding articles of the other codification conventions, covers all kinds of jurisdictional immunities, i.e. immunities from criminal, administrative or civil jurisdiction. This conclusion derives from the explicit provisions of the articles on jurisdictional immunities, such as article 31 of the 1961 Vienna Convention. The immunities from criminal, administrative or civil jurisdiction are also accorded to members of the administrative and technical staff. In conformity with these provisions, and taking into consideration the official functions of the diplomatic courier, as has been suggested in the present report,[166] such jurisdictional immunities should also be accorded to the diplomatic courier. Consequently, waiver of immunity from jurisdiction should encompass all forms of waiver of immunity in respect of cases in which a diplomatic courier may be involved.

203. The other problem relating to the effect of waiver of jurisdictional immunities is waiver of execution of a judgment handed down in a criminal, administrative or civil action in which a diplomatic courier is involved. It is suggested that these cases be considered separately, especially waiver in respect of criminal proceedings as distinct from waiver in respect of civil and administrative proceedings.

204. Waiver of immunity from the criminal jurisdiction of the receiving or the transit State should also be considered in relation to jurisdictional immunities in their entirety. Nevertheless, such waiver might raise certain specific problems relating to waiver of execution in respect of criminal proceedings. In this case, the provisions of draft articles 20, on personal inviolability (para. 68 above), and 23, on immunity from jurisdiction (para. 139 above), should be taken into account. According to draft article 20, the diplomatic courier shall enjoy personal inviolability and shall not be liable to any form of arrest or detention when performing his functions. Consequently no penalty affecting personal inviolability could be conceived. Furthermore, draft article 23, paragraph 3, provides that no measures of execution may be taken against the diplomatic courier, except in respect of acts performed outside his official functions, provided that the measures of execution would not infringe the inviolability of his person, of his temporary accommodation or of the diplomatic bag entrusted to him. These provisions, as has already been pointed out in the present report, are based on articles 27, 29 and 31 of the 1961 Vienna Convention.[167]

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[159] Cf. the third report on jurisdictional immunities of States and their property (see footnote 155 above), document A/CN.4/340 and Add.1, paras. 86-89.

[160] *Ibid.*

[161] *Yearbook ... 1957*, vol. I, pp. 110-118, 405th meeting, paras. 21 *et seq.*, and 406th meeting.

[162] See footnote 158 above.

[163] See the discussion on this subject at the Conference (*Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. I, pp. 173-177, *Committee of the Whole*, 28th meeting, paras. 35-45, and 29th meeting, paras. 1-42). See also the amendment submitted by Poland (*ibid.*, vol. II, p. 25, document A/CONF.20/C.1/L.171).

[164] See Denza, *op. cit.* (footnote 81 above), p. 186.

[165] See the third report on jurisdictional immunities of States and their property (see footnote 155 above), document A/CN.4/340 and Add.1, para. 85.

[166] See para. 139 above, draft article 23 on jurisdictional immunity of the diplomatic courier.

[167] See paras. 47-68, 85-87, 91, 95-97, 119-121 and 133-139 above.

205. The 1961 Vienna Convention and the other codification conventions do not attempt to establish any special rule governing waiver of immunity from jurisdiction in respect of criminal proceedings as distinct from waiver of immunity in respect of execution of a judgment resulting from such proceedings. Perhaps one of the reasons is the difficulty or the practical value of a case where the effective execution of a judgment resulting from criminal proceedings could be detached from such proceedings. Even when immunity from criminal jurisdiction of the receiving State has been renounced, a judgment resulting from criminal proceedings against a member of the diplomatic mission, imposing as a penalty his arrest, detention or other measures infringing his inviolability, cannot be executed. It may also be inferred from the absence of a special provision on separate waiver of immunity from jurisdiction in respect of criminal proceedings that no separate waiver in respect of execution of the judgment was contemplated. Therefore waiver of immunity from criminal jurisdiction cannot be conceived in disassociation from waiver of immunity in respect of execution of the judgment resulting from criminal proceedings.

206. However, in respect of civil and administrative proceedings instituted in the receiving State in which a member of the diplomatic mission is involved, article 32, paragraph 4, of the 1961 Vienna Convention draws a distinction between waiver of immunity from jurisdiction and waiver of immunity in respect of execution of the judgment. It stipulates that waiver of immunity from jurisdiction in respect of civil and administrative proceedings shall not be held to imply waiver of immunity in respect of execution of the judgment, for which a *separate waiver* is required. This rule was established in customary international law prior to the 1961 Vienna Convention and confirmed by State practice. Nevertheless, at the United Nations Conference in 1961, there were some amendments designed to delete or modify this rule.[168] The discussion at the Conference produced no substantive change in the draft article, which was adopted in its present form.

207. It was argued after the 1961 Conference, and in connection with the 1963 Vienna Convention, that the separate waiver of immunity in respect of execution of judgment defeated the purpose of the waiver of immunity from jurisdiction in respect of civil proceedings. Some critics of this rule, referring to it as the "double-waiver requirement", considered that, in some cases when the waiver of immunity in respect of execution of a judgment imposing a certain obligation on a consul was withheld, to accept such a second waiver would "make a mockery of justice."[169] It may be mentioned, without entering into polemics on this matter, that State practice since the United Nations Conferences of 1961 and 1963 has provided no substantive support to such conclusions. Moreover, the two other conventions codifying diplomatic law, namely, the Convention on Special Missions and the 1975 Vienna Convention, incorporated corresponding provisions on waiver of immunity, modelled on article 32 of the 1961 Vienna Convention and article 45 of the 1963 Vienna Convention. This could imply that the provisions of those two articles were considered viable.

208. The 1975 Vienna Convention on the Representation of States added a new aspect to the issue of waiver of immunity from jurisdiction in respect of civil proceedings. Articles 31 and 61 of the Convention introduced a special provision on the settlement of cases in respect of civil proceedings, if the sending State did not waive the immunity from jurisdiction of the head of delegation, other delegates and members of the diplomatic staff of the delegation and of other persons enjoying immunity from the civil jurisdiction of the host State. Such a provision was introduced as a method for a just settlement of disputes by peaceful means other than judicial proceedings.

209. This idea was based on the recommendation contained in General Assembly resolution 3531 (XXIV) of 8 December 1969, in connection with consideration of the draft articles on special missions, and in particular with the question of settlement of civil claims. The recommendation itself was inspired by article IV, section 14, of the Convention on the Privileges and Immunities of the United Nations which provides:

> Privileges and immunities are accorded to the representatives of Members not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connection with the United Nations. Consequently a Member not only has the right but is under a duty to waive the immunity of its representative in any case where in the opinion of the Member the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity in accorded.[170]

This provision was reproduced *mutatis mutandis* in article V, section 16, of the Convention on the Privileges and Immunities of the Specialized Agencies,[171] and in other international instruments of regional organizations.[172]

210. The Commission, in its commentary to paragraph 5 of draft article 62 (Waiver of immunity) of the draft articles on the representation of States in their relations with international organizations, submitted the following to the United Nations Conference of 1975:

> ... the provision set forth in paragraph 5 places the sending State, in respect of civil action, under the obligation of using its best endeavours to bring about a just settlement of the case if it is unwilling to waive the immunity of the person concerned. If, on the one hand, the provision of paragraph 5 leaves the decision to waive immunity to the discretion of the sending State which is not obliged to explain its decision, on the other, it imposes on that State an objective obligation

[168] See footnote 163 above, and *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. II, pp. 26 and 28, documents A/CONF.20/C.1/L.179 and Add.1 and A/CONF.20/C.1/L.200/Rev.2.

[169] Lee, *op. cit.* (footnote 103 above, *in fine*), p. 146.

[170] United Nations, *Treaty Series*, vol. 1, p. 22.

[171] *Ibid.*, vol. 33, p. 261.

[172] See para. (3) of the Commission's commentary to article 31 (Waiver of immunity) of the final draft on the representation of States in their relations with international organizations (*Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations*, vol. II, pp. 25-26).

which may give to the host State grounds for complaint if the sending State fails to comply with it. The legal obligation of the sending State to seek a just settlement of the case might lead, in the case of delegations as well as of missions, to the initiation of the consultation and conciliation procedures provided for in articles 81 and 82 [on conciliation], to which the host State can resort if the sending State does not find a means of settlement.[173]

211. This provision, of course, should be considered as a practical method for the settlement of disputes in civil matters. Perhaps it may offer a more effective means of resolving problems by a procedure that may be less formal and more appropriate. Taking into account the specific features of the legal status and official functions of the diplomatic courier, the extrajudicial method of amicable solution of a dispute is more appropriate.

212. In the light of the above considerations, the Special Rapporteur presents the following draft article for examination and provisional approval:

[173] *Ibid.*, p. 42, para. (2) of the commentary.

Article 29. Waiver of immunity

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

2. The waiver must always be express.

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

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

5. If the sending State does not waive the immunity of the diplomatic courier in respect of a civil suit, it shall make every effort to settle the matter justly.

III. Draft article on the status of the captain of a commercial aircraft or the master of a merchant ship entrusted with the transportation and delivery of a diplomatic bag

A. Introduction

213. As has already been indicated in the second report submitted by the Special Rapporteur, the use of aircraft personnel for the transportation and delivery of diplomatic bags represents a significant development in modern diplomatic communications.[174] Therefore the regulation of the legal status of the captain of a commercial aircraft or the master of a ship entrusted with such a mission has acquired practical importance. The survey of State practice clearly attests to the widespread recourse to civil aviation for the dispatch of diplomatic mail. The number of States using this kind of official communication has increased enormously and its use is not confined to States with limited financial means. The speedy and more economic delivery of the diplomatic bag through aircraft pilots has indeed become a common practice. This does not mean that the practical significance of the regular service of professional diplomatic couriers or of couriers *ad hoc* has declined. It is a well-known fact that States that entrust their diplomatic bags to the captains of aircraft employ either a professional courier or a courier *ad hoc* when they are concerned with the secrecy of the mail. Thus there are States that continue to maintain a regular courier service as an important part of the communications activities of the Foreign Ministry. The extensive use of aircraft pilots or masters of commercial vessels for the delivery of the diplomatic bag should thus be considered as one of the means of official communication of States with their missions abroad.

214. The use of the captain of a commercial aircraft or the master of a merchant ship or, in rare cases, the truck driver, for the transportation and delivery of diplomatic mail has increased the practical need for the elaboration of relevant rules governing the operation of this kind of official communication. In fact, the necessity for such rules was pointed out at an early stage of the work of the Commission, at its ninth session, in 1957.[175] It is all the more justified now, when the utilization of diplomatic bags not accompanied by diplomatic couriers has acquired such importance.

215. The main problems relating to the legal status of the captain of a commercial aircraft or the master of a merchant ship may be identified as follows: (*a*) rights and duties of these persons in connection with the transportation, custody and delivery of the bag, including special arrangements or contracts concluded to that effect; (*b*) treatment by the authorities of the receiving or the transit State of the captain or the master, including the facilities and protection accorded

[174] Document A/CN.4/347 and Add.1 and 2 (see footnote 1 above), para. 116.

[175] See *Yearbook ... 1957*, vol. I, pp. 83-84, 399th meeting, paras. 82-87, and 400th meeting, paras. 1-16.

to them; (*c*) conditions and procedures for access of authorized persons of the diplomatic mission of the sending State concerned in order to take direct possession of the dipomatic bag. The examination of these three matters would be facilitated by a brief account of the legislative background of the existing provisions on this matter in the four codification conventions and an analytical survey of State practice as evidenced by international agreements and national laws and regulations.

B. Legislative background of the relevant provisions in the codification conventions

216. In the Special Rapporteur's two previous reports,[176] reference was made to the *travaux préparatoires* relating to the status of the captain of a commercial aircraft or the master of a merchant ship. There were also some indications on the evolving process of codification on this issue. However, it is suggested that this examination be supplemented by more information that could serve as a starting-point for the draft provision to be submitted for examination by the Commission.

217. During the consideration of article 21 of the draft articles on diplomatic intercourse and immunities by the Commission, one member divided pilots carrying diplomatic mail into three categories. The first was "the ordinary commercial airline pilot, carrying diplomatic mail merely as part of the aircraft's payload, and naturally not entitled to any diplomatic privileges". The second was "the commercial airline pilot who was also accredited as diplomatic courier". Cases of that kind, he maintained, were quite common, and "such pilots enjoyed the privilege of inviolability until they handed over their diplomatic mail to a representative of the mission, a formality generally carried out at the airport itself". The third category he alluded to was a "quite new category, of flying couriers operating planes allocated to embassies for the sole purpose of carrying diplomatic mail". He gave the example of the United States Embassy in Belgrade as having had two such planes at the time. However, since the innovation had not been introduced by agreement with the Yugoslav Government, the latter had protested. On further consideration, however, it had been agreed that the practice was in accordance with international law: States were entitled to use any means of communication in their relations with their missions, and all civil planes had the right to fly over countries signatories to the conventions of ICAO.[177]

218. Another member of the Commission expressed the view that captains of aircraft carrying diplomatic mail were in exactly the same position as ordinary postmen unless they were provided with a diplomatic passport.[178] Some members stated that, if the same person combined the functions of pilot and diplomatic courier, he was entitled to protection. If, however, he was merely a pilot and not an accredited courier, he was not entitled to protection.[179] One member pointed out that, if the sending State chose a means of communication such as the aeroplane, which prevented the receiving State from according the diplomatic courier proper protection, then the sending State must bear the consequences.[180] Some members considered that the use of aircraft pilots as couriers raised an important legal problem. The point raised was that, under the ICAO conventions, aircraft poilots were liable to arrest on personal grounds, "for instance if they were not properly qualified, or on grounds involving third party liability". It was thus maintained that "pilots accredited as diplomatic couriers, though still subject to the law, would have to be immune from arrest on such grounds".[181] The Chairman of the Commission then observed that the majority of members of the Commission appeared to agree that, "where commercial airline pilots were involved, it was the diplomatic pouch only that enjoyed immunity and not the pilot".[182]

219. In a commentary to article 25 of the draft articles on diplomatic intercourse and immunities, adopted by the Commission at its tenth session, in 1958, it was stated that the captain of a commercial aircraft carrying a diplomatic bag "is not regarded as a diplomatic courier", and that "this case must be distinguished from the not uncommon case in which a diplomatic courier pilots an aircraft specially intended to be used for the carriage of diplomatic bags"; in the latter case, "there is no reason for treating such a courier differently from one who carries the bag in a car driven by himself".[183]

220. The 1961 Vienna Convention states in article 27, paragraph 7, that:

> 7. A diplomatic bag may be entrusted to the captain of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag but he shall not be considered to be a diplomatic courier. The mission may send one of its members to take possession of the diplomatic bag directly and freely from the captain of the aircraft.

221. The Commission again embarked on the consideration of the status of the captain of a commercial aircraft entrusted with the transportation of a diplomatic bag in connection with the preparation of draft articles on consular intercourse and immunities. It was agreed that the draft article on consular communications through the employment of consular couriers and bags should be modelled on article 27 of the 1961 Vienna Convention.[184]

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[176] Second report: document A/CN.4/347 and Add.1 and 2 (see footnote 1 above), paras. 66, 86, 116 and 118; third report: document A/CN.4/359 and Add.1 (*ibid.*), paras. 86 and 94.

[177] *Yearbook ... 1957*, vol. I, p. 84, 400th meeting, para. 4 (Mr. Bartos).

[178] *Ibid.*, para. 2 (Mr. Matine-Daftary).

[179] *Ibid.*, para. 8 (Mr. Verdross) and para. 14 (Mr. Sandstrom).

[180] *Ibid.*, para. 11 (Mr. Amado).

[181] *Ibid.*, paras. 12-13 (Mr. Bartos, supported by Mr. Spiropoulos).

[182] *Ibid.*, para. 15.

[183] *Yearbook ... 1958*, vol. II, p. 97, document A/3859, chap. III, sect. II, B, para. (6) of the commentary.

[184] *Yearbook ... 1961*, vol. II, p. 112, document A/4843, chap. II, sect. IV, commentary to article 35 para. (8).

222. At the United Nations Conference on Consular Relations, in 1963, Italy submitted an amendment, with reference to the status of the captain of an aircraft carrying a consular bag, aimed at deleting the words "but he shall not be considered to be a consular courier",[185] on the grounds that the captain in question "should be protected by certain safeguards".[186] However, the prevailing view was to retain the wording of article 27, paragraph 7, of the 1961 Vienna Convention, i.e. that the captain of a commercial aircraft "shall not be considered to be a diplomatic courier". It was argued that the position of a captain carrying a *consular bag* should not differ from that of a captain carrying a *diplomatic bag*, and that there might be confusion if the captain was entrusted with a diplomatic *and* a consular bag. The representative of Italy therefore proposed that the captain entrusted with a bag "shall be considered to be a courier *ad hoc*". However, that amendment was rejected at Committee level.

223. Thus the text adopted by the Conference (art. 35, para. 7) was modelled on article 27, paragraph 7, of the 1961 Vienna Convention, but included the captain of a passenger vessel among the persons to whom a consular bag could also be entrusted. It should be underlined that the main controversial issue in connection with the status of a captain carrying a consular bag was the legal protection of the captain in question, including the problem of granting him facilities, privileges and immunities in the exercise of his task in respect of the delivery of the bag.

224. As has already been pointed out, some delegations at the United Nations Conferences in 1961 and 1963 expressed opposition to according personal inviolability or immunity to the captain of a commercial aircraft or the master of a ship, whose position was governed by the international rules on civil aviation or maritime navigation. At the United Nations Conference in 1963, one delegation observed that, by virtue of those rules, the captain

> had many civil liabilities and responsibility for the safety of his passengers and cargo . . . It would be a contradiction in law, and impracticable, to give a captain the immunities and inviolability of a consular courier simply because he was carrying a consular bag: to do so would mean that he would be unable to discharge his main responsibility as the commander of the vessel or aircraft. The question of inviolability arose in respect of the consular bag itself, which remained immune wherever it was. Since the principle of the inviolability of consular archives and documents always applied, there was no reason to confer immunity on the captain, who was merely the carrier in the same way as his aircraft or vessel. In 1961 and 1962 there had been occasion in India to arrest at least six captains of aircraft and several ships' captains for smuggling gold into the country.[187]

225. Paragraph 6 of article 35 of the final draft articles of the Commission on consular relations, dealing with the status of a captain carrying a consular bag, was adopted with an amendment inserting at the beginning of the last sentence the words "By arrangement with the local airport authorities".[188] That paragraph, as amended, thus became paragraph 7 of article 35 of the 1963 Vienna Convention.

226. Article 28, paragraph 7, of the draft articles on special missions,[189] as well as paragraph 7 of article 27 of the draft articles on permanent missions[190] and paragraph 8 of article 97 of the draft articles on the representation of States in their relations with international organizations,[191] were copied *mutatis mutandis* from paragraph 7 of article 35 of the 1963 Vienna Convention.

227. Views on the legal protection of the captain of a commercial aircraft entrusted with a diplomatic bag have also been expressed on the occasion of the consideration of the present topic. During the debate in the Sixth Committee at the thirty-sixth session of the General Assembly, in 1981, one representative suggested that the captain of an aircraft carrying a bag should be accorded some degree of functional immunity.[192] That issue was raised in connection with the consideration of the second report of the Special Rapporteur at the thirty-third session of the Commission, in 1981. The Special Rapporteur pointed out at the time that all multilateral conventions concluded under the auspices of the United Nations *explicitly* provided that the captain carrying a bag *should not be considered to be a diplomatic or any other kind of courier.* He suggested further that the main concern should be the *safety* and *inviolability* of the bag as well as the *facilities for access* to the aircraft or the ship in order to ensure the taking of *direct and free possession* of the bag.[193]

228. In international law and in national laws and regulations, supported by well established State practice, the captain of a commercial aircraft or the master of a merchant ship is in full command on board the aircraft or ship on or flying over the high seas, and his position is also given due respect within maritime zones or air space under national jurisdiction. It may thus be assumed that the captain of an aircraft or the master of a ship needs no further protection than that which is generally recognized for commanding officers of aircraft or vessels in international law and national laws and regulations. The captain of an aircraft or the master

[185] *Official Records of the United Nations Conference on Consular Relations*, vol. II (United Nations publication, Sales No. 64.X.1), p. 84, document A/CONF.25/C.2/L.102.

[186] *Ibid.*, vol. I, p. 328, *Second Committee*, 14th meeting, para. 43.

[187] *Ibid.*, p. 329, *Second Committee*, 15th meeting, para. 3.

[188] *Ibid.*, vol. II, p. 81, document A/CONF.25/C.2/L.75.

[189] *Yearbook ... 1967*, vol. II, p. 361, document A/6709/Rev.1, chap. II, sect. D.

[190] *Yearbook ... 1968*, vol. II, p. 150, document A/CN.4/203 and Add.1-5. This article subsequently became article 28 (see *Yearbook ... 1969*, vol. II, p. 11, document A/CN.4/218 and Add.1).

[191] *Yearbook ... 1970*, vol. II, pp. 293-294, document A/8010/Rev.1, chap. II, sect. B.

[192] See the statement of the representative of Poland (*Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee*, 48th meeting, para. 11); and "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commisison during the thirty-sixth session of the General Assembly" (A/CN.4/L.339), para. 188.

[193] Document A/CN.4/347 and Add.1 and 2 (see footnote 1 above), paras. 179-180.

of a ship is not supposed to deliver the bag outside the aircraft or the vessel under his command. Special legal protection would be justified only if it were required or admitted that the captain of an aircraft or the master of a ship had to deliver the bag to a diplomatic mission at a point outside the port of entry within the territory of the receiving State. In international law and in State practice, diplomatic mail has to be received by an authorized person of the mission of the sending State directly *at the aircraft or vessel.* Therefore, in the elaboration of the relevant rules governing the dispatch of a diplomatic bag through a commercial aircraft or merchant ship, the main attention has to be focused on the *conditions for access and direct and free possession of the bag.* Nevertheless, the captain of a commercial aircraft or the master of a merchant ship carrying a diplomatic bag should be treated with due respect and should be accorded special facilities for handing over the bag to an authorized person of the mission of the sending State or an official of that State.

C. Brief analytical survey of State practice

229. State practice, as reflected in international agreements and national laws and regulations, provides sufficient evidence of the implementation of the rules incorporated in the four codification conventions in regard to the status of the captain of a commercial aircraft entrusted with the transportation and delivery of a diplomatic bag. It attests to the viability of the existing rules but also shows the need for their further elaboration in order to provide a sound legal framework for the practical functioning of such a widely used means of official communication. State practice is quite revealing and conclusive on this matter.

230. A number of consular conventions contain provisions relating to the status of the captain of a commercial aircraft or ship carrying a diplomatic bag. It is generally recognized in such conventions that the captain of a merchant ship or commercial aircraft scheduled to land at an authorized port *may be entrusted to carry a consular bag.* It is further stipulated that the captain must be provided with *an official document indicating the number of packages constituting the bag.*

231. Most of the conventions in this category provide that the captain, by virtue of carrying a consular bag, is not to be considered to be a consular courier. They also provide that the consular post may send one of its members to take *direct possession* of the bag from the captain of the ship or aircraft after due arrangements have been made with the appropriate authorities. Article 25, paragraph 4, of the Consular Convention between France and Czechoslovakia (1969) is illustrative of this rule:

> 4. The consular bag may be entrusted to the captain of a ship or of a commercial aircraft which is scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a consular courier. By arrangement with the appropriate local authorities, the consular post may send one of its members to take possession of the bag directly and freely from the captain of the ship or aircraft or to deliver a bag to him.[194]

232. Some conventions are however silent on the question of the status of the captain of a ship or commercial aircraft when he is carrying the consular bag.[195] It seems that they operate on the assumption that in this case the rules incorporated in article 35 of the 1963 Vienna Convention would apply.

233. Domestic laws and regulations also provide evidence as to the main trends of State practice in regard to the transmission of diplomatic bags not accompanied by diplomatic courier or diplomatic courier *ad hoc*, but entrusted to the captain of a commercial aircraft. The source materials available on this matter indicate the existence of a variety of rules. Nevertheless, most of the rules and regulations promulgated by a number of States are in conformity with the international rules embodied in the four codification conventions and are followed by a significant number of bilateral consular and other agreements.[196]

234. Some details of the practice of certain States are worth mentioning by way of illustration. For instance, in Finland:

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[194] See also the corresponding provisions in the consular conventions concluded between the following States: Austria and Romania (1970), art. 31, para. 5; Belgium and Czechoslovakia (1976), art. 18, para. 7; Belgium and Hungary (1976), art. 15 (*b*); Belgium and Turkey (1972), art. 19, para. 3; Belgium and USSR (1972), art. 19, para. 3; Bulgaria and Austria (1975), art. 30, para. 5; Czechoslovakia and Cyprus (1976), art. 16, para. 5; Czechoslovakia and Italy (1975), art. 26, para. 5; France and Algeria (1974), art. 13, para. 7; France and Poland (1976), art. 18, *b*; France and Senegal (1974), art. XI, para. 7; France and Tunisia (1972), art. 12, para. 7; Greece and Hungary (1977), art. 14, para. 6; Greece and Poland (1977), art. 18, *b*; Hungary and Bulgaria (1971), art. 14, para. 4; Hungary and Czechoslovakia (1973), art. 15, para. 4; Hungary and German Democratic Republic (1972), art. 14, para. 4; Mongolia and Czechoslovakia (1976), art. 14, para. 4; Poland and Cuba (1972), art. 16, para. 6; Poland and Mongolia (1973), art. 17, para. 4; Poland and Romania (1973), art. 31, para. 6; Romania and Italy (1967), art. 28, para. 6; Romania and USSR (1972), art. 24, para. 4; USSR and Benin (1976), art. 14, para. 4; USSR and Bulgaria (1971), art. 14, para. 4; USSR and Cyprus (1978), art. 13, para. 4; USSR and Czechoslovakia (1972), art. 13; USSR and Ethiopia (1977), art. 13, para. 4; USSR and Guinea (1976), art. 14, para. 4; USSR and Guinea-Bissau (1976), art. 13, para. 4; USSR and Hungary (1971), art. 14, para. 4; USSR and India (1973), art. 14, *b*; USSR and Mongolia (1972), art. 13, para. 4; USSR and Somalia (1971), art. 14, para. 4; United Kingdom and Czechoslovakia (1975), art. 16, para. 4; United Kingdom and German Democratic Republic (1976), art. 17, para. 5; United Kingdom and Mongolia (1975), art. 16, para. 4; United States of America and Bulgaria (1974), art. 14, para. 5; United States of America and China (1980), art. 12, para. 5.

[195] See the consular conventions between Belgium and Poland (1972), art. 15, para. 4; Belgium and Turkey (1972), art. 22, para. 4; and Poland and USSR (1971), art. 13, para. 4.

[196] See, for example, the rules of the Federal Republic of Germany on the Courier Service, reproduced in *Yearbook ... 1982*, vol. II (Part One), pp.236-237, document A/CN.4/356 and Add.1-3; art. 9 of the Regulations concerning diplomatic and consular missions of foreign States on the territory of the USSR (*ibid.*, p. 241); para. 4 of the Rules concerning passage of the diplomatic bag of foreign States and of the personal effects of diplomatic couriers across the USSR frontier (*ibid.*, p. 242); and sect. I, para. 3 (*c*), of the information communicated by Yugoslavia (*ibid.*, p. 245).

When land or sea transportation is used (for heavy consignments), captains of Finnish ships or Finnish truck drivers may act as couriers.[197]

In respect of "confidential, classified or urgent documents only", the Regulations concerning the diplomatic bag issued in 1968 by the Government of Spain provide:

... Such bags shall be entrusted, against receipt, to the flight personnel of national airlines, who shall deliver them at the place of destination, against receipt, to authorized members of diplomatic and consular missions or to official couriers of this Ministry. In exceptional cases, they may be delivered to the Chief of Operations of the Spanish airline Iberia.[198]

Similar special arrangements have been made by several other States, for example Colombia, whose Ministry for Foreign Affairs has concluded a contract with the airline Avianca providing for the transportation of couriers and bags on routes served by that airline.[199]

235. Sometimes domestic laws and regulations provide that special international agreements be concluded for the delivery of diplomatic mail entrusted to the captains of civil aircraft. Article 22 of Decree No. 4891 of 21 June 1961 of the Government of Argentina as amended by Decree No. 3408 of 12 April 1966, thus provides:

The diplomatic pouches of the States with which the Republic has signed special agreements shall continue to be dispatched according to the provisions of the same. Diplomatic privileges shall not be granted to the so-called "annexes" to diplomatic pouches, except in the cases contemplated in special agreements. The envelopes, sealed packets, or packages containing diplomatic mail that arrive in the country by air shall be dispatched directly by the customs authorities at the airport and delivered to a duly authorized person possessing the corresponding identity card. The said pieces, sealed and labelled, should be sent by the Ministries of Foreign Affairs and addressed to their respective diplomatic missions in Buenos Aires to the chief thereof. The shipments should be declared on a bill of lading.[200]

A similar provision is contained in article 52 of Decree No. 3135 of 20 December 1956 adopted by the Government of Colombia.[201]

236. Since captains of commercial aircraft are not entitled to special treatment and are not accorded any privileges and immunities, national laws and international agreements concentrate basically on measures facilitating the delivery of the bag at the airport. For example, the administrative regulations concerning the diplomatic bag contained in the Manual of Diplomatic Service of Finland provide:

... The Ministry for Foreign Affairs has regular connections by air to all Finnish diplomatic missions and missions headed by appointed consuls-general. Since the captain of the aeroplane cannot, in accordance with article 27, para. 7, of the 1961 Vienna Convention, be considered a diplomatic courier, he or the member of the crew acting in his place as "courier" will be given only the reference numbers of the packages constituting the bag and a certificate indicating the total number of the packages, but not a courier passport. In the instructions issued to Finnish missions, it is also emphasized that a courier consignment shall be delivered directly to the plane as well as received directly from the plane.[202]

237. It is useful to refer also, in connection with State practice in respect of the handing over of a diplomatic bag carried by the captain of an aircraft, to the regulations established by the Indonesian Government in 1978, 1980 and 1981. These regulations stipulate that

... the diplomatic bag which has been sealed is exempted from inspection and can be picked up from the airport platform on arrival.

If the diplomatic bag is not picked up immediately and is kept in storage, the issuance procedures are as stated in Government Regulation No. 8 of 1957 relating to the issuance of diplomatic materials.[203]

The regulations contain special rules regarding the procedure to be followed for taking possession of the unaccompanied bag. The person authorized by the foreign mission to receive the diplomatic bag is provided with a special pass issued by the competent Indonesian authorities (Perum Angkasa Pura). Direct possession of the bag may be taken upon presentation of the special pass. There are also contingency provisions in cases where the person in charge of receiving the diplomatic bag is not in possession of a special pass, etc. In all instances the main concern is to ensure the safety of the diplomatic bag and to facilitate its delivery.

D. Main constituent elements of the status of the captain of a commercial aircraft or the master of a merchant ship

238. The examination of the *travaux préparatoires* of the codification conventions and the brief analytical survey of State practice in regard to the employment of air or maritime transportation for the dispatch of unaccompanied diplomatic bags provide sufficient source material for drawing some conclusions concerning the status of the captain of an aircraft or the master of a merchant ship carrying diplomatic bags. The ground rules on this matter are set out in article 27, paragraph 7, of the 1961 Vienna Convention and the corresponding articles in the other codification conventions.

239. The employment of the captain of a commercial aircraft or the master of a merchant ship for the custody, transportation and delivery of diplomatic bags forms part of modern international law. The relevant rules are generally recognized and apply primarily to aircraft or vessels used in regular service on a scheduled itinerary and travelling to an authorized port of entry in the territory of the receiving State. It may be assumed that the same rules should apply to a chartered plane following an established itinerary in the territory of the receiving State, although on an *ad hoc* service. The same rules may apply to merchant ships used for an *ad hoc* voyage.

[197] Para. 5 of the information communicated by Finland (*ibid.*, p. 236).

[198] Art. 3 of the Spanish Regulations of 1 July 1968 (*ibid.*, p. 239).

[199] See p. 58 above, document A/CN.4/372 and Add.1 and 2.

[200] See Pan American Union, *Documents and Notes on Privileges and Immunities with special reference to the Organization of American States* (Washington, D.C., 1968), p. 235.

[201] *Ibid.*, p. 271.

[202] Para. 4 of the information communicated by Finland, see footnote 197 above.

[203] Paras 3 and 4 of the information communicated by Indonesia, see p. 59 above, document A/CN.4/372 and Add.1 and 2.

240. Article 27, paragraph 7, of the 1961 Vienna Convention and numerous bilateral agreements explicitly refer to the *captain* of a commercial aircraft or the *master* of a ship as a person entrusted with the transportation and delivery of diplomatic mail. However, in the domestic rules and regulations of certain States and in some international agreements, such tasks may also be assigned to members of the crew.[204] In such cases it is assumed that such members of the personnel of the aircraft or vessel should be duly authorized by the captain of the aircraft or the master of the ship to act in his place or on his behalf. This rule may provide some flexibility warranted by practical considerations.

241. The captain of an aircraft or the master of a merchant ship entrusted with the transportation of the diplomatic bag has a special status which is recognized in international law and in national laws and regulations. He is provided with an *official document* indicating the number of packages constituting the diplomatic bag entrusted to him. This document may be considered as having the same character as the official document issued to a diplomatic courier. The captain of an aircraft and the master of a ship are not considered to be diplomatic couriers or diplomatic couriers *ad hoc*, but simply by reason of their mission they are entitled to be treated by the authorities of the receiving State with due respect and be given appropriate assistance for the handing over of the diplomatic bag entrusted to them to an authorized person of the diplomatic or other mission of the sending State. This assistance should be accorded particularly with a view to facilitating the *free and direct delivery* of the diplomatic bag to the authorized members of the diplomatic mission or other duly authorized officials of the sending State, who are allowed to have access to the aircraft or ship in order to take possession of the diplomatic bag.

242. When the aircraft or vessel is carrying a diplomatic bag from the mission of the sending State to the capital of that State, the persons entitled to take direct possession of the bag should be officials duly authorized by the Ministry for Foreign Affairs or other governmental institution of the sending State. The receiving State should be under the obligation to enact relevant rules and regulations and establish appropriate procedures in order to ensure the prompt and free delivery of the diplomatic bag at its port of entry. *Free and direct access* to the plane or ship should be provided for *reception* of *incoming* diplomatic mail at the authorized port of entry, or for the *handing over*, to the captain of the aircraft or the master of the ship or other authorized members of the crew, of *outgoing* diplomatic mail. In both instances the persons entitled to *receive* or *hand over* the diplomatic bag should be authorized members of the diplomatic mission of the sending State. This two-way facility—*reception* of the diplomatic bag from the captain or a crew member and *handing over* of the diplomatic bag to the captain or a crew member—should be reflected in appropriate provisions of the rules governing the dispatch of a diplomatic bag entrusted to the captain of a commercial aircraft or the master of a merchant ship.

243. In the light of the above considerations, the Special Rapporteur presents the following draft article for examination and provisional approval:

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

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

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

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

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

[204] See the Finnish practice, para. 234 above.

IV. Draft articles on the status of the diplomatic bag

A. Introduction

244. The draft articles on the status of the diplomatic bag form part III of the entire set of draft articles on the present topic, in conformity with the structure of the draft articles suggested by the Special Rapporteur and provisionally adopted by the Commission.[205] These draft articles are intended to cover both the diplomatic bag carried by diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, i.e. the bag

[205] See footnote 1 above, *in fine*.

entrusted to the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew, and the bag dispatched by postal services or other means, whether by land, air or sea. It is suggested, whenever reference is made to the status of the diplomatic bag, that these two kinds of diplomatic bags be borne in mind, unless the special legal features of the unaccompanied bag make it necessary to indicate that the reference is specifically to such a bag. Furthermore, it should be pointed out at the outset that, as in the case of the status of the diplomatic courier, it is proposed to proceed with the examination of the issues relating to the diplomatic bag from the same functional point of view, taking into consideration the multipurpose service of the bag in respect of all kinds of official missions—diplomatic missions, consular posts, special missions, permanent missions to international organizations and delegations to international conferences.[206]

245. The status of the diplomatic bag, as an important instrument in the exercise by States of freedom of communication for all official purposes, constitutes the core of the entire set of draft articles on the topic under consideration. It highlights many important elements of the status of the diplomatic courier, for the official function of the courier is to ensure the safety of the bag and its transportation and delivery to the final destination. The diplomatic courier is entitled to certain facilities, privileges and immunities in the territory of the receiving or the transit State even when he is not carrying a diplomatic bag and is proceeding from one mission of the sending State to another in order to pick up the diplomatic bag that is to be entrusted to him. The legal protection accorded to the diplomatic bag by national and international law is reflected in the facilities, privileges and immunities granted to the diplomatic courier for the performance of his official functions. The impact of such special legal protection of the diplomatic bag on the treatment of the diplomatic courier underlines the intrinsic relationship between the status of the diplomatic courier and that of the diplomatic bag; they are inseparable and cannot be considered in isolation from each other.

246. The increasing significance of the status of the diplomatic bag has also to be considered from the point of view of the widespread practice of using diplomatic bags not accompanied by diplomatic couriers. The volume of this kind of diplomatic communication and the importance of adequate protection of unaccompanied diplomatic mail further emphasize the need for the elaboration of appropriate rules that would supplement existing law in this field. There are some elements of the legal status of the diplomatic bag that still remain unresolved or problematic in spite of multilateral and bilateral treaties on diplomatic relations. It is therefore necessary to design a formula that will adequately protect the confidentiality of diplomatic communication through the bags as well as the legitimate interests of the receiving State. The abuse of diplomatic bags has been sufficiently proved in practice to warrant a more equitable balancing of the interests of the sending State and the receiving State. In other words, a set of international rules governing the status of the bag, especially the régime of the facilities, privileges and immunities that should be accorded to the diplomatic bag, is lacking. Hence the adoption of appropriate rules regarding the status of the diplomatic bag would, it may be hoped, contribute to the prevention of possible abuses and provide an effective legal framework for the utilization of such important means of official communications.

247. It may be recalled that already in the second report submitted by the Special Rapporteur the basic elements of the legal status of the diplomatic bag were indicated.[207] It was suggested that those elements were the following: *function* of the bag as an instrument for the exercise of freedom of communication; *indication of the status* of the bag through visible external marks; *content* of the bag; and *treatment* of the diplomatic bag by the authorities of the receiving or the transit State.

248. The Special Rapporteur therefore proposes to examine the following points relating to the status of the diplomatic bag and the corresponding draft articles:

(1) Indication of the status of the diplomatic bag, including the required visible external marks and the documents indicating the official character of the bag (art. 31).

(2) Rules relating to the content of the diplomatic bag (art. 32).

(3) Status of the diplomatic bag not accompanied by diplomatic courier, i.e. the bag entrusted to the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew (art. 33).

(4) Status of a diplomatic bag dispatched by postal services (art. 34).

(5) General facilities accorded to the diplomatic bag (art. 35).

(6) Inviolability of the diplomatic bag (art. 36).

(7) Exemption from customs inspection (art. 37).

(8) Exemption from customs duties and all dues and taxes (art. 38).

(9) Protective measures to prevent any infringement of the diplomatic bag and applicable in the event of termination of the functions of the diplomatic courier (art. 39).

249. It is proposed to follow the same methodology in the examination of the above-mentioned issues, i.e. to survey briefly the *travaux préparatoires* of the relevant rules in the four codification conventions and to study State practice regarding the legal protection of diplomatic and other official bags used by States in communications with their missions abroad. In this connection, two observations are to be made. First, the second report, in 1981, contained an extensive survey of

[206] See in this connection the Special Rapporteur's second report, document A/CN.4/347 and Add.1 and 2 (see footnote 1 above), paras. 14-19; the third report, document A/CN.4/359 and Add.1 (*ibid.*), para. 7; and the present report, para. 5.

[207] Document A/CN.4/347 and Add.1 and 2, para. 159.

the work of the Commission since 1955 and of the three United Nations codification conferences of 1961, 1963 and 1975, as well as of the debate in the Sixth Committee of the General Assembly in 1968 on the notion of "diplomatic bag" and its main elements.[208] Reference to the *travaux préparatoires* will therefore be confined to the particular issues under consideration. Secondly, as has been pointed out (para. 243 above), specific aspects of the status of the diplomatic bag have seldom been dealt with in the domestic law and treaty practice of States. Case-law in this area is very scarce.

B. Indication of status of the diplomatic bag

1. External markings and required documents indicating the official status of the diplomatic bag

250. Two main problems relate directly to proof of the official character of the diplomatic bag, namely the *external features* of the diplomatic bag and the *official documents* indicating its status. In addition, some other physical features of the diplomatic bag have to be taken into account, for instance its size and weight or other external characteristics, including the type or denomination of the consignment, such as envelope, pouch, sack, bag, box, brief-case or any kind of container. The term "diplomatic bag" has been employed as the common denomination for all packages containing official correspondence, documents or articles used for communications between the sending State and its missions abroad. It should also be mentioned that the basic requirements and rules regarding proof of status are identical for both the diplomatic bag accompanied by a diplomatic courier and the non-accompanied bag. Nevertheless, some specific features of the documents indicating the status of the bag concern especially the bag dispatched by postal services or entrusted to the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew. These aspects, of a secondary and technical character, should be taken into account when considering the question of proof of status of the bag.

251. In conformity with long-standing State practice, diplomatic mail has always been identified through certain *visible external marks*. Above all, the diplomatic bag must be sealed with wax or lead seals bearing the official stamp by the competent authority of the sending State, usually the Ministry for Foreign Affairs. In some instances the diplomatic bag is also locked and fastened with fastenings or padlocks indicating the sending authority. The most common visible external feature of a diplomatic bag is a tag, or a stick-on label, on which is written "diplomatic correspondence", "official correspondence" or *expédition officielle*", with an indication of the sender and the consignee.

252. The *official documents* should indicate the character of the bag and the number of packages constituting the bag. When the diplomatic bag is carried by a diplomatic courier, it is the courier who is provided with an official document testifying to his status as a courier and indicating the number of packages constituting the diplomatic bag carried by him. This document may take the form of "courier's passport", "courier's waybill", or "courier's certificate", in conformity with the regulations adopted by various States.[209]

253. When the diplomatic bag is entrusted to the captain of a commercial aircraft, the master of merchant ship, or an authorized crew member, that person also has to be provided with an official document indicating the number of packages constituting the bag. Such a document serves the purpose of testifying to the official character of the bag and its destination. As far as the visible external markings of this kind of diplomatic bag are concerned, they must meet all the requirements already indicated.

254. The diplomatic bag dispatched through postal services, as airmail or surface mail parcels, or shipped by sea or air freight, should be sealed and have the required visible external marks. The official documents attesting to the character of the bag are the postal documents issued by the receiving postal administration, or the documents for the consignment by ship or air freight, indicating the number of packages and their consignee.

255. For other physical features of the diplomatic bag there are optional requirements, such as the maximum size or weight of the container carrying the official correspondence, documents or articles for the official use of the diplomatic or other missions. This issue was discussed by the Commission and the codification conferences, especially with reference to diplomatic bags of excessive size or weight.[210] Postal regulations usually set certain limits on the maximum weight or size of postal parcels, but in all other instances this matter should be settled by agreement between the States concerned. The Executive Council of UPU has observed that the international carriage of diplomatic mail governed by bilateral or multilateral agreements has so far functioned without difficulty.

256. The external features and required documents indicating the official status of the diplomatic bag mentioned above were considered during the preparation of the relevant provisions of the four codification conventions. This may be seen from a brief account of the *travaux préparatoires*. State practice is another important source material on this issue, and should also be reviewed.

[208] *Ibid.*, paras. 123-186.

[209] Details of national regulations on official documents used by diplomatic couriers may be found in the information communicated to the Secretariat by Governments and published in *Yearbook ... 1982*, vol. II (Part One), p. 231, document A/CN.4/356 and Add.1-3. The Special Rapporteur's third report (*ibid.*, pp. 261-262, document A/CN.4/359 and Add.1, paras. 75-76) contains information on the various forms or denominations of the official document with which the diplomatic courier is provided.

[210] See Cahier, *op. cit.* (footnote 115 above), pp. 213-214.

2. BRIEF ANALYTICAL SURVEY OF STATE PRACTICE

257. During the preparation of draft articles on diplomatic intercourse and immunities between 1955 and 1958, the Commission, when considering the status of the diplomatic bag, concentrated on the problem of the inviolability of the diplomatic bag. However, provisions on proof of status and external features of the bag were occasionally discussed. In the draft articles on diplomatic intercourse and immunities submitted by the Special Rapporteur at the tenth session of the Commission, in 1958, article 21, paragraph 2, read as follows:

2. The diplomatic bag, which may contain only diplomatic documents or articles of a confidential nature intended for official use, shall be furnished with the sender's seal and bear a visible indication of its character ...[211]

At the same session, the Commission adopted the following final text as article 25, paragraph 4:

4. The diplomatic bag, which must bear visible external marks of its character, may only contain diplomatic documents or articles intended for official use.[212]

In the commentary to this article, the Commission stated:

... In accordance with paragraph 4, the diplomatic bag may be defined as a bag (sack, pouch, envelope or any type of package whatsoever) containing documents and (or) articles intended for official use. According to the amended text of this paragraph, the bag must bear visible external marks of its character.[213]

258. At the United Nations Conference on Diplomatic Intercourse and Immunities, in 1961, there were many amendments on several issues relating to the status of the diplomatic courier and the diplomatic bag, but they did not, in substance, affect the text mentioned above, which was incorporated as paragraph 4 of article 27 of the Vienna Convention on Diplomatic Relations.

259. During the consideration of draft articles on consular intercourse and immunities at the twelfth session of the Commission, in 1960, the Chairman of the Commission stated that

... consular correspondence should be placed in special envelopes bearing external marks and seals denoting its character; it would not be wise, however, to define the physical characteristics of bags of consular correspondence.[214]

260. In the final draft articles on consular relations submitted by the Commission in 1963 to the United Nations Conference on Consular Relations, article 35, paragraph 4, provided:

4. The packages constituting the consular bag must bear visible external marks of their character and may contain only official correspondence and documents or articles intended for official use.[215]

The 1963 Vienna Convention provides for no specific requirements as to marks except that the bag should have "visible external marks". These may or may not be the official seal of the mission of the sending State. Some States, however, lay down such requirements as an internal administrative matter, and this seems to have been generally accepted.

261. Article 28, paragraph 4, of the Convention on Special Missions[216] was taken *mutatis mutandis* from the corresponding provision in the 1963 Vienna Convention, as were articles 27 and 57 of the 1975 Vienna Convention.[217]

262. The treaty practice of States regarding indication of the official status of diplomatic, consular and other official bags has followed basically the provisions of the four codification conventions. Several consular conventions specifically provide that consular bags must be easily identifiable by some special external marks indicating their official character. Some examples are cited below.

263. The Consular Convention between the USSR and the United Kingdom (1965) provides, in article 16, paragraph 2, that

The official correspondence of a consulate, whatever the means of communication employed, as also the sealed pouches, bags, and other containers ... shall, provided they bear visible external marks of their official character, be inviolable ...[218]

In other words, the inviolability of official correspondence is dependent upon its proper identification as such, and this is achieved by the exhibition of external marks, as stated above.

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[211] *Yearbook ... 1958*, vol. II, p. 17, document A/CN.4/116/Add.1.

[212] *Ibid.*, p. 96, document A/3859, chap. III, sect. II.

[213] *Ibid.*, commentary to article 25, para. (4).

[214] *Yearbook ... 1960*, vol. I, p. 31, 532nd meeting, para. 32.

[215] See *Official Records of the United Nations Conference on Consular Relations*, vol. II, p. 23.

[216] See the history of the Commission's work on this article in the Special Rapporteur's second report, document A/CN.4/347 and Add.1 and 2 (see footnote 1 above), paras. 147-153.

[217] *Idem.*, paras. 156 and 157.

[218] See also the corresponding provisions of the consular conventions concluded between the following States: Belgium and Poland (1972), art. 15, para. 2; Belgium and Turkey (1972), art. 22, para. 2; Belgium and USSR (1972), art. 19, para. 2; Belgium and United States of America (1969), art. 18, para. 2; Czechoslovakia and Cyprus (1976), art. 16, para. 3; Finland and Hungary (1971), art. 11, para. 3; Finland and Poland (1971), art. 10, para. 2; Greece and Bulgaria (1973), art. 13; Hungary and Bulgaria (1971), art. 14, para. 2; Hungary and Czechoslovakia (1973), art. 15, para. 2; Hungary and German Democratic Republic (1972), art. 14. para. 2; Hungary and United States of America (1972), art. 14, para. 3; Mongolia and Czechoslovakia (1976), art. 14, para. 2; Mongolia and German Democratic Republic (1973), art. 14, para. 2; Romania and USSR (1972), art. 24, para. 2; Romania and United States of America (1972), art. 21, para. 4; USSR and Benin (1976), art. 14, para. 2; USSR and Bulgaria (1971), art. 14, para. 2; USSR and Cuba (1972), art. 13, para. 2; USSR and Cyprus (1978), art. 13, para. 2; USSR and Czechoslovakia (1972), art. 13; USSR and Guinea (1976), art. 14, para. 2; USSR and Guinea-Bissau (1976), art. 13, para. 2; USSR and Hungary (1971), art. 14, para. 2; USSR and India (1973), art. 14, para. 2; USSR and Italy (1967), art. 28, para. 2; USSR and Mexico (1978), art. 14, para. 3; USSR and Mongolia (1972), art. 13, para. 2; USSR and Norway (1971), art. 12, para. 2; USSR and Somalia (1971), art. 14, para. 2; United Kingdom and Bulgaria (1968), art. 19, para. 3; United Kingdom and Czechoslovakia (1975), art. 16, para. 2; United Kingdom and German Democratic Republic (1976), art. 17, para. 2; United Kingdom and Hungary (1971), art. 14, para. 3; United Kingdom and Mongolia (1975), art. 16, para. 2; United Kingdom and Poland (1967), art. 21, para. 3; United States of America and Bulgaria (1974), art. 14, para. 2; United States of America and China (1980), art. 12, para. 2; United States of America and Poland (1972), art. 12, para. 3.

264. The Consular Convention between Romania and Mongolia (1967), provides in article 18, paragraph 3, that "the consular bag and its parts, if it consists of more than one package ... shall bear visible external marks of their character ...", while the Consular Convention between Romania and the United Kingdom (1968) provides, in article 34, paragraph 4, that "the consular bag and its components shall ... bear physical external marks of their official character ...". The Consular Convention between Czechoslovakia and Italy (1975) provides, in article 23, that "packages constituting the consular bag must bear visible external marks indicating their nature ...". It is to be noted here that even though different terms are used in the conventions cited above, they all point to one and the same objective, namely, ease of identification of official bags, pouches, sacks, boxes and other containers used to convey diplomatic or consular correspondence and objects intended for official use.[219]

265. Only a limited number of bilateral conventions are silent on the question of indication of the status of the diplomatic or consular bag. This is conclusive proof of the main pattern of treaty practice on this matter.

266. Similarly, the national rules and regulations of many States contain provisions on indication of the official status of the bag. For example, the regulations concerning the diplomatic bag issued by the Government of Spain state:

> The bag shall consist of one or more sealed bags or one or more sealed canvas packages. Each bag shall have attached to it a tag or a stick-on label in a visible position bearing the stamp of the Ministry of Foreign Affairs or the mission of origin and the words "diplomatic bag". Diplomatic bags may be addressed only to the Minister of Foreign Affairs, heads of diplomatic missions or officers in charge of a consular post. Consignments dispatched by other departments or addressed to other offices, even within the Ministry of Foreign Affairs itself, have no such status and are not, therefore, regarded as diplomatic bags by the Spanish or foreign customs.[220]

267. The Order issued by the Government of Czechoslovakia implementing the Customs Act of 1974 provides that diplomatic bags "shall be accompanied by an official document ... [which] must indicate ... the type of external cover ...".[221] A ministerial directive issued by the Government of the Republic of Korea states:

> Newspapers, books or other materials may be sent by air or sea mail depending on their urgency. In such a case, they shall bear the visible external mark "diplomatic freight".[222]

The rules concerning passage of the diplomatic bag of foreign States and the personal belongings of diplomatic couriers across the USSR frontier also provide:[223]

> All parcels constituting the diplomatic bag must bear visible external indications of their character and may contain only official correspondence and documents or articles intended for official use.
>
> Each parcel of the diplomatic bag must be sealed with wax or lead seals by the sender and must bear a gummed label with the words *"expédition officielle"*.

The rules provide further:

> The weight of the diplomatic bag sent to the USSR may be limited on the basis of reciprocity. There shall be no limit on the weight of the diplomatic bag sent in transit through the territory of the USSR.

269. In a circular note sent by the Federal Secretariat for Foreign Affairs of the Government of Yugoslavia to all diplomatic missions in Belgrade on the procedures applicable to receiving and dispatching diplomatic mail, it was stated:

> ... accompanied and unaccompanied diplomatic bags should bear visible external marks (a seal or *plomb*, address of the sender and address of the recipient) ...[224]

270. The United States of America has established specific practices in respect of pouches, couriers and open mail, recorded in a memorandum prepared by the Department of State in 1960.[225] For instance, with regard to the Soviet Union, the memorandum provides:

> All pouches sent into or out of the Soviet Union must be in perfect condition, with no holes or tears. Documentation, including visaed courier letters, must be precisely accurate.

In respect of Spain, the memorandum states:

> This country has a past history of requiring absolutely correct documentation on pouches entering or leaving as well as a fairly regular inspection of the personal baggage of couriers ...

In the case of Czechoslovakia, the memorandum states:

> The air waybills covering unaccompanied air pouches destined for the American Embassy, Prague, must bear a special certification that the contents are official correspondence and documents. This requirement exists with no other country.

As far as Switzerland is concerned, the memorandum draws attention to the fact that the Swiss authorities insist upon absolutely correct documentation on all types of pouches entering or leaving the country. The same comment is applied to Austria. In respect to Argentina, the memorandum states:

> The Argentine customs officials frequently inspect the personal baggage of United States diplomatic couriers. As a result, the country reciprocates. To date, they have given us no trouble in moving diplomatic pouches in and out of the country, except when these pouches take the form of wooden crates. Other countries such as Switzerland and India also object to documentation of sealed crates as diplomatic pouches.

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[219] See also the corresponding provisions in the consular conventions concluded between the following States: Austria and Romania (1970), art. 31, para. 3; Belgium and Czechoslovakia (1976), art. 18, para. 4; Belgium and Hungary (1976), art. 15, para. 4; Bulgaria and Austria (1975), art. 30, para. 3; France and Bulgaria (1968), art. 13, para. 3; France and Romania (1968), art. 25, para. 4; France and Tunisia (1972), art. 12, para. 4; Greece and Hungary (1977), art. 14, para. 3; Greece and Poland (1977), art. 18, para. 3; Hungary and Cuba (1969), art. 25, para. 4; Poland and Cuba (1972), art. 16, para. 3; Romania and Belgium (1970), art. 32, para. 4; Romania and Democratic People's Repubic of Korea (1971), art. 20, para. 3; Romania and Italy (1967), art. 28, para. 4; USSR and Ethiopia (1977), art. 13, para. 2.

[220] Art. 23 of the Regulations of 1 July 1968, reproduced in *Yearbook ... 1982*, vol. II (Part One), p. 239, document A/CN.4/356 and Add.1-3.

[221] Art. 7, para. 2, of the Order of 25 November 1974 (*ibid.*, p. 236).

[222] Art. 29, para. 4, of the Regulation on the treatment of official documents, enacted in 1962 (*ibid.*, p. 238).

[223] Para. 2 of the Rules (*ibid.*, p. 242).

[224] Circular note 949/80 of 12 May 1980 (*ibid.*, p. 245).

[225] See in Whiteman, *op. cit.* (footnote 36 above), pp. 218-219, the rules cited in paras. 270-271 of the present report.

271. The memorandum of the Department of State also contains some general rules. For example, it provides:

The use of international mails for the dispatch of official materials is limited by the possibility of censorship in the country of addressor and addressee as well as in those countries through which the mail must pass. The Department uses open mail for official materials on a very small scale ...

272. In conclusion, it may be pointed out that domestic regulations on indication of the status of the bag, supported by State practice, are in conformity with the existing general rules of conventional international law. It is also evident that harmonization of these rules and their further elaboration might serve a useful practical purpose.

273. In the light of these considerations on indication of the status of the diplomatic bag, the Special Rapporteur submits the following draft article for examination and provisional approval:

PART III

STATUS OF THE DIPLOMATIC BAG

Article 31. Indication of status of the diplomatic bag

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

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

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

C. Content of the diplomatic bag

1. SCOPE AND PRACTICAL SIGNIFICANCE OF THE RULES DETERMINING THE CONTENT OF THE DIPLOMATIC BAG

274. The rules governing the content of the diplomatic bag may comprise two kinds of provisions. First, there are those provisions that indicate, in general terms and in accordance with paragraph 4 of article 27 of the 1961 Vienna Convention, the permissible content of an official bag. Secondly, there are those concerning the appropriate preventive measures to be taken in order to ensure compliance with the rules on the content of the diplomatic bag and to avoid any abuses of the facilities, privileges and immunities accorded by international and domestic law to the diplomatic bag.

275. These two elements, namely the rule on the legally admissible content of the bag and its efficient implementation, have undeniable practical significance for the proper functioning of official communications in the interests of international co-operation and understanding. Their strict observance would prevent suspicions on the part of the receiving State when the diplomatic bag is admitted into its territory, as well as on the part of the sending State when procedures for inspection, including the use of sophisticated devices for examination, are required by the receiving State. At present, none of the multilateral conventions in the field of diplomatic law has offered a viable solution to the problem of verification of the legally admissible content of the diplomatic bag. The increasing number of abuses has given particular importance to this problem, with certain political, economic and other implications.

2. STATE PRACTICE REGARDING THE REQUIREMENTS IN RESPECT OF THE CONTENT OF THE DIPLOMATIC BAG

276. The question of the permissible content of the diplomatic bag was the subject of special consideration in the preparation of the first two Vienna conventions, in 1961 and 1963. Subsequently, the Convention on Special Missions and the 1975 Vienna Convention simply followed the pattern established by the two earlier conventions. The groundwork on this issue was done by the Commission at its ninth and tenth sessions, in 1957 and 1958. Article 21, paragraph 2, of the draft articles on diplomatic intercourse and immunities submitted by the Special Rapporteur in 1958 provided:

2. The diplomatic bag ... may contain only diplomatic documents or articles of a confidential nature intended for official use ...[226]

277. Article 35, paragraph 4, of the final draft articles on consular relations, adopted by the Commission at its thirteenth session, in 1961, contained similar wording. It provided that packages constituting the consular bag "may contain only official correspondence and documents or articles intended for official use".[227] In the commentary to this article, the Commission noted that the consular bag

... may be defined as a bag (sack, box, wallet, envelope or any sort of package) containing the official correspondence, documents or articles intended for official purposes or all these together.[228]

278. During the discussion on article 35, paragraph 3, at the United Nations Conference on Consular Relations, in 1963, the representative of the Philippines stated that paragraph 3

... provided safeguards against abuse of the bag, which must not contain anything other than official correspondence, and could be opened if there was reasonable cause to suspect that it did.[229]

279. Article 28, paragraph 5, of the Convention on Special Missions was adapted *mutatis mutandis* from article 27, paragraph 4, of the 1961 Vienna Convention. The same was true of article 27, paragraph 4, and article 57, paragraph 5, of the 1975 Vienna Convention, with particular reference to delegations to an organ or to a conference.

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[226] See footnote 211 above.

[227] See *Official Records of the United Nations Conference on Consular Relations*, vol. II, p. 22.

[228] *Ibid.*, p. 23, commentary to article 35, para. (5).

[229] *Ibid.*, vol. I, p. 29, 10th plenary meeting, para. 8. See also the observations to the same effect of the representative of the Byelorussian SSR (*ibid.*, p. 31, para. 27).

280. The four codification conventions use almost the same language concerning the requirements in respect of the content of diplomatic, consular or other official bags. Thus there seems to be no objection with regard to the scope of the rule contained in article 27, paragraph 4, of the 1961 Vienna Convention and the corresponding provisions in the other codification conventions. Under this rule, the bags may include not only official letters, reports, instructions, information and other official documents but also cypher or other coding or decoding equipment and manuals, office materials such as rubber stamps or other articles used for office purposes, wireless equipment, medals, books, pictures, cassettes, films and *objets d'art* which could be used for the promotion of cultural relations. It is common practice in the case of books, films, exhibits etc., to use ordinary open consignments with the indication that they are intended for the official purposes of the mission.

281. The treaty practice of States basically conforms to the rules governing the content of the diplomatic bag embodied in the codification conventions. Some consular conventions specifically state that the pouches, bags and other containers "shall contain only official correspondence and objects intended exclusively for official use".[230] Some use the term "may contain"[231] instead of "shall contain", while others use the term "must contain".[232] Besides "correspondence and objects", some include "documents" exclusively intended for the official use of the consulate.[233]

282. In some conventions, reference is made to the contents of the consular bag only in the context of the inviolability of the consular bag itself. It is provided, for example, in article 12, paragraph 2, of the Consular Convention between the United Kingdom and Spain (1961) that the consular bag is inviolable and may be opened only in the presence of authorized representatives of the sending State, "with a view to satisfying themselves that [it does] not contain anything other than official correspondence".[234] It may be inferred from this that the consular bag may contain only official correspondence and objects intended exclusively for official use.

283. The Order issued by the Federal Ministry of Foreign Trade of Czechoslovakia implementing the 1974 Customs Act provides that diplomatic bags "may contain only diplomatic documents or articles intended for the official use of the mission".[235] On the other hand, the ministerial directive regulating the treatment of official documents of the Government of the Republic of Korea provides that the diplomatic bag "shall contain documents and articles intended only for official use", and goes on to define the meaning of "official use" as covering:

(*a*) Official documents and materials necessary for the management of the missions abroad and for their diplomatic negotiations;

(*b*) Letters and other materials required for the maintenance of security;

(*c*) Semi-official correspondence and communications; and

(*d*) Other matters recognized as important by the Minister of Foreign Affairs and the heads of the missions.[236]

Some consular conventions choose to define the term "official correspondence". For example, the Consular Convention between Romania and Italy (1967) provides in article 28, paragraph 2, that "official correspondence" means "all correspondence relating to the consular post and its functions".[237]

284. The Government of Yugoslavia, on this point, expressed the following view:

... As to the contents, the existing conventions laconically stipulate that a diplomatic bag "may contain only diplomatic documents or articles intended for official use". Prior to the adoption of the 1961 Vienna Convention on Diplomatic Relations, there prevailed the notion that the diplomatic bag could contain only "diplomatic documents" and not "articles intended for official use". Obviously

[230] See, for example, the consular conventions concluded between the following States: France and Tunisia (1972), art. 12, para. 4; Hungary and United States of America (1972), art. 14, para. 3; Romania and Belgium (1970), art. 32, para. 4; Romania and United Kingdom (1968), art. 34, para. 4; United Kingdom and Czechoslovakia (1975), art. 16, para. 2; United Kingdom and German Democratic Republic (1976), art. 17, para. 3; United Kingdom and Hungary (1971), art. 14, para. 3; United Kingdom and Mongolia (1975), art. 16, para. 2; United States of America and Ireland (1950), art. 10, para. 3; United States of America and Republic of Korea (1963), art. 9, para. 2.

[231] See, for example, the consular conventions concluded between the following States: Austria and Romania (1970), art. 31, para. 3; Czechoslovakia and Cyprus (1976), art. 16, para. 3; Czechoslovakia and Italy (1975), art. 26, para. 3; France and Romania (1968), art. 25, para. 4; Poland and Romania (1973), art. 31, para. 4; Romania and Cuba (1971), art. 23, para. 3; Romania and Democratic People's Republic of Korea (1971), art. 20, para. 3; Romania and Italy (1967), art. 28, para. 4; United States of America and China (1980), art. 12, para. 2.

[232] See, for example, the consular conventions concluded between Hungary and Cuba (1969), art. 25, para. 4; Romania and United States of America (1972), art. 21, para. 4; United States of America and Poland (1972), art. 12, para. 3.

[233] See, for example, the consular conventions concluded between the following States: Belgium and Czechoslovakia (1976), art. 18, para. 4; Belgium and Hungary (1976), art. 15, para. 4; France and Poland (1976), art. 18, para. 3; Greece and Hungary (1977), art. 14, para. 3; Greece and Poland (1977), art. 18, para. 3; Romania and Cuba (1971), art. 23, para. 3; Romania and Mongolia (1967), art. 18, para. 3; Romania and United Kingdom (1968), art. 34, para. 4.

[234] See also the corresponding provisions in the consular conventions concluded between the following States: Belgium and Turkey (1972), art. 22, para. 3; Belgium and United Kingdom (1961), art. 17, para. 4; Belgium and United States of America (1969), art. 18, para. 3; Bulgaria and Austria (1975), art. 30, para. 3; Finland and Poland (1971), art. 10, para. 2; Finland and Romania (1971), art. 29, para. 2; France and Algeria (1974), art. 13, para. 3; France and Bulgaria (1968), art. 13, para. 3; France and Senegal (1974), art. XI, para. 3; Greece and Bulgaria (1973), art. 13, para. 2; Japan and United States of America (1963), art. 10, para. 2; Sweden and Romania (1974), art. 30, para. 3; United Kingdom and France (1951), art. 13, para. 4; United Kingdom and Japan (1964), art. 13, para. 3; United Kingdom and Norway (1951), art. 12, para. 4; United States of America and Bulgaria (1974), art. 14, para. 3; United States of America and France (1966), art. 15, para. 3; United States of America and Poland (1972), art. 12, para. 3.

[235] Art. 7, para. 3, of the Order of 25 November 1974, reproduced in *Yearbook ... 1982*, vol. II (Part One), p. 236, document A/CN.4/356 and Add.1-3.

[236] Art. 25 of the Regulation on the treatment of official documents (*ibid.*, p. 238).

[237] See also the consular conventions between France and Algeria (1974), art. 13, para. 2, and between France and Bulgaria (1968), art. 13, para. 2.

there are reasons why almost all States have accepted the solution outlined in article 27, paragraph 4, of the 1961 Vienna Convention. The Yugoslav Government nevertheless is of the opinion that there exist underlying causes for the reassessment of this provision in terms of having only some articles serving official purposes dispatched by diplomatic bag. It is well known that some States parties to the 1961 Vienna Convention have adopted internal regulations listing each article separately and limiting the number to three or four articles; obviously they are not satisfied with the solution contained in the existing conventions.[238]

285. Apart from treaty practice and national regulations, there have been a few cases relating to the content of the diplomatic bag. Some of them occurred prior to the United Nations codification conventions, while others were the subject of diplomatic correspondence and negotiations after the Vienna Conventions of 1961 and 1963 entered into force.

