

YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1983

Volume II
Part Two

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

UNITED NATIONS



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UNITED NATIONS
New York, 1985



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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Report of the International Law Commission on the work of its thirty-fifth session (3 May-22 July 1983)

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ABBREVIATIONS

IAEA	International Atomic Energy Agency
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ILA	International Law Association
PCIJ	Permanent Court of International Justice
UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environment Programme
UNITAR	United Nations Institute for Training and Research

*
* *

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

NOTE CONCERNING QUOTATIONS

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

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

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Chapter I

ORGANIZATION OF THE SESSION

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, in accordance with its Statute annexed thereto, as subsequently amended, held its thirty-fifth session at its permanent seat at the United Nations Office at Geneva from 3 May to 22 July 1983. The session was opened by the Chairman of the thirty-fourth session, Mr. Paul Reuter.

2. The work of the Commission during this session is described in the present report. Chapter II of the report, on the draft Code of Offences against the Peace and Security of Mankind, contains a description of the Commission's work thereon. Chapter III, on jurisdictional immunities of States and their property, contains a description of the Commission's work on the topic, together with three articles and two paragraphs of two other articles and commentaries thereto, as provisionally adopted by the Commission at the present session. Chapter IV, on State responsibility, contains a description of the Commission's work on the topic, together with the texts of four articles and commentaries thereto, as provisionally adopted by the Commission at the present session. Chapter V, on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, contains a description of the Commission's work on the topic, together with eight articles and commentaries thereto, as provisionally adopted by the Commission at the present session. Chapter VI, on the law of the non-navigational uses of international watercourses, chapter VII, on relations between States and international organizations (second part of the topic), and chapter VIII, on international liability for injurious consequences arising out of acts not prohibited by international law, contain descriptions of the Commission's work on those respective topics. Finally, chapter IX deals with the programme and methods of work of the Commission, as well as a number of administrative and other questions.

A. Membership

3. The Commission consists of the following members:

Chief Richard Osuolale A. AKINJIDE (Nigeria);
Mr. Riyadh Mahmoud Sami AL-QAYSI (Iraq);
Mr. Mikuin Leliel BALANDA (Zaire);
Mr. Julio BARBOZA (Argentina);
Mr. Boutros BOUTROS GHALI (Egypt);
Mr. Carlos CALERO RODRIGUES (Brazil);
Mr. Jorge CASTAÑEDA (Mexico);

Mr. Leonardo DÍAZ GONZÁLEZ (Venezuela);
Mr. Khalafalla EL RASHEED MOHAMED AHMED (Sudan);
Mr. Jens EVENSEN (Norway);
Mr. Constantin FLITAN (Romania);
Mr. Laurel B. FRANCIS (Jamaica);
Mr. Jorge E. ILLUECA (Panama);
Mr. Andreas J. JACOVIDES (Cyprus);
Mr. S. P. JAGOTA (India);
Mr. Abdul G. KOROMA (Sierra Leone);
Mr. José Manuel LACLETA MUÑOZ (Spain);
Mr. Ahmed MAHIOU (Algeria);
Mr. Chafic MALEK (Lebanon);
Mr. Stephen C. MCCAFFREY (United States of America);
Mr. Zhengyu NI (China);
Mr. Frank X. NJENGA (Kenya);
Mr. Motoo OGISO (Japan);
Mr. Syed Sharifuddin PIRZADA (Pakistan);
Mr. Robert Q. QUENTIN-BAXTER (New Zealand);
Mr. Edilbert RAZAFINDRALAMBO (Madagascar);
Mr. Paul REUTER (France);
Mr. Willem RIPHAGEN (Netherlands);
Sir Ian SINCLAIR (United Kingdom of Great Britain and Northern Ireland);
Mr. Constantin A. STAVROPOULOS (Greece);
Mr. Sompong SUCHARITKUL (Thailand);
Mr. Doudou THIAM (Senegal);
Mr. Nikolai A. USHAKOV (Union of Soviet Socialist Republics);
Mr. Alexander YANKOV (Bulgaria).

B. Officers

4. At its 1754th meeting, on 4 May 1983, the Commission elected the following officers:

Chairman: Mr. Laurel B. Francis;
First Vice-Chairman: Mr. Alexander Yankov;
Second Vice-Chairman: Mr. Edilbert Razafindralambo;
Chairman of the Drafting Committee: Mr. José Manuel Lacleta Muñoz;
Rapporteur: Mr. S. P. Jagota.

5. At the present session of the Commission, its Enlarged Bureau was composed of the officers of the session, former Chairmen of the Commission and the Special Rapporteurs. The Chairman of the Enlarged Bureau was the Chairman of the Commission at the present session. On the recommendation of the Enlarged Bureau, the Commission, at its 1760th meeting

on 13 May 1983, set up for the present session a Planning Group to consider matters relating to organization, programme and methods of work of the Commission and to report thereon to the Enlarged Bureau. The Planning Group was composed as follows: Mr. Alexander Yankov (Chairman), Mr. Mikuin Leliel Balanda, Mr. Julio Barboza, Mr. Leonardo Díaz González, Mr. Andreas J. Jacovides, Mr. Chafic Malek, Mr. Stephen C. McCaffrey, Mr. Paul Reuter, Mr. Constantin A. Stavropoulos, Mr. Doudou Thiam and Mr. Nikolai A. Ushakov. The Group was opened and other members of the Commission were welcome to attend its meetings.

C. Drafting Committee

6. At its 1757th meeting, on 9 May 1983, the Commission appointed a Drafting Committee. It was composed of the following members: Mr. José Manuel Lacleta Muñoz (Chairman), Mr. Riyadh Mahmoud Sami Al-Qaysi, Mr. Mikuin Leliel Balanda, Mr. Julio Barboza, Mr. Carlos Calero Rodrigues, Mr. Constantin Flitan, Mr. Abdul G. Koroma, Mr. Ahmed Mahiou, Mr. Stephen C. McCaffrey, Mr. Zhengyu Ni, Mr. Motoo Ogiso, Mr. Paul Reuter, Sir Ian Sinclair and Mr. Nikolai A. Ushakov. Mr. S. P. Jagota also took part in the Committee's work in his capacity as Rapporteur of the Commission. Members of the Commission not members of the Committee were invited to attend.

D. Secretariat

7. Mr. Carl-August Fleischhauer, Under-Secretary-General, the Legal Counsel, represented the Secretary-General at the session and made a statement at the 1768th meeting of the Commission, on 26 May 1983. Mr. Valentin A. Romanov, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General. Mr. Eduardo Valencia-Ospina, Senior Legal Officer, acted as Deputy Secretary to the Commission. Mr. Andronico O. Adede, Senior Legal Officer, Mr. Larry D. Johnson, Mr. Manuel Rama-Montaldo and Ms. Mahnoush Arsanjani, Legal Officers, served as Assistant Secretaries to the Commission.

E. Agenda

8. At its 1754th meeting, on 4 May 1983, the Commission adopted an agenda for its thirty-fifth session, consisting of the following items:

1. State responsibility
2. Jurisdictional immunities of States and their property
3. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier
4. Draft Code of Offences against the Peace and Security of Mankind
5. The law of the non-navigational uses of international water-courses
6. International liability for injurious consequences arising out of acts not prohibited by international law
7. Relations between States and international organizations (second part of the topic)

8. Programme and methods of work
9. Co-operation with other bodies
10. Date and place of the thirty-sixth session
11. Other business.

9. The Commission considered all the items on its agenda. In the course of the session, the Commission held 61 public meetings (1753rd to 1813th) and two private meetings. In addition, the Drafting Committee held 30 meetings, the Enlarged Bureau of the Commission two meetings and the Planning Group four meetings.

F. Visit by the Secretary-General

10. His Excellency Mr. Javier Pérez de Cuéllar, Secretary-General of the United Nations, paid a visit to the Commission and addressed it at its 1795th meeting, on 4 July 1983.¹

11. The Chairman extended to the Secretary-General a very warm and cordial welcome on behalf of all the members of the Commission and said that, as a jurist, scholar and professor who had taught and published on questions of international law, the Secretary-General should feel at home in the Commission. Everyone present respected and admired the contributions which the Secretary-General had made to the cause of peace through the United Nations, with which he had been associated in several capacities. In the course of a brilliant career, he had provided constant proof of a deep personal commitment to the principles and purposes enshrined in the Charter of the United Nations and of his belief in the important role of international law as a means of achieving the goals of the Charter. The Secretary-General's visit to the Commission, relatively early in his mandate, offered additional proof of his deep commitment to the promotion and maintenance of international legal order.

12. - The Secretary-General thanked the Chairman for welcoming him on behalf of the members of the Commission and said that as he, too, was a lawyer, it was a particular pleasure for him to be in the Commission's company. Since he was present in the Commission for the first time, he wished to mention some of his preoccupations concerning the vital importance of the codification and progressive development of international law.

13. He stressed that the concept of a coherent and generally accepted body of international law lay at the heart of the Charter of the United Nations. Such a body of law was essential not only for solving existing disputes without violence, but also for the day-to-day coexistence and co-operation of the many States which now constituted the international community. It might be asked whether it was not perhaps ironic to stress the importance of the role of international law in the present state of international relations, when constant

¹ The text of the statement made by the Secretary-General on the occasion of his visit was distributed as document A/CN.4/L.368, pursuant to a decision taken by the Commission.

claims were being made about the violation of the basic principles that made up that corpus of law. In his view, however, the time had never been more critical than now, when substantial confusion reigned about international norms of conduct for restating and formulating the very foundations of international relationships and legal order. The history of mankind had demonstrated that, without a clear formulation of legal principles to serve as guidelines for the conduct of States in the common interest, the world would face even greater difficulties in searching for an ordered direction of international affairs. Regardless of their ideologies, social and economic systems, size and relative military and economic strength, States should acknowledge that there was no viable and long-term alternative to a policy of development and peaceful coexistence within a framework of international law.

14. The Secretary-General referred to the continuing role which the United Nations was expected to play in the growth and development of a coherent and generally accepted body of international law which had found expression in Article 13, paragraph 1 (a), of the Charter, providing that the General Assembly would initiate studies and make recommendations for the purpose of "promoting international co-operation in the political field and encouraging the progressive development of international law and its codification". The adoption of that provision by the San Francisco Conference had marked the beginning of a new and unprecedented era in the process of progressive development and codification of international law. The framers of the Charter had conceived of work on the progressive development and codification of international law as a political objective of the United Nations in whose achievement the Member States had undertaken a political and legal commitment to co-operate.

15. He noted that the process of developing and codifying international law was now taking place primarily in the forums of the universal international organization, in which the participants were seeking to update, mould and even transform the criteria for the conduct of their relations so as to make those norms more responsive and effective in the context of new situations. That process relied on multilateral diplomacy, rather than on the development of customary international law through practice, acceptance or acquiescence. Its aim was the fulfilment of the political aspirations, interests and needs of States and of the organized international community with a view to facilitating international co-operation and contributing to the maintenance of international peace and security through the certainty of law.

16. In addition, he said it was generally recognized that, in the past 40 years, international society had undergone a substantial transformation which constantly called for the progressive development of international law and its codification in the interest of contemporary requirements. As had been emphasized time and again, what had been adequate and appropriate at

the turn of the century, when 60 per cent of the world's land and 70 per cent of its total population had been made up of colonies, dominions and protectorates, or even in 1945, when 51 States had signed the Charter of the United Nations, could not be expected to meet the demands of an international community of 157 States faced with a whole range of new issues and problems. Those issues and problems had also arisen out of the scientific and technological developments that had materially affected the global structure and the global economy, thereby producing a need for the legal regulation of activities that had, by the middle of the current century, still been beyond man's capabilities. The point was that sustained global interaction had made the life and stable existence of States dependent upon numerous factors operating beyond their national boundaries: the contemporary effective pursuit by States of development and coexistence was increasingly dependent on their ability to identify those factors and to devise feasible means of dealing with them.

17. At the same time, according to the Secretary-General, States continued to be jealous of their independence and territorial sovereignty. The current emphasis was on what separated States rather than on what brought them together. There was, moreover, no doubt that, in a world with limited resources and severe economic depression, one State's larger share would be at the expense of another's smaller share. There was thus a danger of losing sight of common interests and of failing to achieve consensus on what direction should be taken. The codification of legal principles against such a background of interdependence had proved to be an enormous task, but it was all the more important precisely for that reason.

18. He noted that, in November 1983, 36 years would have passed since the General Assembly, in resolution 174 (II), had established the International Law Commission as a means of exercising one of the principal functions entrusted to it by Article 13 of the United Nations Charter. With the establishment of the Commission, the General Assembly had acquired a permanent subsidiary organ of the highest scientific and technical quality to carry out the essential preparatory work for all codifications, namely the elaboration of basic drafts on a variety of complex topics. The Commission's membership also added a unique feature to its character: individual experts from *academia*, diplomacy and the bar provided a valuable combination of talents and experience for the theoretical and practical analysis of State practice, judicial decisions and doctrine with a view to defining the content of the legal rules to be formulated. Since diplomatic codification could not be carried out in a political vacuum, the General Assembly had made the Commission part of the political system of the United Nations and had associated Member States, individually and collectively, with all the main stages of the codification process. That amalgam of legal objectivity and political subjectivity was without doubt one of the most characteristic features of the Commission and of the codifying method adopted by the United Nations.

19. The Secretary-General stated that, in the 35 years of its existence, the Commission had become the most respected international institution in the field of codification and progressive development of international law. It had responded to the appeal made by the international community as a whole as expressed through the General Assembly and had, over the years, produced a series of conventions, some of which constituted the principal landmarks in current international law. The Commission's achievements had been the result not only of improvements in the process of co-ordination of its studies of particular topics with the opinions expressed by Governments, but also of the flexible approach it had adopted. The Commission's practice in that regard had demonstrated that there was a range of possibilities available in furtherance of its purposes and that what might suit the needs of a particular topic and of the international community in one context might not be suitable in another. As the Commission continued its work in future, it would no doubt expand the repertoire of techniques available within the framework of its Statute for the successful codification and progressive development of international law in different spheres. That would be particularly important as the Commission moved, as it certainly would, into new areas of international law in which scientific and technological advances would require the development of legal rules to regulate the immensely valuable, but sometimes potentially dangerous, instruments made available by science and technology.

20. In his first report on the work of the Organization,² he had emphasized that an important first step towards the full realization of the role and capacity of the United Nations would be a conscious recommitment by Governments to the Charter. He believed that such a recommitment would be particularly appropriate today in respect of the objective enshrined in the Article of the Charter to which he had referred earlier. Clearly, the progressive development and codification of any legal rules that would be universally acceptable was no simple task. More than ever, there was a need for legal minds to search for ways of accommodating conflicting demands and relationships and to design coherent legal rules that would provide guidance in meeting the challenges of peaceful co-existence and development. He was convinced that the Commission would again prove to be responsive to the winds of change and continue to meet the growing expectations of mankind.

21. The Chairman said that he spoke on behalf of all members of the Commission in expressing appreciation for the important statement which the Secretary-General had made to mark his first visit to the Commission. During the three and a half decades that had elapsed since its establishment, the Commission had concerned itself with basic chapters of public international law in their comprehensive sense and, pursuant to the instructions of the General Assembly, had now em-

barked upon the study of other complex and far-reaching topics of great practical value to the international community. The Commission thus had a full agenda for the immediate future, but that did not mean that it would not be capable of undertaking additional work of an urgent nature if the General Assembly deemed it necessary. Indeed, it could be said that, in its present composition, the Commission could respond as readily as ever, if not more so, to pressing demands for international legal regulations designed to meet the needs of the contemporary international community.

22. He recalled that, in 1981, the General Assembly had decided to increase by nine the membership of the Commission in accordance with an agreed set pattern for the regional distribution of seats, so that the Commission's size and composition would be more consonant with the substantial growth in the membership of the United Nations since 1961. That enlargement attested to the continuing and increasing interest shown by States in the process of progressive development of international law and its codification within the framework of the United Nations system. The Commission was aware of that interest and of all the responsibilities it entailed and had at all times endeavoured to discharge those responsibilities with the utmost efficiency. In that connection, it was significant that, since the thirty-seventh session of the General Assembly, action had been taken in one instance and action was expected to be taken by States in two other instances in respect of three of the final drafts recently prepared by the Commission.

23. The increase in the membership of the Commission by the General Assembly in 1981 was, according to the Chairman, an inevitable consequence of the increase in the membership of the General Assembly itself in the wake of the decolonization process. That transformation in the membership of the Organization had, *inter alia*, been accompanied by insistent appeals from developing countries for reforms in the international economic, financial and trading relationships between developed and developing countries. The Commission, being a microcosm of the General Assembly, would from time to time have to deal with the legal aspects of such relevant issues, as evidenced in articles 23, 24 and 30 of the draft articles on most-favoured-nation clauses. The Commission was well equipped to deal with such contingencies, not only because of its expertise, but also because of the excellent rapport which existed between members from the developed countries and those from the developing countries.

24. He said that, in discharging its functions, the Commission was fortunate to have the services and assistance of a small number of highly skilled, competent and devoted staff members from the Codification Division of the Office of Legal Affairs. He took the opportunity to thank the Secretary-General for that assistance, which had over the years become an integral part of the Commission's work, and to express the hope that, in future, such assistance would not only be main-

² *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 1 (A/37/1).*

tained but also expanded in response to the Commission's needs at any given time.

25. The Chairman concluded by stressing that the Secretary-General's visit to the Commission was of

great significance, as the Commission had a difficult task ahead of it. The Secretary-General's presence would offer the Commission the encouragement it needed to continue to work for the codification and progressive development of international law.

Chapter II

DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND

A. Introduction

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

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

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

27. At its first session, in 1949, the Commission considered the matters referred to in resolution 177 (II) and appointed Mr. Jean Spiropoulos Special Rapporteur to continue the work on (a) the formulation of the principles of international law recognized in the Charter and Judgment of the Nürnberg Tribunal; and (b) the preparation of a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in (a) above. The Commission also decided to circulate a questionnaire to Governments inquiring what offences, apart from those defined in the Charter and Judgment of the Nürnberg Tribunal, should in their view be comprehended in the draft code envisaged in resolution 177 (II).⁴

28. On the basis of a report submitted by the Special Rapporteur on the formulation of the Nürnberg Principles,⁵ the Commission adopted at its second session, in accordance with paragraph (a) of resolution 177 (II), a formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and

in the Judgment of the Tribunal and submitted them, with commentaries, to the General Assembly.⁶ As to the matter referred to in paragraph (b) of resolution 177 (II), the Commission discussed the topic on the basis of a report by the Special Rapporteur on the draft Code of Offences against the Peace and Security of Mankind⁷ and of replies received from Governments to its questionnaire.⁸ In the light of the deliberations on the matter in the Commission, a Drafting Sub-Committee prepared a provisional draft code which was referred to the Special Rapporteur, who was requested to submit a further report.⁹

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

30. The Special Rapporteur submitted his second report¹⁰ to the Commission at its third session, in 1951. It contained a revised draft code as well as a digest of observations made in the Sixth Committee at the fifth session of the General Assembly on the Commission's formulation of the Nürnberg Principles. The Commission also had before it observations received from Governments on that formulation,¹¹ as well as a memorandum concerning the draft code prepared by Professor Vespasien V. Pella.¹² At that session, the Commission adopted a draft Code of Offences against the Peace and Security of Mankind, consisting of five articles with commentaries, and submitted it to the General Assembly.¹³

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

⁴ *Yearbook ... 1949*, p. 283, document A/925, paras. 30-31.

⁵ *Yearbook ... 1950*, vol. II, p. 181, document A/CN.4/22.

⁶ *Ibid.*, pp. 374-378, document A/1316, paras. 95-127.

⁷ *Ibid.*, p. 253, document A/CN.4/25.

⁸ *Ibid.*, p. 249, document A/CN.4/19, part II, and A/CN.4/19/Add.1 and 2.

⁹ *Ibid.*, p. 380, document A/1316, para. 157. The Drafting Sub-Committee was composed of the Special Rapporteur, Mr. Ricardo J. Alfaro and Mr. Manley O. Hudson.

¹⁰ *Yearbook ... 1951*, vol. II, p. 43, document A/CN.4/44.

¹¹ *Ibid.*, p. 104, document A/CN.4/45 and Add.1 and 2.

¹² *Yearbook ... 1950*, vol. II, p. 278, document A/CN.4/39.

¹³ *Yearbook ... 1951*, vol. II, pp. 134 *et seq.*, document A/1858, paras. 57-59.

31. In 1951, at its sixth session, the General Assembly postponed consideration of the question of the draft code until its seventh session. As a result, the attention of Governments of Member States was drawn to the draft code prepared by the Commission in 1951 and they were invited to submit their comments and observations thereon. While the comments and observations thus received were circulated at the seventh session of the General Assembly in 1952,¹⁴ the question of the draft code was not placed on the agenda of that session, on the understanding that the matter would continue to be considered by the Commission. At the Commission's fifth session in 1953, the Special Rapporteur was requested to undertake a further study of the question.¹⁵

32. In his third report,¹⁶ the Special Rapporteur discussed the observations received from Governments and, in the light of those observations, proposed certain changes in the draft code adopted by the Commission in 1951. The Commission considered that report at its sixth session, in 1954, made certain revisions in the text previously adopted, and transmitted to the General Assembly a revised version of the draft code, consisting of four articles with commentaries thereto.¹⁷

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

Article 1

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

Article 2

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

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

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

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

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

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

toleration by the authorities of a State of organized activities calculated to foment civil strife in another State.

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

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

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

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

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

- (i) Killing members of the group;
- (ii) Causing serious bodily or mental harm to members of the group;
- (iii) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (iv) Imposing measures intended to prevent births within the group;
- (v) Forcibly transferring children of the group to another group.

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

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

(13) Acts which constitute:

- (i) Conspiracy to commit any of the offences defined in the preceding paragraphs of this article; or
- (ii) Direct incitement to commit any of the offences defined in the preceding paragraphs of this article; or
- (iii) Complicity in the commission of any of the offences defined in the preceding paragraphs of this article; or
- (iv) Attempts to commit any of the offences defined in the preceding paragraphs of this article.

Article 3

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

Article 4

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

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

¹⁴ *Official Records of the General Assembly, Seventh Session, Annexes*, vol. II, agenda item 54, document A/2162 and Add.1.

¹⁵ *Yearbook ... 1953*, vol. II, p. 231, document A/2456, paras. 167-169.

¹⁶ *Yearbook ... 1954*, vol. II, p. 112, document A/CN.4/85.

¹⁷ *Ibid.*, pp. 150-151, document A/2693, paras. 49-53.

¹⁸ *Ibid.*, pp. 151-152, para. 54.

report.¹⁹ The Assembly was of a similar opinion in 1957, although it transmitted the text of the draft code to Member States for comment; replies were to be submitted to the Assembly at such time as the item might be placed on its provisional agenda.²⁰ In 1968, the Assembly again decided not to include in its agenda the item concerning the draft code and the item "international criminal jurisdiction", until a later session when further progress had been made in arriving at a generally agreed definition of aggression.

35. On 14 December 1974, the General Assembly adopted by consensus the Definition of Aggression.²¹ In allocating the item on the question of defining aggression to the Sixth Committee, the General Assembly commented that it had decided, *inter alia*, to consider whether it should take up the question of a draft Code of Offences against the Peace and Security of Mankind and the question of an international criminal jurisdiction, as envisaged in previous Assembly resolutions and decisions.²²

36. In its report on the work of its twenty-ninth session, in 1977, the Commission referred to the possibility of the General Assembly giving consideration to the draft code, including its review by the Commission if the Assembly so wished, having regard to the fact that the Definition of Aggression had been approved by the General Assembly.²³

37. Although the item was included in the agenda of the thirty-second session of the General Assembly, in 1977, its consideration was postponed until the thirty-third session, in 1978. By resolution 33/97 of 16 December 1978, the General Assembly invited Member States and relevant international intergovernmental organizations to submit their comments and observations on the draft code, including comments on the pro-

cedure to be adopted. The comments received were circulated at the Assembly's next session.²⁴ At its thirty-fifth session, in 1980, by its resolution 35/49 of 4 December 1980, the General Assembly reiterated the invitation for the submission of comments and observations made in resolution 33/97, adding that such replies should indicate views on the procedure to be followed in the future consideration of the item, including the suggestion that the item be referred to the Commission.²⁵

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

The General Assembly,

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

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

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

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

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

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

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

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

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

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

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

2. *Requests* the International Law Commission to consider at its thirty-fourth session the question of the draft Code of Offences against the Peace and Security of Mankind in the context of its five-

¹⁹ In addition, by its resolution 898 (IX) of 14 December 1954, the General Assembly, considering, *inter alia*, the connection between the question of defining aggression, the draft Code of Offences against the Peace and Security of Mankind and the question of an international criminal jurisdiction, decided to postpone consideration of the report of the 1953 Committee on International Criminal Jurisdiction (*Official Records of the General Assembly, Ninth Session, Supplement No. 12 (A/2645)*) until it had taken up the report of the Special Committee on the Question of Defining Aggression and had taken up the draft Code of Offences against the Peace and Security of Mankind. It may be noted that the 1953 Committee on International Criminal Jurisdiction was preceded by the Committee on International Criminal Jurisdiction (hereinafter called 1951 Committee) established by General Assembly resolution 489 (V) of 12 December 1950. The 1951 Committee submitted its report to the seventh session of the General Assembly in 1952 (*ibid.*, *Seventh Session, Supplement No. 11 (A/2136)*).

²⁰ General Assembly resolution 1186 (XII) of 11 December 1957; however, by its resolution 1187 (XII) of the same day, the General Assembly also decided once again to defer consideration of the question of an international criminal jurisdiction until such time as it took up again the question of defining aggression and the question of the draft Code of Offences against the Peace and Security of Mankind.

²¹ General Assembly resolution 3314 (XXIX), annex.

²² See *Official Records of the General Assembly, Twenty-ninth Session, Annexes*, agenda item 86, document A/9890, para. 2. As of July 1983, the General Assembly has not taken up the question of an international criminal jurisdiction.

²³ *Yearbook ... 1977*, vol. II (Part Two), p. 130, para. 111.

²⁴ A/35/210 and Add.1 and 2 and Add.2/Corr.1.