286. For example, in 1938, an American film producer, Mr. de la Varre, used the French diplomatic pouch to bring films into the United States without paying customs duties. The case was brought before a grand jury in the jurisdiction of the Federal District Court of the Southern District of New York. The issue became the subject of diplomatic correspondence between the French Ambassador to the United States, Mr. Saint-Quentin, and the Acting Secretary of State of the United States, Mr. Welles. The French Ambassador presented his regrets on this account and gave an assurance that the misuse of the bag was due to "ignorance of the American regulations or lack of surveillance on the part of certain French officials who handled the shipment by pouch of the films in question" and not to the deliberate intention to facilitate "the usage of the diplomatic pouch by an American businessman in order to permit him to defraud the Federal Customs". At the same time, the Ambassador admitted the responsibility of the French authorities and stated that "the French Government has taken all measures necessary to correct the irregularities which may have been committed in the use of the diplomatic pouch and prevent their occurrence".[239]

287. In 1973, the Nigerian Government, in order to combat trafficking in Nigerian currency, introduced, for a period of six weeks beginning 1 January 1973, search by the customs authorities with a view to preventing the illegal import into the country of local currency. In its notes to the heads of diplomatic and consular missions accredited to Nigeria, the Ministry of External Affairs stated that those measures were "without prejudice to their immunities and privileges, which the Federal Republic of Nigeria respectfully upholds under the Vienna Convention on Diplomatic Relations, 1961, as well as the Vienna Convention on Consular Relations, 1963", but that the Ministry wished to confirm that "no packages or articles consigned to any person, diplomatic agent, diplomatic or consular mission, organization or institution may be immune from search". In its note of protest against the Nigerian decision to search diplomatic bags, dated 19 January 1973, the United States Embassy pointed out that "sealed consular pouches, bags and other containers shall be inviolable when they contain nothing but official communications and are so certified by a responsible office of the sending State".[240] This case related more to the problem of the inviolability of the diplomatic bag, but it also raised some issues regarding the content of the bag.

288. Since none of the four codification conventions contains provisions aimed at the solution of the problems of verification of the content of the bag, it is perhaps advisable to provide a possible legal remedy against abuses, for example by creating an obligation for the sending State to take appropriate measures to prevent abuses and, in cases when they occur, to prosecute and punish any person under its jurisdiction responsible for the abuse. Such a provision would add to the responsibility of the sending State. In case of abuse of the bag, the sending State not only has a general responsibility to the receiving State for violation of its treaty obligation under international law, but it is also responsible under its domestic law, for prosecuting and punishing the person who abused the bag. Hence States should enact domestic rules and regulations to provide for the prosecution and punishment of their officials for misuse of the diplomatic bag. Such measures could be of a legislative and administrative nature and would be undertaken in conformity with the domestic law and international obligations of the State.

289. In the light of these considerations regarding the requirements for the content of the diplomatic bag, the Special Rapporteur submits the following draft article for examination and provisional approval:

Article 32. Content of the diplomatic bag

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

2. The sending State shall take appropriate measures to prevent the dispatch through its diplomatic bag of articles other than those referred to in paragraph 1, and shall prosecute and punish any person under its jurisdiction responsible for misuse of the diplomatic bag.

D. Status of the diplomatic bag entrusted to the captain of a commercial aircraft or the master of a merchant ship

1. Practical significance of this type of diplomatic bag

290. The diplomatic bag not accompanied by diplomatic courier has acquired a prominent place in modern diplomatic communications. The frequency of

[238] Sect. I, para. 3 (*b*) of the information communicated by Yugoslavia (*Yearbook ... 1982*, vol. II (Part One), p. 245, document A/CN.4/356 and Add.1-3).

[239] See Whiteman, *op. cit.* (footnote 36 above), pp. 217-218.

[240] See A. W. Rovine, "Contemporary practice of the United States relating to international law", *American Journal of International Law* (Washington, D.C.), vol. 67 (1973), pp. 537-538.

the use of this kind of diplomatic bag is evidence of a widespread State practice of increasing dimensions and significance. There is no doubt that among the various types of unaccompanied diplomatic bags the most widely used is diplomatic mail entrusted to the captain of a commercial aircraft or an authorized member of the crew. It has proved its practical advantages and viability in terms of economy, speed and reasonable safety, for although not accompanied by a courier it is still in the custody of a responsible person. The employment of the master of a passenger or other merchant ship or of an authorized member of the crew has not been so frequent, but it has occurred where seaborne transport is the most convenient means of communication or where the shipment of sizeable consignments is more economical by sea. In some instances the diplomatic bag may be entrusted to the driver of a truck used for the international transport of goods.[241]

291. The practical importance of the diplomatic bag not accompanied by a professional diplomatic courier or a diplomatic courier *ad hoc* was emphasized by Governments in written comments and during the discussions on this topic in the Sixth Committee of the General Assembly.[242] The use of diplomatic bags entrusted to the captain of a commercial aircraft or a member of its crew has become an almost regular practice of developing countries, for economic considerations. At present this kind of diplomatic bag is also widely used by many other States.

292. As has been pointed out above (paras. 229-237) in connection with the status of the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew, there has been a growing number of bilateral agreements containing special provisions on the dispatch of a diplomatic or consular bag entrusted to the captain of an aircraft or the master of a ship.[243] Following the rule established by article 27, paragraph 7, of the 1961 Vienna Convention, the bilateral agreements in question contain special provisions concerning the unaccompanied bag. Most of them refer specifically to: (*a*) the official document indicating the number of packages constituting the diplomatic bag, and (*b*) the procedures to be followed for the taking of free and direct possession of the bag by an authorized member of the mission from the captain of the aircraft or the master of the ship.[244] In conformity with these basic rules, some States have adopted national rules and regulations on this matter. In some instances, the regular utilization of the services of airlines for the dispatch of diplomatic bags is based on long-term contracts or special arrangements between the Ministry for Foreign Affairs and the airlines.[245] As has been pointed out above (para. 235), some States have entered into special agreements governing the practical procedures to be used for the delivery of diplomatic bags entrusted to the capital of a civil aircraft.

2. Main characteristics of the diplomatic bag entrusted to the captain of a commercial aircraft, the master of a merchant ship or a member of the crew

293. Taking into consideration the practical significance of the diplomatic bag entrusted to the captain of an aircraft, the master of a ship or a member of the crew, it would be well justified to elaborate more specific rules relating to the status of such a bag and to its legal protection, which would entail certain obligations on the part of the receiving and the transit States. These rules should be considered in conjunction with those on the status of the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew under his command, as proposed in article 30 of the present draft articles (see paras. 238-243 above). Furthermore, they should contain a special reference to the relevance of the general requirements applicable to any diplomatic bag regarding proof of status and content, as dealt with in articles 31 and 32 proposed above (paras. 250-289), as well as its legal protection, including the facilities, privileges and immunities accorded to the diplomatic bag whether or not accompanied by diplomatic courier or diplomatic courier *ad hoc* (see paras. 322-365 below).

294. The diplomatic bag entrusted to the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew must meet the same requirements in respect of its external features as that accompanied by a courier. It should be sealed with wax or lead seals bearing the official stamp by the competent authority of the sending State. Because the bag is not carried by a professional or an *ad hoc* courier, even greater care may be required to ensure proper fastening, or closing with special padlocks, since it is forwarded as a consignment entrusted to the captain of an aircraft, the master of a ship or a member of the crew. As far as the *visible external marks* are concerned, they are also absolutely necessary for proof of the official status of the unaccompanied bag, together with the document indicating the number of packages constituting the diplomatic bag and its consignee. It is also mandatory to provide the bag with a tag or stick-on label indicating its character as official mail, as well as the sender and the addressee. It has been suggested that a special colour be established for the non-accompanied diplomatic bag to make it easily identifiable and facilitate customs clearance and other formalities at the frontier of the transit or the receiving State.

295. It is absolutely clear that the requirements for the legally permissible content of the diplomatic bag in general, set out in article 27, paragraph 4, of the 1961

[241] See the Finnish practice referred to in para. 234 above.

[242] *Yearbook ... 1979*, vol. II (Part Two), pp. 180-181, report of the Working Group on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, item 15 (*a*).

[243] See footnote 194 above.

[244] Most of the bilateral consular conventions also provide explictly that the captain of an aircraft or the master of a ship shall not be considered to be a diplomatic courier.

[245] This is the case, for example, in Spain and Colombia (see para. 234 above).

Vienna Convention and incorporated in paragraph 1 of article 32 of the present draft articles, must be fully applicable in regard to all kinds of unaccompanied bags, including those that are entrusted to the captain of an aircraft or the master of a ship. Nevertheless, this rule is of such paramount significance for the proper functioning of official communications and prevention of abuses in connection with the diplomatic bag that the draft article on the status of this type of diplomatic bag should include a specific reference to the mandatory requirement that the bag must contain only official correspondence and documents or articles intended exclusively for official use.

296. The diplomatic bag entrusted to the captain of an aircraft, the master of a ship or an authorized member of the crew should be given the same measure of legal protection and be accorded the same facilities, privileges and immunities as are granted by the receiving or the transit State to the bag accompanied by a professional or *ad hoc* diplomatic courier. As was pointed out in the second report submitted by the Special Rapporteur, the diplomatic bag which is not in the direct and permanent custody of a diplomatic courier requires an even greater measure of protection and preferential treatment in order to ensure its safe and unimpeded transportation and delivery.[246] This aspect of the status of the unaccompanied bag has been indicated in the comments by Governments. The rule relating to the legal protection and inviolability of such a bag has been widely upheld by the practice of States during the last decades.[247]

297. One of the prerequisites for the appropriate custody of the unaccompanied diplomatic bag is to entrust such a bag to the captain of an aircraft or the master of a ship, as the commanding officer, or to an authorized member of the crew. Some Governments in their written comments explicitly pointed out that, in that case, the bag should be entrusted to the highest ranking officer of the aircraft or the ship.[248]

3. Obligations of the receiving or the transit State

298. It is obvious that the main requirement for the safe delivery of the unaccompanied diplomatic bag is the obligation of the transit State or the receiving State to take appropriate meausres to ensure the protection of the diplomatic bag and its expeditious transmission to its destination. These measures may be of a legislative or an administrative character. Their scope should be determined by the functional necessity underlying the status of the diplomatic bag and should comprise facilities for the safe and speedy transportation and delivery of the bag, its inviolability, exemption from customs inspection, duties and all dues and taxes, as well as some other protective measures that might be necessary in special circumstances. As has been pointed out above (paras. 229-237), the practice of States, as evidenced by international agreements and national laws and regulations, shows conclusively that the above-mentioned rules are implemented. It should be pointed out, however, that, on the subject matter under consideration, i.e. the safe delivery of the bag, these rules are confined to general rules regarding the inviolability of the bag and the procedures to be followed for the taking possession of the bag by authorized members of the mission of the sending State at the apron of the airfield, the airport arrival platform or on board the aircraft.[249] Thus it might be desirable to elaborate some more specific rules.

299. In the light of the above considerations concerning the status of the diplomatic bag entrusted to the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew, the Special Rapporteur submits the following draft article for examination and provisional approval:

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

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

E. Status of the diplomatic bag dispatched by postal services or other means

1. Introduction

300. The diplomatic bag dispatched by postal channels or other means, whether by land, air or sea, constitutes another type of unaccompanied diplomatic bag. The common feature of these diplomatic bags is that they are dispatched either by public postal services or by other ordinary means of communication or transportation used for commercial purposes: surface (road, rail or boat), air or maritime transport. Nevertheless, the conveyance of a diplomatic bag by the postal services as postal mail, letter-post item or postal parcel, on the one hand, and the transmission of the bag as a consignment by other means of transportation, on the other, present certain specific features that should be taken into account. It is therefore suggested that the dispatch of a diplomatic bag by public postal channels should be considered separately from the use of other means of transportation, whether by land, air or sea, it being understood that in both instances the subject of the examination is the unaccompanied diplomatic bag.

[246] Document A/CN.4/347 and Add.1 and 2 (see footnote 1 above), para. 175.

[247] See footnote 242 above.

[248] See, for example, the written comments of Chile, para. 15, in *Yearbook ... 1979*, vol. II (Part One), p. 220, document A/CN.4/321 and Add.1-7; and the second report of the Special Rapporteur, document A/CN.4/347 and Add.1 and 2 (see footnote 1 above), para. 177.

[249] See the Indonesian practice, para. 237 above.

2. Use of postal services for the dispatch of diplomatic bags

301. The use of public postal services and other ordinary means of transportation of goods for the dispatch of an unaccompanied diplomatic bag had been established in the practice of States long before the 1961 Vienna Convention. The rules governing the sending of this kind of diplomatic bag formed part of customary international law and were embodied in a considerable number of bilateral agreements and domestic regulations. At the same time, the dynamic development and intensification of modern diplomatic communications have increased the practical significance of the rules governing the forwarding of diplomatic bags through postal services and other means. However, it may be pointed out that the United Nations Conference on Diplomatic Intercourse and Immunities tended to concentrate its attention on the diplomatic bag entrusted to the captain of a commercial aircraft. Thus, while the 1961 Vienna Convention contains a special provision, in paragraph 7 of article 27, on this kind of diplomatic bag not accompanied by diplomatic courier, it refers in only very general terms, in paragraph 1 of the same article, to the right of the sending State and its missions to "employ all appropriate means" of communication. This broad notion of *all appropriate means* would certainly cover the postal services and other means of communication and transportation. However, the absence of specific provisions relating to such means of transport of the unaccompanied diplomatic bag would justify the elaboration of a draft article dealing with the status of this kind of diplomatic bag.

302. Before proceeding to the examination of the specific features of the diplomatic bag conveyed by public postal channels and of the bag dispatched by other means, it should be emphasized first of all that the basic requirements concerning proof of official status and content of the diplomatic bag must apply fully to this type of unaccompanied bag. Secondly, the diplomatic bag should enjoy the same régime of protection, particularly regarding its inviolability and expeditious forwarding, as that established for the diplomatic bag carried by professional or *ad hoc* diplomatic courier or the diplomatic bag entrusted to the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew. For it is absolutely essential for the proper functioning of official communications that the unaccompanied bag dispatched by postal channels or other means should reach its final destination as expeditiously as possible and without any infringement of its inviolability.

3. Practice of States, including international agreements and domestic regulations, regarding use of postal services

303. A brief analytical survey of the practice of States in respect of the use of ordinary postal services for the conveyance of diplomatic bags may provide the background for the specific provisions on this matter to be suggested by the Special Rapporteur. This practice has been confirmed by several international agreements, domestic rules and regulations and diplomatic correspondence. It should be noted that the bilateral agreements in question may be placed in three main categories: (*a*) a significant number of consular conventions which contain only a general reference to the use of public or ordinary means of communication;[250] (*b*) consular or other bilateral agreements which simply mention the postal services among the means of communication without further elaborating on the functioning of this kind of diplomatic communication;[251] (*c*) special agreements for the transmission by post of diplomatic correspondence or the exchange of diplomatic correspondence through postal channels by airmail.[252] Some States have also adopted special administrative and postal regulations which have a certain bearing on the subject matter under consideration.[253] Another pertinent source of information regarding the treatment of diplomatic correspondence conveyed by postal mail as letter-post items or postal parcels is the decisions of the governing bodies of UPU, which will be briefly examined in the present report.

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[250] Nearly all the consular and other bilateral agreements mentioned in the study of the topic under consideration in the previous reports and the present report contain a general provision about the use of "ordinary means of communication", "public means of communication", "appropriate means of communication" or "suitable means of communication". See e.g. the consular conventions referred to in footnotes 174, 218, 219 and 233 above.

[251] See, for example, the consular conventions concluded between the following States: Belgium and United Kingdom (1961), art. 17, para. 1; Czechoslovakia and Yugoslavia (1963), art. 15; France and Cameroon (1960), art. 12; Sweden and United Kingdom (1952), art. 12, para. 3; United Kingdom and France (1951), art. 13, para. 3; United States of America and Ireland (1950), art. 10, para. 2.

[252] See, for example, the exchanges of notes concerning diplomatic correspondence between the following States: *Brazil and Argentina*—Exchange of notes constituting an agreement for the exchange of official mail by diplomatic pouch (6 July 1961); *Brazil and Uruguay*—Exchange of notes constituting an administrative agreement for the exchange of diplomatic correspondence by airmail in special bags (16 December 1944); *Brazil and Venezuela*—Exchange of notes constituting an administrative agreement for the exchange of official correspondence by airmail (30 January 1946); *Ecuador and Brazil*—Exchange of notes constituting an agreement for the exchange of diplomatic correspondence by airmail in special diplomatic bags (15 November 1946 and 31 May 1947); *United Kingdom and Dominican Republic*—Exchange of notes constituting an agreement for the exchange through postal channels without prepayment of postage of diplomatic bags containing non-confidential correspondence (1 and 9 August 1956); *United Kingdom and Mexico*—Exchange of notes constituting an agreement for the transmission of diplomatic correspondence between London and Mexico City (27 September 1946); *United Kingdom and Netherlands*—Exchange of notes constituting a reciprocal agreement for the exchange through postal channels without prepayment of postage of diplomatic bags containing non-confidential correspondence (30 November 1951); *United Kingdom and Norway*—Exchange of notes constituting an agreement concerning the transmission by post of diplomatic correspondence (23 December 1946 and 15 January 1947).

[253] See, for example, United States of America, *Code of Federal Regulations, Title 39—Postal Service (Revised as of August 1973)* (Washington, D.C., 1973), p. 63, part 56, para. 56.1, "Consular and commercial invoices"; Colombia, art. 49 of decree No. 3135 of 20 December 1956 (Pan American Union, *op. cit.* (footnote 200 above), p. 270); Ecuador, art. 13 of order No. 1422 of 31 December 1963 of the Supreme Court (*idem.*, p. 292).

304. The special agreements for the transmission of diplomatic bags through postal channels usually contain specific provisions relating to *external features*, including visible external marks, seals and safety devices such as locks, padlocks and safety bolts. The Agreement of 27 September 1946 between the United Kingdom and Mexico stipulates:

> The bag shall bear the appropriate seals, and may be locked if desired, the keys resting in the custody of the respective Foreign Offices and embassies.

Identical provisions are incorporated in the agreements between the United Kingdom and the Netherlands and between the United Kingdom and the Dominican Republic. The note of 2 September 1947 of the United Kingdom Embassy in Oslo addressed to the Ministry for Foreign Affairs of Norway, constituting part of the Exchange of notes between the Governments of the two countries concerning the transmission by postal services of diplomatic correspondence, states:

> It is understood that bags intended for transmission by airmail should be clearly marked for conveyance in this manner, and that, so far as bags to be dispatched by the Norwegian Embassy in London are concerned, they shall be conveyed by aircraft of British European Airways or Norwegian Airlines operating from London to Oslo.

For its part, the Ministry for Foreign Affairs of Norway, in its note of 30 October 1947, confirmed that understanding concerning the transmission by air of diplomatic bags clearly marked and sealed. The agreements concluded by Brazil with Argentina, Ecuador, Venezuela and Uruguay also provide that the "special diplomatic pouches" or "special bags" must be provided with locks, padlocks, safety bolts or other safety devices by the Ministry for Foreign Affairs of the sending State or its embassies, which shall retain possession of the keys or pliers of their bags. The use of such safety equipment is optional in the prevailing practice of States, the general rule being that the diplomatic bag dispatched through postal channels must bear visible external marks and seals testifying to its official character.

305. Most of the special agreements on the transmission of diplomatic bags by the postal services contain specific provisions regarding the maximum size and weight of the consignments.[254] In some agreements, the type of container (sacks, pouches, bags, etc.), or the material of which those containers are made, e.g. canvas or other lighter material, light bags or envelopes, is specified.[255] The Agreement between Ecuador and Brazil stipulates that each of the parties shall "be authorized to dispatch airmail not more than four bags per month".[256] Some of the agreements refer specifically to compliance with the international postal regulations established by UPU.

306. All the special agreements under consideration refer explicitly to the content of the diplomatic bag in general terms as "diplomatic correspondence", official correspondence", "diplomatic mail", etc., without specifically indicating any requirements regarding the admissible content of the bag. Perhaps one of the reasons is that most of these agreements were concluded prior to the 1961 Vienna Convention. It is however obvious that the rule contained in paragraph 4 of article 27 of that Convention, in respect of the content of the diplomatic bag, was a rule of customary international law that was generally recognized prior to the adoption of the Convention. The bilateral agreements referred to above usually employ the term "diplomatic correspondence", or "diplomatic mail", but it is certain that they also cover articles used for official purposes. The special agreements on the dispatch of diplomatic mail through postal channels provide that the States parties and their postal administrations must facilitate the transmission and delivery of the bag. The Agreement of 6 July 1961 between Brazil and Argentina for the exchange of official mail in diplomatic pouches provides:

> The postal authorities of the two countries shall take the necessary complementary measures for the performance of the service, and by common agreement and in the light of practical experience in Brazil and Argentina respectively, shall fix the date, time and place for handing over the pouches, which shall be dispatched by local post offices in the same mail bags as are used for regular mail between the two countries.

307. Most of the special agreements also provide for the procedures to be followed to facilitate the transmission of the unaccompanied diplomatic bag. In conformity with these agreements, the States concerned undertake to make the necessary administrative arrangements with their national or foreign airline companies to ensure the expeditious transmission of the diplomatic bag dispatched through postal channels.[257] In some instances, special provision is made for the dispatch of urgent letters, letter packets and other items for which such transmission is justified, subject to the according of reciprocal facilities.[258]

308. The domestic rules and regulations adopted by some States regarding the transmission of diplomatic bags through postal channels or other means are along the lines of the special agreements referred to above. In some instances, the national administrative rules and regulations derive from or are aimed at the implementa-

[254] The mutually agreed standards regarding weight and size range from 2 kg to 30 kg or more, and from 30 × 40 cm to 124 × 66 cm. In some instances there are different standards for dispatches by air and for dispatches by surface or parcel post. In the agreements between Brazil and Argentina, the maximum weight of the diplomatic bag is set at 15 kg and its size at 50 × 50 cm; between Brazil and Uruguay, at 2 kg and 40 × 30 cm; between Brazil and Venezuela, at 5 kg and 60 × 40 cm; between Ecuador and Brazil, at 2 kg and 40 × 60 cm. In the practice of the United Kingdom, as evidenced by several special agreements, it is generally provided that the weight of the diplomatic bag must not exceed 66 pounds avoirdupois (30 kg) and the size 49 × 26 inches (124 × 66 cm) (see the exchanges of notes between the United Kingdom and several States referred to in footnote 252 above).

[255] See, for example, the exchanges of notes between Brazil and Venezuela, between Ecuador and Brazil, and between the United Kingdom and Norway (*ibid.*).

[256] See, for example, the exchanges of notes between the United Kingdom and the Netherlands and between the United Kingdom and the Dominican Republic (*ibid.*).

[257] See, for example, in the Exchange of notes between Brazil and Uruguay (*ibid.*), paragraph 6 of note 83 of 16 December 1944 of the Brazilian Embassy at Montevideo.

[258] See the Exchange of notes between the United Kingdom and the Netherlands (*ibid.*).

tion of these agreements. This is the case with Decree No. 3135 of Colombia of 20 December 1956, which stipulates in article 49:

> The exchange of diplomatic pouches is governed by special agreements between Colombia and the nations that have diplomatic representation in Bogotá or by the current provisions of the Universal Postal Union. In all cases it is to be understood that a pouch contains only official documents or publications and that appendages to diplomatic pouches arriving in Colombia cannot be accepted.[259]

309. The documents indicating the official character of the diplomatic bag dispatched as postal mail are the papers issued by the post office upon receipt of the consignment and sent to the consignee. For example, the *Code of Federal Regulations, Title 39—Postal Service* contains a special provision (para. 56.1) on "consular and commercial invoices", which states:

> Many countries require special documents to be prepared by the sender and either presented by the addressee or enclosed within the package.[260]

310. This survey of the practice of States reveals some important aspects of the question under consideration. It shows (*a*) that certain rules governing the transmission of diplomatic bags by ordinary postal services are contained in international agreements and national regulations; (*b*) that those rules are applied on a reciprocal basis by the States parties to special agreements; (*c*) that a further effort might be advisable to harmonize the existing rules and amplify their scope. This objective could be achieved by concerted codification measures undertaken both within and outside UPU in respect of the international rules and regulations governing the transmission of diplomatic correspondence by the postal services.

311. The action to be taken within UPU would be to amend the international regulations so that they provide for special treatment for the conveyance of the diplomatic bag. The codification effort to be undertaken outside UPU would be to provide a general legal framework aimed at enhancing the protection of the diplomatic bag through bilateral arrangements between States. These two methods are not only mutually compatible but are also necessarily interdependent. The lack of progress in respect of the first, as will be explained in the following lines, may require that emphasis be placed on the second, namely, codification and development of certain rules governing the dispatch of diplomatic bags through postal channels. This is all the more necessary as there are no specific provisions on this matter in the 1961 Vienna Convention or in the other conventions codifying diplomatic law.

4. Position of the Universal Postal Union

312. The question of the transmission of diplomatic correspondence by postal services in the special category of "diplomatic mail" already has its history. Reference to the study of this question by various organs of UPU will be confined to a very brief account of the action taken by the Congress and the Executive Council of UPU relating to the topic under examination. The question was first raised in 1972 and has been under consideration ever since. The last time a governing body of UPU was seized with it was at the Congress in 1979, held in Rio de Janeiro.

313. The UPU Congress, held in 1974 in Lausanne, instructed the Executive Council to "continue the study of transmission by post of official correspondence of diplomatic missions, consulates and intergovernmental international organizations".[261] The study was based on a special questionnaire[262] adopted by Committee 4, dealing with letter post, and was carried out by the Netherlands in co-operation with the International Bureau of UPU. Sixty-one national postal administrations took part in the consultation. The main problem under examination was whether it was possible to draw up international regulations on the conveyance of diplomatic mail by creating a *new category of postal items* under the denomination of "diplomatic bags" in the international postal service. Closely connected with this problem was that of the special treatment to be accorded to the new category of postal items.

314. The great majority (72 per cent) of the postal administrations consulted expressed the view that "diplomatic bags" could be transmitted by the postal service, taking into account article 27, paragraph 1, of the 1961 Vienna Convention. One administration pointed out that for security reasons it would like the anonymity of these items during the handling of the mail to be guaranteed. However, by a still larger majority (80 per cent), the administrations consulted refused to associate acceptance of "diplomatic bags" in the international postal service with the creation of a new category of postal items. The 13 postal administrations favouring the creation of a new category of items expressed the view that the maximum weight to be allowed for such items should vary between 2 kg and 30 kg, with a clear preference for 10 kg. Only two administrations were in favour of granting the diplomatic bag exemption from postage, one of them on a reciprocal basis, while the other 59 administrations were against such exemption. With regard to special treatment, views were divided, but with negative positions prevailing. The proposal that diplomatic bags be inserted in mailbags of a special colour was also rejected.

315. It was also suggested that international regulations be laid down by inserting optional provisions in the Acts regarding the special category of "diplomatic bags". On that issue there was a clear division of views (31 in favour, 27 against, with 3 abstentions), which proved that such a suggestion would not receive substantial support from the postal administrations. At

[259] See footnote 253 above.

[260] *Ibid.*

[261] See *Acts of the Universal Postal Union, revised at Lausanne in 1974 and annotated by the International Bureau, volume II* (Bern, 1975), p. 284, decision C 42 (III 875).

[262] See UPU, document CE/C 4 — Doc 22 (agenda item 8 of the May 1977 session of the Executive Council), in particular the comments of the postal administrations consulted (paras. 12-19 of the document).

the same time, a fairly large majority was in favour of international postal conveyance of diplomatic mail under bilateral and multilateral agreements.

316. The results of the study were submitted to the UPU Congress held in 1979 in Rio de Janeiro in connection with the consideration of possible amendments to article 18, dealing with the conveyance of letter items. It was pointed out that the postal administrations had the duty to respect the facilities for communication accorded to diplomatic missions, consular posts, special missions, permanent missions and delegations of States to international organizations, in conformity with the 1961 Vienna Convention (art. 27); the 1963 Vienna Convention (art. 35); the Convention on Special Missions (art. 28); and the 1975 Vienna Convention (art. 27). The Congress took note of the conclusions contained in the report of the Executive Council, based on the study undertaken by decision of the Lausanne Congress. The Executive Council stated in its report that the majority of the postal adminstrations consulted were opposed to the creation of a new category of postal items, but that they accepted the transmission by the postal service of "official correspondence" as well as of the "diplomatic bag", to be treated in the same way as other letter-post items. It indicated finally that the international conveyance of diplomatic mail should continue to be governed by bilateral or multilateral agreements that the postal administrations could enter into.[263] In its conclusions submitted to the Congress, the Executive Council emphasized that

> ... the dispatch of diplomatic mail on the basis of bilateral agreements as practised hitherto has never given rise to complaints from the missions concerned, neither has this procedure caused their services any difficulties.[264]

317. This brief survey of the deliberations that took place in various organs of UPU with regard to the status of the diplomatic bag dispatched through postal channels indicates that, while the majority of the postal administrations did not favour the creation of a special category of letter post items for the diplomatic bag, they accepted the conveyance of diplomatic mail by international postal service and favoured the operation of such a service on the basis of bilateral or multilateral agreements. In this connection, it may be pointed out that the present work of the Commission on the topic under consideration might well provide the basis for a general legal framework for the transmission of diplomatic bags through postal channels.

5. Diplomatic bags dispatched through ordinary means of transport by land, air or sea

318. The dispatch of diplomatic bags as cargo consignments by commercial means of transportation, whether by land, air or sea, was a common practice of States long before the adoption of the 1961 Vienna Convention. This kind of official communication was used in particular for heavy and sizeable consignments or for non-confidential correspondence, documents and other articles, such as books, exhibits, films and other items for the official use of diplomatic missions, consular posts and other missions.

319. The four conventions codifying diplomatic law contain no specific provisions regarding this type of non-accompanied diplomatic bag. Its use might nevertheless be deduced from article 27, paragraph 1, of the 1961 Vienna Convention and the corresponding provisions in the other codification conventions, which refer to "all appropriate means" that may be employed for official communications. There are however certain aspects of the legal status of the non-accompanied diplomatic bag dispatched by normal commercial means of transportation that deserve special consideration.

320. The rules applicable to proof of status, external features, requirements in regard to the content of the bag and the régime of its treatment must be applied *mutatis mutandis* to this kind of unaccompanied diplomatic bag. In accordance with established practice, diplomatic bags dispatched as railroad or truck consignments, air freight or shipments by sea, must bear official seals and other visible external marks and, when appropriate, be provided with the necessary safety devices such as locks, padlocks and safety bolts. The bill of lading attached to the consignment could be used as a document indicating the status of the diplomatic bag, the sender and the addressee. Some domestic regulations explicitly require that the official character of the shipment should be declared on the bill of lading.[265] Unaccompanied diplomatic bags dispatched by surface or air must enjoy the inviolability and other privileges and immunities accorded to any diplomatic bag. The transmission of such an unaccompanied bag would impose certain obligations upon the receiving or the transit State and their port authorities, as well as upon the customs, transport, public health and other authorities, for the safe and expeditious delivery of the bag.

321. In the light of the above considerations on the status of the diplomatic bag dispatched by postal services or other means, the Special Rapporteur submits the following draft article for examination and preliminary approval:

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

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

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[263] See *Acts of the Universal Postal Union revised at Rio de Janeiro in 1979 and annotated by the International Bureau, volume 2* (Bern, 1980), p. 24.

[264] UPU, document CE/C 4 — Doc 22 (see footnote 262 above), para. 22.

[265] See, for example, article 22 of Decree No. 4891 of 21 June 1961 of the Government of Argentina, as amended by Decree No. 3408 of 12 April 1966 (para. 235 above).

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

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

F. General facilities accorded to the diplomatic bag

322. The provision on general facilities should be applied to all kinds of diplomatic bags, whether accompanied or not accompanied by diplomatic courier. It may only be added that, in practice, unaccompanied diplomatic bags, particularly those that are dispatched by postal services or other means of transport, require greater care for their safe and expeditious delivery. Therefore the general facilities accorded to the diplomatic bag should always be considered in the light of functional necessity and actual need for assistance, depending on the various means of transport and the concrete circumstances.

323. The general facilities should also be conceived in close relation with all other provisions that contain explicit or implicit reference to the need, on the part of the receiving or the transit State and its authorities, to grant a certain assistance or extend co-operation to ensure the proper functioning of official communications through the use of the diplomatic bag. The scope of the general facilities should be determined by the official function of the diplomatic bag and the conditions required for the safe and expeditious delivery of the bag to its final destination. Since it is neither advisable nor possible to indicate in more concrete terms what those facilities are, it would seem preferable not to attempt to list them but to provide a general rule. In conformity with such a general rule, the receiving and the transit States are under an obligation to accord to the diplomatic bag, whether accompanied or not by diplomatic courier, all the facilities that are necessary for the proper delivery of the bag.

324. It is obvious that the facilities in question should be accorded first of all, when necessary, for the *transportation and delivery of the bag* as expeditiously as possible. In certain circumstances, the unaccompanied diplomatic bag may require favourable or even preferential treatment, in case of heavy traffic or other transportation problems. Another very probable instance of the need to accord special facilities to the diplomatic bag might be in connection with the *clearance procedures and formalities* applied to incoming and outgoing consignments. The most important provisions relating to the protection of the diplomatic bag, and the immunities, privileges and exemptions granted to the bag, should be specified in corresponding draft articles.

325. In the light of the above considerations on the general facilities to be accorded to all kinds of diplomatic bags, the Special Rapporteur submits the following draft article for examination and provisional adoption:

Article 35. General facilities accorded to the diplomatic bag

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

G. Inviolability of the diplomatic bag

1. Introduction

326. The inviolability of the diplomatic bag has always constituted the most essential aspect of the status of this important means of communication. The principle that the diplomatic bag shall not be opened, examined or detained has been upheld as a long-standing and widely recognized rule, yet it has been challenged on the grounds of the abuses to which it can give rise. 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. Nevertheless, alleged abuses, on the part either of the sending State or of the receiving State, have often given rise to disputes. Diplomatic bags have on occasion been used for the illicit import or export of foreign currency, narcotic drugs, arms or other items that contravene the established rules regarding the admissible content of the bag, which has adversely affected the legitimate interests of the receiving States. On the other hand, in some instances the sending States have suspected that the claim to open the diplomatic bag or to examine or screen it by sophisticated electronic and other mechanical devices, on the presumption of the unlawful content of the bag, is motivated by attempts to penetrate State secrets. It would therefore be advisable to suggest a formula that, while maintaining the principle of inviolability, would contain safeguard provisions of a preventive nature that would satisfy the genuine concern of the receiving or the transit State.

327. The basic rules underlying the legal protection of the diplomatic bag and its inviolability are the relevant provisions of the 1961 Vienna Convention—article 24, on the inviolability of the archives and documents of the

diplomatic mission, and article 27, paragraph 3, which states that "the diplomatic bag shall not be opened or detained"—and the corresponding articles in the other conventions codifying diplomatic law. The other important source for the rules to be submitted for examination is the treaty practice of States and domestic legislation.

2. Legislative background of the principle of the inviolability of the diplomatic bag

328. The previous reports on this topic contained a comprehensive survey of the preparatory work for the 1961 Vienna Convention and the other codification conventions relating to the legal status of the diplomatic and other bags and their inviolability.[266] The examination of the legislative background of the provisions on the inviolability of the diplomatic bag will therefore be confined to other more significant aspects of the evolving codification process on this subject.

329. The initial draft article 16, paragraph 2, submitted by the Special Rapporteur on the topic of diplomatic intercourse and immunities to the Commission at its seventh session, in 1955, read as follows:

2. The diplomatic pouch shall be exempt from inspection unless there are very serious grounds for presuming that it contains illicit articles. The pouch may be opened for inspection only with the consent of the Ministry for Foreign Affairs of the receiving State and in the presence of an authorized representative of the mission.[267]

330. This draft article was extensively discussed by the Commission. As a result, the Special Rapporteur withdrew the initial text and, after reconsidering it, submitted a revised text to the Commission at its ninth session, in 1957, based on the concept of absolute inviolability, which provided simply that "the diplomatic pouch shall be exempt from inspection".[268] The Special Rapporteur explained the reasons for this radical change in the following terms:

... it was drafted before he had been able to study the municipal laws on the subject. On discovering that *none of the many municipal laws dealing with the question of the diplomatic bag provided for any exception to the principle of inviolability,** he had come to the conclusion that it would be better to state the bare principle in the article, and see whether the Commission wished to include in the commentary qualifications on the lines of those made in his original text.[269]

331. During the consideration of the revised text, in 1957, some members of the Commission favoured the complete inviolability of the bag in all circumstances, while others stressed the danger of abuse of the bag. Finally a compromise was reached along the lines suggested by the Special Rapporteur, to the effect that the draft article should set out the general principle of inviolability, while the commentary should contain a qualifying passage.[270]

332. Consequently, the provision finally adopted by the Commission on the inviolability of the diplomatic bag read as follows:

Article 25. Freedom of communication

...

3. The diplomatic bag shall not be opened or detained.[271]

The relevant part of the commentary to this provision stated:

... The Commission considered it desirable that the statement of the inviolability of the diplomatic bag should be preceded by the more general statement that the official correspondence of the mission, whether carried in the bag or not, is inviolable ...

The Commission has noted that the diplomatic bag has on occasion been opened with the permission of the Ministry for Foreign Affairs of the receiving State, and in the presence of a representative of the mission concerned. While recognizing that States have been led to take such measures in exceptional cases where there were serious grounds for suspecting that the diplomatic bag was being used in a manner contrary to paragraph 4 of the article, and with detriment to the interests of the receiving State, the Commission wishes nevertheless to emphasize the overriding importance which it attaches to the observance of the principle of the inviolability of the diplomatic bag.[272]

333. At the United Nations Conference on Diplomatic Intercourse and Immunities, in 1961, several proposals were made aimed at restricting in one way or another the unconditional inviolability of the diplomatic bag as provided for in the draft article submitted by the Commission.[273] One of them, namely, the amendment by Ghana, provided for the right of the sending State to withdraw an unopened bag that was suspected of containing articles other than those intended for official use.[274] All those amendments were rejected by the Conference,[275] and the draft text as proposed by the Commission was thus adopted as paragraph 3 of article 27.

334. In the course of its preparatory work on the Convention on Consular Relations, from 1957 to 1961, the Commission discussed extensively the question of the inviolability of the consular bag. There were divergent views on this matter. Some members of the Commission maintained that consular bags also contained official correspondence and were therefore entitled to receive the same treatment as diplomatic bags.[276] Some took the view that in exceptional circumstances the consular bag might be opened. However, the prevailing trend was in favour of the complete inviolability of the consular bag. Thus the final draft article 35, paragraph 3, adopted by the Commission at its thirteenth session, in 1961, read as follows:

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[266] See the Special Rapporteur's second report, document A/CN.4/347 and Add.1 and 2 (see footnote 1 above), paras. 126-186.

[267] *Yearbook ... 1955*, vol. II, p. 11, document A/CN.4/91.

[268] *Yearbook ... 1957*, vol. I, p. 74, 398th meeting, para. 27.

[269] *Ibid.*, p. 80, 399th meeting, para. 29.

[270] *Ibid.*, pp. 77-83, 398th meeting, paras. 84-100, and 399th meeting, paras. 1-77.

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

[272] *Ibid.*, p. 97, paras. (4) and (5) of the commentary.

[273] *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. II, p. 20, document A/CONF.20/C.1/L.125 (France); p. 22, document A/CONF.20/C.1/L.151/Rev.2 (United Arab Republic); p. 23, document A/CONF.20/C.1/L.154 (United States of America); pp. 38-39, document A/CONF.20/C.1/L.286 (France and Switzerland).

[274] *Ibid.*, p. 42, document A/CONF.20/C.1/L.294.

[275] *Ibid.*, vol. I, pp. 180-181, *Committee of the Whole*, 29th meeting, paras. 72-79.

[276] *Yearbook ... 1960*, vol. I, pp. 27-28, 531st meeting, paras. 37-53.

3. The consular bag, like the diplomatic bag, shall not be opened or detained.[277]

In its commentary to that provision, the Commission stated:

... The consular bag must not be opened or detained. This rule, set forth in paragraph 3, is the logical corollary of the rule providing for the inviolability of the consulate's official correspondence, archives and documents ...[278]

It was further explained by the Chairman of the Drafting Committee that the words "like the diplomatic bag" had been inserted because consular papers were sometimes sent in the diplomatic bag.[279]

335. At the United Nations Conference on Consular Relations, in 1963, there were several amendments to paragraph 3 of draft article 35 designed to restrict the unconditional inviolability of the consular bag.[280] Those amendments were emphatically opposed by representatives who favoured the text proposed by the Commission upholding the principle of absolute inviolability of the consular bag. It was pointed out, for instance, that such phrases as "serious reasons" used in those amendments left wide scope for interpretation by the receiving State and could lead to abuse and to the restriction of the sending State's freedom of communication.[281] It was further argued that the amendments would only add to the possibility of friction, suspicion and misunderstanding.[282]

336. The Conference adopted, by 46 votes to 15, with 3 abstentions,[283] a joint amendment proposed by the Federal Republic of Germany. Article 35, paragraph 3, thus provides that "the consular bag shall be neither opened nor detained", but admits that, "nevertheless, if the competent authorities of the receiving State have serious reasons to believe that the bag contains something other than the correspondence, documents or articles" intended exclusively for official use, "they may, with the authorization of the Ministry for Foreign Affairs of the receiving State, request that the bag be opened in their presence by an authorized representative of the sending State". It further provides that, in case of a refusal of this request by the authorities of the sending State, the bag shall be returned to its place of origin.[284] It is obvious that the 1963 Vienna Convention introduces a restriction on the principle of the inviolability of the consular bag. As was pointed out by the Special Rapporteur in his second report, this restriction "constitutes an important deviation from the principle of free communication for all official purposes, affecting the inviolability of the consular bag".[285]

337. The two other codification conventions adopted subsequently, namely the Convention on Special Missions and the 1975 Vienna Convention, did not adopt the approach of the 1963 Vienna Convention on this matter. On the contrary, they adhered to the principle of the absolute inviolability of the bag of the special mission (art. 28, para. 4) and of the bag of the permanent mission or delegation (art. 27, para. 3, and art. 57, para. 4), and reproduced *mutatis mutandis* paragraph 3 of article 27 of the 1961 Vienna Convention.

3. Recent practice of States relating to the inviolability of the diplomatic bag

338. Most bilateral consular conventions, including those concluded after the 1963 Vienna Convention entered into force, provide that the consular bag is inviolable and may neither be examined nor detained by the authorities of the receiving State.[286] Thus, despite the provision contained in article 35, paragraph 3, of the 1963 Vienna Convention, they adhere to the principle of the unconditional inviolability of the diplomatic bag set forth in article 27, paragraph 3, of the 1961 Vienna Convention. This seems to be the prevailing trend in the recent practice of States, as evidenced by a significant number of bilateral agreements entered into by States that are also parties to the Vienna Conventions of 1961 and 1963.

339. However, some bilateral conventions provide that the authorities of the receiving State may, in special cases, request the sealed consular bags to be opened in their presence in order to determine that they do not contain anything other than official correspondence. For example, article 12, paragraph 4, of the Consular Convention between the United Kingdom and Norway (1951) provides:

4. The official consular correspondence ... shall be inviolable and the authorities of the territory shall not examine or detain it. In special

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

[278] *Ibid.*, p. 112, para. (5) of the commentary.

[279] *Yearbook ... 1961*, vol. I, p. 242, 619th meeting, para. 24.

[280] *Official Records of the United Nations Conference on Consular Relations*, vol. II, p. 81, document A/CONF.25/C.2/L.73 (Federal Republic of Germany), and document A/CONF.25/C.2/L.75 (South Africa); p. 83, document A/CONF.25/C.2/L.91 (Spain); p. 85, document A/CONF.25/C.2/L.108 (Nigeria).

[281] *Ibid.*, vol. I, pp. 322-323, *Second Committee*, 13th meeting, para. 40.

[282] *Ibid.*, p. 324, para. 67.

[283] *Ibid.*, p. 325, para. 79.

[284] Document A/CONF.25/C.2/L.73 (see footnote 280 above).

[285] Document A/CN.4/347 and Add.1 and 2 (see footnote 1 above), para. 168.

[286] See, for example, the consular agreements referred to in footnotes 251 and 252 above, concluded by Argentina, Belgium, Brazil, Cameroon, Czechoslovakia, Dominican Republic, Ecuador, France, Ireland, Mexico, Netherlands, Norway, Sweden, United Kingdom, United States of America, Uruguay, Venezuela and Yugoslavia. See also the consular conventions concluded between the following States: Czechoslovakia and German Democratic Republic (1957), Japan and United States of America (1963), Poland and Austria (1974), Romania and German Democratic Republic (1958), Romania and Hungary (1959), USSR and Bulgaria (1957), USSR and Hungary (1957), USSR and Romania (1957), United States of America and Republic of Korea (1963). While most of these bilateral agreements simply state that "consular bags shall be inviolable and shall not be subject to examination", some are more specific. Thus the Consular Convention between Japan and the United States of America (1963) provides that "sealed official pouches and other official containers shall be inviolable when they are certified by a responsible officer of the sending State as containing only official documents" (art. 10, para. 2), and the Consular Convention between the United States of America and the Republic of Korea (1963) contains the same provision (art. 9, para. 2).

cases they may, however, request that sealed consular pouches, bags, and other containers shall be opened by a consular officer in their presence in order to satisfy themselves that the containers do not hold anything but official correspondence.[287]

Some consular conventions provide further that, if the request to open the official pouch is refused, "the pouch or container shall be returned forthwith by the sending State to its place of origin".[288]

340. The positions of States in respect of the inviolability of the diplomatic bag was further evidenced in connection with some reservations made to article 27, paragraph 3, of the 1961 Vienna Convention by Bahrain, Kuwait and the Libyan Arab Jamahiriya. The Government of Bahrain stated that it reserved "its right to open the diplomatic bag if there are grounds for presuming that it contains articles the import or export of which is prohibited by law".[289] The reservations made by Kuwait and the Libyan Arab Jamahiriya provide that those Governments have the right to request the opening of the bag in the presence of an official representative of the diplomaitc mission concerned and that, if such request is denied by the authorities of the sending State, "the diplomatic pouch shall be returned to its place of origin".[290]

341. The above-mentioned reservations with respect to article 27, paragraphs 3 and/or 4, were objected to by a number of States parties to the Convention, including Belgium, Bulgaria, Czechoslovakia, France, the Federal Republic of Germany, Haiti, Hungary, Mongolia, Poland, the USSR, the United Kingdom and the United States of America.[291] This reaction is indicative of the importance attached to the principle of the inviolability of the diplomatic bag.

4. Scope of the principle of the inviolability of the diplomatic bag

342. The scope and legal implications of the principle of the inviolability of the diplomatic bag has to be considered in close connection with the broader principle of the inviolability of the archives and documents of the diplomatic mission. This fundamental rule of international law, incorporated in article 24 of the 1961 Vienna Convention, stipulates that "the archives and documents of the mission shall be inviolable at any time and wherever they may be". Furthermore, paragraph 2 of article 27 of the same Convention provides that "the official correspondence of the mission shall be inviolable".

343. The principle of the inviolability of the official correspondence of the mission applied in respect of the diplomatic bag would mean that the diplomatic bag should not be opened or detained. This obligation of the transit or the receiving State constitutes an essential prerequisite for the protection of the inviolability of the bag and the confidential nature of its content. For it is obvious that the opening of the bag is already an infringement of its inviolability and secrecy.

344. *The opening of the diplomatic bag* by the authorities of the receiving State, upon their request, could take place only with the consent of the sending State. In this case, however, the sending State has exercised its sovereign right of renunciation of immunity, or voluntary submission to the jurisdiction of the receiving State, with clear cognizance of all the risks entailed in respect of the confidential character of the diplomatic bag. The opening of the diplomatic bag constitutes a method of direct examination of its content. It is therefore considered to be incompatible with the principle of the inviolability of diplomatic correspondence.

345. In recent times, the occurrence of international terrorism through the unlawful seizure of aircraft and other acts of air piracy, as well as the increase in illicit traffic in narcotic drugs, have warranted the undertaking of special measures of examination of passengers and their luggage at airports and frontier checkpoints. Sophisticated technical security devices have been put into service. These devices include X-rays for hand baggage, magnetometers to identify metal articles, and other electronic and mechanical means of examination and screening. The diplomatic bag could thus *be inspected at a distance without being opened.* In that case, the question would arise whether this kind of examination would be compatible with articles 24 and 27 of the 1961 Vienna Convention. The view has been expressed that, since the inspection would not involve manual search, electronic screening would be admissible under the said Convention.[292]

346. It is however doubtful whether this interpretation would be satisfactory. There might be a justified suspicion that modern sophisticated devices possessed a wide range of technical capacity to record and acquire all kinds of data that might jeopardize the confidential character of the diplomatic bag. Whether the inspection

[287] See also the consular conventions concluded between Greece and the United Kingdom (1953), art. 12, para. 4; United Kingdom and Denmark (1962), art. 11, para. 4; United Kingdom and France (1951), art. 13, para. 4; United Kingdom and Mexico (1954), art. 12, para. 4; United Kingdom and Spain (1961), art. 12, para. 2.

[288] See the consular conventions concluded between the following States: Austria and Romania (1970), art. 31, para. 2; Belgium and Poland (1972), art. 15, para. 3; Belgium and Turkey (1972), art. 22, para. 3; Belgium and United States of America (1969), art. 18, para. 3; Bulgaria and Austria (1975), art. 30, para. 2; Finland and Poland (1971), art. 10, para. 2; Finland and Romania (1971), art. 29, para. 2; France and Algeria (1974), art. 13, para. 3; France and Bulgaria (1968), art. 13, para. 4; France and Czechoslovakia (1969), art. 25, para. 3; France and Senegal (1974), art. XI, para. 3; Greece and Bulgaria (1973), art. 13, para. 2; Romania and Italy (1967), art. 28, para. 3; Romania and United States of America (1972), art. 21, para. 3; Sweden and Romania (1974), art. 30, para. 3; United Kingdom and Japan (1964), art. 13, para. 3; United States of America and France (1966), art. 15, para. 3; United States of America and Poland (1972), art. 12, para. 3.

[289] United Nations, *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1982* (Sales No. E.83.V.6), p. 53.

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

[291] *Ibid.*, pp. 57 *et seq.*

[292] See the views expressed by the Austrian Ministry for Foreign Affairs in the circulars addressed to the diplomatic missions accredited to Austria, reproduced in *Yearbook ... 1982*, vol. II (Part One), p. 233, document A/CN.4/356 and Add.1-3.

is carried out as a manual search or through mechanical devices, it is in fact an examination aimed at establishing the content of the diplomatic bag and therefore affects the inviolability of official correspondence. As has been mentioned above (para. 332), the Commission, in its commentary to paragraph 3 of article 25 (which became article 27 of the 1961 Vienna Convention), while recognizing that in exceptional cases States had been led to request the opening of the bag in the presence of a representative of the mission concerned when there were serious grounds for suspecting that the bag in question was being used in a manner contrary to paragraph 4 of the draft article, nevertheless emphasized the overriding importance which it attached to the observance of the principle of the inviolability of the diplomatic bag.

347. It is therefore suggested that inviolability of the bag should be adopted as a uniform rule. This rule should be generally applied, unless the States concerned have agreed to introduce exceptions, by way of reciprocity, on the basis of multilateral or bilateral agreements. In that case, draft article 6 on non-discrimination and reciprocity[293] would apply in any event, as evidenced by recent State practice. In the case of dispute between the authorities of the receiving State or the transit State, on the one hand, and those of the sending State, on the other hand, concerning the legally admissible content of the bag, the solution might be the return of the bag to its place of origin. In this way the inviolability of the bag would be observed and at the same time the legitimate concern of the receiving or the transit State would receive due consideration. Such an arrangement could be arrived at through agreement between the States concerned.

348. The other substantive element of the rule of the inviolability of the diplomatic bag is the obligation of the transit or the receiving State not to detain the diplomatic bag while on its territory. Detention of the bag constitutes an infringement of the inviolability of diplomatic correspondence and inevitably delays its delivery. Detention of the bag, which means that for a certain period of time it is under the direct control of the authorities of the transit or the receiving State, may give rise to a suspicion that within that period the bag is undergoing an unauthorized examination which is incompatible with the requirements for the observance of its confidential character. It is also obvious that any detention of the bag may upset the initial time schedule for its transportation and thus delay its delivery.

349. In the light of the above considerations regarding the inviolability of the diplomatic bag, the Special Rapporteur submits the following draft article for examination and provisional approval:

Article 36. Inviolability of the diplomatic bag

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

2. The receiving State or the transit State shall take all appropriate measures to prevent any infringement of the inviolability of the diplomatic bag, and shall also prosecute and punish persons under its jurisdiction responsible for such infringement.

H. Exemption from customs and other inspections

1. Legal grounds and scope of the exemption from customs and other inspections

350. Exemption of the diplomatic bag from customs and other kinds of inspection was established as a rule of customary international law long before the 1961 Vienna Convention. It has always been considered as an important component of the privileges and immunities granted to diplomatic correspondence. There is no specific rule on such exemption in that Convention or in the other conventions codifying diplomatic law. However, it could be derived from the general principle of the inviolability of the diplomatic bag. This conclusion is also supported by the *travaux préparatoires* relating to the draft article which became article 27 of the 1961 Vienna Convention and by the practice of States.

351. Article 16, paragraph 2, of the draft articles on diplomatic intercourse and immunities, which constitutes the basis for the relevant provision of article 27, and which was submitted by the Special Rapporteur to the Commission at its ninth session, in 1957, provided:

> 2. The diplomatic pouch shall be exempt from inspection.[294]

The discussions on this provision always encompassed all means of examination of the bag, whether customs inspection or inspection carried out by other authorities, such as public health, phytosanitary or veterinary authorities.

352. Exemption from customs and other inspection, although included within the broader scope of inviolability, deserves to be specifically mentioned by reason of its practical significance. Several bilateral agreements and the domestic laws of some States indicate that it would be advisable to formulate a special provision on exemption from customs inspection. The legal grounds for such a rule would be the principle of the inviolability of diplomatic correspondence in general and of the diplomatic bag in particular. The scope and legal implications of the exemption should be determined by functional necessity, that is, by the functions of the diplomatic bag as an instrument of official communications.

[293] For text, see *Yearbook ... 1982*, vol. II (Part Two), p. 114, footnote 309.

[294] Yearbook ... 1957, vol. I, p. 74, 398th meeting, para. 27.

2. Recent practice of States

353. Some States have established special rules and regulations regarding exemption from customs inspection or free customs clearance of diplomatic bags. For example, in Argentina, article 17 of Decree No. 3437 of 22 November 1955 states that "the customs authorities shall give free clearance to closed and sealed packages which contain diplomatic correspondence which are brought in by a diplomatic courier".[295] A similar procedure is provided for in article 22 of Decree No. 4891 of 21 June 1961 in respect of diplomatic bags not accompanied by diplomatic courier which arrive at the airport.[296] In Austria, article 172 of the Federal Act of 15 June 1955 concerning customs regulations stipulates:

> Provided that it is officially sealed in the prescribed manner, the official luggage of diplomatic couriers shall be cleared through customs without inspection if the nature, number and bulk of the packages and the address correspond to the description given in the list, which the courier must produce, prepared by the consigning authority.[297]

The legislation of Colombia concerning the diplomatic bag accompanied by courier, or the diplomatic bag dispatched by air, provides for certain privileges and immunities, including exemption from customs inspection, on a reciprocal basis, in conformity with special bilateral agreements.[298] In Finland, article 92, paragraph 3, of Customs Act No. 271 of 8 September 1939 provides:

> Any package, bag, bundle, suitcase, chest or the like addressed to the head of the embassy or the embassy itself and carried by foreign diplomatic courier may be brought into the customs territory free of duty and inspection if duly sealed with an official seal and entered in the courier's list.

The same régime is provided for in article 92, paragraph 4, for consular bags.[299] Similar regulations have been established by many other States.[300]

354. Exemption from customs inspection and other kinds of inspection at the frontier is also provided for in some bilateral agreements relating to the exchange of diplomatic mail, whether or not accompanied by diplomatic courier.

355. In the light of the above considerations on exemption of the diplomatic bag from customs and other inspection, the Special Rapporteur submits for examination and provisional approval the following draft article:

[295] Reproduced (in English) in United Nations, Legislative Series, vol. VII ..., p. 7.

[296] See footnote 200 above.

[297] Reproduced (in English) in United Nations, Legislative Series, vol. VII ..., p. 20.

[298] Pan American Union, *op. cit.* (footnote 200 above), pp. 270-271.

[299] Reproduced (in English) in United Nations, Legislative Series, vol. VII ..., pp. 118-119.

[300] See, for example, the relevant regulations adopted by the Philippines (*ibid.*, p. 237), Sweden (*ibid.*, p. 302) and Paraguay (Pan American Union, *op. cit.* (footnote 200 above), p. 338).

Article 37. Exemption from customs and other inspections

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

I. Exemption from customs duties and all dues and taxes

1. Scope of the exemptions

356. Exemption from customs duties, taxes and related charges on articles for the official use of the diplomatic mission, as has been pointed out above (paras. 155 and 166), formed part of customary international law long before the 1961 Vienna Convention. Usually such exemptions were considered as customs or fiscal privileges accorded to the diplomatic mission and its members on the basis of *comitas gentium* and by way of reciprocity. Article 36 of the 1961 Vienna Convention codified this rule of customary law and transformed it into a conventional rule of modern international law. This provision has a direct bearing on the status of the diplomatic bag, particularly in respect of the financial privileges and immunities accorded to the bag by reason of its official functions. Thus, among the articles exempt from all customs duties, taxes and dues levied by the receiving State, and referred to in paragraph 1 of article 36, "articles for the official use of the mission" are listed first. This is exactly the case of the diplomatic bag, which contains official correspondence, documents or articles intended for official use.

357. The exemptions cover customs and other fiscal dues and taxes levied by the transit or the receiving State on the import or export of goods. They also usually cover related charges for customs clearance or other formalities. They are granted in accordance with the laws and regulations of the States concerned. The exemptions may refer to national, regional or municipal dues and taxes, as provided for in the domestic rules and regulations of the receiving or the transit State. The exemptions from customs duties and related charges, as well as from other dues and taxes levied by the transit or the 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, may also be exempted, but only on the basis of reciprocal arrangements between the sending State and the receiving or the transit State.

2. Treaty practice and national legislation of States regarding exemption from customs duties and dues and taxes

358. The practice of States in respect of exemption from customs and other charges relating to the diplomatic bag is relatively limited, but nevertheless quite indicative of the existence of a common trend

in this matter. Most bilateral agreements[301] refer specifically to the exchange of diplomatic bags by air-mail and other postal channels or by entrusting the bags to the captain of a commercial aircraft or the master of a merchant ship. In the Exchange of notes between Brazil and Argentina (1961), it was agreed that "the diplomatic pouches of both countries conveyed by regular mail shall be exempt from duties and charges of any kind". Similarly, the Exchange of notes between Brazil and Uruguay (1944) provides: "The diplomatic bags of Brazil and Uruguay ... shall enjoy complete exemption from imposts and duties of every kind ...". Several bilateral agreements provide for exemption from payment of postage. It should be emphasized at the outset that these are arrangements on a reciprocal basis. Thus the Exchange of notes between the United Kingdom and Norway (1946 and 1947) provides: "There shall be no charge for the acceptance or conveyance of these diplomatic bags, which shall enjoy all the immunities customarily granted by the British and Norwegian authorities respectively to official mails and shall be inviolable." The Exchange of notes between the United Kingdom and the Netherlands (1951) also provides: "There shall be no charges for the acceptance or conveyance of these diplomatic bags ...". Identical provisions are contained in other agreements concluded by the United Kingdom, with Mexico in 1946 and with the Dominican Republic in 1956.

359. Some States have enacted special rules and regulations regarding exemption of the diplomatic bag from customs duties. A cogent example is article 92, paragraph 3, of the Customs Act of Finland of 1939, which provides that diplomatic bags "may be brought into the customs territory free of duty and inspection if duly sealed with an official seal and entered in the courier's list".[302] Similar rules and regulations exist in the domestic law of many other countries.

360. In the light of the above considerations, the Special Rapporteur submits the following draft article for examination and provisional approval:

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

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

J. Protective measures in circumstances preventing the delivery of the diplomatic bag

361. It might be advisable to consider certain protective measures that must be taken by the receiving or the transit State in respect of the diplomatic bag while on its territory and in circumstances when the bag could not be in the custody of an authorized person of the sending State. This would be the case if the function of the diplomatic courier were terminated before he had delivered the bag to its final destination. Another situation that might call for protective measures on the part of the receiving or the transit State would be when, owing to accident, death or another cause, the courier was unable to take care of the diplomatic bag entrusted to him. Similar circumstances might also occur with a diplomatic bag entrusted to the captain of a commercial aircraft or the master of a merchant ship.

362. Such circumstances would not necessarily come under the heading of *force majeure* or fortuitous event, *stricto sensu*, although the most probable cases might be of such a nature. The rationale of the protective measures is that, whatever the factors preventing the courier from performing his functions, the diplomatic bag should not be left without appropriate custody and protection, bearing in mind its significance as an instrument for official communications. The same considerations would apply with regard to the case where the captain of an aircraft or the master of a ship were prevented by events beyond his control to accomplish his task, namely, to carry the diplomatic bag to an authorized port of entry on his scheduled itinerary and hand over the bag to an authorized representative of the mission of the sending State on the territory of the receiving State.

363. The circumstances alluded to above are of an exceptional character. However, the rare occurrence of a special situation should not prevent the elaboration of a rule that might be both indispensable and useful. In practice, special measures of protection for the safety of the diplomatic bag, however extraordinary or sporadic they might be, would be warranted by the importance of the interests protected. In exceptional circumstances, when the bag could not be in the custody of the person to whom it had been entrusted, it would need the protection of the transit or the receiving State. This obligation could be justified as an expression of international co-operation and solidarity of States in the promotion of diplomatic communications. It could derive from the general principle of freedom of communication for all official purposes effected through diplomatic couriers and diplomatic bags. In conformity with this principle, the receiving or the transit State is under the obligation to facilitate official communications and to protect them within its territory.

364. The action to be undertaken by the transit or the receiving State in special circumstances would entail first of all appropriate measures to protect the safety of the bag and its integrity. This would require provision of the necessary conditions for the proper storage or custody of the bag. Secondly, the transit State or the receiving State must inform the competent authorities of the sending State that the bag dispatched by that State is in its custody, owing to special circumstances. When the sending State has its diplomatic mission or consular post in the receiving or the transit State, such

[301] See the exchanges of notes referred to in footnote 252 above.

[302] See footnote 299 above.

notification should be addressed to that mission or post. In the absence of such a mission or consular post on their territories, the authorities of the receiving or the transit State in which the diplomatic bag is found must notify either the Ministry for Foreign Affairs of the sending State or the mission of another State on the territory which is charged with the protection of the interests of the sending State. Similar procedures should be followed in exceptional circumstances when the bag entrusted to the captain of a commercial aircraft or the master of a merchant ship is not in his custody and cannot be handed over to an authorized person of the sending State.

365. In the light of the above considerations concerning protective measures in circumstances preventing the delivery of the diplomatic bag, the Special Rapporteur submits the following draft article for examination and provisional adoption:

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

1. In the event of termination of the functions of the diplomatic courier before the delivery of the diplomatic bag to its final destination, as referred to in articles 13 and 14, or of other circumstances preventing him from performing his functions, the receiving State or the transit State shall take the appropriate measures to ensure the integrity and safety of the diplomatic bag, and shall immediately notify the sending State of that event.

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

V. Draft articles on part IV: miscellaneous provisions

A. Introduction

366. In conformity with the structure of the present draft articles as tentatively agreed by the Commission and generally supported by the Sixth Committee of the General Assembly, part IV of the draft articles consists of a number of miscellaneous provisions of a general character (see para. 4 above). In accordance with prevailing treaty-making practice, as evidenced by a number of multilateral agreements, including the 1963 Vienna Convention and the 1975 Vienna Convention, these matters are usually dealt with in a chapter entitled "General provisions".[303]

367. As was indicated in the introduction to the present report (*ibid.*), it is intended to deal with only three items under the heading of miscellaneous provisions: (*a*) obligations of a transit State regarding the courier and the bag in case of *force majeure* or fortuitous events; (*b*) treatment of the courier and the bag in the case of non-recognition of the sending State or its Government by the receiving or the transit State, or in the case of absence of diplomatic or consular relations between them; (*c*) relation of the present draft articles to other conventions in the field of diplomatic or consular, particularly the four codification conventions and certain other agreements relating to the topic under consideration.

368. The scope of the draft articles in part IV is selective since they are confined to issues of a general character directly relating to both the status of the diplomatic courier and to that of the diplomatic bag. Thus other matters of a general character, such as provisions on the settlement of disputes and final clauses, have been deliberately left outside the purview of this part of the draft articles at this stage of the work on the present topic. The main reason for this restrictive approach is that matters of such a nature would best be considered once the whole set of draft articles constituting the *sedes materiae* of the topic has been examined. It is also submitted that there might be some other provisions of a general nature relating to the status of the courier and the bag which might be added to the list suggested by the Special Rapporteur and which are not within the scope of procedures for the settlement of disputes, of the application of special rules in the case of a state of war or armed conflict, or of provisions relating to signature, ratification, accession, entry into force and other routine final clauses.

B. Obligations of a transit State in case of *force majeure* or fortuitous event

369. For the purpose of the present draft articles, the term "transit State" means a State through whose territory the diplomatic courier and the diplomatic bag accompanied by him or the unaccompanied diplomatic bag pass *en route* to or from the receiving State. This definition of "transit State" was advanced in article 3, paragraph 1, sub-paragraph (6), of the present draft articles.[304] As the Special Rapporteur pointed out in his second report,[305] the four codification conventions do not contain a definition of the term "transit State", nor do they use an expression. However, they employ in-

[303] For example, the 1963 Vienna Convention, "Chapter IV. General provisions" (arts. 69-73); the 1975 Vienna Convention, "Part V. General provisions" (arts. 73-85); the Vienna Convention on the Law of Treaties, "Part VI. Miscellaneous provisions" (arts. 73-75).

[304] See *Yearbook ... 1982*, vol. II (Part Two), p. 116, footnote 318.

[305] Document A/CN.4/347 and Add.1 and 2 (see footnote 1 above), para. 198.

stead the term "third State" as the State through which the courier or the bag passes in transit. Thus article 40, paragraph 3, of the 1961 Vienna Convention and the corresponding articles in the other codification conventions[306] provide:

> 3. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as is accorded by the receiving State. They shall accord to diplomatic couriers, who have been granted a passport visa if such visa was necessary, and diplomatic bags in transit the same inviolability and protection as the receiving State is bound to accord.

370. It is evident that by "third State" is meant not the usual notion of a State not involved in a given legal relationship or not a party to a treaty, as defined by article 2, paragraph 1 (*h*), of the Vienna Convention on the Law of Treaties of 1969, but a State through whose territory the diplomatic courier or the bag not accompanied by diplomatic courier pass *en route* to or from the receiving State.

371. Following the discussions on this topic in the Sixth Committee of the General Assembly and later in the Commission, the Special Rapporteur felt that, for the purpose of this topic, there should be a definition of the term "transit State". He therefore pointed out in his second report that the "transit State should be defined as such and not merely be assimilated to third State, i.e. a State which is neither a sending nor a receiving State".[307]

372. It is submitted that in normal circumstances the transit State is known in advance according to the established itinerary of the courier, and provided, if so required, with a transit visa. In the case of the bag not accompanied by courier and entrusted to the captain of a commercial aircraft of a regular air service, or to the master of a merchant ship, the journey of the unaccompanied bag is also known in advance, including the countries through whose territories the bag will pass in transit.

373. The Special Rapporteur thought that the term "transit State" might be more appropriate, bearing in mind the particular features inherent in the functions of the diplomatic courier and the diplomatic bag. The courier is a travelling official whose function is to transmit the diplomatic bag from one place to another. Thus in the performance of the functions of the courier the transit State may acquire the same importance as the receiving State, and may sometimes appear on the courier's waybill even more often than the receiving State. It would be preferable in this case not to call such a State a "third State", but to indicate its proper significance for the operation of official communications as the State of transit of the means of these communications.

374. It has also been submitted that the term "third State" has acquired such a well-established legal meaning that its use in another sense may lead to confusion. A view to this effect was expressed during the discussions in the Sixth Committee, when it was suggested that the term "third State" might be misleading for the purposes of the present draft articles.

375. Taking into consideration the practical importance of the facilities, privileges and immunities granted by the transit State to the diplomatic courier and the diplomatic bag, the reference to the transit State has been made side by side with the reference to the receiving State throughout the whole set of the draft articles. For it is obvious that, for the proper operation of official communications, through diplomatic couriers and diplomatic bags, their protection by the transit State is of the same nature and significance as the treatment that they have to be granted by the receiving State.

376. The definition of the transit State, although referring first of all to the State whose territory is used for transit to or from the receiving State in conformity with the normal itinerary, would also refer to a State that was not initially anticipated for the transit passage of the courier or the unaccompanied bag. This would be the case with a transit State whose territory the diplomatic courier or the unaccompanied diplomatic bag were compelled to enter, or in which they would have to remain for some time, in a case of *force majeure* or fortuitous event, such as the forced landing of an aircraft, the breakdown of the means of transport, a natural disaster or another event beyond the control of the courier or the carrier of the bag. In distinction from the transit State known in advance, and which has granted a transit visa, if so required, the identity of the transit State in the case of *force majeure* or fortuitous event cannot be known in advance. It comes into the picture only in an extraordinary situation.

377. In such a case, the problem may arise whether or not such a transit State should accord the necessary protection and facilities, privileges and immunities as are accorded by the receiving or the transit State initially envisaged. Prior to the 1961 Vienna Convention, legal doctrine and State practice did not adhere to a firm position on the right of transit of the diplomatic agent and the scope of the privileges accorded to him by the transit State. Sometimes the right of transit, i.e. *jus transitus innoxii*, was based on bilateral agreements, because the customary rules to that effect were not generally recognized. With the evolving process of intensified diplomatic communications, the right of transit has acquired its legitimacy.

378. The 1961 Vienna Convention, however, was the first multilateral treaty that established the rule of transit passage of the members of the diplomatic mission and their families, as well as of the diplomatic courier and the diplomatic bag whose presence in the territory of the transit State was due to *force majeure*. In conformity with this rule, the transit State is under the obligation to accord to the diplomatic courier and the

[306] See art. 54, para. 3, of the 1963 Vienna Convention; art. 42, paras. 3-4, of the Convention on Special Missions; art. 81, para. 4, of the 1975 Vienna Convention.

[307] See footnote 305 above.

diplomatic bag in transit the same freedom of movement, inviolability and protection as are accorded by the receiving State.

379. It may be assumed that in practice the scope of the facilities, privileges and immunities accorded by the transit State to the diplomatic courier and the diplomatic bag in exceptional circumstances, as a result of *force majeure* or fortuitous event, would be more limited. Chief among these facilities, privileges and immunities would be the inviolability and protection of the diplomatic courier and the diplomatic bag. Among the facilities, privileges and immunities to be accorded to the courier and the bag, priority would be given to any measures that facilitated the prompt resumption of the journey of the courier or the transportation of the unaccompanied bag. In such conditions of distress a transit visa, if required, should be issued promptly, on the spot, without adherence to the normal procedures and formalities usually applied.

380. In the light of the above considerations regarding the obligations of the transit State in case of *force majeure* or fortuitous event, the Special Rapporteur submits the following draft article for examination and provisional adoption:

PART IV

MISCELLANEOUS PROVISIONS

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

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

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

381. Having examined the possible effects of *force majeure* or fortuitous event on the treatment of the diplomatic courier and the diplomatic bag in emergency situations, it might be appropriate to consider also the impact of other extraordinary situations, such as *non-recognition* of a State or Government and *absence* or *severance of diplomatic or consular relations*. In this case again we are faced with the effects of exceptional circumstances on the functioning of official communications through diplomatic couriers and diplomatic bags. The state of war or armed conflict has been deliberately excluded from the scope of the present topic, although it also falls within the broader concept of extraordinary situations. The main reason for such a restrictive approach has been the fact that the problem of armed conflict or of a state of war would require not only the elaboration of a general rule but also of a set of special rules applicable to various situations of armed conflict or state of war, constituting *jus ad bellum*.

382. The main problem arising in the above-mentioned exceptional situations is whether the obligation to accord legal protection and other facilities, privileges and immunities to the diplomatic courier and the diplomatic bag should apply as between parties to the instrument resulting from the present draft articles even in cases where the host State on whose territory an international organization has its headquarters or an international conference is held, or a transit State, do not recognize the sending State or its Government. The same problem would arise also as between the States referred to above in the absence or severance of diplomatic or consular relations between them. Although the possible effects of these exceptional situations on the treatment of the courier and the bag are common to both, there are some specific features which require that separate consideration be given to non-recognition as distinct from non-existence or severance of diplomatic or consular relations.

383. The rule of non-recognition of States or Governments was not considered by the codification conferences on diplomatic and consular relations in 1961 and 1963. The Commission dealt with the problem in connection with the draft articles on special missions at its nineteenth session, in 1967, and proposed a special provision, incorporated in draft article 7, paragraph 2, which stated:

> 2. A State may send a special mission to a State, or receive one from a State, which it does not recognize.[308]

However, this provision was not adopted by the Sixth Committee, and consequently was not included in the Convention on Special Missions.

384. The problem of non-recognition was also considered by the Commission in a different context, when elaborating the draft articles on the law of treaties. In its commentary to draft article 60, the Commission stated that

> ... any problems that may arise in the sphere of treaties from the absence of recognition of a Government do not appear to be such as should be covered in a statement of the general law of treaties.[309]

385. It was not until its twenty-third session, in 1971, that the Commission considered it necessary, in connection with the draft articles on relations between States and international organizations, to formulate a special rule on non-recognition of States or Governments and on absence and severance of diplomatic or consular relations.[310] The decision to that effect resulted from the consideration, at its twenty-first and twenty-second ses-

[308] *Yearbook ... 1967*, vol. II, p. 350, document A/6709/Rev.1, chap. II, sect. D.

[309] *Yearbook ... 1966*, vol. II, p. 260, document A/6309/Rev.1, part II, chap. II, para. (1) of the commentary.

[310] *Yearbook ... 1971*, vol. II (Part Two), pp. 101-105, document A/CN.4/L.166.

sions, in 1969 and 1970, of draft articles referring to exceptional situations.[311]

386. In its commentary to article 79 (Non-recognition of States or Governments or absence of diplomatic or consular relations) of the final draft articles on the representation of States in their relations with international organizations, the Commission expressed the view that the formulation of the provision should not follow that of the relevant provisions of the conventions previously adopted, namely the 1961 Vienna Convention, the 1963 Vienna Convention and the Convention on Special Missions. Given the specific features of relations between States and international organizations as distinct from bilateral relations between States, the Commission deemed it necessary to give special consideration to this problem, and stated that:

> ... The non-recognition or the absence of diplomatic or consular relations between a host State and a sending State cannot therefore have the same effects as it would have in their mutual relations.[312]

The conclusion reached by the Commission was that:

> ... the non-recognition by the host State or the sending State of the other State or of its government or the non-existence or severance of diplomatic or consular relations between them does not affect their *respective* "rights and obligations" under the present articles. In other words, the rights and obligations of the host State and the sending State under the present articles are not dependent upon recognition or upon the existence of diplomatic or consular relations at the bilateral level.[313]

387. These considerations seem very relevant to the status of the diplomatic courier and the diplomatic bag in the exceptional situations where the sending State and the transit or host State do not recognize each other. Consequently, the non-recognition of a State or a Government should not be invoked to prevent the functioning of diplomatic communications and the granting of protection to the diplomatic courier or the diplomatic bag. The obligation to accord the facilities, privileges and immunities provided for in the present draft articles should not be affected by the absence of mutual recognition between the States concerned.

388. On the other hand, the granting of facilities, privileges and immunities to the diplomatic courier and the diplomatic bag does not of itself imply recognition by the sending State of the receiving or the transit State or of its government, nor does it imply recognition by the host State or the transit State of the sending State or of its government. The protection and special treatment accorded to the diplomatic courier and the diplomatic bag should be considered as observance of the principle of freedom of official communications, which is independent of recognition of a State or Government. Of course this does not mean that the application of this principle may not be politically influenced by the attitude of one State *vis-à-vis* another State or Government. However, if a State is bound by an international treaty to respect the status of a diplomatic courier or a diplomatic bag duly authorized to perform an official function, that State must be under the obligation to grant legal protection, despite the non-recognition of the sending State or of its Government. This fact of itself implies no form of recognition.

389. Absence or severance of diplomatic or consular relations, as another exceptional situation with possible effect on the functioning of relations between States, was considered during the preparation of the four codification conventions. In some instances the impact of diplomatic or consular relations is implied by the relevant provisions of the conventions, while in other instances it is explicitly stated. The 1961 Vienna Convention provides that the establishment of diplomatic relations is a prerequisite for the establishment by mutual consent of permanent diplomatic missions. Consequently article 45 of the Convention states what would be the effect of severance of diplomatic relations or the temporary or permanent recall of the mission on its premises, property and archives. Article 2, paragraph 3, of the 1963 Vienna Convention provides:

> 3. The severance of diplomatic relations shall not *ipso facto* involve the severance of consular relations.

For its part, the Convention on Special Missions states in article 7:

> The existence of diplomatic or consular relations is not necessary for the sending or reception of a special mission.

390. The effect of severance of diplomatic or consular relations was also considered in regard to the operation of a treaty between the parties concerned. Thus article 63 of the Vienna Convention on the Law of Treaties of 1969 explicitly provides:

> The severance of diplomatic or consular relations between parties to a treaty does not affect the legal relations established between them by the treaty except in so far as the existence of diplomatic or consular relations is indispensable for the application of the treaty.

Article 74 of the same Convention further stipulates:

> The severance or absence of diplomatic or consular relations between two or more States does not prevent the conclusion of treaties between those States. The conclusion of a treaty does not in itself affect the situation in regard to diplomatic or consular relations.

391. As has already been pointed out (paras. 384-386 above), the Commission and, later, the United Nations Conference on the Representation of States, accorded special attention to the legal effects of non-recognition of States or Governments and of absence or severance of diplomatic or consular relations on the mutual relations between the sending State and the host State. Article 82 of the 1975 Vienna Convention reads as follows:

> 1. The rights and obligations of the host State and of the sending State under the present Convention shall be affected neither by the non-recognition by one of those States of the other State or of its government nor by the non-existence or the severance of diplomatic or consular relations between them.
>
> 2. The establishment or maintenance of a mission, the sending or attendance of a delegation or of an observer delegation or any act in application of the present Convention shall not by itself imply recognition by the sending State of the host State or its government or by the host State of the sending State or its government.

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[311] *Ibid.*, p. 101, para. 21, and p. 105, para. 24.

[312] *Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations*, vol. II, p. 52, para. (5) of the commentary.

[313] *Ibid.*, pp. 52-53, para. (7) of the commentary.

392. The rules relating to the legal effect of non-recognition of a State or Government or absence or severance of diplomatic or consular relations contained in the codification conventions are applicable to the status of the diplomatic courier and the diplomatic bag. The courier and the bag being practical means for the operation of official communications, they need special protection and treatment independently of the existence or absence of diplomatic or consular relations between the sending State and the host State, the receiving State (in the case of a special mission) or the transit State. The official function of the courier and the bag is of such significance that it should not be prevented from performing its functions by the absence of diplomatic relations. The proper functioning of official communications is in the interests of the maintenance of international co-operation and understanding and should therefore be facilitated even in exceptional circumstances.

393. Consequently the receiving State, the host State or the transit State should be under the obligation to accord to the diplomatic courier and the diplomatic bag the necessary facilities, privileges and immunities for the proper performance of their functions. In this respect a comment made by one Government on the topic under consideration in 1979 seems to be of special relevance. It was pointed out that:

> The function of the diplomatic courier, although he is accorded privileges and immunities similar to those of the diplomatic agent, is of a procedural rather than a substantively political nature. Consequently, the severance or suspension of diplomatic relations or the recall of missions should not influence decisively the functions of the courier during his passage through transit States. In strict law, the same would be true even in the event of an armed conflict with such States. In the event of the severance or suspension of diplomatic relations with the receiving State, or the recall of diplomatic missions, the diplomatic courier would act as a liaison between the sending State and the diplomatic mission agreeing to look after the interests of that State; such situations of bilateral abnormality would not then interfere with the performance of the courier's functions. In the event of armed conflict, the *de facto* situation would prevent the courier from continuing to perform his functions.[314]

394. Leaving aside the problem of the effect of a state of war or armed conflict for the reasons already indicated (para. 381), it seems that, in exceptional situations such as non-recognition or non-existence or severance of diplomatic relations, the courier may accomplish the modest but noble function of a "messenger", a well deserved denomination having its roots in history. It should be added that, prior to the codification conventions, and more specifically up to the Second World War, certain cases occurred relating to the consequences, in respect of observance of the inviolability of the diplomatic bag, of the recall of diplomatic missions, of severance or suspension of diplomatic relations, or of armed conflict.[315] The practice of States was not very coherent, particularly during armed conflicts or state of war, which is understandable.

395. In the light of the above considerations, the Special Rapporteur submits the following draft article for examination and provisional approval:

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

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

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

D. Relation of the draft articles to other conventions and international agreements

396. At this stage, consideration of the relation between the present draft articles and the four codification conventions and other international agreements in the field of diplomatic or consular law having a bearing on the status of the diplomatic courier and the diplomatic bag should be of a preliminary and very provisional character. Pending a final decision regarding the form and legal nature of these articles, the question of their relation to other treaties should remain open. Nevertheless, it might be advisable to submit for preliminary examination some draft provisions which could be considered when the draft provisions on this issue are finalized.

397. The *main objective* of a provision regarding the relation of the present draft articles to existing international treaties in the field of diplomatic and consular law should be to establish the *legal relationship* between the rules governing the status of the diplomatic courier and the diplomatic bag and the four codification conventions. This legal relationship may be expressed in several ways.

398. First of all, the provision should attempt to establish a *common legal basis* for a *coherent* and as uniform as possible a régime of the courier and of the bag. This could be achieved through *harmonization of the existing legal provisions* governing the status of various kinds of couriers and bags employed by States for official communications. The rationale of this approach is the assumption that couriers and bags are used for multipurpose functions in respect to various mis-

[314] See the written comments of Chile, para. 9, in *Yearbook ... 1979*, vol. II (Part One), p. 219, document A/CN.4/321 and Add.1-7.

[315] See the cases occurring between 1869 and 1940 in Moore, *op. cit.* (footnote 108 above), pp. 696-701; and Hackworth, *op. cit.* (footnote 59 above), pp. 624-629.

sions. Diplomatic couriers and bags are employed by States for the exercise of their right of communication with permanent diplomatic missions, consular posts, permanent missions to international organizations and delegations to international conferences. Basically, however, they serve the same right of States and should therefore be accorded the same degree of legal protection.

399. Secondly, the present draft articles are intended to *complement* the four codification conventions in so far as the status of the diplomatic courier and the diplomatic bag is concerned, especially regarding the use of the unaccompanied diplomatic bag. The rules governing the dispatch of the diplomatic bag by civil aircraft, merchant ship, postal services and other means should be elaborated, taking into consideration the practice of States as evidenced by the four codification conventions and other international agreements, as well as by national rules and regulations. Thus the present draft articles have to be considered in their relationship with the ground rules established by treaty practice and national legislation. In this connection it is suggested that the present draft articles be conceived as *accessory rules*, especially in respect of the 1961 Vienna Convention and the other codification conventions.

400. The codification and progressive development of the rules governing the operation of official communications through diplomatic couriers and diplomatic bags should therefore always take as its basis and starting point the existing multilateral conventions and other international agreements. At the same time, these draft articles should not prevent States from concluding international agreements relating in one way or another to the status of the diplomatic courier and the diplomatic bag.

401. This flexible approach to the relation of the present draft articles to other international treaties in the field of diplomatic or consular law seems to be supported by international law, and particularly by the relevant provisions of the 1969 Vienna Convention on the Law of Treaties and the codification conventions. In this connection, article 30 of the Vienna Convention on the Law of Treaties, on the application of successive treaties to the same subject-matter, and article 41 of the same Convention on agreements to modify multilateral treaties between parties to such treaties, appear to have a certain relevance. However, for the purposes of the present draft articles, especial significance should be attached to those codification conventions that contain explicit provisions on their relationship with other international agreements. In this connection reference should be made to article 73 of the 1963 Vienna Convention, which stipulates that the Convention shall not affect other international agreements in force between the State parties, and that it shall not preclude those States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof. A similar provision is incorporated in article 4 of the 1975 Vienna Convention, which states that the provisions of the Convention are without prejudice to other international agreements in force between States or between States and international organizations of a universal character, and that it shall not preclude the conclusion of other international agreements regarding the representation of States.

402. The draft provision regarding the relation of the present draft articles to the codification conventions and other international agreements may be considered not only as a *legal connection* with those conventions and agreements but also as a *safeguard clause* in respect of the rights and obligations of States deriving from them and their inherent sovereign right to enter into other agreements. It should be assumed that, in the latter case, successive agreements may modify the articles on the status of the diplomatic courier and the diplomatic bag as between the parties concerned without affecting the rights and obligations of other States parties to those articles, providing that the modifications do not relate to a provision in respect of which derogation would be incompatible with the effective realization of the object and purpose of the articles on the courier and the bag.

403. In the light of the above considerations regarding the relation of the present draft articles to the codification conventions and the other international agreements in this field, the Special Rapporteur submits the following draft article for examination and provisional adoption:

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

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

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

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

Conclusion

404. With the presentation of the draft articles of part IV, Miscellaneous provisions, the set of draft articles on the topic under consideration, as initially contemplated by the Special Rapporteur, is completed. Throughout the study of the topic an attempt has been made to follow a pragmatic method in the examination of the practice of States with a view to ascertaining the areas of emerging positive law, based on functional necessity. The proposals for codification of existing rules and proposals *de lege ferenda* have been motivated by the practical requirements of providing a comprehensive legal basis for the operation of official communications. In so doing, especial attention has been given to the increasing role of the diplomatic bag carried by *ad hoc* couriers, or entrusted to the captain or an authorized member of the crew of a commercial aircraft, as well as the diplomatic bag dispatched through postal channels or other means of transportation. The purpose of the whole set of draft articles has been to try to elaborate a coherent legal régime governing the various kinds of couriers and bags which would provide a proper balance between the legitimate interests of the sending and the receiving or transit States. It was felt that this would be the basis for a viable international régime governing modern diplomatic communications.

DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND

[Agenda item 4]

DOCUMENT A/CN.4/364

First report on the draft Code of Offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur

[*Original: French*]
[*18 March 1983*]

CONTENTS

Introduction

1. By its resolution 36/106 of 10 December 1981, the General Assembly once again referred to the International Law Commission the question of offences against the peace and security of mankind and requested it to resume its work with a view to elaborating a draft code which would take into account new developments in international law.

2. Pursuant to that request, the Commission appointed a Special Rapporteur at its thirty-fourth session and requested him to submit an introductory report on the topic.[1]

3. The fact is that, at this stage, the present report can only be exploratory. Its purpose is to put to the Commission as a whole a number of questions, the answers to which will guide the Special Rapporteur. A prerequisite for codification of the subject-matter covered by the title "offences against the peace and security of mankind" is that certain possible approaches should be pointed out and that certain essential choices, which are indicated in the following paragraph, should be made.

4. What is the scope of our subject-matter? What method should be followed in codifying it? Should we deal with the question of implementation of the code? In other words, should we simply draw up a list of offences against the peace and security of mankind, leaving aside all the problems raised by its actual implementation, or should we consider the question of penalties and of the international penal jurisdiction competent to enforce the code? Such are the questions which the

[1] *Yearbook ... 1982*, vol. II (Part Two), p. 121, paras. 252-256.

Special Rapporteur invites the Commission to join him in pondering. First of all, however, it seems necessary to give a brief account of the evolution of the political and theoretical issues involved.

5. The present report will therefore consist, after a historical review, of three parts: scope of the draft codification; methodology of codification; implementation of the code.

CHAPTER I

Evolution of the codification of international penal law

6. The necessity of elaborating a penal code for the international community and establishing an international penal jurisdiction became apparent at the end of the First World War. A rough distinction may be made between two periods in the evolution of international penal law: (*a*) after the First World War; (*b*) after the Second World War.

A. After the First World War

7. The former German Emperor, William II, owed his life to the absence of an international penal code and of any generally agreed rules for bringing to trial persons responsible for international crimes, the Netherlands Government of the day having invoked the principle *nullum crimen sine lege* as a ground for declining to surrender the ex-monarch to the Allies for trial. Nevertheless, the atrocities committed during the First World War had led to repeated statements by politicians to the effect that war crimes would not go unpunished. In particular, on 4 October 1918, the acts of destruction committed by the retreating German troops had resulted in a warning by the French Government that systematic violations of law and of humanity, and acts contrary to international law and to the principle of human civilization, would entail civil, financial and penal liability for those committing them.

8. An outgrowth of this warning was the establishment, on 23 February 1919, of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties. The Commission, after recognizing the right of any belligerent State to bring before its courts individuals, including heads of State, who had been guilty of violations of the laws and customs of war, proposed the establishment of an actual international jurisdiction to pass judgment on crimes against persons of different nationalities and excesses committed in camps for inter-Allied prisoners, and on the responsibility arising from unlawful orders given by enemy civil or military authorities which had affected the armed forces or civilian populations. Although no action was taken on this proposal, it marked an important step in the intellectual elaboration of the concept of international penal justice.

9. The Commission's report was adopted, but with reservations on the part of some of its signatories which made a nullity of the provisions relating to international penal justice. Those making the reservations argued that violations of the laws and customs of war were not international crimes under any written law or any international convention. They also argued that the acts of sovereigns entailed their political responsibility but not their penal responsibility.

10. Thus the setting in which the issue of the responsibility of former Emperor William II was joined was hardly propitious. Despite a study by Professors François Larnaude and Albert de La Pradelle, who even at that early date were of the view that heads of State, and hence the former Emperor, could incur penal responsibility and be tried by an international jurisdiction, the authors of the Treaty of Versailles ruled out any legal responsibility on the part of the former Emperor.

11. In the end, article 227 of the Treaty of Versailles[2] referred only to his political responsibility:

> The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.
>
> A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan.
>
> In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating *the solemn obligations of international undertakings and the validity of international morality.** It will be its duty to fix the punishment which it considers should be imposed.
>
> ...

12. It was obvious that any criminal prosecution based on violation of international morality had no chance of acceptance, and the Netherlands Government had no difficulty in rebutting it and thus frustrating the move to extradite the former Emperor.

13. The provisions of articles 227 to 230 of the Treaty of Versailles, which sought to organize at the international level punishment for crimes against peace and for violations of the law of war, ultimately left no mark, apart from their value as a legal precedent.

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[2] *British and Foreign State Papers, 1919,* vol. CXII (London, H.M. Stationery office, 1922), p. 103. The relevant extract from the Treaty of Versailles (Part VII: Penalties) is reproduced in United Nations, *Historical survey of the question of international criminal jurisdiction,* memorandum by the Secretary-General (Sales No. 1949.V.8), p. 60, appendix 3.

14. It should, however, be noted that a great deal was being done at the theoretical level during the years between the wars. The advances in thinking took place under the impetus of the legal associations, especially the International Law Association, the InterParliamentary Union and the International Association for Penal Law, forums where ideas and men came face to face in free scholarly debates in which—it is true—idealism prevailed over realism but which had the merit of raising the issue of legal penalties for international offences and thus opening the way for the decisions taken in 1945, after the Second World War, which will be discussed later. Hugh Bellot, Count Henri Carton de Wiart, Henri Donnedieu de Vabres,[3] Nicolas Politis, Quintiliano Saldaña, Mégalos Caloyanni and Vespasien V. Pella[4] left their mark on the course of events.[5]

15. At the Thirty-first Conference of the International Law Association, in 1922, Hugh Bellot submitted a motion on the urgent need for the establishment of a permanent international criminal court. He submitted to the Association in 1924 a draft which was approved, as amended, in 1926.[6] The draft envisaged the establishment of a Penal Division within the PCIJ whose jurisdiction would extend to charges of violations of the laws and customs of war of a penal character and to cases referred to it by the Council or Assembly of the League of Nations.

16. At the same time, the Inter-Parliamentary Union, on the initiative of Vespasien V. Pella,[7] took up the question in 1924; and, the following year, at its Washington conference,the Union adopted a resolution recommending that the PCIJ should be given jurisdiction to deal with international offences and international crimes.[8] Under the terms of the resolution, crimes committed by States would be tried by the full Court, while individual crimes would be referred to a special division. The conference also appointed a subcommittee to draft an international legal code.

17. Lastly, the International Association for Penal Law, in 1926, the very year in which it was established, had placed the question of international penal justice on the agenda of its first congress. It, too, recommended that the PCIJ should be given penal jurisdiction. In 1928, the International Association for Penal Law adopted a draft statute for the establishment of a criminal chamber within the PCIJ.[9] The author of the draft, Vespasien V. Pella, also attached his name to a draft international penal code which the three associations had asked him to prepare and which was published on 15 March 1935 under the title *Code répressif mondial*.[10]

18. Hans Kelsen, for his part, advocated the establishment of an international organization to replace the League of Nations, one of whose organs would be an international court competent to try individuals charged with unlawful use of force or with war crimes and which would also be competent to hear appeals against judgments of national courts in cases involving a violation of international law.[11]

19. However, these scholarly efforts, laudable as they were, proved fruitless. Along with the scholars, diplomats themselves, in the subdued style which they so often affect, were echoing the concerns of the international community at the threats to peace which were a feature of the period between the wars. Conflagrations had broken out here and there, not only on the continent of Europe (reoccupation of the Rhineland (1936), Spanish civil war (1936), annexation of Austria (1938)), but also in Asia (invasion of Manchuria by Japanese troops (1931)), in Latin America (war between Bolivia and Paraguay (1932)) and in Africa (invasion of Ethiopia (1935)). Diplomatic efforts during this period were directed towards organizing collective security by outlawing war of aggression.

20. Mention may be made, simply by way of reminder, of the Geneva Protocol of 2 October 1924, which established the principle of compulsory arbitration and, for the first time, qualified war of aggression as an international crime.[12] Note should also be taken of the Declaration of 24 September 1927 adopted at the eighth Assembly of the League of Nations, which reproduced the 1924 wording and regarded war of ag-

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[3] Donnedieu de Vabres, *Introduction à l'étude du droit pénal international* (Paris, Sirey, 1922), p. 36; *Les principes modernes du droit pénal international* (Paris, Sirey, 1928), pp. 403 *et seq.*; "La Cour permanente de justice internationale et sa vocation en matière criminelle", *Revue internationale de droit pénal* (Paris), vol. I (1924), p. 175.

[4] Pella, *La criminalité collective des Etats et le droit pénal de l'avenir* (2nd ed.) (Bucharest, Imprimerie de l'Etat, 1926); "La répression des crimes contre la personnalité de l'Etat", *Recueil des cours de l'Académie de droit international de La Haye, 1930-III* (Paris, Sirey, 1931), vol. 33, p. 677.

[5] See J.-B. Herzog, *Nuremberg: un échec fructueux?* (Paris, Librairie générale de droit et de jurisprudence, 1975), pp. 25-31.

[6] See "Report of the permanent International Criminal Court Committee", ILA, *Report of the Thirty-fourth Conference, Vienna, 1926* (London, 1927), p. 109. The text of the draft statute of the International Penal Court adopted by the Association is reproduced in United Nations, *Historical survey of the question of international criminal jurisdiction ...*, p. 61, appendix 4.

[7] Pella, "La criminalité de la guerre d'agression et l'organisation d'une répression internationale", report presented to the Twenty-third Conference of the Inter-Parliamentary Union, *Compte rendu de la XXIII^e Conférence* (Washington and Ottawa, 1925), p. 205.

[8] *Ibid.*, pp. 46-50 (English text); text reproduced in United Nations, *Historical survey of the question of international criminal jurisdiction...*, p. 70, appendix 5.

[9] The text of the draft statute adopted by the Association in 1928 and revised in 1946 is reproduced in United Nations, *Historical survey of the question of international criminal jurisdiction ...*, p. 75, appendix 7. See also Pella, *La guerre-crime et les criminels de guerre* (Paris, Pedone, 1946), p. 129; 2nd ed. (Neuchâtel, Editions de la Baconnière, 1964).

[10] Pella, "Plan d'un code répressif mondial", *Revue internationale de droit pénal* (Paris), vol. 12 (1935), p. 348.

[11] Kelsen, *Peace through Law* (Chapel Hill, The University of North Carolina Press, 1944), pp. 127 *et seq.*, annexes I and II.

[12] Protocol for the Pacific Settlement of International Disputes, adopted by the fifth Assembly of the League of Nations (League of Nations, *Official Journal, Special Supplement No. 21*, p. 21).

gression as a crime.[13] Unfortunately, the 1924 Protocol was not ratified and the 1927 Declaration was simply a set of principles without any system of penalties.

21. This entire process did, however, lead up to the most significant manifestation: The General Treaty for Renunciation of War as an Instrument of National Policy of 27 August 1928 (the Kellogg-Briand Pact),[14] which formed the basis for the Nürnberg International Military Tribunal because, on the day war was declared in 1939, it was binding on 63 States, including Germany, Italy and Japan. However, while the Kellogg-Briand Pact made war illegal, it did not make it criminal, at least according to the theory which had prevailed in the Treaty of Versailles and which had made it impossible to indict William II, except on moral and political grounds.

22. But simultaneously with this movement towards a general prohibition of war, realism required that it should continue to be regulated. Hence the signing of the Washington Treaty of 6 February 1922, concerning the use of submarines and noxious gases in warfare.[15] Article 3 of the Treaty provided that violations of the laws of war would be considered criminal. However, the Washington Treaty never came into effect, for lack of ratification. Other well-known agreements and conventions were also adopted: the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, of 17 June 1925,[16] which supplemented the provisions of the Hague Declaration of 29 July 1899,[17] and the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, of 27 July 1929.[18] These instruments confirmed and strengthened the provisions of the Hague Convention of 1907.[19] It should, however, be noted that, for our purposes, all these instruments had the same weakness and the same inherent defect: they established prohibitions without attaching any penalties. Donnedieu de Vabres placed them in the category of *leges imperfectae,* which impose moral or political obligations without any real penalty.

23. Accordingly, during the period leading up to the Second World War, there was an effort by the international community on both the scholarly and the diplomatic and political levels to try to protect the international order by law. However, codification had its ups and downs as a result of random events, unfortunately of a horrifying and tragic nature. For instance, in 1934, the assassination in Marseilles of King Alexander of Yugoslavia and President Barthou rekindled strong feelings in the international community. France, supported by other European countries, decided to take the matter before the League of Nations. It is true that it was dealt with only from the standpoint of terrorism,[20] an approach which was much too restricted but which does show how the codification of international penal law has often been linked to current events and has, unfortunately, depended greatly on day-to-day developments. The French initiative resulted in the adoption, by the International Conference on the Repression of Terrorism, of the Convention for the Creation of an International Criminal Court, of 16 November 1937.[21] However, the events leading up to the Second World War prevented its ratification and entry into force.

B. After the Second World War

24. By the end of the Second World War, there had been little progress in the matter. During the war, some important declarations, including the Inter-Allied Declaration signed at St. James's Palace on 13 January 1942 by the United Kingdom Government and the Governments-in-exile in London,[22] the Inter-Allied Declaration of 17 December 1942, issued simultaneously in London, Moscow and Washington,[23] and the Moscow Declaration of 30 October 1943,[24] done in the name of the "Big Three", expressed the need for "punishment, through the channel of organised justice", of those responsible for war crimes. The Allied Powers had solemnly undertaken not to permit a repetition of the hesitations and errors which had characterized the attitude of the Allies after the First World War. Those political declarations having been noted, it should be stated that, from the legal standpoint, the most important instrument was the Agreement for the prosecution and punishment of the major war criminals of the European Axis, of 8 August 1945, together with the Charter of the International Military Tribunal annexed thereto,[25] The Nürnberg system had been established. Subsequently, the International Military Tribunal for the Far East was established with the adoption of its Charter on 19 Janauary 1946.[26]

25. The Nürnberg system is undoubtedly an important precedent, to which we shall revert. But its incidental and contingent features and the *ad hoc* character of the

[13] Declaration concerning Wars of Aggression (*ibid. No. 54,* p. 155).

[14] League of Nations, *Treaty Series,* vol. XCIV, p. 57.

[15] M. O. Hudson, ed., *International Legislation* (Washington), vol. II (1922-1924) (1931), p. 794, No. 66.

[16] League of Nations, *Treaty Series,* vol. XCIV, p. 65.

[17] J. B. Scott, ed., *The Hague Conventions and Declarations of 1899 and 1907* (3rd ed.) (New York, Oxford University Press, 1918), p. 225.

[18] League of Nations, *Treaty Series,* vol. CXVIII, p. 303.

[19] Scott, *op. cit.,* p. 100.

[20] See C. Eustathiadès, *La Cour pénale internationale pour la répression du terrorisme et le problème de la responsabilité internationale des Etats* (Paris, Pedone, 1936).

[21] League of Nations, document C.547(1).M.384(1).1937.V, reproduced in United Nations, *Historical survey of the question of international criminal jurisdiction ...* , p. 88, appendix 8.

[22] See *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London, H.M. Stationery Office, 1948), pp. 89-90.

[23] *Ibid.,* p. 106.

[24] See United Nations, *The Charter and Judgment of the Nürnberg Tribunal. History and analysis,* memorandum by the Secretary-General (Sales No. 1949.V.7), p. 87, appendix I.

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

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

tribunal which it instituted are matters for regret. The criticisms levelled at the Nürnberg system are too well known to require much discussion here. It has been blamed for violating the principle *nullum crimen sine lege, nulla poena sine lege,* since the acts were made crimes and the penalties were established after the event. It has been criticized for placing the vanquished under the jurisdiction of the victors and for setting up *ad hoc* jurisdictions, whereas the protection of those brought to trial and the rights of the defence required that the offences and the penalties should have been established beforehand. There is no need to enter into the argument here. For our purposes, the important point is that the issue has still not been settled, almost 50 years after that landmark event. There again, no sooner had the lights of Nürnberg been extinguished than the discussion became bogged down, apart from some flare-ups which seemed to be related to certain incidents and a number of more or less sporadic crises.

26. The almost religious atmosphere which followed the atrocious events of the Second World War, and the soul-searching and meditation to which those events had given rise, caused mankind to take a hard look at itself after the unprecedented cataclysm. In the aftermath, world leaders prescribed a number of measures which, over and above the historic Judgments of Nürnberg and Tokyo, were designed to prevent the recurrence of such events. Recourse to law, the primacy of which seemed to have been acknowledged and accepted, was at that time regarded as a remedy and, above all, a deterrent to international crime. The main concern was to determine the principles which should, in future, guide the conduct of men and States. As was to be expected, the Nürnberg Judgment was scrutinized first, in an attempt to determine the principles by which that important international tribunal had been guided.

27. The Commission was entrusted with this task by General Assembly resolution 177 (II) of 21 November 1947. The discussion of the subject in the Commission dealt principally with the question as to whether the principles laid down in the Charter and Judgment of the Nürnberg Tribunal constituted principles of international law. The Commission held that the Nürnberg Principles had been endorsed by the General Assembly itself and that its own task was, therefore, merely to identify and formulate them; and this it did. However, by the same resolution, the General Assembly also directed the Commission to prepare, at the same time, a "draft code of offences against the peace and security of mankind". The draft code, prepared by the Commission in 1951,[27] was submitted to the General Assembly at its sixth session, when consideration of it was postponed until the following session. At its seventh session, in 1952, the General Assembly decided not to place the topic of the draft code on its agenda and to refer it back to the Commission. After certain modifications, the draft was resubmitted to the General Assembly at its ninth session, in 1954.[28] The Assembly suspended consideration of it, however, on the grounds that the code and the definition of aggression being prepared by a special committee whose report had not yet been completed were interrelated.[29]

28. After many ups and downs, the General Assembly finally requested the Secretary-General, in resolution 33/97 of 16 December 1978, to invite Member States and relevant organizations to submit their comments on the draft, and to prepare a report for submission at its thirty-fifth session, in 1980.[30] Such was the status of the topic at the time of the adoption of resolution 36/106 of 10 December 1981, cited in paragraph 1 of the present report.

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[27] See the report of the Commission on its third session, *Yearbook ... 1951*, vol. II, pp. 134 *et seq.*, document A/1858, para. 59.

[28] See the report of the Commission on its sixth session, *Yearbook ... 1954*, vol. II, pp. 151-152, document A/2693, para. 54.

[29] General Assembly resolution 897 (IX) of 4 December 1954.

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

CHAPTER II

Scope of the draft codification

29. Delimitating the scope of the proposed codification means answering two basic questions: Which offences? Which subjects of law?

A. Offences to which the codification applies

30. There are two distinctions to be made:

(*a*) Crimes under international law and crimes under internal law;

(*b*) Political crimes and crimes under ordinary law.

1. THE DISTINCTION BETWEEN CRIMES UNDER INTERNATIONAL LAW AND CRIMES UNDER INTERNAL LAW

31. Crimes under international law, namely those defined by international law without any reference to internal law, should be distinguished from another category of crimes which, though they admittedly have consequences and effects capable of transcending frontiers, are not as a rule crimes under international law. Co-operation between States for the punishment of the latter category of crimes has at times led to confusion,

which it would be well to dispel. Rapid transport and communication facilities have aided international brigandage. Many ordinary-law criminals today make extensive use of such facilities in order to evade justice in the country where they committed their crimes. Some mutual assistance has been organized among the malefactors of various countries, who shelter each other and exchange information, and thus succeed in eluding police and courts at the national level.

32. In response, States have been induced to organize co-operation, which is all the more necessary because of a well-established tradition that makes the territoriality of penal law the fundamental principle of contemporary criminal law. Thus there has developed within internal law a discipline which is wrongly termed, in French at least, "international penal law", but which is in fact an internal discipline, its subject-matter being the internal laws which delimitate the jurisdiction of foreign courts and the authority of judgments outside the territory of the State in which they were rendered. The fact that, because of the need for co-operation in this field, countries decided to make the principle of the territoriality of penal law less rigid may have been misleading, and this discipline was styled "international penal law". But the crimes to which the discipline relates are, as a rule, crimes under internal law, the courts competent to try them are national courts, and they may become international crimes only by virtue of conventions or of the circumstances in which they were committed. In this respect, they are different from crimes that are international by their very nature, which fall directly under international law irrespective of the will of States.

33. Some writers[31] think that the principle of State sovereignty and its corollary, the territoriality of penal law, will be diluted with the advent of a new international order, and that the legal discipline just discussed, which is concerned with the study of conflict of laws and of jurisdictions and the conventions pertaining thereto, will be superseded by a new discipline whose scope will expand, since it will relate to the constantly increasing range of crimes under international law *stricto sensu*, which are not subject to any conflict of laws and jurisdictions. The ambit of this new discipline, the name of which remains in dispute,[32] will be the higher universe, with no frontiers, where offences are considered in and of themselves, without regard to territoriality. This idealized world may come about one day. In the meantime, common sense dictates that we look at the situation as it exists at present; and this situation is quite different. It is characterized by the variety of sources and origins of international crime, which endows the concept with very different features.

34. Side by side with crimes that are international by their nature, namely those which fall directly under international law, there exist crimes which are international by virtue of a convention and international crimes which are so called solely because of the circumstances in which they are committed. This coexistence destroys the unity of the concept of international crime, under which three different categories are distinguishable. The first category of crimes, that of crimes under international law *stricto sensu*, or crimes which are international by their nature, comprises crimes that assail sacred values or principles of civilization—for example, human rights or peaceful coexistence of nations—which are to be protected as such. In accordance with these principles, slavery, aggression, colonialism and *apartheid*, for example, are considered crimes under international law. Crimes which adversely affect a common heritage of mankind, such as the environment, may also be placed in this category. The second category covers crimes which have become international solely for the purposes of punishment and which have been transposed from the national to the international level by conventions adopted to that end. The third and last category concerns cases in which a combination of circumstances has caused the offence to be transferred from the realm of internal law to that of international law. This occurs whenever a State becomes the author of or an accomplice in the offence. The distinction is not, of course, so clear-cut in practice. Some crimes which are international by their nature are the subject of conventions, such as the Convention concerning Forced or Compulsory Labour,[33] or the International Convention on the Elimination of All Forms of Racial Discrimination.[34] But, in many cases, censure predates the convention, and the latter merely confirms a moral advance. A case in point is the condemnation of slavery. Moreover, the third category of crimes is not *sui generis*, since it encompasses crimes which are internal crimes and whose internationalization is due solely to the fact that a State is implicated in their perpetration. As this category has no specific character, it could, if necessary, be disregarded. But it is indispensable to mention it for the purposes of the study.

35. The relative value of the proposed distinction is therefore obvious. This distinction does, however, enable us to ask an essential question. Which category of crimes is to be covered by the codification? It seems that, in 1954, the Commission was concerned primarily with the first category, crimes that are international by their nature or, in other words, fall directly under international law without passing through the "antechamber" of an international convention, or crimes which, although covered by a convention, would have been considered crimes under international law even in the absence of such a convention. The question, then, is whether the Commission will maintain its earlier position. As already stated, the peace and security of mankind can be affected by offences which are not

[31] See, for example, Pella, *La criminalité collective des Etats et le droit pénal de l'avenir* (*op. cit.*).

[32] This discipline is propounded under the name of inter-State penal law, or universal penal law, or supranational penal law, or international penal law.

[33] Convention No. 29 adopted on 28 June 1930 by the General Conference of ILO at its fourteenth session, International Labour Office, *Conventions and Recommendations, 1919-1966* (Geneva, 1966), p. 155.

[34] Signed at New York on 7 March 1966, United Nations, *Treaty Series*, vol. 660, p. 211.

necessarily international crimes by their nature. However, at its third session, in 1951, the Commission took the view that there would be no need for it to deal with such offences. Thus it left aside piracy, counterfeiting, damage to submarine cables, and so forth. The debate is now reopened. Crimes of this kind may become international crimes when perpetrated by, or with the complicity of, a State, and some of them have assumed such importance and are committed on such a scale that it is reasonable to ask whether they have not made the shift from internal law to international law and become international crimes by their nature. Such is the case of hijacking of aircraft. In any event, it is clear that the distinction between crimes under internal law and crimes under international law is relative and at times arbitrary. We shall revert to this point when we consider the methodology of codification. The question, in any case, is whether the Commission will maintain the dividing line, as it did in 1954.

2. The distinction between political crimes and crimes under ordinary law

36. For the 1954 draft code, the Commission took the view that the category of offences against the peace and security of mankind "should be limited to offences which contain a political element and which endanger or disturb the maintenance of international peace and security".[35] This distinction between ordinary and political crimes has since been severely criticized. For one thing, the distinction between "political" and "non-political" is sometimes difficult to establish. And when it does exist, it shifts and is awkward to define. The political motivation for an act is not easy to determine. Depending on their philosophical, moral or ideological outlook, States have different opinions on the political nature of an act and its underlying motive. As an old saying goes: "What is true on this side of the Pyrenees becomes a fallacy on the other side", an idea that was arrestingly, and sarcastically, expressed by Balzac when he said: "Conspirators are brigands when vanquished and heroes when victorious". One might add that the fallacies of today are sometimes the truths of tomorrow. Graveyards are full of those who fell victim to the moral blindness and fanaticism of their contemporaries. It has also been observed that it is dangerous to transpose a concept of internal law—that of a political crime—to the level of international law. Under internal law, a political crime is defined as an action directed against the form of a government or the political order of a State. By this definition, punishment would seem to concern solely the internal order of the State concerned.

37. What is more, the political element is generally considered to be a factor for mitigating and making more humane the conditions in which persons guilty of political crimes are detained and the treatment accorded to them. One philosophy, still very much in vogue, tends to confer on political offenders heroic stature or the halo of a martyr. They are viewed by some countries with a condescending attitude which thwarts or hampers international co-operation in the punishment of this type of offence and precludes all possibility of extradition. In view of the present division of the world into different ideological and political systems, universal punishment for political crimes would appear to be unfeasible. It would be idle to deny the truth of such assertions. But this is not, to all appearances, the weakest point of the Commission's position. In actual fact, the majority of offences against the peace and security of mankind are politically inspired. Nazism, which was responsible for the heinous crimes of the last world war, was a political doctrine based on an ideology that affirmed the superiority of one race and one nation and the transcendence of one State. In most cases, the perpetrators of crimes with world-wide dimensions take refuge in a belief and a faith in order to salve their consciences. Thus the political crime may exist in both the internal and the international orders. But not all offences against the peace and security of mankind necessarily have a political content. Serious harm done to the environment may be a matter of self-interest and be prompted by purely selfish motives. It is nevertheless an offence against the peace and security of mankind if its seriousness and scope are such as to impair a fundamental interest of the international community. It may be that the authors of the Charter of the Nürnberg Tribunal were struck not so much by the political content of the crimes with which they were concerned as by their gravity, their atrociousness, their scale and their effects on the international community.

38. Be that as it may, the Commission should reexamine this important question with a view to determining which crimes fall into the category of offences against the peace and security of mankind and by what criteria such crimes can be identified. The political criterion appears inadequate. Some political crimes concern the internal order alone. Conversely, some crimes under ordinary law necessarily concern the international order because of the extent of their effect on the international community. Let us take as an example the traffic in narcotic drugs, which today is frequently organized at the world level. Inasmuch as it endangers the health of mankind in general, and not only the health of the nationals of a given country, it must be granted that it is in some cases an international crime; and when it is organized with the complicity of a State, it may become an offence against the peace and security of mankind. Yet the motives for trafficking are in almost all cases motives of self-interest. The same is true of counterfeiting. That counterfeiting could be organized by a State is no gratuitous assumption. The question was discussed in the Council of the League of Nations on 10 June 1926 in connection with the discovery in Hungary of an enterprise which was producing counterfeit French banknotes in the denomination of 1,000 francs. It was considered by many at the time that the production of counterfeit currency in such circumstances was something "absolutely inadmissible in international relations, and that, if such acts were

[35] See the report of the Commission on its third session (see footnote 27 above), p. 134, para. 58 (*a*).

repeated, an international authority would be found" to condemn them.[36] This discovery led to the International Convention for the Suppression of Counterfeiting Currency, of 20 April 1929,[37] whose purpose was the international protection of all currencies rather than the establishment of co-operation to enable individual States to protect their own currencies. Moreover, the allusion to an international forum was significant.

39. It follows from this that offences against the peace and security of mankind may be committed either for political reasons or for purely selfish ones and that the criterion for them must be sought elsewhere. In its search for such a criterion, the Commission will surely find it necessary to look at the provisions of article 19 of part 1 of the draft articles on State responsibility.[38] Paragraph 2 of the article states that an international crime results from the breach of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by the international community as a whole. The adjectives "essential" and "fundamental" denote a degree of gravity of the international offence, that gravity being associated with an objective criterion and a subjective criterion.

40. The objective criterion is a fundamental interest of the international community. The subjective criterion is the evaluation of the offence by the international community itself. It is the subjective element—the evaluation of the offence by the international community and the way in which the offence is perceived by that community—which determines whether the offence is to be transposed from the internal to the international level and made a crime under international law. Indeed, the process is the same in national penal legislation as well. It is the seriousness with which an offence is viewed by the collective conscience within the national community that determines whether it is a crime or a delict, and the law is merely a subsequent confirmation of this subjective judgment.

41. Although article 19 defines international crimes as a whole, it does not define an offence against the peace and security of mankind. Yet the latter has its own specificity. The Special Rapporteur will analyse this concept in the part of the report which follows. In any event, we can see from the foregoing how difficult it is to delimitate the subject. That which was outside the scope of codification in 1954 will today seem to qualify for coverage. The transition from the internal to the international order occurs imperceptibly, often by the effect of *jus cogens*. Frequently, too, activities are transferred from the internal to the international order owing to the intervention of States in ever broader areas. Furthermore, as we shall see, the very complexity of the concept of an offence against the peace and security of mankind, and the variety of its sources, make any delimitation of the subject difficult.

B. Subjects of law

42. One interesting question is which subjects of law international criminal responsibility may be attributed to. The Commission previously decided to confine its draft to acts by individuals and to exclude from its field of inquiry the question of the criminal responsibility of other legal entities, including States. The Commission thus saw eye to eye with the Nürnberg Tribunal, which stated that crimes were committed by men, not by abstract entities, and had to be punished under international law.

43. There is an interesting theoretical debate here. It should first be noted that the problem is posed in different terms according to whether civil or criminal matters are involved. Whereas in civil matters the subject of international law is the State, in criminal matters the subject of international law is the individual. This reverse relationship prompted a spirited exchange in the Sixth Committee when it took up Nürnberg Principle I, as formulated by the Commission.[39] There were those who sought in Principle I, according to which any person who committed an act which constituted an international crime was responsible therefor and liable to punishment, confirmation that the individual could always be a subject of international law. Others, on the contrary, took the view that the concept of the legal personality of the individual should be limited to international penal law, where it was justified only because, under penal law, conscious individuals alone could incur responsibility; the concept was an exception stemming from the very nature of penal law, and it remained the rule that the State was the primary subject of public international law. Conventions which have established direct links between the individual and international law are still the exception. Strictly speaking, the question of the individual as a subject of international law goes beyond the scope of the present study, which is confined to international penal law. The only question which concerns us here is whether legal entities can be brought before an international criminal jurisdiction. A legal entity may be a group, an association or a State. Despite the position of the Nürnberg Tribunal, there is no unanimity on this question among jurists. More and more of them take the opposite view and consider that the criminal responsibility of legal entities cannot continue to be ignored.

44. The question of the criminal responsibility of legal entities is posed not only in international law, but also in municipal law. Under the laws of some countries today, commercial companies, for example, may be tried for criminal offences, such as economic crimes, and are liable to financial penalties. In its draft articles on State responsibility, the Commission itself has adopted the

[36] League of Nations, *Official Journal, 7th year, No. 7* (July 1926). *Minutes of the fortieth session of the Council* (7-10 June 1926), 4th meeting (public), p. 871, at p. 873.

[37] *Idem, Treaty Series*, vol. CXII, p. 371.

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

[39] See the report of the Commission on its second session, *Yearbook ...1950*, vol. II, p. 374, document A/1316, part III, "Formulation of the Nürnberg Principles".

aforementioned article 19 (see para. 39 above), paragraph 2 of which refers to international crimes. Article 19 lists a number of offences considered to be international crimes: aggression, the establishment or maintenance by force of colonial domination, slavery, genocide, *apartheid* and actions impeding the safeguarding and preservation of the environment. This list is declaratory and not exhaustive. The inclusion of article 19 in the draft on State responsibility has reopened the debate. The question is whether the Commission's position, which was to exclude States from the scope of the 1954 draft code, can still be maintained today. If it cannot, the Commission will have to reshape the 1954 draft substantially, thus putting an end to the long-drawn-out theoretical debate—no doubt extremely interesting, but apparently interminable—between advocates and opponents of the theory of criminal responsibility of States.

45. In his work, *La criminalité collective des Etats et le droit pénal de l'avenir*, Pella considered whether such high legal entities as States could be brought before a criminal jurisdiction.[40] The concept of the criminal State, which was hardly conceivable at the turn of the century, has come increasingly to the fore because of Pella's patient research and doggedness. The need to establish the criminal responsibility of States can be justified on the grounds that measures of coercion involving the use of force, although sometimes necessary to stop aggression, for example, are not perceived to be acts of justice. The aggressor State will always think that it yielded not to the force of law, but simply to force. it will consider itself defeated rather than guilty. The concept of criminal responsibility of States therefore introduces an essential element of morality in bringing the guilty State to an awareness of its wrongdoing towards the international community. Moreover, Pella argued, States are not mere fictions. Citing well-known theories relating to collective psychology and the collective will, according to which every human group has feelings, reflexes and a will distinct from those of its members, Pella saw in these elements a basis for the theory of criminal responsibility of States, resting on the collective will of the nation. That collective will, he contended, was expressed through the nation's constitutional organs, especially in the case of such serious decisions as a declaration of war. Rejecting Napoleon's aphorism that no one is answerable for collective crimes, Pella took the view that establishing the criminal responsibility of States would expose each and every individual to the threat of a sanction that would serve as a deterrent against international crime. It must be admitted that there has been growing interest in the concept of the criminal State. The difficulty of applying this concept is no less evident. Apart from actions which may be taken under Chapter VII of the United Nations Charter and which, strictly speaking, are not penalties, but measures, coercion of a State is difficult. The odds are that a State cannot be brought before an international criminal jurisdiction unless it has had the misfortune to be defeated. The Commission will again have to make a decision on this important question and say whether it intends to embark on a fabulous adventure that borders on science fiction, at least as things stand at present in the world order. Toppling the State from the lofty pedestal where it was held in awe like the gods of antiquity, making it a creature susceptible to error and wrongdoing and prescribing for it a course of conduct and a code of ethics to be followed under pain of coercive sanctions would clearly amount to a complete reversal of hitherto prevailing ideas and concepts.

46. There are those who believe that there can be found in the Charter of the Nürnberg International Military Tribunal the genesis of the idea that criminal organizations, viewed as groups—that is to say, as legal entities—can incur criminal responsibility. On 16 May 1945, the United Nations War Crimes Commission unanimously adopted recommendation C.105(1), paragraph (*b*) of which recommended that Governments should "commit for trial, either jointly or individually, all those who, as members of these criminal gangs, have taken part in any way in the carrying out of crimes committed collectively by groups, formations or units".[41] That recommendation influenced the drafting of the Charter of the Nürnberg Tribunal,[42] and in particular article 6, which stated that the Tribunal had the power to try major war criminals, whether they were accused as individuals or as members of organizations. This came very close to declaring that criminal organizations could be brought before a criminal jurisdiction. It would have been dangerous to take that further short step. A reading of articles 9 and 10 is quite instructive and shows that the Charter of the International Military Tribunal did not attempt at all to establish the penal responsibility of criminal organizations as legal entities. In fact, those articles merely gave the Tribunal competence to declare a given organization a criminal organization. Such a declaration had to precede any prosecution of the organization's members before national courts. Six Nazi organizations were declared criminal organizations during a trial which took place separately from the proceedings against the accused. The declaration of criminality was only a preliminary, an essential pre-condition for individual prosecution of members of the organizations. It cannot, therefore, be deduced from the mere existence of the aforementioned texts that there was the least inclination to establish the international criminal responsibility of legal entities. However, the controversy did not die down after Nürnberg. Even the difficulty of enforcing a coercive penalty on a State did not give pause to those who support the theory of the responsibility of legal entities. Such entities, they argue, can be subjected to penalties appropriate to their nature, such as reprimands and fines. States can be ordered to dismantle war factories. A kind of *capitis diminutio* can be imposed on them, which would curtail their legal capacity by, for example, deny-

[40] *Op. cit.*; see also, by the same author, "La responsabilité pénale des personnes morales", *Actes du deuxième Congrès international de droit pénal* (Bucharest, October 1929) (Paris, Godde, 1930), p. 582.

[41] See *History of the United Nations War Crimes Commission ...* (*op. cit.*), p. 296.

[42] See footnote 25 above.

ing them the right to manufacture certain types of armaments. To date, there has been no judicial precedent ordering such measures. The function of the Nürnberg Tribunal was not to pass judgment on States. The decisions which did so were taken by the Governments of the victorious States, not by their courts.

47. One difficulty, of course, is distinguishing between penalties and sanctions. The term "penalty" is a misnomer unless it refers to the outcome of a judicial decision; a sanction, on the other hand, may result from a non-judicial act. Still, it must be admitted that the present trend is towards a preference for the terms "measures" and "countermeasures" to describe actions decided on by a State or an international organization in response to, or in order to prevent, acts likely to cause damage. In the view of some writers, this distinction derives from an intellectual approach which has no practical application. Donnedieu de Vabres, in his report to the first International Congress on Penal Law, in 1926, asserted:

> ... Penalties [imposed on a State] are not different in nature from the economic, financial or military measures envisaged as coercive measures in Article 16 of the Covenant [of the League of Nations]. ...[43]

Endorsing this opinion, the Swiss jurist Jean Graven wrote:[44]

> A sanction, whether described as a "penalty" or a "measure", is a sanction; what matters is not the name, but the thing itself. It may prevent and chastise, it may be severe and cause atonement, it may intimidate or protect, it may teach a lesson, impose a fine and prevent a recurrence of the crime; so much the better if it has all these diverse effects! But is it really necessary to insist and ordain at all costs that, if it is termed a "penalty", it will have certain effects and, if a "measure", certain other effects, solely and exclusively?
>
> ...
>
> A variety of sanctions, diplomatic, political, economic or military, may be imposed on a State; a State which has a host of material, territorial and intellectual assets and privileges may find all of them substantially affected by measures ranging from the severance of diplomatic relations to the sequestration of property, the destruction of installations and the demolition of factories, from blockades, embargoes and boycotts to heavy fines, levies and seizure of assets, and from assault landings to military occupation. ...

However, despite the opinion of this eminent jurist, it must be admitted that, while penalties and measures may often have the same effect, they are not of the same nature and do not have the same legal basis. Furthermore, measures may be preventive, whereas penalties are imposed after the event.

48. In any case, the Commission must harmonize its positions by bringing its 1954 draft code on offences against the peace and security of mankind into line with article 19 of part 1 of the draft articles on State responsibility. This seems to be the appropriate place for a few brief observations on the method to be adopted in elaborating the draft.

[43] *Premier Congrès international de droit pénal* (Brussels, 26-29 July 1926), *Actes du Congrès* (Paris, Godde, 1927), p. 408.

[44] Reply to the questionnaire of the International Association for Penal Law and the International Bar Association (November 1949). See also "Principes fondamentaux d'un code répressif des crimes contre la paix et la sécurité de l'humanité", *Revue de droit international, de sciences diplomatiques et politiques* (A. Sottile) (Geneva), vol. 28 (1950), pp. 381-382.

Chapter III

Methodology of codification

49. The first observation that comes to mind on examining the draft code prepared by the Commission in 1954 is that it contains no general part, except for the statement that offences against the peace and security of mankind are crimes under international law. The Commission deliberately refrained from formulating a criterion for identifying which of the vast range of crimes under international law were crimes against the peace and security of mankind. In addition, no reference is made to any general principle of penal law, such as the rule *nulla poena sine lege*, to the theory of justified acts (self-defence or participation in an action recommended or decided upon by the United Nations) or to the theory of extenuating circumstances. The Commission was no doubt justified in thinking that certain general principles of law now form an integral part of general public international law.

50. In the case of the principle *nulla poena sine lege*, however, the Commission's motives do not seem to have been quite so simple. The Commission had originally stated that principle in a draft article 5, which read as follows:

> The penalty for any offence defined in this Code shall be determined by the tribunal exercising jurisdiction over the individual accused, taking into account the gravity of the offence.[45]

The Commission eventually deleted this draft article 5 and deferred consideration of the question of penalties until such time as it came to discuss enforcement of the code, and more specifically the question of a penal jurisdiction. The fact remains that that decision gives the draft as produced a rather curious appearance. What we have is a catalogue, a mere listing of offences, without any operational character. A penal code which says nothing about penalties is of no more use to contemporary society than the mummies of the Pharaohs. The principle *nulla poena sine lege* would make it unenforceable. That principle, which was reaffirmed in

[45] See the report of the Commission on its third session (see footnote 27 above), p. 137.

the Universal Declaration of Human Rights of 10 December 1948 (art. 11, para. 2) is one of the pillars of penal justice.[46] It constituted the basis for the refusal by the Netherlands authorities to surrender former Emperor William II to the Allies for trial after the 1914-1918 war, and also for some of the criticisms that were levelled at the judgment of the Nürnberg Tribunal. Jean-André Roux, Honorary Counsellor to the French Court of Cassation, wrote:

> ... the maxim *nulla poena sine lege*, which some quite prominent authors have apparently found it easy to discard ... must on the contrary govern international criminal law just as it dominates national penal law. The more highly placed the offender who is threatened with prosecution, the more precise must be the conditions governing his responsibility and determining the penalties which he incurs. ...[47]

The principle *nulla poena sine lege* may seem difficult to apply in the field of international law, because of the variety of national legal systems. Yet it would appear that offences against the peace and security of mankind, being among the most odious and most monstrous of offences, should not be difficult to penalize by reference to the most severe penalties prescribed under national laws.

51. As for self-defence, this is a concept endorsed by Article 51 of the Charter of the United Nations, which refers to the "inherent right of individual or collective self-defence". One is, of course, aware of all the controversies aroused by the concept of self-defence, both in itself and as regards the difficulties in identifying self-defence in each specific case. The Commission itself did not venture to attempt any definition of the term in its draft articles on State responsibility[48] because of the controversies surrounding that legal concept. It simply noted the existence of that primary rule both in the United Nations Charter and in customary international law. There nevertheless remains the question as to whether the concepts referred to above did not have a place in a draft criminal code. It is true that, as has just been mentioned, the draft on State responsibility included some relevant articles concerning circumstances precluding the wrongfulness of an international act. But it must be borne in mind that that draft was more generally concerned with civil responsibility, whereas ours deals with criminal responsibility, although both often arise from the same offence. In any event, it will be for the Commission to decide whether it will adhere to its earlier approach or whether it now intends to formulate a criterion and refer to general principles of penal law, in the form of a few introductory articles.

52. Enunciating a criterion would have another advantage. It might serve to link the proposed list to a common denominator, to a guiding thread, and thus make it plain that the proposed list was provisional and not exhaustive. It has been said that non-criminal acts often shade imperceptibly into criminal acts, and some practices and usages that were for long considered sacrosanct have already been cast on the scrap-heap of history. It is not very long ago that some serious writers, and even ecclesiastics, were producing works sanctioning the right to colonize,[49] and that colonial law was among the traditional courses at universities. Consequently, any list of international offences must be presented in such a way that it can be seen to be provisional and contingent. Between the time of Nürnberg and 1954, the date of the Commission's latest draft, considerable changes had already been observed; and since 1954 there have been further changes. When the Commission was directed in 1947 to formulate the principles contained in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, it set forth under Principle VI those offences which were considered at the time to be crimes under international law.[50] The main headings were aggression and preparation for aggression, violations of the laws or customs of war, and crimes against humanity, but only when committed "in execution of or in connexion with any crime against peace or any war crime".

53. By 1954, the Commission had already considerably lengthened the list of crimes enunciated and, in addition, had eliminated the need for a link between crimes against peace and war crimes, on the one hand, and crimes against humanity, on the other, which had previously been required in order for the latter to be regarded as offences. Additional offences against the peace and security of mankind were therefore identified and set forth in the 1954 draft. They were the following:

(*a*) The organization, encouragement or toleration by the authorities of a State of incursions by armed bands into the territory of another State;

(*b*) The undertaking, encouragement or toleration by the authorities of a State of activities calculated to foment civil strife in another State;

(*c*) The undertaking, encouragement or toleration by the authorities of a State of terrorist activities or of activities calculated to carry out terrorist acts in another State;

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

(*e*) The annexation by the authorities of a State, contrary to international law, of territory belonging to another State;

(*f*) Intervention in the internal or external affairs of a State by means of coercive measures of an economic or political character in order to force its will and thereby obtain advantages of any kind;

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

[47] See Pella, *La criminalité collective des Etats et le droit pénal de l'avenir* (*op. cit.*), p. cxxxii, "enquête internationale".

[48] See art. 30 and the commentary thereto of part 1 of the draft articles on State responsibility, *Yearbook ... 1979*, vol. II (Part Two), pp. 115 *et seq.*

[49] J. Folliet, *Le droit de colonisation: étude de morale sociale et internationale* (Paris, Bloud et Gay, 1933).

[50] See footnote 39 above.

(*g*) Acts by the authorities of a State or by private individuals committed with intend to destroy, in whole or in part, a national, ethnic, racial or religious group as such.

54. Is this list, drawn up in 1954, in addition to the one which derives from the Nürnberg Charter, still satisfactory? Can it be regarded as exhaustive in the light of the general principles of international law and of the present state of world consciousness? Or must the scope of our research be extended? The answer does not seem to be in doubt, as we have already indicated. During the last quarter of a century, the international community has gained awareness of a number of imperatives, which have become categorical imperatives and are set forth in United Nations resolutions. Thus we mentioned decolonization. Thus there is also an obvious need to protect the sovereignty of peoples over their natural wealth and resources. Again, the use of modern means and techniques for research purposes, if not controlled, exposes mankind to serious dangers. Environmental problems have accordingly assumed a new dimension and are now a matter of international public interest. Problems of racial segregation, to mention another topic, have come within the field of codification, which appears to act as a magnetic field in view of the force of attraction it exerts on anything that may pollute or disturb the international public order. Thus the transition from what is lawful to what is unlawful occurs more and more through the effect of that force of attraction.

55. No doubt in the case of criminal matters of the kind with which we are concerned, the statement of a general rule would not suffice. The principle *nullum crimen sine lege* requires that every unlawful act should be expressly defined and declared to be an offence in order to be punishable. It is not by chance that consideration of the 1954 draft code was made conditional on a prior definition of aggression. On the other hand, merely listing criminal acts without relating them to a common principle does not appear satisfactory. There might be a temptation to regard the list as exhaustive, as established *ne varietur,* whereas in fact we are dealing with a singularly evolutive field. Since 1954, many matters have been the subject of individual declarations or conventions which govern them and which restrict the activities of individuals and States. The need to include such matters in the present draft has often been questioned on the grounds that the code would then duplicate the conventions in question. The Commission will be discussing this point. If it agrees that all offences against the peace and security of mankind should fall within the scope of our topic, irrespective of their source (*jus cogens,* convention, custom), then it will be necessary to look into the relevant conventions and derive from them such lessons as may serve the purposes of the present codification. There is a further consideration: some conventions attach no penalties, or only very minor ones, to the acts which they declare to be offences. One example is the Tokyo Convention on offences and certain other acts committed on board aircraft, of 14 September 1963;[51] and while the Hague Convention for the suppression of unlawful seizure of aircraft, of 16 December 1970,[52] declares such offences to be criminal, it prescribes no penalties and leaves that task to States. The Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration)[53] is a code of conduct, simply spelling out behavioural obligations, and there is no convention governing this area and providing for penalties. Many more examples could be cited.

56. It should also be noted that some matters regulated by conventions and excluded from the scope of codification in 1954 would perhaps fall within it today in the light of a review. The Commission did not consider, in 1950, that offences against the peace and security of mankind included piracy. But what view should one take, for example, of the seizure of aircraft mentioned above? Here we have an offence which is, perhaps improperly, called "air piracy" but which is not motivated by any desire for financial gain or personal profit and is often based on purely political considerations. When the seizure is effected by individuals acting with the encouragement or complicity of a State, we are confronted with an act which, depending on its scope and consequences, may jeopardize the peace and security of mankind. In the view of the Special Rapporteur, such an offence, regardless of the conventions governing it, should be regarded as a crime under international law, as an offence which is, by its very nature, subject to that law. It is no doubt a complicated situation, involving two distinct acts: the injurious act itself, namely the seizure of an aircraft, which is punishable under the Hague Convention of 16 December 1970, and the wrongful act of a State, entailing its civil responsibility for injury to another State. However, the question of the criminal responsibility of the State, as author of the unlawful act, might also be considered for complicity in a crime under international law. Such a situation can imperil the peace and security of mankind.

57. Here we are in that grey area where offences are of an ambiguous nature and where the internal order shades almost imperceptibly into the international order. That being the case, arriving at a criterion for identifying an offence against the peace and security of mankind becomes a hazardous task. If, as has been mentioned, the Commission adheres to its 1954 position, the task will be less arduous: an offence against the peace and security of mankind is any offence which, by its nature, is covered by international law, in that it infringes a lofty principle of human civilization. If, on the other hand, the Commission understands offences against the peace and security of mankind to include not only offences that are international by their very nature, but also offences which are covered by international law

[51] United Nations, *Treaty Series,* vol. 704, p. 219.