²⁵ The replies were subsequently circulated in document A/36/416. In addition, the Secretary-General, pursuant to General Assembly resolution 35/49, prepared an analytical paper (A/36/535) on the basis of replies received and statements made during the debate on the item at the thirty-third and thirty-fifth sessions of the Assembly.

year programme and to report to the General Assembly at its thirty-seventh session on the priority it deems advisable to accord to the draft Code, and the possibility of presenting a preliminary report to the Assembly at its thirty-eighth session bearing, *inter alia*, on the scope and the structure of the draft Code;

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

4. *Requests* the Secretary-General to submit to the International Law Commission all the necessary documentation, comments and observations presented by Member States and relevant international intergovernmental organizations on the item entitled "Draft Code of Offences against the Peace and Security of Mankind";

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

39. Accordingly, at its thirty-fourth session, in 1982, the Commission appointed Mr. Doudou Thiam Special Rapporteur for the topic "Draft Code of Offences against the Peace and Security of Mankind" and established a Working Group on the topic, chaired by the Special Rapporteur.²⁶ On the recommendation of the Working Group, the Commission decided to accord the necessary priority to the topic within its five-year programme and indicated its intention to proceed during the present, thirty-fifth, session to a general debate in plenary on the basis of a first report to be submitted by the Special Rapporteur. The Commission furthermore indicated that it would present to the General Assembly at its thirty-eighth session the conclusions of that debate.²⁷

40. Also on the recommendation of the Working Group, the Commission requested the Secretariat to give the Special Rapporteur the assistance that might be required and to submit to the Commission all necessary source materials, including in particular a compendium of relevant international instruments and an updated version of the analytical paper prepared pursuant to General Assembly resolution 35/49.²⁸ The Commission had before it the comments and observations received from Governments pursuant to the request contained in paragraph 4 of General Assembly resolution 36/106.²⁹

41. On 16 December 1982, the General Assembly adopted resolution 37/102, by which it invited the Commission to continue its work with a view to elaborating

the draft Code of Offences against the Peace and Security of Mankind, in conformity with paragraph 1 of Assembly resolution 36/106 and taking into account the decision contained in the report of the Commission on the work of its thirty-fourth session (see para. 39 above). It also requested the Commission, in conformity with resolution 36/106, to submit a preliminary report to the General Assembly at its thirty-eighth session bearing, *inter alia*, on the scope and structure of the draft code, and reiterated the invitation to Member States and relevant international intergovernmental organizations to present or update their comments and observations on the draft code.

B. Consideration of the topic at the present session

42. The Commission had before it at the present session the first report on the topic submitted by the Special Rapporteur (A/CN.4/364),³⁰ as well as a compendium of relevant international instruments (A/CN.4/368 and Add.1) and an analytical paper (A/CN.4/365), both prepared by the Secretariat pursuant to the request made by the Commission at its thirty-fourth session (see para. 40 above). It also had before it replies received from Governments (A/CN.4/369 and Add.1 and 2)³¹ in response to the invitation contained in resolution 37/102.

43. At its 1755th to 1761st meetings, from 5 to 16 May 1983, and at its 1802nd meeting, on 13 July 1983, the Commission, as it had indicated in its report on its thirty-fourth session (see para. 39 above), proceeded to a general debate on the topic in plenary on the basis of the first report submitted by the Special Rapporteur.

44. The report submitted by the Special Rapporteur related to three important questions: (a) the scope of the draft codification; (b) the methodology of codification; (c) implementation of the code.

1. SCOPE OF THE DRAFT CODIFICATION

45. The problem is to determine the content of the draft *ratione materiae* and *ratione personae*.

(a) Content of the draft *ratione materiae*

46. To which offences does the codification apply? The Commission considered that the codification applied not to the wide variety of international crimes as a whole, but only to those which may affect the peace and security of mankind. Although international crimes are very varied, they are nevertheless essentially similar in *character*, as defined and illustrated in article 19 of part I of the draft articles on State responsibility (see para. 53 below).

47. If international crimes, however, are considered not from the point of view of their character but from that of their *effects*, it will be seen that there is some gradation of those effects. International crimes as a

²⁶ *Yearbook ... 1982*, vol. II (Part Two), p. 121, para. 252. The Working Group was composed of the following members: Mr. Mikuin Leliel Balanda, Mr. Boutros Boutros Ghali, Mr. Jens Evensen, Mr. Laurel B. Francis, Mr. Jorge E. Illueca, Mr. Ahmed Mahiou, Mr. Chafic Malek, Mr. Frank X. Njenga, Mr. Motoo Ogiso, Mr. Syed Sharifuddin Pirzada, Mr. Willem Riphagen and Mr. Alexander Yankov (*ibid.*, p. 8, para. 8).

²⁷ *Ibid.*, p. 121, para. 255.

²⁸ See footnote 25 above.

²⁹ A/CN.4/358 and Add.1-4, reproduced in *Yearbook ... 1982*, vol. II (Part One), p. 273. These comments and observations were circulated at the thirty-seventh session of the General Assembly in document A/37/325.

³⁰ Reproduced in *Yearbook ... 1983*, vol. II (Part One).

³¹ *Idem.*

whole are, of course, regarded as *the most serious* international offences. From the standpoint of *seriousness*, there is nevertheless a kind of hierarchy of these international crimes. Offences against the peace and security of mankind are at the top of the hierarchy. They are in a sense *the most serious of the most serious offences*.

48. The Commission unanimously agreed on that point. The codification will therefore cover the category of the most serious international crimes. Accordingly, the present draft will clearly not relate to all the international crimes defined in article 19, which would make it an international penal code, but only to those crimes which are at the top of the scale because of their especial seriousness. This seriousness may be measured either by the *extent* of the calamity or by its *horrific* character, or by both at once. Certain crimes committed during the last world war constitute an example. The content *ratione materiae* will therefore concern this category of crimes, each of which will be defined in the draft code.

49. It will, moreover, make no difference whether or not such crimes are politically motivated. The idea of a political crime is difficult to define. Furthermore, acts which seriously jeopardize the fundamental interests of mankind may have complex motives—for example, damage to the environment. The Commission was also in agreement on that point.

(b) *Content of the draft ratione personae*

50. The problem is to determine to which subjects of law international penal responsibility may be attributed: to individuals only or to States and other entities as well?

51. Since Nürnberg and Tokyo, there had been no further doubt about the international criminal responsibility of individuals, and this proposition is unanimously accepted within the Commission.

52. With regard to States, the persistence of many writers³² and, to some extent, the changing views within the Commission, as well as the Commission's work, have raised the question whether new subjects of law, in the form of the State or certain other groups, have not emerged in the criminal area.

53. Article 19 of part 1 of the draft articles on State responsibility prepared by the Commission indicates

which internationally wrongful acts of a State constitute international crimes and delicts. It reads as follows:

Article 19. International crimes and international delicts

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached.

2. An internationally wrongful act which results from the breach by a State 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 that community as a whole constitutes an international crime.

3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, *inter alia*, from:

(a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

(b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

(c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and *apartheid*;

(d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.

4. Any internationally wrongful act which is not an international crime in accordance with paragraph 2 constitutes an international delict.

54. The debate in the Commission was thus resumed. The prevailing opinion was that the criminal responsibility of the State must be recognized and set forth in the draft. In support of this view, it was argued that offences against the peace and security of mankind were often committed by States and, indeed in many cases, could only be committed by States—for example, aggression, *apartheid* or annexation. Failure to recognize the State as a subject of criminal law would simply mean allowing those offences to go unpunished. It was also emphasized that it would be regrettable not to derive from article 19 all the legal consequences entailed by the principle stated therein, and that a system of sanctions adapted to the nature of States would appear to be altogether conceivable: moral or financial sanctions, among many others. It was also observed that to treat the existence of criminal jurisdiction in that area as an impossibility would, in a sense, involve recognizing that war was not only unavoidable but also *necessary* as the only means of redress against criminal acts of States and the only means of punishing such acts. However, such an acknowledgement would appear to be inconsistent with contemporary trends in law, whereby recourse to peaceful means of settling disputes has been elevated to the status of a mandatory legal rule. Emphasis was also placed on the *preventive* and *deterrent* role of the code. It was better to prevent offences against the peace and security of mankind than to have to punish them. If the future code were to be limited in scope to individuals, it would not achieve the aims set by the General Assembly; to limit it in that manner would be to ignore the value of the code as an instrument of prevention and

³² Q. Saldaña, "La justice pénale internationale", *Recueil des cours de l'Académie de droit international de La Haye*, 1925-V (Paris, Hachette, 1927), vol. 10; V. V. Pella, *La criminalité collective des Etats et le droit pénal de l'avenir* (2nd ed.) (Bucharest, Imprimerie de l'Etat, 1926) and *La guerre-crime et les criminels de guerre* (Neuchâtel, Editions de la Baconnière, 1964); H. Donnedieu de Vabres, *Les principes modernes du droit pénal international* (Paris, Sirey, 1928), pp. 418 *et seq.* It should be noted that some writers do not go so far as to advocate the *criminal* responsibility of States, but are of the opinion that there are several degrees of seriousness of internationally wrongful acts, the most serious being wrongful acts—especially those involving aggression—that jeopardize international peace and security: see in particular G. I. Tunkin, *Droit international public—Problèmes théoriques* (Paris, Pedone, 1965) and the authors cited in the commentary to article 19, paras. (47)—(49), *Yearbook ... 1976*, vol. II (Part Two), pp. 115-116.

deterrence and to disregard the development of the international community during the past 30 years. The view was expressed that, whereas some States had the capability to use force to defend their interests, the same was not true of the great majority of other States. Most States would wish to have a certain code of conduct established in international life and a certain justice applied therein. In the interests of medium-sized and small States, the scope of the draft code should cover States and other legal persons.³³

55. On the other hand, some members of the Commission opposed the idea that international criminal responsibility could be attributed to a State under the present draft code. They emphasized the practical impossibility of instituting criminal proceedings against States and considered that State immunity would prevent the courts of another State from exercising jurisdiction in such circumstances. In their view, it was unrealistic to believe that States suspected of having committed international crimes would agree to an international tribunal exercising its jurisdiction over them. Lastly, these members argued that the responsibility of States for acts classified as international crimes should be considered only in the context of the draft on State responsibility.

56. However, it was pointed out that it is easy to imagine that a State acting in contempt by its refusal to appear before the competent jurisdiction would not only be viewed with suspicion but would bring down upon itself the general disapproval of the international community, quite apart from the condemnation which it might have incurred. As to the argument that the responsibility of States for international crimes is a matter solely for the draft on State responsibility, it implicitly raises the problem of delimiting the respective scope of the draft on the responsibility of States for internationally wrongful acts and of the present draft. It would, however, seem evident that the scope of the two drafts cannot possibly be confused, since the present draft covers only offences against the peace and security of mankind, whereas the other draft covers the much broader field of international crimes in general, as defined in article 19. It would be wrong to say that consideration of any act classified as an international crime by article 19 is exclusively a matter for the draft on State responsibility.

57. Some members were opposed to the idea of criminal responsibility on the part of the State because, in their view, such responsibility does not exist in current international law.

58. The present draft codification cannot, in any case, disregard article 19.

59. On the other hand, it is true that there should be no misconceptions about the apparent unity of ar-

ticle 19, which gives a comprehensive, composite definition of an international crime by a State. It covers a diversity of international crimes, among which offences against the peace and security of mankind constitute a category *sui generis* characterized by the particular horror which they evoke in the universal conscience. Owing to their specific nature, are these crimes subject to a special régime as regards both substantive and procedural rules?

60. In the case of individuals, such a special régime seems to be beyond doubt. It is significant that only offences committed by individuals against the peace and security of mankind are not subject to statutory limitations. It is also significant that countries with territorial competence to try such offences acknowledge that these offences are subject to special rules which are not necessarily those of their national law. For instance, in the Klaus Barbie case, the chambre d'accusation of the Court of Appeal of Lyon, in a ruling of 8 July 1983, stated "that, because of their nature, crimes against humanity . . . do not come solely under French criminal law, but also under an international punitive order to which the notion of frontiers and the special rules deriving therefrom are fundamentally alien". The régime of the criminal responsibility of individuals for offences against the peace and security of mankind thus stands apart from the general régime of responsibility for internationally wrongful acts. If it did not, the General Assembly would not have called for a separate codification of these offences. Moreover, there is general agreement among the members of the Commission that such a régime exists; some of them consider that it should be limited to individuals only.

61. With reference to States, the advocates of criminal responsibility in the case of such legal persons consider that it should, *a fortiori*, be subject to a special régime, in view of the specific nature of legal entities.

2. METHODOLOGY OF CODIFICATION

62. The Commission's discussion of the methodology of codification centred on whether it should follow a deductive method, an inductive method or a combination of the two. The deductive method involves the definition, at the outset, of a general criterion for the identification, by reference to that criterion, of offences which may be regarded as offences against the peace and security of mankind. On the other hand, the inductive method involves an examination of the facts, a review of the relevant conventions, for example, and if possible, the identification, following the review of those conventions, of a criterion for an offence against the peace and security of mankind.

63. The method followed by the Commission in 1954 was a purely enumerative one. The Commission listed a number of acts which, in its view, constituted offences against the peace and security of mankind but it did not try to establish a link between such acts, except to state that such crimes were crimes in international law, without establishing any connection between them. In

³³ One member was of the opinion that the elaboration of the draft Code of Offences against the Peace and Security of Mankind was of interest to all States and that an indication of only some categories of States was completely inadmissible.

actual fact, the foregoing remarks on the scope of the draft *ratione materiae* seem to have answered, at least in part, the question with which the Commission is now faced.

64. It should be noted that the offences to which the term "offences against the peace and security of mankind" refers are the most serious *international crimes*.

65. That is, consequently, a general criterion by which to judge whether or not an international crime falls into the category of offences against the peace and security of mankind. As has already been stated, these are not all the crimes referred to in article 19, but only those which are regarded as being the most serious. It is, of course, obvious that this criterion is a subjective one. The opinion of the international community as a whole will be the decisive factor.

66. The Commission is also of the opinion that the deductive method should be closely combined with the inductive method and that it will be necessary to explore the large number of relevant conventions. The Commission will thus complete the work it began in 1954 by considering for inclusion in the present draft offences which meet the criterion defined and which have emerged, *inter alia*, as a result of the decolonization process, the need to foster fundamental human rights, and the development of *jus cogens*. A general and comprehensive criterion will, moreover, offer the advantage of constituting a policy statement, making it clear from the outset that the list of offences contained in the draft is not exhaustive and is subject to change as a result of developments in international society.

67. Lastly, it was on the whole considered advisable to include an introduction recalling the general principles of criminal law, such as the non-retroactivity of criminal law and the theories of aggravating or mitigating circumstances, complicity, preparation and justified acts.

3. IMPLEMENTATION OF THE CODE

68. Once the offences constituting crimes against the peace and security of mankind under the code are established, it will be necessary, for the code to be implemented or applied, to determine the penalties incurred by the perpetrators and to attribute to an existing or future jurisdiction competence to impose those penalties. A penal system generally consists of a three-tiered structure constituted by three successive stages:

(a) *Offences*, which are determined by a delicate operation termed "characterization". At this stage, the acts are analysed and examined thoroughly and then, as appropriate, declared criminal—in other words, in the present case, included in the category of offences against the peace and security of mankind;

(b) A *scale of penalties*, namely maximum and minimum penalties for the offences considered;

(c) A *judicial organization* (courts, rules of competence and procedure, judgments, enforcement of judgments, etc.).

The 1954 draft was limited to the first of these operations, namely determination of offences, leaving aside the other two operations described in subparagraphs (b) and (c). The question before the Commission is whether it should abide by its 1954 position or go further. With regard to item (b), there would appear to be no doubt that the draft should tackle the problem of penalties. However, the opinion was expressed that, as far as States are concerned, the method to be followed should take account of their special nature and a realistic and appropriate system should be sought. Some members, however, are opposed to any system of criminal penalties encompassing States and want the system to be confined to individuals. With respect to item (c), the prevailing opinion in the Commission was that an international criminal jurisdiction would be necessary. But some members, while favouring such a jurisdiction, again want its competence to be limited solely to crimes committed by individuals. Lastly, one member considers that the question of an international criminal jurisdiction must be dealt with separately from the draft, since the matter has been entrusted to two successive committees, as noted above in the section dealing with the history of the topic.³⁴ However, it was pointed out that the drafts drawn up have never been considered, despite the fact that the definition of aggression was completed in 1974. The problem thus remains intact, and the Commission is justifiably asking itself about the scope of its mandate.

4. CONCLUSION

69. To sum up:

(a) The International Law Commission is of the opinion that the draft code should cover only the most serious international offences. These offences will be determined by reference to a general criterion and also to the relevant conventions and declarations pertaining to the subject;

(b) With regard to the subjects of law to which international criminal responsibility can be attributed, the Commission would like to have the views of the General Assembly on this point, because of the political nature of the problem;

(c) With regard to the implementation of the code:

(i) Since some members consider that a code unaccompanied by penalties and by a competent criminal jurisdiction would be ineffective, the Commission requests the General Assembly to indicate whether the Commission's mandate extends to the preparation of the statute of a competent international criminal jurisdiction for individuals;

(ii) Moreover, in view of the prevailing opinion within the Commission, which endorses the principle of criminal responsibility in the case of States, the General Assembly should indicate whether such jurisdiction should also be competent with respect to States.

³⁴ See footnote 19 above.

JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

A. Introduction

1. HISTORICAL REVIEW OF THE WORK OF THE COMMISSION

70. The topic entitled "Jurisdictional immunities of States and their property" was included in the Commission's current programme of work by the decision of the Commission at its thirtieth session, in 1978,³⁵ on the recommendation of the Working Group which it had established with a view to starting work on the topic and in response to General Assembly resolution 32/151 of 19 December 1977.

71. At its thirty-first session, in 1979, the Commission had before it a preliminary report³⁶ on the topic submitted by the Special Rapporteur, Mr. Sompong Sucharitkul. The preliminary report gave a historical sketch of international efforts towards codification and examined sources of international law and possible contents of the law of State immunities, including the practice of States, international conventions, international adjudications and opinions of writers as source materials. The report also made an enquiry into initial questions, definitions, the use of the inductive approach to the study of the topic, the general rule of State immunity and possible exceptions to the rule itself.

72. During the discussion of the preliminary report, it was pointed out that relevant materials on State practice, including the practice of the socialist countries and developing countries, should be consulted as widely as possible. It was also emphasized that another potential source of materials would be found in the treaty practice of States, which indicates consent to some limitations on jurisdictional immunity in specific circumstances. In that connection, the Commission, at its thirty-first session, decided to seek further information from Governments of Member States of the United Nations in the form of replies to a questionnaire. It was noted that States themselves knew best their own practice, wants and needs as to immunities in respect of their activities and that the views and comments could provide an appropriate indication of the direction in which the codification and progressive development of the international law of State immunity should proceed.³⁷

³⁵ *Yearbook ... 1978*, vol. II (Part Two), pp. 152-153, paras. 179-190.

³⁶ *Yearbook ... 1979*, vol. II (Part One), p. 227, document A/CN.4/323.

³⁷ The materials received were originally organized by the Secretariat in a systematic order (and published in English, French, Russian and Spanish) as follows: Part I consisted of Government

73. Following the preliminary report, the Special Rapporteur submitted the second report³⁸ for the consideration of the Commission at its thirty-second session, in 1980,³⁹ the third report⁴⁰ during the thirty-third session of the Commission, in 1981,⁴¹ the fourth report⁴² during the thirty-fourth session of the Commission, in 1982,⁴³ and the fifth report (A/CN.4/363 and Add.1)⁴⁴ at the present session of the Commission.

74. In the second and third reports, the Special Rapporteur submitted the texts of 11 draft articles divided into two parts. Part I, entitled "Introduction", comprised five draft articles:⁴⁵ "Scope of the present articles" (art. 1); "Use of terms" (art. 2); "Interpretative provisions" (art. 3); "Jurisdictional immunities not within the scope of the present articles" (art. 4); "Non-

replies to the questionnaire (A/CN.4/343 and Add.3 and 4); Part II contained materials that Governments had submitted together with their replies to the questionnaire (A/CN.4/343/Add.1); Part III contained materials submitted by the Governments which had not replied to the questionnaire (A/CN.4/343/Add.2). The materials now appear (in either English or French) 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), hereinafter referred to as *Materials on Jurisdictional Immunities ...*.

³⁸ *Yearbook ... 1980*, vol. II (Part One) p. 199, document A/CN.4/331 and Add.1.

³⁹ See *Yearbook ... 1980*, vol. I, pp. 195-205 and 214-220, 1622nd to 1626th meetings; and *Yearbook ... 1980*, vol. II (Part Two), pp. 138 *et seq.*, paras. 112-122.

⁴⁰ *Yearbook ... 1981*, vol. II (Part One), p. 125, document A/CN.4/340 and Add.1.

⁴¹ See *Yearbook ... 1981*, vol. I, pp. 55-80, 1653rd to 1657th meetings, and pp. 110-124, 1663rd to 1665th meetings; and *Yearbook ... 1981*, vol. II (Part Two), pp. 154 *et seq.*, paras. 208-225.

⁴² *Yearbook ... 1982*, vol. II (Part One), p. 199, document A/CN.4/357.

⁴³ See *Yearbook ... 1982*, vol. I, pp. 59-119, 1708th to 1718th meetings, and pp. 182-199, 1728th to 1730th meetings; and *Yearbook ... 1982*, vol. II (Part Two), pp. 95 *et seq.*, paras. 171-198.

⁴⁴ Reproduced in *Yearbook ... 1983*, vol. II (Part One).

⁴⁵ Of the six draft articles submitted in the second report, namely articles 1 to 5 of part I of the draft and article 6 of part II, only articles 1 and 6 were referred to the Drafting Committee at the thirty-second session of the Commission and were provisionally adopted by the Commission at that session (see sect. B.I and footnotes 60 and 63 below). At the request of the Special Rapporteur, draft articles 2 to 5 were not referred to the Drafting Committee.

However, after consideration of the other draft articles of part II contained in the third report, which were referred to the Drafting Committee during the thirty-fourth session of the Commission, the Commission decided that the Drafting Committee should also examine the provisions of articles 2 and 3 concerning the problem of the definition of "jurisdiction" and "trading or commercial activity". See *Yearbook ... 1982*, vol. II (Part Two), p. 99, para. 198.

retroactivity of the present articles" (art. 5). As revised, part II, entitled "General principles", also comprised five draft articles:⁴⁶ "The principle of State immunity" (art. 6);⁴⁷ "Obligation to give effect to State immunity" (art. 7); "Consent of State" (art. 8); "Expression of consent" (art. 9); and "Counter-claims" (art. 10).⁴⁸

75. In the fourth and fifth reports, the Special Rapporteur submitted the texts of another set of five draft articles constituting part III, entitled "Exceptions to State immunity". The first two draft articles of part III were presented in the fourth report and were as follows: "Scope of the present part" (art. 11) and "Trading or commercial activity" (art. 12). The three other draft articles (arts. 13 to 15) were presented in the fifth report (see para. 76 below). At the conclusion of its consideration of draft articles 11 and 12 at the thirty-fourth session,⁴⁹ the Commission decided to refer them to the Drafting Committee.⁵⁰

2. CONSIDERATION OF THE TOPIC AT THE PRESENT SESSION

76. At the present session, the Commission had before it the fifth report of the Special Rapporteur on the topic (A/CN.4/363 and Add.1).⁵¹ The report dealt with part III of the draft articles, concerning exceptions to State immunity, and contained three draft articles: "Contracts of employment" (art. 13); "Personal injuries and damage to property" (art. 14); and "Ownership, possession and use of property" (art. 15).⁵² The

⁴⁶ The rest of the draft articles of part II were submitted in the third report of the Special Rapporteur. The drafts were as follows: "Rules of competence and jurisdictional immunity" (art. 7); "Consent of State" (art. 8); "Voluntary submission" (art. 9); "Counter-claims" (art. 10); "Waiver" (art. 11). On the basis of the discussion of the third report in the Commission (see note 41 above), the Special Rapporteur prepared revised versions of articles 7 to 11, combining articles 9 and 10 into one article dealing with various means of expressing consent. As revised, the articles were also presented under different headings from those in the third report (cf. the original headings of the articles as contained in this footnote and the revised headings contained in para. 74 above.)

⁴⁷ See sect. B.1 and footnote 63 below. Draft article 6 (State immunity) was provisionally adopted by the Commission at its thirty-second session. But at the end of the discussion of the rest of the draft articles of part II, submitted by the Special Rapporteur in his third report and referred to the Drafting Committee during the thirty-third session of the Commission, the Commission decided at its thirty-fourth session that article 6 should also be re-examined by the Drafting Committee in the light of the discussions on all the draft articles constituting part II (*Yearbook ... 1982*, vol. II (Part Two), p. 99, para. 198).

⁴⁸ Owing to lack of time, the Drafting Committee did not consider articles 7 to 10, referred to it at the thirty-third session (*ibid.*, p. 95, para. 169). Draft articles 7 to 9 were provisionally adopted by the Commission at its thirty-fourth session, and draft article 10 was provisionally adopted by the Commission at its present session (see sect. B below).

⁴⁹ See footnote 43 above.

⁵⁰ The Drafting Committee decided to take up draft article 11 after consideration of the rest of the draft articles in part III. Draft article 12 was provisionally adopted by the Commission at its present session (see sect. B below).

⁵¹ See footnote 44 above.

⁵² As indicated in the fifth report (A/CN.4/363 and Add.1, para. 26), part III as a whole will comprise articles 11 to 20, of which five have been submitted (see paras. 75-76 above). The remaining ar-

Commission also had before it a memorandum on the topic submitted by one of its members (A/CN.4/371).⁵³

77. The fifth report of the Special Rapporteur was considered by the Commission at its present session, at the 1762nd to 1770th meetings, from 17 to 30 May 1983.

78. In presenting his fifth report, the Special Rapporteur noted an earlier suggestion that the title of part II of the draft articles, currently "General principles", might be changed to "General provisions". It was the Special Rapporteur's view that, if such a change were made, the draft articles in part III, entitled "Exceptions to State immunity", might perhaps also be replaced by a reference to certain specified areas of activity that required further qualification of the rule of State immunity.

79. Draft article 13 submitted by the Special Rapporteur, concerning the problem of contracts of employment as an exception to State immunity,⁵⁴ raised a number of drafting points and issues of substance. All the comments were aimed at improving the text of the draft article, either by enlarging or by restricting the scope of this possible exception.

80. A balanced view of the draft article should ensure recognition of freedom of action on the part of the State in the appointment or employment of its employees abroad, while taking into account the emerging problem of labour relations, unemployment, social welfare and the benefits to be given to the labour force in local and international labour markets.

81. According to some members of the Commission, the meaning of the opening phrase of paragraph 1 of the draft article, "Unless otherwise agreed", was unclear. They accordingly called for its deletion. To others, the phrase served a useful purpose in that it made the exception in question a residual rule rather than the general rule. Thus they supported the retention of the phrase.

titles for this part are: "Patents, trade marks and other intellectual properties" (art. 16); "Fiscal liabilities and customs duties" (art. 17); "Shareholdings and membership of bodies corporate" (art. 18); "Ships employed in commercial service" (art. 19); "Arbitration" (art. 20).

⁵³ Reproduced in *Yearbook ... 1983*, vol. II (Part One).

⁵⁴ The text submitted in the fifth report 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."

82. The view was also expressed that the phrase in paragraph 2 (a) of draft article 13 "failure to employ an individual or dismissal of an employee" should be either deleted or reworded to enable the paragraph to convey the basic idea that a State is not bound to employ or keep an individual in employment. Another view was that, consistent with the right to work as a human right, the exception of draft article 13 should also cover proceedings relating to the "appointment" or "dismissal" of State employees.

83. As it was recognized that the draft article dealt with a completely new area, a suggestion was made that the term "contract of employment" itself be defined for the purpose of this article. Other drafting comments sought to bring the text of the draft, in several places, closer to the texts of certain existing legal instruments on which it was based.

84. The fundamental point was that a contract of employment as an exception to State immunity was closely bound up with the possibility of proceedings being instituted before the local courts by an employee of a foreign State. The problem would not arise at all where no jurisdiction existed in the local courts, for there was no occasion to invoke State immunity if, in the ordinary course of events, the courts would not have jurisdiction over the dispute, especially in cases where the contract was covered exclusively by the administrative or labour law of the sending State.

85. One possible indication was the choice that could be made by the employer State by placing a particular local employee under the social security system of the State where the services were being performed. In such a situation, it was observed, the employer State could be said to have consented to the jurisdiction of the court of the forum State with respect to that employee.

86. Draft article 14 as submitted by the Special Rapporteur, dealing with the problem of tort,⁵⁵ generated considerable discussion on issues of substance. As conceived, the article was confined to personal injuries and damage to property and did not cover financial or economic injury or criminal offences.

87. The view was expressed that the exceptions set forth in the article were relatively new and that their legal basis was closely connected with the corporeal or physical nature of the injury or damage to property suffered and the place at which the tort or wrongful act had been committed. It was observed that such wrongful acts largely concerned insurable risks involving claims by the victims of traffic accidents for damages or compensation for negligent or unintended personal injury or

damage to property. Accordingly the remedies are, at least in some jurisdictions, available through actions against an insurance company rather than against a State directly. Such proceedings in the courts of the forum could thus go ahead without in any way offending the sovereignty of the State concerned.

88. A number of members of the Commission expressed doubt as to the existence of any justification for draft article 14, since the cases in which it would apply were so few. The view was also expressed against the incorporation of article 14 in the draft on the grounds that it was premature to deal with the exceptions envisaged therein, since opinions of writers on the subject had not yet crystallized. On this point, however, it was observed that as long ago as 1891 a position had been taken on the fact that, among the actions admissible against a foreign State, were, for example, actions for damages resulting from a wrongful act or tort committed in the forum State.⁵⁶ Thus draft article 14 proposed nothing new. It attempted to address views on jurisdictional immunities of States not fully covered by some of the existing international instruments, which admittedly did not deal with all areas of activity where questions of jurisdictional immunities of States and their property might arise. Nor, indeed, did such instruments apply to all States.

89. A possibility was thus being left open for a narrow and limited exception under the article, confined to personal injury or damage to property resulting from insurable accidents of inland transportation, either by road, sea, rail or air.

90. The view was expressed that the exceptions set forth in the article should indeed be expanded so as to cover also cases of transfrontier torts, including time bombs or letter-bombs. This was to be achieved by deleting from the draft article the requirement of the presence of the author of the wrongful act in the territory where the injury or damage occurred. According to another view, however, it was preferable to exclude from the scope of the article liability connected with criminal or political offences.

91. There was also the view that, as conceived, draft article 14 might open a floodgate of litigation in cases where the alternative method of peaceful settlement of disputes by negotiations through diplomatic channels would be more suitable. But it was also pointed out that the territorial State did not always come to the assistance of injured private parties, particularly when

⁵⁵ The text submitted in the fifth report 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."

⁵⁶ At its session at Hamburg, on 11 September 1891, the Institute of International Law adopted a set of "Draft international regulations on the competence of courts in proceedings against foreign States, sovereigns or heads of State", containing in article 4, para. 6, a provision on actions for tort damages, which reads:

"The only actions admissible against a foreign State are:

"...

"(6) Actions for damages resulting from an offence or tort committed on the territory." (Institute of International Law, *Tableau général des résolutions (1873-1956)* (Basel, Editions juridiques et sociologiques, 1957), pp. 15-16.)

other valid legal remedies were available apart from negotiations through diplomatic channels. According to this view, draft article 14 was not intended to discourage negotiations through diplomatic channels; rather, it was intended to expedite such negotiations.

92. Draft article 15 as submitted by the Special Rapporteur, concerning ownership, possession and use of property³⁷ as an exception to State immunity, was generally supported. The exception was based on the exclusive authority of the courts of the State of the forum to determine legal issues concerning immovable property situated in the forum State. It was also based on the need for the courts of the State of the forum to be able to adjudicate upon conflicting claims to property being administered by those courts. Where the foreign State appeared as one among several claimants endeavouring to assert title to property or a claim to an inheritance, it was natural that the State concerned should be deemed to have consented to the exercise of jurisdiction by a court of the territorial State competent to adjudicate the claim. Once title had been recognized, the court of the territorial State might well decline the exercise of further jurisdiction in the case, had there been no other reasons for entertaining the proceeding beyond the establishment of title to property.

93. Certain drafting suggestions were made to improve the draft article. It was generally observed that paragraph 1 (d) of the article should be simplified. It was also suggested that the expression "the distribution of assets" in paragraph 1 (c) was too narrow and that it could be replaced by "the administration of the estate". There was also a question as to whether the term "inviolability of premises" in paragraph 2 was appropriate in the context of the article. On this question, the point was made that the term "inviolability" itself was wider than the expression "jurisdictional immunity" and that, in ordinary circumstances, the former term would cover

the latter situation. The term "inviolability" was accordingly considered to be the accurate expression as used in the draft article.

94. At the conclusion of its debate on the topic, the Commission decided to refer draft articles 13, 14 and 15 to the Drafting Committee.

95. On the recommendation of the Drafting Committee, draft articles 10, 12 and 15, together with the relevant provisions of article 2, para. 1 (g), and of article 3, para. 2, were provisionally adopted by the Commission at its 1806th meeting, on 18 July 1983.

96. On the basis of the discussions in the Commission, the Special Rapporteur prepared and submitted to the Drafting Committee revised versions (A/CN.4/L.367) of draft article 13 (Contracts of employment)³⁸ and draft article 14 (Personal injuries and damage to property).³⁹

³⁷ The Special Rapporteur's revised text of article 13 read as follows:

"Article 13. Contracts of employment"

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

"2. Paragraph 1 does not apply if:

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

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

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

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

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

³⁸ The Special Rapporteur's revised text of article 14 read as follows:

"Article 14. Personal injuries and damage to property"

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

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

³⁷ The text submitted in the fifth report 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."

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

1. TEXTS OF THE DRAFT ARTICLES PROVISIONALLY ADOPTED SO FAR BY THE COMMISSION

PART I INTRODUCTION

*Article 1. Scope of the present articles*⁴⁰

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

*Article 2. Use of terms*⁴¹

1. For the purposes of the present articles:

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

...

(g) "commercial contract" means:

- (i) any commercial contract or transaction for the sale or purchase of goods or the supply of services;
- (ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee in respect of any such loan or of indemnity in respect of any such transaction;
- (iii) any other contract or transaction, whether of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

...

*Article 3. Interpretative provisions*⁴²

...

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

PART II GENERAL PRINCIPLES

*Article 6. State immunity*⁴³

⁴⁰ As provisionally adopted by the Commission at its thirty-fourth session, during which the article was re-examined. For the commentary thereto, see *Yearbook ... 1982*, vol. II (Part Two), pp. 99-100. An earlier version of the article was provisionally adopted by the Commission at its thirty-second session (*ibid.*, p. 94, footnote 209).

⁴¹ The Commission adopted the text of subparagraph (a) at its thirty-fourth session during its consideration of article 7, dealing with the modalities for giving effect to State immunity. For the commentary to that text, *ibid.*, p. 100. The Commission adopted the text of subparagraph (g) at its present session during its consideration of article 12, dealing with commercial contracts. For the commentary to that text, see sect. B.2 below.

⁴² The Commission adopted the text of paragraph 2 of article 3 at its present session during its consideration of article 12, dealing with commercial contracts. For the commentary to that text, see sect. B.2 below.

⁴³ Article 6 as provisionally adopted by the Commission at its thirty-second session read as follows:

"Article 6. State immunity

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

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

*Article 7. Modalities for giving effect to State immunity*⁴⁴

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

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

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

*Article 8. Express consent to the exercise of jurisdiction*⁴⁵

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

- (a) by international agreement;
- (b) in a written contract; or
- (c) by a declaration before the court in a specific case.

*Article 9. Effect of participation in a proceeding before a court*⁴⁶

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.

For the commentary to the article, see *Yearbook ... 1980*, vol. II (Part Two), pp. 142 *et seq.*

Article 6 was further discussed by the Commission at its thirty-fourth session and still gave rise to divergent views. The Drafting Committee also re-examined draft article 6 as provisionally adopted. While no new formulation of the article was proposed by the Drafting Committee at the thirty-fourth session, the Commission agreed to re-examine draft article 6 at its subsequent session. Owing to lack of time, however, the Drafting Committee was not in a position to consider the question during the present session.

⁴⁴ The Commission provisionally adopted article 7 at its thirty-fourth session. For the commentary thereto, see *Yearbook ... 1982*, vol. II (Part Two), pp. 100 *et seq.*

⁴⁵ The Commission provisionally adopted article 8 at its thirty-fourth session. For the commentary thereto, *ibid.*, pp. 107 *et seq.*

⁴⁶ The Commission provisionally adopted article 9 at its thirty-fourth session. For the commentary thereto, *ibid.*, pp. 109 *et seq.*

Article 10. Counter-claims⁶⁷

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

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

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

PART III
EXCEPTIONS TO STATE IMMUNITY⁶⁸

Article 12. Commercial contracts⁶⁹

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

2. Paragraph 1 does not apply:

- (a) in the case of a commercial contract concluded between States or on a Government-to-Government basis;
- (b) if the parties to the commercial contract have otherwise expressly agreed.

Article 15. Ownership, possession and use of property⁷⁰

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

- (a) any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, immovable property situated in the State of the forum; or
- (b) any right or interest of the State in movable or immovable property arising by way of succession, gift or *bona vacantia*; or
- (c) any right or interest of the State in the administration of property forming part of the estate of a deceased person or of a person of unsound mind or of a bankrupt; or
- (d) any right or interest of the State in the administration of property of a company in the event of its dissolution or winding up; or
- (e) any right or interest of the State in the administration of trust property or property otherwise held on a fiduciary basis.

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

- (a) which is in the possession or control of the State; or
- (b) in which the State claims a right or interest,

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

⁶⁷ The Commission provisionally adopted article 10 at its present session. For the commentary thereto, see sect. B.2 below.

⁶⁸ The title of this part will be re-examined after the Commission has considered all possible exceptions.

⁶⁹ The Commission provisionally adopted article 12 at its present session. For the commentary thereto, *ibid.*

⁷⁰ The Commission provisionally adopted article 15 at its present session. For the commentary thereto, *ibid.*

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

2. TEXTS OF ARTICLES 10, 12, 2, PARA. 1 (g), 3, PARA. 2, AND 15, WITH COMMENTARIES THERETO, ADOPTED BY THE COMMISSION AT ITS THIRTY-FIFTH SESSION

PART II
GENERAL PRINCIPLES (*continued*)

Article 10. Counter-claims

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

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

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

Commentary

(1) Article 10 follows logically from articles 8 and 9. While article 8 deals with the effect of consent given expressly by one State to the exercise of jurisdiction by a court of another State, article 9 defines the extent to which consent may be inferred from a State's conduct in participating in a proceeding before the court of another State. Article 10 is designed to complete the trilogy of provisions on the scope of consent by dealing with the effect of counter-claims against a State and counter-claims by a State.

(2) A State may institute a proceeding before a court of another State under article 9, paragraph 1 (a), thereby consenting or subjecting itself to the exercise of jurisdiction by that court in respect of that proceeding, including pre-trial hearing, trial and decisions, as well as appeals. Such consent to jurisdiction is not consent to execution, which is a separate matter to be examined in part IV in connection with immunity of the property of States from attachment and execution. The question may arise as to the extent to which the initiative taken by a State in instituting that proceeding could entail its subjection or amenability to the jurisdiction of that court in respect of counter-claims against the plaintiff State. Conversely, a State against which a proceeding has been instituted in a court of another State may decide to make a counter-claim against the party which initiated

the proceeding. In both instances, a State is to some extent amenable to the competent jurisdiction of the forum, since in either case there is clear evidence of consent by conduct or manifestation of volition to submit to the jurisdiction of that court. The consequence of the expression of consent by conduct, such as by a State instituting a proceeding, or by intervening in a proceeding to present a claim or, indeed, by making a counter-claim in a proceeding instituted against it, may indeed vary according to the effectiveness of its consent to the exercise of jurisdiction by the competent judicial authority concerned. In each of the three cases, an important question arises as to the extent and scope of the effect of consent to the exercise of jurisdiction in the event of such a counter-claim against or by a State.

(a) *Counter-claims against a State*

(3) The notion of "counter-claims" in current English usage, and as understood in English and common-law systems, presupposes the prior existence or institution of a claim. A counter-claim is a cross-claim or a cross-action brought by a defendant in response or in answer to an original or principal claim. Likewise in civil-law systems, a *demande reconventionnelle* may be brought in reply to a *demande principale*. For this reason, there appear to be two possible circumstances in which counter-claims could be brought against a State. The first possibility is where a State has itself instituted a proceeding before a court of another State, as in article 9, paragraph 1 (a), and in article 10, paragraph 1. The second case occurs when a State has not itself instituted a proceeding but has intervened in a proceeding to present a claim. There is an important qualification as to the purpose of the intervention. In article 9, paragraph 1 (b), a State may intervene in a proceeding or take any other step relating to the merits thereof, and by such intervention subject itself to the jurisdiction of that court in regard to the proceeding. Article 10, paragraph 2, deals with cases where a State intervenes in order to present a claim; hence the possibility arises of a counter-claim being brought against the State in respect of the claim it has presented by way of intervention. There would be no such possibility of a counter-claim against an intervening State which had not also made a claim in connection with the proceeding. For instance, a State could intervene as an *amicus curiae*, or in the interest of justice, or to make a suggestion, or to give evidence on a point of law or of fact without itself consenting to the exercise of jurisdiction against it in respect of the entire proceeding. Thus, as in article 9, paragraph 2 (a), a State could intervene to invoke immunity or, as in paragraph 2 (b) of that article, to assert a right or interest in property at issue in that proceeding. In the case of paragraph 2 (b) of article 9, the intervening State, in so far as it may be said to have presented a claim connected with the proceeding, could also be considered to have consented to a counter-claim brought against it in respect of the claim it has presented, quite apart from, and in addition to, its amenability to the requirement to answer a judicial inquiry or to give prima facie evidence in support of its title or claim to rights or

interests in property as contemplated in article 9, paragraph 2 (b). Even to invoke immunity as envisaged in article 9, paragraph 2 (a), a State may also be required to furnish proof of the legal basis of its claim to immunity. But once the claim to immunity is sustained under article 9, paragraph 2 (a), or the claim of right or title is established under paragraph 2 (b), consent to the exercise of jurisdiction ceases. The court should therefore, in such a case, refrain from further exercise of jurisdiction in respect of the State that is held to be immune or the property in which the State is found to have an interest, for the reason that the State and the property respectively would, in ordinary circumstances, be exempt from the jurisdiction of the court. Nevertheless, the court could continue to exercise jurisdiction if the proceeding fell within one of the exceptions provided in part III or the State had otherwise consented to the exercise of jurisdiction or waived its immunity.

(4) As has been seen in article 9, paragraph 1 (a), a State which has itself instituted a proceeding is deemed to have consented to the jurisdiction of the court for all stages of the proceeding, including trial and judgment at first instance, appellate and final adjudications and the award of costs where such lies within the discretion of the deciding authority, but excluding execution of the judgment. Article 10, paragraph 1, addresses the question of the extent to which a State which has instituted a proceeding before a court of another State may be said to have consented to the jurisdiction of the court in respect of counter-claims against it. Clearly, the mere fact that a State has instituted a proceeding does not imply its consent to all other civil actions against the State which happen to be justiciable or subject to the jurisdiction of the same court or another court of the State of the forum. The extent of consent in such an event is not unlimited, and the purpose of article 10, paragraph 1, is to ensure a more precise and better balanced limit of the extent of permissible counter-claims against a plaintiff State. A State instituting a proceeding before a court of another State is not open to all kinds of cross-actions before that court nor to cross-claims by parties other than the defendants. A plaintiff State has not thereby consented to separate and independent counter-claims. There is no general submission to all other proceedings or all actions against the State, nor for all times. The State instituting a proceeding is amenable to the court's jurisdiction in respect of counter-claims arising out of the same legal relationship or facts as the principal claim,⁷¹ or the same transaction or occurrence that is the

⁷¹ For example, the United Kingdom *State Immunity Act 1978* (The Public General Acts, 1978, part 1, chap. 33, p. 715; reproduced in United Nations, *Materials on Jurisdictional Immunities...*, pp. 41 *et seq.*) provides in sect. 2, subsect. (6), that:

"A submission in respect of any proceedings extends to any appeal but not to any counter-claim unless it arises out of the same legal relationship or facts as the claim."

See also *Strousberg v. Republic of Costa Rica* (1881) (*Law Times Reports* (London), vol. 44, p. 199), where the defendant was allowed to assert any claim he had by way of cross-action or counter-claim to the original action in order that justice might be done. But such counter-claims and cross-suits can only be brought in respect of the same transactions and only operate as set-offs.

subject-matter of the principal claim.⁷² In some jurisdictions, the effect of a counter-claim against a plaintiff State is also limited in amount, which cannot exceed that of the principal claim; or if it does exceed the principal claim, the counter-claims against the State can only operate as a set-off.⁷³ This is expressed in American legal terminology as "recoupment against the sovereign claimant", which normally cannot go beyond "the point where affirmative relief is sought".⁷⁴ Only defensive counter-claims against foreign States appear to have been permitted in common-law jurisdictions.⁷⁵ On the other hand, in some civil-law jurisdictions, independent counter-claims have been allowed to operate as offensive remedies, and, in some cases, affirmative relief is known to have been granted.⁷⁶

(5) Where the rules of the State of the forum so permit, article 10, paragraph 1, also applies in the case where a counter-claim is made against a State, and that State could not, in accordance with the provisions of the present articles, notably in part III, invoke immunity from jurisdiction in respect of that counter-claim, had separate proceedings been brought against the State in those courts.⁷⁷ Thus independent counter-claims, arising out of different transactions or occurrences not forming part of the subject-matter of the claim or arising out of a distinct legal relationship or separate facts

from those of the principal claim, may not be maintained against the plaintiff State, unless they fall within the scope of one of the admissible exceptions to be examined in part III. In other words, independent counter-claims or cross-actions may be brought against a plaintiff State only when separate proceedings are available against that State under other parts of the present articles, whether or not the State has instituted a proceeding as in paragraph 1, or has intervened to present a claim as in paragraph 2 of article 10.

(6) Paragraph 2 of article 10 deals with cases where a State intervenes in a proceeding before a court of another State not as an *amicus curiae*, but as an interested party, to present a claim. It is only in this sense that it is possible to conceive of a counter-claim being brought against a State which has intervened as a claimant, and not as a mere witness or merely to make a declaration, as in article 9, paragraph 1 (b), without presenting a claim. Once a State has intervened in a proceeding to make or present a claim, it is amenable to any counter-claim against it which arises out of the same legal relationship or facts as the claim presented by the State. Other parts of the commentary applicable to paragraph 1 concerning the limits of permissible counter-claims against a plaintiff State apply equally to counter-claims against an intervening claimant State, as envisaged in paragraph 2. They apply in particular to the identity of the legal relationship and facts as between the claim presented by the intervening State and the counter-claim, and possibly also to the quantum of the counter-claim and the extent or absence of allowable affirmative relief, if any, or of a remedy different in kind from, or beyond the limits of, the claim presented by the intervening State.

(b) Counter-claims by a State

(7) Where a State itself makes a counter-claim in a proceeding instituted against it before a court of another State, it is taking a step relating to the merits of the proceeding within the meaning of article 9, paragraph 1. In such a case, the State is deemed to have consented to the exercise of jurisdiction by that court with respect not only to the counter-claim brought by the State itself, but also to the principal claim against it.

(8) By itself bringing a cross-suit or a cross-action or a counter-claim before a judicial authority of another State, a State consents by conduct to the exercise of jurisdiction by that forum. However, the effect, extent and scope of counter-claims by a State under article 10, paragraph 3, could be wider than those of counter-claims against the plaintiff State under paragraph 1, or against the intervening claimant State under paragraph 2 of article 10. For one thing, counter-claims by a defendant foreign State, although usually limited by local law to matters arising out of the same legal relationship or facts as the principal claim, are not limited in respect of the extent or scope of the relief sought, nor in respect of the nature of the remedy requested. Indeed, if they arise out of a different legal relationship or a different set of facts from those of the principal claim,

⁷² For example, the United States *Foreign Sovereign Immunities Act of 1976* (United States Code, 1976 Edition, vol. 8, title 28, chap. 97; reproduced in United Nations, *Materials on Jurisdictional Immunities...*, pp. 55 *et seq.*) provides in sect. 1607 (Counter-claims), subsect. (b), that immunity shall not be accorded with respect to any counter-claim "arising out of the transaction or occurrence that is the subject matter of the claim of the foreign State".

⁷³ Sect. 1607, subsect. (c), of the *Foreign Sovereign Immunities Act of 1976* states: "to the extent that the counter-claim does not seek relief exceeding in amount or differing in kind from that sought by the foreign State". See also *Strousberg v. Republic of Costa Rica* (1881) (see footnote 71 above) and *Union of Soviet Socialist Republics v. Belaiew* (1925) (*The All England Law Reports 1925* (reprint), p. 369).

⁷⁴ See, for example, *South African Republic v. La Compagnie franco-belge du chemin de fer du Nord* (1897) (United Kingdom, *The Law Reports, Chancery Division*, 1898, p. 190) and the cases cited in footnotes 71 and 73 above.

⁷⁵ For an indication of possible means of affirmative relief in justifiable circumstances, see *Republic of Haiti v. Plesch et al.* (1947) (*New York Supplement, 2nd Series*, vol. 73 (1947), p. 645); *United States of Mexico v. Rask* (1931) (*Pacific Reporter, 2nd Series*, vol. 4 (1931), p. 981); *The International and Comparative Law Quarterly* (London), vol. 2 (1953), p. 480; *The Law Quarterly Review* (London), vol. 71, No. 283 (July 1955), p. 305; *The Modern Law Review* (London), vol. 18 (1955), p. 417; *Minnesota Law Review* (Minneapolis, Minn.), vol. 40 (1956), p. 124.

⁷⁶ See, for example, *Etat du Pérou v. Kreglinger* (1857) (*Pasicrisie belge*, 1857 (Brussels), part 2, p. 348); *Letort v. Gouvernement ottoman* (1914) (*Revue juridique internationale de la locomotion aérienne* (Paris), vol. V (1914), p. 142).

⁷⁷ See, for example, the United States *Foreign Sovereign Immunities Act of 1976* (see footnote 72 above), sect. 1607, subsect. (a), concerning counter-claims "for which a foreign State would not be entitled to immunity under section 1605 of this chapter had such claim been brought in a separate action against the foreign State". Cf. article 1, para. 2, of the 1972 European Convention on State Immunity (Council of Europe, *European Convention on State Immunity and Additional Protocol*, European Treaty Series (Strasbourg), No. 74 (1972); reproduced in United Nations, *Materials on Jurisdictional Immunities...*, pp. 156 *et seq.*).

or if they are truly new and separate or independent counter-claims, they are still permissible as independent cross-actions or, indeed, as separate proceedings altogether unconnected with the principal or original claim against the State. It is clear that the defendant State has the choice of bringing a counter-claim against the plaintiff or instituting a fresh and separate proceeding. Whatever the alternative chosen, the State making the counter-claim under article 10, paragraph 3, or instituting a separate proceeding under article 9, paragraph 1, is deemed to have consented to the exercise of jurisdiction by that court. The extent of its consent could be different in each case. Under article 9, as has been seen, the plaintiff State has consented to all stages of the proceeding before all the courts up to judgment, but not including its execution. Article 10, paragraph 3, on the other hand, is more limited in scope and the State is deemed to have consented to the exercise of jurisdiction with regard not only to its counter-claims, but also to the principal claim instituted against it.⁷⁸

(9) A slight but apparent disparity stands out between the position of a State making a claim and that of a State making a counter-claim, resulting in a possible minor technical advantage in favour of the foreign State in the practice of some jurisdictions.⁷⁹ A State is generally free to elect to be a plaintiff by instituting a proceeding, thereby subjecting itself to the court's jurisdiction only to the extent of permissible counter-claims against it, which could sometimes operate only as set-offs, without exposing itself to otherwise available affirmative relief or any other positive remedy sought by the counter-claiming individuals. On the other hand, if the State has failed to take the initiative of instituting the proceeding, it can still make a counter-claim which could result in affirmative relief in favour of the defendant State or a remedy different in nature or in kind from that sought in the principal claim. In either position, as claimant or as counter-claimant, a State appears to be better off than an individual before a court of another State and may see advantages in taking the initiative of being plaintiff, since permissible counter-claims against the State are more restrictive in scope and essentially defensive or reactive in character.