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

[53] See *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), chap. I.

as a result of a *convention*, then its task will be considerably more extensive. And what if the Commission wanted to cover all cases in which a State is the author of or an accomplice in an international offence? In that case, the whole of international penal law would have to be reviewed, because any offence is capable of becoming an international offence if a State participates in its commission. As Professor Malaurie wrote in his preface to the excellent manual by Claude Lombois: "There is no such thing as an offence which is an internal offence by its nature; any offence may become international if an element of extraneousness is discernible."[54] However, the Commission, without going as far as that, will no doubt consider whether or not it is desirable to include in the codification that whole area covered by conventions where offences are international not by their nature, but by the will of States. If it considers that approach inappropriate, then it will adhere to its 1954 position and the debate will be simplified accordingly.

58. It is clear, in any event, that the scope depends on the criterion selected. The possible criteria for offences against the peace and security of mankind are the following: (*a*) a narrow criterion: an offence which is international by its nature; (*b*) a broader criterion: any offence which is international by its nature or as the result of a convention; (*c*) a still broader criterion which would add to those two categories any offence involving the participation of a State. It would seem that the draft code should in any case include, as an introduction, a general part indicating, if possible, the criterion adopted for the codification, thus permitting a better delimitation of the subject.

[54] C. Lombois, *Droit pénal international* (2nd ed.) (Paris, Dalloz, 1979), p. v.

CHAPTER IV

Implementation of the code

59. The questions of an international penal code and of an international jurisdiction are closely interrelated. They are so linked together that neither can advance without the other. However, the Commission took the view that it should deal with offences first and consider the question of penalties only at a later stage. In keeping with that approach, it eventually decided to delete from its 1954 draft code article 5, concerning the rule *nulla poena sine lege* (see para. 50 above), which it felt was more bound up with the imposition of the penalty and hence with the existence of an international jurisdiction. However, implementation of the penalty also presupposes the existence of a scale of penalties. This point was mentioned above.

60. There were several courses open to the Commission: it could itself establish the penalties applicable to each of the offences concerned; or, as at Nürnberg, it could leave that to the judge; or, lastly, it could refer to national legislation. The question remains open for discussion. But, in any event, there has to be a jurisdiction. The establishment of an international penal jurisdiction is the most difficult issue. It is not that this is inconceivable in theory. The Commission itself, in answer to a question put to it by the General Assembly,[55] replied that it was possible and desirable to establish such a jurisdiction.[56] In fact, many drafts have been produced to that end. They were mentioned in our review of the history of the codification. From the beginning, there have been arguments between realists and idealists as to the practical possibility of making such a jurisdiction work, of making it effective. Pella wrote in the *Revue générale de droit international public*:

> For a quarter of a century, it has been repeatedly stated that elaborating an international penal code and refusing to establish the necessary jurisdiction to enforce it means formulating rules of international law on the basis of the idea that their enforcement depends on the fluctuating fortunes of war and not on stable elements consisting of a pre-existing and permanent organization of international justice.[57]

The Chairman of the Commission at its second session, Georges Scelle, said on 9 June 1950 that

> ... if such an organ were not set up, what would be the point of defining the Nürnberg principles ...? If, as a preliminary step, an international organ were created, there would be some chance of a real court of international justice being established which would be competent to judge all war criminals, to whichever side they belonged. ...[58]

Following that statement, the Commission decided to answer the question put to it in the affirmative. After considering the reports of R. J. Alfaro[59] and A. E. F. Sandström,[60] the Commission even proposed the establishment of a separate penal jurisdiction, instead of a chamber of a pre-existing court.[61]

61. Pursuant to that recommendation, the General Assembly, by its resolution 489 (V) of 12 December

[55] General Assembly resolution 260 B (III) of 9 December 1948.

[56] See the report of the Commission on its second session (see footnote 39 above), p. 379, para. 140.

[57] Pella, "La Codification du droit pénal international", *Revue générale de droit international public* (Paris), vol. LVI (1952), p. 415.

[58] *Yearbook ... 1950*, vol. I, p. 22, summary record of the 43rd meeting, para. 41.

[59] *Yearbook ... 1950*, vol. II, p. 1, document A/CN.4/15.

[60] *Ibid.*, p. 18, document A/CN.4/20.

[61] See *Yearbook ... 1950*, vol. I, pp. 24-28, summary record of the 44th meeting, paras. 1-63; see also the report of the Commission on its second session (see footnote 39 above), p. 379, paras. 141-145.

1950, decided to establish a committee composed of the representatives of 17 Member States for the purpose of preparing "proposals relating to the establishment and the statute of an international criminal court". The work of this Committee of Seventeen was to be based on one or more preliminary drafts prepared by the Secretary-General. On 31 August 1951, the committee approved a draft for the establishment of an international criminal court.[62] The draft was transmitted to Governments, but only a few of them made observations on it.

62. A new committee was established for the same purpose in 1952,[63] its terms of reference being to re-examine the draft prepared in 1951, to explore its implications and to study the relationship between the proposed court and the United Nations and its organs.[64] After a number of vicissitudes, the General Assembly finally decided, in 1954, to suspend consideration of the draft pending submission of the report of another committee, the Special Committee on the Question of Defining Aggression.[65] The Assembly thus made the definition of aggression a pre-condition for a code of offences against the peace and security of mankind. When a draft Definition of Aggression was proposed to the General Assembly in 1974,[66] the question was taken up anew but was again referred to the Sixth Committee, to be considered jointly with the question of a code of offences against the peace and security of mankind.

63. Thus the question arose whether this vicious circle could be broken, since consideration of each of the drafts was linked to consideration of the other. It therefore seems appropriate to see whether the Commission should not prepare a draft statute for an international jurisdiction as a necessary and vital complement to the draft code. The Commission might seek the views of the General Assembly on that point. It must, however, be noted that the ups and downs of the proposal for the establishment of an international criminal court are also due to widespread scepticism, and no doubt to the current state of international affairs. That scepticism was expressed again only recently, with pithiness and grim humour, in the following terms: "An international tribunal of the Nürnberg type is more an incantatory psychodrama than a really useful legal instrument."[67] The authors of that statement actually go much further, since they consider that any attempt at prosecution for international offences is really superfluous, and that preventive measures and subsequent reparations are more to the point than punishment as such. They take the view that "war crimes and crimes against humanity or peace have the force of a *fait accompli* which makes any criminal conviction pointless ..." and that, unless one wants to doctor the dead, the concern should be for prevention rather than cure. It is startling to encounter such a rejection of any international criminal jurisdiction. Nevertheless, this view reflects the feeling of impotence which holds many people in its grip and puts a damper on enthusiasm. It is also argued that the penalties imposed by such a jurisdiction would hardly be exemplary, "even if surrounded with international ceremony", and even if, at the time when they were pronounced, they resulted in "a satisfying catharsis for a traumatized public opinion".

64. Some writers, without espousing the more extreme elements of these arguments, do note the lack of any international power of coercion. But in reply to this, those in favour of an international jurisdiction refer to Articles 94 and 39 of the Charter of the United Nations, which deal, respectively, with giving effect to decisions of the ICJ and with measures under Chapter VII of the Charter. It has also been pointed out that the State of which a guilty party is a national cannot be forced to surrender him unless that State has been conquered.

65. Lastly, it has been argued that the establishment of an international criminal court would contravene the principle of the sovereignty of States and its corollary, the territoriality of penal law. This, as we have seen, is the weakest argument, since the existence of an international order, and of crimes under international law, is now generally accepted. Defining and punishing such crimes is not a matter for State sovereignty but for the international order. Moreover, in present circumstances, the establishment of such a jurisdiction would, of course, involve conventions to which States would necessarily be parties.

66. As for the principle of the territoriality of penal law, that principle is now subject to exceptions because of the need for international co-operation in suppressing banditry. In that connection, the theory of the active or passive personality of penal law and the theory of real protection are sometimes invoked to enable a State to apply its own law to offences committed by its nationals abroad, or to protect them when they are the victims of offences committed abroad, or to apply its own law to offences by which it is injured, irrespective of any consideration of the *lex loci delicti commissi* or of the law to which the offender himself is subject. The principle of universality has even been applied when an offence, because of its magnitude, endangers the material and moral interests of mankind. That principle formed the basis of the Charter of the Nürnberg International Tribunal. Admittedly, everything is a matter of degree, but the principle of State sovereignty is perfectly com-

[62] See "Report of the Committee on International Criminal Jurisdiction on its session held from 1 to 31 August 1951" (*Official Records of the General Assembly, Seventh Session, Supplement No. 11* (A/2136)), annex I, "Draft statute for an international criminal court".

[63] General Assembly resolution 687 (VII) of 5 December 1952.

[64] See "Report of the 1953 Committee on International Criminal Jurisdiction, 27 July-20 August 1953" (*ibid., Ninth Session, Supplement No. 12* (A/2645)).

[65] General Assembly resolution 898 (IX) of 14 December 1954.

[66] See "Report of the Special Committee on the Question of Defining Aggression, 11 March-12 April 1974" (*ibid., Twenty-ninth Session, Supplement No. 19* (A/9619)). The Definition of Aggression was adopted on the basis of this report: General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

[67] M.-F. Furet, J.-C, Martinez and H. Dorandeu, *La guerre et le droit* (Paris, Pedone, 1979), p. 294.

patible with the existence of an international order providing the basis for a code of international penal law.

67. However, it is for the Commission to take a clear decision and set the limits of its task, the role of the Special Rapporteur at the present stage being simply to take stock of the problems which arise and to evoke answers. Moreover, as has been suggested (see para. 63 above), the Commission might be well advised to question the General Assembly about its terms of reference and whether or not it is necessary also to draft a statute for the international jurisdiction. If the Assembly replied in the affirmative, it would appear that the Commission could hardly complete that task during its present term of office, in view of the other topics on its agenda. However, the Commission may take the view, as it did in 1954, that, pending the establishment of an international jurisdiction, penalties could be imposed by national courts. That view is certainly not to be disregarded, but its drawbacks must be recognized; for there are two alternatives. One is that the authors of an offence are tried by their own national courts, which is often impossible so long as they occupy a high place in the hierarchy of the State or Government. In that case, must one wait for a change of régime or an internal upheaval before the guilty parties can be apprehended and tried? The other alternative is trial by the courts of the States directly injured, in which case guarantees of objectivity and impartiality might be seriously lacking. Jules Basdevant, who signed on behalf of France the 1937 Convention for the Creation of an International Criminal Court[68] aimed at repressing terrorism, speaking of national courts, said that

> ... the methods of procedure of such courts, their view of the possibly complicated circumstances of the case before them, the perhaps doubtful authenticity of the evidence and the nature of the judgment rendered might be viewed in a different light in different countries. Indeed, the court's decision in such a case might well lead to political tension between the country affected by the terrorist offences and the country in which judgment was passed.[69]

It is precisely in view of cases of this kind that it may be desirable, for the sake of good feeling between nations, to bring the offender before judges whose impartiality and independence are beyond question. Moreover, the consistency of public international law requires harmonization of judicial decisions, which is difficult to ensure in the absence of an international jurisdiction. Lastly, what about cases where the issue is the criminal responsibility not of individuals, but of the State? In such cases, a State could hardly be summoned to appear before another State to answer for criminal acts.

68. Such are the arguments, stated briefly and no doubt incompletely, for and against an international criminal jurisdiction. The decision rests with the Commission. If it should decide to embark on this undertaking, only then would there arise the technical problems mentioned by the Special Rapporteur, at this stage, purely for reference purposes. Those problems involve organization, procedure, institution of proceedings, preliminary investigation, trial, defence, civil actions, appeals, execution of decisions, and so on. Consideration of such problems would, of course, be premature because it depends on whether or not it is thought desirable to establish a statute for an international criminal court.

[68] See footnote 21 above.

[69] League of Nations, *Proceedings of the International Conference on the Repression of Terrorism* (Geneva, 1-16 November 1937) (publication No. 1938.V.3), p. 59.

CHAPTER V

Conclusion

69. This report has consisted of a review of the problems involved in codifying the topic of offences against the peace and security of mankind. As announced at the thirty-fourth session of the Commission, it is an introductory report which has attempted to make an inventory—no doubt incomplete—of the problems, in order to evoke joint thinking and answers. Those problems concern:

(a) *The scope of the topic, and in particular:*

1. *The nature of the offences.* What offences should the codification cover? What are the specific features of an offence against the peace and security of mankind? What distinguishes it from other international offences? Must it necessarily include a political element?

2. *The subjects of law.* (Individuals? Groups? States? All three together?)

(b) *The method*

Deductive method: should one start with a general definition of an offence against the peace and security of mankind? Or should one adopt the *inductive* method, consisting of seeking in positive law, including international conventions, what is now considered to constitute an offence against the peace and security of mankind?

(c) *Implementation of the code*

Should the Commission take up the question of implementation of the code or, in other words, the establishment of an international criminal jurisdiction and the rules of procedure required for its functioning?

70. Such are the questions on which the Special Rapporteur solicits the thoughts and suggestions of the Commission. He is fully aware that he has not covered all the problems. However, should the report give rise to a wide-ranging and thorough discussion, the Special Rapporteur will have achieved his purpose.

DOCUMENT A/CN.4/369 and Add.1 and 2

Comments and observations of Governments received pursuant to General Assembly resolution 37/102

[*Original: English, Spanish*]
[*19 April, 27 May and 17 June 1983*]

CONTENTS

NOTE

The text of the draft Code of Offences against the Peace and Security of Mankind, prepared by the International Law Commission in 1954, is reproduced in *Yearbook ... 1983*, vol. II (Part Two), p.11, para. 33.

Introduction

1. On 16 December 1982, the General Assembly adopted resolution 37/102, the operative paragraphs of which read as follows:

The General Assembly,

...

1. *Invites* the International Law Commission to continue its work with a view to elaborating the draft Code of Offences against the Peace and Security of Mankind, in conformity with paragraph 1 of General Assembly resolution 36/106 and taking into account the decision contained in paragraph 255 of the report of the International Law Commission on the work of its thirty-fourth session;

2. *Requests* the International Law Commission, in conformity with resolution 36/106, to submit a preliminary report to the General Assembly at its thirty-eighth session bearing, *inter alia*, on the scope and the structure of the draft Code;

3. *Requests* the Secretary-General to reiterate his invitation to Member States and relevant international intergovernmental organizations to present or update their comments and observations on the draft Code with a view to their submission to the International Law Commission;

4. *Decides* to include in the provisional agenda of its thirty-eighth session the item entitled "Draft Code of Offences against the Peace and Security of Mankind".

2. On 17 January 1983, the Secretary-General addressed a note to the Governments of Member States and a letter to the relevant international intergovernmental organizations, requesting their comments and observations on the subject.

3. The replies received as at the end of June 1983 from the Governments of three Member States are reproduced below.

Czechoslovakia

[*Original: English*]
[*17 May 1983*]

1. The Czechoslovak Socialist Republic reaffirms its keen interest in the resumption of work on the elaboration of the Code of Offences against the Peace and Security of Mankind.

2. Czechoslovakia's position, which is one of support for the elaboration of the code, as well as its approach to the basic issues involved, have been set out in its written replies.[1] Czechoslovakia's views were also presented in the statements by Czechoslovak representatives in the Sixth Committee of the General Assembly at its thirty-fifth session, on 8 October 1980, thirty-sixth session, on 30 November 1981, and thirty-seventh session, on 24 November 1982.[2]

3. On the question of the further course of action to be pursued, the Czechoslovak Socialist Republic is inclined to the view that the urgency of elaborating the code requires that, apart from the Commission, the matter should be considered also as a separate item in the Sixth Committee of the General Assembly and that priority attention be accorded to it.

[1] A/35/210, p. 7, and A/37/325, p. 6.

[2] *Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee,* 15th meeting, paras. 40-43; *ibid., Thirty-sixth Session, Sixth Committee,* 62nd meeting, paras. 1-6; *ibid., Thirty-seventh Session, Sixth Committee,* 54th meeting, paras. 73-77.

Suriname

[*Original: English*]
[*8 March 1983*]

The Republic of Suriname considers the draft code prepared by the International Law Commission in 1954 as an acceptable basis for further work.

In continuing this work, account should be taken of the new international legal instruments that have been concluded since the original draft Code of Offences against the Peace and Security of Mankind. These include:

The Definition of Aggression;[1]

The 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity;[2]

The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations;[3]

The Declaration on the Prevention of Nuclear Catastrophe,[4] in which it is provided that statesmen who resort first to the use of nuclear weapons will be committing the gravest crime against humanity;

General Assembly resolution 37/77 of 9 December 1982, entitled "Prohibition of the development and manufacture of new types of weapons of mass destruction and new systems of such weapons", in which the General Assembly calls upon the permanent members of the Security Council, as well as upon other militarily significant States, to make declarations identical in substance concerning the refusal to create new types of weapons of mass destruction and new systems of such weapons.[5]

Special attention must also be given to the Additional Protocols of 1977 to the 1949 Geneva Conventions regarding the protection of victims of armed conflicts.[6]

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

[2] United Nations, *Treaty Series,* vol. 754, p. 73.

[3] General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

[4] General Assembly resolution 36/100 of 9 December 1981.

[5] Para. 3 of part A of the resolution.

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

Uruguay

[*Original: Spanish*]
[*13 June 1983*]

Since it is a draft code, it should regulate in more exhaustive fashion unlawful acts committed against the peace and security of mankind.

For this purpose, it would be appropriate:

1. To elaborate a definition containing the essential elements characterizing such acts or omissions, without prejudice to specific mention of any such offences;

2. Similarly, to refer in the draft to offences that have been defined in United Nations conventions and resolutions;

3. To provide for a competent international judicial body, for procedural rules relating in particular to evidence and appraisal thereof, and for applicable sanctions;

4. To distinguish between the various categories of internationally wrongful acts in terms of the content of the obligation breached, which entails the application of different régimes of international responsibility;

5. To extend responsibility for the offences covered by article 1 of the draft to cover legal persons, since acts affecting the peace and security of mankind may be performed by individuals, States and other subjects of international law, and by other agencies;

6. To provide that the personal punishment of individuals or State organs to which one of these offences is attributable shall not preclude the international responsibility of the State and other subjects of international law to which the organ belongs; such responsibility will be of a special character because of the consequences of the offence as well as of the subject that may allege such consequences;

7. To provide for the possibility that, in cases where the offence is committed by means of an international agency which is not a State or another subject of international law, that agency may be declared an unlawful association from the standpoint of international law.

THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

[Agenda item 5]

DOCUMENT A/CN.4/367*

First report on the law of the non-navigational uses of international watercourses, by Mr. Jens Evensen, Special Rapporteur

[*Original:English*]
[*19 April 1983*]

CONTENTS

* Incorporating document A/CN.4/367/Corr.1.

CHAPTER I

Work of previous Special Rapporteurs

1. Mr. Richard D. Kearney was the first Special Rapporteur appointed by the International Law Commission to study the topic "The law of the non-navigational uses of international watercourses". He filed his report to the Commission at its twenty-eighth session, in 1976.[1] The report was of an introductory nature, dealing *inter alia* with the questionnaire[2] circulated to the Member States of the United Nations upon the recommendation made by the Commission at its twenty-sixth session, in 1974.[3] The question of the definition of the term "international watercourse" was briefly discussed in the report, and the concept of non-navigational uses was likewise touched upon. In item D of its questionnaire, the Commission had submitted an outline of such uses under three main headings: (*a*) agricultural uses; (*b*) economic and commercial uses; (*c*) domestic and social uses. In that connection, the Special Rapporteur emphasized that

> ... The individual uses listed under each heading, ranging from irrigation to energy production to fishing and boating, are illustrative of the range of human activities for which water is required. ...[4]

2. The questionnaire raised the question whether other uses should be included in the study, such as flood control and erosion problems, although neither flood control nor erosion can be considered as "use" of water as a natural resource. States replying to the questionnaire supported the inclusion of flood control and erosion problems in the study. Several States suggested that sedimentation problems should also be dealt with. Other countries favoured the approach that the Commission should begin its work by concentrating on pollution aspects.

3. The Special Rapporteur mentioned various international instruments to illustrate the complex problems involved in drawing up legal principles regarding the use of international watercourses. However, he proposed no draft articles in his report.

4. The second Special Rapporteur on the topic, Mr. Stephen Schwebel, now a judge at the International Court of Justice, filed his first report at the thirty-first session of the Commission, in 1979.[5] In chapter I of that report he presented an interesting analysis of "some salient characteristics of water", emphasizing *inter alia* that

> ... one of water's most extraordinary characteristics is its limited but forever renewable quantity ... [and that] the ... amount of fresh water in watercourse systems is unevenly distributed throughout the world. Therefore, even though the total supply of fresh water may well be sufficient for current human needs, there have always been large deficiencies of water in many regions and large excesses in others ... .[6]

5. Chapter I was summed up as follows:

> It merits repeating that water is a unique substance. The characteristics described—constant in quantity, self-purifying, but varying in flow—contribute to water's singular nature in many ways ... it is a solvent of great efficacy, able to dissolve about half of all chemical elements. It has enormous capacity to absorb heat and is consequently an immense source of energy when it releases heat. ...[7]

6. In chapter II, entitled "Use of international watercourses", the Special Rapporteur dealt with the concept of international drainage basin, as well as with the question of a definition of the term "international watercourse". He pointed out that a consensus had emerged in the Commission's debate to the effect that "the question of determining the meaning of the term 'international watercourses' need not be pursued at the outset of the Commission's work". ... Instead, the Commission had recommended that

> ... attention should be devoted to beginning the formulation of general principles applicable to legal aspects of the *uses** of these watercourses. In so doing, every effort should be made to devise rules which would maintain a *delicate balance** between those which were *too detailed** to be generally applicable and those which were *so general** that they would *not be effective.**...[8]

7. The discussions in the Sixth Committee of the General Assembly prove that these guidelines are still generally valid. The present Special Rapporteur will bear them in mind in his work on the topic. In its resolution 2669 (XXV) of 8 December 1970, the General Assembly recommended that the study should be aimed at the progressive development of the topic as well as at its codification, a recommendation which the present Special Rapporteur will likewise adhere to.

8. In chapter II, the Special Rapporteur also dealt with the scope of a draft on international watercourses.[9] He considered that for a number of reasons "an article of limited substance on scope of application is desirable, despite the large measure of ambiguity it will carry". In that context, he briefly developed his views on the term "use". On the basis of his examination in chapter II, he proposed an article 1 on "Scope of the present articles".

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[1] *Yearbook ... 1976*, vol. II (Part One), p. 184, document A/CN.4/295.

[2] *Ibid.*, p. 150, document A/CN.4/294 and Add.1, para. 6.

[3] See the report of the Sub-Committee on the Law of the Non-navigational Uses of International Watercourses, adopted by the Commission at its twenty-sixth session (*Yearbook ... 1974*, vol. II (Part One), p. 303, document A/9610/Rev.1, chap. V, annex, para. 30).

[4] Document A/CN.4/295 (see footnote 1 above), para. 14.

[5] *Yearbook ... 1979*, vol. II (Part One), p. 143, document A/CN.4/320.

[6] *Ibid.*, p. 149, para. 24.

[7] *Ibid.*, p. 150, para. 31.

[8] *Ibid.*, p. 151, para. 35.

[9] *Ibid.*, pp. 157-158, paras. 56-60.

9. In chapter III, on "User agreements", the Special Rapporteur examined in detail the immense diversity of international river systems. He pointed out that:

> ... In size, they range from such enormous systems as the Congo, the Amazon, the Mississippi and the Ganges, all of which drain more than 1 million square kilometers, to the smallest of streams. Many are located in arid parts of the earth, so that they flow on the surface only intermittently, and disappear in the dry season. Many others are in water surplus areas, so that a major concern is not too little water but too much, in the form of floods ... In short, there are international watercourses in almost every part of the world, and this means that their physical characteristics and the human needs they serve are subject to the same extreme variations as are found in other respects throughout the world.
>
> Each watercourse is unique. Each has a special congeries of uses which differ from that of any other system. ...[10]

10. After examining in some detail the Helsinki Rules on the Uses of the Waters of International Rivers[11] and the Convention relating to the development of hydraulic power affecting more than one State,[12] the Special Rapporteur proposed six draft articles on user agreements: article 2, "'User States"; article 3, "User agreements"; article 4, "Definitions"; article 5, "Parties to user agreements"; article 6, "Relation of these articles to user agreements"; and article 7, "Entry into force for an international watercourse".

11. In chapter IV, the Special Rapporteur dealt with the questions of data collection and exchange of data pertaining to international watercourses by co-riparian States. He emphasized, on the basis of an examination of State practice, that agreements varied in degree of specificity with regard to the collection, analysis and exchange of data, and then tentatively submitted three draft articles dealing with these important issues: article 8, "Data collection"; article 9, "Exchange of data"; and article 10, "Costs of data collection and exchange".

12. The Special Rapporteur filed his second report on the law of the non-navigational uses of international watercourses at the thirty-second session of the Commission, in 1980.[13] In chapter I of that report, he expressed the opinion that "in order to ensure harmony between the physical laws governing water and the legal rules governing the use of fresh water, the drainage basin must be taken as the unit for the formulation of such rules".[14] He noted, however, that, in the discussions in the Commission and in the Sixth Committee of the General Assembly regarding international watercourses, divergent views had been advocated, and that some States had held that

> ... earlier concepts, such as the definition in the Final Act of the Congress of Vienna (1815) of international rivers for the purpose of navigation only should be preserved and generally applied.[15]

Accordingly, the Special Rapporteur considered that it was advisable to move ahead with "the preparation of articles, to the extent possible, without an initial definition of an international watercourse".[16]

13. The present Special Rapporteur shares the view that a definition of an international watercourse based on the concept of the drainage basin would not command sufficient agreement within the General Assembly to recommend itself as the starting-point for a draft convention on this topic. The second Special Rapporteur recognized the great diversity of watercourses. The geographical and hydrological diversities of the various watercourses are apparent. So are the political issues involved as well as the factual and legal problem areas that differ from watercourse to watercourse. Thus the second Special Rapporteur recognized that

> there was a need for a method of dealing with watercourse problems that would permit *the development of principles of general applicability within a framework sufficiently flexible to allow adaptation to the unique aspects** of individual watercourses[17]

The Special Rapporteur reverted to the question of definition in chapter II of his second report.[18]

14. The present Special Rapporteur holds the view that a definition of international watercourses based on a doctrinal approach to the topic would be counterproductive, whether the definition is based on the drainage basin concept or on other concepts of a doctrinal nature. The definition of the term "international watercourse" should not have as its purpose to create a superstructure from which to distil or extract legal principles. Such an approach would defy the purpose of drafting principles of general applicability that were sufficiently flexible "to allow adaptation to the unique aspects" of each individual international watercourse.

15. On the other hand, it may be useful to attempt to formulate a definition of an international watercourse for the purposes of the draft convention. The present Special Rapporteur will revert to the question in chapter III of this report.

16. In chapter I of his second report, the Special Rapporteur also dealt with the discussions in the Commission at its thirty-first session, in 1979, and likewise with the discussions in the Sixth Committee of the General Assembly in the course of its review of the report of the Commission on its 1979 session.[19]

17. In chapter II of the same report, the Special Rapporteur reconsidered the draft articles submitted in his first report on the basis of the discussions which had taken place in the Commission and in the Sixth Committee in 1979. In spite of some divergences of views,

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[10] *Ibid.*, p. 159, paras. 63-64.

[11] Rules adopted by the International Law Association at its fifty-second Conference, held at Helsinki in 1966. See ILA, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), pp. 484 *et seq.* The text of the Helsinki Rules (with the exception of chap. IV, "Navigation") is reproduced in *Yearbook ... 1974*, vol. II (Part Two), pp. 357 *et seq.*, document A/CN.4/274, para. 405.

[12] Convention adopted at Geneva on 9 December 1923 (League of Nations, *Treaty Series*, vol. XXXVI, p. 75).

[13] *Yearbook ... 1980*, vol. II (Part One), p. 159, document A/CN.4/332 and Add.1.

[14] *Ibid.*

[15] *Ibid.*

[16] *Ibid.*

[17] *Ibid.*, para. 3.

[18] *Ibid.*, paras. 32-39.

[19] *Ibid.*, paras. 11-26.

the Special Rapporteur was justified in drawing the following conclusions from these discussions:

> ... there was general agreement on the need for provisions that would set forth the scope of the draft articles, define the relationship of the Commission's work to agreements on individual watercourses and deal with the collection and exchange of essential information.[20]

18. The report emphasized that a new element had appeared in those discussions. In a number of interventions attention had been drawn to the need for a definition of the term "international watercourses" at an early stage. As a matter of fact, such views were also expressed in subsequent discussions in the Sixth Committee, for example at the thirty-seventh session of the General Assembly, in 1982, although the topic was not extensively dealt with during that session.

19. In that context, the Special Rapporteur expressed the view that it was "difficult to see the utility of drawing a distinction between *use of the watercourse and use of the water of the watercourse*".*[21] The present Special Rapporteur shares the view that such a distinction would hardly be fruitful for the Commission's work on the topic. Such a distinction would be elusive, even artificial. Should the Commission deal only with the "uses of the watercourse" and not with the uses of the *water* of watercourses, the work of the Commission would be so restrictive as to deprive the draft convention of its usefulness and urgency. Such a narrow definition would, as stated by the Special Rapporteur in his second report, "exclude all uses that depend upon the diversion or abstraction of water from the watercourse".[22] The wider definition was adopted as a matter of course by the Special Rapporteur and by the Commission.

20. The present Special Rapporteur also shares the view expressed in the second report that lakes (and canals) form a natural part of a number of international watercourses. This approach has likewise been adopted in international agreements regulating international watercourses.[23]

21. In section B of chapter II, the Special Rapporteur submitted revised texts, with comments, of the articles he had submitted earlier. In his first report (see para. 10 above), he had introduced the concept of "user States" and "user agreements". In his revised draft articles,[24] he introduced the new concept of "international watercourse systems" (art. 1) and of "system States" (art. 2). That revision was made, *inter alia,* to make it clear that an international watercourse was not to be regarded merely "as a pipe carrying water" but "to avoid being bogged down in recurring discussions over what uses of water are to be dealt with and whether lakes (and canals) are included".[25] The Special Rapporteur produced documentation to the effect that the concept of "watercourse systems" or "river systems" had been widely adopted in international relations.

22. On the basis of the revised approach, the second Special Rapporteur submitted six draft articles to the Commission in his second report.[26] Article 1 (Scope of the present articles) introduced the concept of "international watercourse systems". As a consequence of that change, the concept of "system States" was introduced in article 2. The Special Rapporteur suggested a geographic approach, describing a "system State" as a State "through whose territory water of an international watercourse system flows". He emphasized that that approach differed from that of articles II and III of the Helsinki Rules, where the concept of "drainage basin", in conjunction with a precise definition of that term, provided a hydrographic background for those rules. The Special Rapporteur also stressed that the definition of system States contained in his proposed article 2 was "not intended to determine the issue whether a State from whose territory ground water moves into an international watercourse system is or is not a 'system State' ". That decision should be taken only as a corollary to the decision "whether (*a*) the drainage basin concept is to be ultimately agreed upon as the measure of the scope of the draft articles, or (*b*) if not, whether any provisions respecting groundwater should be included in the draft articles".[27]

23. The Special Rapporteur reserved article 3 for "meaning of terms". He did not attempt to give definitions of relevant terms but raised certain issues to be dealt with at later stages depending on future decisions as to whether the doctrinal approach of river basins should be adopted as the basis for the draft articles or not.

24. Article 4 contained provisions regarded "system agreements". Owing to the wide diversity of watercourses, the Special Rapporteur stressed the consequent difficulty of drafting general principles that would apply universally to the various watercourses throughout the world. He also felt that "a decision to employ the approach of a framework convention is important to the orderly development of a set of articles".[28] In addition to changing the terminology from "user agreements" to "system agreements", article 4 dealt with two issues that had been left open in the first report, namely, the extent to which there was an obligation upon system States to negotiate and conclude such specific agreements and, secondly, whether such system agreements should apply to the entire watercourse or could be concluded for subsystems or other special parts of the watercourse system. The proposed text left open the possibility of concluding such partial agreements. The Special Rapporteur found the basis for an obligation to conclude system agreements in the general obligation of States under international law to resolve outstanding issues by negotiating in good faith. As

[20] *Ibid.*, para. 32.
[21] *Ibid.*, para. 40.
[22] *Ibid.*, para. 41.
[23] *Ibid.*, para. 48.
[24] *Ibid.*, paras. 52 and 59.
[25] *Ibid.*, para. 52.
[26] *Ibid.*, paras. 52-139.
[27] *Ibid.*, para. 62.
[28] *Ibid.*, para. 69.

stated by the ICJ in the *North Sea Continental Shelf* cases,

> ... the Court would recall ... that the obligation to negotiate ... merely constitutes a special application of a principle which underlies all international relations, and which is moreover recognized in Article 33 of the Charter of the United Nations as one of the methods for peaceful settlement of international disputes.[29]

25. The obligation under international law to negotiate in good faith to resolve outstanding issues follows not only from customary international law but, as stated by the Court in the *North Sea Continental Shelf* cases, is "a special application of a principle which underlies all international relations", as well as from the Charter of the United Nations and from international jurisprudence, including the precedents of the ICJ and of its predecessor, the Permanent Court of International Justice,[30] and State practice.

26. However, in the context of article 4, the question arises whether the obligation concerning the conclusion of "system agreements" should go beyond an obligation to negotiate in good faith, for example by including an obligation to resort to other procedures for peaceful settlement in accordance with Article 33 of the United Nations Charter. The Special Rapporteur touched upon those problems in his second report, where he quoted from the "Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States" prepared by UNEP.[31] Principle 11, paragraph 2, provides:

> 2. In case negotiations or other non-binding means have failed to settle a dispute within a reasonable time, it is necessary for States to submit the dispute to an appropriate settlement procedure which is mutually agreed by them, preferably in advance. The procedure should be speedy, effective and binding.

27. With regard to the provisions of article 4, paragraph 2, the Special Rapporteur dwelt on the possibility and necessity of subsystem agreements for individual watercourses. He emphasized that the possibility of entering into subsystem agreements for individual parts of an international watercourse might be of special pertinence "when there are three or more system States, because in such cases dealing with only a part of the watercourse may have advantages of simplicity and utility".[32] A number of watercourse agreements in force are limited to part of a watercourse system. The need for such subsystem agreements and for agreements covering limited areas is obvious. In that context, the Special Rapporteur made the following observation:

> ... In some watercourse systems, such as the Indus, the Plate and the Niger, the differences between subsystems are as marked as those between separate watercourse systems. Agreements on subsystems are likely to be more readily attainable than agreements on the watercourse system as a whole, particularly if a considerable number of States are involved.[33]

28. It is equally apparent, however, that the need for limited agreements is not explained by geographic limitations only. A great number of international watercourse agreements are included for the purpose of regulating particular projects, programmes or uses rather than for the purpose of regulating certain subsystems or geographically limited sections of an international watercourse. A number of separate agreements regulating hydroelectrical developments are among functionally limited watercourse agreements that come to mind.

29. Some agreements are concluded for the purpose of one project or one specific part of an international watercourse system. However, there are also examples of such functionally limited conventions of a general nature. Mention may be made of the Geneva Convention of 9 December 1923 relating to the development of hydraulic power affecting more than one State.[34] Draft provisions on system agreements must be so drafted as to take into account the different types of agreements, bilateral, multilateral, geographically restricted or functionally restricted.

30. Article 5 proposed in the second report dealt with "Parties to the negotiation and conclusion of system agreements". In his comments, the Special Rapporteur stated that the article "deals with the right to participate in the negotiation of an agreement rather than with the duty to negotiate, which is addressed in article 4. If there is a duty to negotiate, there is a complementary right to participate in the negotiations. Article 5 is limited to identification of the States which are entitled to exercise this right ...".[35]

31. The Special Rapporteur proposed as a condition for exercising the right to participate in the negotiation (and conclusion) of a system agreement that the use and enjoyment of the waters of an international watercourse system of the State concerned may be affected "to an appreciable extent"[36] by the proposed system agreement, even though such agreement would apply to only a part of the system. The criterion "to an appreciable extent" may perhaps be lacking in scientific, technical and mathematical stringency. The present Special Rapporteur is of the opinion that it is hardly possible to devise "scientific, technical or mathematical" formulae that could be more or less automatically applied to the great variety of elements that may be relevant, and to the concrete problems which necessarily will arise from time to time in regard to the relative use and enjoyment by the various system States of the waters of an international watercourse system. The more flexible approach inherent in the formulation "to an appreciable extent"

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[29] Judgment of 9 February 1969 (*I.C.J. Reports 1969*, p. 47).

[30] See the advisory opinion of 15 October 1931 in the *Railway Traffic between Lithuania and Poland* case (*P.C.I.J., Series A/B*, No. 42, p. 108). See also the *Lake Lanoux* case (United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), p. 281).

[31] Text reproduced in document A/CN.4/L.353, sect. B (see p. 197 below).

[32] Document A/CN.4/332 and Add.1 (see footnote 13 above), para. 95.

[33] *Ibid.*, para. 101.

[34] See footnote 12 above.

[35] Document A/CN.4/332 and Add.1 (see footnote 13 above), para. 107.

[36] *Ibid.*, paras. 115-123.

is recommendable as a guideline for the maze of widely varying issues that will arise in this field of international law and international relations. It is not unusual for the legal profession to accept the indisputable fact that human society, and especially international relations, are so dynamic and so varied that legal standards, with the necessary flexibility and faculty of forming and amending themselves with the endless variety of cases and developments, are preferable to hard and fast formulae. The present Special Rapporteur doubts whether a body of experts would be able, on the basis of scientific, technical or mathematical considerations, to come forward with formulae that would be more acceptable than the criterion "to an appreciable extent".

32. In his first report, the Special Rapporteur presented rather detailed proposals on data collection (art. 8), exchange of data (art. 9), and costs of data collection and exchange (art. 10) (see para. 11 above). In his second report, he revised his approach and presented in the new article 6 his proposal for collection and exchange of information. The Special Rapporteur considered that the relevant draft articles proposed in the first report might be "unduly specific for use in a framework agreement". On the other hand, he emphasized that "the need for the collection and exchange of information is so essential that its expression can and should be cast in the form of a basic obligation".[37] The present Special Rapporteur shares the view that the necessity for a general principle regarding the collection and exchange of data and other information cannot be challenged.

33. In chapter III of his second report, the Special Rapporteur dealt in an illuminating manner with water as a shared natural resource. He emphasized how the concept of shared natural resources, and of co-operation among States with respect to the mutually beneficial development and use of such shared resources, had become widely accepted, not least in a United Nations context. And he described the waters of international watercourses as "the archetype of the shared natural resource".[38] Consequently, the Special Rapporteur proposed in article 7, as the *first* main principle governing the uses of water of an international watercourse, that such water was a shared natural resource.

34. A descriptive but brief analysis of the consequences that should be drawn from the fact that the water of an international watercourse must be treated as a shared natural resource is found in the Mar del Plata Action Plan adopted by the United Nations Water Conference which convened at Mar del Plata in 1977.[39] Recommendation 85 of the Action Plan states:

> 85. Countries sharing water resources, with appropriate assistance from international agencies and other supporting bodies, on the request of the countries concerned, should review existing and available techniques for managing shared water resources and co-operate in the establishment of programmes, machinery and institutions necessary for the co-ordinated development of such resources. Areas of co-operation may with agreement of the parties concerned include planning, development, regulation, management, environmental protection, use and conservation, forecasting, etc. Such co-operation should be a basic element in an effort to overcome major constraints such as the lack of capital and trained manpower as well as the exigencies of natural resources development.[40]

It was further recommended that countries sharing an international watercourse should sponsor studies, establish joint committees, encourage joint education and training schemes, encourage exchanges between interested countries and meetings between representatives of international or inter-State river commissions, etc.

35. The Action Plan also recognized the need for close international co-operation among co-riparian States. Thus recommendation 90 provides:

> 90. It is necessary for States to co-operate in the case of shared water resources in recognition of the growing economic, environmental and physical interdependencies across international frontiers. Such co-operation, in accordance with the Charter of the United Nations and principles of international law, must be exercised on the basis of the equality, sovereignty and territorial integrity of all States ... .[41]

Recommendation 91 provides:

> 91. In relation to the use, management and development of shared water resources, national policies should take into consideration the right of each State sharing the resources to equitably utilize such resources as the means to promote bonds of solidarity and co-operation.[42]

36. It is also interesting to note that recommendation 93 (*b*) confirms the existence of "generally accepted principles of international law in the use, development and management of shared water resources" in the absence of bilateral or multilateral agreements. In regard to the collection and exchange of information and data, recommendation 93 (*g*) provides that "the United Nations system should be fully utilized in reviewing, collecting, disseminating and facilitating exchange of information and experiences on this question".[43]

37. In dealing with the concept of shared natural resources, the Special Rapporteur examined the *River Oder* case adjudicated by the PCIJ in 1929.[44] He stressed that the decision of the Court was notable "in placing the weight of the Permanent Court ... behind the principle of 'a community of interest of riparian States' " in respect of international watercourses.[45] The decision may be of interest because it dealt with tributaries of the Oder, albeit it dealt with navigational aspects only and was based to a large extent on the interpretation of articles 341 and 343 of the Treaty of Versailles.

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[37] *Ibid.*, para. 130.

[38] *Ibid.*, para. 141.

[39] See *Report of the United Nations Water Conference, Mar del Plata, 14-25 March 1977* (United Nations publication, Sales No. E.77.II.A.12), part one.

[40] *Ibid.*, p. 51.

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

[42] *Ibid.*

[43] *Ibid.*, pp. 53-54.

[44] *Territorial Jurisdiction of the International Commission of the River Oder,* Judgment No. 16 of 10 September 1929 (*P.C.I.J., Series A*, No. 23).

[45] *Yearbook ... 1980,* vol. II (Part One), p. 189, document A/CN.4/332 and Add.1, para. 190.

38. After his election as a judge of the ICJ in January 1981, Mr. Schwebel submitted for the consideration of the Commission at its thirty-fifth session, in 1982, his third report on the topic, on which he had begun research prior to resigning from the Commission.[46] He submitted that third report with a view to facilitating the continued consideration of the topic by the Commission, in accordance with the recommendation of the General Assembly contained in paragraph 4 (*e*) of its resolution 35/163 of 15 December 1980.

39. The third report is a monumental work. The present Special Rapporteur has studied it with the greatest admiration and respect. It has proved invaluable in providing source material and in presenting a set of draft articles on the topic, taking as its starting point the six draft articles provisionally adopted by the Commission during its thirty-second session, in 1980.[47] The articles adopted were: "Scope of the present articles" (art. 1); "System States" (art. 2); "System agreements" (art. 3); "Parties to the negotiation and conclusion of system agreements" (art. 4); and "Use of waters which constitute a shared natural resource" (art. 5). An additional article "X" was likewise provisionally adopted in order to make it clear at the outset that treaties in force with respect to "a particular international watercourse system or any part thereof or particular project, programme or use" were not to be affected by the draft articles.[48]

40. Following the first five articles provisionally adopted by the Commission, the Special Rapporteur presented in his third report 11 other articles with the purpose of placing at the disposal of the Commission a complete set of proposals for the "codification and, to a certain extent, progressive development of international law on the subject".[49]

41. The 11 draft articles proposed in the third report deal with the following issues: "Equitable participation" (art. 6); "Determination of equitable use" (art. 7); "Responsibility for appreciable harm" (art. 8); "Collection, processing and dissemination of information and data" (art. 9); "Environmental pollution and protection" (art. 10); "Prevention and mitigation of hazards" (art. 11); "Regulation of international watercourses" (art. 12); "Water resources and installation safety" (art. 13); "Denial of inherent use preference" (art. 14); "Administrative management" (art. 15); and "Principles and procedures for the avoidance and settlement of disputes" (art. 16).

42. The draft articles presented in the third report are characterized by a comprehensive approach to the issues dealt with as well as by great detail in drafting. The technical and legal expertise with which they have been drafted is almost overwhelming. Thus the third report is a monumental achievement. For students of the topic it is of unique value, as it furnishes source material of unexcelled richness and will be a constant source of thought and inspiration. It has been of great assistance to the present Special Rapporteur in the preparation of the present report. But the proposals of the third report may at times seem so detailed that their interpretation and the practical application of the articles may be difficult in concrete cases. It should perhaps also be borne in mind that the issues involved are of a highly delicate nature, both politically and legally; furthermore, each international watercourse system has its distinctive characteristics and its specific and unique set of problems, in addition to the common features pertaining to the administration and management of international watercourse systems in general.

43. The present Special Rapporteur has attempted in this report to formulate the principles in a somewhat different manner in order to make the texts of the various provisions slightly more accessible. He has also slightly different views with regard to substance. However, in drafting his set of articles, he has relied heavily on the third report of the previous Special Rapporteur and has to a great extent used formulations presented in that report. One main difficulty that the Special Rapporteur has experienced in this context is the fact that the Commission has not acted upon the third report, for the obvious reason that, after Mr. Schwebel's resignation as Special Rapporteur, there was no Special Rapporteur on the topic either at the thirty-third session, in 1981, or at the thirty-fourth session, in 1982. Nor has there been any discussion in the Sixth Committee of the General Assembly based on that third report.

44. In spite of the comprehensiveness of the draft articles submitted with the third report, the previous Special Rapporteur considered that there were several issues that had not been addressed.[50] In addition to possible articles on specific uses, he mentioned "the legality of diversion of water outside the international watercourse system", the intricate question of cost sharing, with special reference to the "production and processing of data or joint studies, the design, construction and operation of projects", the training of technical and managerial personnel, and protection and control measures of both a structural and a non-structural nature. The previous Special Rapporteur also mentioned the highly sensitive issue of "use, protection and control of the waters of shared groundwater resources". Another topic that he did not address in the form of a draft article in his third report was the "preservation of wild and scenic watercourses". Worthy of note in this context is the following observation:

> It may be hoped that more and more States will act upon their awareness of the progressive loss of these priceless and, once spoiled, irretrievable parts of their heritage. The Governments of many system States can be expected to designate some streams or extensive portions

[46] *Yearbook ... 1982,* vol. II (Part One), p. 65, document A/CN.4/348.

[47] *Yearbook ... 1980,* vol. II (Part Two), pp. 110 *et seq.*

[48] The Commission supplemented the provisionally adopted articles by a note indicating a tentative understanding of the term "international watercourse system" (*ibid.*, p. 108, para. 90).

[49] Document A/CN.4/348 (see footnote 46 above), para. 500 (*a*).

[50] *Ibid.*, paras. 513-516.

of such streams for preservation under special legal regimes. In some cases, system States may join forces to preserve an especially valuable portion of an international watercourse.[51]

45. One question of principle which has created great difficulty for the present Special Rapporteur derives from some of the issues dealt with in article 13, "Water resources and installation safety".[52] It is obvious that the question of public safety raised by possible failure, mismanagement, natural hazards and *force majeure*, including sabotage, in regard to watercourses and installations, involves problems that may be of major importance. In article 13, which is excellently drafted and which contains well-reasoned observations, the previous Special Rapporteur dealt with serious and highly relevant issues. The present Special Rapporteur fully shares his views and concerns and will probably have no major reservations with regard to drafting.

46. However, the present Special Rapporteur sees one major difficulty of principle with regard to this article. In paragraphs 2, 3, 5 and 6, issues are dealt with that pertain not only to the use, administration and management of international watercourse systems in ordinary circumstances and in time of peace. Protection in times of armed conflict is also extensively and laudably dealt with therein. Thus principles pertaining to the realm of the laws of war and to the realm of civil wars (non-international armed conflicts) are introduced in this article. The proposed provisions in that regard are obviously in harmony with the scope and tenor of the 1949 Geneva Conventions[53] on rights and duties in time of war and their two Additional Protocols of 1977.[54] In view of the great difficulties with which the Geneva Diplomatic Conference of 1977 was faced, it seems somewhat doubtful whether questions pertaining to the laws of armed conflicts should be introduced in the present draft convention. Such an effort might easily be construed as an attempt to amend or change some of the instruments concerned, especially Protocol I, relating to the protection of victims of international armed conflicts. This may create unforeseen difficulties in the Commission's work. If need be, the Commission could possibly propose special amendments to the Geneva Protocols of 1977 along the lines of certain of the proposals contained in article 13 of the third report. The present Special Rapporteur will express no opinion as to whether it would be expedient for the Commission to do so.

47. The first and second reports of the previous Special Rapporteur were extensively discussed in the Commission and in the Sixth Committee of the General Assembly in 1979 and 1980, and resulted in the aforementioned six articles being provisionally adopted by the Commission in 1980 (see para. 39 above). The previous Special Rapproteur used those six draft articles as his starting-point for the proposed additional articles contained in his third report.

48. The present Special Rapproteur shares the view that the six articles adopted by the Commission, albeit provisionally, must serve as the natural starting-point for his work on the topic.

[51] *Ibid.*, para. 519.

[52] *Ibid.*, para. 415.

[53] Geneva Conventions of 12 August 1949 for the protection of war victims (United Nations, *Treaty Series*, vol. 75).

[54] Protocol I relating to the protection of victims of international armed conflicts, and Protocol II relating to the protection of victims of non-international armed conflicts, adopted at Geneva on 8 June 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (United Nations, *Juridical Yearbook 1977* (Sales No.E.79.V.1), pp. 95 *et seq.*).

CHAPTER II

Brief outline of work

49. In his statement at the opening of the United Nations Water Conference at Mar del Plata on 14 March 1977, the Secretary-General of the Conference, Mr. Abdel Mageed, emphasized that:

> ... It is a fact of contemporary life that there are important points of difference among many countries with regard to the problems of shared water resources. It appears that no significant progress can be achieved in the management and development of these resources without a more effective system or framework within which the differing national positions, interests or approaches can be harmonized so as to facilitate co-operation.

He further expressed the hope that:

> ... these shared resources [would] be viewed as links to promote the bonds of unity, solidarity and fraternity among the nations sharing a common destiny.[55]

[55] *UNITAR News*, vol. IX (1977): *The United Nations and Water*, p. 10.

50. A State must of course be entitled to make use of the waters of an international watercourse system within its borders. But it is also frequently the fact that all system States cannot realize all the reasonable and beneficial uses of those waters to their full extent because a conflict of uses—often serious—results therefrom. In these cases adjustments and accommodations are required. One of the main goals of the work undertaken on this topic must be to draw up principles and rules for such adjustments and accommodations based on the principle of "equality of rights" and the application of the "equitable share" concept in one form or another. However, the necessary accommodations and adjustments can be realized only through co-operation among the States concerned—bilateral, multilateral and/or organizational.

51. The uses made of international watercourses are many and varied. Before the advent of the technological revolution, the main concerns with regard to international watercourses were navigational. Those aspects lie in principle outside the scope of the work now entrusted to the Commission. Thus, according to article 1, paragraph 2, provisionally adopted by the Commission, navigational aspects will be taken into consideration only "in so far as other uses of the waters affect navigation or are affected by navigation".

52. In its questionnaire of 1974, the Commission suggested comments by States on the uses of fresh water under three headings: agricultural uses; economic and commercial uses; and domestic and social uses (see para. 1 above). Such a classification may be useful as an illustration of the main categories of uses to which waters and watercourses are put. By the same token, the questionnaire made it clear that there existed, among the manifold uses to which a river might be put, a state of interdependence which demanded unity of efforts.

53. The most important agricultural uses are irrigation of cultivated land, consuming large quantities of fresh water as the case may be, consumption of water for domestic purposes, and the watering of livestock of adjacent farms. Fishing and fish breeding may also be vital sources of food supply or income. Lack of water for agricultural purposes remains one of the insurmountable problems for self-sufficiency in food production. While about one tenth of the land area of the world is cultivated, only about one sixth of this cultivated land is currently under irrigation. "Yet this same irrigated land produces between 40 and 50 per cent of all agricultural output. It is clear that, if future famines are to be avoided, more land will have to be placed under irrigation."[56]

54. Timber-floating is still a vital part of forestry in many parts of the world, as is the flooding of farmland, *inter alia* for siltation purposes as a natural fertilizing technique. The agricultural uses of a watercourse may have obvious repercussions. Irrigation may result in heavy consumption, which may affect other uses. Pollution may result from the use of artificial or natural fertilizers as well as from the waste products from livestock.

55. With the technological revolution, the use of watercourses and the waters thereof for economic and industrial purposes has increased dramatically, with ensuing harmful consequences and possible conflicts between uses and between co-riparian States. One main economic use which may frequently have repercussions on competing uses and on other States of a shared water resource is that of hydroelectric power installations. Such installations, however, are also among the most encouraging instances of close co-operation among co-riparian States in joint projects and in bilateral and multilateral agreements on friendly co-operation and the orderly development and exploitation of the power-generating facilities of an international watercourse.

56. Industrial activities may create serious complications for other legitimate uses of an international watercourse because of heavy consumption and/or serious pollution of the waters when the watercourse (or its affluents) is used as a means of waste disposal, outlets for sewage, etc.

57. The pressure on fresh water resources in the 20th century is further increased by the population explosion and the ever-increasing tendency of populations to gather in cities or densely populated areas. Thus the fresh water resources required for domestic purposes are taxed to their limits, at the same time as waste disposal needs and sewage from such population centres tax the hydrological environment drastically.

58. The recreational and social uses of watercourses will likewise increase with the developments outlined above.

59. The examination of the various uses to which an international watercourse may be subjected is useful in pointing out problem areas and the conflicts inherent in such a multitude of uses. However, the discussion in and the work of the Commission have been directed towards elaborating general principles and rules based on the experiences drawn from such an examination of uses rather than towards elaborating specific rules for individual uses. This was also the predominant view in the Sixth Committee at the thirty-fourth session of the General Assembly.[57] That approach was expressed in the following manner by the previous Special Rapporteur in his third report:

> ... The predominant view was that the product of the Commission's work should serve to provide ... the general principles and rules governing international watercourses in the absence of agreement among the States concerned and to provide guidelines for the negotiation of future specific agreements. That is, the Commission's articles would contain general principles plus residual rules applicable to subject matters not covered by such agreements. ...[58]

60. One question which arises as to the scope of the draft articles is whether the term "non-navigational uses of international watercourses" should be taken in a narrow sense or whether the principles and rules to be drafted on the topic should cover broader issues. As indicated in its questionnaire, the Commission drew attention to certain issues of a broader nature than those raised by the list of specific issues. Thus it asked States for their comments on such issues as flood control and erosion problems. States replying to the questionnaire supported the adoption of such a more comprehensive approach. There are several pressing problems of such a broader character which may arise from uses of a watercourse or affect such uses by their seasonal or long-term consequences on a watercourse or the surrounding land. A number of these problems may fall under the heading of natural hazards. The two previous Special Rap-

[56] *Ibid.*

[57] See the second report of the previous Special Rapporteur, document A/CN.4/332 and Add.1 (see footnote 13 above), paras. 19-26.

[58] Document A/CN.4/348 (see footnote 46 above), para. 2.

porteurs were of the opinion that those broader issues found their natural place in the draft articles.[59] The present Special Rapporteur shares that view.

61. In his second report, the previous Special Rapporteur proposed the following formulation for paragraph 1 of article 1 ("Scope of the present article"):

> 1. The present articles apply to the uses of the water of international watercourse systems and to problems associated with international watercourse systems, such as flood control, erosion, sedimentation and salt water intrusion.[60]

The reference here to "flood control, erosion, sedimentation and salt water intrusion" was obviously meant as an exemplification of the broader approach.

62. Article 1, paragraph 1, provisionally adopted by the Commission at its thirty-second session, in 1980, was drafted in a somewhat different manner:

> 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.* *[61]

This change in drafting seems to make the article more purpose-oriented than the original proposal, and may consequently command broader support.

63. In his third report, the previous Special Rapporteur dealt in great detail with these issues: environmental pollution and protection (art. 10); prevention and control of water-related hazards (art. 11); regulation of international watercourses (art. 12); and water resources and installation safety (art. 13). The proposals are illustrative of the role these issues play for States sharing international watercourse systems and for the reasonable and effective management of such watercourses. Among the water-related hazards taken up for examination in the third report are: *floods* and flood control;[62] *ice conditions,* concerning which it is stressed that "the problem of damage from ice ranks with floods as a concern to many system States located in the northern latitude";[63] *drainage* problems, concerning which it is stressed that measures "to improve or ensure adequate drainage" have been the subject matter of "a good number of international agreements";[64] *flow obstructions,* either man-made, such as dams, locks or other installations, or caused by natural forces, such as landslides, earthquakes, sedimentation and log-jams, which may constitute a constant hazard in a great number of international watercourses;[65] *avulsion,* an occurrence which takes place when a watercourse precipitously abandons its original river bed and "is redirected across-country";[66] *sedimentation (siltation)* which, it is emphasized, is frequently one of the main problems of international watercourse systems:

> ... As this sediment load is shifted continually downstream, reservoirs are gradually filled in, spawning beds may be smothered, water supply intakes and treatment plants become clogged or damaged, channels silt up, decreasing the depth of the fairway and harbours, light transmission essential for aquatic life is reduced and recreational uses are spoiled. Costly dredging and filtration efforts are engaged in and are frequently overwhelmed ... .[67]

Erosion is closely related to sedimentation. Control measures aim at the protection of river banks and adjacent land against erosion stemming from the forces of river currents and floods. Erosion is a main source of sedimentation. Thus control of erosion is closely related to that of sedimentation.[68] *Saline intrusion,* i.e. the penetration of sea water upstream from the mouth of a watercourse and likewise into groundwater aquifers, "is a serious 'harmful effect' in a number of international watercourse systems".[69] Concerning *drought and other natural hazards,* the United Nations Water Conference drew attention to the fact that "the negative economic impact of water-related natural disasters in developing countries was greater than the total value of all the bilateral and multilateral assistance given to these countries".[70] For drought control as well as for flood control, the Conference stressed the obvious: that it was "necessary to plan ahead and co-ordinate the measures that need to be taken ...".[71] In the work necessary to mitigate the disastrous effects of drought, the co-ordinated development and management of water resources as well as drought forecasting on a long-term basis should be viewed as a key element. The present Special Rapporteur shares the view expressed in the third report that

> ... The Commission's articles should include a proper provision comprehending this concern with respect to international watercourse systems. ...[72]

Desertification or similar harmful changes to the environment through human activities or natural hazards may in many cases be closely related to the lack of effective administration and management of watercourse systems, in combination with other factors, such as excessive deforestation.[73] *Water-related health hazards* have become a matter of increased concern, especially to developing countries. Certain types of watercourse developments may unfortunately have increased the in-

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[59] See the report of the first Special Raporteur, document A/CN.4/295 (see footnote 1 above), paras. 14-20; and the three reports of the Second Special Rapporteur: first report, document A/CN.4/320 (see footnote 4 above), para. 58; second report, document A/CN.4/332 and Add.1 (see footnote 13 above), paras. 46-47; third report, document A/CN.4/348 (see footnote 46 above), paras. 243-430.

[60] Document A/CN.4/332 and Add.1 (see footnote 13 above), para. 52.

[61] *Yearbook ... 1980,* vol. II (Part Two), p. 110.

[62] Document A/CN.4/348 (see footnote 46 above), paras. 339-349 and 372-374.

[63] *Ibid.,* paras. 350-352.

[64] *Ibid.,* paras. 353-358.

[65] *Ibid.,* paras. 359-364.

[66] *Ibid.,* para. 365.

[67] *Ibid.,* paras. 366-367.

[68] *Ibid.,* paras. 368-369.

[69] *Ibid.,* para. 370.

[70] *Report of the United Nations Water Conference ...* (see footnote 39 above), p. 112, part three, para. 100.

[71] *Ibid.,* p. 39, part one, recommendation 62.

[72] Document A/CN.4/348 (see footnote 46 above), para. 378.

[73] *Ibid.,* footnote 649.

cidence of water-related diseases. This increasingly grievous problem has been addressed in a number of system agreements and consultations concerning the management and administration of international watercourse systems.[74] As an example, the third report cites article VIII of the Treaty for Amazonian Co-operation of 3 July 1978, which provides:

> The Contracting Parties decide to promote co-ordination of the present health services in their rexpective Amazonian territories and to take other appropriate measures to improve the sanitary conditions in the region and perfect methods for preventing and combating epidemics.[75]

64. The provisions contained in article 13 proposed in the third report have been touched upon earlier (see paras. 45-54 above). They deal with the protection and safety of shared water resources and of constructions and installations in international watercourses. The article deals mainly with the question of terrorist acts, sabotage and situations relating to times of war or armed conflict. The present Special Rapporteur doubts whether it would be expedient to include an article along these lines in the present draft. There are, however, other aspects of safety and control that may have their rightful place in a draft convention, namely those pertaining to the general conditions and safety standards for the establishment, upkeep and management of installations and constructions; the methods for exercising technical control; establishment of reasonable public security routines, including the protection of sites, etc. Certain guidelines on these issues may be found in bilateral or multilateral agreements such as the Geneva Convention of 1923 relating to the development of hydraulic power affecting more than one State.[76]

65. On the basis of the work of the previous Special Rapporteur and the considerations developed in this report, the Special Rapporteur will propose the following outline for a draft convention:

Outline for a draft convention

CHAPTER I. INTRODUCTORY ARTICLES

Article 1. Explanation (definition) of the term "international watercourse system" as applied in the present Convention
Article 2. Scope of the present Convention
Article 3. System States
Article 4. System agreements
Article 5. Parties to the negotiation and conclusion of system agreements

CHAPTER II. GENERAL PRINCIPLES: RIGHTS AND DUTIES OF SYSTEM STATES

Article 6. The international watercourse system—a shared natural resource. Use of this resource
Article 7. Equitable sharing in the uses of an international watercourse system and its waters
Article 8. Determination of reasonable and equitable use
Article 9. Prohibition of activities with regard to an international watercourse system causing appreciable harm to other system States

CHAPTER III. CO-OPERATION AND MANAGEMENT IN REGARD TO INTERNATIONAL WATERCOURSE SYSTEMS

Article 10. General principles of co-operation and management
Article 11. Notification to other system States. Content of notification
Article 12. Time-limits for reply to notification
Article 13. Procedures in case of protest
Article 14. Failure of system States to comply with the provisions of articles 11 to 13
Article 15. Management of international watercourse systems. Establishment of commissions
Article 16. Collection, processing and dissemination of information and data
Article 17. Special requests for information and data
Article 18. Special obligations in regard to information about emergencies
Article 19. Restricted information

CHAPTER IV. ENVIRONMENTAL PROTECTION, POLLUTION, HEALTH HAZARDS, NATURAL HAZARDS, REGULATION AND SAFETY, USE PREFERENCES, NATIONAL OR REGIONAL SITES

Article 20. General provisions on the protection of the environment
Article 21. Purposes of environmental protection
Article 22. Definition of pollution
Article 23. Obligation to prevent pollution
Article 24. Co-operation between system States for protection against pollution. Abatement and reduction of pollution
Article 25. Emergency situations regarding pollution
Article 26. Control and prevention of water-related hazards
Article 27. Regulation of international watercourse systems
Article 28. Safety of international watercourse systems, installations and constructions
Article 29. Use preferences
Article 30. Establishment of international watercourse systems or parts thereof as protected national or regional sites

CHAPTER V. SETTLEMENT OF DISPUTES

Article 31. Obligation to settle disputes by peaceful means
Article 32. Settlement of disputes by consultations and negotiations
Article 33. Inquiry and mediation
Article 34. Conciliation
Article 35. Functions and tasks of the Conciliation Commission
Article 36. Effects of the report of the Conciliation Commission. Sharing of costs

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[74] In his third report (*ibid.*, footnote 510), the previous Special Rapporteur provided an excellent summary of water-related health hazards. The wide variety of water developments have increased the incidence of water-related diseases. The creation of ponds, reservoirs, irrigation and drainage canals as well as the widespread inadequacy of waste water disposal systems favour the persistence and spread of such diseases. In recent years new irrigation systems and reservoirs have provided ideal habitats for the snail, host of schistosomiasis. This debilitating disease of the intestinal and urinary tract affects an estimated 250 million people throughout the world. In some irrigation-project and reservoir areas, up to 80 per cent of the population is affected. There are numbers of other serious water-related diseases. These include malaria, filariasis (elephantiasis) and yellow fever transmitted by mosquitoes. Onchocerciasis (river blindness disease) is another water-related disease transmitted by flies; likewise paragonimiasis, transmitted by a snail. Poorly managed water resource development and the impact of urbanization on aquatic habitats and water quality contribute to the spread of these diseases. Diseases typical of waste water contaminated by faeces are cholera, typhoid fever, amoebic infections and bacillary dysentery. In the developing countries almost 1.5 billion persons are exposed to these diseases for lack of safe water supplies and human waste disposal facilities.

[75] The text of the Treaty was circulated to the General Assembly under the symbol A/35/580 (to be issued in United Nations, *Treaty Series*, No. 19194).

[76] See footnote 12 above.

CHAPTER III

Introductory articles
(Chapter I of the draft)

66. In chapter I of the draft articles, the Special Rapporteur deals with the introductory articles of the draft. Articles 2 to 5 correspond to articles 1 to 4 of the draft provisionally adopted by the Commission at its thirty-second session, in 1980. In article 1, the Special Rapporteur has made a first try at explaining (defining) the term "international watercourse system". In this attempt he has relied heavily on the note agreed on by the Commission "describing its tentative understanding of what was meant by the term 'international watercourse system' ".[77]

CHAPTER I.
INTRODUCTORY ARTICLES

Article 1. Explanation (definition) of the term "international watercourse system" as applied in the present Convention

1. An "international watercourse system" is a watercourse system ordinarily consisting of fresh water components, situated in two or more system States.

Watercourses which in whole or in part are apt to appear and disappear more or less regularly from seasonal or other natural causes such as precipitation, thawing, seasonal avulsion, drought or similar occurrences are governed by the provisions of the present Convention.

Deltas, river mouths or other similar formations with brackish or salt water forming a natural part of an international watercourse system shall likewise be governed by the provisions of the present Convention.

2. To the extent that a part or parts of a watercourse system situated in one system State are not affected by or do not affect uses of the watercourse system in another system State, such parts shall not be treated as part of the international watercourse system for the purposes of the present Convention.

Commentary to article 1

67. In this article the Special Rapporteur attempts to set forth an explanation (definition) of the term "international watercourse system" as applied in the present draft. The Commission's note "describing its tentative understanding of what was meant by the term 'international watercourse system' " is the basis for the present proposal.

68. One question with which the Special Rapporteur grappled was whether the criterion for an *international* watercourse system should be that its components "are situated in two or more States" or that "sovereignty" over the watercourse system was exercised by two or more States. The Special Rapporteur considered that the geographically-oriented criterion proposed by the Commission in the above-mentioned note was preferable to the criterion of sovereignty.

69. In the well-known Helsinki Rules, adopted on 20 August 1966 by the International Law Association,[78] the concept of an "international drainage basin" was formulated in articles I and II in the following terms:

Article I

The general rules of international law as set forth in these chapters are applicable to the use of the waters of an international drainage basin except as may be provided otherwise by convention, agreement or binding custom among the basin States.

Article II

An international drainage basin is a geographical area extending over two or more States determined by the watershed limits of the system of waters, including surface and underground waters, flowing into a common terminus.

70. Article III of the Helsinki Rules contained the following definition of a "basin State":

Article III

A "basin State" is a State the territory of which includes a portion of an international drainage basin.

71. For several reasons, the concept of "international drainage basin" met with opposition in the discussions both of the Commission and of the Sixth Committee of the General Assembly. Concern was expressed that "international drainage basin" might imply a certain doctrinal approach to all watercourses regardless of their special characteristics and regardless of the wide variety of issues and special circumstances of each case. It was likewise feared that the "basin" concept put too much emphasis on the land areas within the watershed, in-

[77] See footnote 48 above.

[78] See footnote 11 above.

dicating that the physical land area of a basin might be governed by the rules of international water resources law.