PART III

EXCEPTIONS TO STATE IMMUNITY

Article 12. Commercial contracts

1. If a State enters into a commercial contract with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences

⁷⁸ See, for example, article 1, para. 3, of the 1972 European Convention on State Immunity (see footnote 77 above), according to which:

"A Contracting State which makes a counter-claim in proceedings before a court of another Contracting State submits to the jurisdiction of the courts of that State with respect not only to the counter-claim but also to the principal claim."

⁷⁹ See, for example, footnotes 74 to 76 above.

relating to the commercial contract fall within the jurisdiction of a court of another State, the State is considered to have consented to the exercise of that jurisdiction in a proceeding arising out of that commercial contract, and accordingly cannot invoke immunity from jurisdiction in that proceeding.

2. Paragraph 1 does not apply:

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

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

Commentary

(a) General observations on the draft article

(1) Article 12 as provisionally adopted by the Commission is now entitled "Commercial contracts". It constitutes the first substantive article of part III, dealing with "Exceptions to State immunity". The title of this part will be re-examined after the Commission has considered all possible exceptions.

(2) Paragraph 1 represents a compromise formulation. It is the result of continuing efforts to accommodate the differing viewpoints of those who are prepared to admit an exception to the general rule of State immunity in the field of trading or commercial activities, based upon the theory of implied consent, or on other grounds, and those who take the position that a plea of State immunity cannot be invoked to set aside the jurisdiction of the local courts where a foreign State engages in trading or commercial activities.

(3) The Commission has held an extensive debate on this specified area of State activities, especially during its thirty-fourth session,⁸⁰ and is now able provisionally to adopt a formula which could, in due course, be revised and improved so as to take more fully into account the interests and views of all countries with different systems and practices.

(4) The application of jurisdictional immunities of States presupposes the existence of jurisdiction or the competence of a court in accordance with the relevant internal law of the State of the forum. The relevant internal law of the forum may be the laws, rules or regulations governing the organization of the courts or the limits of judicial jurisdiction of the courts and may also include the applicable rules of private international law.

(5) It is common ground among the various approaches to the study of State immunities that there must be a pre-existing jurisdiction in the courts of the foreign State before the possibility of its exercise arises and that such jurisdiction can only exist and its exercise only be authorized in conformity with the internal law of the State of the forum, including the applicable rules

⁸⁰ See *Yearbook ... 1982*, vol. I, pp. 183-199, 1728th meeting, paras. 7-45, and 1729th to 1730th meetings; the discussion is summarized in *Yearbook ... 1982*, vol. II (Part Two), pp. 98-99, paras. 194-197.

of jurisdiction, particularly where there is a foreign element involved in a dispute or differences that require settlement or adjudication. The expression "applicable rules of private international law" is a neutral one, selected to refer the settlement of jurisdictional issues to the applicable rules of conflict of laws or private international law, whether or not uniform rules of jurisdiction are capable of being applied. Each State is eminently sovereign in matters of jurisdiction, including the organization and determination of the scope of the competence of its courts of law or other tribunals.

(6) The rule stated in paragraph 1 of article 12 concerns commercial contracts concluded by a State with a foreign natural or juridical person and where a court of another State is available and in a position to exercise its jurisdiction by virtue of its own applicable rules of private international law. The conduct of the State in concluding a commercial contract with a person, natural or juridical, other than its own national implies its consent to the exercise of jurisdiction by the judicial authority of another State where that judicial authority is competent to exercise its jurisdiction by virtue of its applicable rules of private international law. Jurisdiction may be exercised by a court of another State on various grounds, such as the place of conclusion of the contract, the place where the obligations under the contract are to be performed, or the nationality or place of business of one or more of the contracting parties. A significant territorial connection generally affords a firm ground for the exercise of jurisdiction, but there may be other valid grounds for the assumption and exercise of jurisdiction by virtue of the applicable rules of private international law.

(7) However, the view was expressed by some members concerning the formula contained in paragraph 1 of article 12 that the expression "the applicable rules of private international law" is elusive, susceptible of differing interpretations leading to different results, and that the concept of "implied consent" is artificial and questionable, since in fact a State concluding a commercial contract with a foreigner has not waived its immunity, or agreed to submit to the territorial jurisdiction, nor should it be presumed to have done so.

(8) Subparagraphs (a) and (b) of paragraph 2 are designed to provide precisely the necessary safeguards and protection of the interests of all States. It is a well-known fact that developing countries often conclude trading contracts with other States, while socialist States also engage in direct State-trading not only among themselves, but also with other States, both in the developing world and with the highly sophisticated industrialized countries. Such State contracts, concluded either between States or on a government-to-government basis, are excluded by subparagraph (a) of paragraph 2 from the operation of the rule stated in paragraph 1. Thus State immunity continues to be the applicable rule in such cases, even though, for example, in the case of a government-to-government basis, contracts are not always actually concluded between two

governments or by governments as such. This type of contract includes also various tripartite transactions for the better and more efficient administration of food aid programmes. Where food supplies are destined to relieve famine or revitalize a suffering village or a vulnerable area, their acquisition could be financed by another State or a group of States, either directly or through an international organization or a specialized agency of the United Nations, by way of purchase from a developing food-exporting country on a government-to-government basis as a consequence of tripartite or multilateral negotiations. Transactions of this kind not only help the needy population, but may also promote the export of food produced in a developing country instead of dumping or encouraging unfair competition in international trade.

(9) Subparagraph (b) leaves a State party to a commercial contract complete freedom to provide for a different solution or method of settlement of differences relating to the contract. A State may expressly agree in the commercial contract itself, or through subsequent negotiations, to arbitration or other methods of amicable settlement such as conciliation, good offices or mediation. Any such express agreement would normally be in writing.

(10) In order to appreciate the magnitude and complexity of the problem involved in the consideration and determination of the precise limits of jurisdictional immunities in this specified area of "commercial contracts",⁸¹ it is useful to provide here, in a condensed form, a chronological survey of State practice relating to this question. Since article 12 is the first substantial article of part III dealing with specified areas of activities with respect to which State immunity would not apply, it is logical to include also at this stage a brief comment on the limitative nature of such specified areas as envisaged in all the remaining draft articles of part III.

(b) *Limitative nature of exceptions to State immunity*

(11) State immunity is a general principle which the inductive method has shown to be limited in the practice of States by the operation of several exceptions. These exceptions, or limitations, are addressed in this part of the draft articles.

(12) The exceptions appear to be limitative in nature; that is to say, they restrict or limit the application of a general rule of State immunity, whether it is the active rule for the State claiming immunity or its corollary, the obligation to give effect to immunity or to implement the first general rule, or the requirement of absence of consent or unwillingness to submit to jurisdiction. The exceptions to State immunity, when established, clear the path for the court to exercise jurisdiction even in

⁸¹ Article 12 has to be read in conjunction with article 2, para. 1 (g), on the definition of "commercial contract", and article 3, para. 2, on the interpretation of that definition. The commentaries to these provisions should also be taken into consideration.

regard to an unwilling foreign sovereign State. Thus, in the circumstances falling within any of the accepted exceptions, the claim of State immunity, as an obstacle to the exercise of jurisdiction, is removed regardless of the unwillingness of the defendant to give consent for the institution or continuation of proceedings against it. In this connection, it should be pointed out that consent, once given expressly or by implication based on conduct, cannot be withdrawn subsequently during any stage of the proceedings.

(13) Having regard to the exercise of several exceptions to it, State immunity may be said to be restricted or limited in the sense that it is not "absolute" or to be accorded in all circumstances, regardless of the capacity in which the State has acted or irrespective of the category of activities attributed to the State. It is also important to note that the juridical basis for "non-immunity" may be described as the counterpart of the legal basis for "State immunity". That is to say, if the exercise of *imperium* by a State is the basis for immunity, then the absence of connection with the *imperium* or activity not pertaining to the sovereignty of the State would afford the *raison d'être* for cases of "non-immunity".

(14) Whatever the legal basis or justification for State immunity, or for the corresponding obligation to recognize and give effect to it as envisaged in part II of these draft articles, it seems clear that the extent and scope of State immunity are limited. Immunity operates as long as there is a legal basis for it. Thus, for each and every type of limitation on State immunity or for each exception to the general rule of State immunity, there appears to be an opposite case or a converse set of circumstances in which State immunity is upheld. These "opposite" or "converse" cases are often not as clear-cut as might be desirable in the formulation of the "restrictive" view of State immunity.

(15) It may be helpful to keep in mind, therefore, that the justification for denial of State immunity in each case of exceptions to State immunity is to be found in the nature and, as appropriate, the purpose of the activities of the State in question, in the field of activities undertaken by the State and in relation to which a dispute or cause of action has arisen (see para. (17) below). According to the "absolute" view of State immunity, however, immunity is complete and all exceptions are necessarily traceable to the consent of the State given either expressly, verbally or in writing, or tacitly by implication based on conduct and legal presumptions.

(16) On the whole, what is to be kept in mind throughout the study of the topic is the fact that the application of the rule of State immunity is a two-way street. Each State is a potential recipient or beneficiary of State immunity as well as having the duty to fulfil the obligation to give effect to jurisdictional immunity enjoyed by another State.

(17) In the attempt to specify areas of activity (exceptions) which permit limitations on the operation of State immunity, several distinctions have been made between

acts or activities to which State immunity is applicable and those not covered by State immunity. The distinctions, which have been discussed in greater detail in a document already before the Commission,⁸² have been drawn on the basis of consideration of the following factors: dual personality of the State,⁸³ dual capacity of the State,⁸⁴ *acta jure imperii* and *acta jure gestionis*,⁸⁵ which also relate to the public and private nature of State acts,⁸⁶ and commercial and non-commercial activities.⁸⁷ What emerges from the discussion on the above distinctions, and as will be further elaborated below, is that the use of the narrower term "commercial contracts" is more widely acceptable than that of the broader expression "trading or commercial activity" in specifying the exception to State immunity envisaged under article 12. As has been noted, a definition provision as well as an interpretation of that definition are still necessary in order to establish greater clarity in actual application of the exception.

(c) Legal basis of "commercial contracts"
as an exception to State immunity

(18) Through the inductive approach, an attempt has been made to ascertain the development, over time, of State practice with respect to this exception. It is evident that, throughout the evolution of various bodies of case-law, the same court at different periods and various courts of different systems have reached different conclusions regarding State immunity in the context of the exception originally entitled "trading or commercial activity". The same set of facts could be construed differently by different courts at various levels with surprisingly divergent or even opposing results. Thus the same activity could be viewed as trading or commercial and therefore not entitled to State immunity, or as non-commercial and therefore entitled to State immunity.⁸⁸

(19) It is indeed difficult for the courts to overlook completely the motivation of a particular transaction or contract, although its nature is clearly commercial or in the field of private law, especially when it is a contract for the purchase or supply of, for instance, materials for the establishment of an embassy,⁸⁹ construction

⁸² See the fourth report of the Special Rapporteur, submitted to the Commission at its thirty-fourth session (see footnote 42 above), paras. 35-45.

⁸³ *Idem*, para. 36.

⁸⁴ *Idem*, para. 37.

⁸⁵ *Idem*, paras. 38-39.

⁸⁶ *Idem*, paras. 40-42.

⁸⁷ *Idem*, paras. 43-45.

⁸⁸ For example, in the "*Parlement belge*" case (1879) (United Kingdom, *The Law Reports, Probate Division*, 1879, vol. IV, p. 129), Sir Robert Phillimore, after reviewing English and American cases, considered the *Parlement belge* itself as being neither a ship of war nor a vessel of pleasure and thus not entitled to immunity. This decision was reversed by the Court of Appeal (1880) (*ibid.*, 1880, vol. V, p. 197); see Lord Justice Brett (*ibid.*, p. 203).

⁸⁹ See, for example, the decision of 30 April 1963 of the Federal Constitutional Court (Federal Republic of Germany) in *X v. Empire of ... [Iran]* (*Entscheidungen des Bundesverfassungsgericht* (Tübingen), vol. 16 (1964), p. 27; English trans. in United Nations, *Materials on Jurisdictional Immunities...*, pp. 282 *et seq.*).

materials for an army, navy or air force,⁹⁰ supplies for the maintenance of an army or military base,⁹¹ or food supplies to relieve famine in an area suffering natural calamity or to assist victims of flood or earthquake.⁹² Difficult cases need not make bad law, although they may serve to obscure some of the finer lines of delineation between cases where immunity is applicable and those where the courts have preferred to exercise jurisdiction in the field of activities involving commercial contracts. A caveat is therefore necessary to emphasize the need to approach certain sensitive issues with the greatest caution, lest an important act of sovereign authority to ensure the safety and security of nationals of a State be misconstrued as a simple commercial transaction, unprotected by jurisdictional immunity. This objective criterion, based on the *nature* of the act, tends to be formal and even mechanical at times. It is thus necessary to supplement it in order to allow reasonable results. Accordingly, a second test—the *purpose* test—is also proposed to provide interpretative guidance in the determination of the nature of a particular contract or transaction.

(d) *A survey of judicial practice:
international and national*

(20) This brief survey, of which a more detailed version has been submitted to the Commission,⁹³ begins by mentioning one of the earliest cases, *The "Charkieh"* (1873),⁹⁴ in which the exception of trading activities (for the purposes of the article, "commercial contracts") was recognized and applied in State practice. In this case, the court observed:

No principle of international law, and no decided case, and no dictum of jurists of which I am aware, has gone so far as to authorize a

sovereign prince to assume the character of a trader, when it is for his benefit; and when he incurs an obligation to a private subject to throw off, if I may so speak, his disguise, and appear as a sovereign, claiming for his own benefit, and to the injury of a private person, for the first time, all the attributes of his character.⁹⁵

(21) State practice has continued to move in favour of such a "restrictive" view of State immunity since the advent of State trading and the continuing expansion of State activities in the field of commercial development. Thus, even at the very beginning, the "absolute" immunity view was theoretically excluded from the area of trading and economic development, although the actual application of the rule in concrete cases remained problematic owing to different interpretations given to similar types of State activities in various courts at various times.

(22) The uncertainty in the scope of application of the rule of State immunity in State practice is, in some measure, accountable for the relative silence of judicial pronouncement on an international level. The only case recently decided by the ICJ, in 1980,⁹⁶ that has a direct bearing on the question of inviolability rather than the usual type of jurisdictional immunity of State property did not touch upon the exception of "commercial contracts" connected with the premises of the embassy or the consulate. This may serve to illustrate the flexible nature of attitudes and positions of governments. By not pursuing the matter on the international level, a State affected by an adverse judicial decision of a foreign court may remain silent at the risk of acquiescing in the judgment or the treatment given. But as will be seen in part IV of the present draft articles, States are none the less further protected by the second-stage immunity from seizure, attachment and execution in respect of their property once a judgment which may adversely affect them has been rendered or obtained.

(23) From the *judicial decision of municipal courts*, it can be seen that the movement of State practice in its progressive evolution towards the "restrictive" view of State immunity has taken the character of a snake, which can move sideways by swinging and swaying its body to the left and right with intermittent ups and downs in a zigzagging pattern.

(24) Thus the practice of States such as Italy,⁹⁷

⁹⁰ See, for example, *Gouvernement espagnol v. Casaux* (1849) (Dalloz, *Recueil périodique et critique de jurisprudence*, 1849 (Paris), part I, p. 9), concerning the purchase of boots by the Spanish Government for the Spanish army. Cf. *Hanukiew v. Ministère de l'Afghanistan* (1933) (*Annual Digest and Reports of Public International Law Cases, 1933-1934* (London), vol. 7 (1940), case No. 66, pp. 174-175), concerning a contract for the purchase of arms; and various loan cases, such as the Moroccan Loan, *Laurans v. Gouvernement impérial chérifien* (1934) (Sirey, *Recueil général des lois et des arrêts*, 1935 (Paris), part I, p. 103). See also *Vavasour v. Krupp* (1878) (United Kingdom, *The Law Reports, Chancery Division*, vol. IX (1978), p. 351).

⁹¹ See, for example, *Trendtex Trading Corporation Ltd. v. The Central Bank of Nigeria* (1977) (*The All England Law Reports*, 1977, vol. I, p. 881), concerning an order for cement for the construction of barracks in Nigeria. Cf. *Gugenheim v. State of Viet Nam* (1961) (*Revue générale de droit international public* (Paris), vol. 66 (1962), p. 654; reproduced in United Nations, *Materials on Jurisdictional Immunities* ..., p. 257), a case concerning a contract for the purchase of cigarettes for the Vietnamese national army.

⁹² See, for example, *Egyptian Delta Rice Mills Co. v. Comisaría General de Abastecimientos y Transportes de Madrid* (1943) (*Annual Digest* ..., 1943-1945 (London), vol. 12 (1949), case No. 27, pp. 103-104), cited by S. Sucharitkul, *Recueil des cours de l'Académie de droit international de La Haye, 1976-I*, vol. 149 (Leyden, Sijthoff, 1977), p. 138.

⁹³ See the fourth report of the Special Rapporteur (see footnote 42 above), paras. 49-92.

⁹⁴ United Kingdom, *The Law Reports, High Court of Admiralty and Ecclesiastical Courts*, vol. IV (1875), p. 59.

⁹⁵ *Ibid.*, pp. 99-100. This was the first case in which the commercial nature of the service or employment of a public ship was held to disentitle her from State immunity.

⁹⁶ See the Judgment of the ICJ of 24 May 1980, *United States Diplomatic and Consular Staff in Tehran*, I.C.J. Reports 1980, p. 3, mentioned in the Special Rapporteur's second report (see footnote 38 above), para. 114. Cf. the decision of the PCIJ of 15 June 1939, *Société commerciale de Belgique, P.C.I.J., Series A/B, No. 78*, p. 160.

⁹⁷ The courts of Italy were the first, in 1882, to limit the application of State immunity to cases where the foreign State had acted as an *ente politico* as opposed to a *corpo morale* (see *Morellet v. Governo Danese* (1882) (*Giurisprudenza Italiana* (Turin), vol. XXXV, part I (1883), p. 125)), or in the capacity of a sovereign authority or political power (*potere politico*) as distinguished from a *persona civile* (see *Gutierrez v. Elmilik* (1886) (*Il Foro Italiano* (Rome), vol. XI, part I

Belgium⁹⁸ and Egypt,⁹⁹ which could be said to have led the field of "restrictive" immunity, denying immunity in regard to trading activities, may now have been overtaken by the recent practice of States which traditionally favoured a more unqualified doctrine of State immunity, such as the Federal Republic of Germany,¹⁰⁰ the

(1886), pp. 920-922)). See also *Hampson v. Bey di Tunisi* (1887) (*ibid.*, vol. XII, part 1 (1887), pp. 485-486).

In Italian jurisdiction, State immunity was allowed only in respect of *atti d'impero* and not *atti di gestione*. The public nature of the State act was the criterion by which it was determined whether or not immunity should be accorded. Immunity was not recognized for private acts or acts of a private-law nature. In a recent case, in 1955, concerning a United States military base established in Italy, the Corte di Cassazione granted immunity in respect of an *attività pubblicistica* connected with the *funzioni pubbliche o politiche* of the United States Government (see *Department of the Army of the United States of America v. Gori Savellini* (*Rivista di diritto internazionale* (Milan), vol. XXXIX (1956), pp. 91-92, and *International Law Reports*, 1956 (London), vol. 23 (1960), p. 201)). Cf. *La Mercantile v. Regno di Grecia* (1955) (*Rivista di diritto internazionale* (Milan), vol. XXXVIII (1955), p. 376, and *International Law Reports*, 1955 (London), vol. 22 (1958), p. 240). A detailed survey of Italian jurisprudence can be found in the fourth report of the Special Rapporteur (see footnote 42 above), paras. 56-57.

⁹⁸ Belgian case-law was settled as early as 1857 in a trilogy of cases involving the guano monopoly of Peru. These cases are: (a) *Etat du Pérou v. Kreglinger* (1857) (see footnote 76 above); cf. E. W. Allen, *The Position of Foreign States before Belgian Courts* (New York, Macmillan, 1929), p. 8; (b) the "Peruvian Loans" case (1877) (*Pasicrisie belge*, 1877 (Brussels), part 2, p. 307); this case was brought not against Peru, but against the Dreyfus Brothers company; (c) *Peruvian Guano Company v. Dreyfus et consorts et le Gouvernement du Pérou* (1880) (*ibid.*, 1881, part 2, p. 313). In these three cases, a distinction was drawn between public and private activities of the State of Peru with respect to which the Court of Appeals of Brussels denied immunity. Thus, like Italian courts, Belgian courts have, since 1888, also adopted the distinction between acts of the State in its sovereign (public) and civil (private) capacities: in *Société pour la fabrication de cartouches v. Colonel Mutkuroff, Ministre de la guerre de la principauté de Bulgarie* (1888) (*ibid.*, 1889, part 3, p. 62), the Tribunal civil of Brussels held that, in concluding a contract for the purchase of bullets, Bulgaria acted as a private person and subjected itself to all the consequences of the contract. Similarly, in *Société anonyme des chemins de fer liégeois-luxembourgeois v. Etat néerlandais (Ministère du Waterstaat)* (1903) (*ibid.*, 1903, part 1, p. 294), a contract to enlarge a railway station in Holland was made subject to Belgian jurisdiction. The distinction between *acta jure imperii* and *acta jure gestionis* has been applied by Belgian courts consistently since 1907. See *Feldman v. Etat de Bahia* (1907) (*ibid.*, 1908, part 2, p. 55); see also the fourth report of the Special Rapporteur (see footnote 42 above), paras. 58-59.

⁹⁹ The current case-law of post-war Egypt has confirmed the jurisprudence of the country's mixed courts, which have been consistent in their adherence to the Italo-Belgian practice of limited immunity. In Egypt, jurisdictional immunities of foreign States constitute a question of *ordre public*; see Decision 1173 of 1963 of the Cairo Court of First Instance (cited in United Nations, *Materials on Jurisdictional Immunities*..., p. 569). Immunity is allowed only in respect of acts of sovereign authority and does not extend to "ordinary acts" (*ibid.*). See also the fourth report of the Special Rapporteur (see footnote 42 above), paras. 60-61.

¹⁰⁰ The practice of German courts has followed a somewhat zigzag course. It began as early as 1885 with restrictive immunity based on the distinction between public and private activities, holding State immunity to "suffer at least certain exceptions"; see *Heizer v. Kaiser-Franz-Joseph-Bahn A.G.* (1885) (*Gesetz- und Verordnungsblatt für das Königreich Bayern* (Munich), vol. I (1885), pp. 15-16; cited in Harvard Law School, *Research in International Law*, part III, "Competence of Courts in regard to Foreign States" (hereinafter called "the Harvard draft") (Cambridge, Mass., 1932), published as *Supplement*

United States of America¹⁰¹ and the United Kingdom.¹⁰²

to the *American Journal of International Law* (Washington, D.C.), vol. 26 (1932), pp. 533-534). In the *Republic of Latvia* case (1953) (*Rechtsprechung zum Wiedergutmachungsrecht* (Munich), vol. 4 (1953), p. 368; *International Law Reports*, 1953 (London), vol. 20 (1957), pp. 180-181), the Restitution Chamber of the Kammergericht of West Berlin denied immunity on the grounds that "this rule does not apply where the foreign State enters into commercial relations... viz., where it does not act in its sovereign capacity but exclusively in the field of *private law*," by engaging in purely private business, and more especially in commercial intercourse". This restrictive trend has been followed by the Federal Constitutional Court in later cases; see, for example, *X v. Empire of... [Iran]* (1963) (see footnote 89 above), in which a contract for repair of the heating system of the Iranian Embassy was held to be "non-sovereign" and thus not entitled to immunity. See further the fourth report of the Special Rapporteur (see footnote 42 above), paras. 67-68.

¹⁰¹ It has sometimes been said that the practice of the courts of the United States of America started with an unqualified principle of State immunity. The truth might appear to be the opposite upon closer examination of the dictum of Chief Justice Marshall in *The Schooner "Exchange" v. McFaddon and others* (1812) (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). Initially, immunities of States were recognized only in respect of certain specified cases: (a) immunity of sovereigns from arrest and detention; (b) immunity granted to foreign ministers; (c) immunity in respect of foreign troops passing through the territorial dominion. Territorial jurisdiction was exempted as a matter of implied consent on the part of the local sovereign and immunity was accordingly considered to be an exception to the attributes of every sovereign power. As such, it should be restrictively construed, from the point of view of the territorial sovereign. In *Bank of the United States v. Planters' Bank of Georgia* (1824) (H. Wheaton, *Reports of Cases argued and adjudged in the Supreme Court of the United States* (New York, 1911), vol. IX (4th ed.), pp. 904 and 907), it was held that, "when a Government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen".

The first clear pronouncement of restrictive immunity by a United States court, based on the distinction between *acta jure imperii* and *acta jure gestionis*, came in 1921 in *The "Pesaro"* case (United States of America, *The Federal Reporter*, vol. 277, (1922), pp. 473, at 479-480; see also *The American Journal of International Law* (Washington, D.C.), vol. 21 (1927), p. 108). This distinction was supported by the Department of State, but rejected by the Supreme Court in 1926 in *Berizzi Brothers Co. v. The S. S. "Pesaro"* (*United States Reports*, vol. 271 (1927), p. 562). The Supreme Court reversed the decision and preferred the view expressed by the Department of Justice. In subsequent cases, the courts preferred to follow the suggestion of the political branch of the Government; see, for example, Chief Justice Stone in *Republic of Mexico et al. v. Hoffman* (1945) (*ibid.*, vol. 324 (1946), pp. 30-42). It was not until the Tate Letter of 1952 (United States of America, *The Department of State Bulletin* (Washington, D.C.), vol. XXVI, No. 678 (23 June 1952), pp. 984-985) that the official policy of the Department of State was restated in general and in the clearest language in favour of a restrictive theory of immunity based upon the distinction between *acta jure imperii* and *acta jure gestionis*.