72. Consequently, the previous Special Rapporteur introduced the concepts of "international watercourse systems" and "system States". In that context, he stated that the term, "system" was believed preferable to the terms "basin" or "drainage basin", and distinct from them, primarily in that its focus was on the waters and their uses and their interdependencies. The term "watercourse system" was sufficiently comprehensive to include, in addition to rivers, lakes and tributaries, other components such as canals, streams, brooks and aquifers and groundwater. At the same time, it was sufficiently flexible to make it possible, in each concrete case and concrete problem area, to determine what components should be affected by the principles provided for in regard to international watercourse systems in general or in regard to a specific watercourse system. Furthermore, the concept of "watercourse system", according to the Special Rapporteur was a recognized concept employed in State practice and by specialists in and commentaries upon the topic.[79] It was so accepted by the Commission.

73. The explanation (definition) submitted in article 1 is of a purely descriptive nature. No legal rule or principle can be deduced from this article. The interdependence of the various components of an international watercourse system is the inevitable consequence of the very nature of things. In subsequent articles, principles of a legal nature will be proposed based on such interdependence, mainly in the form of framework principles.

74. In the view of the Special Rapporteur, it is advisable to mention expressly that the term "international watercourse system" includes watercourses that appear and disappear more or less regularly from seasonal or other natural causes. River beds will normally be obvious indications of such "seasonal" watercourses. In arid areas this type of watercourse may be of special significance. The Special Rapporteur likewise thought that express mention should be made in article 1 of deltas, river mouths and similar formations with brackish or salt water. These form in many instances not only a natural part but also a highly important part of an international watercourse system. Aside from the obvious question of navigational uses, such areas may be of great importance for other uses and be significant problem areas for other reasons as well, for example, as throughways for anadromous stocks of fish,[80] salt-water intrusion in aquifers and ground water, problems of sedimentation and flooding, etc.

75. The proposed paragraph 2 of article 1 corresponds to the first sentence of paragraph 3 of the "note" of the Commission (see para. 66 above).

Article 2. Scope of the present Convention

1. The present Convention applies to uses of international watercourse systems and of their waters for purposes other than navigation and to measures of administration, management and conservation related to the uses of those watercourse systems and their waters.

2. The use of the waters of international watercourse systems for navigation is not within the scope of the present Convention except in so far as other uses of the waters affect navigation or are affected by navigation.

Commentary to article 2

76. Article 2 corresponds verbatim to article 1 as provisionally adopted by the Commission at its thirty-second session, in 1980,[81] except for a minor addition in paragraph 1: the reference to "measures of conservation" has been expanded as follows: "measures of administration, management and conservation".[82]

Article 3. System States

For the purposes of the present Convention, a State in whose territory components/part of the waters of an international watercourse system exist[s] is a system State.

Commentary to article 3

77. Article 3 is taken verbatim from article 2 as provisionally adopted by the Commission at its thirty-second session, in 1980,[83] except that the Special Rapporteur proposes that the term "components" be substituted for the word "part". This possible change has been indicated as follows: "components/part". It may make the concept of "system State" somewhat clearer.

Article 4. System agreements

1. A system agreement is an agreement between two or more system States which applies and adjusts the provisions of the present Convention to the characteristics and uses of a particular international watercourse system or part thereof.

2. A system agreement shall define the waters to which it applies. It may be entered into with respect to an entire international watercourse system, or with respect to any part thereof or particular project, programme or use, provided that the use by one or more

[79] Document A/CN.4/348 (see footnote 46 above), para. 512.

[80] Article 66 of the United Nations Convention on the Law of the Sea of 1982 is evidence of the importance attached to questions pertaining to anadromous stocks of fish such as salmon and sea trout. See *Report of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No.E.84.V.3), document A/CONF.62/122.

[81] *Yearbook ... 1980*, vol. II (Part Two), p. 110.

[82] A brief commentary to this article may be found in the third report of the previous Special Rapporteur (document A/CN.4/348 (see footnote 46 above), paras. 15-16).

[83] *Yearbook ... 1980*, vol. II (Part Two), p. 111.

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.

Commentary to article 4

78. Article 4 corresponds verbatim to article 3 as provisionally adopted by the Commission at its thirty-second session, in 1980.[84] The general merits of the article seem obvious. The importance of the conclusion of system agreements for the effective and orderly administration, management and conservation of the wide variety of international watercourse systems, and the fair and equitable distribution of their resources to the system States, is further emphasized by the fact that the article on system agreements is placed among the introductory articles. The previous Special Rapporteur presented detailed comments on system agreements in his second report[85] and in his third report.[86] These questions have also been dealt with in chapter I of the present report (paras. 24-29).

Article 5. Parties to the negotiation and conclusion of system agreements

1. Every system State of an international watercourse system is entitled to participate in the negotiation of and to become a party to any system agreement that applies to that international watercourse system as a whole.

2. A system State whose use of the waters of an international watercourse system may be affected to an appreciable extent by the implementation of a proposed system agreement that applies only to a part of the system or to a particular project, programme or use is entitled to participate in the negotiation of such an agreement, to the extent that its use is thereby affected, pursuant to article 4 of the present Convention.

Commentary to article 5

79. Article 5 corresponds verbatim to article 4 as provisionally adopted by the Commission at its thirty-second session, in 1980.[87] The article has been dealt with briefly in chapter I of this report (paras. 30-31). The previous Special Rapporteur commented on the article in his second report.[88] There he dwelt, *inter alia*, on the meaning of the term "to an appreciable extent". He also dealt with the article in his third report.[89]

[84] *Ibid.*, p. 112.

[85] Document A/CN.4/332 and Add.1 (see footnote 13 above), paras. 69-104.

[86] Document A/CN.4/348 (see footnote 46 above), paras. 18-22.

[87] *Yearbook ... 1980*, vol. II (Part Two), p. 118.

[88] Document A/CN.4/332 and Add.1 (see footnote 13 above), paras. 105-123.

[89] Document A/CN.4/348 (see footnote 46 above), paras. 23-26.

CHAPTER IV

General principles: rights and duties of system States (Chapter II of the draft)

80. In this chapter, the Special Rapporteur deals with chapter II of the draft articles, that is with articles 6 to 9 pertaining to "General principles". It is a general principle that an international watercourse system must be considered as a shared natural resource that must be used and distributed in an equitable manner among the relevant system States (arts. 6 and 7). In article 8, the Special Rapporteur has attempted to lay down guidelines for the determination of what amounts to equitable and reasonable uses. In article 9, a corollary to articles 6 to 8 has been suggested, namely, that activities pertaining to an international watercourse system that cause appreciable harm to other system States are prohibited. The four articles have been drafted as general legal principles binding upon system States, unless otherwise provided for in this draft convention or in system State agreements, or otherwise. In the view of the Special Rapporteur, these articles give expression to prevailing principles of international law applicable to the rights and duties of co-riparian States of an international watercourse system.

CHAPTER II

GENERAL PRINCIPLES: RIGHTS AND DUTIES OF SYSTEM STATES

Article 6. The international watercourse system—a shared natural resource. Use of this resource

1. To the extent that the use of an international watercourse system and its waters in the territory of one system State affects the use of a watercourse system or its waters in the territory of another system State or other system States, the watercourse system and its waters are, for the purposes of the present Convention, a shared natural resource. Each system State is entitled

to a reasonable and equitable participation (within its territory) in this shared resource.

2. An international watercourse system and its waters which constitute a shared natural resource shall be used by system States in accordance with the articles of the present Convention and other agreements or arrangements entered into in accordance with articles 4 and 5.

Commentary to article 6

81. Article 6 sets out the main principle with regard to international watercourse systems, namely, that the system proper as well as its waters shall be regarded as a shared natural resource and constitute such a resource. In this shared natural resource each of the system States is entitled to a reasonable and equitable share. This basic principle, as laid down in article 6, is a codification of prevailing principles of international law following from customary international law, as evidenced by general State practice and general principles of law (including those laid down in Articles 1 and 2 of the Charter of the United Nations), and also following from the very nature of things.

82. The present formulation for article 6 is taken mainly from article 5 as provisionally adopted by the Commission at its thirty-second session, in 1980,[90] with some minor adjustments and amendments.

83. In the Helsinki Rules,[91] the principle is drafted in the following manner in article IV:

> Each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin.

84. The comment to this article includes the following pertinent observations:

> This article reflects the key principle of international law in this area that every basin State in an international drainage basin has the right to the reasonable use of waters of the drainage basin. It rejects the unlimited sovereignty position, exemplified by the "Harmon doctrine", which has been cited as supporting the proposition that a State has the unqualified right to utilize and dispose of the waters of an international river flowing through its territory; such a position imports its logical corollary, that a State has no right to demand continued flow from co-basin States.
>
> The Harmon doctrine has never had a wide following among States and has been rejected by virtually all States ... .[92]

85. A main starting-point for the drafting and application of the provisions contained in article 6 is not only the sovereignty of States but also the equality of States and their obligation to act in good faith towards each other, consonant with their territorial integrity, the development of friendly relations and good neighbourliness. The article is further based on the obvious: that an international watercourse system must be viewed as an integrated whole, and administered and dealt with in keeping with this concept in order that it may render the greatest possible service to the human communities and the environments that it serves.

86. In paragraph 1 of article 6, an additional proposal is made to the effect that each system State is entitled to reasonable and equitable participation—within its territory—in the benefits of the watercourse as a shared natural resource. The present Special Rapporteur shares the view expressed in the third report of the previous Special Rapporteur that the wording "equitable participation" is preferable to the words "equitable share", as used in article IV of the Helsinki Rules. The word "participation" conveys in a more appropriate form the dual aspect of a system State's "sharing": the "right to use", but also "the duty to contribute" to the necessary management and conservation of a watercourse system for the optimal distribution, in a reasonable and equitable manner, of the benefits to be derived from the international watercourse system.[93] Because of the infinite diversity of watercourse systems and the wide variety of uses and problems arising in that connection, system States should to the extent necessary conclude system agreements of a general or specific nature.

Article 7. Equitable sharing in the uses of an international watercourse system and its waters

An international watercourse system and its waters shall be developed, used and shared by system States in a reasonable and equitable manner on the basis of good faith and good-neighbourly relations with a view to attaining optimum utilization thereof consistent with adequate protection and control of the watercourse system and its components.

Commentary to article 7

87. Article 7 deals with certain aspects of the concept of "shared natural resource". From the natural unity of each international watercourse system follows the unity of purpose that system States must demonstrate in a spirit of "good faith and good-neighbourly relations". This also follows from established principles of international law, as evidenced by a number of bilateral and multilateral system agreements entered into in all regions of the world. Because of the natural diversities of watercourses and also the wide variety of interests, concerns and political circumstances, these principles must of necessity be couched in the form of "legal standards".

88. Inherent in this legal concept is the need and obligation of system States to co-operate in the development, use and sharing of an international watercourse system, and to do so in a reasonable and equitable manner. Only in such a framework of political will and practical co-operation will system States be able to attain the ultimate goal of the management and administration of

[90] *Yearbook ... 1980,* vol. II (Part Two), p. 120.

[91] See footnote 11 above.

[92] See the fairly detailed comments of the previous Special Rapporteur, in his third report, on the rejection of the Harmon doctrine (document A/CN.4/348 (see footnote 46 above), footnote 98).

[93] *Ibid.*, paras. 87-90.

an international watercourse system, namely, optimum utilization and the necessary control and protection of the watercourse system and its components. In order to attain these goals, system States must co-operate like neighbours in a spirit of good faith and friendly relations. In so doing in such an important and politically delicate area as the administration and management of an international watercourse system, they will further enhance and strengthen their good-neighbourly relations and, necessarily, the realization of the interdependence of States and the brotherhood of man.

89. Concretely, the administration and management of an international watercourse system—in spite of its highly political and delicate diplomatic nature—is essentially a practical task, constituting as often as not a day-to-day routine. This is a concrete task governed by the circumstances of each particular case. The variety and diversity of these special circumstances and details are legion. The task of the Commission in drafting these articles must first and foremost be to draft principles, some of them of an obligatory nature, by codifying already established principles of international law; others as legal ideas of a more progressive nature as guidelines or ideas for inclusion in bilateral or multilateral system agreements. In the opinion of the Special Rapporteur, the provisions laid down in article 7 belong to the first category of principles.

90. The previous Special Rapporteur demonstrated in his reports how international and national tribunals had applied these general principles to concrete cases.[94] Thus, in the award rendered in the *Lake Lanoux* case on 16 November 1957 in a dispute between France and Spain,[95] the arbitral tribunal held:

> ... The Tribunal considers that the upper riparian State, under the rules of good faith, has an obligation to take into consideration the various interests concerned, to seek to give them every satisfaction compatible with the pursuit of its own interests and to show that it has, in this matter, a real desire to reconcile the interests of the other riparian with its own.[96]

91. In this context, the arbitral tribunal stressed the obligation of co-riparian States to conduct real and effective negotiations. The tribunal emphasized that among the settlement procedures to be followed by co-riparian States negotiations played an important role. It also stressed that such negotiations

> cannot be reduced to purely formal requirements, such as taking note of complaints, protests or expressions of regret submitted by the lower riparian State.[97]

92. In the *Donauversinkung* case (1927), the Constitutional Court of Germany expressed the applicable principles of international law as follows:

> ... No State may substantially impair the natural use of [an international] river by its neighbour ... The application of this principle is governed by the circumstances of each particular case. The interests of the States in question must be weighed in an equitable manner against one another. One must consider not only the absolute injury caused to the neighbouring State, but also the relation of the advantage gained by one to the injury caused to the other.[98]

93. Various aspects of the general principle set out in article 7 will be dealt with more specifically in subsequent draft articles.

Article 8. Determination of reasonable and equitable use

1. In determining whether the use by a system State of a watercourse system or its waters is exercised in a reasonable and equitable manner in accordance with article 7, all relevant factors shall be taken into account, whether they are of a general nature or specific for the watercourse system concerned. Among such factors are:

(*a*) The geographic, hydrographic, hydrological and climatic factors together with other relevant circumstances pertaining to the watercourse system concerned;

(*b*) The special needs of the system State concerned for the use or uses in question in comparison with the needs of other system States, including the stage of economic development of all system States concerned;

(*c*) The contribution by the system State concerned of waters to the system in comparison with that of other system States;

(*d*) Development and conservation by the system State concerned of the watercourse system and its waters;

(*e*) The other uses of a watercourse system and its waters by the State concerned in comparison with the uses by other system States, including the efficiency of such uses;

(*f*) Co-operation with other system States in projects or programmes to attain optimum utilization, protection and control of the watercourse system and its waters;

(*g*) The pollution by the system State in question of the watercourse system in general and as a consequence of the particular use, if any;

(*h*) Other interference with or adverse effects, if any, of such use for the uses or interests of other system States including, but not restricted to, the adverse effects upon existing uses by such States of the watercourse system or its waters and the impact upon protection and control measures of other system States;

(*i*) Availability to the State concerned and to other system States of alternative water resources;

(*j*) The extent and manner of co-operation established between the system State concerned and other system States in programmes and projects concerning

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[94] Document A/CN.4/332 and Add.1 (see footnote 13 above), paras. 73-89; and document A/CN.4/348 (see footnote 46 above), paras. 44-48.

[95] See footnote 30 above. Large extracts from the award of the arbitral tribunal are reproduced in *Yearbook ... 1974*, vol. II (Part Two), pp. 194 *et seq.*, document A/5409, paras. 1055-1068.

[96] Para. 22 of the award.

[97] *Idem*.

[98] *Annual Digest of Public International Law Cases, 1927-1928* (London, 1931), vol. 4, case No. 86, p. 128, at p. 131.

the use in question and other uses of the international watercourse system and its waters in order to attain optimum utilization, reasonable management, protection and control thereof.

2. In determining, in accordance with paragraph 1 of this article, whether a use is reasonable and equitable, the system States concerned shall negotiate in a spirit of good faith and good-neighbourly relations in order to resolve the outstanding issues.

If the system States concerned fail to reach agreement by negotiation within a reasonable period of time, they shall resort to the procedures for peaceful settlement provided for in chapter V of the present Convention.

Commentary to article 8

94. In article 8, the Special Rapporteur has given an example of the factors that might be relevant in determining whether the provisions laid down in article 7 have been complied with in concrete cases. In drafting these proposals, the Special Rapporteur has used as precedents bilateral and multilateral system agreements,[99] the Helsinki Rules, and article 7 proposed in the third report submitted by the previous Special Rapporteur.[100]

95. The relevant provisions in article V of the Helsinki Rules[101] read:

1. What is a reasonable and equitable share ... is to be determined in the light of all the relevant factors in each particular case.

2. Relevant factors which are to be considered include, but are not limited to:

(*a*) the geography of the basin, including in particular the extent of the drainage area in the territory of each basin State;

(*b*) the hydrology of the basin, including in particular the contribution of water by each basin State;

(*c*) the climate affecting the basin;

(*d*) the past utilization of the waters of the basin, including in particular existing utilization;

(*e*) the economic and social needs of each basin State;

(*f*) the population dependent on the waters of the basin in each basin State;

(*g*) the comparative costs of alternative means of satisfying the economic and social needs of each basin State;

(*h*) the availability of other resources;

(*i*) the avoidance of unnecessary waste in the utilization of waters of the basin;

(*j*) the practicability of compensation to one or more of the co-basin States as a means of adjusting conflicts among uses; and

(*k*) the degree to which the needs of the basin State may be satisfied, without causing substantial injury to a co-basin State.

3. The weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors. ...

96. The factors mentioned in paragraph 1 of article 8 are not intended to be exhaustive but to serve as examples of certain main factors. It is equally obvious that the factors mentioned may not be applicable to a concrete case.

97. Paragraph 2 of article 8 provides for the duty to commence negotiations expeditiously and peacefully, in a spirit of good faith and good-neighbourly relations, in order to resolve the issues that have arisen as to the uses of the watercourse system. It goes without saying that any system State concerned may demand the opening of such negotiations. The Special Rapporteur therefore deemed it superfluous to mention this expressly.

98. The second part of paragraph 2 provides that the system States concerned are under an obligation to resort to available procedures for peaceful settlement in case the parties fail to reach a solution by negotiations. This obligation follows from general principles of international law, as laid down for example in Article 2, paragraphs 3 and 4, and in Article 33, of the Charter of the United Nations. Such procedures for peaceful settlement are also provided for in chapter V of this draft.

Article 9. Prohibition of activities with regard to an international watercourse system causing appreciable harm to other system States

A system State shall refrain from and prevent (within its jurisdiction) uses or activities with regard to a watercourse system that may cause appreciable harm to the rights or interests of other system States, unless otherwise provided for in a system agreement or other agreement.

Commentary to article 9

99. The principle laid down in article 9 is a basic rule of international law pertaining to international watercourse systems. Thus it is a codificaiton of an established principle of international law. In the Helsinki Rules[102] it is provided in article X, regarding pollution:

1. Consistent with the principle of equitable utilization of the waters of an international drainage basin, a State

(*a*) must prevent any new form of water pollution or any increase in the degree of water pollution in an international drainage basin which would cause *substantial injury** in the territory of a co-basin State, and

(*b*) should take all reasonable measures to abate existing water pollution in an international drainage basin to such an extent that *no substantial damage** is caused in the territory of a co-basin State. ...

100. The issue has been dealt with in a number of bilateral and multilateral system agreements and other arrangements. Thus, in the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), adopted on 16 June 1972,[103] principle 21 provides:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources ...

[99] See, for example, the agreements referred to in the third report of the previous Special Rapporteur (document A/CN.4/348 (see footnote 46 above), paras. 99-105); and in the report of the Secretary-General on the legal problems relating to the utilization and use of international rivers (*Yearbook ... 1974*, vol. II (Part Two), pp. 57-187, document A/5409, part II).

[100] Document A/CN.4/348 (see footnote 46 above), para. 106.

[101] See footnote 11 above.

[102] *Idem.*

[103] *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), chap. I.

but also that they have

> ... the responsibility to ensure that activities within their jurisdiction or control do not *cause damage** to the environment of other States or of areas beyond the limits of national jurisdiction.

The words "cause damage" are used without further qualification. Other treaties use the term "abuse of rights". This term was used as recently as in the United Nations Convention on the Law of the Sea,[104] article 300 of which deals with issues of "good faith and abuse of rights". In the Act of Asunción of 1971,[105] the States of the River Plate Basin decided, in resolution No. 25, paragraph 2, that "each State may use the waters in accordance with its needs provided that it causes *no appreciable damage** to any other State of the basin". The same term, "appreciable damage", was used in the Act of Santiago of 1971 concerning hydrologic basins,[106] and likewise in the Buenos Aires Declaration on water resources of 1971.[107] However, in the 1975 Statute for the Uruguay River concluded between Uruguay and Argentina,[108] it is provided in article 35 that the parties shall manage the land and forests, and use the ground water and the river's tributaries, in such a manner as not to "cause *appreciable harm** to the régime of the river or the quality of its waters". Other instruments use wording such as "detrimental to", "seriously to interfere with", "seriously modify", "significantly affect" or *perjuicio sensible*, etc.

101. The Special Rapporteur shares the view of the previous Special Rapporteur that the appropriate criterion in the matter is that expressed by the term "appreciable harm".[109]

[104] See footnote 80 above.

[105] Adopted on 3 June 1971 by the Fourth Meeting of Foreign Ministers of the countries of the River Plate Basin. Relevant extracts from this document are reproduced in *Yearbook ... 1974*, vol. II (Part Two), pp. 323-324, document A/CN.4/274, para. 326.

[106] Signed on 26 June 1971 by Argentina and Chile (*idem*, p. 324, para. 327).

[107] Signed on 9 July 1971 by Argentina and Uruguay (*idem*, pp. 324-325, para. 328).

[108] Signed on 26 February 1975. See Uruguay, Ministerio de Relaciones Exteriores, *Actos Internacionales Uruguay-Argentina, 1830-1980* (Montevideo, 1981), p. 593.

[109] Document A/CN.4/348 (see footnote 46 above), paras. 111-156. See also paras. 9-14 of the commentary to article 4 provisionally adopted by the Commission (*Yearbook ... 1980*, vol. II (Part Two), p. 119.

CHAPTER V

Co-operation and management in regard to international watercourse systems (Chapter III of the draft)

102. In this chapter, the Special Rapporteur deals with chapter III of the draft articles, comprising articles 10 to 19, pertaining to co-operation and management in regard to international watercourse systems.

103. It follows from the fact that an international watercourse system is a shared natural resource that co-operation between system States is essential for the effective management and administration of such watercourse systems and to secure optimum utilization of these invaluable resources and the reasonable and equitable sharing of them between system States. it has also been increasingly recognized that such inter-State and international co-operation must be institutionalized to a reasonable extent. However, some participants at the Interregional Meeting of International River Organizations, convened by the United Nations at Dakar in May 1981, expressed concern

> ... that, if international river and lake commissions were given too extensive responsibilities, the result would be a degree of supranational authority unacceptable to many Governments.[110]

[110] United Nations, *Experiences in the Development and Management of International River and Lake Basins*, Natural Resources/Water Series No. 10 (Sales No. E.82.II.A.17), p. 12, part one, "Report of the Meeting", para. 39.

104. However, both the United Nations Water Conference, convened at Mar del Plata in March 1977, and the aforementioned Dakar Interregional Meeting, stressed the importance of co-operation and of the establishment of the necessary organizations as a basis for such co-operation at the international and/or regional levels and for specific watercourse systems. Thus recommendation 85 of the Mar del Plata Action Plan provides:

> 85. Countries sharing water resources, with appropriate assistance from international agencies and other supporting bodies, on the request of the countries concerned, should review existing and available techniques for managing shared water resources and co-operate in the establishment of programmes, machinery and institutions necessary for the co-ordinated development of such resources. Areas of co-operation may with agreement of the parties concerned include planning, development, regulation, management, environmental protection, use and conservation, forecasting, etc. Such co-operation should be a basic element in an effort to overcome major constraints such as the lack of capital and trained manpower as well as the exigencies of natural resource development.[111]

105. The urgent need for technical and financial support for such institutional arrangements was repeatedly stressed at the above-mentioned conferences. Thus, in

[111] *Report of the United Nations Water Conference* ... (see footnote 39 above), p. 51, part one.

its conclusions, the Dakar Interregional Meeting of International River Organizations held that:

> 12. ... with a view to promoting greater co-operation between neighbouring States, and where the interested States request the establishment of new and strengthened institutional arrangements, it is desirable that the Secretary-General of the United Nations strengthen the support available within the Department of Technical Co-operation for Development to service the various needs for such organizations and of States concerned.[112]

106. In article 10, the Special Rapporteur proposes general provisions on co-operation and management. The question is reverted to in more detail in article 15, concerning management of international watercourse systems. Articles 11 to 14 deal with the obligation of a system State to notify others of plans for new projects, programmes or constructions pertaining to a watercourse system, the effects of protests concerning such plans and the effects of failure to follow the procedure outlined in these articles. These issues were dealt with by the previous Special Rapporteur in paragraphs 3 to 9 of article 8 proposed in his third report.[113] Articles 16 to 19 deal with issues pertaining to the collection, processing and dissemination of information and data.

CHAPTER III

CO-OPERATION AND MANAGEMENT IN REGARD TO INTERNATIONAL WATERCOURSE SYSTEMS

Article 10. General principles of co-operation and management

1. System States sharing an international watercourse system shall, to the extent practicable, establish co-operation with regard to uses, projects and programmes related to such watercourse system in order to attain optimum utilization, protection and control of the watercourse system. Such co-operation shall be exercised on the basis of the equality, sovereignty and territorial integrity of all system States.

2. System States should engage in consultations (negotiations) and exchange of information and data on a regular basis concerning the administration and management of such watercourse and other aspects of regional interest with regard to watercourse systems.

3. System States shall, when necessary, establish joint commissions or similar agencies or arrangements as a means of promoting the measures and objects provided for in the present Convention.

Commentary to article 10

107. The Special Rapporteur deems it essential at the outset of chapter III to state the general principle of co-operation among system States of an international watercourse. It follows from the concept of a shared natural resource and from the fact that every watercourse system in many respects constitutes an "indivisible unity" that such co-operation is necessary for the orderly use, administration and management of international watercourse systems. The previous Special Rapporteur expressed this principle in the following terms:

> A number of international organs have in recent years taken clear stands in favour of strengthened co-operation among system States in view of the perceived need for more rational utilization of the world's shared water resources. Thus the Committee on Natural Resources of the United Nations Economic and Social Council received a report from the Secretary-General which emphasized that a shift had taken place from the early period of minimal international co-ordination to a more active approach in light of "the rapid expansion of increasingly complex societies in most parts of the world. ... Multiple, often conflicting uses and much greater total demand have made imperative an integrated approach to river basin development in recognition of the growing economic as well as physical interdependencies across national frontiers".[114]

108. The present Special Rapporteur, in drafting a general principle on co-operation among system States, has deemed it advisable to refer to the established principle that such co-operation shall be exercised on the basis of the equality, sovereignty and territorial integrity of all system States.

109. In paragraph 2 of article 10, it has been deemed natural to refer to consultations (negotiations) and exchange of information and data on a regular basis as an essential part of the general principle of co-operation. These issues are dealt with in more detail, in the subsequent articles of chapter III of the draft.

110. The reference to joint commissions or similar agencies or arrangements reflects the widespread practice of co-riparian States to establish joint commissions or inter-State committees in multilateral or bilateral system agreements in order to activate and institutionalize the necessary co-operation among system States.[115] These issues are reverted to in more detail in article 15 below.

Article 11. Notification to other system States. Content of notification

1. Before a system State undertakes, authorizes or permits a project or programme or alteration or addition to existing projects and programmes with regard to the utilization, conservation, protection or management of an international watercourse system which may cause appreciable harm to the rights or interests of another system State or other system States, the system State concerned shall submit at the earliest possible date due notification to the relevant system State or system States about such projects or programmes.

2. The notification shall contain *inter alia* sufficient technical and other necessary specifications, information and data to enable the other system State or States to evaluate and determine as accurately as possible the

[112] United Nations, *Experiences in the Development and Management...* (see footnote 110 above), p. 15, part one, "Report of the Meeting", para. 49.

[113] Document A/CN.4/348 (see footnote 46 above), para. 156.

[114] *Ibid.*, para. 79.

[115] See *Yearbook ... 1974*, vol. II (Part Two), pp. 215-218, document A/5409, annex II, sects. B, C and D; and pp. 289-325, document A/CN.4/274, part two.

potential for appreciable harm of such intended project or programme.

Commentary to article 11

111. The principle of adequate notification laid down in article 11 is, in the view of the Special Rapporteur, an expression of a prevailing principle of international law. This principle of notification has been spelled out in some detail in this article and the following articles in order to concretize the obligations of system States that follow from the general principle. The principle of notifying other States should become effective not only where the system State plans new constructions, projects or programmes that may cause appreciable harm to the rights or interests of another system State, but also where alterations of or additions to existing constructions, projects or programmes may cause such harm.

112. It also seems obvious that such notification must contain adequate information, data and specifications so as to enable other system States to assess the potential for harmful effects as accurately as possible.

113. The obligation to notify other system States provided for in article 11 was formulated in the following manner in paragraph 2 of article XXIX of the Helsinki Rules.[116]

2. A State, regardless of its location in a drainage basin, should in particular furnish to any other basin State, the interests of which may be substantially affected, notice of any proposed construction or installation which would alter the regime of the basin in a way which might give rise to a dispute ... The notice should include such essential facts as will permit the recipient to make an assessment of the probable effect of the proposed alteration.

114. In its resolution on the utilization of non-maritime international waters (except for navigation), adopted at Salzburg in 1961, the Institute of International Law likewise provided, in article 5, that "works or utilizations" which seriously affect the possibility of utilization of the same waters by other States "may not be undertaken except after previous notice to interested States".[117] The principle of notification has also been laid down in a number of system State agreements.

115. A proposal similar to that in article 11 was made in article 8, paragraph 3, proposed by the previous Special Rapporteur in his third report.[118]

Article 12. Time-limits for reply to notification

1. In a notification transmitted in accordance with article 11, the notifying system State shall allow the receiving system State or States a period of not less than six months from the receipt of the notification to study and evaluate the potential for appreciable harm arising from the planned project or programme and to communicate its reasoned decision to the notifying system State.

2. Should the receiving system State or States deem that additional information, data or specifications are needed for a proper evaluation of the problems involved, they shall inform the notifying system State to this effect as expeditiously as possible. Justifiable requests for such additional data or specifications shall be met by the notifying State as expeditiously as possible and the parties shall agree to a reasonable extension of the time-limit set forth in paragraph 1 of this article for the proper evaluation of the situation in the light of the available material.

3. During the time-limits stipulated in paragraphs 1 and 2 of this article, the notifying State may not initiate the project and programme referred to in the notification without the consent of the system State or system States concerned.

Commentary to article 12

116. Inherent in the principle of notification is the obligation to allow the recipient system State or States a reasonable time to study and assess the information received and the possible effects for such other State or States of the planned project or programme. It is equally reasonable to give recipient States the possibility to request additional necessary information and data. In cases where this is obviously practical, a reasonable extension of the time-limit must be granted. It seems equally reasonable that the notifying State should not be able to work on the planned project or programme before the time-limit provided for has expired, unless the recipient State or States agree to it.

117. Article XXIX, paragraph 3, of the Helsinki Rules[119] provides:

3. A State providing the notice ... should afford to the recipient *a reasonable period of time** to make an assessment of the probable effect of the proposed construction or installation and to submit its views thereon to the State furnishing the notice.

118. The criterion of "a reasonable period of time" would reflect a somewhat flexible time criterion in a general principle of law pertaining to notification. In his third report, in article 8, paragraph 4, the previous Special Rapporteur proposed that the reference to "a reasonable period of time" be replaced by a reference to a period of not less than six months.[120] The present Special Rapporteur deems it advantageous to concretize the time-limit in this manner. He has consequently included in article 12, paragraph 1, the reference to "a period of not less than six months", but has added the words "from the receipt of the notification".

119. Nevertheless, the criterion "a reasonable period of time" would still be the basic guideline in international law. This is inherent in the term "not less than six months". Six months has been proposed as a reasonable

[116] See footnote 11 above.

[117] See *Annuaire de l'Institut de droit international, 1961* (Basel, 1962), vol. 49, part II, pp. 370-373. The text of the resolution is reproduced in *Yearbook ... 1974*, vol. II (Part Two), p. 202, document A/5409, para. 1076.

[118] Document A/CN.4/348 (see footnote 46 above), para. 156.

[119] See footnote 11 above.

[120] Document A/CN.4/348 (see footnote 46 above), para. 156.

minimum period. In complicated cases it may very well prove to be too short for an adequate assessment of the information and data contained in a notification and of the implications of a planned project or programme for a recipient State. In such cases, a six-month period may not correspond to "a reasonable period of time", and should be prolonged accordingly.

Article 13. Procedures in case of protest

1. If a system State having received a notification in accordance with article 12 informs the notifying State of its determination that the project or programme referred to in the notification may cause appreciable harm to the rights or interests of the State concerned, the parties shall without undue delay commence consultations and negotiations in order to verify and determine the harm which may result from the planned project or programme. They should as far as possible arrive at an agreement with regard to such adjustments and modifications of the project or programme or agree to other solutions which will either eliminate the possible causes for any appreciable harm to the other system State or otherwise give such State reasonable satisfaction.

2. If the parties are not able to reach such agreement through consultations and negotiations within a reasonable period of time, they shall without delay resort to the settlement of the dispute by other peaceful means in accordance with the provisions of the present Convention, system agreements or other relevant agreement or arrangement.

3. In cases where paragraph 1 of this article applies and the outstanding issues have not been resolved by agreement between the parties concerned, the notifying State shall not proceed with the planned project or programme until the provisions of paragraph 2 have been complied with, unless the notifying State deems that the project or programme is of the utmost urgency and that a further delay may cause unnecessary damage or harm to the notifying State or other system States.

4. Claims for damage or harm arising out of such emergency situations shall be settled in good faith and in accordance with friendly neighbourly relations by the procedures for peaceful settlement provided for in the present Convention.

Commentary to article 13

120. Article 13 deals with the situation where a recipient system State determines that the project or programme planned by the notifying system State may cause appreciable harm to its interests. Within the time-limit laid down in the notification in accordance with article 12 or agreed upon between the parties, it must inform the notifying State of its determination that the planned project or programme may cause "appreciable harm" to its interests and, within a reasonable time-limit, give the reasons for this determination.

121. In a somewhat different form, this principle was also laid down by the previous Special Rapporteur in article 8, paragraph 5, contained in his third report.[121] The same idea is conveyed in article XXIX, paragraph 3, of the Helsinki Rules, which states that the recipient system State having received such "notice" shall "submit its views thereon to the State furnishing the notice" (see para. 117 above).

122. The obligation of system States to commence consultations and negotiations concerning these issues without undue delay follows from general provisions of international law and also from other provisions of this draft convention (see paras. 24-26 above).

123. The purpose of these negotiations would first and foremost to be amend planned projects or programmes so as to eliminate the causes for any appreciable harm or otherwise to give a protesting system State reasonable satisfaction. The previous Special Rapporteur expressed this as follows in his third report:

> The rule ... does not require modification to the extent of removing all harm to the other system State, but only such changes as will avoid impermissible *appreciable* harm ... Modern, multipurpose projects and programmes contemplate, under appropriate and agreed circumstances, the yielding of a use or benefit by one system State in order that the greater total benefits of the integral project or programme, or of a set of works and programmes, may be achieved. The system State constricting or even forgoing its particular use ... would ... be compensated for the value of its sacrifice; such compensation might be financial or it might be in the form of electricity supplies, flood control measures, enlargement of another use, or other good ...[122]

124. The provisions laid down in paragraph 2 of article 13, to the effect that the parties must resort to other peaceful means of settlement should the consultations and negotiations be unsuccessful, follow from basic principles of international law which are repeatedly invoked in the draft convention.

125. Paragraph 3 of article 13 provides that a notifying State shall not proceed with a planned project or programme until the outstanding issues that have arisen have been resolved. This principle is likewise accepted as a principle of international law in accordance with the concept of good faith and friendly neighbourly relations. It was expressed in the following manner by the Institute of International Law, in article 7 of its resolution on utilization of non-maritime international waters, adopted at Salzburg in 1961:

> During the negotiations, every State must, in conformity with the principle of good faith, refrain from undertaking the works or utilizations which are the object of the dispute or from taking any other measures which might aggravate the dispute or render agreement more difficult.[123]

126. The Special Rapporteur has proposed an exception to the main rule contained in paragraph 3, to the effect that a planned project or programme may be commenced provided that the following two conditions are fulfilled: the programme or project must be "of the utmost urgency", and "a further delay may cause un-

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[121] *Ibid.*

[122] *Ibid.*, para. 162.

[123] See footnote 117 above.

necessary damage or harm to the notifying State or other system States".

127. The proposed paragraph 4 of article 13 is a corollary to such situations of urgency.

Article 14. Failure of system States to comply with the provisions of articles 11 to 13

1. If a system State having received a notification pursuant to article 11 fails to communicate to the notifying system State within the time-limits provided for in article 12 its determination that the planned project or programme may cause appreciable harm to its rights or interests, the notifying system State may proceed with the execution of the project or programme in accordance with the specifications and data communicated in the notification.

In such cases the notifying system State shall not be responsible for subsequent harm to the other system State or States, provided that the notifying State acts in compliance with the provisions of the present Convention and provided that it is not apparent that the execution of the project or programme is likely to cause appreciable harm to the other system State or States.

2. If a system State proceeds with the execution of a project or programme without complying with the provisions of articles 11 to 13, it shall incur liability for the harm caused to the rights or interests of other system States as a result of the project or programme in question.

Commentary to article 14

128. The provisions proposed in article 14 deal, in paragraph 1, with the failure of a recipient system State to communicate to the notifying system State its determination that a planned project or programme may cause appreciable harm to its interest within the prescribed time-limits. The previous Special Rapporteur dealt with this issue in his third report, in article 8, paragraph 6.[124]

129. In paragraph 2 of article 14, the Special Rapporteur deals with the issues arising if a system State proceeds with the execution of a project without transmitting the prescribed notifications to other system States. The consequence of such failure will be that the system State is liable for any harm caused to other system States as a result of the project or programme in question. The previous Special Rapporteur proposed this principle in his third report, in article 8, paragraph 9.[125]

130. Acute emergency situations are not covered by the provisions of article 14, paragraph 2. Whether these provisions and the provisions of article 13, especially paragraph 3, shall apply to such situations must depend on the special circumstances of the emergency.

[124] Document A/CN.4/348 (see footnote 46 above), para. 156.

[125] *Ibid.*

Article 15. Management of international watercourse systems. Establishment of commissions

1. System States shall, where it is deemed advisable for the rational administration, management, protection and control of an international watercourse system, establish permanent institutional machinery or, where expedient, strengthen existing organizations or organs in order to establish a system of regular meetings and consultations, to provide for expert advice and recommendations and to introduce other decision-making procedures for the purposes of promoting optimum utilization, protection and control of the international watercourse system and its waters.

2. To this end system States should establish, where practical, bilateral, multilateral or regional joint watercourse commissions and agree upon the mode of operation, financing and principal tasks of such commissions.

Such commissions may, *inter alia*, have the following functions:

(*a*) To collect, verify and disseminate information and data concerning utilization, protection and conservation of the international watercourse system or systems;

(*b*) To propose and institute investigations and research concerning utilization, protection and control;

(*c*) To monitor on a continuous basis the international watercourse system;

(*d*) To recommend to system States measures and procedures necessary for the optimum utilization and the effective protection and control of the watercourse system;

(*e*) To serve as a forum for consultations, negotiations and other procedures for peaceful settlement entrusted to such commissions by system States;

(*f*) To propose and operate control and warning systems with regard to pollution, other environmental effects of water uses, natural hazards or other hazards which may cause damage or harm to the rights or interests of system States.

Commentary to article 15

131. In the history of the administration and management of international watercourse systems, there has been a clear trend towards institutionalizing the machinery for such administration, management and control. This trend is manifested in the practice of States as well as in the work of United Nations organs. In his third report, the previous Special Rapporteur outlined this development in the following manner:

> Numerous international watercourse systems are now provided with permanent institutional machinery, tailored to the needs of the participating system States and the singularities of the shared water resources. These advances from *ad hoc* or sporadic negotiations and agreement-making through diplomatic channels to institutionalized collaboration involving data sharing, studies, analysis and projects and programmes, manifest the commitment of the parties to "manage" their shared resources technically and in a more integrated fashion than would otherwise be possible. These international river

and lake organizations vary widely in their capacities and competences, and have had a long history of development.[126]

132. The importance of institutionalizing the co-operation of States in water resource management was emphasized by the United Nations Conference on the Human Environment in its recommendation 51,[127] which reads as follows:

It is recommended that Governments concerned consider the creation of river-basin commissions or other appropriate machinery for co-operation between interested States for water resources common to more than one jurisdiction.

...

(*c*) Such arrangements, when deemed appropriate by the States concerned, will permit undertaking on a regional basis:

(i) Collection, analysis and exchanges of hydrologic data through some international mechanism agreed upon by the States concerned;

(ii) Joint data-collection programmes to serve planning needs;

(iii) Assessment of environmental effects of existing water uses;

(iv) Joint study of the causes and symptoms of problems related to water resources, taking into account the technical, economic and social considerations of water quality control;

(v) Rational use, including a programme of quality control, of the water resource as an environmental asset;

(vi) Provision for the judicial and administrative protection of water rights and claims;

(vii) Prevention and settlement of disputes with reference to the management and conservation of water resources;

(viii) Financial and technical co-operation of a shared resource;

(*d*) Regional conferences should be organized to promote the above considerations.

133. At the Interregional Meeting of International River Organizations, held in Dakar in May 1981, the importance of establishing international agencies to conduct and co-ordinate co-operation among system States was likewise emphasized. In a working paper evaluating its experiences, the International Joint Commission of Canada and the United States recommended the following principles for the establishment of joint watercourse commissions:

(*a*) The provision of an ongoing, permanent joint Commission, within which there is absolute parity between countries in spite of the very significant disparity in the size of their populations and of their economies. Thus Governments are assured that the Commission will provide a balanced forum within which issues can be resolved;

(*b*) The provision that the Commission establish its own rules of procedure ...;

(*c*) The development of a Commission structure ... to provide a broad network within which a great deal of information can be exchanged formally and informally between Governments. The structure provides a forum which encourages officials with similar responsibilities ... to work together and to know one another to a greater extent than they would were the Commission not in existence ...;

(*d*) The development of a Commission process that permits the Governments to depoliticize issues that are difficult to resolve. It often acts as a buffer between the two parties ... The process of joint fact-finding generally provides Governments with a common data base ...;

(*e*) Provision of a mechanism which can alert Governments to matters of concern that may or may not be fully appreciated by Governments. Thus the Commission plays a part in assisting Governments in the process of notice and consultation, regarding proposed activities in one country which may have adverse impacts in the other country.[128]

134. In addition to the general provisions proposed in paragraph 1 of article 15, the Special Rapporteur has tried to reflect the concerns referred to above in paragraph 2 of the article. He has refrained from proposing suggestions as to how such commissions, joint arrangements or joint projects and programmes should be financed and how costs should be distributed among system States. These highly complicated questions were extensively discussed at the Dakar Meeting. But, as stated in the report of the Meeting:

The debate brought out difficulties even in the calculation of benefits and costs (including environmental costs). Apart from criteria for apportionment in joint projects, references were made, for example, to the relative impact of inflation on different components, problems of choosing commodity price levels (as in calculation of irrigation benefits) and those of exchange rates for currencies of participating States; other problems mentioned included "lag factors" with components of multipurpose projects coming into use at different time stages, and the difficulty in realistically evaluating growth of navigation and other uses made possible by proposed major projects in developing regions.[129]

135. The conclusions drawn at the Dakar Meeting with regard to topic III, "Economic and other considerations", included the following:

1. There is no one agreed or universally applicable methodology or formula for apportioning benefits and costs. The allocation, which is thus left flexible, should follow principles of equity, taking into account the nature of the works to be undertaken, the benefits and utilization which each receives, and the rights, needs and possibilities of each participant. It was further suggested that competent United Nations bodies could ... elaborate basic principles and methods as a guide for basin commissions and Member States ...

2. Views on cost allocation procedures were divided. It was recognized that since each basin case tends to be unique, allocation norms have to be worked out in each case, taking into account the conclusions under the previous point.[130]

136. It follows from the foregoing that little or no guidance can be had from bilateral or multilateral agreements or specific arrangements pertaining to concrete projects, programmes or issues. In some cases concerning the development of hydroelectric power plants jointly by two system States, a 50-50 formula has been applied for the distribution of benefits and costs. But different formulae are not infrequent. The 50-50 formula may also be encountered with regard to other uses, such as irrigation. A number of treaties or agreements refer to equity, to the sharing of the waters on a just and reasonable basis, to principles of international law, to common agreement in each individual case, to the equitable share, etc., which shows that no concrete formula can possibly be extracted from State practice and that allocation norms must be worked out in each case, taking into consideration the special circumstances and features of the case in question.

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[126] *Ibid.*, para. 453.

[127] *Report of the United Nations Conference on the Human Environment* ... (see footnote 103 above), chap. II, "Action Plan for the Human Environment".

[128] United Nations, *Experiences in the Development and Management* ... (see footnote 110 above), p. 202, part three, "Selected papers prepared by international river organizations ...".

[129] *Ibid.*, p. 16, part one, "Report of the Meeting", para. 54.

[130] *Ibid.*, p. 19, para. 69.

137. The previous Special Rapporteur dealt with the question of institutional arrangements in article 15, proposed in his third report.[131]

Article 16. Collection, processing and dissemination of information and data

1. In order to ensure the necessary co-operation between system States, the optimum utilization of a watercourse system and a fair and reasonable distribution of the uses thereof among such States, each system State shall to the extent possible collect and process the necessary information and data available within its territory of a hydrological, hydrogeological or meteorological nature as well as other relevant information and data concerning, *inter alia,* water levels and discharge of water of the watercourse, ground water yield and storage relevant for the proper management thereof, the quality of the water at all times, information and data relevant to flood control, sedimentation and other natural hazards and relating to pollution or other environmental protection concerns.

2. System States shall to the extent possible make available to other system States the relevant information and data mentioned in paragraph 1 of this article. To this end, system States should to the extent necessary conclude agreements on the collection, processing and dissemination of such information and data. To this end, system States may agree that joint commissions established by them or special (regional) or general data centres shall be entrusted with collecting, processing and disseminating on a regular and timely basis the information and data provided for in paragraph 1 of this article.

3. System States or the joint commissions or data centres provided for in paragraph 2 of this article shall to the extent practicable and reasonable transmit to the United Nations or the relevant specialized agencies the information and data available under this article.

Commentary to article 16

138. It is generally recognized that the collection, processing and dissemination of information and data are essential for the effective management and control of international watercourse systems; such collection and exchange of information and data are an essential part of an integrated water system approach by system States and of the co-operation needed for such an approach.

139. Thus, at the 1981 Dakar Interregional Meeting, the participants concluded, in respect of topic II, "Progress in co-operative arrangements":

> 11. An adequate and reliable data base is deemed indispensable to rational planning and project and programme execution. Since data gathering, processing and dissemination for complex shared water resource systems is costly and is a continuous process, it is more than normally important that the system States agree quite specifically on the kinds of data needed for different purposes ... With respect to the basic hydrologic data and operational information, however, a free and ample flow on a timely basis is called for at all times.[132]

140. They furthermore concluded:

> 12. In light of the desirability of intensifying exchange of information and experience among international river or lake organizations in various regions, and with a view to promoting greater co-operation between neighbouring States, and ... the establishment of new or strengthened institutional arrangements, it is desirable that the Secretary-General of the United Nations strengthen the support available within the Department of Technical Co-operation for Development to service the various needs of such organizations and of States concerned.[133]

141. At its forty-eighth Conference, held at New York in 1958, the International Law Association adopted the following recommendation with regard to exchange of data and information:

> 3. Co-riparian States should make available to the appropriate agencies of the United Nations and to one another hydrological, meteorological and economic information, particularly as to stream flow, quantity and quality of water, rain and snow fall, water tables and underground water movements.[134]

142. In article XXIX of the Helsinki Rules,[135] the International Law Association formulated, in paragraph 1, the following additional rule:

> 1. With a view to preventing disputes from arising between basin States ..., it is recommended that each basin State furnish relevant and reasonably available information to the other basin States concerning the waters of a drainage basin within its territory and its use of, and activities with respect to, such waters.

143. In the Mar del Plata Action Plan, the importance of co-operation with international organizations in regard to the collection and exchange of river data is emphasized in recommendation 93 (*g*):

> (*g*) The United Nations system should be fully utilized in reviewing, collecting, disseminating and facilitating exchange of information and experiences on this question. The system should accordingly be organized to provide concerted and meaningful assistance to States and basin commissions requesting such assistance.[136]

144. A number of bilateral and multilateral treaties contain provisions concerning the collection and dissemination of information and data.[137] The previous Special Rapporteur dealt with the question in chapter IV of his first report,[138] in his second report,[139] and extensively in his third report, which included a proposed article 9 on the question.[140]

145. Article 16 contains general provisions on the collection, processing and dissemination of information

[131] Document A/CN.4/348 (see footnote 46 above), paras. 452-471.

[132] United Nations, *Experiences in the Development and Management* ... (see footnote 110 above), p. 15, "Report of the Meeting", para. 49.

[133] *Ibid.*

[134] ILA, *Report of the Forty-eighth Conference, New York, 1958,* (London, 1959), p. ix.

[135] See footnote 11 above.

[136] *Report of the United Nations Water Conference* ... (see footnote 39 above), p. 54, part one.

[137] See the third report of the previous Special Rapporteur, document A/CN.4/348 (see footnote 46 above), paras. 218-229.

[138] Document A/CN.4/320 (see footnote 4 above), paras. 111-136.

[139] Document A/CN.4/332 and Add.1 (see footnote 13 above), paras. 124-139.

[140] Document A/CN.4/348 (see footnote 46 above), paras. 187-230.

and data. Provisions on special requests for information and data are proposed in article 17. Article 18 contains provisions on the obligation to provide information about emergencies and article 19 has rules on restricted information.

146. According to paragraph 1 of article 16, each system State shall to the extent possible collect and process relevant information and data available within its territory as well as information and data pertaining to the international watercourse system concerned. The limitations and this obligation inherent in the words "to the extent possible" refer not only to factual possibilities but also to the fact that this obligation must be within reason, economically as well as otherwise. The enumeration made in the last part of paragraph 1 as to relevant information and data is not exhaustive.

147. The obligation to make such information and data available to other system States is provided for in paragraph 2. This obligation is likewise tempered by the criterion "to the extent possible". Paragraph 2 also proposes the conclusion of special agreements concerning the collection, processing and dissemination of information and data and the possibility of entrusting such tasks to joint commissions or other data centres.

148. Paragraph 3 of the article provides that the information and data thus collected and processed should be made available to the relevant agencies of the United Nations. This is a corollary to the tasks entrusted to the relevant United Nations agencies to assist system States by providing information and data and by affording them technical or expert assistance in general, or for special projects or problems.

Article 17. Special requests for information and data

If a system State requests from another system State information and data not covered by the provisions of article 16 pertaining to the watercourse system concerned, the other system State shall upon the receipt of such a request use its best efforts to comply expeditiously with the request. The requesting State shall refund the other State the reasonable costs of collecting, processing and transmitting such information and data, unless otherwise agreed.

Commentary to article 17

149. The provisions contained in this article were proposed by the previous Special Rapporteur in his third report in article 9, paragraph 1, second sentence.[141]

Article 18. Special obligations in regard to information about emergencies

A system State should by the most rapid means available inform the other system State or States concerned of emergency situations or incidents of which it has gained knowledge and which have arisen in regard to a shared watercourse system—whether inside or outside its territory—which could result in serious danger of loss of human life or of property or other calamity in the other system State or States.

Commentary to article 18

150. The obligation that would follow from this proposal with regard to emergencies of a more serious nature would also follow from the principle of good faith and good-neighbourly relations. The Special Rapporteur has been in doubt whether he should apply the term "shall" or "should" in laying down this special obligation. His preliminary reaction has been to apply the word "should", but not in order to weaken the obligation to inform other States. This special obligation has strong moral and humanitarian overtones which ought to carry more weight than a narrow legal obligation. The Special Rapporteur considered that use of the word "should" would more appropriately convey this meaning and purpose. In addition, specific early warning machinery should be agreed upon and elaborated in specific areas of watercourses where such emergencies might arise. The previous Special Rapporteur dealt with these issues in article 9, paragraph 7, proposed in his third report.[142]

Article 19. Restricted information

1. Information and data the safeguard of which a system State considers vital for reasons of national security or otherwise need not be disseminated to other system States, organizations or agencies. A system State withholding such information or data shall co-operate in good faith with other system States in furnishing essential information and data to the extent practicable on the issues concerned.

2. Where a system State for other reasons considers that the dissemination of information or data should be treated as confidential or restricted, other system States shall comply with such a request in good faith and in accordance with good-neighbourly relations.

Commentary to article 19

151. These questions were dealt with by the previous Special Rapporteur in article 9, paragraph 6, proposed in his third report. By way of commentary he stated, *inter alia:*

> ... The very real needs in the information and data field when dealing with shared water resources must here be balanced against ... [the] undeniable interest of the system State to retain confidentiality in sensitive circumstances. This sensitive area is not limited to strategic or military types of information ... The matter of "trade secrets", national or corporate, has also come up in this context, as has a reluctance to divulge certain aspects of economic planning or local socio-economic conditions ...[143]

[141] *Ibid.*, para. 230.

[142] *Ibid.*, paras. 230 and 241.

[143] *Ibid.*, para. 239.

CHAPTER VI

Environmental protection, pollution, health hazards, natural hazards, regulation and safety, use preferences, national or regional sites

(Chapter IV of the draft)

152. In this chapter the Special Rapporteur deals with environmental questions. In article 20, he proposes general provisions on the protection of the environment and in article 21 provisions on the purposes of such environmental protection of international watercourse systems. In articles 22 to 25, he deals with the special problem of pollution of international watercourse systems. Thus in article 22 a definition of pollution is proposed. Article 23 contains provisions establishing the obligation to prevent pollution. Article 24 deals with the special need of co-system States to co-operate in protective measures in order to prevent and reduce pollution. Article 25 has provisions dealing with emergency situations.

153. In articles 26 to 28, the Special Rapporteur makes proposals with regard to the prevention and abatement of other water-related hazards, mainly from natural causes such as floods, ice conditions and other obstructions, sedimentation, avulsion, deficient drainage and salt-water intrusion and the scourge of drought. Article 26 contains general provisions on the prevention and control of water-related hazards; article 27 deals with the regulation of international watercourses for such purposes. Article 28 contains provisions on safety precautions.

154. Article 29 deals with the issue of use preferences. Article 30 deals with concerns that have made themselves increasingly felt in recent years, namely, the question of the establishment of international watercourse systems or parts thereof as protected national or regional sites.

CHAPTER IV

ENVIRONMENTAL PROTECTION, POLLUTION, HEALTH HAZARDS, NATURAL HAZARDS, REGULATION AND SAFETY, USE PREFERENCES, NATIONAL OR REGIONAL SITES

Article 20. General provisions on the protection of the environment

1. System States—individually and in co-operation—shall to the extent possible take the necessary measures to protect the environment of a watercourse system from unreasonable impairment, degradation or destruction or serious danger of such impairment, degradation or destruction by reason of causes or activities under their control and jurisdiction or from natural causes that are abatable within reason.

2. System States shall—individually and through co-ordinated efforts—adopt the necessary measures and régimes for the management and equitable utilization of a joint watercourse system and surrounding areas so as to protect the aquatic environment, including the ecology of surrounding areas, from changes or alterations that may cause appreciable harm to such environment or to related interests of system States.

3. System States shall—individually and through co-ordinated efforts—take the necessary measures in accordance with the provisions of the present Convention and other relevant principles of international law, including those derived from the United Nations Convention on the Law of the Sea of 10 December 1982, to protect the environment of the sea as far as possible from appreciable degradation or harm caused by means of the international watercourse system.

Commentary to article 20

155. The pressure which modern technology has exerted on the natural environment of international watercourse systems and the concern to protect them from and to abate such pressures and harmful consequences are evidenced in a number of conventions and agreements of fairly recent date, not only on protection against pollution but also on broader environmental aspects.

156. Thus the European Water Charter of 1968[144] contains *inter alia* the following observations and recommendations on the conservation of nature and the natural resources of international watercourse systems:

...

Persuaded that the advance of modern civilization leads in certain cases to an increasing deterioration in our natural heritage;

Conscious that water holds a place of prime importance in that natural heritage;

...

Adopts and proclaims the principles of this Charter ...:

I. *There is no life without water. It is a treasure indispensable to all human activity*

...

Man depends on it for drinking, food supplies and washing, as a source of energy, as an essential material for production, as a medium for transport, and as an outlet for recreation which modern life increasingly demands.

...

[144] Adopted in 1967 by the Consultative Assembly and by the Committee of Ministers of the Council of Europe and proclaimed at Strasbourg on 6 May 1968; text reproduced in *Yearbook ... 1974*, vol. II (Part Two), pp. 342-343, document A/CN.4/274, para. 373.

VI. *The maintenance of an adequate vegetation cover, preferably forest land, is imperative for the conservation of water resources*

It is necessary to conserve vegetation cover, preferably forests, and wherever it has disappeared to reconstitute it as quickly as possible.

The conservation of forests is a factor of major importance for the stabilization of drainage basins and their water regime. ...

...

157. Mention may also be made of the following two examples of expression of concern not only about pollution but also about the environment in a broader context. In the Treaty on the River Plate and its maritime outlet of 1973,[145] the parties undertook to "protect and preserve the aquatic environment" in general "and, in particular, to prevent its pollution". In the 1975 Statute of the Uruguay River,[146] great emphasis was placed on environmental aspects. Thus article 35 provides:

The parties undertake to adopt the necessary measures to ensure that the management of land and forests and the use of groundwater and of the river's tributaries do not effect an alteration such as to cause appreciable harm to the regime of the river or the quality of its waters.

Article 36 further provides:

The parties shall, through the Commission, co-ordinate appropriate measures to prevent alteration of the ecological balance ...

158. At the United Nations Water Conference, in 1977, the issues of environment, health and pollution control were extensively debated. Emphasizing the environmental repercussions of large-scale water development projects and their possible adverse effects on human health, the Conference, in recommendation 35 of the Mar del Plata Action Plan, stressed the need "to evaluate the consequences which the various uses of water have on the environment, to support measures aimed at controlling water-related diseases, and to protect ecosystems".[147]

159. The question of environment was likewise extensively discussed at the 1981 Dakar Interregional Meeting. The debates were summed up as follows in the report of the Meeting:

There was considerable discussion on the requirements for environmental studies with stress on the positive—as well as negative—impacts that projects have on the environment. However, it was felt by many participants that the requirements in industrial countries for the amount of data collected, places too great a burden on planning if applied in developing countries. Although environmental impacts may sometimes take the form of long-term damage on the resource base, it was at the same time stressed that there are serious difficulties in transferring environmental experiences between ecological zones. Environmental concern must be harmonized with development.[148]

160. The Special Rapporteur has taken these various considerations into account in attempting to draft general provisions on the protection of the environment in paragraphs 1 and 2 of article 20.

161. Paragraph 3 of article 20 contains a reference to the obligations which States have undertaken in part XII of the United Nations Convention on the Law of the Sea of 1982,[149] concerning the "protection and preservation of the marine environment". The pertinent articles are articles 194, 197 and 207.

162. Thus article 194, on measures to prevent, reduce and control pollution of the marine environment, provides in paragraphs 1 and 5:

1. States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection.

...

5. The measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species or other forms of marine life.

163. Article 207, on pollution from land-based sources, provides in paragraph 1:

1. States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources, including rivers, estuaries, pipelines and outfall structures, taking into account internationally agreed rules, standards and recommended practices and procedures.

164. The provisions proposed in this report concerning the protection of the marine environment correspond in general to article 10, paragraph 8, proposed by the previous Special Rapporteur in his third report.[150] Paragraph 2 of that article contained a definition of "environmental protection". The present Special Rapporteur has found it unnecessary to include a definition of the term in the draft articles. In any event, he feels that the definition given in the above-mentioned article is too restrictive.

Article 21. Purposes of environmental protection

The measures and régimes established under article 20 shall, *inter alia*, be designed to the extent possible:

(*a*) To safeguard public health;

(*b*) To maintain the quality and quantity of the waters of the international watercourse system at the level necessary for the use thereof for potable and other domestic purposes;

(*c*) To permit the use of the waters for irrigation purposes and industrial purposes;

(*d*) To safeguard the conservation and development of aquatic resources, including fauna and flora;

(*e*) To permit to the extent possible the use of the watercourse system for recreational amenities, with special regard to public health and aesthetic considerations;

[145] *International Legal Materials* (Washington, D.C.), vol. XIII, No. 2 (1974), pp. 259-260; see also *Yearbook ... 1974*, vol. II (Part Two), p. 299, document A/CN.4/274, para. 121.

[146] See footnote 108 above.

[147] *Report of the United Nations Water Conference* ... (see footnote 39 above), p. 25, part one.

[148] United Nations, *Experiences in the Development and Management* ... (see footnote 110 above), p. 17, part one, para. 61.

[149] See footnote 80 above.

[150] Document A/CN.4/348 (see footnote 46 above), para. 312.

(f) To permit to the extent possible the use of the waters by domestic animals and wildlife.

Commentary to article 21

165. The enumeration given in article 21 is not intended to be exhaustive. Nor does it indicate any qualitative indication of the relative importance of the various uses. The importance of the various uses in regard to environmental protection may vary from watercourse to watercourse, and no indication of general priority of uses is possible or rational. The uses specifically mentioned in this article are to be found in other agreements as well.[151]

Article 22. Definition of pollution

For the purposes of the present Convention, "pollution" means any physical, chemical or biological alteration in the composition or quality of the waters of an international watercourse system through the introduction by man, directly or indirectly, of substances, species or energy which results in effects detrimental to human health, safety or well-being or detrimental to the use of the waters for any beneficial purpose or to the conservation and protection of the environment, including the safeguarding of the fauna, the flora and other natural resources of the watercourse system and surrounding areas.

Commentary to article 22

166. The definition of pollution here proposed corresponds to the definitions applied since the United Nations Conference on the Human Environment, held at Stockholm in June 1972. It is in all essentials the same definition as that proposed by the previous Special Rapporteur in article 10, paragraph 1, submitted in his third report.[152]

Article 23. Obligation to prevent pollution

1. No system State may pollute or permit the pollution of the waters of an international watercourse system which causes or may cause appreciable harm to the rights or interests of other system States in regard to their equitable use of such shared water resources or to other harmful effects within their territories.

2. In cases where pollution emanating in a system State causes harm or inconveniences in other system States of a less serious nature than those dealt with in paragraph 1 of this article, the system State where such pollution originates shall take reasonable measures to abate or minimize the pollution. The system States concerned shall consult with a view to reaching agreement with regard to the necessary steps to be taken and to the defrayment of the reasonable costs for abatement or reduction of such pollution.

3. A system State shall be under no obligation to abate pollution emanating from another system State in order to prevent such pollution from causing appreciable harm to a third system State. System States shall—as far as possible—expeditiously draw the attention of the pollutant State and of the States threatened by such pollution to the situation, its causes and effects.

Commentary to article 23

167. The obligation to prevent pollution of an international watercourse is now well established in international law, as evidenced by the practice of States in an increasing number of bilateral and multilateral instruments. Article 42 of the Statute on the utilization of the River Uruguay of 1975[153] gives a fair indication of the rules contained in such treaties. It provides:

> Each party shall be liable to the other for damage resulting from pollution caused by its own activities or by those of natural or juridical persons domiciled in its territory.

168. Article X of the Helsinki Rules[154] contains provisions on pollution of international watercourses to the following effect:

> 1. Consistent with the principle of equitable utilization of the waters of an international drainage basin, a State
>
> (*a*) must prevent any new form of water pollution or any increase in the degree of existing water pollution in an international drainage basin which would cause substantial injury in the territory of a co-basin State, and
>
> (*b*) should take all reasonable measures to abate existing water pollution in an international drainage basin to such an extent that no substantial damage is caused in the territory of a co-basin State.
>
> ...

169. The draft European convention on the protection of fresh water against pollution[155] annexed to recommendation 555, adopted on 12 May 1969 by the Consultative Assembly of the Council of Europe, provides in paragraph 1 of article 2:

> 1. Contracting States shall take measures to abate any existing pollution and to prevent any new form of water pollution or any increase in the degree of existing water pollution causing or likely to cause substantial injury or damage in the territory of any other contracting State. ...

170. In the draft European convention for the protection of international watercourses against pollution of 1974,[156] the *Ad Hoc* Committee of Experts proposed the following provisions:

Article 2

> Each contracting party shall endeavour to take, in respect of all surface waters in its territory, all measures appropriate for the reduction of existing water pollution and for the prevention of new forms of such pollution.

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[151] See in particular the draft European convention on the protection of fresh water against pollution, prepared in 1969 under the aegis of the Council of Europe (see footnote 155 below).

[152] Document A/CN.4/348 (see footnote 46 above), para. 312.

[153] See footnote 108 above.

[154] See footnote 11 above.

[155] Text reproduced in part in *Yearbook ... 1974*, vol. II (Part Two), pp. 344-346, document A/CN.4/274, para. 374.

[156] *Idem*, pp. 346-349, para. 377.

Article 3

1. Each contracting party undertakes, with regard to international watercourses, to take:

(*a*) all measures required to prevent new forms of water pollution or any increase in the degree of existing water pollution;

(*b*) measures aiming at the reduction of existing water pollution.

...

171. The three draft instruments here quoted seem to distinguish between two categories of pollution: existing pollution and new pollution. More recent developments indicate that such a distinction between old and new sources of pollution is not acceptable. Injurious pollution of an international watercourse system must not be permitted, whether the source of pollution has caused pollution over a period of time or is new. To pollute an international watercourse system so as to cause appreciable harm to other system States cannot acquire "the rank of a vested right".

172. In article 23, paragraph 1, the Special Rapporteur proposes that pollution causing appreciable harm to other system States shall be prohibited. Paragraph 2 of the article deals with pollution that is of a less serious nature. Even here the system State concerned must take reasonable measures to abate or minimize the pollution. In such cases, the question of defrayment of the reasonable cost may arise. The system States concerned must consult with a view to reaching agreement on the defrayment of such costs.

173. Paragraph 3 provides that a system State is under no obligation to abate pollution emanating from the territory of another State. But it should expeditiously draw the attention of the pollutant State and the States threatened by such pollution to the situation. The problems dealt with in article 23 were dealt with by the previous Special Rapporteur in article 10, paragraphs 3 and 4, proposed in his third report.[157]

Article 24. Co-operation between system States for protection against pollution. Abatement and reduction of pollution

1. System States of an international watercourse system shall co-operate through regular consultations and meetings or through their joint regional or international commissions or agencies with a view to exchanging on a regular basis relevant information and data on questions of pollution of the watercourse system in question and with a view to the adoption of the measures and régimes necessary in order to provide adequate control and protection of the watercourse system and its environment against pollution.

2. The system States concerned shall, when necessary, conduct consultations and negotiations with a view to adopting a comprehensive list of pollutants, the introduction of which into the waters of the international watercourse system shall be prohibited, restricted or monitored. They shall, where expedient, establish the procedures and machinery necessary for the effective implementation of these measures.

3. System States shall to the extent necessary establish programmes with the necessary measures and timetables for the protection against pollution and abatement or mitigation of pollution of the international watercourse system concerned.

Commentary to article 24

174. Article 24 spells out in a general manner the co-operation foreseen between system States for the control of and protection against pollution of a watercourse system. The practice of establishing lists concerning pollutants is endorsed in paragraph 2 of the article. In current practice at least two types of lists are established: a "black" list of pollutants, the introduction of which into the sea, rivers (or ground water) is prohibited, and a "grey" list of pollutants, the introduction of which is not absolutely prohibited but is nevertheless monitored. There exist in practice somewhat different approaches to categories of "lists" and to the contents of each "list".

175. The principles proposed in article 24 were dealt with by the previous Special Rapporteur in paragraphs 7, 10 and 11 of article 10 proposed in his third report.[158]

Article 25. Emergency situations regarding pollution

1. If an emergency situation arises from pollution or from similar hazards to an international watercourse system or its environment, the system State or States within whose jurisdiction the emergency has occurred shall make the emergency situation known by the most rapid means available to all system States that may be affected by the emergency together with all relevant information and data which may be of relevance in the situation.

2. The State or States within whose jurisdiction the emergency has occurred shall immediately take the necessary measures to prevent, neutralize or mitigate danger or damage caused by the emergency situation. Other system States should to a reasonable extent assist in preventing, neutralizing or mitigating the dangers and effects caused by the emergency and should be refunded the reasonable costs for such measures by the State or States where the emergency arose.

Commentary to article 25

176. Reference is made to the general provisions on emergencies proposed in article 18 above. The obligations laid down in article 25 are more far-reaching with regard to the legal duty to inform other States and the obligation to provide other system States with all relevant information and data. Paragraph 2 provides that other system States should to a reasonable extent assist in preventing, neutralizing or mitigating the dangers and

[157] Document A/CN.4/348 (see footnote 46 above), para. 312.

[158] *Ibid.*

effects caused by the "accident" that has caused the pollution emergencies. This would follow from the principle of good faith and friendly neighbourly relations. On the other hand, those States should be refunded the reasonable costs for such measures of prevention by the pollutant State.

Article 26. Control and prevention of water-related hazards

1. System States shall co-operate in accordance with the provisions of the present Convention with a view to the prevention and mitigation of water-related hazardous conditions and occurrences, as the special circumstances warrant. Such co-operation should, *inter alia*, entail the establishment of joint measures and régimes, including structural or non-structural measures, and the effective monitoring in the international watercourse system concerned of conditions susceptible of bringing about hazardous conditions and occurrences such as floods, ice accumulation and other obstructions, sedimentation, avulsion, erosion, deficient drainage, drought and salt-water intrusion.

2. System States shall establish an effective and timely exchange of information and data and early warning systems that would contribute to the prevention or mitigation of emergencies with respect to water-related hazardous conditions and occurrences relating to an international watercourse system.

Commentary to article 26

177. The Special Rapporteur considers that, in addition to the articles proposed above with regard to the general protection of the environment and protection from the abatement of pollution, it is appropriate to include an article on control and prevention of water-related hazards due mainly to natural causes such as floods, ice accumulation, sedimentation and siltation, avulsion, drainage problems, drought and salt-water intrusion. It is unfortunately a fact that too "many parts of the world are prone to hazards caused by extremes of water—floods and droughts—...".[159]

178. At the 1981 Dakar Interregional Meeting of International River Organizations, it was repeatedly stressed that the dangers and damage caused by floods and droughts were viewed with the utmost concern. These problems were summed up in the following manner in the conclusions relating to topic II, "Progress in co-operative arrangements":

> 5. The prevention and mitigation of floods, droughts and other hazards, natural and man-made, are increasingly of concern to the co-operating States because of the numerous changes that are taking place at accelerating rates within the watersheds; therefore new or strengthened activities must be undertaken to deal effectively with the detrimental effects of water-related hazards and conditions. The international river and lake organizations are appropriate bodies for initiating studies and recommending measures, contingency plans or warning systems, as well as for conducting the necessary ongoing review of conditions and of the adequacy of measures undertaken.[160]

179. At its fifty-fifth Conference, held at New York in 1972, the International Law Association adopted articles on flood control,[161] article 2 of which provides:

> Basin States shall co-operate in measures of flood control in a spirit of good neighbourliness, having due regard to their interests and well-being as co-basin States.

Article 3 provides that co-operation between co-basin States with respect to flood control should include *inter alia* collection and exchange of relevant data; planning and designing of relevant measures; execution of flood control measures; flood forecasting and communication of flood warnings. According to article 4, paragraph 1,

> 1. Basin States should communicate amongst themselves as soon as possible on any occasion such as heavy rainfalls, sudden melting of snow or other events likely to create floods and/or dangerous rises of water levels in their territory.

180. In a great number of system agreements concluded since the Second World War, system States have agreed on provisions aimed especially at measures for the prevention of floods, erosion and drought. Among such measures are exchange of information and data on high water, drifting ice or any other danger that may arise in rivers;[162] establishment of reporting services and the duty of the competent services "to remain in constant communication" in case of flood warnings until "the end of the danger is announced";[163] to "complete the necessary work to prevent ... changes in the course of the river as well as floods and erosion" and to "study and plan" new works which are necessary to establish necessary "permanent flood channels";[164] to remove obstacles to the natural flow of rivers;[165] to construct and strengthen dikes, and to install drainage systems and pumping stations.[166] A number of other examples are mentioned in the 1963 report of the Secretary-

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[159] H. M. Neghassi, "The Mar del Plata Action Plan", *UNITAR News* ... (see footnote 55 above), p. 15.

[160] United Nations, *Experiences in the Development and Management* ... (see footnote 110 above), p. 14, part one, "Report of the Meeting", para. 49.

[161] See ILA, *Report of the Fifty-fifth Conference, New York, 1972* (London, 1973), pp. xvi-xvii.

[162] See the Agreement of 4 April 1958 between Yugoslavia and Bulgaria concerning water economy questions, art. 8 (see *Yearbook ... 1974*, vol. II (Part Two), p. 121, document A/5409, para. 516).

[163] See the Treaty of 27 October 1956 between France and the Federal Republic of Germany concerning the settlement of the Saar question, art. 9 (*ibid.*, p. 185, document A/5409, para. 998).

[164] See the Exchange of Notes of 9 November and 21 December 1961 between Guatemala and Mexico constituting an agreement concerning the establishment of the International Commission on Boundaries and Waters (*ibid.*, p. 293, document A/CN.4/274, para. 70).

[165] See the Treaty of 15 February 1961 between Poland and the USSR concerning the régime of the Soviet-Polish frontier and co-operation and mutual assistance in frontier matters, art. 16, para. 3 (*ibid.*, p. 306, document A/CN.4/274, para. 181).

[166] See the Protocol of 19 January 1963 between Greece and Turkey concerning the final elimination of differences concerning the execution of hydraulic operations for the improvement of the bed of the River Meriç-Evros carried out on both banks (*ibid.*, p. 308, document A/CN.4/274, para. 206).

General and in his 1974 supplementary report,[167] as well as in the third report of the previous Special Rapporteur.[168]

181. In paragraph 1 of article 26, the Special Rapporteur proposes a general obligation of system States to co-operate in accordance with the provisions of this convention, in good faith and according to friendly neighbourly relations and within the bounds of the reasonable and possible, in order to prevent and mitigate the dangers of water-related hazards, mainly with a view to "natural hazards". The main hazards have been specifically mentioned but this enumeration is not meant as being exhaustive.

182. In paragraph 2, the Special Rapporteur has proposed an express reference to the timely exchange of information and data on such hazards and to this effect the establishment of early warning systems with respect to water-related hazards and occurrences.

183. The previous Special Rapporteur dealt with these issues in article 11 proposed in his third report.[169]

Article 27. Regulation of international watercourse systems

1. For the purposes of the present Convention, "regulation" means continuing measures for controlling, increasing, moderating or otherwise modifying the flow of the waters in an international watercourse system. Such measures may include, *inter alia*, the storing, releasing and diverting of water by means of dams, reservoirs, barrages, canals, locks, pumping systems or other hydraulic works.

2. System States shall co-operate in a spirit of good faith and good-neighbourly relations in assessing the needs and possibilities for water system regulations with a view to obtaining the optimum and equitable utilization of shared watercourse resources. They shall co-operate in preparing the appropriate plans for such regulations and negotiate with a view to reaching agreement on the establishment and maintenance—individually or jointly—of the appropriate regulations, works and measures and on the defrayal of the costs for such watercourse regulations.

Commentary to article 27

184. The effective regulation or "training" of international watercourse systems in order to obtain the optimum utilization and reasonable and equitable distribution of such shared resources is a main aim of all system agreements. In article 27, the Special Rapporteur has proposed a concretization of this obligation to co-operate with a view to achieving these ends through permanent or continuing measures, installations and machinery. As hereinbefore touched upon, it is, in the view of the Special Rapporteur, impossible to suggest a general formula for the defrayal of the costs of such measures because of the wide variety of situations pertaining to the different watercourse systems of the world and the possibility, necessity and desirability of regulating them. Co-system States must reach agreement with regard to these questions as well as with regard to all other problems of co-operation in these matters. The yardstick of good faith and friendly relations has to be applied also in these matters.

185. The previous Special Rapporteur dealt with the issue of regulation of international watercourses in article 12 proposed in his third report.[170]

Article 28. Safety of international watercourse systems, installations and constructions

1. System States shall employ their best efforts to maintain and protect international watercourse systems and the installations and constructions pertaining thereto.

2. To this end, system States shall co-operate and consult with a view to concluding agreements concerning:

(*a*) Relevant general and special conditions and specifications for the establishment, operation and maintenance of sites, installations, constructions and works of international watercourse systems;

(*b*) The establishment of adequate safety standards and security measures for the protection of the watercourse system, its shared resources and the relevant sites, installations, constructions and works from hazards and dangers due to the forces of nature, wilful or negligent acts or hazards and dangers created by faulty construction, insufficient maintenance or other causes.

3. System States shall as far as reasonable exchange information and data concerning the safety and security issues dealt with in this article.

Commentary to article 28

186. In article 13 proposed in his third report,[171] the previous Special Rapporteur dealt with the question of "Water resources and installation safety". In paragraph 1 of that article, he dealt with the question of the wilful poisoning of water resources and the prohibitions provided for in that context by Protocol I (art. 54, para. 2) and Protocol II (art.14) of 1977 of the 1949 Geneva Conventions for the protection of war victims.[172] In paragraphs 2 and 3, article 13 dealt with destruction and damage caused by military attack "during peacetime, or in time of armed conflict" on hydraulic installations, etc., and the prohibition of using such installations or facilities "in preparation for, or in the conduct of, offensive military operations".

[167] *Ibid.*, pp. 57 *et seq.*, document A/5409, part two; and pp. 289 *et seq.*, document A/CN.4/274, part two.

[168] Document A/CN.4/348 (see footnote 46 above), paras. 337-387.

[169] *Ibid.*, para. 379.

[170] *Ibid.*, para. 389.

[171] *Ibid.*, para. 415. See also paras. 390-340.

[172] See footnotes 53 and 54 above.

Paragraph 4 contained provisions for protection against "terrorist attacks of sabotage". Paragraph 5 provided that system States should "during times of armed conflict" establish warning systems in co-operation with other system States for the purpose of informing a system State or system States of the threat or occurrence of a water-related hazardous event stemming from the armed conflict. Such provisions are obviously called for. Nevertheless, the present Special Rapporteur has doubts about the expediency of including such provisions in the present draft. The two Protocols of the 1949 Geneva Conventions were agreed on after long and delicate negotiations. The Special Rapporteur fears that the inclusion of such provisions here might be considered as constituting an amendment or an addition to the two Protocols and thus renew the discussions on the principles and rules pertaining to international and internal armed conflicts. Thus, although being in favour of provisions along these lines, he hesitates to include them in his first draft until he has obtained the guidance of the Commission and of the Sixth Committee of the General Assembly. He has touched upon this issue earlier in the present report (see para. 46 above).

187. On the other hand, the Special Rapporteur deems it essential to include in the draft general provisions concerning the safety of international watercourse systems, their construction, operation and maintenance. Such proposals are contained in article 28 of the present draft. Paragraph 1 proposes that system States shall employ their best efforts to maintain and protect international watercourse systems. To this end, paragraph 2 (*a*) proposes that system States shall co-operate and consult with each other with a view to establishing general and specific conditions and specifications, such as rules and regulations, handbooks and operating and inspection manuals, etc., for the establishment, operation and maintenance of sites.

188. Paragraph 2 (*b*) provides for the establishment of the necessary safety standards and security measures to protect the watercourse system and its works, installations, etc., against natural hazards as well as "wilful or negligent acts". Also included in this formulation are acts of terrorism and sabotage. Reasonable measures must be taken to give the best possible protection. Even so, accidents may happen. It seems to be an unfortunate fact that even the best of protection and supervision cannot totally prevent damage caused, for example, by acts of terrorism or sabotage.

189. In his third report, the previous Special Rapporteur proposed in article 13, paragraph 6, the following provision:

> 6. Withholding, by diversion or other means, of water from a system State so as to place in jeopardy the survival of the civilian population or to imperil the viability of the environment is prohibited in peacetime and in time of armed conflict.[173]

190. The present Special Rapporteur has considered whether to include provisions along these lines in his proposed article 28. However, he has come to the conclusion that it is not advisable. He is of the opinion that it follows clearly from established principles of international law, as well as from the provisions of this draft, that such acts would be in flagrant violation of established principles pertaining to international watercourse systems, such as the principle of waters as a shared resource, the principle of reasonable and equitable use and distribution, the principle of close co-operation among system States in a spirit of good faith and of friendly, neighbourly relations. Thus the inclusion of a specific paragraph focusing on one somewhat atypical situation that forms part of a vast and difficult problem area might tend to weaken the protection given by the more general provisions of this draft. However, the attention of the Commission is drawn to the provisions of paragraph 6 of article 13 as proposed by the previous Special Rapporteur.

Article 29. Use preferences

1. In establishing systems or régimes for equitable participation in the utilization of an international watercourse system and its resources by all system States, no specific use or uses shall enjoy automatic preference over other equitable uses except as provided for in system agreements, other agreements or other legal principles and customs applicable to the watercourse system in question.

2. In settling questions relating to conflicting uses, the requirements for and the effects of various uses shall be weighed against the requirements for and effects of other pertinent uses with a view to obtaining the optimum utilization of shared watercourse resources and the reasonable and equitable distribution thereof between the system States, taking into account all considerations relevant to the particular watercourse system.

3. Installations and constructions shall be established and operated in such a manner as not to cause appreciable harm to other equitable uses of the watercourse system.

4. When a question has arisen with regard to conflicting uses or use preferences in an international watercourse system, system States shall, in conformity with the principles of good faith and friendly neighbourly relations, refrain from commencing works on installations, constructions or other watercourse projects or measures pertaining to the relevant conflicting uses which might aggravate the difficulty of resolving the questions at issue.

Commentary to article 29

191. Historically, navigation was the use on which the main interest was focused in early agreements between co-riparian States. Even today, navigation aspects are a main concern in regard to a number of international rivers. The sole or main emphasis on navigational issues has changed somewhat in recent years as other uses and interests have made themselves increasingly felt. This progressive shift in accent was expressed as follows in

[173] Document A/CN.4/348 (see footnote 46 above), para. 415.

the commentary of the International Law Association to article VI of the Helsinki Rules:[174]

Preferential use. Historically, navigation was preferred over other uses of water, irrespective of the later needs of the particular drainage basin involved. In the past twenty-five years, however, the technological revolution and population explosion, which have led to the rapid growth of non-navigational uses, have resulted in the loss of the former pre-eminence accorded navigational uses. Today, neither navigation nor any other use enjoys such a preference. A drainage basin must be examined on an individual basis and a determination made as to which uses are most important in that basin or, in appropriate cases, in portions of the basin.

192. In consequence, the International Law Association proposed the following principle in article VI:

A use or category of uses is not entitled to any inherent preference over any other use or category of uses.

193. The interrelationship between navigation and other uses in international watercourse systems where navigation is carried on or may be carried on was described by the previous Special Rapporteur, in his first report, in the following succinct manner:

... the impact of navigation on other uses of water and that of other uses on navigation must be addressed in the Commission's draft articles. Navigation requirements affect the quantity and quality of water available for other uses. Navigation may and often does pollute watercourses, and requires that certain levels of water be maintained; it further requires passages through and around barriers in the watercourse. The interrelationships between navigational and non-navigational uses of watercourses are so many that, on any watercourse where navigation is practised or is to be instituted, navigational requirements and effects and the requirements and effects of other water projects cannot be separated by the engineers and administrators entrusted with development of the watercourse. ...[175]

194. That view was shared by the Commission which, basing itself on a proposal by the previous Special Rapporteur, provisionally adopted the provisions contained in article 2, paragraph 2, of the present report (see para. 75 above):

2. The use of the waters of international watercourse systems for navigation is not within the scope of the present Convention except in so far as other uses of the waters affect navigation or are affected by navigation.

195. From this starting-point, however limited, it would follow that navigation may be affected by certain of the provisions of this draft. Thus the provisions contained in article 4, on system agreements, may be understood as implying that system agreements may include navigation among the uses regulated by such an agreement. Similarly, the provisions of article 5, by their very nature, may apply also to navigation. It must be equally clear that the provisions proposed in this report for article 6, pertaining to international watercourse systems as a shared natural resource, may also apply to navigational uses. This obvious assumption was succinctly stated by the previous Special Rapporteur as follows:

It will be noted that "use" in that article [article 6 in this report] is not limited to non-navigational uses, nor can it logically or properly be so limited. Though the specifics of regulation ... of the navigational uses are not to be taken up, the status of a shared resource comprehends conflicts between uses and the intimately related problems of, for example, pollution, environmental protection, hazards, public safety and improvement works ... Navigation is or may be involved in each of these aspects ...[176]

196. In article 29, the Special Rapporteur deals with "use preferences". Paragraph 1 provides that "no specific use or uses shall enjoy automatic preference over other equitable uses except as provided for in system agreements, other agreements or other legal principles or customs applicable to the watercourse system in question". These provisions apply to all uses, including navigation and its interrelationship with other uses.

197. Paragraph 2 of article 29, which concerns the question of settling conflicting uses, likewise provides that all relevant uses must be weighed against each other. Paragraphs 3 and 4 require no additional comments.

198. The previous Special Rapporteur dealt with these issues in article 14 (Denial of inherent use preference) proposed in his third report.[177]

Article 30. Establishment of international watercourse systems or parts thereof as protected national or regional sites

1. A system State or system States may—for environmental, ecological, historic, scenic or other reasons—proclaim a watercourse system or part or parts thereof a protected national or regional site.

2. Other system States and regional and international organizations or agencies should in a spirit of good faith and friendly neighbourly relations co-operate and assist such system State or States in preserving, protecting and maintaining such protected site or sites in their natural state.

Commentary to article 30

199. Environmental concern has made itself increasingly felt in countries throughout the word, often in connection with concern for the protection of the habitat for wildlife or with the demands of local ethnic groups or tribes to be allowed to keep their environment and mode of life intact. The protection of such rivers or river stretches may be a relatively recent extension of the conservation movement, but has proved in many countries to be a very forceful one. "It may be hoped that more and more States will act upon their awareness of the progressive loss of these priceless and, once spoiled, irretrievable parts of their heritage."[178]

[174] See footnote 11 above.

[175] Document A/CN.4/320 (see footnote 5 above), para. 61.

[176] Document A/CN.348 (see footnote 46 above), para. 437.

[177] *Ibid.*, para. 451.

[178] *Ibid.*, para. 519.

CHAPTER VII

Settlement of disputes
(Chapter V of the draft)

200. In this chapter, the Special Rapporteur deals with the settlement of disputes concerning the interpretation and application of the proposed convention. The obvious starting-point is the fundamental principles formulated in Article 2 of the United Nations Charter, especially in paragraphs 3 and 4, that all Members of the United Nations have the unconditional obligation to "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered" (para. 3) and to "refrain in their international relations from the threat or use of force" against other States (para. 4). The peaceful means referred to in the present chapter are those dealt with in Chapter VI of the United Nations Charter, on pacific settlement of disputes, in particular in Article 33.

201. The Special Rapporteur therefore proposes the following articles for chapter V of the draft: article 31 (Obligation to settle disputes by peaceful means); article 32 (Settlement of disputes by consultations and negotiations); article 33 (Inquiry and mediation); articles 34 and 35 (Conciliation and functions and tasks of the Conciliation Commission); article 36 (Effects of the report of the Conciliation Commission. Sharing of costs); articles 37 and 38 (Adjudication by the International Court of Justice, another international court or a permanent or *ad hoc* arbitral tribunal, and binding effect of such adjudication).

202. In addition to the obligations undertaken by the States Members of the United Nations in accordance with the aforementioned provisions of the United Nations Charter and the Statute of the ICJ, the Special Rapporteur has relied on a great number and variety of bilateral treaties on friendship and commerce, or on judicial settlement, and on a number of multilateral and international conventions such as the General Act (pacific settlement of international disputes) adopted by the League of Nations on 26 September 1928;[179] the Revised General Act for the Pacific Settlement of International Disputes adopted by the General Assembly of the United Nations on 28 April 1949;[180] and the European Convention of 1957 for the Peaceful Settlement of Disputes.[181] Of considerable interest as a precedent for the peaceful settlement of disputes concerning international watercourse systems are the chapters and annexes of the 1982 United Nations Convention on the Law of the Sea.[182] Part XV of the Convention deals with "Settlement of disputes". Section 5 of part XI of the Convention, on "The Area", deals with settlement of disputes and advisory opinions pertaining to disputes arising out of activities in the Area. In addition, four annexes deal in detail with the peaceful settlement of disputes: annex V with "Conciliation", annex VI with the "Statute of the International Tribunal for the Law of the Sea", composed of 21 judges, annex VII with "Arbitration", and annex VIII with "Special arbitration".

203. Part XV of the United Nations Convention on the Law of the Sea provides, in section 2, for compulsory court or arbitral procedures entailing binding decisions to a considerable degree (arts. 286 *et seq.*). But section 3 provides for a number of limitations and exceptions to the applicability of such compulsory procedures (arts. 297 *et seq.*). The Convention also provides for compulsory conciliation in certain situations (see art. 297, paras. 2 (*b*) and 3 (*b*), (*c*) and (*d*), and art. 298, para. 1 (*a*) (i)). Although lacking somewhat in clarity and consistency, the clauses of part XV of the Convention are both challenging and far-reaching in providing for compulsory settlement procedures in the context of a universal international instrument.

204. The Special Rapporteur has been in some doubt whether he should introduce compulsory settlement procedures, especially procedures entailing compulsory and binding adjudication, in the present draft. Upon reflection, he has deemed it inadvisable to do so. The main purpose of the draft articles is to serve as a framework agreement. A number of the principles proposed with regard to substance have been drafted as binding principles of international law which, by their very nature, apply to disputes with regard to the management and use of international watercourse systems. Other provisions are suggested as a yardstick to be recommended with regard to the behaviour of co-riparian States. The Special Rapporteur furthermore envisages that, in order to ensure maximum applicability of the proposed principles to concrete watercourse systems, agreements should to the widest possible extent be entered into. In addition to the firm obligation of system States to resolve their disputes by peaceful means and to this end to conduct negotiations, consultations and close co-operation on the basis of good faith and friendly neighbourly relations, system agreements should provide for compulsory settlement procedures such as commissions of inquiry, conciliation and, in more serious cases, resort to compulsory proceedings before international courts or arbitral tribunals. Although a warm supporter of compulsory procedures before international courts, the Special Rapporteur is not convinced that providing for such compulsory

[179] League of Nations, *Treaty Series*, vol. XCIII, p. 343.

[180] United Nations, *Treaty Series*, vol. 71, p. 101.

[181] Done at Strasbourg on 29 April 1957 under the aegis of the Council of Europe (*ibid.*, vol. 320, p. 243).

[182] See footnote 80 above.

jurisdiction in an absolute form in this proposed framework agreement would be the best means of furthering this ultimate goal. The articles contained in this chapter reflect this opinion.

205. Obviously, States may be under an obligation to resort to special procedures for the settlement of disputes, including compulsory jurisidiction under general or special agreements on peaceful settlement of disputes. Of course, it is not the purpose of the articles proposed in this chapter to detract from such obligations already entered into. This principle was expressed in article XXVIII of the Helsinki Rules[183] as follows:

1. States are under a primary obligation to resort to means of prevention and settlement of disputes stipulated in the applicable treaties binding upon them.

The Special Rapporteur has touched upon this self-evident principle in article 31, paragraph 2.

206. The previous Special Rapporteur dealt with "Principles and procedures for the avoidance and settlement of disputes" in article 16 proposed in his third report.[184]

CHAPTER V

SETTLEMENT OF DISPUTES

Article 31. Obligation to settle disputes by peaceful means

1. System States as well as other States Parties shall settle disputes between them concerning the interpretation or application of the present Convention by peaceful means in accordance with Article 2 of the Charter of the United Nations and, to this end, shall seek solutions by the means indicated in Article 33, paragraph 1, of the Charter.

2. Nothing in this chapter impairs the right of States Parties (system States) to agree at any time to settle a dispute between them concerning the interpretation or application of the present Convention by any peaceful means of their own choice.

Commentary to article 31

207. This article reiterates the obligation of all Member States to settle their disputes by peaceful means. Article 31, paragraph 1, is more or less identical with article 279 of the United Nations Convention on the Law of the Sea. Paragraph 2 of the article is identical with article 280 of the said Convention.

Article 32. Settlement of disputes by consultations and negotiations

1. When a dispute arises between system States or other States Parties concerning the interpretation or application of the present Convention, the parties to the dispute shall proceed expeditiously with consultations and negotiations with a view to arriving at a fair and equitable solution to the dispute.

2. Such consultations and negotiations may be conducted directly between the parties to the dispute or through joint commissions established for the administration and management of the international watercourse system concerned or through other regional or international organs or agencies agreed upon between the parties.

3. If the parties have not been able to arrive at a solution of the dispute within a reasonable period of time, they shall resort to the other procedures for peaceful settlement provided for in this chapter.

Commentary to article 32

208. The obvious starting-point for the peaceful settlement of disputes between system States or between a system State or another State party to the Convention is to commence consultations and negotiations in good faith to seek solutions to outstanding issues. Such an obligation to negotiate follows from established principles of international law, as touched upon earlier in the present report. This point of departure was laid down in article XXX of the Helsinki Rules[185] as follows:

In case of a dispute between States as to their legal rights or other interests, ... they should seek a solution by negotiation.

209. Paragraph 2 of article 32 provides that such negotiations between the parties concerned may be conducted through or with the assistance of joint commissions or other organs or agencies. Such joint commissions or agencies are envisaged in a number of the foregoing articles. Such commissions may obviously possess expertise, knowledge or a more detached and impartial approach to the dispute and thus be able to assist the parties in many respects. Article XXXI of the Helsinki Rules[186] deals in detail with this approach and provides, *inter alia*:

1. ... it is recommended that the basin States refer the question or dispute to a joint agency and that they request the agency to survey the international drainage basin and to formulate plans or recommendations ... .

210. The obligation to negotiate must be tempered by a provision to the effect that such consultations and negotiations must go on only for a reasonable period of time. When all reasonable attempts at negotiations in good faith have been exhausted, the parties shall resort to the other procedures for peaceful settlement provided for in chapter V of the draft. As explained earlier, the Special Rapporteur holds the view that such other means of peaceful settlement should be resorted to, but that the parties should not be bound by compulsory settlement procedures unless they have so agreed.

[183] See footnote 11 above.

[184] Document A/CN.4/348 (see footnote 46 above), para. 498.

[185] See footnote 11 above.

[186] *Idem.*

Article 33. Inquiry and mediation

1. In connection with the consultations and negotiations provided for in article 32, the parties to a dispute concerning the interpretation or application of the present Convention may, by agreement, establish a Board of Inquiry of qualified experts for the purpose of establishing the relevant facts pertaining to the dispute in order to facilitate the consultations and negotiations between the parties. The parties must agree to the composition of the Board, the tasks entrusted to it, the time-limits for the accomplishment of its findings and other relevant guidelines for its work. The Board of Inquiry shall decide on its procedure unless otherwise determined by the parties. The findings of the Board of Inquiry are not binding on the parties unless otherwise agreed upon by them.

2. The parties to a dispute concerning the interpretation or application of the present Convention may by agreement request mediation by a third State, an organization or one or more mediators with the necessary qualifications and reputation to assist them with impartial advice in such consultations and negotiations as provided for in article 32. Advice given by such mediation is not binding upon the parties.

Commentary to article 33

211. This article provides for the establishment of a board of inquiry or mediation composed of a third State, an organization or persons with the necessary reputation and qualifications, in order to assist the parties in their consultations and negotiations. Inquiry or mediation may serve as a useful corollary to negotiations between parties to a dispute. Neither has been widely used in recent years nor included in the procedures for peaceful settlement advocated in the 1982 United Nations Convention on the Law of the Sea (see para. 202 above). But the Special Rapporteur deems that inquiry or mediation may serve a useful purpose in disputes pertaining to international watercourses, where expertise may be a basic foundation on which the parties may build peaceful solutions.

212. Good offices, mediation and inquiry were recommended in articles XXXII and XXXIII of the Helsinki Rules.[187]

Article 34. Conciliation

1. If a system agreement or other regional or international agreement or arrangement so provides, or if the parties agree thereto with regard to a specific dispute concerning the interpretation or application of the present Convention, the parties shall submit such dispute to conciliation in accordance with the provisions of this article or with the provisions of such system agreement or regional or international agreement or arrangement.

Any party to the dispute may institute such proceedings by written notification to the other party or parties, unless otherwise agreed upon.

2. Unless otherwise agreed, the Conciliation Commission shall consist of five members. The party instituting the proceedings shall appoint two conciliators, one of whom may be its national. It shall inform the other party of its appointments in the written notification.

The other party shall likewise appoint two conciliators, one of whom may be its national. Such appointment shall be made within thirty days from the receipt of the notification mentioned in paragraph 1.

3. If either party to the dispute fails to appoint its conciliators as provided for in paragraphs 1 or 2 of this article, the other party may request the Secretary-General of the United Nations to make the necessary appointment or appointments unless otherwise agreed upon between the parties. The Secretary-General of the United Nations shall make such appointment or appointments within thirty days from the receipt of the request.

4. Within thirty days after all four conciliators have been appointed the parties shall choose by agreement the fifth member of the Commission from among the nationals of a third State. He shall act as the president of the Conciliation Commission. If the parties have not been able to agree within that period, either party may within fourteen days from the expiration of that period request the Secretary-General of the United Nations to make the appointment. The Secretary-General of the United Nations shall make such appointment within thirty days from the receipt of the request.

Commentary to article 34

213. Chapter I of the General Act of 1928 for the pacific settlement of international disputes[188] contains provisions on conciliation. Such provisions are in general included in other instruments on the peaceful settlement of disputes, for example in chapter II of the European Convention for the Peaceful Settlement of Disputes[189] and also in annex V of the 1982 United Nations Convention on the Law of the Sea.[190] Provisions concerning the composition of conciliation commissions and the appointment of their members are also contained in the "Model rules for the constitution of the Conciliation Commission" annexed to the Helsinki Rules.[191]

214. The establishment of conciliation commissions has in practice proved to be useful in the search for peaceful solutions to international disputes. The advantage of such commissions consists, *inter alia*, in that their procedures are less cumbersome than court or arbitration proceedings. They are also less time-

[187] *Idem.*

[188] See footnote 179 above.

[189] See footnote 181 above.

[190] See footnote 80 above.

[191] See footnote 11 above.

consuming and less expensive. The fact that the recommendations of conciliation commissions are not formally binding upon the parties may likewise make them politically more acceptable than court proceedings in certain cases. On the other hand, the fact that the recommendations of a conciliation commission are not binding on the parties may make the procedure less effective in the case of recalcitrant parties. Furthermore, in making its findings and recommendations, the conciliation commission, by its very nature, will not feel constrained to make its recommendations strictly within the confines of international law, which in practice may prove to be an advantage or a disadvantage.

215. One of the most recent examples of international conciliation was the establishment in 1980 of the Icelandic-Norwegian Conciliation Commission, which in May 1981 presented its recommendations to the Governments of Iceland and Norway with regard to the delimitation of the continental shelf of Iceland and Norway in the Jan Mayen area. The Conciliation Commission was composed of three members, one national of each of the parties and a chairman who was a United States citizen (E. Richardson). The two Governments accepted the Commission's recommendations and concluded an agreement accordingly.[192]

216. The provisions proposed in article 34 are based on the provisions concerning the establishment of conciliation commissions laid down in the aforementioned international and multilateral instruments.

Article 35. Functions and tasks of the Conciliation Commission

1. Unless the parties otherwise agree, the Conciliation Commission shall determine its own procedure.

2. The Conciliation Commission shall hear the parties, examine their claims and objections, and make proposals to the parties with a view to reaching an amicable settlement.

3. The Conciliation Commission shall file its report with the parties within twelve months of its constitution, unless the parties otherwise agree. Its report shall record any agreement reached between the parties and, failing agreement, its recommendations to the parties. Such recommendations shall contain the Commission's conclusions with regard to the pertinent questions of fact and law relevant to the matter in dispute and such recommendations as the Commission deems fair and appropriate for an amicable settlement of the dispute. The report with recorded agreements or, failing agreement, with the recommendations of the Commission shall be notified to the parties to the dispute by the Commission and also be deposited by the Commission with the Secretary-General of the United Nations, unless otherwise agreed by the parties.

[192] For further details, see J. Evensen, "La délimitation du plateau continental entre la Norvège et l'Islande dans le secteur de Jan Mayen", *Annuaire français de droit international, 1981* (Paris), vol. XXVII, p. 711.

Commentary to article 35

217. The Special Rapporteur has deemed it advisable to spell out in some detail the functions traditionally assigned to a conciliation commission. Thus the provision contained in paragraph 1 that, in the absence of agreement to the contrary, the Conciliation Commission shall lay down its own procedure, is a generally accepted principle, as evidenced by article 11 of the Revised General Act for the Pacific Settlement of International Disputes of 1949,[193] article 12 of the European Convention for the Peaceful Settlement of Disputes of 1957[194] and article V of the "Model rules for the constitution of the Conciliation Commission" annexed to the Helsinki Rules.[195] Procedural matters, such as the fact that conciliation shall ordinarily not be conducted in public, rules and procedures with regard to possible pleadings, voting etc., have not been spelled out in detail, except for the provision in paragraph 2 that the Conciliation Commission shall hear the parties. Paragraph 3 of article 35 provides for a time-limit of 12 months for the filing by the Conciliation Commission of its report. The Revised General Act of 1949 (art. 15, para. 3) and the European Convention of 1957 (art. 15, para. 3) provide for a time-limit of six months. The Special Rapporteur deems this time-limit to be unrealistically short. Reference is made, in that connection, to article 7, paragraph 1, of annex V of the 1982 United Nations Convention on the Law of the Sea. It is proposed that the report should be filed by the Commission with the Secretary-General of the United Nations. However, the parties should have the possibility to decide otherwise.

218. A report rendered by a conciliation commission in matters pertaining to international watercourses may be of interest to the international community. The filing of the report with the Secretary-General does not automatically imply that the report will be made public. It may be of interest in this connection to draw attention to article 16 of the Revised General Act for the Pacific Settlement of Disputes of 1949, which provides:

> The Commission's *procès-verbal* shall be communicated without delay to the parties. The parties shall decide whether it shall be published.

219. The European Convention of 1957 has a provision in article 16 which seems somewhat more restrictive, to the following effect:

> The Commission's *procès-verbal* shall be communicated without delay to the parties. It shall only be published with their consent.

220. However, the Special Rapporteur considers that, regardless of these provisions, it seems reasonable to provide that the report of a conciliation commission in these matters should be filed with the Secretary-General and to the extent possible be made available to the international community. If the report records an agreement between the parties concerned, it seems to follow from the principles contained in Article 102 of the United Na-

[193] See footnote 180 above.

[194] See footnote 181 above.

[195] See footnote 11 above.

tions Charter that it should "be registered with the Secretariat and published by it".

221. Annex V, on "Conciliation", of the United Nations Convention on the Law of the Sea, provides in article 7, paragraph 1, that the report of a conciliation commission "shall be deposited with the Secretary-General of the United Nations and shall immediately be transmitted by him to the parties to the dispute". However, the Special Rapporteur is in some doubt whether this very formal approach would be advisable in all cases.

Article 36. Effects of the report of the Conciliation Commission. Sharing of costs

1. Except for agreements arrived at between the parties to the dispute through the conciliation procedure and recorded in the report in accordance with paragraphs 2 and 3 of article 35, the report of the Conciliation Commission—including its recommendations to the parties and its conclusions with regard to facts and law—is not binding upon the parties to the dispute unless the parties have agreed otherwise.

2. The fees and costs of the Conciliation Commission shall be borne by the parties to the dispute in a fair and equitable manner.

Commentary to article 36

222. The task entrusted to a conciliation commission will obviously vary with the agreement entered into between the parties. In some instances, emphasis has been placed on the commission's task as being one of negotiation. When a conciliation procedure results in agreement between the parties, it is natural for this agreement to be recorded in the conciliation commission's report. To this extent, the report is binding upon the parties under general principles of international law. Often, however, the conciliation commission will be entrusted with the task of making recommendations to the parties if they have been unable to achieve agreement. The commission may also put forward its views with regard to the facts and the law which it deems applicable to the dispute. Such recommendations and such findings on the facts and the law are in principle not binding on the parties to the dispute, even though they may have considerable influence on a final amicable solution. This principle has been expressly laid down in article 7, paragraph 2, of annex V of the United Nations Convention on the Law of the Sea. The agreement between the parties instituting conciliation may expressly or implicitly provide that the recommendations of the conciliation commission shall be taken into account to the extent reasonable in subsequent negotiations between the parties. Of course, it is also possible that the conciliation commission is not able to formulate recommendations to the parties because of substantial divergence of views within the commission or for other reasons. It may be of interest in this connection to note that, in the conciliation agreement between Iceland and Norway, it was provided that the Commission should not file a report with recommendations unless such recommendations were unanimously adopted by the commission. In that particular case, the conciliation commission submitted unanimous recommendations. These served as the basis for subsequent agreement between Iceland and Norway (see para. 215 above).

223. Paragraph 2 of article 36 refers to fees and costs. Ordinarily, the parties contribute in equal shares to such expenses. See, for example, article 14 of the Revised General Act of 1949[196] and article 17 of the European Convention for the Peaceful Settlement of Disputes of 1957.[197]

Article 37. Adjudication by the International Court of Justice, another international court or a permanent or ad hoc *arbitral tribunal*

States may submit a dispute for adjudication to the International Court of Justice, to another international court or to a permanent or *ad hoc* arbitral tribunal if they have not been able to arrive at an agreed solution of the dispute by means of articles 31 to 36, provided that:

(*a*) The States parties to the dispute have accepted the jurisdiction of the International Court of Justice in accordance with Article 36 of the Statute of the Court or accepted the jurisdiction of the International Court of Justice or of another international court by a system agreement or other regional or international agreement or specifically have agreed to submit the dispute to the jurisdiction of the Court;

(*b*) The States parties to the dispute have accepted binding international arbitration by a permanent or *ad hoc* arbitral tribunal by a system agreement or other regional or international agreement or specifically have agreed to submit the dispute to arbitration.

Commentary to article 37

224. Article 287 of the 1982 United Nations Convention on the Law of the Sea[198] provides that, in signing, ratifying or acceding to the Convention, a State shall "be free to choose" between "one or more of the following means" of settlement of disputes:

(*a*) the International Tribunal for the Law of the Sea established in accordance with annex VI;

(*b*) the International Court of Justice;

(*c*) an arbitral tribunal constituted in accordance with annex VII;

(*d*) a special arbitral tribunal constituted in accordance with annex VIII for one or more of the categories of disputes specified therein.

225. It is further provided in article 296 of the Convention:

1. Any decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute.

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[196] See footnote 180 above.

[197] See footnote 181 above.

[198] See footnote 80 above.

2. Any such decision shall have no binding force except between the parties and in respect of that particular dispute.

226. These provisions derive mainly from Articles 59 and 60 of the Statute of the ICJ (see also Article 94 of the United Nations Charter). It is inherent in the very act of submitting a dispute to the ICJ, to another international court or to an arbitral tribunal that the decision rendered by such court or tribunal is binding and also final, unless, contrary to common practice, a court of appeals has been provided for. The Special Rapporteur has repeated this main principle in article 38.

227. The resort to adjudication provided for in article 37 refers to the jurisdiction of the ICJ, of another international court or of an arbitral tribunal, as the case may be. As mentioned before, annex VI of the United Nations Convention on the Law of the Sea provides for the establishment of an "International Tribunal for the Law of the Sea". The question may obviously arise whether this tribunal could be such another international court which could be charged with the task of adjudicating disputes relating to international watercourses. Suffice it here to refer to article 21 of annex VI of the Convention relating to the jurisidiction of the International Tribunal for the Law of the Sea, which provides:

The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.

228. The provisions contained in part XV, section 2, of the United Nations Convention on the Law of the Sea clearly envisage compulsory adjudication (arts. 286 *et seq.*). However, it is equally important to note that this compulsory jurisdiction entailing binding decisions is predicated on a system where a great number of important disputes are excepted from such adjudication (see articles 297-299).

229. The Special Rapporteur has not deemed it advisable to provide for compulsory jurisdiction in article 37. Such compulsory jurisdiction by the ICJ or another international court may follow from other international instruments, as provided for in subparagraph (*a*). The obligation to submit to binding arbitration may follow from other international instruments, as provided for in subparagraph (*b*).

230. The Special Rapporteur, in choosing this approach, was not convinced that a general principle providing for compulsory adjudication of disputes relating to international watercourses would be acceptable.

Article 38. Binding effect of adjudication

A judgment or award rendered by the International Court of Justice, by another international court or by an arbitral tribunal shall be binding and final for States Parties. States Parties shall comply with it and in good faith assist in its execution.

Commentary to article 38

231. See the commentary to article 37 above.

CHAPTER VIII

Relationship to other conventions and final provisions
(Chapter VI of the draft)

232. At its thirty-second session, in 1980, the Commission adopted provisionally an article X on "Relationship between the present articles and other treaties in force".[199] Such provisions are ordinarily dealt with in the final chapter of international agreements, together with other "final clauses". In an attempt to give as complete as possible an outline for a draft convention on the non-navigational uses of international watercourses, the Special Rapporteur suggests that this article X be placed as article 39 in chapter VI, entitled "Final provisions".

233. The Special Rapporteur has ventured to make some slight amendments to the text provisionally adopted as article X.

[199] *Yearbook ... 1980*, vol. II (Part Two), p. 136.

CHAPTER VI

FINAL PROVISIONS

Article 39. Relationship to other conventions and international agreements

Without prejudice to article 4, paragraph 3, the provisions of the present Convention do not affect conventions or other international agreements in force relating to a particular international watercourse system or any part thereof, to international or regional watercourse systems or to a particular project, programme or use.

Commentary to article 39

234. The Special Rapporteur deems it superfluous to make any comments to this article.

DOCUMENT A/CN.4/L.353

Note presented by Mr. Constantin A. Stavropoulos

[*Original: English*]
[*10 June 1983*]

It would be useful for the members of the International Law Commission to have before them, during the discussions on the first report of the Special Rapporteur[1] on the topic of "The law of the non-navigational uses of international watercourses", the Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States, prepared by UNEP. A short account of the background is provided below,[2] followed by the text of the draft principles.

A. Action taken by UNEP and by the General Assembly

Action taken by the UNEP Intergovernmental Working Group of Experts on Natural Resources Shared by Two or More States

1. Pursuant to the provisions of General Assembly resolution 3129 (XXVIII) of 13 December 1973, the Intergovernmental Working Group of Experts on Natural Resources Shared by Two or More States was established by UNEP in 1975.[3] The working Group held five sessions in the period 1976-1978. Interest in the activities of the Working Group grew, and at the final session, held from 23 January to 7 February 1978, experts from 26 States took part.[4] At that final session, the Working Group adopted 15 draft principles entitled "Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States", which represented the consensus of the experts. These were accompanied by a variety of declarations and reservations.[5] In this connection, it should be noted that the principles are preceded by an explanatory note.

Action taken by the UNEP Governing Council

2. At its sixth session, in 1978, the UNEP Governing Council had before it a note by the Executive Director transmitting the final report of the Intergovernmental Working Group of Experts on Natural Resources Shared by Two or More States.[6] At its 12th plenary meeting, on 19 May 1978, the Governing Council adopted by consensus decision 6/14, entitled "Co-operation in the field of the environment concerning natural resources shared by two or more States",[7] reading as follows:

The Governing Council,

Affirming the principles of the Declaration of the United Nations Conference on the Human Environment,

Taking duly into account General Assembly resolution 3129 (XXVIII) of 13 December 1973 entitled "Co-operation in the field of the environment concerning natural resources shared by two or more States",

Expressing its satisfaction at the work done by the Intergovernmental Working Group of Experts on Natural Resources Shared by Two or More States in carrying out the tasks entrusted to it for the implementation of the above resolution,

Taking into consideration articles 3 and 30 of the Charter of Economic Rights and Duties of States, as adopted by the General Assembly in its resolution 3281 (XXIX) of 12 December 1974,

Recognizing the right of countries to provide specific solutions on a bilateral or regional basis,

Desiring to promote and develop international law regarding the conservation and harmonious exploitation of natural resources shared by two or more States,

1. *Approves* the report of the Intergovernmental Working Group of Experts on Natural Resources Shared by Two or More States on the work of its fifth session, containing the "Draft principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States";

2. *Authorizes* the Executive Director to transmit the report to the General Assembly at its thirty-third session as the final report of the Working Group of Experts, and invites the Assembly to adopt the draft principles.[8]

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[1] See p. 155 above, document A/CN.4/367.

[2] For further details, see *Yearbook ... 1980*, vol. II (Part Two), pp. 123-127, commentary to art. 5, paras (11)-(31).

[3] The Intergovernmental Working Group was initially composed of experts from the following 17 countries: Argentina, Brazil, Canada, France, India, Iraq, Kenya, Mexico, Morocco, Netherlands, Philippines, Poland, Romania, Senegal, Sweden, USSR and United States of America. An observer from Turkey was also present. See the report of the Working Group on its first session (UNEP/IG.2/4 paras. 2 and 5, annexed to UNEP/GC/74).

[4] Argentina; Bangladesh; Brazil; Canada; France; Germany, Federal Republic of; Ghana; Greece; India; Iran; Iraq; Jamaica; Kenya; Mexico; Netherlands; Philippines; Poland; Romania; Senegal; Sweden; Switzerland; Uganda; USSR; United Kingdom; United States of America; Yugoslavia. Experts from Austria, Japan and Turkey participated as observers. See the report of the Working Group on its fifth session (UNEP/IG.12/2, para. 11, annexed to UNEP/GC.6/17).

[5] *Ibid.*, para. 15.

[6] See footnote 4 above, *in fine*.

[7] *Official Records of the General Assembly, Thirty-third Session, Supplement No. 25* (A/33/25), chap. VIII, containing a brief summary of the discussion on the subject in the Governing Council.

[8] *Ibid.*, pp. 154-155, annex I.

ACTION TAKEN BY THE GENERAL ASSEMBLY

3. By its resolution 33/87 of 15 December 1978, the General Assembly requested the Secretary-General to submit the principles to Member States for consideration and comment. Thirty-six Governments commented on the report of the Intergovernmental Working Group of Experts. The report of the Secretary-General on co-operation in the field of the environment concerning natural resources shared by two or more States contains the following summary of replies received:

(*a*) Thirty of the 36 Governments whose views were received were generally in favour of the adoption of the principles. Without derogating from their favourable views on the principles, some of those Governments, however, expressed reservations on specific principles, or suggested alternative formulations of some of them. Some expressed the view that the adoption of the principles should not preclude the solution of specific problems on shared natural resources through bilateral agreements based on principles other than the 15 principles.

(*b*) Many Governments expressed views on the legal status of the principles. On this issue most of the Governments that regarded the principles as acceptable also wanted the principles to be regarded as guidelines only and not as an international code of conduct which was necessarily binding on States. Nearly all the Governments in favour of the principles wanted those principles to be used as the negotiating basis for the preparation of bilateral or multilateral treaties among States with regard to their conduct when dealing with natural resources they shared in common. Some of them even indicated that similar principles were already being used by States to make treaties relating to shared natural resources.

...[9]

4. Two States expressed strong opposition to the principles. A number of States were concerned that there was no definition of shared natural resources.[10] The Secretary-General's report suggested that the General Assembly might wish to adopt the principles.

5. A draft resolution was introduced in the Second Committee which would have had the General Assembly adopt the draft principles for the guidance of States and request States Members "to respect the principles in their inter-State relations".[11] The draft resolution attracted both considerable support and opposition.

6. Efforts were made in the Second Committee to find a compromise solution. Finally, the representative of Pakistan, on behalf of the sponsors, introduced a revised version of the draft resolution as the highest measure of agreement that could be reached in informal discussions. The operative paragraphs as proposed by the representative of Pakistan included the following:

The General Assembly,

...

2. *Adopts* the draft principles as guidelines and recommendations in the conservation and harmonious utilization of natural resources shared by two or more States without prejudice to the binding nature of those rules already recognized as such in international law;

3. *Requests* all States to use the principles as guidelines and recommendations in the formulation of bilateral or multilateral conventions regarding natural resources shared by two or more States, on the basis of the principle of good faith and in the spirit of good neighbourliness and in such a way as to enhance and not to affect adversely development and the interests of all countries, in particular the developing countries;

...[12]

The representative of Pakistan stated that agreement could not be reached on the proposed text because some delegations continued to press for the replacement of the word *"Adopts"* by the phrase *"Takes note of "*. The representative of Brazil proposed that paragraph 2 of the resolution be so amended. The Brazilian amendment was adopted in the Second Committee by 59 votes to 25, with 27 abstentions.[13]

7. On 18 December 1979, the General Assembly adopted without a vote, as resolution 34/186, the revised draft resolution submitted by the Second Committee. That resolution, entitled "Co-operation in the field of the environment concerning natural resources shared by two or more States", reads as follows:

The General Assembly,

Recalling the relevant provisions of its resolutions 3201 (S-VI) and 3202 (S-VI) of 1 May 1974, in which it reaffirmed the principle of full permanent sovereignty of every State over its natural resources and the responsibility of States as set out in the Declaration of the United Nations Conference on the Human Environment to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States and to co-operate in developing the international law regarding liability and compensation for such damages,

Recalling its resolution 3129 (XXVIII) of 13 December 1973 on co-operation in the field of the environment concerning natural resources shared by two or more States,

Recalling also the Charter of Economic Rights and Duties of States, contained in its resolution 3281 (XXIX) of 12 December 1974,

Noting that the Governing Council of the United Nations Environment Programme, by its decision 6/14 of 19 May 1978, invited the General Assembly to adopt the draft principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States, including the explanatory note, contained in the report of the Intergovernmental Working Group of Experts on Natural Resources Shared by Two or More States established under Governing Council decision 44 (III) of 25 April 1975,

Taking note of the report of the Secretary-General requested by the General Assembly in its resolution 33/87 of 15 December 1978 and containing summaries of the comments made by Governments regarding the draft principles, as well as other significant information, recommendations and suggestions in connection therewith,

Desiring to promote effective co-operation among States for the development of international law regarding the conservation and harmonious utilization of natural resources shared by two or more States,

Recognizing the right of States to provide specific solutions on a bilateral or regional basis,

Recalling that the principles have been drawn up for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States,

1. *Takes note* of the report as adopted of the Intergovernmental Working Group of Experts on Natural Resources Shared by Two or More States established under decision 44 (III) of the Governing Council of the United Nations Environment Programme in conformity with General Assembly resolution 3129 (XXVIII);

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[9] A/34/557 and Corr.1, para. 6.

[10] *Ibid.*, annex. The Working Group had stated in its final report that, for want of time, it had not been in a position to enter into an in-depth discussion of the question of the definition of shared natural resources, and had therefore not reached a conclusion (UNEP/IG.12/2, para. 16, annexed to UNEP/GC.6/17).

[11] *Official Records of the General Assembly, Thirty-fourth Session, Annexes*, agenda item 60, document A/34/837, para. 18.

[12] *Ibid.*, para. 19.

[13] *Ibid.*, paras. 20 and 23.

2. *Takes note* of the draft principles as guidelines and recommendations in the conservation and harmonious utilization of natural resources shared by two or more States without prejudice to the binding nature of those rules already recognized as such in international law;

3. *Requests* all States to use the principles as guidelines and recommendations in the formulation of bilateral or multilateral conventions regarding natural resources shared by two or more States, on the basis of the principle of good faith and in the spirit of good neighbourliness and in such a way as to enhance and not adversely affect development and the interests of all countries, in particular the developing countries;

4. *Requests* the Governing Council of the United Nations Environment Programme to submit to the General Assembly at its thirty-sixth session, through the Economic and Social Council, a report on the progress made in the implementation of the present resolution.

8. The UNEP Governing Council submitted to the General Assembly, at its thirty-seventh session, the progress report requested in paragraph 4 of resolution 34/186.[14] The report indicated that 27 States had replied to a request for relevant information on progress made in the implementation of resolution 34/186. Of that number, according to the report, eight had expressed support for the principles without citing specific examples of their use, 13 had expressed support for the principles and given examples of their application, five had reported that they had had no experience in implementing the principles and one had reported that it had not applied the principles as guidelines and recommendations in the formulation of bilateral or multilateral conventions regarding shared natural resources because it considered the definition of "shared natural resources" to be inappropriate.

9. On 20 December 1982, the General Assembly adopted without a vote resolution 37/217, entitled "International co-operation in the field of the environment", which reads in part:

The General Assembly,

...

6. *Takes note* of Governing Council decision 10/14 of 31 May 1982 on programme matters, comprising seven specific subsections, and in this context:

(*a*) *Takes note* of the progress report on co-operation in the field of the environment concerning natural resources shared by two or more States, reiterates the terms of its resolution 34/186 of 18 December 1979 as a whole, and requests the Governing Council to submit a further progress report on its implementation to the General Assembly at its fortieth session;

...

B. Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States

Explanatory note

The draft principles of conduct, in this note further referred to as "the principles", have been drawn up for the guidance of States in the field of the environment with respect to the conservation and harmonious utilization of natural resources shared by two or more States. The principles refer to such conduct of individual States as is considered conducive to the attainment of the said objective in a manner which does not adversely affect the environment. Moreover, the principles aim to encourage States sharing a natural resource to co-operate in the field of the environment.

An attempt has been made to avoid language which might create the impression of intending to refer, as the case may be, either to a specific legal obligation under international law or to the absence of such obligation.

The language used throughout does not seek to prejudge whether or to what extent the conduct envisaged in the principles is already prescribed by existing rules of general international law. Neither does the formulation intend to express an opinion as to whether or to what extent and in what manner the principles—as far as they do not reflect already existing rules of general international law—should be incorporated in the body of general international law.

Definition

In the present text, the expression "significantly affect" refers to any appreciable effects on a shared natural resource and excludes *de minimis* effects.

Principle 1

It is necessary for States to co-operate in the field of the environment concerning the conservation and harmonious utilization of natural resources shared by two or more States. Accordingly, it is necessary that, consistent with the concept of equitable utilization of shared natural resources, States co-operate with a view to controlling, preventing, reducing or eliminating adverse environmental effects which may result from the utilization of such resources. Such co-operation is to take place on an equal footing and taking into account the sovereignty, rights and interests of the States concerned.

Principle 2

In order to ensure effective international co-operation in the field of the environment concerning the conservation and harmonious utilization of natural resources shared by two or more States, States sharing such natural resources should endeavour to conclude bilateral or multilateral agreements between or among themselves in order to secure specific regulation of their conduct in this respect, applying as necessary the present principles in a legally binding manner, or should endeavour to enter into other arrangements, as appropriate, for this purpose. In entering into such agreements or arrangements, States should consider the establishment of institutional structures, such as joint international commissions, for consultations on environmental problems relating to the protection and use of shared natural resources.

Principle 3

1. States have, in accordance with the Charter of the United Nations and the principles of international law,

[14] A/37/396, annex.

the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

2. The principles set forth in paragraph 1, as well as the other principles contained in this document, apply to shared natural resources.

3. Accordingly, it is necessary for each State to avoid to the maximum extent possible and to reduce to the minimum extent possible the adverse environmental effects beyond its jurisdiction of the utilization of a shared natural resource so as to protect the environment, in particular when such utilization might:

(*a*) cause damage to the environment which could have repercussions on the utilization of the resource by another sharing State;

(*b*) threaten the conservation of a shared renewable resource;

(*c*) endanger the health of the population of another State.

Without prejudice to the generality of the above principle, it should be interpreted taking into account, where appropriate, the practical capabilities of States sharing the natural resource.

Principle 4

States should make environmental assessments before engaging in any activity with respect to a shared natural resource which may create a risk of significantly* affecting the environment of another State or States sharing that resource.

Principle 5

States sharing a natural resource should, to the extent practicable, exchange information and engage in consultations on a regular basis on its environmental aspects.

Principle 6

1. It is necessary for every State sharing a natural resource with one or more other States:

(*a*) to notify in advance the other State or States of the pertinent details of plans to initiate, or make a change in the conservation or utilization of the resource which can reasonably be expected to affect significantly* the environment in the territory of the other State or States; and

(*b*) upon request of the other State or States, to enter into consultations concerning the above-mentioned plans; and

(*c*) to provide, upon request to that effect by the other State or States, specific additional pertinent information concerning such plans; and

(*d*) if there has been no advance notification as envisaged in subparagraph (*a*) above, to enter into consultations about such plans upon request of the other State or States.

2. In cases where the transmission of certain information is prevented by national legislation or international conventions, the State or States withholding such information shall nevertheless, on the basis, in particular, of the principle of good faith and in the spirit of good neighbourliness, co-operate with the other interested State or States with the aim of finding a satisfactory solution.

Principle 7

Exchange of information, notification, consultations and other forms of co-operation regarding shared natural resources are carried out on the basis of the principle of good faith and in the spirit of good neighbourliness and in such a way as to avoid any unreasonable delays either in the forms of co-operation or in carrying out development or conservation projects.

Principle 8

When it would be useful to clarify environmental problems relating to a shared natural resource, States should engage in joint scientific studies and assessments, with a view to facilitating the finding of appropriate and satisfactory solutions to such problems on the basis of agreed data.

Principle 9

1. States have a duty urgently to inform other States which may be affected:

(*a*) of any emergency situation arising from the utilization of a shared natural resource which might cause sudden harmful effects on their environment;

(*b*) of any sudden grave natural events related to a shared natural resource which may affect the environment of such States.

2. States should also, when appropriate, inform the competent international organizations of any such situation or event.

3. States concerned should co-operate, in particular by means of agreed contingency plans, when appropriate, and mutual assistance, in order to avert grave situations, and to eliminate, reduce or correct, as far as possible, the effects of such situations or events.

Principle 10

States sharing a natural resource should, when appropriate, consider the possibility of jointly seeking the services of any competent international organization in clarifying the environmental problems relating to the conservation or utilization of such natural resource.

* See definition of this term above.

Principle 11

1. The relevant provisions of the Charter of the United Nations and of the Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations apply to the settlement of environmental disputes arising out of the conservation or utilization of shared natural resources.

2. In case negotiations or other non-binding means have failed to settle a dispute within a reasonable time, it is necessary for States to submit the dispute to an appropriate settlement procedure which is mutually agreed by them, preferably in advance. The procedure should be speedy, effective and binding.

3. It is necessary for the States parties to such a dispute to refrain from any action which may aggravate the situation with respect to the environment to the extent of creating an obstacle to the amicable settlement of the dispute.

Principle 12

1. States are responsible for the fulfilment of their international obligations in the field of the environment concerning the conservation and utilization of shared natural resources. They are subject to liability in accordance with applicable international law for environmental damage resulting from violations of these obligations caused to areas beyond their jurisdiction.

2. States should co-operate to develop further international law regarding liability and compensation for the victims of environmental damage arising out of the utilization of a shared natural resource and caused to areas beyond their jurisdiction.

Principle 13

It is necessary for States, when considering, under their domestic environmental policy, the permissibility of domestic activities, to take into account the potential adverse environmental effects arising out of the utilization of shared natural resources, without discrimination as to whether the effects would occur within their jurisdiction or outside it.

Principle 14

States should endeavour, in accordance with their legal systems and, where appropriate, on a basis agreed by them, to provide persons in other States who have been or may be adversely affected by environmental damage resulting from the utilization of shared natural resources with equivalent access to and treatment in the same administrative and judicial proceedings, and make available to them the same remedies as are available to persons within their own jurisdictions who have been or may be similarly affected.

Principle 15

The present principles should be interpreted and applied in such a way as to enhance and not to affect adversely development and the interests of all countries, and in particular of the developing countries.

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

[Agenda item 6]

DOCUMENT A/CN.4/373*

Fourth report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Robert Q. Quentin-Baxter, Special Rapporteur

[*Original: English*]
[*27 June 1983*]

CONTENTS

Delineation of the topic

A. The duty to avoid, minimize and repair transboundary harm

1. Every topic begins with a concept. Usually the concept comes ready made: "treaties between States", "the most-favoured-nation clause", "diplomatic privileges and immunities" are examples. Sometimes the concept has itself to be crystallized, as when "State responsibility" was removed from its familiar textbook setting, relating to the treatment of aliens, and was restated more generally as the consequence attaching to any breach of an international obligation.[1] Only when that had been done was it possible to proceed inductively, finding significant patterns of conduct in the practice of States. It was the study of the origin of State responsibility that gave rise to the study of the present topic;[2] for there were indications in State practice of patterns of behaviour that could not readily be explained by reference to rules of prohibition. It was thought by the Commission that an obligation might subsist even when circumstances precluded the wrongfulness of a particular act or omission of the State.[3] Moreover, it had become a commonplace that scientific and technological advances had multiplied the circumstances in which legitimate activities entailed the possibility—or even the certainty—of transboundary harm.

2. The long title of the present topic was therefore conceived as one that would not foreclose or predetermine the avenues of future development. It has often been said that the real purpose of the topic is to deal with a "twilight zone",[4] and that most of the activities which the Commission intended to treat were not currently prohibited by international law, but were on the

* Incorporating documents A/CN.4/373/Corr.1 and 2.

[1] See the report of the Sub-Committee on State Responsibility, approved by the Commission at its fifteenth session (*Yearbook ... 1963*, vol. II, pp. 227-228, document A/5509, annex I).

[2] The Special Rapporteur's three previous reports on the topic were: (*a*) preliminary report (*Yearbook ... 1980*, vol. II (Part One), p. 247, document A/CN.4/334 and Add.1 and 2); (*b*) second report (*Yearbook ... 1981*, vol. II (Part One), p. 103, document A/CN.4/346 and Add.1 and 2); (*c*) third report (*Yearbook ... 1982*, vol. II (Part One), p. 51, document A/CN.4/360).

[3] See article 35 (Reservation as to compensation for damage) and the commentary thereto of part 1 of the draft articles on State responsibility, adopted by the Commission at its thirty-second session (*Yearbook ... 1980*, vol. II (Part Two), pp. 61-62).

[4] See the observations made by Mr. Yankov at the thirty-third session of the Commission (*Yearbook ... 1981*, vol. I, p. 226, 1687th meeting, para. 1).

way to being so prohibited.[5] Yet it is equally true to say that the topic is concerned with the regulation of activities that are in principle useful and legitimate, and should therefore not be prohibited, even though the conduct of these activities entails an element of transboundary harm or the risk of such harm.[6] These are the two sides of a single coin. From either point of view, the central concept is that conditions attach to the conduct of an activity which is in principle legitimate, but inherently dangerous.[7] The evidence of this concept is to be found in a large and fast-growing range of treaty practice, establishing the conditions upon which particular activities may be conducted without engaging the responsibility of the source State for wrongfulness, even if the conduct of the activity gives rise to transboundary loss or injury.[8]

3. The situations that dramatize and lend urgency to the topic are those that were first described systematically by Jenks,[9] that is, situations in which scientific and technological progress has allowed the development of activities that carry with them a small but inescapable risk of very serious accident. There are two possible—but not necessarily incompatible—lines of approach to the regulation of such problems. One starting-point is to stress the dissimilitude between the modern situations of "ultra-hazard" and any that mankind has previously experienced, and to find that these situations do not lend themselves to regulation by the classical method, that is, by engaging the responsibility of States for wrongful acts. From this premise would arise a need to invoke a new and exceptional system of obligation under which the causal connection between a legitimate activity and the occurrence of serious harm replaces a wrongful act of the State as the generator of an obligation.[10]

4. Such an exceptional system of obligation, governed by the principle of causality or strict liability, may indeed be seen as separate from and complementary to the classical system of State responsibility for a wrongful act or omission. One Commission member, favouring this approach, has suggested that the subject-matter of the present topic should be treated as an additional chapter of the topic of State responsibility, a chapter in which the mere occurrence of transboundary loss or injury would take the place of a wrongful act or omission as giving rise to an obligation for the source State to provide reparation.[11] In the terminology which the Commission has used throughout its discussions on State responsibility, this additional chapter would introduce a new system of "secondary" rules. The essential problem in promoting such a system of "strict" or "absolute" or "no-fault" liability[12] is to keep it within proper limits; for most would agree that strict liability, like atomic energy, is a good servant but a bad master.

5. This theme has been stressed again and again during the various discussions of the present topic in the Commission and in the Sixth Committee of the General Assembly. It was said, for example, at the thirty-seventh session of the General Assembly, that strict liability was always the product of a particular conventional régime and that it had no place in customary international law.[13] It has been urged that the adoption of the principle of strict liability would radically change the rules of attribution, which limit State responsibility to the consequences of wrongful acts or omissions.[14] It has been argued, moreover, that it would be premature to embark upon the description of a new system of obligation before the completion of the Commission's current study of the classical system of State responsibility for wrongful acts or omissions.[15] To some extent these

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[5] See the Special Rapporteur's preliminary report, document A/CN.4/334 and Add.1 and 2 (see footnote 2 above), para. 14.

[6] See e.g. the following observations made in the Sixth Committee of the General Assembly in 1982 by the representative of the Soviet Union, Mr. Lukyanovich: "... As for the subject of international liability for injurious consequences arising out of acts not prohibited by international law, the Commission was still at the initial stage of its consideration ... Operations using the latest scientific and technical developments were in themselves lawful, but the possibility of harm resulting from their use could not be excluded ... The Commission should continue its study of the subject on the basis of a genuinely comprehensive consideration of the practice of States in [each] field." (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 39th meeting, para. 34).

[7] See the observations made at the thirty-second session of the Commission by Mr. Riphagen (*Yearbook ... 1980*, vol. I, p. 245, 1630th meeting, paras. 29-30; and by Sir Francis Vallat (*ibid.*, p. 250, 1631st meeting, para. 36).

[8] Activities and situations dealt with in State practice which the Special Rapporteur has at present in view include the following: use and regulation of rivers crossing or forming an international boundary and avoidance of damage from floods and ice; use of land in frontier areas; spread, across national boundaries, of fire or any explosive force, or of human, animal or plant disease; activities which may give rise to transboundary pollution of fresh water, of coastal waters or of national airspace, or to pollution of the shared human environment, including the oceans and outer space; development and use of nuclear energy, including the operation of nuclear installations and nuclear ships and the carriage of nuclear materials; weather modification activities; overflight of aircraft and space objects involving a risk of accidental damage on the surface of the earth, in airspace or in outer space; and activities physically affecting common areas or natural resources in which other States have rights or interests.

[9] C. W. Jenks, "Liability for ultra-hazardous activities in international law", *Recueil des Cours de l'Académie de droit International de la Haye*, 1966-I (Leyden, Sijthoff, 1967), vol. 117, p. 105.

[10] For a recent review of the issues, see G. Handl, "State liability for accidental transnational environmental damage by private persons", *American Journal of International Law* (Washington, D.C.), vol. 74 (1980), p. 525.