In the long line of cases since the Tate Letter, an interesting trend was instituted more recently, in 1964, in *Victory Transport Inc. v. Comisaría General de Abastecimientos y Transportes* (United States of America, *Federal Reporter*, 2nd Series, vol. 336 (1965), p. 354; see also *International Law Reports* (London), vol. 35 (1967), p. 110). The Federal District Court rejected immunity in an action arising out of a contract for the carriage of wheat, denying immunity unless it is plain that the activity in question falls within one of the following categories of strictly political and public acts: (a) internal administrative acts, such as expulsion of aliens; (b) legislative acts, such as nationalization; (c) acts concerning the armed forces; (d) acts concerning diplomatic activity; (e) public loans.

(Continued on next page.)

(25) In Europe, the "restrictive" view of State immunity pronounced by the Italian and Belgian courts, as

already noted, was soon followed also by the French,¹⁰³ Netherlands¹⁰⁴ and Austrian¹⁰⁵ courts.

(Footnote 101 continued.)

Since the adoption of the *Foreign Sovereign Immunities Act of 1976* (see footnote 72 above), United States courts have been left to decide alone on the question of immunity, without any suggestion from the Department of State in the form of a "Tate Letter". It is this 1976 Act that now provides legislative guidance for the courts with regard to the exception of commercial activity. See further the fourth report of the Special Rapporteur (see footnote 42 above), paras. 74-79.

¹⁰² In view of the recent reversal of a long line of cases allowing State immunity even in respect of trading activity of a foreign government, it is no longer fashionable to state that British courts have consistently upheld jurisdictional immunities in any circumstances. In connection with the commercial activities of a foreign State, notably in the field of shipping or maritime transport, the case-law fluctuated throughout the nineteenth century. The decision which went furthest in the direction of restricting immunity was that of *The "Charkieh"* case (1873) (see footnote 94 above). The decision which went furthest in the opposite direction was that of *The "Porto Alexandre"* case (1920) (United Kingdom, *The Law Reports, Probate Division*, 1920, p. 30). Thus the principle of unqualified immunity was followed in subsequent cases concerning commercial shipping, such as *Compañía Mercantil Argentina v. United States Shipping Board* (1924) (*Annual Digest of Public International Law Cases*, 1923-1924 (London), vol. 2 (1933), case No. 73, p. 138), and other trading activities, such as the ordinary sale of a quantity of rye in *Baccus S.R.L. v. Servicio Nacional del Trigo* (1956) (United Kingdom, *The Law Reports, Queen's Bench Division*, 1957, vol. 1, p. 438).

Long before the final *coup de grâce* given by the House of Lords in the "*I Congreso del Partido*" case (1981) (*The All England Law Reports*, 1981, vol. 2, p. 1064), judicial decisions of British courts abounded with opinions and dicta pointing in the direction of restrictive immunity. Even in *The "Cristina"* case (1938) (United Kingdom, *The Law Reports, House of Lords, Judicial Committee of the Privy Council*, 1938, p. 485; *Annual Digest ...*, 1938-1940 (London), vol. 9 (1942), case No. 86, p. 250), considerable doubts were thrown upon the soundness of the doctrine of immunity when applied to trading vessels, and some of the judges were disposed to reconsider the unqualified immunity held in *The "Porto Alexandre"* case (1920). Thus, in a series of cases which include *Dollfus Mieg et Cie S.A. v. Bank of England* (1950) (United Kingdom, *The Law Reports, Chancery Division*, 1950, p. 333), *United States of America and Republic of France v. Dollfus Mieg et Cie S.A. and Bank of England* (1952) (*The All England Law Reports*, 1952, vol. 1, p. 572), *Sultan of Johore v. Abubakar, Tunku Aris Bendahara and others* (1952) (*ibid.*, p. 1261; see also *The Law Quarterly Review* (London), vol. 68 (1952), p. 293) and *Rahimtoola v. Nizam of Hyderabad* (1957) (United Kingdom, *The Law Reports, House of Lords*, 1958, p. 379), a trend towards a "restrictive" view of immunity was maintained. In the *Dollfus Mieg et Cie S.A.* case (1950), the Master of the Rolls, Sir Raymond Evershed, agreed with Lord Maugham that "the extent of the rule of immunity should be jealously watched". In the *Sultan of Johore* case (1952), Lord Simon, *per curiam*, denied that unqualified immunity was the rule in England in all circumstances.

A forerunner of the ultimate reversal of the unqualified immunity held in *The "Porto Alexandre"* case (1920) came in 1975 in the "*Philippine Admiral*" case, in which the decision in the "Parlement belge" case (1880) (see footnote 88 above) was distinguished and the *Sultan of Johore* case (1952) cited as establishing that the question of unqualified immunity was an open one when it came to State-owned vessels engaged in ordinary commerce.

Then, in 1977, in *Trendtex Trading Corporation Ltd. v. The Central Bank of Nigeria* (see footnote 91 above), the Court of Appeal unanimously held that the doctrine of sovereign immunity no longer applied to ordinary trading transactions and that the restrictive doctrine of immunity should therefore apply to actions *in personam* as well as actions *in rem*. This emerging trend was reinforced by the *State Immunity Act 1978* (see footnote 71 above), which came before the House of Lords for a decision in 1981 in the "*I Congreso del Partido*" case. With the 1978 Act and this recent series of cases, the judicial practice of British courts must now be said to be well settled in relation to the exception of trading activities of foreign Governments.

¹⁰³ A survey of the practice of French courts discloses traces of certain limitations on State immunity, based on the distinction between the State as *puissance publique* and as *personne privée*, and between *acte d'autorité* and *acte de gestion* or *acte de commerce*, in the judgments of lower courts as early as 1890; see *Faucon et Cie v. Gouvernement grec* (1890) (*Journal du droit international privé* (Clunet) (Paris), vol. 17 (1890), p. 288). It was not until 1918, however, that the restrictive theory of State immunity was formulated and adopted by the French courts. In the case of the "*Hungerford*", the first in which this theory was applied, the Court of Appeal of Rennes declined jurisdiction on the grounds that the vessel in question was employed "not for a commercial purpose and for private interest but ... for the requirements of national defence, beyond any idea of profit or speculation". The Court did not, however, find that the contract itself was of a commercial nature; see *Société maritime auxiliaire de transports v. Capitaine du vapeur anglais "Hungerford"* (Tribunal de commerce de Nantes, 1918) (*Revue de droit international privé* (Darras) (Paris), vol. XV (1919), p. 510) and *Capitaine Seabrook v. Société maritime auxiliaire de transports* (Court of Appeal of Rennes, 1919) (*ibid.*, vol. XVIII (1922-1923), p. 743). In 1924, in *Etat roumain v. Pascalet et Cie* (*Journal du droit international* (Clunet) (Paris), vol. 52 (1925), p. 113), the Tribunal de commerce of Marseilles established that the operation of acts denominated *actes de commerce* excluded any consideration concerning the exercise of the State's public authority, its independence and its sovereignty.

The current jurisprudence of France may be said to be settled in its adherence to the "restrictive" view of State immunity, based on "trading activities". The more recent decisions, however, have interpreted the theory of *actes de commerce* with some divergent results. For example, on the one hand, the purchase of cigarettes for a foreign army and a contract for a survey of water distribution in Pakistan were both held to be *actes de puissance publique* for public service; see, respectively, *Gugenheim v. State of Viet Nam* (1961) (see footnote 91 above) and *Société Transshipping v. Federation of Pakistan* (1966) (*International Law Reports* (London), vol. 47 (1974), p. 150). On the other hand, a contract for the commercial lease of an office for the tourist organization of a foreign government and methods of raising loans both posed difficulties for the courts in applying the standards of *actes de commerce*; see, respectively, *Etat espagnol v. Société anonyme de l'Hôtel George V* (1970) (*ibid.*, (Cambridge), vol. 52 (1979), p. 317; reproduced in United Nations, *Materials on Jurisdictional Immunities ...*, pp. 267 *et seq.*) and *Montefiore v. Congo belge* (1955) (*International Law Reports*, 1955 (London), vol. 22 (1958), p. 226). See further the fourth report of the Special Rapporteur (see footnote 42 above), paras. 62-66.

¹⁰⁴ A survey of the Netherlands courts indicates that, after the passage of a bill in 1917 allowing the courts to apply State immunity with reference to *acta jure imperii*, the question of *acta jure gestionis* remained open until 1923, when a distinction between the two categories of acts was made. However, the Netherlands courts remained reluctant to consider any activities performed by Governments to be other than an exercise of governmental functions. Thus a public service of tug boats, State loans raised by public subscription and the operation of a State ship were all considered to be *acta jure imperii*; see, respectively, *F. Advokaat v. Schuddinck & den Belgischen Staat* (1923) (*Weekblad van het Recht* (The Hague, 1923), No. 11088; *Annual Digest ...*, 1923-1924 (London), vol. 2 (1933), case No. 69, p. 133), *E. C. E. de Froe v. USSR* (1932) (*Weekblad van het Recht* (The Hague, 1932), No. 12453; *Annual Digest ...*, 1931-1932 (London), vol. 6 (1938), case No. 87, p. 170) and *The "Garbi"* (1938) (*Weekblad van het Recht en Nederlandse Jurisprudentie* (Zwollen, 1939), No. 96; *Annual Digest ...*, 1919-1942 (London), vol. 11 (1947), case No. 83, p. 155).

It was not until 1947 that the Netherlands courts were able to find and apply a more workable criterion for restricting State immunity, holding that "the principles of international law concerning the immunity of States from foreign jurisdiction did not apply to State-conducted undertakings in the commercial, industrial or financial fields"; see *Weber v. USSR* (1942) (*Weekblad van het Recht en Nederlandse Jurisprudentie* (Zwollen, 1942), No. 757; *Annual Digest ...*, 1919-1942 (*op. cit.*), case No. 74, p. 140) and *The Bank of*

(26) The judicial practice of a certain number of developing countries can also be said to have adopted restrictive immunity. Egypt, as already noted,¹⁰⁶ was the pioneer in this field. In recent years, the judicial practice of Pakistan¹⁰⁷ and Argentina¹⁰⁸ has provided examples

the Netherlands v. The State Trust Arktikugol (Moscow); The Trade Delegation of the USSR in Germany (Berlin); The State Bank of the USSR (Moscow) (1943) (Weekblad van het Recht en Nederlandse Jurisprudentie (Zwollen, 1943), No. 600; Annual Digest ..., 1943-1945 (London), vol. 12 (1949), case No. 26, p. 101). The exception of trading activities, however, was more clearly stated in the 1973 decision of the Netherlands Supreme Court in Société européenne d'études et d'entreprises en liquidation volontaire v. Socialist Federal Republic of Yugoslavia (Netherlands Yearbook of International Law, 1974 (Leyden), vol. V, p. 290; reproduced in United Nations, Materials on Jurisdictional Immunities ..., pp. 355 et seq.). See further the fourth report of the Special Rapporteur (see footnote 42 above), paras. 69-71.

¹⁰⁶ The practice of Austria, like that of Germany, has also fluctuated, starting with unqualified immunity in the nineteenth century, changing to restrictive immunity from 1907 to 1926, and reverting to unqualified immunity until 1950. In *Dralle v. Republic of Czechoslovakia*, decided in 1950 (*Österreichische Juristen Zeitung* (Vienna), vol. 5 (1950), p. 341, case No. 356; English trans. in United Nations, Materials on Jurisdictional Immunities ..., pp. 183 et seq.), the Supreme Court of Austria reviewed existing authorities on international law before reaching a decision denying immunity for what were not found to be *acta jure gestionis*. The Court declared:

"... This subjection of the *acta gestionis* to the jurisdiction of States has its basis in the development of the commercial activity of States. The classic doctrine of immunity arose at a time when all the commercial activities of States in foreign countries were connected with their political activities ... Today the position is entirely different; States engage in commercial activities and ... enter into competition with their own nationals and with foreigners. Accordingly, the classic doctrine of immunity has lost its meaning, and, *ratione cessante*, can no longer be recognized as a rule of international law." (*Österreichische Juristen Zeitung* ..., p. 347; United Nations, Materials ..., p. 195)

See further the fourth report of the Special Rapporteur (see footnote 42 above), paras. 72-73.

¹⁰⁶ See footnote 99 above.

¹⁰⁷ In its decision in 1981 in *A. M. Qureshi v. Union of Soviet Socialist Republics through Trade Representative in Pakistan and another (All Pakistan Legal Decisions (Lahore), vol. XXXIII (1981), p. 377)*, the Supreme Court of Pakistan, after reviewing the laws and practice of other jurisdictions, as well as relevant international conventions and opinions of writers, and confirming with approval the distinction between *acta jure imperii* and *acta jure gestionis*, held that the courts of Pakistan had jurisdiction in respect of commercial acts of a foreign Government. See further the fourth report of the Special Rapporteur (see footnote 42 above), paras. 88-89.

¹⁰⁸ An examination of the case-law of Argentina reveals a trend in favour of a restrictive doctrine of State immunity. The courts have recognized and applied the principle of sovereign immunity in various cases concerning sovereign acts of a foreign Government; see, for example, *Baima y Bessolino v. Gobierno del Paraguay* (1916) (Argentina, *Fallos de la Corte Suprema de Justicia de la Nación* (Buenos Aires), vol. 123, p. 58), *United States Shipping Board v. Dodero Hermanos* (1924) (*ibid.*, vol. 141, p. 127) and *Zubiaurre v. Gobierno de Bolivia* (1899) (*ibid.*, vol. 79, p. 124); all cases referred to in United Nations, Materials on Jurisdictional Immunities ..., pp. 73-74. The exception of trading activities was confirmed in *The "Aguila"* case (1892) in respect of a contract of sale to be performed and complied with within the jurisdictional limits of the Argentine Republic (see *Ministro Plenipotenciario de Chile v. Fratelli Lavarello* (Fallos ..., vol. 47, p. 248)). The court declared itself competent and ordered the case to proceed on the grounds that "the intrinsic validity of this contract and all matters relating to it should be regulated in accordance with the general laws of the Nation and that the national courts are competent in such matters" (see extract of the decision in United Nations, Materials ..., p. 73). See also I. Ruiz Moreno, *El Derecho Inter-*

of acceptance of restrictive immunity, while in the case of Chile¹⁰⁹ and the Philippines,¹¹⁰ there have been some relevant cases, but no decisions on the question of the exception of commercial contracts from State immunity.

(c) A survey of national legislation

(27) A number of Governments have recently enacted legislation dealing comprehensively with the question of jurisdictional immunities of States and their property. While these laws share a common theme, namely the trend towards "restrictive" immunity, some of them differ in certain matters of important detail which must be watched. Without going into such details here, it is significant to compare the relevant texts relating to the "commercial contracts" exception as contained in the *Foreign Sovereign Immunities Act of 1976*¹¹¹ of the United States of America and in the *State Immunity Act 1978*¹¹² of the United Kingdom. The latter Act has, on this point, been followed closely by Pakistan¹¹³ and Singapore,¹¹⁴ and partly by Canada.¹¹⁵

nacional Público ante la Corte Suprema (Editorial Universitaria de Buenos Aires, 1941); and the fourth report of the Special Rapporteur (see footnote 42 above), para. 90.

¹⁰⁹ See the fourth report of the Special Rapporteur (see footnote 42 above), para. 91.

¹¹⁰ *Idem*, para. 92.

¹¹¹ This Act contains the following provisions:

"Section 1604. Immunity of a foreign State from jurisdiction

"Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign State shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter."

"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:

"...

"(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;"

(See United Nations, Materials on Jurisdictional Immunities ..., pp. 57-58, and footnote 72 above.)

¹¹² This Act contains the following provision:

"Exceptions from immunity

"...

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

"(a) a commercial transaction entered into by the State; or

"(b) an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom."

(*Ibid.*, p. 42, and footnote 71 above.)

¹¹³ The *State Immunity Ordinance, 1981* contains the following provisions:

"5. Commercial transactions and contracts to be performed in Pakistan

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

"(a) a commercial transaction entered into by the State; or

"(b) an obligation of the State which by virtue of a contract, which may or may not be a commercial transaction, falls to be performed wholly or partly in Pakistan."

(Continued on next page.)

(f) *A survey of treaty practice*

(28) The attitude or views of a Government can be gathered from its established treaty practice. Bilateral treaties may contain provisions whereby parties agree in advance to submit to the jurisdiction of the local courts in respect of certain specified areas of activities, such as trading. Thus the treaty practice of the Soviet Union amply demonstrates its willingness to have commercial relations carried on by separate enterprises or trading organizations regulated by competent territorial authorities.¹¹⁶ While the fact that a State is consistent in its practice in this particular regard may be considered as proof of the absence of rules of international law on the subject, or of the permissibility of deviation or derogation from such rules through bilateral agreements, an accumulation of such bilateral treaty practices could combine to corroborate the evidence of the existence of a general practice of States in support of the limitations agreed upon, which could ripen into accepted exceptions in international practice. This view was substantiated by a member of the Commission in 1981, concerning the practice of his own country.¹¹⁷

(29) A typical example of the provisions contained in a series of treaties concluded by the Soviet Union with socialist countries is furnished by the Treaty of Trade and Navigation with the People's Republic of China, signed at Peking on 23 April 1958.¹¹⁸ With regard to the

legal status of the trade delegation of the Union of Soviet Socialist Republics in China and the Chinese trade delegation in the Soviet Union, article 4 of the annex provides:

The Trade Delegation shall enjoy all the immunities to which a sovereign State is entitled and which relate also to foreign trade, with the following exceptions only, to which the Parties agree:

(a) Disputes regarding *foreign commercial contracts** concluded or guaranteed under article 3 by the Trade Delegation in the territory of the receiving State shall, in the absence of a reservation regarding arbitration or any other jurisdiction, be subject to the competence of the courts of the said State. No interim court orders for the provision of security may be made;

(b) Final judicial decisions against the Trade Delegation in the aforementioned disputes which have become legally valid may be enforced by execution, but such execution may be levied only on the goods and claims outstanding to the credit of the Trade Delegation.

(30) The comparable provisions of article 10 of a 1951 agreement with France, typical of treaties concluded between the Soviet Union and developed countries,¹¹⁹ and of paragraph 3 of the exchange of letters of 1953 between the Soviet Union and India,¹²⁰ which is an example of such agreements between the Soviet Union and developing countries, provide further illustrations of State practice relating to this exception.

(1957) (*ibid.*, vol. 292, p. 75); Mongolia (1957) (*ibid.*, vol. 687, p. 237); Albania (1958) (*ibid.*, vol. 313, p. 261); Viet Nam (1958) (*ibid.*, vol. 356, p. 149); the Democratic People's Republic of Korea (1960) (*ibid.*, vol. 399, p. 3); Czechoslovakia (1973) (*ibid.*, vol. 904, p. 17). The relevant provisions of these treaties are reproduced in English in United Nations, *Materials on Jurisdictional Immunities* ..., pp. 134-140.

¹¹⁹ Article 10 contains the following provision:

"The Trade Delegation of the Union of Soviet Socialist Republics in France shall enjoy the privileges and immunities arising out of article 6 above, with the following exceptions:

"Disputes regarding *commercial transactions** concluded or guaranteed in the territory of France by the Trade Delegation of the Union of Soviet Socialist Republics under the first paragraph of article 8 of this Agreement shall, in the absence of a reservation regarding arbitration or any other jurisdiction, be subject to the competence of the French courts and be settled in accordance with French law, save as otherwise provided by the terms of individual contracts or by French legislation.

"No interim orders may, however, be made against the Trade Delegation.

"..."

(United Nations, *Treaty Series*, vol. 221, p. 95.)

See, for example, *Société le Gostorg et Représentation commerciale de l'URSS v. Association France-Export* (1926) (Sirey, *Recueil général des lois et des arrêts*, 1930 (Paris), part 1, p. 49; summary and trans. in *Annual Digest* ..., 1925-1926 (London), vol. 3 (1929), case No. 125, p. 174). See also similar provisions in treaties concluded by the USSR with Denmark (1946) (United Nations, *Treaty Series*, vol. 8, p. 201); Finland (1947) (*ibid.*, vol. 217, p. 3); Italy (1948) (*ibid.*, p. 181); Austria (1955) (*ibid.*, vol. 240, p. 289); Japan (1957) (*ibid.*, vol. 325, p. 35); Federal Republic of Germany (1958) (*ibid.*, vol. 346, p. 71); the Netherlands (1971) (*Tractatenblad van het Koninkrijk der Nederlanden* (The Hague, 1971), No. 163). The relevant provisions of these treaties are reproduced in English in United Nations, *Materials on Jurisdictional Immunities* ..., pp. 140-144.

¹²⁰ Paragraph 3 reads as follows:

"It was agreed that the commercial transactions entered into or guaranteed in India by the members of the Trade Representation including those stationed in New Delhi shall be subject to the jurisdiction of the Courts of India and the laws thereof unless otherwise provided by agreement between the contracting parties to the said

(Footnote 113 continued.)

The expression "commercial transaction" is defined in subsection (3) of section 5 as meaning:

"(a) any contract for the supply of goods or services;

"(b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and

"(c) any other transaction or activity, whether of a commercial, industrial, financial, professional or other similar character, into which a State enters or in which it engages otherwise than in the exercise of its sovereign authority."

(*The Gazette of Pakistan* (Islamabad), 11 March 1981; text reproduced in United Nations, *Materials on Jurisdictional Immunities* ..., pp. 21-22.)

¹¹⁴ Singapore's *State Immunity Act*, 1979 contains in section 5, subsection (1), paragraph (b), a similar provision to that of the Pakistan ordinance above, except that it excludes from this exception contracts of employment between a State and an individual (Singapore, 1979 *Supplement to the Statutes of the Republic of Singapore*; reproduced in United Nations, *Materials on Jurisdictional Immunities* ..., p. 29).

¹¹⁵ In the "Act to provide for State immunity in Canadian courts" (*State Immunity Act*) (*The Canada Gazette, Part III* (Ottawa), vol. 6, No. 15 (22 June 1982), p. 2949, chap. 95), section 5 provides simply that: "A foreign State is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign State."

¹¹⁶ See footnote 118 below for a list of treaties between socialist countries containing provisions on jurisdictional immunities of States.

¹¹⁷ See the statement by Mr. Tsuruoka during the thirty-third session of the Commission, in which he referred to the trade treaties concluded by Japan with the United States of America in 1953 and with the USSR in 1957 (*Yearbook* ... 1981, vol. I, p. 63, 1654th meeting, para. 23).

¹¹⁸ United Nations, *Treaty Series*, vol. 313, p. 135. Cf. concluded by the USSR with Romania (1947) (*ibid.*, vol. 226, p. 79); Hungary (1947) (*ibid.*, vol. 216, p. 247); Czechoslovakia (1947) (*ibid.*, vol. 217, p. 35); Bulgaria (1948) (*ibid.*, p. 97); the German Democratic Republic

(g) *A survey of international conventions and efforts towards codification by intergovernmental bodies*

(31) One regional convention, the 1972 European Convention on State Immunity,¹²¹ and one global convention, the 1926 Brussels Convention,¹²² addressed the question of commercial contracts as an exception to State immunity. While article 7 of the European Convention is self-evident in addressing the issue,¹²³ it needs to be observed that the main object of article 1 of the Brussels Convention¹²⁴ was clearly to assimilate the position of State-operated merchant ships to that of private vessels of commerce in regard to the question of immunity.

(32) While the efforts of the Council of Europe culminated in the entry into force of the 1972 European Convention on State Immunity, similar efforts have been or are being pursued also in other regions. The Central American States, the Inter-American Council and the Caribbean States have been considering similar

transactions. Only the goods, debt demands and other assets of the Trade Representation directly relating to the commercial transactions concluded or guaranteed by the Trade Representation shall be liable in execution of decrees and orders passed in respect of such transactions. It was understood that the Trade Representation will not be responsible for any transactions concluded by other Soviet Organizations direct, without the Trade Representation's guarantee."

(United Nations, *Treaty Series*, vol. 240, p. 157.)

See also similar provisions in treaties concluded by the USSR with other developing countries, such as Egypt (1956) (*ibid.*, vol. 687, p. 221); Iraq (1958) (*ibid.*, vol. 328, p. 118); Togo (1961) (*ibid.*, vol. 730, p. 187); Ghana (1961) (*ibid.*, vol. 655, p. 171); Yemen (1963) (*ibid.*, vol. 672, p. 315); Brazil (1963) (*ibid.*, vol. 646, p. 277); Singapore (1966) (*ibid.*, vol. 631, p. 125); Costa Rica (1970) (*ibid.*, vol. 957, p. 347); Bolivia (1970) (*ibid.*, p. 373). The relevant provisions of these treaties are reproduced in English in United Nations, *Materials on Jurisdictional Immunities* ..., pp. 145-150.

¹²¹ See footnote 77 above.

¹²² 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; United Nations, *Materials on Jurisdictional Immunities* ..., pp. 173 *et seq.*).

¹²³ Article 7 provides:

"1. A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if it has on the territory of the State of the forum an office, agency or other establishment through which it engages, in the same manner as a private person, in an industrial, commercial or financial activity, and the proceedings relate to that activity of the office, agency or establishment.

"2. Paragraph 1 shall not apply if all the parties to the dispute are States, or if the parties have otherwise agreed in writing." (*Ibid.*, p. 158.)

¹²⁴ Article 1 provides:

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

projects.¹²⁵ It is not insignificant to note the contribution made in this field by the Asian-African Legal Consultative Committee (AALCC), which set up a Committee on Immunity of States in respect of Commercial and other Transactions of a Private Character. In 1960, AALCC adopted the final report of the Committee, in which it was recorded that all delegations except that of Indonesia "were of the view that a distinction should be made between different types of State activity and immunity to foreign States should not be granted in respect of their activities which may be called commercial or of private nature". Although a final decision was postponed, the following recommendations were made:

(i) State Trading Organisations which have a separate juristic entity under the Municipal Laws of the country where they are incorporated should not be entitled to the immunity of the State in respect of any of its activities in a foreign State. Such organisations and their representatives could be sued in the Municipal Courts of a foreign State in respect of their transactions or activities in their State.