[11] See the observations made by Mr. Thiam at the thirty-fourth session of the Commission (*Yearbook ... 1982*, vol. I, p. 284, 1743rd meeting, paras. 39-41).

[12] See the preliminary report, document A/CN.4/334 and Add.1 and 2 (see footnote 2 above), paras. 15-16, and the second report, document A/CN.4/346 and Add.1 and 2 (*idem*), paras.11-14.

[13] See e.g. the observations made by the representatives of the German Democratic Republic, Mr. Görner (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 38th meeting, paras. 34-35), the Soviet Union, Mr. Lukyanovich (*ibid.*, 39th meeting, para. 34); Czechoslovakia, Mr. Tyc (*ibid.*, 46th meeting, para. 9); and Israel, Mr. Baker (*ibid.*, 47th meeting, para. 10).

[14] See e.g. the observations made by the representative of the United Kingdom, Mr. Berman (*ibid.*, 48th meeting, para. 20); and by the representative of France, Mr. Museux (*ibid.*, 38th meeting, para. 17).

[15] See e.g. the observations made by the representative of Israel, Mr. Baker (*ibid.*, 47th meeting, para. 9).

critical comments may have reflected anxiety about the fact that the scope of the present topic is as yet ill defined; but they are also a vindication of the Commission's initial decision that the present topic should not be equated with a description of the principle of strict liability.

6. That decision in no way reflects upon the present value or the future significance of the principle of strict liability. Indeed, it seems self-evident that, if a low risk of very serious transboundary loss or injury must be tolerated as the price of maintaining a beneficial activity, the occurrence of that loss or injury should give rise to a right to reparation as ample as if the loss or injury had been attributable to a wrongful act of the source State. Nevertheless, it would be reckless to disregard the warnings summarized in the preceding paragraph. It is necessary to show that the principle of strict liability is not a stark and exceptional departure from the classical system of State responsibility for wrongful acts and omissions, but an ultimate development of broader tendencies, well grounded in existing State practice. Strict liability—whether assumed by the State itself or imposed upon others involved in the conduct of an activity—is a frequent ingredient in a recipe with endless permutations, all designed to prevent, minimize and provide reparation for harm that was foreseeable, not always in its actual occurrence but at least as a substantial possibility.[16]

7. Since the Working Group established by the Commission at its thirtieth session to make a preliminary study of the nature and scope of the subject submitted its report,[17] it has been the Commission's consistent aim, not to describe an alternative system of obligation, but to choose the other starting-point, building upon the full breadth of existing legal foundations, finding similarities rather than contrasts in the practices that States follow as they turn from the older areas of transboundary harm to newer ones.[18] The choice of this line of approach was signified in the Commission's initial decision, repeatedly reaffirmed, that the topic lay within the field of "primary" rules, i.e. rules that are governed by and do not compete with the established system of State responsibility for wrongful acts or omissions.[19] The path chosen is a logical sequel to the Commission's earlier policy decision to codify the system of State responsibility generally, rather than in the particular historical context of the treatment of aliens. The duties that a State owes, as a territorial or controlling authority, in respect of aliens within its borders can then be compared with the duties it owes in a similar capacity to other States and their citizens or inhabitants to avoid and repair transboundary harm.[20]

8. It is, of course, true that for centuries the concept of State responsibility was scarcely articulated in any context other than that of the treatment of aliens;[21] but that is an anachronism which the Commission has sought to remedy. It is also true that transboundary harm, not amounting to a clear-cut violation of sovereignty, is a modern phenomenon; but the spate of recent State practice, in the form of agreements or negotiated settlements, affords adequate guidance for the mapping of this new area. As in other branches of international law, the starting-point is the exclusive authority that States enjoy in respect of national territory, and the correlative duty they owe to other members of the international community.[22] Characteristically, they discharge this duty by reaching agreements which accommodate their mutual or respective interests, prescribing a course of conduct that will avoid the possibility of wrongfulness in their mutual relations. The régimes that States construct almost always give pride of place to the measures they consider necessary to avoid the occurrence of transboundary harm; but, if they believe that these measures will not cover all contingencies, they may also make specific provision as to reparation for any loss or injury that does occur.

9. The schematic outline of the present topic[23] reflects—but perhaps does not fully reflect—the flexible procedures and unlimited range of options of which States make use in constructing régimes to avoid, minimize and provide reparation for various kinds of transboundary loss or injury. Indeed, some have asserted that no rule emerges from the diversity of State practice.[24] Certainly, there is no simple formula to reconcile one State's right to freedom of action with another State's right to freedom from adverse trans-

[16] See the Special Rapporteur's three previous reports (see footnote 2 above): preliminary report, document A/CN.4/334 and Add.1 and 2, paras. 26-27 and 38; second report, document A/CN.4/346 and Add.1 and 2, paras. 73-77; third report, document A/CN.4/360, paras. 19-23 and 39.

[17] Reproduced in *Yearbook ... 1978*, vol. II (Part Two), pp. 150-152.

[18] See the report on the Commission's work on the topic at its thirty-second session (*Yearbook ... 1980*, vol. II (Part Two), pp. 158-161, chap. VII); at its thirty-third session (*Yearbook ... 1981*, vol. II (Part Two), pp. 146-152, chap. V); and at its thirty-fourth session (*Yearbook ... 1982*, vol. II (Part Two), pp. 83-92, chap. IV).

[19] See the third report, document A/CN.4/360 (see footnote 2 above), paras. 6-8 and the references thereto.

[20] See the preliminary report, document A/CN.4/334 and Add.1 and 2 (*idem*), para. 29; and the second report, document A/CN.4/346 and Add.1 and 2 (*idem*), para. 8.

[21] "The textbooks show that the doctrine of international responsibility is not highly developed. Primarily it deals with the responsibility of a State for injuries to aliens in its territory and only marginally with State responsibility for direct injury to the rights of other States. Even in the latter category, there are few references to general principles that pertain specifically to situations of environmental injury ..." (J. Barros and D. M. Johnston, *The International Law of Pollution* (New York, the Free Press, 1974), p. 74.)

[22] "Territorial sovereignty cannot limit itself to its negative side, i.e. to excluding the activities of other States; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian." (*Island of Palmas* case (1928), Arbitrator, Max Huber, United Nations, *Reports of International Arbitral Awards*, vol. II (Sales No. 1949.V.1), p. 839.)

[23] The schematic outline submitted in the third report, document A/CN.4/360 (see footnote 2 above), para. 53, and reproduced in the Commission's report on the work of its thirty-fourth session (*Yearbook ... 1982*, vol. II (Part Two), pp. 83 *et seq.*, para. 109), is annexed to the present report.

[24] See the observations referred to in footnote 11 above.

boundary effects. As in other negotiations, States seek a balance of advantage, sometimes with a willingness to pursue their interests by a sacrifice of what they believe to be their rights, but more often by simply setting aside the vexed question of determining their respective rights and obligations in customary law. Yet in all these shifting perspectives there is one constant. The whole of State practice bears witness that a State in whose territory or under whose control a danger arises owes other States a duty to contain that danger, if possible on terms agreed with other States affected by the danger.

10. During the discussion in the Sixth Committee of the General Assembly at its thirty-seventh session, there was preponderant support either for the general tenor of the schematic outline[25] or, more specifically, for implementing the duty to avoid, minimize and provide reparation for transboundary losses or injuries.[26] Some thought that the schematic outline should be reinforced to give better guarantees that that duty would be discharged.[27] A few, on the other hand, were sceptical about the value of the topic or its viability.[28] A few others thought that a conceptual distinction must be made between the question of prevention and that of reparation,[29] and several saw advantage in concentrating upon the latter duty.[30] Most, however, were firmly in favour of maintaining the linkage between prevention and reparation indicated in the schematic outline.[31] These and other doctrinal issues, which had figured prominently in the Commission's discussions at its thirty-second and thirty-third sessions, in 1980 and 1981, will be reconsidered later in the present report; but a more immediate question concerns the scope of the topic. In 1980 and in 1981 the Commission took the view that the scope of the topic should not be settled or narrowed until the content could be evaluated. It was recognized that the Special Rapporteur would be able to find materials mainly in the field of the physical uses of territory, but he was invited to consider their implications in a wider context.[32] His efforts to comply with those directives were reflected in sections 1, 5, 6 and 7 of the schematic outline.[33]

B. The matching of scope and content

11. The schematic outline submitted to the Commission at its thirty-fourth session, in 1982, provided it with the opportunity to consider scope in relation to content. In these circumstances the balance of opinion in the Commission (newly constituted after the 1981 election) changed, and the unlimited scope clause attracted considerable criticism. This was noted in the remarks of the Commission Chairman, Mr. Reuter, when introducing the Commission's report in the Sixth Committee of the General Assembly at its thirty-seventh session:

> Some members had taken the view that the topic should not be further discussed for want of any basis in general international law or because of existing difficulties. Most of the members, however, had taken the opposite view: that the draft could be limited to transboundary problems pertaining to the physical environment and that questions involving the most delicate problems that might arise in the economic sector could be set aside.[34]

12. Although some representations in the Sixth Committee were disappointed,[35] most were of the same opinion as the majority in the Commission.[36] As has been noted, there was in the Committee strong and broadly based support for the central aim of the topic, namely, to analyse the growing volume and variety of State prac-

[25] See e.g. the observations made by the representative of Sweden, Mr. Danelius (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 41st meeting, paras. 13-17); Thailand, Mr. Sucharitkul (*ibid.*, 44th meeting, paras. 26-27); Finland, Mr. Hakapää (*ibid.*, 45th meeting, paras. 8-11); Canada, Mr. Bacon (*ibid.*, paras. 85-87); India, Mr. Jagota (*ibid.*, 46th meeting, paras. 90-91); Italy, Mr. Sperduti (*ibid.*, 47th meeting, paras. 33-34); Mexico, Mr. Gonzalez Galvez (*ibid.*, paras. 50-52); Tunisia, Mr. Mahbouli (*ibid.*, paras. 69-74); Australia, Mr. De Stoop (*ibid.*, 48th meeting, paras. 10-12); Indonesia, Mr. Oerip (*ibid.*, para. 72); Romania, Mr. Mazilu (*ibid.*, 49th meeting, para. 10); Morocco, Mr. Gharbi (*ibid.*, 50th meeting, paras. 36-38); Iraq, Mr. Al-Qaysi (*ibid.*, paras. 53-55); Kenya, Mr. Wabuge (*ibid.*, 51st meeting, para. 49); and Austria, Mr. Tuerk (*ibid.*, paras. 98-102).

[26] See e.g. the observations made by the representatives of Yugoslavia, Mr. Sahović (*ibid.*, 39th meeting, para. 7); Canada, Mr. Bacon (*ibid.*, 45th meeting, paras. 85-86); Kenya, Mr. Wabuge (*ibid.*, 51st meeting, para. 49); and Austria, Mr. Tuerk (*ibid.*, para. 99).

[27] See e.g. the observations made by the representatives of Madagascar, Mr. Razanakoto (*ibid.*, 46th meeting, paras. 120-123); Mexico, Mr. Gonzalez Galvez (*ibid.*, 47th meeting, para. 52); Libyan Arab Jamahiriya, Mr. Azzarouk (*ibid.*, 49th meeting, para. 53); Zaire, Mr. Balanda (*ibid.*, 51st meeting, para. 14); and Trinidad and Tobago, Mr. McKenzie (*ibid.*, para. 65).

[28] See the observations made by the representatives of France, Mr. Museux (*ibid.*, 38th meeting, para. 17); Venezuela, Mr. Díaz González (*ibid.*, 45th meeting, paras. 40-42); and Argentina, Mr. Barboza (*ibid.*, 49th meeting, paras. 13-20).

[29] See e.g. the observations made by the representative of the United Kingdom, Mr. Berman (*ibid.*, 48th meeting, para. 20).

[30] See the observations made by the representatives of Brazil, Mr. Calero Rodrigues (*ibid.*, 43rd meeting, paras. 63 and 65); Finland, Mr. Hakapää (*ibid.*, 45th meeting, para. 11); and Spain, Mr. Lacleta Muñoz (*ibid.*, 48th meeting, para. 97).

[31] See e.g. the observations made by the representatives of Thailand, Mr. Sucharitkul (*ibid.*, 44th meeting, para. 27); Canada, Mr. Bacon (*ibid.*, 45th meeting, para. 86); Japan, Mr. Hayashi (*ibid.*, 46th meeting, para. 25); Syrian Arab Republic, Mr. Kahaleh (*ibid.*, 47th meeting, para. 24); Italy, Mr. Sperduti (*ibid.*, para. 34); Australia, Mr. De Stoop (*ibid.*, 48th meeting, para. 10); Sierra Leone, Mr. Koroma (*ibid.*, 49th meeting, para. 44); Morocco, Mr. Gharbi (*ibid.*, 50th meeting, para. 37); Iraq, Mr. Al-Qaysi (*ibid.*, para. 54); Bangladesh, Mr. Morshed (*ibid.*, para. 67); and Austria, Mr. Tuerk (*ibid.*, 51st meeting, para. 99).

[32] See *Yearbook ... 1980*, vol. II (Part Two), p. 160, paras. 138-139; and *Yearbook ... 1981*, vol. II (Part Two), p. 152, para. 199.

[33] See annex below.

[34] *Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 37th meeting, para. 12.

[35] See e.g. the observations made by the representatives of Tunisia, Mr. Mahbouli (*ibid.*, 47th meeting, para. 74); Algeria, Mr. Lamamra (*ibid.*, 48th meeting, para. 37); Romania, Mr. Mazilu (*ibid.*, 49th meeting, para. 10); and Zaire, Mr. Balanda (*ibid.*, 51st meeting, para. 15).

[36] See e.g. the observations made by the representatives of Greece, Mr. Economides (*ibid.*, 40th meeting, para. 48); Sweden, Mr. Danelius (*ibid.*, 41st meeting, para. 16); Thailand, Mr. Sucharitkul (*ibid.*, 44th meeting, para. 26); Japan, Mr. Hayashi (*ibid.*, 46th meeting, paras. 23-24); Netherlands, Mr. Siblesz (*ibid.*, para. 47); India, Mr. Jagota (*ibid.*, para. 91); Australia, Mr. De Stoop (*ibid.*, 48th meeting, para. 11); and United States of America, Mrs. Schwab (*ibid.*, 52nd meeting, paras. 26-29).

tice relating to uses made of land, sea, air and outer space, and to identify rules and procedures which can safeguard national interests against losses or injuries arising from activities and situations that are in principle legitimate, but that may entail adverse transboundary effects. Yet the course of debate made it clearer than before that unity of purpose would collapse if either of two boundary lines were crossed. One such boundary line, described in earlier paragraphs, forbids the abrupt adoption of a new system of obligation, based upon the principle of causality or strict liability, and developed in municipal legal systems to meet situations of inherent danger.[37] The other boundary line forbids the wholesale transfer of pioneering experience in the field of the physical uses of territory to the even less developed field of economic regulation.[38]

13. It should be recognized that the two boundary lines under discussion are interconnected. Neither limitation could command general respect if the other were ignored. The essential reason for invoking a new and exceptional system of obligation is that rules of prohibition, limiting the freedom of States—and therefore limiting initiatives within national societies—are too crude a method of adjusting rights and interests in some modern situations. It is therefore entirely understandable that States which seek to moderate the interplay of international economic forces should regard the principle of strict liability as a potentially useful one. Yet, as statements made in the debates in 1982 have shown, merely to raise that question is to redouble every anxiety that the principle of strict liability arouses;[39] and the consequence is deadlock, the very negation of the spirit of *bon voisinage*, which does shine through much of State practice relating to the adverse transboundary effects of the physical uses of territory.

14. If, however, we set aside the question of invoking a new and exceptional system of obligation, and follow instead the broadly established trends of State practice, the distinction between the regulation of economic affairs and the regulation of the physical uses of territory becomes extremely clear. The whole body of State practice relating to the latter area responds to the perceived duty to avoid, minimize and repair transboundary harm: if loss or injury occurs, it is palpable, and ordinarily the relationship of cause and transboundary effect is plain. In the economic sphere, on the other hand, there is a missing intermediate step. There is as yet no sufficiently broad agreement at the international level about the distinctions—well developed in municipal legal systems—between fair and unfair competition. The loser in a race must attribute his loss to his own lack of prowess, not to the tenacity of his rival; but there are rules of fair play that have to be observed even in the running of races.

15. The Special Rapporteur would not think it right to deny a significant connection between the two areas under discussion. An international society which failed to act upon the perceived duty to prevent physical transboundary harm would be unlikely to tackle resolutely the more sophisticated problems of economic regulation. The techniques of the present topic—that is, the promotion of painstaking individual adjustment of competing interests in particular subject areas to reconcile liberty of action with freedom from adverse transboundary effects—might well be more productive of solutions in the economic area than undue reliance upon rules curtailing freedom of action. Nevertheless, there is no possibility of proceeding inductively from the evidence of State practice in the field of the physical uses of territory to the formulation of rules or guidelines in the economic field. Even if it were possible to parallel the principles, factors and modalities mentioned in sections 5, 6 and 7 of the schematic outline with materials drawn from State practice in the economic field, those materials might not reveal a sufficient unity to permit a common development. The Commission, which thought it wise to separate the topic of State succession in matters relating to treaties from other aspects of State succession, would probably find it advisable to sever the treatment of loss or injury arising from the physical uses of territory from losses or injuries arising from causes of an economic character.

16. Within the two boundary lines described above (paras. 12-13), the topic takes its shape. It is required of States only that, as territorial or controlling authorities, they act conscientiously to reconcile their separate interests, so that the freedom of action of one State, and of its citizens or inhabitants, does not become the involuntary burden of other States, and of their citizens or inhabitants. When States have the will to regulate a particular area of international conduct, their representatives bring to the conference table the totality of their experience as lawyers or technologists, and they tend to find solutions that build upon similarities in their domestic situations. Nowhere is this tendency more evident than in conventional régimes relating to physical uses of territory; the standards that States have established within their own jurisdictions are usually those they would wish to have prevail in their relations with other States and, when conditions are propitious, international arrangements make reciprocal use of municipal procedures and instrumentalities.

17. Once the nature and thrust of the topic have been understood in the sense described in the preceding paragraph, there is a rather general expectation that the field of application will include all physical uses of territory giving rise to adverse physical transboundary effects. No short phrase exactly describes the full extent of

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[37] See the observations referred to in footnotes 13, 14 and 15 above.

[38] See in particular the observations made by the representative of the United States of America, Mrs. Schwab (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 52nd meeting, paras. 25-29):

"The United States considered the scope of the topic to be too broad ... The failure to narrow the concept substantially was a fatal flaw in the balance of the schematic outline. ..." (*Ibid.*, para. 26.)

"For all these reasons, her delegation supported the predominant view in the Commission that the topic should be limited to the physical environment or, at most, to physical damage caused by physical actions." (*Ibid.*, para. 29.)

[39] See the observations referred to in footnote 36 above and those supporting a contrary view referred to in footnote 35 above.

this field of application, and some doubts have been raised by an injudicious reliance upon references to "environment" or "physical environment". A warning about this source of ambiguity was given during the Commission's discussions at its thirty-second session, in 1980,[40] and a similar question arose during the consideration of the Commission's report in the Sixth Committee of the General Assembly, at its thirty-seventh session, in 1982.[41] It should therefore be confirmed that there was never an intention to propose a reduction in the scope of the topic to questions of an ecological nature, or to any other subcategory of activities involving the physical uses of territory; nor, indeed, did any speaker in the Sixth Committee urge the desirability of such a reduction.

18. Some pertinent comments were however made in the Sixth Committee upon the question of "control". It was noted, for example, that ships in territorial waters were in some respects in the same legal position as any other foreign-owned chattel, in other words, that they fell within the jurisdiction of the State to which the territorial sea belonged.[42] Several speakers drew attention to the problems of developing countries, one observing that

> ... the Commission should keep in mind the reality of actual circumstances and in particular the need for industrial development in developing countries, the absence of technical expertise to detect or monitor harmful effects which might follow from acts which were otherwise lawful, and the fact that the control of certain activities was in the hands of contractors or multinational agencies.[43]

In this context, as in the case of ships, it seems worth emphasizing again that the schematic outline does not require States to bear a direct—much less an absolute—liability in respect of loss or injury occasioned by activities within their territories or under their control. It implies only that such States should take the initiatives that they alone can take to sponsor régimes which offer acceptable assurances of avoiding, minimizing and repairing transboundary losses or injuries.

C. Relationship with other primary obligations

19. Indeed, some are of the opinion that the expectations mentioned in the preceding paragraph are too low, that the provisions indicated in the schematic outline[44] are too fragile and permissive to afford substantial protection; but here there is a basic misunderstanding. The rules contained in the schematic outline are not a substitute for specific conventional or customary rules that engage the responsibility of the State. The present topic has been described, with fairly general approval, as "a catalyst in the field of primary rules".[45] It is not its purpose to multiply prohibitions. Indeed, it cannot do so and yet remain true to its description; nor can it modify or supplant any established legal obligation. Thus a failure to consult under section 2 of the schematic outline, or to provide proper regulation under section 3, is no more than an element to be taken into account if the activity in question does give rise to transboundary harm. Nevertheless, it may be wrongful—independently of any provision made in pursuance of the present topic—to subject another State or its citizens to an undisclosed risk of serious transboundary loss or injury.[46] In such a case, the disclosure of the risk, and the effort to obtain the other State's agreement to a feasible régime, would be the only alternative to purging the activity of its harmful transfrontier effects.

20. This very important issue was well discussed in the Commission at its thirty-third session, in 1981,[47] but it was overshadowed by other issues at the following session and must now be restated. One starting-point is, of course, to recall the origins of the topic, which were evoked in paragraph 2 of this report. The topic concerns activities which are "on the way to being ... prohibited" or, alternatively, are being saved from prohibition because adequate guarantees have been provided as to the avoidance of adverse transboundary effects and, if necessary, as to reparation for such effects. Because these activities are near the moving frontier between lawfulness and unlawfulness, the Commission members found it difficult to agree, at the twenty-fifth session, in 1973, on whether to describe such activities as licit or illicit.[48] Both nuances were preserved in the title of the

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[40] Sir Francis Vallat observed:

> "On the question of limitations, he agreed that it would be wise to focus attention on what might be described as environment in its broad meaning, and not to become involved in economic and social questions for the time being. He hesitated over the use of the term 'environment', however, because in its narrow sense it had become connected with the expression 'environmental law' and the concerns of ecology. It must be made clear that what the Commission was concerned with in the topic under consideration was acts having physical consequences and therefore connected with the environment in the broader sense." (*Yearbook ... 1980*, vol. I, p. 249, 1631st meeting, para. 32.)

[41] See in particular the observations made by the representative of India, Mr. Jagota:

> "His delegation had not visualized that the scope of the proposed articles would be restricted to the physical environment. It had expected them to be of more general application and to establish or refer to regimes involving hazardous activity, activities in outer space, activities relating to the exploitation of resources straddling a land or maritime boundary, utilization of shared resources and so forth. ..." (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 46th meeting, para. 91.)

[42] See the observations made by the representative of the Netherlands, Mr. Siblesz (*ibid.*, para. 46).

[43] Observations made by the representative of Sri Lanka, Mr. Marapana (*ibid.*, 51st meeting, para. 84). See also, in particular, the observations made by the representative of Zaire, Mr. Balanda (*ibid.*, para. 17).

[44] See annex below.

[45] See the second report, document A/CN.4/346 and Add.1 and 2 (see footnote 2 above), para. 18.

[46] See e.g. the view expressed by Handl:

> "... a frontier activity is reasonable only to the extent that its modalities reflect the findings of transnational safety analyses that consider the possible transnational environmental consequences of national action ..." ("An international legal perspective on the conduct of abnormally dangerous activities in frontier areas: the case of nuclear power plant siting", *Ecology Law Quarterly* (Berkeley, Calif.), vol. 7, (1978), p. 38.)

[47] *Yearbook ... 1981*, vol. I, pp. 217-230, 1685th and 1686th meetings and 1687th meeting, paras. 1-31, and pp. 250-255, 1690th meeting, paras. 32-71.

[48] During the discussion on article 1 of part 1 of the draft articles on State responsibility at the twenty-fifth session of the Commission, Mr. Kearney raised the question of

present topic by the use of the awkward periphrasis "acts not prohibited by international law". The same idea is reflected in the more recent tendency of some Commission members, and of some representatives in the Sixth Committee, to describe the obligations that engage State responsibility for wrongful acts and the obligations dealt with in the present topic as dealing with "different shades of prohibition".[49]

21. The phrase "on the way to being ... prohibited" has another important aspect: it conveys the idea of movement and of instability. The present topic is concerned with process; and this is reflected in the emphasis upon procedure in sections 2, 3 and 4 of the schematic outline. It is not the policy of the law to perpetuate ambivalent situations, but rather to break them down into elements of right and wrong. That is the process which takes place whenever the parties concerned construct a régime, or agree that a potential problem can be overcome without resort to such a régime. As has been pointed out in the Commission's debates, there is in some areas a growing body of conventional rules which would give rise to international responsibility. The International Law Association in its recently adopted "Montreal Rules",[50] which provide the Commission with a valuable new point of reference, takes the view that there is also, at least in regard to pollution, a body of customary rules giving rise to State responsibility. These are the kinds of development which it is the very purpose of this topic to promote.

22. Nevertheless, it is not within the province of the present topic to pronounce when any particular activity "on the way to being prohibited" has reached that destination. Therefore it is logically as well as practically impossible for the Special Rapporteur to draw a dividing line between wrongful acts and acts which, although not prohibited, give rise to liability. Where there is a clear and undisputed breach of a conventional or customary obligation, States will no doubt deal with the matter on that basis. Where, however, there is doubt or disagreement that a transboundary loss or injury has been occasioned by a wrongful act—and that is by no means the exceptional case—it is natural that the States concerned should canvass the matter on the wider basis of recompense for a loss or injury sustained. As one Commission member has noted:

> ... States were sometimes prepared to make good loss and damage by the payment of a sum of money which they were not prepared to admit was made in compensation. The States which accepted what were therefore termed *ex gratia* payments did so in the knowledge that such payments were intended as compensation. In that way, yesterday's *ex gratia* payment became tomorrow's obligation.[51]

23. Tactical reasons may favour a denial of liability, even when both parties are aware that the circumstances under which a claim arose could be characterized as the consequence of a wrongful act. Yet, in the twilight zone

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> "... the difference between the responsibility of a State for an internationally wrongful act and its responsibility for an act which was not wrongful as such, or, to use the common-law expression, a case in which there was 'liability without fault'." Mr. Kearney went on to state:
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> "Current developments were tending to make the distinction between those two cases less and less clear. Environmental pollution raised a whole series of problems as to circumstances in which the probability of risks as compared with the fact of wrongful action was a governing factor. The use of outer space involved similar problems ..." (*Yearbook ... 1973*, vol. I, p. 7, 1202nd meeting, paras. 22-23.)

At the same meeting, Mr. Hambro stressed that

> "... consideration would have to be given to the problem of State responsibility for acts which had formerly been regarded as lawful, but which in the light of recent scientific developments must now be considered wrongful, and there progressive lawyers had a role to play; it was their duty to shift the frontier between what was legal and what was illegal ..." (*Ibid.*, pp. 7-8, para. 32.)

See also the remarks of Mr. Castañeda (*ibid.*, p. 10, 1203rd meeting, para. 16).

Mr. Ago attempted to accommodate both viewpoints in his text of the Commission's draft report on its twenty-fifth session, proposing a reference to:

> "... responsibility for possible injurious consequences arising out of the performance of certain lawful activities, or activities which international law may not yet have definitively prohibited—such as certain maritime activities, activities in the atmosphere or in outer space, and nuclear and other activities, particularly in connection with the protection of the environment" (A/CN.4/L.198, para. 26).

That formula provoked a discussion concerning the extent to which certain activities, or ways of performing activities—particularly those referred to by way of example—had already become wrongful, or were likely to become so, or would remain lawful but would be subject to regulation because they involved certain risks. See the remarks of Mr. Kearney, Mr. Sette Câmara, Mr. Ramangasoavina, Mr. Ago, Mr. Hambro, Mr. Castañeda, Mr. Yasseen, Sir Francis Vallat and Mr. Ustor (*Yearbook ... 1973*, vol. I, pp. 211-213, 1243rd meeting, paras. 40-53, and 1244th meeting, paras. 1-9). To avoid prejudging these questions, the Commission adopted the following wording in its report on its twenty-fifth session:

> "... liability for possible injurious consequences arising out of the performance of certain lawful activities; especially those which because of their nature give rise to certain risks" (*Yearbook ... 1973*, vol. II, p. 169, document A/9010/Rev.1, para. 38).

In the same report, the Commission referred also to "the so-called responsibility for risk" and to "that other form of responsibility which is the protection against the hazards associated with certain activities that are not prohibited by international law" (*ibid.*, paras. 38 and 39).

[49] See e.g. the observations made at the thirty-third session of the Commission by Sir Francis Vallat:

> "He could not agree with the view that because any breach of a duty existing under international law must constitute an internationally wrongful act, and was therefore subject to the rules contained in part 1 of the draft, it necessarily fell outside the scope of the present topic ... The concepts of acts not prohibited by international law and internationally wrongful acts were not mutually exclusive." (*Yearbook ... 1981*, vol. I, p. 230, 1687th meeting, paras. 26 and 28.)

See also the observations made in the Sixth Committee of the General Assembly, in 1982, by the representative of the Netherlands, Mr. Siblesz:

> "...at first sight there seemed to be an absolute separation between the two topics covered in chapters III and IV of the Commission's report (A/37/10), one dealing with prohibited conduct and the other with acts not prohibited by international law. In fact, however, it seemed rather to be a question of different shades of prohibition ..." (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 46th meeting, para. 44).

[50] Resolution No. 2 1982 on legal aspects of the conservation of the environment, adopted by the International Law Association at its Sixtieth Conference, held in Montreal from 29 August to 4 September 1982 (the text of the resolution is cited in full in footnote 52 below).

[51] *Yearbook ... 1981*, vol. I, p. 224, 1686th meeting, para. 24 (Mr. Sucharitkul).

with which the present topic deals, unless the precedents for a case in question are clear and apposite, there may be few indications in doctrine or State practice that can help the parties to determine whether or not the responsibility of the source State for a wrongful act or omission has been engaged. In doubtful circumstances, the source State will be slow to admit such responsibility, because the admission will restrict correspondingly its right to take initiatives without the prior consent of other States that may be affected. However, the source State should have much less hesitation in agreeing to repair the loss or injury suffered, unless there are relevant considerations which argue for a different distribution of costs. It must be stressed again that the present topic has twin objectives: it encourages the construction of régimes, when these are needed to give precision to the respective rights and obligations of the States concerned; but, when that precision is lacking, it asserts the duty to avoid and to repair transboundary loss or injury, without a prior finding of the responsibility of the source State for a wrongful act or omission.

24. In order to show more concretely the relationship between the matters dealt with in the present topic and other primary rules of obligation, it may be useful to make some comparisons with the coverage of the "Montreal Rules".[52] If one regards the entire field of interaction of States, in relation to physical activities that entail transboundary harm or hazard, as an apparatus through which some rules about the wrongfulness of causing harm are being distilled, it could be said that the authors of the Montreal Rules have set out to record the final product of the distillation process up to the present time in their chosen field of transboundary pollution. The topic we are now considering, on the other hand, is concerned with the dynamics of the distillation process—itself a response to the duty to avoid, minimize and repair physical transboundary harm—and with the measures States must take to adjust and accommodate their respective rights and interests, when those rights and interests cannot be determined merely by reference to applicable customary and conventional rules.

25. There are very important elements which are common to the Montreal Rules and to the present topic. There is, first, the recognition—in article 4, dealing with highly dangerous substances—that some activities, or ways of doing things, may be absolutely prohibited, and therefore removed from the general area of adjustment of rights and interests. Secondly, article 3, paragraph (1), articulates the basic principle of the duty

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[52] Resolution No. 2 1982 on legal aspects of the conservation of the environment, adopted by the International Law Association, reads as follows:

"The sixtieth Conference of the International Law Association held in Montreal, 29 August-4 September 1982:

"*Having received and considered* the report of the Committee on Legal Aspects of the Conservation of the Environment,

"*Approves* the statement of the Rules of international law applicable to transfrontier pollution recommended in the Committee's report as follows:

"*Article 1 (Applicability)*

"The following rules of international law concerning transfrontier pollution are applicable except as may be otherwise provided by convention, agreement or binding custom among the States concerned.

"*Article 2 (Definition)*

"(1) 'Pollution' means any introduction by man, directly or indirectly, of substance or energy into the environment resulting in deleterious effects of such a nature as to endanger human health, harm living resources, ecosystems and material property and impair amenities or interfere with other legitimate uses of the environment.

"(2) 'Transfrontier pollution' means pollution of which the physical origin is wholly or in part situated within the territory of one State and which has deleterious effects in the territory of another State.

"*Article 3 (Prevention and abatement)*

"(1) Without prejudice to the operation of the rules relating to the reasonable and equitable utilization of shared natural resources, States are in their legitimate activities under an obligation to prevent, abate and control transfrontier pollution to such an extent that no substantial injury is caused in the territory of another State.

"(2) Furthermore, States shall limit new and increased transfrontier pollution to the lowest level that may be reached by measures practicable and reasonable under the circumstances.

"(3) States should endeavour to reduce existing transfrontier pollution, below the requirements of paragraph 1 of this article, to the lowest level that may be reached by measures practicable and reasonable under the circumstances.

"*Article 4 (Highly dangerous substances)*

"Notwithstanding the provisions in article 3, States shall refrain from causing transfrontier pollution by discharging into the environment substances generally considered as being highly dangerous to human health. If such substances are already being discharged, States shall eliminate the polluting discharge within a reasonable time.

"*Article 5 (Prior notice)*

"(1) States planning to carry out activities which might entail a significant risk of transfrontier pollution shall give early notice to States likely to be affected. In particular, they shall on their own initiative or upon request of the potentially affected States, communicate such pertinent information as will permit the recipient to make an assessment of the probable effects of the planned activities.

"(2) In order to appraise whether a planned activity implies a significant risk of transfrontier pollution, States should make environmental assessment before carrying out such activities.

"*Article 6 (Consultations)*

"Upon request of a potentially affected State, the State furnishing the information shall enter into consultations on transfrontier pollution problems connected with the planned activities and pursue such consultations in good faith and over a reasonable period of time.

"*Article 7 (Emergency situations)*

"When, as a result of an emergency situation or of other circumstances, activities already carried out in the territory of a State cause or might cause a sudden increase in the existing level of transfrontier pollution, the State of origin is under a duty:

"(*a*) to promptly warn the affected or potentially affected States;

"(*b*) to provide them with such pertinent information as will enable them to minimize the transfrontier pollution damage;

"(*c*) to inform them of the steps taken to abate the cause of the increased transfrontier pollution level.

"*Recommends* that these rules be designated the 'Montreal Rules of international law applicable to transfrontier pollution';

"*Requests* the Secretary-General of the Association to transmit the report to the Secretary-General of the United Nations for submission to the International Law Commission."

(ILA, *Report of the Sixtieth Conference, Montreal, 1982* (London, 1983), pp. 1-3.)

to avoid, minimize and repair substantial transboundary loss or injury, deriving its authority from the award in the *Trail Smelter* case,[53] from principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration),[54] and from the trends of State practice.[55] Thirdly, although this does not clearly appear from the actual language of the Montreal Rules, it is the unmistakable intention of the Rules to enunciate the regulatory duties of the State in relation to any activity within its borders, whether or not conducted by the State itself; and in this also the Rules follow the seminal precedent of the *Trail Smelter* case. Fourthly, article 3, paragraph (2), dealing with new or increased transboundary pollution, recognizes that the standards of the State's obligations must be related to technical and economic possibilities; and that, too, is a principle upon which the tribunal in the *Trail Smelter* case acted.[56] Finally, articles 5, 6 and 7 recognize the extreme importance of exchange of information and consultation with other interested States, whenever there is a significant risk of transboundary pollution.

26. In other ways the Montreal Rules and the present topic are in sharp contrast and have complementary roles. For the reasons explained above (para. 24), the Montreal Rules necessarily proceed by exclusion, eliminating from their purview (art. 2, para. (2)) the whole area of the globe not included within the territory of a State, eliminating not only the protection of that area, but also the protection of State territory itself from sources of pollution arising in or under or above the high seas, or in outer space. Secondly—although this emerges from the comment on article 2, paragraph (2), rather than from the text—the Montreal Rules exclude also any form of long-range pollution, even though originating and causing adverse effects within the territory of a State.[57] Thirdly, the Montreal Rules (art. 2, para. (1)) are concerned essentially with the chronic or cumulative effects of pollution, excluding the release of substances which are merely "likely to" result in deleterious effects of the nature described in the definition.[58] Thus the first impression of a study of the Montreal Rules might be a realization that areas in which clear-cut customary rules about the wrongfulness of causing harm can perhaps be discerned are small—much less than the tip of the proverbial iceberg which is the proper subject-matter of the present topic.

27. The meagreness of this coverage could be offset by a gain in precision within the area covered; but here also there are difficulties. The familiar problems of approximation and appraisal crop up even within the confines of a specific obligation engaging the responsibility of the State. "Admittedly, it is impossible to formulate a general rule of international law fixing a level at which the damages produced by transfrontier pollution can be deemed to be substantial."[59] "The yardstick must rather be determined in the light of the technical standard and the level of pollution generally accepted in the region concerned or even of the level of general damage caused by human influence on the environment."[60] These are universal truths, but differences in appraisal among interested parties are least likely to be resolved in a context in which those parties are debating the lawfulness of the conduct of one of their number. Admittedly, this was done in the *Trail Smelter* case, and this is an aspect of its uniqueness; but although the tribunal felt obliged by its terms of reference to fix the point of wrongfulness, it fixed the ultimate level of Canada's legal obligations without reference to the point of wrongfulness.[61] That is the usual practice of States, which establish régimes to avoid, minimize and repair loss or injury pragmatically, although with a shrewd sense of what the law demands of them.

28. To pursue the issue a little further, it may be useful to consider the way in which article 3, paragraph (1), of the Montreal Rules would operate. "From the fact that causing substantial damages on the territory of other States constitutes an internationally wrongful act results the duty for the polluting State to cut down transfrontier pollution to such an extent that the transfrontier damages cannot any more be termed substantial."[62] In other words, an attempt has been made to combine the notion of avoiding a wrongful act or omission of the State with that of avoiding substantial transboundary loss or injury; but despite the apparently absolute nature of the obligation described in the statement quoted, the real effect of this amalgam is to produce a very weak obligation indeed. Under article 3, paragraph (1), wrongfulness flows only from the fact of loss or injury, not from exposure to the risk of loss or injury; and, as has been mentioned (para. 26 above), activities that are merely "likely to" cause loss or injury have been excluded, in order to narrow the field of application. It does not however follow—as article 3, paragraph (1), and the commentary might seem to imply—that the actual occurrence of transboundary loss or injury will always entail the responsibility of the source State for a wrongful act or omission; for the responsibility of the source State will not be engaged

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

[54] *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), p. 5.

[55] See, in particular, paras. 1-4, 11 and 16 of the comments on article 3 submitted by the Committee on Legal Aspects of the Conservation of the Environment (ILA, *Report of the Sixtieth Conference, Montreal 1982 ...*, pp. 160 *et seq.*).

[56] See the second report, document A/CN.4/346 and Add.1 and 2 (see footnote 2 above), paras 27-28, 30-31 and 33-39.

[57] See para. 4 of the comments on article 2 submitted by the Committee on Legal Aspects of the Conservation of the Environment (ILA, *Report of the Sixtieth Conference, Montreal, 1982, ...*, pp. 159-160).

[58] See para. 2 of the comments on article 1 (*ibid.*, p. 158).

[59] Para. 8 of the comments on article 3 (*ibid.*, p. 162).

[60] Para. 9 of the comments on article 3 (*ibid.*, p. 163).

[61] See the second report, document A/CN.4/346 and Add.1 and 2, (see footnote 2 above), paras. 39, 64 and 66.

[62] Para. 10 of the comments on article 3 (*loc. cit.*, footnote 60 above).

unless the State authorities had the means of foreseeing that loss or injury was likely to be caused, as well as the duty to prevent its occurrence.[63]

29. The paradox arises through failure to distinguish acts or omissions that are wrongful because they are prohibited from acts or omissions which, although not prohibited, entail an obligation to avoid injury and to take remedial measures if loss or injury ensues. In the case of the *Cosmos 954* satellite, a Soviet space object which crash-landed in Canadian territory, Canada claimed from the Soviet Union compensation pursuant to the Convention on International Liability for Damage caused by Space Objects of 1972,[64] and further compensation, pursuant to general principles of international law, for additional costs incurred.[65] The first head of claim was made under a treaty which accepted a measure of liability for the accidental intrusion of a space object into foreign territory, and did not characterize that intrusion as unlawful. No doubt in deference to the prevailing dogma that liability in respect of acts not prohibited had always a conventional origin, Canada's second head of claim was framed in terms of an intrusion constituting a violation of Canadian sovereignty.[66] In that way the inadequacy of legal doctrine seems to have imposed a conceptual straitjacket which drove Canada to the curious extremity of alleging that the arrival of the space object was both licit and illicit, prohibited and not prohibited. A failure to develop the law relating to obligations arising from acts or omissions that are not prohibited must encourage States to rely more heavily on the extension of general rules of outright prohibition. Yet that is a regressive course, based on mutual restriction rather than on mutual accommodation.

30. To raise these analytical questions is not to dispute the significance and the value of the Montreal Rules. If it is wrongful for the source State to allow substantial levels of transboundary pollution—and the Special Rapporteur, although having no mandate in this area, does not doubt that it often is wrongful—the reason is not merely a literal application of the famous award of the tribunal in the *Trail Smelter* case. Contrary to the original wishes of the United States of America, but consistently with the tribunal's ultimate terms of reference, its second and final award was not based solely on the finding that transboundary pollution "of serious consequence" had been "established by clear and convincing evidence".[67] It was based also on the finding, after exhaustive scientific inquiry, that the pollution could have been avoided by technical measures that were within the economic capacity of the industry.[68] If that particular award has broadened into a general rule, it may well be because many of the kinds of chronic or cumulative pollution with which the Montreal Rules are especially concerned have proved to be equally avoidable. States which in future construct régimes to meet this kind of danger will do so with more assurance that, in the absence of a régime, the occurrence of substantial transboundary pollution would in all probability engage the responsibility of the source State for a failure in its duty of regulation.[69]

31. The last sentence of the previous paragraph brings the matter back into a relationship with the present topic. If rules of the Montreal kind have to stand alone, they will tend to show that law lags permanently behind the march of events, seldom constraining effectively the leaders in industry and technology, but learning from their excesses to prescribe rules that the leaders are at length finding the means and self-discipline to observe. As the Montreal Rules and commentaries imply,[70] the levels of protection thus evolved may not suit so well the more limited economic and industrial options of other members of the world community; and it may therefore seem to the latter that law is in the service of power and privilege. If that tendency—which has been the subject of complaint throughout the lifetime of the United Nations—is to be effectively countered, one early step is to dismiss the dogma that law imposes no obligations until particular rules of prohibition have been crystallized. Freed from that dogma, article 3, paragraph (1), of the Montreal Rules represents the obligation that is characteristic of the present topic, that is, an obligation of unsettled content, until articulated in an agreed or accepted régime, arising from the need to avoid and repair transboundary loss or injury. Article 3, paragraph (2), of the Montreal Rules, proclaiming the wrongfulness of allowing new sources or increased levels of pollution, then represents the second stage in regulation, that is, a rule of prohibition, embodying an objective standard, emerging from the consistent practice of States in constructing régimes or settling claims.

32. If we now return to the issues posed in paragraph 19 above, it should again be stressed that the rules contained in the schematic outline of the present topic

[63] To quote P. Reuter:

"We could, however, formulate a slightly different rule, namely, that a State is not entitled to perform acts in its territory that might be abnormally dangerous for other States, in particular neighbouring States. In such a case, it is not the materialization of the danger, i.e. a disastrous accident, that entails responsibility, but simply the performance of the act, such as the construction of the dam." ("Principes de droit international public", *Recueil des cours ..., 1961-II* (Leyden, Sijthoff, 1962), vol. 103, p. 592.)

For a longer extract from Mr. Reuter's paper, see the second report, document A/CN.4/346 and Add.1 and 2 (see footnote 2 above), footnote 95.

[64] United Nations, *Treaty Series*, vol. 961, p. 187.

[65] See Canada, Ministry of External Affairs, Note No. FLA-268 of 23 January 1979, annex A (*International Legal Materials* (Washington, D.C.), vol. XVIII (1979), p. 902).

[66] Note No. FLA-268, annex A, para. 21 (*ibid.*, p. 907).

[67] United Nations, *Reports of International Arbitral Awards*, vol. III ..., p. 1965. See paras. 2, 3 and 4 of the comments on article 3 submitted by the Committee on Legal Aspects of the Conservation of the Environment (*loc. cit.*, footnote 55 above).

[68] See the second report, document A/CN.4/346 and Add.1 and 2 (see footnote 2 above), paras. 27, 31 and 34-39.

[69] This would appear to be the case at least in relation to new sources of transboundary pollution of fresh water and to those rare circumstances where the transboundary consequences of a new source of air pollution can be specifically identified, but subject, in each case, to the rules of sharing (see para. 36 below).

[70] See footnotes 59 and 60 above.

are not a substitute for specific conventional or customary rules that engage the responsibility of the State. It is the main purpose of the present topic to encourage the elaboration or emergence of such rules. When such rules are determinative, there will be no occasion to refer to the flexible framework of rules or guidelines formulated in pursuance of the present topic. On the other hand, it should not be forgotten that in this area customary rules are not easily or frequently discernible. The Montreal Rules are perhaps the most ambitious attempt yet made to find and describe such customary rules. Their limited field of application, and their margins of inexactitude, have already been discussed; and, if one may judge from some positions taken in the Sixth Committee of the General Assembly in reference to the present topic, the Montreal Rules would not yet be acceptable to every State whose practice has been cited in their support. The best result is achieved by combining a nascent customary rule with the procedures outlined in pursuance of the present topic. For any one case in which a problem is resolved by an agreed application of the Montreal Rules there are likely to be many in which States—influenced perhaps by the thrust of those Rules—construct régimes that embody the duty to avoid and to repair pollution damage, and that place the burden of doing so squarely upon the State or activity which is the source of the damage.

33. In theory, there is another kind of obligation that may supervene to obviate or reduce reliance on rules and guidelines formulated in pursuance of the present topic. Wherever there are rules of sharing—for example, in relation to equal benefit from the freedoms of the high seas, or to the balance of rights between the flag State and the coastal State in case of innocent passage through the territorial sea, or to competing uses of the flow of an international watercourse—those rules must in principle provide the means of adjusting conflicts of rights or interests. In practice, however, the operation of such rules is seldom effectively separated from the question of a loss or injury caused by activities within the territory or control of one State to persons or property within or belonging to another State.

34. In the well-known case of the *Fukuryu Maru* (1954),[71] injuries and losses were suffered by the crew members and owners of a Japanese fishing boat on the high seas caught in the fall-out from a United States nuclear bomb test, although outside the designated testing area. One element in the situation, which also lengthened the journeys of other Japanese fishing boats to their usual fishing grounds, was the competing uses of the high seas for fishing and for weapons testing. Another question, which Japan was disposed to answer affirmatively, was whether the risk entailed by the bomb test, in all the circumstances of the particular case, was such as to engage the responsibility of the United States of America for a wrongful act. Although such responsibility was not admitted, the United States was prompt in its expressions of concern and in the provision of medical and other help; and it offered equally prompt assurances that the necessary steps would be taken to ensure fair and just compensation if the facts so warranted. The case was therefore settled, as many cases are settled, by the tender and acceptance of a sum of money, paid in compensation for the injuries and losses shown to have been suffered.

35. It is not within the province of the present topic to articulate the rules of sharing, except as optional methods of accommodating interests. So, to take a simple example, navigable boundary waters will seldom be of much use to either riparian unless there is mutual willingness to allow common use of the main channel. On the other hand, the element of sharing is sometimes logically prior to the questions with which the present topic is centrally concerned; for the relevant rules of sharing may identify the State under whose control an activity is conducted, and may determine whether any other State is involved in a loss or injury to which that activity gives rise. Thus, for example, a coastal State substantially controls the movement of foreign ships in passage through its territorial sea; but it plainly does not control the safety standards to which such ships are constructed.

36. Elements of sharing may also play an auxiliary role in determining the content of obligations arising out of acts or omissions not prohibited by international law. In the *Poplar River Project* case,[72] it was not doubted that the Canadian province of Saskatchewan had the right to construct and operate a power-generating station, even though the station would inevitably give rise to a significant degree of transboundary pollution in the neighbouring American state of Montana. In deference to United States representations, the new station's pollution emission standards were in general conformity with those prevailing on both sides of the international border, although fractionally below the United States standards for new source emissions. The extent of the injury done to the United States could be expressed in terms of a reduction in the potential for increasing power generation in Montana within predetermined levels limiting the degradation of air quality. Nevertheless, as Canada was adhering to standards that were more or less uniform on both sides of the international boundary, the view was taken that Canada must be allowed without penalty to draw upon the common reservoir of tolerable increase in air pollution levels.

37. Except to the extent that the States concerned have chosen to assign priorities to competing uses, the rules of sharing seldom lend themselves to any automatic or inevitable application. For example, article V of the Helsinki Rules on the Uses of the Waters of International Rivers, adopted by the International Law Association at its fifty-second conference (Helsinki,

[71] M. M. Whiteman, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1967), vol. 8, p. 764.

[72] *Digest of United States Practice in International Law 1976* (Washington, D.C., U.S. Government Printing Office, 1977), pp. 590-594; *ibid. 1978* (1980), pp. 1116-1121 and 1496-1498.

1966)[73] which deals with the reciprocal rights and obligations of States that share an international drainage basin, cannot be and does not purport to be more than an incomplete listing of unranked factors upon which the parties may draw in a negotiation to establish the legitimacy of any particular demand upon a shared resource. The framers of the Montreal Rules at length abandoned a proposal to include in those Rules a corresponding list of criteria for sharing,[74] no doubt because such open-ended provisions consort badly with an attempt to formulate rules that engage the responsibility of the State for a wrongful act or omission. Yet these wide margins of appreciation cannot be eliminated. The rules of sharing, even more than other rules which may play a part in determining the point of intersection of harm and wrong, are seldom reducible, in their application to a given set of facts, to a relentless, indisputably correct analysis, leading to an inescapable conclusion.

38. State practice, whether reflected in settlements that are nearly always "non-principled", or in agreements that are seldom intended to be an exact reflection of customary law, may be cited in support either of emerging rules of prohibition or of obligations that form the subject-matter of the present topic. In the case of the *Fukuryu Maru*, briefly described above (para. 34), the United States authorities may have considered anxiously whether their conduct of the nuclear bomb test breached any international obligation. Whether they did so or not, there is no doubt at all that they recognized a duty to respond positively when the bomb tests were shown to have caused serious injuries to foreign nationals on the high seas. Obviously, the more closely State practice approaches uniformity, the better will be the prospect of identifying an emerging rule of prohibition; but as has been noted, such norms emerge slowly and meagrely in proportion to the richness of State practice. Often, as the judgments of the International Court of Justice in the *North Sea Continental Shelf* cases[75] and the *Fisheries Jurisdiction* cases[76] bear witness, law provides the parameters for solutions that allow elements of choice, in order that the best results may be secured for the various interests affected.[77] In one sense, therefore, the question which underlies this topic is whether lawyers take so narrow a view of their discipline that they do not share the sense of responsibility of others who influence the behaviour of States, and wait until the latter have provided the materials from which general rules of prohibition may be discerned.

39. To put the argument differently, it is the Commission's own invariable working rule that no attempt should be made to fix the boundary between progressive development and codification. This is not because that boundary is unreal or unimportant, but because the attempt to mark it out would magnify every possibility of disagreement and would obscure every avenue of progress. In much the same way, when States adjust their overlapping interests, they mix pragmatism with regard for principle. This does not constitute an abandonment of legal reasoning in favour of blind compromise. On the contrary, it would be irrational to attempt to resolve complex issues by searching, at the outset, for a point of intersection of harm and wrong. To do so would imply that, up to this elusive point, States are free to act as they please and that, beyond this point, their conduct is always wrongful. Nothing in the State practice which concerns this topic, or in the legal rules by which any democratic society regulates the fundamental freedoms of its members, justifies such a view. It is of course most desirable that States should delimit by agreement their respective rights and obligations in greater or smaller areas. In doing so, they liquidate—but seldom completely liquidate—the more generalized obligation with which this topic deals.

D. The continuum of prevention and reparation

40. The habit of squeezing every interpretation of State practice into the mould of rules of wrongfulness dies hard, even when the topic is by definition concerned with the consequences of acts that are *not* prohibited by international law. Thus, even in relation to the present topic, one or two representatives suggested, in the Sixth Committee of the General Assembly, at its

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[73]

"*Article V*

"1. What is a reasonable and equitable share within the meaning of article IV is to be determined in the light of all the relevant factors in each particular case.

"2. Relevant factors which are to be considered include, but are not limited to:

"(*a*) the geography of the basin, including in particular the extent of the drainage area in the territory of each basin State;

"(*b*) the hydrology of the basin, including in particular the contribution of water by each basin State;

"(*c*) the climate affecting the basin;

"(*d*) the past utilization of the waters of the basin, including in particular existing utilization;

"(*e*) the economic and social needs of each basin State;

"(*f*) the population dependent on the waters of the basin in each basin State;

"(*g*) the comparative costs of alternative means of satisfying the economic and social needs of each basin State;

"(*h*) the availability of other resources;

"(*i*) the avoidance of unnecessary waste in the utilization of waters of the basin;

"(*j*) the practicability of compensation to one or more of the co-basin States as a means of adjusting conflicts among uses; and

"(*k*) the degree to which the needs of a basin State may be satisfied, without causing substantial injury to a co-basin State.

"3. The weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors. In determining what is a reasonable and equitable share, all relevant factors are to be considered together and a conclusion reached on the basis of the whole."

(ILA, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), p. 488; text reproduced in *Yearbook ... 1974*, vol. II (Part Two), pp. 357-358, document A/CN.4/274, para. 405.)

[74] See draft articles 5 and 6 submitted by the Committee on Legal Aspects of the Conservation of the Environment (ILA, *Report of the Sixtieth Conference, Montreal 1982*, ..., pp. 168, 170 and 171). Those draft articles were not included in the resolution adopted by the International Law Association (see footnotes 50 and 52 above).

[75] Judgment of 20 February 1969, *I.C.J. Reports 1969*, p. 3.

[76] Judgments of 25 July 1974, *I.C.J. Reports 1974*, pp. 3 and 175.

[77] See the second report, document A/CN.4/346 and Add.1 and 2 (see footnote 2 above), paras. 53-54.

thirty-seventh session, that there was a conceptual difference between rules of prevention and rules of reparation,[78] or asked why the schematic outline refused to prohibit an act unduly injurious to others.[79] A topic dealing with liability for injurious consequences arising out of acts *not* prohibited by international law cannot prohibit acts which give rise to injurious consequences. Rules of prevention are conceptually different from rules of reparation only when the latter are triggered by wrongfulness, that is, when they arise from "secondary", not "primary", rules. From a formal standpoint, the subject-matter of the present topic must be expressed as a compound "primary" obligation that covers the whole field of preventing, minimizing and providing reparation for the occurrence of physical transboundary harm. The true parallel, suggested in earlier reports,[80] is with obligations relating to the treatment of aliens, which allow the receiving State an opportunity to repair any injury an alien in its territory has suffered, and so to avoid wrongfulness.

41. It is nonetheless true—in a looser, less doctrinaire sense—that these compound "primary" obligations contain their own "secondary" elements. In that connotation—and with all the reservations expressed in the previous paragraph—it seems to the Special Rapporteur to be legitimate to describe the rules which engage State responsibility for a wrongful act or omission, and the rules dealt with in the present topic, as embodying "different shades of prohibition".[81] So, for example, the failure of a State official to deal scrupulously with an alien precipitates a situation in which a response is required of the receiving State to redress the injury done to the individual alien and his State of nationality. The case of the *Fukuryu Maru*, already considered (see para. 34 above), may be characterized in the same way: the fact of physical injury and loss to Japanese fishermen, arising out of bomb tests conducted by the United States over the high seas, calls for and receives a response from the United States to redress the injury. Naturally, it remains open to the injured State to insist that the injury was caused wrongfully, and to the acting State to deny the validity of either ground of claim. The possibility of pursuing such a claim upon two quite different grounds should not be regarded as a disadvantage; for, as the Special Rapporteur on the topic of State responsibility has reminded the Commission in his fourth report, allegations of wrongful action are a good deal more numerous than admissions.[82]

42. It is also entirely true, as one representative in the Sixth Committee took especial pains to point out, that initiatives taken in pursuance of the present topic may be less productive of antagonism than accusations of wrongfulness. According to that representative:

> It was often forgotten that the application of local remedies might go a long way towards repairing and removing injury and thereby towards avoiding putting into effect responsibility and liability in State to State relations ...

Therefore, he continued, and the Special Rapporteur agrees, particular emphasis should be placed on establishing, as an initial measure, equal access for aliens, and non-discriminatory treatment, in domestic courts. In so far as those measures yielded substantial results, they would have the additional advantage of dealing directly with harm done to private individuals by privately conducted activities, thus avoiding the artificiality of making States the nominal parties in matters that might really concern an appropriate recompense to an injured individual.[83]

43. In short, this topic allows a soft approach to the problem of reconciling one State's freedom of action with another State's freedom from transboundary harm. Wherever possible, the topic provides the means of avoiding State to State confrontations. As in the *Poplar River Project* case,[84] it uses congruent municipal legal standards in the measurement and analysis of substantial loss or injury. In numerous treaty régimes, it refers the assessment of claims to municipal tribunals. It reduces the nightmare that a State may be absolutely liable for all physical transboundary loss or injury generated within its territory or under its control to the not so impossible dream that States are never without the shadow of an obligation in relation to situations or activities over which international law gives them exclusive or dominant territorial or other jurisdiction.

44. However soft the approach, it must not in the end leave the affected State as a mere supplicant, entitled only to whatever relief the laws and tribunals of the source State may provide. Subjection to the rule of prior exhaustion of local remedies is, in relation to the present topic, a question of deliberate choice;[85] even in matters as comparatively straightforward as the regulation by neighbouring States of transboundary civil wrongs, sub-

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[78] See e.g. the observations made by the representative of the United Kingdom, Mr. Berman (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 48th meeting, para. 20).

[79] See e.g. the observations made by the representative of Zaire, Mr. Balanda (*ibid.*, 51st meeting, para. 16).

[80] See footnote 20 above.

[81] This seems to be the sense in which the representatives of Italy, Mr. Sperduti, and Morocco, Mr. Gharbi, spoke, in the Sixth Committee of the General Assembly, in 1982, of the need to provide for both the "primary" duty to avoid or minimize loss or injury, and the "secondary" duty to make reparation, which came into play only in the last resort (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 47th meeting, para. 33, and 50th meeting, para. 37, respectively. See also, in this connection, the observations of Mr. Reuter at the thirty-third session of the Commission:

> "... throughout the preparation of the articles in Part One of the topic of State responsibility, the Commission had taken care not to state primary rules. In his view, however, it had not been careful enough when it had drafted provisions on the exhaustion of local remedies." (*Yearbook ... 1981*, vol. I, p. 220, 1685th meeting, para. 25.)

[82] See p. 8 above, document A/CN.4/366 and Add.1, para. 37.

[83] Observations made in the Sixth Committee of the General Assembly by the representative of the Netherlands, Mr. Siblesz, delivering the statement of his colleague, Mr. Riphagen (the quotation is from the verbatim text of the statement) (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 46th meeting, paras. 48-49).

[84] See footnote 72 above.

[85] See the contrary view of the representative of the Netherlands, Mr. Siblesz (*loc. cit.*, footnote 83 above).

mission to the law of the source State is frequently qualified by conferment of jurisdiction on boundary commissioners rather than on ordinary courts, and by providing for removal to the level of diplomatic negotiation in the case of larger claims.[86] More generally, it is of course true that this system of "different shades of prohibition" is in part an appeal to self-regulation by the source State: if it cannot reach agreement with an affected State, it is at least in duty bound to take objective account of the legitimate interest of the affected State, whether by providing a protective régime or by providing reparation for a transboundary loss or injury not governed by an adequate or agreed régime. What is the alternative: continuing, unlitigated disagreement about a question to which in real life the parties never directly address themselves, namely, the theoretical point of intersection of harm and wrong? Small wonder, then, that nearly all settlements are "non-principled".

45. On the other hand, it is self-defeating for those who approach this topic mainly from the standpoint of an affected State to assume that the risk or occurrence of physical transboundary loss or injury necessarily entails either a wrongful act or omission, or the strict liability, of the source State. If, for example, there is concern that a neighbouring State is constructing hydroelectric or atomic power stations with insufficient regard to their placement or safety margins, and a joint inquiry into these factual questions is desired, it would seldom make good sense to suggest that the neighbouring State must bear the full cost of the inquiry.[87] If there is concern that obsolete industrial methods in one country cause hazards or outright losses in another country, it may be appropriate for both countries to contribute to the costs of the clean-up.[88] If a developing State cannot afford not to become the repository of some wealthier country's "dirty" industries, it may require international effort—perhaps monitored and organized by an appropriate international organization—to arrive at solutions that do justice to the interests of the source State and of other affected States.[89] If scientific advances show that a pollution standard once thought satisfactory has contributed to deaths from pulmonary diseases across an international frontier, any question of the liability of the source State must take into account the former "shared expectation" that no such causal relationship would exist.[90] Not every risk or occurrence of substantial, unregulated, physical transboundary loss or injury is allowed to arise through a wrongful act or omission of the source State; but it is submitted that a sustained refusal of co-operation by the source State is in such circumstances always wrongful.

46. The six preceding paragraphs do not exhaust the theoretical and practical difficulties that have been raised in connection with the simplest and most popular theme of the present topic: the continuum of prevention and reparation. While acknowledging the paramount importance of prevention, it has been felt by some that this topic can, or should, begin only where prevention leaves off.[91] The Special Rapporteur does not quite understand the nature of this difficulty. It may be partly a matter of stereotyping: the term "liability" and, more particularly, the concept of strict liability, conjure up an image of compensation for a loss or injury that has not been avoided. Again, it has often enough been said that, while States continue to give attention to the need to prevent transboundary losses and injuries, they have signally failed to develop a sense of obligation to make good the losses and injuries that have not been prevented.[92] Principle 22 of the Stockholm Declaration[93] remains largely undeveloped, ten years after it attracted the full support of the world community. Therefore, the argument may run, it is the function of the present topic to fill that gap.[94]

47. But what is "prevention" and what is "reparation"? Reparation has always the purpose of restoring as fully as possible a pre-existing situation; and, in the context of the present topic, it may often amount to prevention after the event. In the *Trail Smelter* case,[95] the assessment of compensation for proven losses was a minor and preliminary phase of the arbitral tribunal's work. The lion's share of the tribunal's attention was devoted to discussing the means by which future loss or

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[86] See e.g. articles 41, 48 and 49 of the Treaty between Hungary and Romania concerning the régime of the Hungarian-Romanian State frontier and co-operation in frontier matters, signed at Budapest on 13 June 1963 (United Nations, *Treaty Series*, vol. 576, p. 275).

[87] See the contrary view expressed in the Sixth Committee of the General Assembly in 1982 by the representative of Zaire, Mr. Balanda (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 51st meeting, para. 17).

[88] See e.g. articles 5 and 7 of the Convention on the Protection of the Rhine against Pollution by Chlorides, signed at Bonn, on 3 December 1976, by France, the Federal Republic of Germany, Luxembourg, the Netherlands and Switzerland (*International Legal Materials* (Washington, D.C.), vol. XVI, No. 3 (March 1977), p. 265).

[89] See the observations made at the thirty-second session of the Commission by Mr. Sucharitkul (*Yearbook ... 1980*, vol. I, p. 246, 1631st meeting, paras. 4 and 5). See also the observations referred to in footnote 43 above.

[90] See the contrary view expressed in the Sixth Committee of the General Assembly, in 1982, by the representative of Jamaica, Mr. Robinson (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 40th meeting, para. 32).

[91] See e.g. the observations made in the Sixth Committee by the representative of Brazil, Mr. Calero Rodrigues (*ibid.*, 43rd meeting, para. 63) and, in a slightly different sense, by the representative of Spain, Mr. Lacleta Muñoz (*ibid.*, 48th meeting, para. 32).

[92] See the preliminary report, document A/CN.4/334 and Add.1 and 2 (see footnote 2 above), paras. 5-9. See also the observations made at the thirty-second session of the Commission by Mr. Riphagen (*Yearbook ... 1980*, vol. I, p. 239, 1630th meeting, para. 30).

[93]

"*Principle 22*

"States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction." (*Op. cit.*, footnote 54 above.)

[94] See the contrary view expressed in the Sixth Committee of the General Assembly, in 1982, by the representative of France, Mr. Museux (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 38th meeting, para. 17).

[95] See the second report, document A/CN.4/346 and Add.1 and 2 (see footnote 2 above), paras. 22, 25-28 and 34-39.

injury could be avoided, consistently with the continued economic viability of the smelting enterprise. The measure of Canada's obligations was set as adherence to a prescribed régime, believed to be sufficient to avoid future loss or injury; but, as a further condition of the operation of an enterprise that might still entail transboundary risks, Canada was required also to provide an indemnity for losses or injuries actually incurred. The measure of reparation was therefore prevention, plus a guarantee. The preventive régime represented an objective standard, comparable with article 3, paragraph (2), of the Montreal Rules:[96] the guarantee, which may be compared or contrasted with article 3, paragraph (1), of those Rules, represented a condition attaching to an act or omission not prohibited by international law. The act or omission in question was the exercise or non-exercise of Canada's regulatory powers as a territorial sovereign to allow the activity of the Trail Smelter to continue.

48. Looked at in this light, State practice is less negative than has often been supposed. The *Colorado River* case,[97] between the United States of America and Mexico, began badly with a flat denial of United States liability for large losses borne by Mexican landholders,[98] because river water, used for irrigation in the United States, had high salt levels in the transboundary flow. The protracted discussions between the two parties ended more happily, with the provision by the United States of desalination and other equipment. The costs incurred by the United States in eliminating the problem were comparable with the large indemnities that Mexico had claimed; and there was also some provision for assistance to Mexican farmers in rehabilitating their land.[99] It is not a weakness in the legal precedents that States should choose to stress duties of prevention rather than of compensation. It would be more worrying if States were disposed to settle easily for the proposition that every transboundary loss or injury has its

[96] See footnote 52 above.

[97] On 30 August 1973, the United States of America and Mexico signed an agreement on a "permanent and definitive solution to the international problem of the salinity of the Colorado River" (see *United States Treaties and Other International Agreements*, vol. 24, part 2 (1973), p. 1968).

[98] The problems likely to arise from salinity had been foreseen as early as 1945 in hearings of the Senate Foreign Relations Committee on the 1944 Water Treaty between Mexico and the United States, and had been the subject of an exchange between Senator Millikin and Assistant Secretary of State Acheson:

"*Senator Millikin*: Do you know of any international principle that should keep us from giving Mexico the water with the salinity that it may have as it has normally developed under our own consumptive use?

"*Mr. Acheson*: No, sir.

"*Senator Milliken*: Could we give Mexico a better claim, so far as pure water is concerned, or fresh water, than we have among ourselves?

"*Mr. Acheson*: No, sir.

"*Senator Milliken*: Is there any international principle that compels that method of doing business?

"*Mr. Acheson*: No, sir.

"*Senator Milliken*: Now, return flows, to which the Senator from California refers, as they reach the Mexican border, are those flows which have returned from the last user of those waters in Arizona or in California. They are as saline as they are due to their consumptive use as visioned by the compact. We do not add to their salinity deliberately, nor have we any way of taking the salinity out of the water except possibly by use of very elaborate chemical works, or something of that kind. Is there any international principle that would require that we do anything of that kind?

"*Mr. Acheson*: Not to my knowledge.

"*Senator Milliken*: In other words, Mexico must take the water as it arrives at the border; is that correct?

"*Mr. Acheson*: That is correct.

"*Senator Milliken*: The salinity of that water arises from geography and consumptive use rather than from the treaty; is not that correct?

"*Mr. Acheson*: That is correct."

(*Water Treaty with Mexico. Hearings before the Committee on Foreign Relations, United States Senate, 79th Congress, 1st Session* (Washington, D.C., 1945), pp. 1764-1765 and 1770-1771.)

[99] Minute No. 242 of 30 August 1973 of the International Boundary and Water Commission, on the agreement concluded by the United States of America and Mexico, provides in article 7:

"7. The United States will support efforts by Mexico to obtain appropriate financing on favourable terms for the improvement and rehabilitation of the Mexicali Valley. The United States will also provide nonreimbursable assistance on a basis mutually acceptable to both countries exclusively for those aspects of the Mexican rehabilitation programme of the Mexicali Valley relating to the salinity problem, including tile drainage. In order to comply with the above-mentioned purposes, both countries will undertake negotiations as soon as possible." (United States of America, *The Department of State Bulletin*, vol. LXIX, No. 1787 (24 September 1973), p. 396.)

At a press conference held after the signing of the minute, President Nixon's special representative for resolution of the salinity problem with Mexico, Mr. Herbert Brownell, made the following remarks and replies:

"...

"The United States and Mexico entered into an agreement in 1944 which called for delivery of a certain quantity of water to Mexico each year, but there was nothing said in the agreement about the quality of the water, and when some of these irrigation districts opened up, like the Wellton-Mohawk District, it substantially decreased the quality of the water so that Mexico had complained that it made it impossible for them to profitably use irrigated lands in the Mexicali Valley for the growing of agricultural crops.

"Their claim was a substantial one, and many hundreds of acres, if not thousands of acres, in their calculations, were adversely affected by the low quality of the water and many acres were taken out of cultivation altogether; so that it meant a decrease in their agricultural income and it meant a decrease in the standard of living, according to their reports, of many of the farmers in that area of Mexico.

"The purpose, therefore, of this agreement was to restore the quality of the water, guarantee that for the future, and settle this irritating dispute between the two nations. And it will mean that from now on they will have usable water for the irrigation of the crops in that whole valley.

"...

"Q. How much damage, how many million dollars in damages have the Mexican farmers asked for the damage to the Mexicali Valley croplands?

"*Ambassador Brownell*: Of course, that has never been adjudicated, but the claims have been up to about $150 million.

"Q. Now, is the drainage ditch that is going to be lined to the Gulf of California, is that going to be in lieu of the damages that the Mexican farmers have asked?

"*Ambassador Brownell*: There is no provision for damages in this agreement whatsoever.

"Q. I know it is an 'in lieu of'. President Echeverría Alvarez said last month that the drainage ditch, the lined canal which will protect their wells in the Mexicali Valley, would be in lieu of, or part of, the damage claims that the Mexican farmers have made. Is this true?

"*Ambassador Brownell*: I think you could say that the whole settlement is in lieu of an acrimonious dispute over damages, yes. The whole settlement is in substitution for fighting it out.

"..."

(*Ibid.*, pp. 388-389.)

price, even when the affected State is a thoroughly unwilling seller.

49. It is, however, equally important that source States in fact recognize a duty to do more than secure the observance of whatever measures of prevention are considered feasible, taking due account of technical and economic possibilities, as well as of the magnitude of the risk. Source States may also contribute to filling perceived gaps in the standards of protection by making provision for liability in the event that loss or injury ensues. Questions affecting the sea carriage of oil afford a very clear example of all the variables. Ship construction and maintenance, and port facilities, are required to be of a standard that is judged to provide substantial protection at manageable cost,[100] and municipal courts are used to determine claims, which are governed by strict but limited liability.[101] There is also a measure of international guarantee, charged upon the industry and its customers.[102] The fact that the two principal treaties in this field are to be revised in 1984[103] is an illustration that, although basic principles do not change, their application in particular areas may call for reassessment in the light of actual experience, of improved technology, or even of an evolving sense of community standards.

50. In spite of all the qualms to which reference has been made, majority opinion in the Sixth Committee has each year given a strong endorsement to the proposal that prevention and reparation should both be treated in the context of this topic. This was especially clear at the thirty-seventh session of the General Assembly, in 1982.[104] It could hardly be otherwise, if the Commission wishes to base itself on State treaty practice. The Special Rapporteur wishes to stress that the division between sections 3 and 4 of the schematic outline[105] is not a division between prevention and reparation: it is a division between the steps that should be taken when States foresee a need to construct a régime of prevention and reparation, and the steps that must be taken when a physical transboundary loss or injury has occurred and the obligations of the course State have not been predetermined by any applicable or accepted régime. The policy of the schematic outline is to reflect and encourage the growing practice of States to regulate these matters in advance, so that precise rules of prohibition, tailored to the needs of particular situations—including, if appropriate, precise rules of strict liability—will take the place of the general obligations treated in this topic.

E. Strict liability

51. As the early paragraphs of this report recall, wrongfulness and strict liability are often regarded as the active principles of two quite distinct systems of obligation—the only possible systems of obligation that legal reasoning admits. The gap between the two systems, thus conceived, is very wide, because strict liability relates obligations to the occurrence of loss or injury, taking no other account of the involvement of the source State than its hierarchical connection, whether or not territorial, with the generator of the harmful consequences. With such a clear-cut distinction in mind, it is not surprising that a partisan of strict liability should be disconcerted by the open texture of the Special Rapporteur's schematic outline, and by his doctrinal struggle to liberate the concept of obligations arising without wrongfulness from the sticky embrace of State responsibility for wrongful acts or omissions. There is no doubt a certain amount of truth in the view taken by several speakers in the Sixth Committee[106] that the Special Rapporteur has worried more about protecting source States from unreasonable demands than

[100] See the International Convention for the Prevention of Pollution from Ships, signed at London on 2 November 1973 (IMCO publication, Sales No. 74.01.E) and the Protocol relating to that Convention, signed at London on 17 February 1978 (*idem*, Sales No. 78.09.E).

[101] See the International Convention on Civil Liability for Oil Pollution Damage, signed at Brussels on 29 November 1969 (*idem*, Sales No. 77.16.E).

[102] See the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, signed at Brussels on 18 December 1971 (*idem*, Sales No. 1972.10.E).

[103] Substantive issues and proposed solutions are described in IMO, "Report of the Legal Committee on the work of its fiftieth session" (LEG 50/8), of 17 March 1983, paras. 10-108.

[104] See e.g. the observations made by the representatives of Thailand, Mr. Sucharitkul (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 44th meeting, para. 27); Canada, Mr. Bacon (*ibid.*, 45th meeting, para. 86); Japan, Mr. Hayashi (*ibid.*, 46th meeting, para. 25); Italy, Mr. Sperduti (*ibid.*, 47th meeting, para. 33); Mexico, Mr. González Gálvez (*ibid.*, para. 52); Australia, Mr. De Stoop (*ibid.*, 48th meeting, para. 10); Romania, Mr. Mazilu (*ibid.*, 49th meeting, para. 10); Sierra Leone, Mr. Koroma (*ibid.*, para. 44); Morocco, Mr. Gharbi (*ibid.*, 50th meeting, paras. 36-37); Iraq, Mr. Al-Qaysi (*ibid.*, para. 54); Bangladesh, Mr. Morshed (*ibid.*, para. 67); Zaire, Mr. Balanda (*ibid.*, 51st meeting, para. 16); Kenya, Mr. Wabuge (*ibid.*, para. 49); and Austria, Mr. Tuerk (*ibid.*, para. 99). The representative of India, Mr. Jagota, also referred to the need for a preventive régime as well as for a régime of reparation, but that remark, which appears in the verbatim record, does not appear in the summary record of the 46th meeting. The representative of the United States of America, Mrs. Schwab, indicated a readiness to contemplate duties of prevention as well as reparation, provided the scope of the topic was suitably narrowed (*ibid.*, 52nd meeting, para. 28). In addition, a number of speakers who did not refer explicitly to the duties of prevention and reparation expressed their agreement with the general thrust of the schematic outline. See e.g. the observations of the representatives of Greece, Mr. Economides (*ibid.*, 40th meeting, para. 48); Madagascar, Mr. Razanakoto (*ibid.*, 46th meeting, para. 123); Tunisia, Mr. Mahbouli (*ibid.*, 47th meeting, para. 71); Indonesia, Mr. Oerip (*ibid.*, 48th meeting, para. 72); Bahamas, Mr. Maynard (*ibid.*, para. 84); and Egypt, Mr. El-Banhawy (*ibid.*, 50th meeting, para. 7). See, however, the observation of the representatives of Brazil, Mr. Calero Rodrigues (*ibid.*, 43rd meeting, paras. 63 and 65); Finland, Mr. Hakapää (*ibid.*, 45th meeting, para. 11); Spain, Mr. Lacleta Muñoz (*ibid.*, 48th meeting, para. 97); and the Libyan Arab Jamahiriya, Mr. Azzarouk (*ibid.*, 49th meeting, para. 53); all of whom, though not doubting the importance of prevention, thought the duty of reparation should be further stressed and, in one or two cases, expressed reservations about the extent to which duties of prevention could be developed within the scope of the present topic.

[105] See footnote 23 above.

[106] See e.g. the observations made by the representative of Finland, Mr. Hakapää (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 45th meeting, para. 10). See also the observations made by the representative of Trinidad and Tobago, Mr. McKenzie, who asked why the automatic application of the rule of reparation for loss or injury did not figure in the schematic outline (*ibid.*, 51st meeting, para. 65).

about ensuring reparation for affected States. That is partly because it does not seem advisable to state the principles and factors in sections 5 and 6 of the schematic outline too fully and definitely until it is possible to make a close contextual examination of the State practice which supports them.

52. Two recent commentators on the Commission's current work on this topic, G. Handl[107] and C. G. Caubet,[108] are concerned by the extent of the Special Rapporteur's reliance upon the duty of source States to negotiate—or, if that is not possible, to provide unilaterally—suitable régimes of prevention and reparation, without the compulsion of an ultimate rule of strict liability. They would wish to strengthen the residual rule, and indeed to give it much more than a residual character. It is hardly possible and perhaps not appropriate to the balance of the present report to include any detailed commentary upon these still unpublished papers; but the Special Rapporteur must try, without misrepresenting the learned authors, to indicate the salient features of the solutions they propose. In both cases, the main effect would be to impose upon the source State an unqualified obligation, in the nature of strict liability, to provide reparation for physical transboundary loss or injury. Caubet narrows the scope of this obligation by applying the distinction between rights and interests[109] dwelt upon in the *Lake Lanoux* award.[110] Handl does so by confining the scope of the presumption of strict liability (but not the scope of the topic) to Jenks's criterion of ultra-hazard—that is, the threat of exceptionally grave consequences coupled with a low probability of their occurrence—and to losses or injuries that are typical of the risks associated with the generating activity.[111]

53. Caubet, confessing to heresy, settles for a "mixed régime", in which activities attract no taint of unlawfulness except when they give rise to physical transboundary loss or injury; but there is then a presumption that the loss or injury has been caused unlawfully.[112] The rebuttal of that presumption turns upon a threshold test, which incorporates a reference to all or most of the principles and factors enumerated in sections 5 and 6 of the schematic outline.[113] Superficially, this solution may look like a more dynamic version of article 3, paragraph 1, of the Montreal Rules,[114] but it is not. It preserves the objective element of an obligation a breach of which would engage the responsibility of the State for a wrongful act or omission; but unlike article 3, paragraph 1, of the Montreal Rules, it suppresses the subjective element. The defence of non-attributability is denied. In a way, this is an all-or-nothing solution: if the affected State fails to establish that the loss or injury has infringed its rights, the victim will be left to pursue whatever remedies municipal law and international solidarity leave open to it. But Caubet can reply cogently, first, that his threshold test favours the view that substantial transboundary loss or injury infringes a right and, secondly, that the very existence of their obligation of strict liability would give States a stronger incentive to make their own agreements embodying that principle, and taking incidental account of interests as well as of rights.

54. The real question is: how much is gained, and at what cost, by Caubet's interesting, if heretical, solution? The Special Rapporteur, who makes no great claim to orthodoxy in his own behalf, does not have a decided view, but will indicate some of the factors. Failing an explicit stipulation in an applicable régime, there must always be room for evaluation of such issues as the way in which a loss or injury should be characterized, and whether that kind of loss or injury was foreseeable; whether the loss or injury is substantial; and whether the quantum of reparation is affected by any question of sharing, or by a change in the circumstances that existed when the activity which gave rise to the loss or injury was established. Caubet seems, a little improbably, to crowd all such issues into his threshold measurement of harm. They have then to be assessed in an all-or-nothing context: everything depends upon determining the point of intersection of harm and quasi-wrong. That is what the Special Rapporteur had hoped to avoid, by relating obligations of non-wrongfulness to the way in which States actually behave, rather than to the evasive tests of

[107] G. Handl, "International liability of States for marine pollution", *The Canadian Yearbook of International Law, 1983* (Vancouver), vol. XXI, p. 85.

[108] C. G. Caubet, "Le droit international en quête d'une responsabilité pour les dommages résultant d'activités qu'il n'interdit pas", report submitted to the Centre for Research and Studies on International Law and International Relations of the Hague Academy of International Law (1982 session), on the international responsibility of States.

[109] "Certain dommages correspondront à un droit, d'autres à un simple intérêt. La question du seuil du dommage indemnisable s'apparente alors à celle du seuil à partir duquel un intérêt obtient la protection juridique et devient un droit."

[110] United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), p. 316, para. 23; see also *Yearbook ... 1974*, vol. II (Part Two), p. 198, document A/5409, para. 1068.

[111] "A truly different approach, however, has been taken by Professor Quentin-Baxter, the International Law Commission's Special Rapporteur on 'international liability for injurious consequences arising out of acts not prohibited by international law'. Particularly his second and third reports on the topic present a challenging invitation to rethink the fundamental premises for loss allocation in the international legal system. After some apparent initial hesitation, he now fully acknowledges the intrinsic merits of the notion of 'special danger' as a loss-shifting device in situations in which the acting State's conduct free of blame. He thus gives recognition to the key role of foreseeability of harm typical of a given activity, not in the sense that it be occasioned as a consequence of a particular way in which the activity is carried on, but as a statistical probability, albeit a very low one, which reasonable care cannot eliminate." (*Loc. cit.* (footnote 107 above), pp. 105-106.)

[112] "On en vient ainsi à envisager un régime mixte—et sans doute hérétique, du point de vue théorique—dans lequel l'activité dangereuse bénéficie d'une présomption de licéité, tandis que ses conséquences préjudiciables tombent sous le coup d'une présomption d'illicéité."

[113] "Il apparaît donc nécessaire de faire respecter un certain équilibre entre les droits et intérêts des parties concernées. M. Quentin-Baxter expose de manière détaillée neuf éléments qui sont 'notamment pertinents pour apprécier l'équilibre des intérêts ...'." There follows a footnote reference to section 6 of the schematic outline.

[114] For text, see footnote 52 above. Concerning the application of that rule, see para. 28 above.

wrongfulness which they seek to evade. There is, incidentally, no reason why the right to reparation, and the principles and factors safeguarding it, should not be stated as strongly as the Commission considers prudent and warranted by developing State practice.[115]

55. Handl has no difficulty in remaining within the field of non-wrongfulness. He approves the general thrust of the Commission's work on the present topic, seeing in that work, and in the General Assembly's continuing support, mounting evidence of the acceptance of the principle of strict liability, at least in the area of ultra-hazard. He approves, in particular, the emphasis, in earlier reports on this topic, upon the foreseeability of risks associated with a particular activity as a criterion justifying an obligation in the nature of strict liability; and he develops the concept of a risk typical of an activity.[116] Handl does not so much depart from the schematic outline as add a bold and comprehensively argued rider: risks typical of an activity that is ultra-hazardous should be presumed to fall on the source State, eliminating the need to put in play all the other principles and factors that might enter into a balance of interests.[117] He chooses to present his general thesis in one of the most difficult areas: the area of accidental, ship-based marine pollution. In this area the very identity of the source State must be ascertained according to the division of competence between flag State and coastal State; and States have never assumed liability for these risks, either directly or as guarantors. The economic interest in super-tankers multiplies the environmental dangers; and the strict, but limited, liability of the industry is as much to protect it from the excessive territorial jurisdiction of the coastal State as to provide an assurance of some reparation for serious accidents.

56. In a legal system with a legislature, Handl's article, and earlier work in similar vein, would provide the kind of thesis that has often set in train a more comprehensive inquiry, leading at length to legislative intervention and an abrupt change in the policy of the law. For his appeal is not only to standards of fairness and morality, well enough grounded in municipal legal systems to have a claim to be regarded as a general principle of law, but also to common sense and to efficiency. The criterion of foreseeability is applied rigorously, so that risks may be insurable and the venture actuarially sound. Yet one must recognize that these proposals are *de lege ferenda*. They represent the kind of quantum leap that one may expect to find in a switch from one basis of obligation to another. Meanwhile the interests represented in the IMO Legal Committee have been making their own businesslike preparations for the 1984 Conference to revise the 1969 International Convention on Civil Liability for Oil Pollution Damage and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage.[118] It seems clear that these conventions, which govern a typical area of ultra-hazardous risk, will not be radically changed. The industry, and its clients and insurers, will continue to bear a limited liability in respect of transboundary loss or injury arising from accidental, ship-based pollution. States parties to the conventions will continue to discharge the duties they may owe to each other in respect of such losses and injuries only by establishing and maintaining the civil liability régimes represented by the revised conventions.[119]

57. It therefore seems to the Special Rapporteur that, if the Commission were to define its aims and its survey of State practice more narrowly than the title of the topic requires, by identifying acts not prohibited by international law with the strict liability of the State, it would outstrip the pace of the international community's advance and would run the risk of obscuring the genuine, underlying momentum of that advance. In this report considerable emphasis has been placed upon the difficulty of articulating the ordinary standards of State responsibility for wrongful acts and omissions in ways that offer practical solutions to current legal problems. The theoretical answer may be a move to the standards of the strict liability of the State. The Commission will not wish to neglect the reasoned arguments of Handl and others that this is a feasible standard, and the only one which finally discourages the shabby compromises that assail the biosphere and leave the victims of avoidable disasters with inadequate redress. Any solutions that the Commission offers must leave the way wide open for further advances. The schematic outline was designed to do that; and, as many have noted, the principles in section 5 need considerable development. However, it should also be borne in mind that, in making the leap to the strict liability of the State, legal doctrine falters and models in State practice are few.

F. Final considerations

58. For a number of reasons, the Special Rapporteur has chosen to present this report in the form of a general review. Some reasons are circumstantial. The priorities settled by the Commission at its thirty-fourth session, in 1982, left no possibility that draft articles on this topic could reach the Drafting Committee at the following session. The third and last part of the Secretariat's valuable study of State practice did not reach the Special Rapporteur in time for his consideration before the current session of the Commission; and the three parts,

[115] For example, the Commission states in its report on its thirty-fourth session:

> "... as one Commission member pointed out, the schematic outline did envisage a rule of automatic answerability. Several members noted that this rule needed the support of a clearly stated principle that protection should be commensurate with the nature of the activity or the risk." (*Yearbook ... 1982*, vol. II (Part Two), p. 90, para. 137.)

[116] See footnote 111 above.

[117] "... the notion that the creation of a transnational risk should entail a strict standard of international accountability in the event that typical harm materializes transnationally is expressive of a general principle of law. As such it must be considered a clear indication of universally shared expectations about the requisite balancing of costs and benefits of a transnationally hazardous activity." (*Loc. cit.* (footnote 107 above), pp. 100-101.)

[118] See footnotes 101 and 102 above.

[119] See footnote 103 above.

dealing respectively with multilateral and bilateral treaty practice and with settlements and claims, need to be considered side by side. The Special Rapporteur welcomes the interest shown in these materials in the Sixth Committee and in the Commission, and he takes this opportunity to renew earlier requests that the materials be made more widely available. The third part of the study, which is presented only as a collection of documents, would need to be put in the form of an analytical study, corresponding more closely to the two earlier parts, so that the reader can more easily understand the criteria that have governed the selection of materials.[120]

59. As may be seen from the topical summary of the debates of the Sixth Committee on the Commission's report during the thirty-seventh session of the General Assembly, the chapter of the report dealing with this topic attracted great interest and predominantly favourable comment.[121] Nevertheless, there was some concern that the General Assembly seemed to be getting mixed signals from the Commission about this topic; and two or three speakers took the view that the Commission should take an early decision whether to continue its consideration of the topic. The Special Rapporteur shares that view and wishes to facilitate such a decision. Eleven years after the Commission identified the topic, six years after it was described by a working group and placed on the active agenda, one year after an initial set of materials was completed, and with four reports canvassing the nature of the topic, 1984 is perhaps the earliest and the latest year in which such a decision should be taken. The work of the Commission has often involved a collegiate commitment to topics for which individual members have little enthusiasm; but the commitment must be made, or the General Assembly's agreement sought to remove the topic from the Commission's agenda.

60. Setting aside procedural issues, the main reason for the shape of the present report is its substance. It is not doubted that the progressive development and codification of any international law topic must, above all, be related to State practice. Although there is little practice that exhibits a rule of strict liability of the State in full working order, there is a rich practice illustrating the steps States take—by agreement, or within the rules of international organizations to which they belong, or even unilaterally—in exercise of their obligations, as territorial or controlling authorities, towards other States. This practice cannot, of course, be severed from the rules of State responsibility for wrongful acts or omissions, for these form the backbone of any legal system. Nevertheless, as international life grows more complex and is more elaborately organized, attempts to interpret international law solely in terms of breaches of imprecise or disputed rules, engaging State responsibility for a wrongful act or omission, are bound to be inadequate. This is the more true because adjudication, or any other principled determination of a legal dispute, is in this area of international law a rarity.

61. One should not, however, underestimate the vested interest in chaos. Once breach of an international obligation has been alleged and denied, the parties can settle down more or less comfortably to work out a "non-principled" solution; and they will perhaps advert to most of the principles and factors which are—or should be—in the schematic outline. Their "non-principled" solution, and many others like it, will provide ambivalent raw materials, to be drawn upon by researchers as birds build nests. The same stock of materials that fabricated the Montreal Rules must serve the cause of strict liability, and the intermediate solution presented in the third report. For that rather modest solution, State practice offers ample materials, but right of access to them is governed by doctrine. The schematic outline proposes, by drawing on treaty practice and claims settlement practice, to fill the void between the allegation and the denial that physical transboundary loss or injury has been caused wrongfully, or must in any case be repaired; but both the party that alleges and the party that denies can claim that the effort is unnecessary.

62. Some, in fact, think exactly that, reverting approximately to the positions taken prior to the *Trail Smelter* case by the United States of America and Canada.[122] In a few such cases, wrongfulness, and strict liability for ultra-hazard, are thought to cover every important category.[123] Some others believe that no general rule or principle of avoiding and repairing transboundary harm exists. It is considered unrealistic to elaborate such a norm, or to suggest that States have obligations to establish standards for the prevention of loss or injury.[124] The role of international law is doubted in areas frequently covered by provisions of domestic law governing liability in actions for damages between private persons and private interests; and the test of foreseeability of damage is countered by the argument of absence of responsibility for private activities.[125] It

[120] The dissemination and interchange of ideas is affected also by the availability of documents. The publication of volume II (Part One) of the Commission's *Yearbook*, which contains the Special Rapporteurs' reports, at present goes no further in its English edition than 1979. It seems strange that Special Rapporteurs' reports, which exist in the working languages before they are discussed, should be published long after the summary records of the discussions that relate to them. The main purpose of a think-tank is not that it should be almost soundproof.

[121] A/CN.4/L.352, sect. C.

[122] See the second report document A/CN.4/346 and Add.1 and 2 (see footnote 2 above), para. 63.

[123] This seems to be the import of the observations made in the Sixth Committee of the General Assembly in 1982 by e.g. the representative of Argentina, Mr. Barboza (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 49th meeting, paras. 13-15).

[124] See the observations made by the representative of the German Democratic Republic, Mr. Görner (*ibid.*, 38th meeting, para. 34).

[125] See the observations made by the representative of the United Kingdom, Mr. Berman (*ibid.*, 48th meeting, para. 20). See also, on the unwillingness of States to accept responsibility for the activities of private individuals and bodies corporate, the observations made by the representative of France, Mr. Museux (*ibid.*, 38th meeting, para. 17), and by the representative of Zaire, Mr. Balanda (*ibid.*, 51st meeting, para. 13).

has already been noted that the majority opinion, as expressed in the Sixth Committee, adheres to the principle of avoiding, minimizing and repairing transboundary loss, and considers that questions of prevention and reparation should not be separated. It should also be noted that majority opinion specifically rejects the notion that the treatment of the present topic should make any distinction between the obligations of the State arising from public activities and those arising from private activities.[126]

63. To summarize, the motive power of the schematic outline[127] is the duty of the source State, subject to factors such as sharing and the distribution of costs and benefits, to avoid—or minimize and repair—substantial, physical transboundary loss or injury which is foreseeable, not necessarily in its actual occurrence but as a risk associated with the conduct of an activity. That duty is a concomitant of the exclusive or dominant jurisdiction which international law reposes in the source State as a territorial or controlling authority. The schematic outline stands, subject to the major qualifications that follow, as a reliable general indication of the Special Rapporteur's proposals for the development of the topic. In accordance with the clear trend of majority opinion in 1982, both in the Commission and in the Sixth Committee, the description of the scope of the topic, contained in section 1 of the schematic outline, will be confined to physical activities giving rise to physical transboundary harm. The essential reason for this change is that State practice is at present insufficiently developed in other areas. Secondly, as the detailed examination of State practice progresses, the statement of principles, in section 5 of the schematic outline, will be amplified and strengthened to the extent that State practice is found to justify; and the statement of factors, in section 6 of the schematic outline, will be correspondingly adjusted. It is this process that will determine the degree to which the solutions contained in the schematic outline approach the standard of strict liability.

64. The third and last major qualification is that, as several commentators have noted,[128] much greater account must be taken of the role of international organizations. Although the question can remain open, the Special Rapporteur has not contemplated that provision need be made for the contingency that an international organization might occupy the role of the source State. A more immediate concern is that the procedures indicated in sections 2, 3 and 4 of the schematic outline may all be substantially affected by the way in which States interact as members of international organizations. For example, the duty, under section 2 of the schematic outline, to provide information and to undertake consultation may often be subsumed in the obligations which States owe and discharge under the constitutions or practice of international organizations to which they belong. Similarly, it would seem that the consultative procedures of international organizations, and reference to the technical services which such organizations provide, may fulfil the functions of or obviate the need for a régime of the kind contemplated in section 3 of the schematic outline, or may have a determinant or advisory role in the assessment of reparation under section 4 of the schematic outline. It is especially in these areas that the Special Rapporteur foresees a need for further Secretariat assistance in assembling and reviewing the available literature and information materials. He would propose also, with the Commission's concurrence and the Secretariat's help, to address a short questionnaire to selected international organizations in regard to the matters raised in this paragraph.

65. As has been said before, the closest analogy to the compound "primary" obligation, which forms the basis of the proposals made in the schematic outline, may be found in the law relating to the treatment of aliens. It is a rule that gives the source State the utmost latitude to review, and, if necessary, to revise the conduct of its various organs, so that conformity with the obligation is at length achieved. It has especial value in relation to sensitive questions, such as the right to receive information from the source State when that State considers that an issue affecting its security is involved. No penalty attaches to the failure or refusal to provide information, except the normal consequence that the source State's ultimate liability may depend upon the whole course of its conduct; and it cannot diminish its responsibility for actions which it chose to take without seeking the concurrence of other States affected. The parallel with responsibility for the treatment of aliens perhaps goes a little further. Sad experience with that topic has shown that law-making is set aside if a State feels that the proposals made require too large a sacrifice of its sovereign discretionary powers in relation to matters arising within its territory or under its control.[129] What is true in the case of harm done to an alien in the territory of a State is no doubt equally true of transboundary harm emanating from the territory of a State; but moderate and acceptable solutions in any one area must improve the prospect in every other area.

[126] See e.g. the observations made by the representatives of Brazil, Mr. Calero Rodrigues (*ibid.*, 43rd meeting, para. 62); the Netherlands, Mr. Siblesz (*ibid.*, 46th meeting, para. 46); Australia, Mr. De Stoop (*ibid.*, 48th meeting, para. 11); and Austria, Mr. Tuerk (*ibid.*, 51st meeting, para. 100). The representative of the United States of America, Mrs. Schwab, indicated a readiness to contemplate application to private activities provided the scope of the topic was suitably narrowed (*ibid.*, 52nd meeting, para. 27). A number of speakers who did not refer explicitly to the question of private activities expressed their agreement with the general thrust of the schematic outline. In addition to the observations of this kind referred to in footnote 104 above, see the observations made by the representatives of Thailand, Mr. Sucharitkul (*ibid.*, 44th meeting, para. 27); Canada, Mr. Bacon (*ibid.*, 45th meeting, para. 86); and Iraq, Mr. Al-Qaysi (*ibid.*, 50th meeting, para. 54).

[127] See annex below.

[128] See e.g. the observations made by the representative of Kenya, Mr. Wabuge (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 51st meeting, para. 49), and by the representative of Sri Lanka, Mr. Marapana (*ibid.*, para. 84).

[129] For the history of the effort to codify State responsibility in the context of the responsibility of the State for injuries caused in its territory to the person or property of aliens, see the report of the Commission on the work of its twenty-first session (*Yearbook ... 1969*, vol. II, pp. 229 *et seq.*, document A/7610/Rev.1, chap. IV).

66. One should take a last look, as succinctly as possible, at the many-faceted comparisons and contrasts between the principle contained in the schematic outline and that of strict liability. The Commission could have treated strict liability as an alternative set of "secondary" rules, proclaimed in the abstract and kept on ice until States were ready to put them to greater use. That idea never appealed to the Commission or to the Special Rapporteur (see para. 7 above). The reason usually given—and sometimes resurrected as a ground for stopping the present topic—was that the Commission was already heavily engaged with "secondary" rules of State responsibility and was not well placed to consider an alternative system of "secondary" rules at the same time. But there were other reasons. In the Special Rapporteur's opinion, the most fundamental reason was the need to avoid even the appearance of putting the principle of strict liability on the same level as the responsibility of States for wrongful acts or omissions. Nothing should be allowed to threaten the unity of international law. In the last resort, obligations of strict liability are obligations to make reparation, and failure to do so engages the responsibility of the State for a wrongful omission.

67. In any case, the great doctrinal problem of strict liability was not the description of the principle but the identification of its natural boundaries, and that problem would have involved an uncharted excursion into "primary" rules. It is an open question even now whether States, in their practice, will resort to the principle of strict liability on any basis other than that of empirical, case-by-case choice. That choice seems likely to be influenced by the historical accident that certain areas of activity, such as ship-based marine pollution, have developed within a civil liability framework, because the original problem was to curb the municipal law jurisdiction of coastal States. No doubt the compulsions of the sea transport industry have tended to put the economic interests of that industry well ahead of social and environmental considerations. Yet as the potential victims are coastal States, which can assert their territorial jurisdiction as a bargaining counter, it cannot be doubted that they will make a carefully calculated choice when they subscribe to the revised conventions on civil liability and the compensation fund (see paras. 49 and 56 above). Nevertheless, some States have more leverage than others in arriving at such a bargain; and it may, in the longer run, be most desirable that the flag of strict liability should be kept flying, not as a compulsion but as an option which provides the discontented with an argument and a standard of reference. That could be done, much as Handl suggests, upon the broader base provided in the schematic outline.[130]

68. In a very real sense, therefore, the principle embodied in the schematic outline can do more for the principle of strict liability than the latter can do for itself. The schematic outline cannot provide for the enthronement of the principle of strict liability, but it can provide that principle with a home a good deal more comfortable than a chilly set of unused "secondary" rules. Moreover, by proclaiming the duty of reparation, subject to certain factors, the schematic outline, without ever attaining the perfection of the principle of strict liability, can work pragmatically for its near-accomplishment. This is not a surprising result for, as we know, the system of strict liability is the only true alternative to the system of State responsibility for wrongful acts or omissions; and as Caubet has shown us,[131] both systems suffer from the same limitation. Unless the equation is a simple one, neither system yields an answer so convincing that the parties to a dispute cannot maintain their own positions and refuse to litigate (see para. 54 above).

69. The first aim of the present topic is to induce States that foresee a problem of transboundary harm to establish a régime consisting of a network of simple rules that yield reasonably clear answers; those simple rules may be rules of specific prohibition or rules of authorization subject to specific guarantees. The second aim of the present topic is to provide a method of settlement that is reasonably fair, and that does not frighten States, when there is no applicable or agreed régime. That involves the possibility that liability will be apportioned—or even, as in the *Poplar River Project* case,[132] that the affected State must bear the whole burden of substantial physical transboundary harm—if the applicable principles and factors modify or cancel out the presumption that the source State should repair transboundary harm (see para. 36 above).

70. To test the thesis restated in the preceding paragraph, it may be useful to take one backward look. In 1980, at its thirty-second session, the Commission, when dealing with a state of necessity as a circumstance precluding wrongfulness, asked itself whether

> such an exclusion, if established, would have the effect not only of completely relieving the State of the consequences which international law attaches to an internationally wrongful act, but also of relieving it of any obligation it might otherwise have to make compensation for damage caused by its conduct ...

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[130] "Relegating the concept of State liability to the sidelines or sidestepping it completely"—a practice increasingly in evidence today—"is a serious mistake. For, at least in so far as accidental transnational pollution is concerned, the concept remains a cornerstone in any international legal régime for the protection of the environment. ... "... the discernible trend towards internationally negotiated allocation of transnational losses has to be recognized as an undesirable development. ... If any reasonable internalization of the costs of the transnationally hazardous activity is to be achieved between victim and polluting States, insistence on State liability as a legal concept with a non-negotiable basic content is essential. ...

"... while it is readily admitted that the 'private law' approach is eminently reasonable ... it is only upon a clear understanding of the central role that the concept of State liability invariably plays in any system of transnational accident law that a régime that would be optimal in terms both of prevention of and compensation for transnational marine pollution damage can be devised." (*Loc. cit.* (footnote 107 above), pp. 87-89.)

[131] *Loc. cit.*, footnote 108 above.

[132] See footnote 72 above.

Finding some cases in which "States relied on the existence of the state of necessity to justify their conduct but offered to make compensation for the material damage ... caused", the Commission concluded that

> the preclusion of the wrongfulness of an act of a State does not automatically entail the consequence that this act may not, in some other way, create an obligation to make compensation for the damage, even though that obligation should not be described as an obligation "to make reparation for a wrongful act".[133]

71. The first point arising out of the passages quoted is that the Commission had no difficulty with the concept that an obligation engaging State responsibility for a wrongful act or omission could co-exist with an obligation relating to injurious consequences arising out of acts not prohibited by international law. The harm caused could be referred to either kind of obligation and, although one failed, the other could remain. The second point is that the latter obligation could hardly be an obligation of strict liability. If it were, it would be difficult to see why compensation or other reparation was not a regular accompaniment of damage caused in circumstances that precluded wrongfulness. Common sense leads to the same conclusion. If firemen and fire-fighting equipment cross an international boundary to fight an unattended forest fire that constitutes a common peril, the plea of necessity may well preclude wrongfulness; but what is the position as to the damage done to crops and other property? Surely it must depend not upon strict liability but upon a balance of factors. Was the fire a grave danger to the State in which it was located, or predominantly a transboundary threat? Had the local fire-fighters failed to do what might reasonably have been expected of them? How high were the costs of the transboundary expedition? In short, did the balance of factors modify or cancel out the presumption that the source State should repair transboundary harm?

72. In this rather homespun hypothetical case, the final answer may well be that, upon a balancing of factors, the affected State must tolerate, without entitlement to any recompense, even a substantial transboundary loss or injury. More typically, however—and especially when the interest of the source State in an activity is not shared by the affected State—there will be no sufficient cause to shift or modify the presumption that the source State must see to the repair of transboundary loss or injury. In these cases, which one would expect to include cases arising from situations of ultra-hazard, the affected State's entitlement to full reparation will be the same, whether under Handl's proposals,[134] or those of Caubet,[135] or those of the Special Rapporteur.[136] It is submitted that the differences in their solutions turn less on substance than on what Caubet has called psychological factors. For Handl it is of cardinal importance to persuade States that the strict liability standard is one of attainable virtue (see para. 55 above). For Caubet it is of equal importance to strengthen the doctrine of the wrongfulness of permitting the occurrence of substantial physical transboundary harm (see para. 53 above). For the Special Rapporteur, the first requirement is to maintain the logic of the distinction that the involvement of the source State arises from its regulatory capacity, and not from its position as a direct actor.

73. Handl—using without embellishment the major element in Jenks's original definition of "ultra-hazard" (see para. 52 above)—carves out a sphere of ultra-hazardous activity in which the variables are not permitted to modify the strict liability of the source State. Caubet, by combining all the variables in a threshold test (see para. 53 above), arrives by synthesis at an unvarying rule of strict liability. By applying a presumption of wrongfulness when loss or injury occurs, Caubet rules out apportionment, holding the source State strictly liable or, if the balance of factors is in its favour, not liable at all (see para. 54 above). The Special Rapporteur is content to maintain a lower profile, sidestepping the complication of introducing the additional criterion of "ultra-hazard", and confronting the State only with the commitments that arise directly from its sovereign powers over its territory and in regard to its citizenry. This solution leaves open in all cases the possibility of apportionment, if there are factors that diminish the liability of the source State. It also leaves open the possibility that the parties will in effect agree to construct retrospectively a régime of civil liability, using municipal institutions to assess the liability, but maintaining the obligation of the Source State to ensure that the appropriate reparation is made.

74. This report has not addressed directly the urgent question, evoked in this year's Gilberto Amado Memorial Lecture,[137] of mobilizing the means of protecting from degradation the areas of the world beyond the territorial jurisdiction of any State. That question is larger than the present topic; and one of the leads into it—that of obligations *erga omnes*, and of being able to invoke such obligations—has been broached by the Special Rapporteur on the topic of State responsibility, Mr. Riphagen, in his fourth report.[138] Another lead, which may emerge from further study of the present topic, is the indispensable role of international organizations in the protection of the common natural heritage. The final theme that the Special Rapporteur would wish to evoke, as being applicable to every aspect of the present topic, has been put brilliantly in a recent article on power sharing in the law of the sea:

> The idea that is here struggling to reach the surface of international consciousness is the distinction between a freedom and a power. The story of the development of international society since 1945 is the story of a progression from legal freedoms to legal powers. A freedom implies the absence of legal control. A power implies the absence of unfettered discretion. ...
>
> ...

[133] Para. (39) of the commentary to article 33 (State of necessity) of part 1 of the draft articles on State responsibility (*Yearbook ... 1980*, vol. II (Part Two), p. 51).

[134] *Loc. cit.*, footnote 107 above.

[135] *Loc. cit.*, footnote 108 above.

[136] Section 4 of the schematic outline (see annex below).

[137] United Nations, Gilberto Amado Memorial Lecture, *The Influence of Science and Technology on International Law*, delivered on 3 June 1983 at Geneva by Mr. G. E. do Nascimento e Silva.

[138] See document A/CN.4/366 and Add.1 above, p. 3.

To ask that the rights and duties of States, under both customary and treaty international law, be perceived in what has in the present study been called an "administrative law" perspective is to ask for a general and far-reaching change of attitude ... It might ... enable us to face with more equanimity certain areas of modern international law and practice that are otherwise a cause of serious concern, areas in which a discretionary power of States seems to be uncontrollable and yet in which its uncontrolled exercise is able gravely to prejudice the general interest of international society. ...

...

The benefit of a power is the discretionary choices that it protects. The burden of a power is respect for the interests of society as a whole, which confers the power on the holder as the agent of all its members.[139]

75. As it would in any case not have been possible to discuss this topic in depth during the thirty-fifth session of the Commission, in 1983, members of the Commission may prefer to regard this very late report as having more the character of a very early report for the 1984 session. The report could not have been issued, even now, without the superb co-operation that the Special Rapporteur has always received from the Commission secretariat, and from the documents and translation services of the European Office of the United Nations. As has been indicated above (para. 59), the ultimate purpose of this report is to provide a background for a careful, and perhaps decisive, evaluation of the topic. The Special Rapporteur plans to submit a further report, directed to the development of section 2 of the schematic outline, which deals with fact-finding; and he would welcome any comments, on this or other questions, that Commission members may care to offer, during whatever time is available for consideration of the present item in the closing stages of the present session. He also intends to submit a report directed to the questions of scope and definitions referred to in section 1 of the schematic outline.

[139] P. Allott, "Power sharing in the law of the sea", *American Journal of International Law* (Washington, D.C.), vol. 77 (1983), pp. 26-27.

ANNEX

Schematic outline*

SECTION 1

1. *Scope*[a]

Activities within the territory or control of a State which give rise or may give rise[b] to loss or injury to persons or things within the territory or control of another State.

[NOTES. (1) It is a matter for later review whether this provision needs to be supplemented or adapted when the operative provisions have been drafted and considered in relation to matters other than losses or injuries arising out of the physical use of the environment.

(2) Compare this provision, in particular, with the provision contained in section 4, article 1.]

2. *Definitions*

(*a*) "Acting State" and "affected State" have meanings corresponding to the terms of the provision describing the scope.

(*b*) "Activity" includes any human activity.[c]

[NOTE. Should "activity" also include a lack of activity to remove a natural danger which gives rise or may give rise to loss or injury to another State?][d]

(*c*) "Loss or injury" means any loss or injury, whether to the property of a State, or to any person or thing within the territory or control of a State.[e]

(*d*) "Territory or control" includes, in relation to places not within the territory of the acting State,

(i) any activity which takes place within the substantial control of that State; and

(ii) any activity conducted on ships or aircraft of the acting State, or by nationals of the acting State, and not within the territory or control of any other State, otherwise than by reason of the presence within that territory of a ship in course of innocent passage, or of an aircraft in authorized overflight.[f]

3. *Saving*

Nothing contained in these articles shall affect any right or obligation arising independently of these articles.[g]

SECTION 2

1. When an activity taking place within its territory or control gives or may give rise to loss or injury to persons or things within the territory or control of another State, the acting State has a duty to provide the affected State with all relevant and available information, including a specific indication of the kinds and degrees of loss or injury that it considers to be foreseeable, and the remedial measures it proposes.[h]

2. When a State has reason to believe that persons or things within its territory or control are being or may be subjected to loss or injury by an activity taking place within the territory or control of another State, the affected State may so inform the acting State, giving as far as its means of knowledge will permit, a specific indication of the kinds and degrees of loss or injury that it considers to be foreseeable; and the acting State has thereupon a duty to provide all relevant and

* Reproduced without change from the text initially submitted in the third report (see footnote 2 above). The principal changes subsequently made by the Special Rapporteur are indicated in paras. 63 and 64 above.

The footnote references are to paragraphs of the third report.

[a] See paras. 46-48.

[b] See para. 35.

[c] See paras. 36-39.

[d] See para. 42.

[e] See paras. 27 and 34-35.

[f] See paras. 43-45.

[g] See para. 37.

[h] See paras. 19-23 and 39.

available information, including a specific indication of the kinds and degrees of loss or injury that it considers to be foreseeable, and the remedial measures it proposes.

3. If, for reasons of national or industrial security, the acting State considers it necessary to withhold any relevant information that would otherwise be available, it must inform the affected State that information is being withheld. In any case, reasons of national or industrial security cannot justify failure to give an affected State a clear indication of the kinds and degrees of loss or injury to which persons and things within the territory or control of that affected State are being or may be subjected; and the affected State is not obliged to rely upon assurances which it has no sufficient means of knowledge to verify.

4. If not satisfied that the measures being taken in relation to the loss or injury foreseen are sufficient to safeguard persons and things within its territory or control, the affected State may propose to the acting State that fact-finding be undertaken.

5. The acting State may itself propose that fact-finding be undertaken; and, when such a proposal is made by the affected State, the acting State has a duty to co-operate in good faith to reach agreement with the affected State upon the arrangements for and terms of reference of the inquiry, and upon the establishment of the fact-finding machinery. Both States shall furnish the inquiry with all relevant and available information.

6. Unless the States concerned otherwise agree,

(*a*) there should be joint fact-finding machinery, with reliance upon experts, to gather relevant information, assess its implications and, to the extent possible, recommend solutions;

(*b*) the report should be advisory, not binding the States concerned.

7. The acting State and the affected State shall contribute to the costs of the fact-finding machinery on an equitable basis.

8. Failure to take any step required by the rules contained in this section shall not in itself give rise to any right of action. Nevertheless, unless it is otherwise agreed, the acting State has a continuing duty to keep under review the activity that gives or may give rise to loss or injury; to take whatever remedial measures it considers necessary and feasible to safeguard the interests of the affected State; and, as far as possible, to provide information to the affected State about the action it is taking.[i]

SECTION 3

1. If (*a*) it does not prove possible within a reasonable time either to agree upon the establishment and terms of reference of fact-finding machinery or for the fact-finding machinery to complete its terms of reference; or (*b*) any State concerned is not satisfied with the findings, or believes that other matters should be taken into consideration; or, (*c*) the report of the fact-finding machinery so recommends, the States concerned have a duty to enter into negotiations at the request of any one of them with a view to determining whether a régime is necessary and what form it should take.

2. Unless the States concerned otherwise agree, the negotiations shall apply the principles set out in section 5; shall also take into account, as far as applicable, any relevant factor, including those set out in section 6, and may be guided by reference to any of the matters set out in section 7.

3. Any agreement concluded pursuant to the negotiations shall, in accordance with its terms, satisfy the rights and obligations of the States parties under the present articles;[j] and may also stipulate the extent to which these rights and obligations replace any other rights and obligations of the parties.

4. Failure to take any step required by the rules contained in this section shall not in itself give rise to any right of action. Nevertheless, unless it is otherwise agreed, the acting State has a continuing duty to keep under review the activity that gives or may give rise to loss or injury; to take or continue whatever remedial measures it considers necessary and feasible to safeguard the interests of the affected State; and, as far as possible, to provide information to the affected State about the action it is taking.[k]

SECTION 4

1. If any activity does give rise to loss or injury, and the rights and obligations of the acting and affected States under the present articles in respect of any such loss or injury have not been specified in an agreement between those States, those rights and obligations shall be determined in accordance with the provisions of this section. The States concerned shall negotiate in good faith to achieve this purpose.

2. Reparation shall be made by the acting State to the affected State in respect of any such loss or injury,[l] unless it is established that the making of reparation for a loss or injury of that kind or character is not in accordance with the shared expectations of those States.[m]

3. The reparation due to the affected State under the preceding article shall be ascertained in accordance with the shared expectations of the States concerned and the principles set out in section 5; and account shall be taken of the reasonableness of the conduct of the parties, having regard to the record of any exchanges or negotiations between them and to the remedial measures taken by the acting State to safeguard the interests of the affected State.[n] Account may also be taken of any relevant factors, including those set out in section 6, and guidance may be obtained by reference to any of the matters set out in section 7.

4. In the two preceding articles, "shared expectations" include shared expectations which

(*a*) have been expressed in correspondence or other exchanges between the States concerned or, in so far as there are no such expressions,

(*b*) can be implied from common legislative or other standards or patterns of conduct normally observed by the States concerned, or in any regional or other grouping to which they both belong, or in the international community.

SECTION 5

1. The aim and purpose of the present articles is to ensure to acting States as much freedom of choice, in relation to activities within their territory or control, as is compatible with adequate protection of the interests of affected States.[o]

2. Adequate protection requires measures of prevention that as far as possible avoid a risk of loss or injury and, in so far as that is not possible, measures of reparation;[p] but the standards of adequate protection should be determined with due regard to the importance of the activity and its economic viability.[q]

3. In so far as may be consistent with the preceding articles, an innocent victim should not be left to bear his loss or injury; the costs of adequate protection should be distributed with due regard to the distribution of the benefits of the activity; and standards of protection should take into account the means at the disposal of the acting State[r] and the standards applied in the affected State and in regional and international practice.

4. To the extent that an acting State has not made available to an affected State information that is more accessible to the acting State concerning the nature and effects of an activity, and the means of verifying and assessing that information, the affected State shall be allowed a liberal recourse to inferences of fact and circumstantial evi-

[i] See paras. 30-33.

[j] See paras. 24-25 and 40.

[k] See paras. 30-33.

[l] See paras. 26, 29 and 41.

[m] See paras. 27 and 35.

[n] See paras. 26 and 32, as well as section 2, article 8, and section 3, article 4, of this schematic outline.

[o] See para. 10.

[p] See para. 9.

[q] See paras. 24-25.

[r] See paras. 22-23.

dence in order to establish whether the activity does or may give rise to loss or injury.[s]

SECTION 6

Factors which may be relevant to a balancing of interests[t] include:

1. The degree of probability of loss or injury (i.e. how likely is it to happen?);

2. The seriousness of loss or injury (i.e. an assessment of quantum and degree of severity in terms of the consequences);

3. The probable cumulative effect of losses or injuries of the kind in question—in terms of conditions of life and security of the affected State, and more generally—if reliance is placed upon measures to ensure the provision of reparation rather than prevention (i.e. the acceptable mix between prevention and reparation);

4. The existence of means to prevent loss or injury, having regard to the highest known state of the art of carrying on the activity;

5. The feasibility of carrying on the activity by alternative means or in alternative places;

6. The importance of the activity to the acting State (i.e. how necessary is it to continue or undertake the activity, taking account of economic, social, security or other interests?);

7. The economic viability of the activity considered in relation to the cost of possible means of protection;

8. The availability of alternative activities;

9. The physical and technical capacities of the acting State (considered, for example, in relation to its ability to take measures of prevention or make reparation or to undertake alternative activities);

10. The way in which existing standards of protection compare with:
(*a*) the standards applied by the affected State; and
(*b*) the standards applied in regional and international practice;

11. The extent to which the acting State:
(*a*) has effective control over the activity; and
(*b*) obtains a real benefit from the activity;

12. The extent to which the affected State shares in the benefits of the activity;

13. The extent to which the adverse effects arise from or affect the use of a shared resource;

14. The extent to which the affected State is prepared to contribute to the cost of preventing or making reparation for loss or injury, or of maximizing its benefits from the activity;

15. The extent to which the interests of:
(*a*) the affected State, and
(*b*) the acting State are compatible with the interests of the general community;

16. The extent to which assistance to the acting State is available from third States or from international organizations;

17. The applicability of relevant principles and rules of international law.

SECTION 7

Matters which may be relevant in negotiations concerning prevention and reparation[u] include:

I. *Fact-finding and prevention*

1. The identification of adverse effects and of material and non-material loss or injury to which they may give rise;

2. The establishment of procedural means for managing the activity and monitoring its effects;

3. The establishment of requirements concerning the structure and operation of the activity;

4. The taking of measures to assist the affected State in minimizing loss or injury.

II. *Compensation as a means of reparation*

1. A decision as to where primary and residual liability should lie, and whether the liability of some actors should be channelled through others;

2. A decision as to whether liability should be unlimited or limited;

3. The choice of a forum in which to determine the existence of liability and the amounts of compensation payable;

4. The establishment of procedures for the presentation of claims;

5. The identification of compensable loss or injury;

6. The test of the measure of compensation for loss or injury;

7. The establishment of forms and modalities for the payment of compensation awarded;

8. Consideration of the circumstances which might increase or diminish liability or provide an exoneration from it.

III. *Authorities competent to make decisions concerning fact-finding, prevention and compensation*

At different phases of the negotiations, the States concerned may find it helpful to place in the hands of their national authorities or courts, international organizations or specially constituted commissions, the responsibility for making recommendations or taking decisions as to the matters referred to under headings I and II.

SECTION 8

Settlement of disputes[v] (taking due account of recently concluded multilateral treaties that provide for such measures).

[s] See paras. 28 and 32.

[t] *Idem.*

[u] See para. 40.

[v] See para. 26.

RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS (SECOND PART OF THE TOPIC)

[Agenda item 7]

DOCUMENT A/CN.4/370*

Preliminary report on relations between States and international organizations (second part of the topic), by Mr. Leonardo Díaz González, Special Rapporteur

[*Original: Spanish*]
[*9 May 1983*]

Basis of the present report

1. The International Law Commission divided its work on the topic "Relations between States and international organizations" into two parts. The first part, relating to the status, privileges and immunities of representatives of States to international organizations, led to a set of draft articles which the Commission adopted at its twenty-third session, in 1971, and submitted to the General Assembly. The Assembly referred the draft articles to a Diplomatic Conference, which met at Vienna in 1975 and adopted the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.[1]

2. At its twenty-eighth session, in 1976, the Commission commenced consideration of the second part of the topic. It requested the Special Rapporteur on the topic, the late Mr. Abdullah El-Erian, to prepare a preliminary report to enable it to take the necessary decisions and to define its course of action on the second part of the topic, relating to the status, privileges and immunities of international organizations, their officials, experts and other persons engaged in their activities who were not representatives of States.[2]

3. In accordance with that decision, the Special Rapporteur submitted a preliminary report to the Commission at its twenty-ninth session, in 1977.[3]

4. Following its discussion of the preliminary report at its twenty-ninth session,[4] the Commission decided to authorize the Special Rapporteur to continue his study on the second part of the topic on the lines indicated in his report, having regard to the views expressed and the questions raised during the discussion. It also decided to authorize the Special Rapporteur to seek additional information and expressed the hope that he would carry out research in the usual way, namely by inquiring into the agreements concluded by international organizations and into the practices followed by those organizations, whether within or outside the United Nations system, as well as into the legislation and practice of States.[5]

5. In paragraph 6 of its resolution 32/151 of 19 December 1977, the General Assembly endorsed "the conclusions reached by the International Law Commission regarding the second part of the topic of relations between States and international organizations".

6. By a letter dated 13 March 1978 addressed to the legal counsels of the specialized agencies and IAEA, respectively, the Legal Counsel of the United Nations stated:

> To assist the Special Rapporteur and the Commission, the United Nations Secretariat at Headquarters has undertaken to examine its own files and to collect materials on the practice of the Organization regarding its status, privileges and immunities during the period from 1 January 1966 to the present. Furthermore, you will find enclosed a questionnaire, largely identical to the relevant one sent in 1965, which is aimed at eliciting information concerning the practice of the specialized agencies and IAEA additional to that submitted previously, namely, information on the practice relating to the status, privileges and immunities of the specialized agencies and IAEA, their officials, experts and other persons engaged in their activities not being representatives of States.

7. The Legal Counsel also pointed out in that letter:

> As in 1965, the questionnaire closely follows the structure of the Convention on the Privileges and Immunities of the Specialized Agencies. This format was chosen to make possible a uniform treatment of the material by all the specialized agencies, and to facilitate comparisons between their replies. It should be emphasized, however, that the additional information sought by the Special Rapporteur under his

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* Incorporating document A/CN.4/370/Corr.1.

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

[2] *Yearbook ... 1976*, vol. II (Part Two), p. 164, para. 173.

[3] *Yearbook ... 1977*, vol. II (Part One), p. 139, document A/CN.4/304.

[4] *Yearbook ... 1977*, vol. I, pp. 201-215, 1452nd and 1453rd meetings, and 1454th meeting, paras. 1-10.

[5] *Yearbook ... 1977*, vol. II (Part Two), p. 127, para. 95.

mandate from the Commission relates not only to the Specialized Agencies Convention—or, in the case of the IAEA, the Agreement on the Privileges and Immunities of the IAEA—but equally to the constituent treaties of the agencies, the agreements with host Governments regarding the headquarters of the agencies, and relevant experience of the agencies concerning the implementation in practice of these international instruments. Any relevant material derived from these sources should be analysed and described under the appropriate sections of the questionnaire.

The questionnaire attempts to indicate the principal problems which, so far as we know, have arisen in practice, but our information may not be complete and consequently the questions may not be exhaustive of the subject. If problems which are not covered by the questionnaire have arisen in your organization during the period under consideration and you think they should be brought to the attention of the Special Rapporteur, you are requested to be good enough to describe them in your replies. Also, the questionnaire was designed for all the specialized agencies, and its terminology may not be completely adapted to your organization; we would be obliged, however, if you would be kind enough to apply the questions to the special position of your organization in the light of their purpose of eliciting all information which will be useful to the International Law Commission.

It is hoped that the replies will not be limited to short answers to the questions, but that, so far as useful and possible, you will furnish materials in relation to your organization—including resolutions, diplomatic correspondence, judicial decisions, legal opinions, agreements, etc.—showing in detail the positions taken both in intergovernmental organizations and by States, and the solutions, if any, which have been arrived at, so that the Special Rapporteur may be afforded a clear view of international practice on points which have given difficulty during the period.

8. At the thirtieth session of the Commission, in 1978, the Special Rapporteur submitted a second report on the second part of the topic.[6]

9. The questions raised during the Commission's discussion on the second report, at its thirtieth session,[7] included the following: definition of the order of work on the topic and advisability of conducting the work in different stages, beginning with the legal status, privileges and immunities of international organizations; special position and regulatory functions of operational international organizations established by Governments for the express purpose of engaging in operational—and sometimes even commercial—activities, and difficulty of applying to them the general rules of international immunities; relationship between the privileges and immunities of international organizations and their responsibilities; responsibility of States to ensure respect by their nationals of their obligations as international officials; need to study the case law of national courts in the sphere of international immunities; need to define the legal capacity of international organizations at the level of both internal and international law; need to study the proceedings of committees on host country relations, such as that functioning at the Headquarters of the United Nations in New York; need to analyse the relationship between the scope of the privileges and immunities of the organizations and their particular functions and objectives. The Commission approved the conclusions and recommendations set out in the second report of the Special Rapporteur (chap. V).[8]

10. In his second report, the Special Rapporteur summarized the discussion in the Commission at its twenty-ninth session (chap. II), and in the Sixth Committee at the thirty-second session of the General Assembly (chap. III), and examined general questions in the light of those discussions (chap. IV).

11. The present Special Rapporteur does not consider it necessary here to repeat all that was said by the previous Special Rapporteur in his second report, to which reference may be made. He would simply point out that, from the conclusions reached in the report and endorsed by the Commission, it may be inferred:

(*a*) That general agreement exists in the Commission and in the Sixth Committee of the General Assembly on the desirability of the Commission taking up the study of the second part of the topic of relations between States and international organizations;

(*b*) That the Commission's work on the second part of the topic should proceed with great prudence;

(*c*) That, for the purposes of its initial work on the second part of the topic, the Commission adopted a broad outlook, inasmuch as the study would include regional organizations. The final decision whether to include such organizations in an eventual codification could be taken only when the study was completed;

(*d*) That the same broad outlook should be adopted in connection with the object of the study, inasmuch as the question of priority would have to be deferred until the study was completed.

12. The questionnaire addressed by the Legal Counsel of the United Nations in 1978 (see paras. 6-7 above) to the legal counsels of the specialized agencies and IAEA in connection with the status, privileges and immunities of those organizations, except in matters pertaining to representatives, complemented the questionnaire on the same topic sent on 5 January 1965. The replies to the latter questionnaire helped to form the basis of the study prepared by the Secretariat in 1967, entitled "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities".[9]

13. The replies to the 1978 questionnaire update and supplement the replies to the 1965 questionnaire. The Special Rapporteur has examined the replies received and is of the view that the Commission might well consider it appropriate to request the Secretariat to revise the 1967 study in the light of the new material for the purpose of producing an updated version.

14. The Special Rapporteur has analysed the material in his possession and has embarked on the study assigned to him by the Commission, in other words, the second part of the topic, concerning the status, privi-

[6] *Yearbook ... 1978*, vol. II (Part One), p. 263, document A/CN.4/311 and Add.1.

[7] *Yearbook ... 1978*, vol. I, pp. 260-269, 1522nd meeting, paras. 22 *et seq.*, 1523rd meeting, paras. 6 *et seq.*, and 1524th meeting, para. 1.

[8] *Yearbook ... 1978*, vol. II (Part Two), p. 147, para. 156.

[9] *Yearbook ... 1967*, vol. II, p. 154, document A/CN.4/L.118 and Add.1 and 2.

leges and immunities of international organizations, their officials, experts and other persons engaged in their activities who are not representatives of States.

15. He intends, however, to comply with the wish expressed by the Commission that the work on the second part of the topic should proceed with great prudence.[10]

16. He therefore takes the view that, because the Commission has been enlarged and newly constituted since the previous Special Rapporteur submitted his second report, in 1978, it would be highly desirable for the present members of the Commission to have the opportunity to express their views, opinions and suggestions as to the lines to be followed by the Special Rapporteur on matters pertaining to each and every one of the more important aspects of the study assigned to him.

17. Since the Commission now has a larger number of members, a fact that implies broader representation not only from a geographical standpoint but also in terms of the diversity of legal systems, any consensus emerging from a debate on this question will be the outcome of a broader range of opinions.

18. The Special Rapporteur will thus have an invaluable indication of the wishes of the Commission as it is now constituted, and this will greatly facilitate his present task of continuing the work on this topic.

19. In this way, the Special Rapporteur will be in a better position to submit for the Commission's consideration his second report, carried out in keeping with the guidelines established, and possibly containing the first draft articles, together with commentaries, on the status, privileges and immunities of international organizations.

[10] See the second report of the previous Special Rapporteur, document A/CN.4/311 and Add.1 (see footnote 6 above), para. 118.

CHECK-LIST OF DOCUMENTS OF THE THIRTY-FIFTH SESSION

Document	*Title*	*Observations and references*
A/CN.4/361	Provisional agenda	Mimeographed. For the agenda as adopted, see *Yearbook ... 1983*, vol. II (Part Two), chap. I, para. 8.
A/CN.4/362	Comments and observations of Governments on part 1 of the draft articles on State responsibility for internationally wrongful acts	Reproduced in the present volume (p. 1).
A/CN.4/363 [and Corr.1] and Add.1 [and Add.1/Corr.1]	Fifth report on jurisdictional immunities of States and their property, by Mr. Sompong Sucharitkul, Special Rapporteur	*Ibid.* (p. 25).
A/CN.4/364	First report on the draft Code of Offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur	*Ibid.* (p. 137).
A/CN.4/365	Draft Code of Offences against the Peace and Security of Mankind: analytical paper prepared pursuant to the request contained in paragraph 256 of the report of the Commission on the work of its thirty-fourth session	Mimeographed.
A/CN.4/366 and Add.1 [and Add.1/Corr.1]	Fourth report on the content, forms and degrees of international responsibility (part 2 of the draft articles), by Mr. Willem Riphagen, Special Rapporteur	Reproduced in the present volume (p. 3).
A/CN.4/367 [and Corr.1]	First report on the law of the non-navigational uses of international watercourses, by Mr. Jens Evensen, Special Rapporteur	*Ibid.* (p. 155).
A/CN.4/368 and Add.1	Draft Code of Offences against the Peace and Security of Mankind: compendium of relevant international instruments	Mimeographed.
A/CN.4/369 and Add.1 and 2	Draft Code of Offences against the Peace and Security of Mankind: comments and observations of Governments received pursuant to General Assembly resolution 37/102	Reproduced in the present volume (p. 153).
A/CN.4/370 [and Corr.1]	Preliminary report on relations between States and international organizations (second part of the topic), by Mr. Leonardo Díaz González, Special Rapporteur	*Ibid.* (p. 227).
A/CN.4/371	Jurisdictional immunities of States and their property: memorandum presented by Mr. Nikolai A. Ushakov	*Ibid.* (p. 53).
A/CN.4/372 and Add.1 and 2	Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier: information received from Governments	*Ibid.* (p. 57).
A/CN.4/373 [and Corr.1 and 2]	Fourth report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Robert Q. Quentin-Baxter, Special Rapporteur	*Ibid.* (p. 201).
A/CN.4/374 [and Corr.1] and Add.1 [and Corr.1] and Add.2 [and Corr.1] and Add.3 [and Corr.1] and Add.4 [and Corr.1 and 2]	Fourth report on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, by Mr. Alexander Yankov, Special Rapporteur	*Ibid.* (p. 62).
A/CN.4/L.352	Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-seventh session of the General Assembly	Mimeographed.
A/CN.4/L.353	The law of the non-navigational uses of international watercourses: note presented by Mr. Constantin A. Stavropoulos	Reproduced in the present volume (p. 195).
A/CN.4/L.354 and Add.1	Draft report of the International Law Commission on the work of its thirty-fifth session: chapter I (Organization of the session)	Mimeographed. For the adopted text, see *Official Records of the General Assembly, Thirty-eighth Session, Supplement No. 10* (A/38/10). The final text appears in *Yearbook ... 1983*, vol. II (Part Two).
A/CN.4/L.355	*Idem:* chapter II (Draft Code of Offences against the Peace and Security of Mankind)	Mimeographed. See A/CN.4/L.366.

Document	*Title*	*Observations and references*
A/CN.4/L.356 [and Corr.1] and Add.1-3 [and Add.3/Corr.1]	*Idem:* chapter III (Jurisdictional immunities of States and their property)	Mimeographed. For the adopted text, see the references relating to A/CN.4/L.354 and Add.1.
A/CN.4/L.357 and Add.1 [and Add.1/Corr.1]	*Idem:* chapter IV (State responsibility)	*Idem.*
A/CN.4/L.358 and Add.1 [and Add.1/Corr.1]	*Idem:* chapter V (Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier)	*Idem.*
A/CN.4/L.359 and Add.1	*Idem:* chapter VI (The law of the non-navigational uses of international watercourses)	*Idem.*
A/CN.4/L.360	*Idem:* chapter VII (Relations between States and international organizations (second part of the topic))	*Idem.*
A/CN.4/L.361	*Idem:* chapter VIII (International liability for injurious consequences arising out of acts not prohibited by international law)	*Idem.*
A/CN.4/L.362 and Add.1 and 2	*Idem:* chapter IX (Other decisions and conclusions of the Commission)	*Idem.*
A/CN.4/L.363	Draft articles on State responsibility (part 2 of the draft articles). Texts adopted by the Drafting Committee: articles 1, 2, 3 and 5	Texts reproduced in *Yearbook ... 1983*, vol. I, 1805th meeting, paras. 30, 33, 37 and 39.
A/CN.4/L.364	Draft articles on jurisdictional immunities of States and their property. Texts adopted by the Drafting Committee: articles 10, 12, 2, para. 1 (*g*), 3, para. 2, and 15	*Idem*, paras. 60, 63 and 67-69.
A/CN.4/L.365 and Add.1	Draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. Texts adopted by the Drafting Committee: articles 1 to 8	*Idem*, 1806th meeting, paras. 2, 4, 6, 19, 21, 23, 25 and 27.
A/CN.4/L.366	Draft report of the International Law Commission on the work of its thirty-fifth session: chapter II (revised) (Draft Code of Offences against the Peace and Security of Mankind)	Mimeographed. For the adopted text, see the references relating to A/CN.4/L.354 and Add.1.
A/CN.4/L.367	Draft articles on jurisdictional immunities of States and their property: revised texts of articles 13 and 14 submitted by the Special Rapporteur	Mimeographed.
A/CN.4/L.368	Statement made by the Secretary-General of the United Nations at the 1795th meeting of the Commission, on 4 July 1983	*Idem.*
A/CN.4/SR.1753-A/CN.4/SR.1813	Provisional summary records of the 1753rd to 1813th meetings of the International Law Commission	*Idem.* The final text appears in *Yearbook ... 1983*, vol. I.

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