(ii) A State which enters into transactions of a commercial or private character ought not to raise the plea of sovereign immunity if sued in the courts of a foreign State in respect of such transactions. If the plea of immunity is raised it should not be admissible to deprive the jurisdiction of the Domestic Courts.¹²⁶

(33) The latest draft (1983) of an Inter-American Convention on Jurisdictional Immunity of States,¹²⁷ contains a similar provision limiting immunity in regard to "claims relative to trade or commercial activities undertaken in the State of the forum".¹²⁸

(h) *Contributions from non-governmental bodies*

(i) *Resolutions of the Institute of International Law*

(34) The Hamburg draft resolution of 1891 contains a provision limiting the application of immunities in certain cases, notably "actions relating to a commercial or industrial establishment or to a railway, operated by the foreign State in the territory".¹²⁹ A similar provision is contained in article 3 of the final draft resolution adopted by the Institute in 1951:

¹²⁵ See, for example, the materials submitted by the Government of Barbados: "The Barbados Government is ... at the moment in the process of considering such legislation [as the United Kingdom *State Immunity Act 1978*] and in addition is spearheading efforts for a Caribbean Convention on State Immunity." (United Nations, *Materials on Jurisdictional Immunities* ..., pp. 74-75.)

¹²⁶ Asian-African Legal Consultative Committee, *Report on the Third Session (Colombo, 20 January to 4 February 1960)* (New Delhi [n.d.]), p. 68. See also M. M. Whiteman, *Digest of International Law* (Washington (D.C.), U.S. Government Printing Office, 1968), vol. 6, pp. 572-574.

¹²⁷ Inter-American Draft Convention on Jurisdictional Immunity of States, adopted on 21 January 1983 by the Inter-American Juridical Committee (OEA/Ser.G-CP/doc.1352/83 of 30 March 1983). The text was distributed at the present session of the Commission as document ILC(XXXV)/Conf. Room Doc.4. See also *International Legal Materials* (Washington, D.C.), vol. XXII, No. 2 (1983), p. 292.

¹²⁸ According to the second paragraph of article 5 of the draft convention, "trade or commercial activities of a State" are construed to mean the performance of a particular transaction or commercial or trading act pursuant to its ordinary trade operations.

¹²⁹ Art. 4, para. 3, of the "Projet de règlement international sur la compétence des tribunaux dans les procès contre les Etats, souverains ou chefs d'Etat étrangers" (Institute of International Law, *Tableau général des résolutions (1873-1956)*, *op. cit.* (footnote 56 above), pp. 14-15).

The courts of a State may hear cases involving a foreign State whenever the act giving rise to the case is an *acte de commerce**, similar to that of an ordinary individual, and within the meaning of the definition accepted in the countries involved in the case.¹³⁰

On 30 April 1954, the Institute adopted new resolutions on the immunity of foreign States from jurisdiction and execution, confirming immunity in regard to acts of sovereignty but upholding jurisdiction relating to an act which, under the *lex fori*, is *not an act of sovereign authority*.¹³¹

(ii) *Draft code of the International Law Association*

(35) Article III of the Strupp draft code of 1926, prepared for the International Law Association, also enumerates certain exceptions to the doctrine of State immunity, including "especially for all cases where the State [or the sovereign] acts not as the holder of public authority, but as a person in private law, *particularly if it engages in commerce*".¹³² Recently, the problem was re-examined by the International Law Association during its conference at Montreal in 1982.

(iii) *Harvard draft convention on competence of courts in regard to foreign States, 1932*

(36) The Harvard Research Centre has prepared a number of draft conventions with commentaries for the "Research in International Law" of the Harvard Law School. Article 11 of the Harvard draft convention on competence of courts in regard to foreign States of 1932 subjects a foreign State to local jurisdiction

... when, in the territory of such other State, it engages in an industrial, commercial, financial or other business enterprise in which private persons may there engage, or does an act there in connection with such an enterprise wherever conducted, and the proceeding is based upon the conduct of such enterprise or upon such act.¹³³

(iv) *Resolution of the International Bar Association*

(37) At the Seventh Conference of the International Bar Association in Cologne in 1958, the American Bar Association proposed a draft resolution incorporating a restrictive doctrine of State immunity. At its Eighth Conference in Salzburg in July 1960, the International Bar Association adopted a resolution spelling out the circumstances in which immunity might be limited.¹³⁴ The resolution closely resembles the corresponding provisions of the Harvard draft convention, while

paragraph 1 clearly endorses the restrictive principle of the Brussels Convention of 1926.¹³⁵

(v) *Draft articles for a convention on State immunity adopted by the International Law Association*

(38) The latest draft articles for a convention on State immunity prepared by the Committee on State Immunity of the International Law Association and adopted, with modifications, by the Association at Montreal in 1982¹³⁶ contain an interesting provision on this exception. Article III, "Exceptions to Immunity from Adjudication", provides:

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

...

B. Where the cause of action arises out of:

1. A commercial activity carried on by the foreign State; or
2. An obligation of the foreign State arising out of a contract (whether or not a commercial transaction but excluding a contract of employment) unless the parties have otherwise agreed in writing.

...

(39) Some members of the Commission pointed out that this survey should not necessarily lead to the conclusion that the majority of States now subscribed to the restrictive practice of immunity.

PART I

INTRODUCTION (*continued*)

...

Article 2. Use of terms

1. For the purposes of the present articles:

...

(g) "commercial contract" means:

- (i) any commercial contract or transaction for the sale or purchase of goods or the supply of services;
- (ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee in respect of any such loan or of indemnity in respect of any such transaction;
- (iii) any other contract or transaction, whether of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

...

Commentary

(1) Article 12, on "commercial contracts", calls for a definition of that expression in order to list the types of

¹³⁰ *Annuaire de l'Institut de droit international*, 1952 (Basel), vol. 44, part I, p. 37. The expression *gestion patrimoniale*, used in the original draft, was replaced by the term *actes de commerce*, which, according to J. P. Niboyet, was more in keeping with the modern activity of the State (*ibid.*, p. 131) and because "with it, one is on relatively firm and familiar ground" (*Traité de droit international privé français* (Paris, Sirey, 1949), vol. VI, part I, p. 350).

¹³¹ See Institute of International Law, *Tableau général des résolutions (1873-1956)*, *op. cit.*, pp. 17-18.

¹³² K. Strupp, "Réforme et codification du droit international. Projet d'une convention sur l'immunité en droit international", *ILA, Report of the Thirty-fourth Conference, Vienna, 1926* (London, 1927), pp. 426 *et seq.*

¹³³ Harvard draft, *op. cit.* (footnote 100 above), p. 597.

¹³⁴ See International Bar Association, *Eighth Conference Report, Salzburg, July 1960* (The Hague, Martinus Nijhoff, 1960), pp. 8-10.

¹³⁵ See W. H. Reeves, "Good fences and good neighbors: Restraints on immunity of sovereigns", *American Bar Association Journal* (Chicago, Ill.), vol. 44, No. 6 (1958), p. 521.

¹³⁶ *ILA, Report of the Sixtieth Conference, Montreal, 1982* (London, 1983), pp. 7-8.

contracts or transactions which are intended to fall within its scope. A definition provision is envisaged in article 2, paragraph 1, although its actual placement and the exact lettering of the subparagraph are left for final arrangement at a later stage.

(2) For the purposes of the draft articles, the expression "commercial contract" covers three types of contract. In the first place, it covers all kinds of commercial contracts or transactions for the sale or purchase of goods or the supply of services. The term "transaction" presents some difficulties of translation into other official languages, owing to the existence of different terminologies in use in different legal systems. In most systems, a distinction exists between an agreement to sell or to buy and a contract of sale or of purchase, which is an outright transaction. Without going into the details of internal laws, the term "commercial transaction" may be viewed as corresponding more closely to the expression "*acte de commerce*", which is a technical term with different meanings in various civil-law systems. It is to be observed that "commercial contracts" as referred to in paragraph 2 (a) of article 12, namely contracts concluded between States and those concluded on a government-to-government basis, are excluded from the application of paragraph 1 of that article. For such contracts, State immunity subsists and continues to apply.

(3) Secondly, the expression "commercial contract" also covers a contract for a loan or other transaction of a financial nature, such as commercial loans or credits or bonds floated in the money market of another State. A State is often required not only to raise a loan in its own name, but sometimes also to provide a guarantee or surety for one of its national enterprises in regard to a purchase, say of civil or commercial aircraft, which is in turn financed by foreign banks or a consortium of financial institutions. Such an undertaking may be given by a State in the form of a contract of guarantee embodying an obligation of guarantee for the repayment or settlement of the loan taken by one of its enterprises and to make payment in the event of default by the co-contractor, or an obligation of indemnity to be paid for the loss incurred by a party to the principal contract for a loan or a transaction of a financial nature. The difference between an obligation of guarantee and one of indemnity may consist in the relative directness or readiness of available remedies in relation to non-performance or non-fulfilment of contractual obligations by one of the original parties to the principal contract. An obligation of indemnity could also be described in terms of willingness or readiness to reimburse one of the original parties for the expense or losses incurred as a result of failure of another party to honour its contractual commitments with or without consequential right of subrogation.

(4) Thirdly, the expression "commercial contract" also covers other types of contracts or transactions of a commercial, industrial, trading or professional nature, thus taking in a wide variety of fields of State activities, especially manufacturing, and possibly investment, as

well as other transactions. "Contracts of employment" are excluded from this definition since they could form the subject of a separate rule, as will emerge from the examination of draft article 13.

(5) Examples of the various types of contracts categorized as commercial contracts are abundant, as illustrated in the commentary to article 12.¹³⁷

Article 3. Interpretative provisions

...

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

Commentary

(1) In order to provide guidance for determining the commercial character of a contract or transaction for the sale or purchase of goods or the supply of services, article 3, paragraph 2, suggests two tests which are to be applied successively. In the first place, reference should be made to the nature of the contract or transaction. If it is established that it is non-commercial or governmental in nature, there would be no necessity to enquire further as to its purpose.

(2) However, if after the application of the "nature" test, the contract or transaction appears to be commercial, then it is open to the State to contest this finding by reference to the purpose of the contract or transaction. This double criterion of the nature and purpose of the contract or transaction is designed to provide an adequate safeguard and protection for developing countries, especially in their endeavours to promote national economic development. States should be given an opportunity to maintain that, in their practice, a given contract or transaction should be treated as non-commercial because its purpose is clearly public and supported by *raison d'Etat*, such as the procurement of armaments for the defence of a State, materials for the construction of a naval base, food supplies to feed a population, relieve famine or revitalize a vulnerable area, or medicaments to combat a spreading epidemic, provided that it is the practice of that State to conclude such contracts or transactions for such public ends.

(3) Controversies have loomed large in the practice of States, as can be seen from the survey of State practice contained in the commentary to article 12.¹³⁸ Paragraph 2 of article 3 is aimed at reducing unnecessary controversies or avoiding one-sided application of a single test such as the nature of the contract, which is initially a useful test but not by any means a conclusive one in all cases. This interpretative provision is therefore designed to provide a supplementary standard for determining whether a particular contract or

¹³⁷ See the commentary to article 12 above, paras. (28)-(29).

¹³⁸ *Idem*, paras. (20)-(26).

transaction for the sale or purchase of goods or the supply of services is "commercial" or "non-commercial". The "purpose" test should not therefore be disregarded. A balanced approach is thus ensured by the possibility of reference as appropriate to both criteria: the nature as well as the purpose of the contract.¹³⁹

(4) What is said with regard to a contract for the sale or purchase of goods or the supply of services applies equally to other types of commercial contracts as defined in article 2, para. 1 (g). For instance, a contract of loan to make such a purchase or a contract of guarantee for such a loan could be non-commercial in character, having regard ultimately also to the public purpose for which the contract of purchase was concluded. For example, a contract of guarantee for a loan to purchase military aircraft would usually be non-commercial because of its presumably public purpose.

PART III EXCEPTIONS TO STATE IMMUNITY (continued)

Article 15. Ownership, possession and use of property

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

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

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

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

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

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

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

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

(b) in which the State claims a right or interest, if the State itself could not have invoked immunity had the proceeding been instituted against it, or if the right

¹³⁹ This is of crucial significance in view of the emerging trend in the judicial practice and legislation of some States, as noted in the commentary to article 12 above, paras. (20)-(27).

or interest claimed by the State is neither admitted nor supported by *prima facie* evidence.

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

Commentary

(1) Article 15 deals with an important exception to the rule of State immunity from the jurisdiction of a court of another State quite apart from State immunity in respect of its property from attachment and execution. It is to be recalled that, 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.¹⁴⁰

State immunity may 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. Article 15 is therefore designed to set out an exception to the rule of State immunity.

(2) This exception, which has not encountered any serious opposition in the judicial and governmental practice of States,¹⁴¹ is formulated in language which has to satisfy the differing views of Governments and differing theories regarding the basis for the exercise of jurisdiction by the courts of another State in which, in most cases, the property—especially immovable property—is situated. According to most authorities, article 15 is a clear and well-established exception, while others may still hold that it is not a true exception since a State has a choice to participate in the proceeding to assert its right or interest in the property which is the subject of adjudication or litigation.

(3) Paragraph 1 of article 15 lists the various types of proceedings relating to or involving the determination

¹⁴⁰ See article 7 and the commentary thereto provisionally adopted by the Commission at its thirty-fourth session (*Yearbook ... 1982*, vol. II (Part Two), pp. 100 *et seq.*). See also sect. B.1 above.

¹⁴¹ See the fifth report of the Special Rapporteur (see footnote 44 above), paras. 116-140. For judicial decisions, reference may be made to the decision of a Tokyo court in *Limbin Hteik Tin Lat v. Union of Burma* (1954) and to the dictum of the court (*ibid.*, para. 117), as well as to the dictum of 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) (*ibid.*, para. 118). For the English doctrine of trust, see the cases cited in paras. 120-122 of the report. The case-law of other countries has also recognized this exception, especially Italian case-law (*ibid.*, para. 122). For the views of Governments, reference may be made to section 56 of Hungary's Law Decree No. 13 of 1979 (*ibid.*, para. 125), to article 29 of Madagascar's Ordinance No. 62-041 of 19 September 1962 (*ibid.*, para. 126) and to the replies to the Secretariat's questionnaire (*ibid.*, paras. 127-128). See also national legislation, international conventions and international opinions (*ibid.*, paras. 130-139).

of any right or interest of a State in, or its possession or use of, movable or immovable property, or any obligation arising out of its interest in, or its possession or use of, immovable property.

(4) Paragraph 1 of the article is not intended to confer jurisdiction on any court where none exists. Hence the expression "which is otherwise competent" is used to specify the existence of competence of a court of another State in regard to the proceeding. The word "otherwise" merely suggests the existence of jurisdiction in normal circumstances had there been no question of State immunity to be determined. In other official languages, an equivalent expression is used which indicates the existence of competence of the court in the actual instance before it. It is understood that the court is competent for this purpose by virtue of the applicable rules of private international law.

(5) Paragraph 1 (a) deals with immovable property and is qualified by the phrase "situated in the State of the forum". This subparagraph as a whole does not give rise to any controversy owing to the generally accepted predominance of the applicability of the *lex situs* and the exclusive competence of the *forum rei sitae*. However, the expression "right or interest" in this subparagraph gives rise to some difficulties of translation from the English original into other official languages. The law of property, especially real property or immovable property, contains many peculiarities and niceties within each municipal legal system. Even in the English usage, what constitutes a right in property in one system may be regarded as an interest in another system. Thus the combination of "right or interest" is used as a term to indicate the totality of whatever right or interest a State may have under any legal system. The 1972 European Convention on State Immunity,¹⁴² in its French version, used the term *droit* in its widest sense, without the addition of *intérêt*. In this connection, it should also be noted that "possession" is not always considered a "right" unless it is adverse possession or *possessio longi temporis, nec vi nec clam nec precario*, which could create a "right" or "interest", depending on the legal terminology used in a particular legal system. The Spanish equivalent expression *derecho o interés* is therefore adopted provisionally, subject to the reservation that a more exact equivalent could be used if found later.

(6) Subparagraph (b) concerns any right or interest of the State in movable or immovable property arising by way of succession, gift or *bona vacantia*. It is clearly understood that, if the proceeding involves not only movable and immovable property situated within the territorial jurisdiction of the State of the forum, then a separate proceeding may also have to be initiated in order to determine such rights or interests before the court of the State where the immovable property is situated, i.e., the *forum rei sitae*.

(7) Subparagraphs (c), (d) and (e) need not concern or relate to the determination of a right or interest of the

State in property, but are included in paragraph 1 to cover the situation in many countries, especially in the common-law systems, where the court exercises some supervisory jurisdiction or other functions with regard to the administration of the estate of a deceased person, a person of unsound mind or a bankrupt; of a company in the event of its dissolution or winding up; or of trust property or property otherwise held on a fiduciary basis. The exercise of such supervisory jurisdiction is purely incidental, as the proceeding may in part involve the determination or ascertainment of rights or interests of all the interested parties, including, if any, those of a foreign State.

(8) Paragraph 2 of the article does not give rise to any difficulty in substance. If the court is competent and chooses to exercise its jurisdiction in a proceeding not brought against a State, there would seem to be no reason to oppose such a proceeding on the grounds of State immunity, if the State itself could not have successfully invoked its immunity had the proceeding been brought against it. It is merely a safeguard or residual clause to make clear that, where the State itself would have no immunity for whatever reason or on whatever ground, the court could not be precluded from exercising its jurisdiction in a proceeding simply because it "relates to, or is designed to deprive the State of, property: (a) which is in the possession or control of the State; or (b) in which the State claims a right or interest".

(9) Paragraph 2 is also needed in view of recent legal developments regarding the effect of assertions by foreign States. At least in the practice of some jurisdictions, it used to be the rule—far more absolute than today—that, if a foreign sovereign said that the property in question was his or in his possession or control, the local court was obliged to decline jurisdiction.¹⁴³ However, the more recent practice of the same jurisdictions now requires the foreign State to provide at least prima facie evidence of its title or proof that the possession was obtained in conformity with the local law.¹⁴⁴ In certain circumstances, the foreign State would be obliged to furnish evidence as to the official status of an agency for which State immunity was invoked.¹⁴⁵

(10) The substance of paragraph 2 does not give rise to difficulties in principle. Its inclusion is deemed appropriate or, indeed, necessary by most members in

¹⁴³ See, for example, Justice Scrutton in *The "Jupiter"* No. 1 (1924) (United Kingdom, *The Law Reports, Probate Division*, 1924, p. 236).

¹⁴⁴ For example, in *Juan Ysmael & Co. Inc. v. Government of the Republic of Indonesia* (1954) (United Kingdom, *The Law Reports, House of Lords and Judicial Committee of the Privy Council*, 1955, p. 72), Earl Jowitt said *obiter* that a claimant Government "must produce evidence to satisfy the court that its claim is not merely illusory, nor founded on a title manifestly defective" (*ibid.*, pp. 89-90). The court must be satisfied that conflicting rights have to be decided in relation to the foreign Government's claim. See also *Hong Kong Aircraft: Civil Air Transport Inc. v. Central Air Transport Corp.* (1953) (*ibid.*, 1953, p. 70).

¹⁴⁵ See, for example, *Compañía Mercantil Argentina v. United States Shipping Board* (1924) (see footnote 102 above).

¹⁴² Art. 9 of the Convention (see footnote 77 above).

view of article 7, paragraph 3, which considers certain proceedings that have not been instituted directly against a State to be proceedings against the State. However, a view has been expressed that the inclusion of paragraph 2 is neither useful nor justified, since the proceedings in question do not concern persons, natural or juridical, other than a State, but are in fact instituted against the State itself. Another member reserved his position on this paragraph, which, by its content and formulation, was likely to give rise to serious difficulties, particularly where it sought to deprive a State of property as a result of a proceeding from which it was absent; he considered that paragraph 2 must be re-examined before deciding whether it should be included in draft article 15.

(11) Paragraph 3 is included as a useful signpost to indicate the future treatment of immunities of States in

respect of their property from attachment and execution. An opportunity is also taken to remind readers of the existence and applicability of the relevant provisions of certain conventions. Particular attention is therefore drawn to the question of the relations between the present draft articles and other existing conventions mentioned in draft article 4, still to be discussed by the Commission.¹⁴⁶ Ultimately, this paragraph may be deleted, revised or modified, after the Commission has considered part IV, dealing with immunities of States in respect of their property from execution and attachment, and draft article 4 of part I (Introduction).

¹⁴⁶ For the text of article 4 (Jurisdictional immunities not within the scope of the present articles), see the second report of the Special Rapporteur (see footnote 38 above), para. 54. See also *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnote 226.

Chapter IV

STATE RESPONSIBILITY

A. Introduction

97. At its thirty-second session, in 1980, the Commission completed its first reading of part 1 of the draft articles on State responsibility,¹⁴⁷ as recommended by the General Assembly in its resolution 34/141 of 17 December 1979.

98. The general structure of the draft was described in detail in the Commission's report on the work of its twenty-seventh session.¹⁴⁸ Under the general plan adopted by the Commission, the origin of international responsibility forms the subject of part 1 of the draft. The 35 draft articles constituting part 1, as provisionally adopted in first reading by the Commission,¹⁴⁹ are concerned 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.

99. The 35 articles of part 1 of the draft are contained in five chapters. Comments and observations on the provisions of all the chapters have been requested from the Governments of Member States. The earlier comments on chapters I, II and III were submitted to the Commission at its thirty-second session¹⁵⁰ and at its thirty-third session.¹⁵¹ Recent comments and observations on those chapters, as well as on chapters IV and V, were submitted to the Commission at its thirty-fourth session¹⁵² and at the present session (A/CN.4/362).¹⁵³ It is hoped that more comments will be received from the Governments of Member States before the Commission embarks on the second reading of part 1 of the draft articles.

100. Part 2 of the draft articles deals with the content, forms and degrees of international responsibility; that is to say, with determining the consequences which an internationally wrongful act of a State may have under international law in different cases (reparative and

punitive consequences of an internationally wrongful act, relationship between these two types of consequences, material forms which reparation and sanction may take). Once these two essential tasks are completed, the Commission may perhaps decide to add a part 3 concerning the "implementation" (*mise en œuvre*) of international responsibility and the settlement of disputes.

101. The Commission began its consideration of part 2 of the draft at its thirty-second session, in 1980, on the basis of a preliminary report¹⁵⁴ submitted by the Special Rapporteur, Mr. Willem Riphagen.

102. The preliminary report 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. In the preliminary report, the Special Rapporteur set out three parameters for the possible new legal relationships arising from an internationally wrongful act of a State. The first parameter was the new obligations of the State whose act is internationally wrongful. The second parameter was the new right of the "injured" State; while the third parameter was the position of the "third" State in respect of the situation created by an internationally wrongful act.¹⁵⁵

103. The General Assembly, by its resolution 35/163 of 15 December 1980, recommended *inter alia* that, taking into account the written comments of Governments and views expressed in debates in the General Assembly, the Commission should continue its work on State responsibility with the aim of beginning the preparation of 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. Similar recommendations were made by the General Assembly in its resolution 36/114 of 10 December 1981 and, in general terms, in its resolution 37/111 of 16 December 1982.

104. At its thirty-third session, the Commission had before it the second report¹⁵⁶ of the Special Rapporteur, containing five draft articles on the content, forms and

¹⁴⁷ *Yearbook ... 1980*, vol. II (Part Two), pp. 26-62.

¹⁴⁸ *Yearbook ... 1975*, vol. II, pp. 55-59, document A/10010/Rev.1, chap. II, paras. 38-51.

¹⁴⁹ For the texts, see *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

¹⁵⁰ A/CN.4/328 and Add.1-4, reproduced in *Yearbook ... 1980*, vol. II (Part One), p. 87.

¹⁵¹ A/CN.4/342 and Add.1-4, reproduced in *Yearbook ... 1981*, vol. II (Part One), p. 71.

¹⁵² A/CN.4/351 and Add.1-3, reproduced in *Yearbook ... 1982*, vol. II (Part One), p. 15.

¹⁵³ Reproduced in *Yearbook ... 1983*, vol. II (Part One).

¹⁵⁴ *Yearbook ... 1980*, vol. II (Part One), p. 107, document A/CN.4/330.

¹⁵⁵ For the views expressed in the Commission, see *Yearbook ... 1980*, vol. I, pp. 73-98, 1597th to 1601st meetings.

¹⁵⁶ *Yearbook ... 1981*, vol. II (Part One), p. 79, document A/CN.4/344.

degrees of international responsibility, divided into two chapters as follows: chapter I "General principles" (arts. 1-3) and chapter II "Obligations of the State which has committed an internationally wrongful act" (arts. 4 and 5).¹⁵⁷ At the conclusion of the debate on the second report,¹⁵⁸ the Commission decided to refer articles 1 to 5 to the Drafting Committee, which did not, however, consider them during the session.

105. At its thirty-fourth session, the Commission had before it the third report¹⁵⁹ of the Special Rapporteur, containing six draft articles (arts. 1-6) for inclusion in part 2 of the draft.¹⁶⁰ At the end of the debate¹⁶¹ on the third report, the Commission decided to refer articles 1 to 6, as submitted 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. The Drafting Committee did not consider during the thirty-fourth session the articles referred to it; that task was deferred to the present session (see para. 133 below).

B. Consideration of the topic at the present session

106. At the present session, the Commission had before it the fourth report (A/CN.4/366 and Add.1)¹⁶² of the Special Rapporteur.

107. After a brief review of the status of the work on the topic, the fourth report concentrated on an "outline" of the possible contents of part 2 and part 3 of the draft articles on State responsibility.

108. It was submitted that the Commission should give early consideration to the possible content of part 3 of the draft articles, since the prospects regarding the "implementation" of international responsibility influenced the way in which part 2 would be elaborated. Doubts were expressed that States generally would be willing to accept *secondary* rules on State responsibility as binding upon them if there were no guarantee of an impartial assessment of the facts and the interpretation and application of the *primary* rules necessarily involved in any internationally wrongful act.

109. In this connection, the question was put whether the Commission should envisage as the final outcome of its work a convention, a form of endorsement of the

draft articles on State responsibility as mere guidance for States and international bodies confronted with the question of State responsibility, or—as an intermediate solution—the acceptance of such articles in the form of a convention only to the extent that a dispute between them concerning the existence of an internationally wrongful act would be submitted to an international procedure for dispute settlement.

110. The report then proceeded to a "categorization" of internationally wrongful acts for the purpose of distinguishing between their legal consequences. Taking as a starting-point article 19 (International crimes and international delicts) of part 1 of the draft articles, the report first posed the questions whether part 2 should deal with the specific legal consequences of *aggression* and the corresponding notion of individual and collective self-defence, in view of the fact (a) that both notions are already covered by the provisions of the Charter of the United Nations and related documents such as the Definition of Aggression¹⁶³ and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,¹⁶⁴ (b) that the Charter of the United Nations also already provides for a machinery of implementation, and (c) that there is a close connection with another topic currently under consideration in the Commission, namely the draft Code of Offences against the Peace and Security of Mankind.

111. The report then turned to international crimes *other* than aggression and enumerated four *elements* of legal consequences which are common to all international crimes, namely (1) the *erga omnes* character of the wrongfulness of the act; (2) the jurisdiction of the United Nations over the situation; (3) the non-applicability of the duty of each State not to intervene in matters within the domestic jurisdiction of another State; (4) the duty of solidarity between all States other than the author State.

112. With reference to internationally wrongful acts which are *not* international crimes, the report noted three aspects of their legal consequences: (a) determination of the "injured" State or States; (b) the content of the new legal relationships created by the internationally wrongful act; (c) the possible "phasing" of those legal consequences.

113. After noting that, with regard to the content of the new legal relationships, three types could be distinguished—(a) reparation; (b) suspension or termination of existing relationships on the international plane; (c) measures of "self-help" to ensure the maintenance of rights—the report turned to the question of admissibility of measures of "self-help" involving an infringement of the rights of the author State (reprisals).

¹⁵⁷ For the texts of the draft articles, see *Yearbook ... 1981*, vol. II (Part Two), p. 144, footnotes 626 and 627.

¹⁵⁸ For the views expressed in the Commission, see *Yearbook ... 1981*, vol. I, pp. 126-144, 1666th to 1670th meetings, and pp. 206-217, 1682nd to 1684th meetings.

¹⁵⁹ *Yearbook ... 1982*, vol. II (Part One), p. 22, document A/CN.4/354 and Add.1 and 2.

¹⁶⁰ For the texts of the draft articles, see *Yearbook ... 1982*, vol. II (Part Two), pp. 80-81, para. 86.

¹⁶¹ For the views expressed in the Commission, see *Yearbook ... 1982*, vol. I, pp. 199-224, 1731st to 1734th meetings, and pp. 230-242, 1736th to 1738th meetings.

¹⁶² Reproduced in *Yearbook ... 1983*, vol. II (Part One).

¹⁶³ General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

¹⁶⁴ General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

114. In this connection, the inadmissibility of “acts of reprisal involving the use of force” was discussed and the lack of international consensus on the scope of this rule was noted.

115. The report then turned to the question of the (in)admissibility of reprisals which consist of a breach of an obligation under an “objective régime”, where the obligations of the States concerned are parallel rather than reciprocal; the impact of a machinery of collective decision-making in this respect was noted.

116. With respect to the possible “phasing” of legal consequences, reference was made to the opinions of writers on the subject that the intention to take reprisals must be notified to the author State, or even that they can be taken only if the author State has been given the opportunity to stop the breach and offer reparation.

117. In the same context of possible “phasing”, the report then discussed the impact of the availability of pre-arranged dispute-settlement procedures on the admissibility of measures of reprisal.

118. After noting the particular situation of the refusal of a State to continue active governmental co-operation as a consequence of an internationally wrongful act having been committed by the other State, the report returned to the question of determining the injured State or States.

119. While recognizing that international obligations are normally bilateral and that, therefore, their breach does not raise a problem as regards the determination of the injured State, the report again referred to the existence of “objective régimes”, protecting extra-State interests and thereby in principle qualifying all the other States participating in the régime as injured States, subject to possible machinery for collective decision-making being provided in such a régime in respect of collective enforcement of the régime.

120. Finally, the possibility was envisaged that, in the case of a *manifest* violation of an international obligation under the objective régime, which *destroys* the object and purpose of that régime, the inadmissibility of certain measures, resulting from the existence of such a régime, would no longer apply.

121. The Commission considered the fourth report at its 1771st to 1773rd meetings, from 31 May to 3 June 1983, and at its 1775th to 1780th meetings, from 6 to 13 June 1983.

122. It was generally agreed that the determination of all the legal consequences of all internationally wrongful acts was a formidable task, since virtually the whole field of international law was involved. Nevertheless, the main trend in the discussions was that the Commission should, at least for the time being, work from the perspective of drafting articles which would ultimately be embodied in a general convention on State responsibility, covering every aspect of the topic and, in particular, dealing with the legal consequences of aggression and other international crimes, as well as of simple

breaches of bilateral obligations. It was remarked by several members that, even if such a convention were not signed and ratified by a large number of States and consequently did not soon come into force as such, it would still influence the conduct of States and constitute a reference text for international courts and tribunals and other international bodies faced with the questions dealt with in such a convention.

123. As to the link between parts 2 and 3, several members stressed the necessity of elaborating part 2 before forming an opinion on the possible contents of part 3. Many members recognized, in various degrees, the importance of “implementation” provisions for the elaboration of part 2, or at least of some of its articles. In this connection, it was stated that different machineries of implementation could be envisaged for the different cases dealt with in part 2.

124. There was no consensus in the Commission on the order in which the work on part 2 should proceed. While several members favoured starting with consideration of the less controversial issues, such as bilateral reparation, turning thereafter to reprisals and then to the legal consequences of international crimes, other members preferred to take up first the last-mentioned subtopic. Several members had no preference, provided that the legal consequences of international crimes would be dealt with in part 2.

125. Although some members were reluctant to deal in part 2 with matters relating to the use of armed force in international relations, since an attempt to do so might involve tampering with the provisions of the Charter of the United Nations, most members felt that the legal consequences of the international crime of aggression should at least be indicated in general terms in part 2.

126. With respect to “objective régimes”, several members—while leaving aside or even rejecting the use of those *words* in the draft *articles*—accepted the notion that, within the context of determining the injured State or States, and within the context of the inadmissibility of particular reprisals, a distinction could be made between primary régimes providing for parallel obligations and primary régimes providing for reciprocal obligations. Other members expressed some doubt as to the possibility of drawing a sharp dividing line between the two types of régime, while some members objected altogether to the existence of regional “objective régimes”.

127. Several members advocated caution in dealing with the admissibility of reprisals, in view of the inherent danger of escalation of conflicts, where the existence of an internationally wrongful act, entailing a right to take reprisals, was itself in dispute.

128. As to the inadmissibility of reprisals before the exhaustion of international remedies, in cases when such remedies were available, several members expressed doubts. It was remarked, in particular, that reprisals might have the character of conservatory measures, which, as such, could be effective only if taken before such an exhaustion of remedies.

129. Several members drew attention to the connection between the work of the Commission on State responsibility and that on the draft Code of Offences against the Peace and Security of Mankind. While it was recognized that the final responsibility of individuals clearly fell inside the latter and outside the former topic, a certain overlap between the two topics would be inevitable if it were decided to include in the latter topic the crimes committed by States as such.¹⁶⁵

130. While most members agreed that the matter of belligerent reprisals should not be dealt with in the rules on State responsibility, but should be left to its own development within the context of the elaboration of humanitarian law in cases of armed conflict, several members remarked that matters connected with "diplomatic law" must be covered by the rules on State responsibility, even where it is admitted that in this field violation of diplomatic immunity by way of reprisal is excluded.

131. Some members drew attention to the necessity of further elaboration of the actual legal consequences of the notion that some internationally wrongful acts are considered to be wrongful *erga omnes*, in particular with respect to the question of responses of individual States to such acts.

132. One member suggested that the first article of part 2 of the draft should, in order to indicate the future approach that should be followed, be drafted along the following lines:

Article 1

1. The international responsibility of a State arising pursuant to the provisions of part 1 of the present articles consists for that State in the negative legal consequences of its internationally wrongful act.

2. Under paragraph 1 and depending on each particular case and the attendant circumstances, the international responsibility of a State consists, *inter alia*, in that the State:

(a) shall be subjected to measures and action provided for in the Charter of the United Nations, including Chapter VII thereof, and taken in accordance with the Charter, or to measures authorized by virtue of the provisions thereof;

(b) shall be subjected to the limitations and restraints in accordance with international law, including restraints on the use of its territory and/or the exercise of its rights;

(c) shall make reparation for the damage caused and, if necessary, restore the rights and interests that have been infringed;

(d) shall take measures and action prescribed by international law, including the applicable international arrangements;

(e) shall provide the requisite satisfaction to the injured State or States;

(f) shall institute criminal proceedings against persons accused of having committed offences which have given rise to the international responsibility of the State.

The other members objected to the introduction of this article because it was drafted in too general a manner. The general view was that article 1 of part 2 of the draft articles on State responsibility should merely be a transitional text linking part 1 and part 2.

133. At its 1806th meeting, on 18 July 1983, on the recommendation of the Drafting Committee, the Commission provisionally adopted draft articles 1, 2, 3 and 5, which had been referred to the Drafting Committee at the previous session (see para. 105 above). The texts of these articles and the commentaries thereto appear in section C below.

C. Draft articles on State responsibility

Part 2. Content, forms and degrees of international responsibility

Article 1

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

Commentary

(1) The sole object of this article is to mark the transition, and the link, between part 1, dealing with the conditions under which the international responsibility of a State arises, and part 2, determining the legal consequences of the internationally wrongful act.

(2) As will appear from the provisions of part 2, these legal consequences consist, in the first place, of new *obligations* of the author State, such as the obligation to make reparation. The legal consequences may also include new *rights* of other States, notably the injured State or States, such as the right to take counter-measures.

(3) In respect of particular internationally wrongful acts, another legal consequence may be that every State, other than the author State, is under an *obligation* to respond to the act.

(4) The foregoing refers to legal consequences as regards the legal relationships *between States*. However, article 1 does not exclude that an internationally wrongful act entails legal consequences in the relationships between States and *other* "subjects" of international law.

Article 2

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

Commentary

(1) Article 2 stipulates the *residual* character of the provisions of part 2. Indeed, States, when creating "primary" rights and obligations between them, may well at the same time—or at some later time before the established "primary" obligation is breached—deter-

¹⁶⁵ See chapter II of the present report.

mine the legal consequences, as between them, of the internationally wrongful act involved.

(2) Such predetermined legal consequences may deviate from those to be set out in part 2. Thus, for example, States parties to a multilateral treaty creating a customs union between them may choose another system of ensuring its effectiveness than the normal legal consequences of internationally wrongful acts (obligation of reparation, right to take counter-measures). However, States cannot, *inter se*, provide for legal consequences of a breach of their mutual obligations which would authorize acts contrary to peremptory norms of general international law, nor escape from the supervision of the competent United Nations organs by virtue of their responsibilities relating to the maintenance of international peace and security.

(3) The opening words of article 2 are intended to recall these limitations.¹⁶⁶

Article 3

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

Commentary

(1) The legal consequences of an internationally wrongful act may include consequences other than those *directly* relating to new obligations of the author State and new rights, or obligations, of another State or States. Thus, for example, article 52 of the 1969 Vienna Convention on the Law of Treaties¹⁶⁷ declares:

*A treaty is void** if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

Another example is provided by article 62, paragraph 2 (b), of the same Convention, which states:

A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

...

(b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

¹⁶⁶ Since, as of its thirty-fifth session, the Commission has not yet taken any decision regarding the formulation of an article concerning peremptory norms, the reference to article 4 has been put between square brackets.

¹⁶⁷ United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), p. 153. Hereinafter referred to as the "Vienna Convention".

These types of legal consequences will not be dealt with in part 2 of the present draft articles.

(2) In this connection, it should be recalled that the ICJ, in its Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, notwithstanding Security Council resolution 276 (1970),¹⁶⁸ expressed the opinion that most articles of the Vienna Convention were declaratory of already existing customary international law.

(3) In any case, part 2 may well not be exhaustive as to the legal consequences of internationally wrongful acts.

Article 5

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

Commentary

(1) Part 2 will indicate the legal consequences of an internationally wrongful act in terms of new obligations and new rights of States.

(2) It cannot *a priori* be excluded that, under particular circumstances, the performance of such obligations and/or the exercise of such rights might result in a situation relevant to the maintenance of international peace and security. In those particular circumstances, the provisions and procedures of the Charter of the United Nations apply and may result in measures deviating from the general provisions of part 2. In particular, the maintenance of international peace and security *may*¹⁶⁹ require that countermeasures in response to a particular internationally wrongful act are not to be taken for the time being. In this connection, it is noted that, even under the Definition of Aggression, the Security Council is empowered to conclude

... that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.¹⁷⁰

¹⁶⁸ *I.C.J. Reports 1971*, p. 16.

¹⁶⁹ In the opinion of the competent United Nations organ.

¹⁷⁰ General Assembly resolution 3314 (XXIX) of 14 December 1974, annex, article 2.

Chapter V

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

A. Introduction

134. The Commission began its consideration of the topic concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier at its twenty-ninth session, in 1977, pursuant to General Assembly resolution 31/76 of 13 December 1976. At its thirtieth session, in 1978, the Commission considered the report of the Working Group on the topic introduced by its Chairman, Mr. Abdullah El-Erian. The result of the study undertaken by the Working Group was submitted to the General Assembly at its thirty-third session, in 1978.¹⁷¹ At that session, after having discussed the results of the Commission's work, the Assembly recommended in resolution 33/139 of 19 December 1978 that the Commission:

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

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

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

136. At its thirty-first session, in 1979, the Commission again established a Working Group, which studied issues concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. As recommended by the Working Group, the Commission, at that session, appointed Mr. Alexander Yankov Special Rapporteur for the topic and reached the conclusion that he would be entrusted with the preparation of a set of draft articles for an appropriate legal instrument.¹⁷²

¹⁷¹ See *Yearbook ... 1978*, vol. II (Part Two), pp. 138 *et seq.*, paras. 137-144.

¹⁷² For a historical review of the work of the Commission on the topic, see (a) the reports of the Commission: *Yearbook ... 1979*, vol. II (Part Two), p. 170, paras. 149-155; *Yearbook ... 1980*, vol. II (Part Two), pp. 162 *et seq.*, paras. 145-176; *Yearbook ... 1981*, vol. II (Part Two), pp. 159 *et seq.*, paras. 228-249; *Yearbook ... 1982*, vol. II (Part Two), pp. 112 *et seq.*, paras. 199-249; (b) the reports of the Special

137. At its thirty-second session, in 1980, the Commission had before it a preliminary report¹⁷³ submitted by the Special Rapporteur, and also a working paper¹⁷⁴ prepared by the Secretariat. At that session, the Commission considered the preliminary report in a general discussion.¹⁷⁵ The General Assembly, by resolution 35/163 of 15 December 1980, recommended that the Commission, taking into account the written comments of Governments and views expressed in debates in the General Assembly, should continue its work on the topic with a view to the possible elaboration of an appropriate legal instrument.

138. At its thirty-third session, in 1981, the Commission had before it the second report of the Special Rapporteur,¹⁷⁶ containing the texts of six draft articles constituting part I of the draft, entitled "General provisions".¹⁷⁷ The six draft articles comprised three main issues, namely the scope of the draft articles on the topic, the use of terms and the general principles of international law relevant to the status of the diplomatic courier and the diplomatic bag.

139. After discussion of the second report of the Special Rapporteur at that session,¹⁷⁸ the Commission referred the six draft articles to the Drafting Committee, but the Committee did not consider them owing to lack of time.

140. At its thirty-fourth session, in 1982, the Commission had before it the third report of the Special Rapporteur.¹⁷⁹ Since the six draft articles contained in the second report were not considered by the Drafting Committee, the Special Rapporteur re-examined them in the

Rapporteur: preliminary report, *Yearbook ... 1980*, vol. II (Part One), p. 231, document A/CN.4/335; second report, *Yearbook ... 1981*, vol. II (Part One), p. 151, document A/CN.4/347 and Add.1 and 2; third report, *Yearbook ... 1982*, vol. II (Part One), p. 247, document A/CN.4/359 and Add.1.

¹⁷³ See footnote 172, (b), above.

¹⁷⁴ A/CN.4/WP.5.

¹⁷⁵ See *Yearbook ... 1980*, vol. I, pp. 260-264, 1634th meeting, and pp. 274-276 and 281-287, 1636th and 1637th meetings; and *Yearbook ... 1980*, vol. II (Part Two), pp. 164-165, paras. 162-176.

¹⁷⁶ See footnote 172, (b), above.

¹⁷⁷ For the texts of the six draft articles, see *Yearbook ... 1981*, vol. II (Part Two), pp. 159 *et seq.*, footnotes 679 to 683.

¹⁷⁸ See *Yearbook ... 1981*, vol. I, pp. 255-260, 1691st meeting, and pp. 273-281, 1693rd and 1694th meetings; and *Yearbook ... 1981*, vol. II (Part Two), pp. 159 *et seq.*, paras. 230-249.

¹⁷⁹ See footnote 172, (b), above.

light of the discussion in the Commission as well as in the Sixth Committee of the General Assembly at its thirty-sixth session,¹⁸⁰ and re-introduced them, as amended, in the third report. The third report consisted of two parts and contained 14 draft articles. Part I, dealing with "General provisions", contained the following six draft articles: "Scope of the present articles" (art. 1);¹⁸¹ "Couriers and bags not within the scope of the present articles" (art. 2);¹⁸² "Use of terms" (art. 3);¹⁸³ "Freedom of communication for all official purposes effected through diplomatic couriers and

¹⁸⁰ See "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-sixth session of the General Assembly" (A/CN.4/L.339), sect. F.

¹⁸¹ Draft article 1 as revised read:

"Article 1. Scope of the present articles"

"The present articles shall apply to communications of States for all official purposes with their diplomatic missions, consular posts, special missions, permanent missions or delegations, wherever situated, and also to official communications of these missions and delegations with the sending State or with each other, by employing diplomatic couriers and diplomatic bags, as well as consular couriers and bags, couriers and bags of the special missions, permanent missions or delegations."

¹⁸² Draft article 2 read:

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

"1. The present articles shall not apply to couriers and bags used for all official purposes by international organizations.

"2. The fact that the present articles do not apply to couriers and bags used for all official purposes by international organizations shall not affect:

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

"(b) the application to such couriers and bags of any rules set forth in the present articles with regard to the facilities, privileges and immunities which would be accorded under international law independently of the present articles."

¹⁸³ Draft article 3 as revised read:

"Article 3. Use of terms"

"1. For the purpose of the present articles:

"(1) 'diplomatic courier' means a person duly authorized by the competent authorities of the sending State entrusted with the custody, transportation and delivery of the diplomatic bag to the diplomatic missions, consular posts, special missions, permanent missions or delegations of the sending State, wherever situated;

"(2) 'diplomatic courier *ad hoc*' means an official of the sending State entrusted with the function of diplomatic courier for a special occasion or occasions;

"(3) 'diplomatic bag' means all packages containing official correspondence, documents or articles exclusively for official use which bear visible external marks of their character, used for communications between the sending State and its diplomatic missions, consular posts, special missions, permanent missions or delegations, wherever situated, dispatched through diplomatic courier or the captain of a commercial ship or aircraft or sent by postal or other means, whether by land, air or sea;

"(4) 'sending State' means a State dispatching a diplomatic bag, with or without a courier, to its diplomatic missions, consular posts, special missions, permanent missions or delegations, wherever situated;

"(5) 'receiving State' means a State on whose territory:

"(a) diplomatic missions, consular posts, special missions or permanent missions are situated; or

"(b) a meeting of an organ of an international organization or an international conference is held;

"(6) 'transit State' means a State through whose territory the diplomatic courier and/or the diplomatic bag passes *en route* to the receiving State;

diplomatic bags" (art. 4);¹⁸⁴ "Duty to respect international law and the laws and regulations of the receiving and the transit State" (art. 5);¹⁸⁵ and "Non-discrimination and reciprocity" (art. 6).¹⁸⁶ Part II, dealing with the "Status of the diplomatic courier, the

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

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

"(9) 'special mission' means a temporary mission, representing the State, which is sent by one State to another with the consent of the latter, for the purpose of dealing with it on specific questions or performing a special task in relation to it;

"(10) 'permanent mission' means a mission of permanent character, representing the State, sent by a State member of an international organization to that organization;

"(11) 'delegation' means the delegation sent by a State to participate on its behalf in the proceedings of either an organ of an international organization or an international conference;

"(12) 'international organization' means an intergovernmental organization.

"2. The provisions of paragraph 1, subparagraphs (1), (2) and (3), on the terms 'diplomatic courier', 'diplomatic courier *ad hoc*' and 'diplomatic bag' may also apply to consular courier and consular courier *ad hoc*, to couriers and couriers *ad hoc* of special missions, permanent missions or delegations, as well as to the consular bag and the bags of special missions, permanent missions or delegations of the sending State.

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

¹⁸⁴ Draft article 4 as revised read:

"Article 4. Freedom of communication for all official purposes effected through diplomatic couriers and diplomatic bags"

"1. The receiving State shall permit and protect on its territory free communications on the part of the sending State for all official purposes with its diplomatic missions, consular posts, special missions, permanent missions or delegations as well as between those missions, consular posts and delegations, wherever situated, as provided for in article 1.

"2. The transit State shall facilitate free communication through its territory effected through diplomatic couriers and diplomatic bags referred to in paragraph 1 of the present article."

¹⁸⁵ Draft article 5 as revised read:

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

"1. Without prejudice to the facilities, privileges and immunities accorded to a diplomatic courier, it is the duty of the sending State and its diplomatic courier to respect the rules of international law and the laws and regulations of the receiving State and the transit State.

"2. The diplomatic courier also has a duty, in the discharge of his functions, not to interfere in the internal affairs of the receiving State and the transit State.

"3. The temporary accommodation of the diplomatic courier must not be used in any manner incompatible with his functions as laid down in the present articles, by the relevant provisions of the Vienna Convention on Diplomatic Relations of 1961 or by other rules of international law or by any special agreements in force between the sending State and the receiving State or the transit State."

¹⁸⁶ Draft article 6 read:

"Article 6. Non-discrimination and reciprocity"

"1. In the application of the provisions of the present articles, no discrimination shall be made as between States with regard to the treatment of diplomatic couriers and diplomatic bags.

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

diplomatic courier *ad hoc* and the captain of a commercial aircraft or the master of a ship carrying a diplomatic bag", contained eight draft articles: "Proof of status" (art. 7);¹⁸⁷ "Appointment of a diplomatic courier" (art. 8);¹⁸⁸ "Appointment of the same person by two or more States as a diplomatic courier" (art. 9);¹⁸⁹ "Nationality of the diplomatic courier" (art. 10);¹⁹⁰ "Functions of the diplomatic courier" (art. 11);¹⁹¹ "Commencement of the functions of the diplomatic courier" (art. 12);¹⁹² "End of the function of the diplomatic

"(a) where the receiving State applies any of the provisions of the present articles restrictively because of a restrictive application of that provision to its diplomatic couriers and diplomatic bags in the sending State;

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

¹⁸⁷ Draft article 7 read:

"Article 7. Proof of status"

"The diplomatic courier shall be provided, in addition to his passport, with an official document indicating his status and the number of packages constituting the diplomatic bag as accompanied by him."

¹⁸⁸ Draft article 8 read:

"Article 8. Appointment of a diplomatic courier"

"Subject to the provisions of articles 9, 10 and 11, diplomatic couriers and diplomatic couriers *ad hoc* are freely appointed by the competent authorities of the sending State or by its diplomatic missions, consular posts, special missions, permanent missions or delegations, and are admitted to perform their functions on the territory of the receiving State or the transit State."

¹⁸⁹ Draft article 9 read:

"Article 9. Appointment of the same person by two or more States as a diplomatic courier"

"Two or more States may appoint the same person as a diplomatic courier or diplomatic courier *ad hoc*."

¹⁹⁰ Draft article 10 read:

"Article 10. Nationality of the diplomatic courier"

"1. The diplomatic courier should, in principle, have the nationality of the sending State.

"2. Diplomatic couriers may not be appointed from among the persons having the nationality of the receiving State except with the express consent of that State, which may be withdrawn at any time.

"3. The receiving State may reserve the same right under paragraph 2 with regard to:

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

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

"4. The application of this article is without prejudice to the appointment of the same person by two or more States as a diplomatic courier, as provided in article 9."

¹⁹¹ Draft article 11 read:

"Article 11. Functions of the diplomatic courier"

"The functions of the diplomatic courier shall consist in taking care of and delivering to its destination the diplomatic bag of the sending State or its diplomatic missions, consular posts, special missions, permanent missions or delegations, wherever situated."

¹⁹² Draft article 12 read:

"Article 12. Commencement of the functions of the diplomatic courier"

"The functions of the diplomatic courier shall commence from the moment he is crossing the territory of the transit or receiving State, depending upon which of these events occurs first."

courier" (art. 13);¹⁹³ and "Persons declared *non grata* or not acceptable" (art. 14).¹⁹⁴

141. The Commission considered the third report of the Special Rapporteur at its thirty-fourth session and referred the 14 draft articles to the Drafting Committee.¹⁹⁵ By its resolution 37/111 of 16 December 1982, the General Assembly recommended that, taking into account the comments of Governments, whether in writing or expressed orally in debates in the Assembly, the Commission should continue its work aimed at the preparation of drafts on all topics in its current programme.

B. Consideration of the topic at the present session

142. At the present session, the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/374 and Add.1-4),¹⁹⁶ as well as information on the topic received from Governments (A/CN.4/372 and Add.1 and 2).¹⁹⁷ Due to lack of time, however, the Commission considered only the first and second instalments of the report (A/CN.4/374 and A/CN.4/374/Add.1). The first two instalments contained draft articles 15 to 23 of part II of the draft articles, entitled "Status of the diplomatic courier, the diplomatic courier *ad hoc* and the captain of a commercial aircraft or the master of a ship carrying a diplomatic bag", namely: "General facilities" (art. 15); "Entry into the territory of the receiving State and the transit State" (art. 16); "Freedom of movement" (art. 17); "Freedom of communication" (art. 18); "Temporary accommodation" (art. 19); "Personal inviolability" (art. 20); "Inviolability of temporary accommodation" (art. 21); "Inviolability of the means of transport" (art. 22); and "Immunity from jurisdiction" (art. 23).

¹⁹³ Draft article 13 read:

"Article 13. End of the function of the diplomatic courier"

"The function of a diplomatic courier comes to an end, *inter alia*, upon:

"(a) the completion of his task to deliver the diplomatic bag to its final destination;

"(b) the notification by the sending State to the receiving State that the function of the diplomatic courier has been terminated;

"(c) notification by the receiving State to the sending State that, in accordance with article 14, it refuses to recognize the official status of the diplomatic courier;

"(d) the event of the death of the diplomatic courier."

¹⁹⁴ Draft article 14 read:

"Article 14. Persons declared non grata or not acceptable"

"1. The receiving State may at any time, and without having to explain its decision, notify the sending State that the diplomatic courier of the latter State is declared *persona non grata* or not acceptable. In that event, the sending State shall, as the case may be, either recall the person concerned or terminate his function.

"2. In cases when a diplomatic courier is declared *persona non grata* or not acceptable in accordance with paragraph 1 prior to the commencement of his function, the sending State shall send another diplomatic courier to the receiving State."

¹⁹⁵ See *Yearbook ... 1982*, vol. I, pp. 293-312, 1745th to 1747th meetings; and *Yearbook ... 1982*, vol. II (Part Two), pp. 114 *et seq.*, paras. 206-249.

¹⁹⁶ Reproduced in *Yearbook ... 1983*, vol. II (Part One).

¹⁹⁷ *Ibid.*

143. The fourth report of the Special Rapporteur was considered by the Commission at its 1774th meeting, on 3 June 1983, at its 1780th to 1784th meetings, from 13 to 17 June 1983, and at its 1779th meeting, on 7 July 1983. In introducing the report, the Special Rapporteur referred to efforts made by the Commission in previous years to determine the scope and parameters of the topic, its implications and possible analogies between the status of the diplomatic courier and that of other diplomatic agents. He found those efforts and the discussions in the Sixth Committee of the General Assembly extremely helpful in his attempts to devise a method to be applied and the basic approach to be followed in carrying out the task entrusted to him.

144. The Special Rapporteur briefly reviewed the structure of the draft articles, which had tentatively been approved by the Commission. He emphasized his commitment to an empirical, functional and pragmatic approach, and to close examination of State practice in the field of diplomatic communications.

1. GENERAL COMMENTS ON THE FOURTH REPORT OF THE SPECIAL RAPPORTEUR

145. While there was general support for the topic and the approach taken by the Special Rapporteur, a number of suggestions were made by members of the Commission. Some suggestions related to the drafting and design of the draft articles, others to their substance. Commenting on the topic in general, a few members of the Commission recalled that the modest aim of this topic was to fill only the small gaps in the existing codification conventions.

146. Some members also commented on draft articles 1 to 14, which had already been submitted to the Drafting Committee at the previous session of the Commission. Those comments concerned primarily the scope of the topic. Some members expressed regret that couriers and bags used for official purposes by international organizations were excluded from the draft. While they understood the reason, they feared that the Commission could be confronted at some later date with a request to take up a separate topic of couriers and bags used by international organizations.

147. Some members thought that the scope of the draft articles should be expanded to include communications of national liberation movements. They regarded such limitation as ignoring the reality of international relations and politics. Some members referred to "recognized" national liberation movements, as opposed to any national liberation movement.

148. Some other members of the Commission, on the other hand, warned against the possible negative consequences of such an expansion of the scope of the articles. In their view, by extending the applicability of the draft articles to international organizations and national liberation movements, the Commission would be seriously limiting the possible acceptability of the draft articles to many States.

149. The Special Rapporteur recalled that, in his preliminary report, he had included those two categories within the scope of the topic. However, the general view of the Commission and of the Sixth Committee at that time had been to exclude them from the draft. His own suggestion, he said, would be to keep in mind a possible extension of the scope of the draft articles, but not to take a decision at this stage, unless the Commission had strong reasons for doing so. In his opinion it was necessary to proceed with great caution, so as to avoid creating any difficulties that might hamper progress. As a member of the Commission, his view was that the scope of the draft articles should be extended to cover entities other than States; but as Special Rapporteur it was his duty to take account of trends and conditions conducive to a solution of that problem.

150. One member of the Commission, commenting on the topic as a whole, wondered about the need for its codification. He questioned whether there was a gap in the existing diplomatic law to be filled by this topic. He found the main problem to be not a lack of law, but rather an abuse of existing rules that were accepted almost universally, if only in principle. In his view, since the law in this area was relatively well settled, it might be appropriate for the Commission to recommend that the draft articles should ultimately take the form of a General Assembly resolution.

151. With regard to the feasibility of codifying the topic, the Special Rapporteur said that he wished to state, for the record, that the Commission had followed the recommendations of a series of General Assembly resolutions. While he agreed that the issues involved were fairly well covered by existing law, there was none the less room for some degree of elaboration or amplification. With regard to the final form of the draft articles, he could not comment as Special Rapporteur; but as a member of the Commission he could not agree that subject-matter of such importance should be consigned to a document which did not, in general, have legally binding force.

152. Most members of the Commission approved of the uniform approach adopted by the Special Rapporteur, but a few members questioned its desirability. They thought it would be advisable for the Commission to consider the degree to which similar considerations should apply to different types of couriers or whether all couriers could justifiably be lumped together. A few other members wondered about the moment of commencement and end of the functions of the diplomatic courier, dealt with in articles 12 and 13, and made certain drafting remarks. Another member thought that the useful distinction between the diplomatic courier and the diplomatic courier *ad hoc* had almost disappeared in the report.

153. The Special Rapporteur said that he had tried to strike a balance between the interests of the sending State and those of the receiving State. He stated that he had at first endeavoured to introduce the idea of an "official" courier and an "official" bag, but when that did not find favour, he had reverted to the more traditional,

and perhaps more reliable, notions of the "diplomatic" courier and the "diplomatic" bag. He agreed that the status of a diplomatic courier was not assimilable to that of a diplomatic agent or of any other existing category of officials. His only purpose in employing such analogies had been to facilitate the preparation of basic rules applicable to any specific situation. The Special Rapporteur further explained that the functions of the diplomatic courier, from the point of view of receiving and transit States, began from the moment of entry of the courier into their territory and that the time of his appointment as courier was immaterial. Thus the Special Rapporteur thought that the difference, if any, between the regular courier and the courier *ad hoc* was in terms of their status after the end of their functions in a foreign State. Otherwise, in his opinion, there was no difference in terms of the significance of their work, or the legal protection, facilities, privileges and immunities which should be accorded to them in the performance of their functions.

154. It was well known, he thought, that if a bag was partly used for a consular mission, States preferred to call it a diplomatic bag, because of the difference between the terms of article 27 of the 1961 Vienna Convention on Diplomatic Relations¹⁹⁸ and those of article 35 of the 1963 Vienna Convention on Consular Relations.¹⁹⁹ In general, however, he believed that the uniform approach would be best, but he recognized that some further precision could perhaps be introduced into the articles at the Drafting Committee stage.

2. FACILITIES TO BE GRANTED TO THE DIPLOMATIC COURIER

155. Introducing the draft articles relating to the facilities to be granted to the diplomatic courier, the Special Rapporteur referred to them as the heart of the law on the status of the diplomatic courier, which would secure the proper functioning of diplomatic relations and promote international co-operation and understanding. He mentioned the principle of reciprocity as being perhaps the most effective remedy in the proper application of diplomatic law, since every receiving State was simultaneously a sending State and a transit State. In his view, the conceptual framework of this topic was pragmatic and could best be worked out through the formulation of draft articles based on existing practice. Hence the official functions and the confidential nature of the duties of the diplomatic courier required appropriate treatment that was functional both in nature and in application.

156. The Special Rapporteur stated that, in drafting articles on facilities to be granted to the diplomatic courier, he had closely followed the relevant provisions of four Conventions: the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the 1969 Convention on Special

Missions²⁰⁰ and the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.²⁰¹ The functions and status of the members of special missions, in particular, he thought, were similar to those of diplomatic couriers, who were on temporary assignment and therefore could not enjoy all the privileges and immunities of diplomatic agents. In comparing the status of members of special missions and diplomatic couriers, however, he had borne in mind the functional approach, the restrictions that applied and the main trends in State practice. In the 1961 Vienna Convention on Diplomatic Relations, the status of a diplomatic courier was similar to that of the administrative, technical and service staff of a diplomatic mission, who enjoyed certain privileges and immunities in the exercise of their functions under article 37, paragraphs 2 and 3, of that Convention. If the 1961 Vienna Convention granted such privileges and immunities, it would be logical for a diplomatic courier, who was entrusted with confidential duties that might in some cases be much more important than those of the administrative, technical or service staff of a diplomatic mission, to enjoy similar privileges and immunities for the purpose of performing those duties. His general approach had thus been not to go too far in assimilating the status of the diplomatic courier to that of diplomatic staff, but at the same time to provide adequate protection for the courier in the exercise of his functions. He had therefore examined the main features of the facilities, privileges and immunities which might be granted to diplomatic couriers as being indispensable for the exercise of their functions and had tried to determine whether the existing rules embodied in the four Conventions were applicable to diplomatic couriers. He had also assessed the comparability and compatibility of the status of diplomatic couriers with that of diplomatic agents, identifying common features that would offer a reliable basis for the codification and progressive development of international law on the topic under consideration. Whenever possible, he had examined the practice of States to see whether treaties, national legislation or case-law could be used to test the viability of the draft articles he was proposing. Although State practice with regard to the status of diplomatic couriers was inconclusive and limited, because Governments preferred to settle the problems that arose confidentially through diplomatic channels, he thought that there was some evidence that it followed the pattern set in the four Conventions.

157. Referring to draft article 15,²⁰² on general

²⁰⁰ United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), p. 125.

²⁰¹ *Idem*, *Juridical Yearbook 1975* (Sales No. E.77.V.3), p. 87. Hereinafter referred to as the "Vienna Convention on the Representation of States".

²⁰² Draft article 15 read:

"Article 15. General facilities

"The receiving State and the transit State shall accord to the diplomatic courier the facilities required for the performance of his official functions."

See the Special Rapporteur's discussion of this draft article in his fourth report, A/CN.4/374 and Add.1-4, paras. 26-31.

¹⁹⁸ United Nations, *Treaty Series*, vol. 500, p. 95.

¹⁹⁹ *Ibid.*, vol. 596, p. 261.

facilities, the Special Rapporteur mentioned the changing circumstances which called for different facilities. He had therefore decided not to make article 15 too detailed and exhaustive. He had considered it necessary to follow the pattern of the four Conventions—in particular, article 25 of the Vienna Convention on Diplomatic Relations and to take account of State practice, which supported the granting of general facilities to the diplomatic courier for the exercise of his official functions.

158. As for draft article 16,²⁰³ on facilities for the entry of the diplomatic courier into the receiving State and the transit State, the Special Rapporteur thought that it was an indispensable condition for the performance of the courier's functions and an essential element of the principle of freedom of communication. The main obligation of the receiving State and the transit State was thus to grant entry or transit visas to the diplomatic courier as quickly as possible, taking into consideration the general régime applicable to the admission of foreigners.

159. Another essential condition for the performance of the diplomatic courier's functions, the Special Rapporteur thought, was freedom of movement and travel, which were dealt with in draft article 17.²⁰⁴ That article stressed the importance of freedom of movement and travel, but also took account of the practice of States of prohibiting or regulating access to certain zones for reasons of national security. That practice was reflected in bilateral agreements, and one important aspect of it was that it operated very effectively on the basis of reciprocity.

160. Draft article 18²⁰⁵ dealt with freedom of com-

²⁰³ Draft article 16 read:

"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."

See the Special Rapporteur's discussion of this draft article in his fourth report, *ibid.*, paras. 32-33.

²⁰⁴ Draft article 17 read:

"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."

See the Special Rapporteur's discussion of this draft article in his fourth report, *ibid.*, paras. 34-37.

²⁰⁵ Draft article 18 read:

"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."

See the Special Rapporteur's discussion of this draft article in his fourth report, *ibid.*, paras. 38-41.

munication. It was the Special Rapporteur's understanding that facilities relating to such freedom would be granted when the diplomatic courier was in difficulty or distress and required assistance to contact the sending State or the diplomatic mission of his destination. Although State practice in that regard was not very abundant, he thought that draft article 18 would be regarded as a practical provision and should not give rise to any difficulties for States, since it applied to cases in which the diplomatic courier was travelling on official business.

161. With regard to draft article 19,²⁰⁶ on temporary accommodation, the Special Rapporteur pointed out that the granting of assistance to the diplomatic courier in obtaining temporary accommodation should not be regarded as a routine obligation of the receiving State or the transit State. There might, however, be cases in which the diplomatic courier encountered difficulties during an official journey and required special assistance.

162. In general, the Commission had no substantial problem with the principles embodied in draft articles 15 to 19. Most of the comments of members related to the design and drafting of the articles. Many members thought that the draft articles on facilities were too long and too many; they suggested that draft articles 15 to 19 be combined to form one or two draft articles. Some members indicated that one or another of the articles overlapped with provisions in another part of the draft or with the provisions of conventions governing relations among States or relations between States and international organizations. One member, while concerned about detailed and lengthy articles, stated that codification inevitably involved some repetition and that sometimes it could even be useful to restate certain existing rules. Another member thought that the general ambiguity he saw in draft articles 15 to 19 stemmed from a lack of clarity as to whether they involved obligations of conduct or obligations of result, within the meaning of articles 20 and 21 of part 1 of the draft articles on State responsibility.²⁰⁷

163. Besides the general agreement in the Commission about combining draft articles 15 to 19, there were a number of drafting and other comments specific to each draft article.

164. Draft article 15 was in principle acceptable to members of the Commission. Since the Special Rapporteur had sought inspiration for this article from article 22 of the Convention on Special Missions, some

²⁰⁶ Draft article 19 read:

"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."

See the Special Rapporteur's discussion of this draft article in his fourth report, *ibid.*, para. 42.

²⁰⁷ See *Yearbook ... 1980*, vol. II (Part Two), p. 30.

members of the Commission found it prudent to add, at the end of draft article 15, the phrase "having regard to the nature and task of the diplomatic courier". It was also mentioned that the word "required" should perhaps be replaced by "necessary", since the diplomatic courier could determine what was necessary in the light of given circumstances, whereas the word "required" could give rise to differing interpretations. One member also thought that the word "facilities" called for clarification.

165. In principle there was no disagreement with draft article 16. Some drafting points were suggested. For example, a few members thought that, in paragraph 2 of draft article 16, the expression "if necessary" would be more accurate than "if required". It was also suggested that the words "if required" be changed to "where required" and the phrase "as quickly as" to "as expeditiously as", in the same paragraph.

166. The Commission also had no problem of principle in connection with draft article 17. However, in order to maintain uniformity with article 26 of the Vienna Convention on Diplomatic Relations, article 34 of the Vienna Convention on Consular Relations, article 27 of the Convention on Special Missions and article 56 of the Vienna Convention on the Representation of States, a few members suggested that the phrase "zones where access is prohibited or regulated for reasons of national security" be replaced by "zones entry into which is prohibited or regulated for reasons of national security". The Commission, they thought, should keep to that formula, if only to avoid possible misinterpretations. By the same token, it was suggested that the phrase "or when returning to the sending State", at the end of the article, might be deleted, since in their opinion it added nothing to the meaning of the article and could lead to misguided interpretations of the above-mentioned Conventions, which contained no corresponding language. One member of the Commission thought that the title of draft article 17 was too vague.

167. A few members raised the question of the necessity for draft article 18. It was observed that the diplomatic courier with the task of carrying the bag of the sending State to its diplomatic or other missions in the receiving State would naturally have access in the receiving State to the means of official communications of the sending State's missions. Hence it was questionable whether there was any need to make special provision for an obligation of the receiving State to assist the diplomatic courier to communicate with the authorities of the sending State or its missions. In the case of the transit State, it was stated that paragraph 2 of draft article 4²⁰⁸ appeared already to cover much the same ground. Any eventuality not covered by that article, it was suggested by one member, could be covered in the commentary to article 15.

168. A few members thought that draft article 18 appeared to overlap with draft article 4. The Commission, they suggested, should therefore examine that provision

more closely to see whether it was really necessary. Some others, however, disagreed, and believed that the emphasis of the two articles was substantially apart. Another question arose in relation to who could decide whether it was necessary to facilitate the communication of the diplomatic courier. The words "when necessary", it was suggested by some members, should be replaced by "if the diplomatic courier so requests" or "when requested". One member thought that the title of the article was vague. Another member saw no reason to confine the missions with which the courier could communicate to those situated in the territory of the receiving State or the transit State. He thought there might be cases in which, for practical reasons, the courier should be in communication with one of his country's missions in a State other than the receiving State or the transit State. Hence he suggested that the article should end with the words "and its missions" and that the last part of the article should be deleted.

169. While some members of the Commission found no major difficulty with draft article 19, a few others were doubtful about its usefulness. They thought that the obligation of the receiving State and the transit State to assist the courier in finding temporary accommodation fell within the scope of the general obligation on both receiving and transit States to accord the courier the facilities required for the performance of his official functions. They thought that the commentary to article 15 could clarify this point and that draft article 19 could be dispensed with in the overall interest of the economy of the draft. One member thought that the question of accommodation should be linked to the status of the diplomatic courier, and not to "the performance of his official functions", as stated in that provision.

170. The Special Rapporteur agreed with most of the drafting comments, subject to decisions to be taken by the Drafting Committee. He was not opposed to combining some of the draft articles, provided none of their provisions was dropped or substantially modified. On the other hand, he could not agree with the comment that draft article 18 merely duplicated draft article 4 and should therefore be deleted. A connection between the two articles certainly existed, he said, but draft article 18 had a specific practical meaning which should not be lost and was substantially different from draft article 4. He thought that all other points raised in the debate could be discussed in the Drafting Committee.

171. The Commission decided at its 1783rd meeting, on 16 June 1983, to refer draft articles 15 to 19 to the Drafting Committee.

3. INVIOABILITY AND JURISDICTIONAL IMMUNITY OF THE DIPLOMATIC COURIER

172. Introducing this part of the report (A/CN.4/374/Add.1), the Special Rapporteur began by spelling out the three main elements of inviolability: the personal inviolability of the courier in the performance of his functions, which was the subject of draft ar-

²⁰⁸ See footnote 184 above.

ticle 20;²⁰⁹ the inviolability of the temporary accommodation of the diplomatic courier, which was the subject of draft article 21;²¹⁰ the inviolability of the means of transport used by the diplomatic courier, which was the subject of draft article 22.²¹¹ On the courier's immunity from jurisdiction, including immunity from criminal, civil and administrative jurisdiction, he had submitted draft article 23.²¹²

²⁰⁹ Draft article 20 read:

"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."

See the Special Rapporteur's discussion of this draft article in his fourth report, A/CN.4/374 and Add.1-4, paras. 47-68.

²¹⁰ Draft article 21 read:

"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."

See the Special Rapporteur's discussion of this draft article in his fourth report, *ibid.*, paras. 69-74.

²¹¹ Draft article 22 read:

"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."

See the Special Rapporteur's discussion of this draft article in his fourth report, *ibid.*, paras. 75-78.

²¹² Draft article 23 read:

"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.

173. The personal inviolability of the diplomatic courier, the Special Rapporteur stated, stemmed from a long-standing rule of international customary law: the courier was not liable to arrest, detention or any other form of restriction on his freedom; the receiving State should treat him with due respect and take all appropriate measures to prevent any attack on his person, freedom or dignity; and finally, persons who committed such attacks should be prosecuted and punished by the receiving State or the transit State. The last element, he said, was possibly a new one and had been suggested as a measure of prevention and enforcement, being the logical outcome of the application of the basic rule of freedom of communication. Functional necessity, he said, was the underlying principle of the personal inviolability of the diplomatic courier and it was reflected in the terms of draft article 20.

174. With reference to the inviolability of the temporary accommodation of a diplomatic courier and of his personal means of transport, the Special Rapporteur noted that article 30 of the Vienna Convention on Diplomatic Relations provided that the private residence of a diplomatic agent should enjoy the same inviolability as the premises of the mission, and that article 37, paragraph 2, of that Convention extended that immunity to members of the administrative and technical staff of the mission who were not nationals of the receiving State. He found no compelling reason why such treatment should not be accorded to the diplomatic courier. The rules applying to the vehicles used by the diplomatic courier, he explained, were the same as those which applied to the courier's temporary accommodation and had been embodied in draft articles 21 and 22 with a view to securing a proper balance between confidentiality, inviolability, security and public order.

175. The Special Rapporteur said that, in drafting article 23, on immunity from jurisdiction, he had tried to follow the guidelines adopted for the topic of jurisdictional immunities of States and their property, so as to ensure harmony between the main trends of the two topics. He noted that, under article 31 of the Vienna Convention on Diplomatic Relations, the immunity of the diplomatic agent from criminal jurisdiction was absolute, but certain exceptions to immunity from civil and administrative jurisdiction had been determined by

"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."

See the Special Rapporteur's discussion of this draft article in his fourth report, *ibid.*, paras. 81-139.

functional necessity. In that connection, however, he would suggest that the Commission should be guided by article 60 of the Vienna Convention on the Representation of States, which was based on article 31 of the Vienna Convention on Diplomatic Relations.

176. With regard to the expression "in respect of all acts performed in the exercise of his official functions", which appeared in paragraph 2 of draft article 23 and was based on paragraph 1 of article 60 of the Vienna Convention on the Representation of States, he pointed out that the functional approach presupposed that immunity was accorded to the courier not *in propria persona*, but by reason of his functions; this immunity was therefore limited to official acts. He reviewed the method of distinguishing between an official act *per se* and an act which, though performed by an official of the sending State, did not come within the scope of an official function, and discussed the question of who was entitled to determine the nature of the act, as well as considering the various doctrines in that connection. The Special Rapporteur also explained that he had dealt with the question of immunity from measures of execution.

177. In the opinion of the Special Rapporteur, since a courier remained in the receiving or transit State for a short period and his main task was speedy delivery of the bag, any measures involving an obligation for the courier to give evidence could hamper his function. Hence he had provided for the removal of such an obligation on the courier in paragraph 14 of draft article 23.

178. As far as the questions of damage arising from an accident caused by a vehicle used or owned by the courier and the sending State's jurisdiction over its own courier were concerned, he introduced paragraphs 5 and 6 of draft article 23.

179. Several members commented on the necessity of reducing the bulk of the draft articles. It was observed that the object was to identify areas in which practical problems had arisen and then to regulate those areas, bearing in mind the duties of the diplomatic courier and especially the peripatetic nature of his activities. Some members also questioned the provision at the end of paragraph 2 of draft article 20 requiring the receiving or transit State to prosecute and punish persons responsible for any infringement of the courier's person, freedom or dignity. No such obligation, they said, was embodied in the four existing codification conventions, because of its undoubted difficulties or the impossibility of taking the required action without violating the requirements of due process in many countries. This problem, they said, was more serious, since, under paragraph 4 of draft article 23, the courier was to be exempt from the obligation to give evidence as a witness. In those circumstances, they said, the obligation to prosecute would not be acceptable to countries where any discretion was vested in the prosecuting authorities.

180. A few members were of the opinion that draft articles 21 and 22 could be omitted. The courier, they said, was normally housed in the premises of the mission and

used the mission's means of transport. The possibility of the courier staying in an hotel in the receiving State or a transit State was rather remote and could be discounted. They thought State agencies might be reluctant to adopt yet another obligation in respect of such remote contingencies. They therefore suggested that draft articles 21 and 22 be deleted, although, should draft article 21 be retained, some provision ought to be included authorizing officials of the receiving or transit State to enter the accommodation in the event of fire or other emergencies.

181. Another member found little justification for paragraph 3 of draft article 21 or paragraph 2 of draft article 22, which, he thought, derogated from the principle of the inviolability of the temporary accommodation of the diplomatic courier and his individual means of transport. Some other members of the Commission, on the other hand, found draft articles 21 and 22 necessary, however rare might be the situations to which they were applicable.

182. A few members stated that, although they were not aware of any case in the past which would call for draft article 23, they were in principle prepared to accept an article on immunity from jurisdiction based on article 60 of the Vienna Convention on the Representation of States. Some also said that paragraph 4 of draft article 23 should be qualified by a phrase such as "concerning matters involving the exercise of his official functions". At the same time, they said, the obligation to give evidence as a witness should not, of course, delay the courier in the performance of his duties. A few other members found draft article 23 satisfactory.

183. The Special Rapporteur recognized the validity of and welcomed many drafting comments made on draft articles 20 to 23. He explained that he took a functional approach in drafting paragraph 3 of draft article 21, on the inviolability of the temporary accommodation of the diplomatic courier. In relation to the inspection or search of the temporary accommodation of the diplomatic courier in the case of suspicion of the presence of articles the import or export of which was prohibited by laws of the receiving or transit State, he said that the draft article also laid down certain procedural rules for safeguarding the inviolability of the courier. He thought the suggestion made by some members to incorporate a provision similar to paragraph 2 of article 31 of the Vienna Convention on Consular Relations to cover emergency cases such as fire deserved careful consideration.

184. As for paragraph 2 of draft article 22, the Special Rapporteur said that he had tried to strike a balance between the requirements of the inviolability of the courier and the legitimate interests of the receiving or transit State with regard to financial, fiscal, economic, health or other matters of public concern. He was well aware of the concern about the abuses of the diplomatic bag and that was the reason for drafting paragraph 2, on inspection and search.

185. The Special Rapporteur also explained, in relation to draft article 23, that he had attempted to draw a

clear distinction between acts performed in and outside the exercise of the courier's official functions. His own basic conception was that the rules on immunity from jurisdiction were governed by the concept of functional necessity. Hence, like all other privileges and immunities, immunity from judicial and administrative jurisdiction had to be based on the notion of functional necessity. As for paragraph 4 of draft article 23, exempting the courier from appearing as a witness, he recalled similar provisions providing such exemptions for technical and administrative staff in the Vienna Convention on Diplomatic Relations, as well as in the other codification conventions. He said that, of course, giving evidence was in the interest of the courier concerned, but the courier should not be obliged to give evidence on matters relating to his official duties. The courier, he thought, could also be exempted from giving evidence, subject to exceptions such as traffic accidents and certain other cases. The Special Rapporteur said that he nevertheless understood the validity of the suggestions, agreed with them in principle and welcomed more comments on these draft articles. He said that he intended to submit a further report at the next session to take into account the comments made in the Sixth Committee of the General Assembly and other considerations that might arise out of the work of the Drafting Committee.

186. The Special Rapporteur, while not formally introducing the other addenda to his fourth report, briefly explained their contents. One (A/CN.4/374/Add.2) contained draft articles 24 to 39 on the status of the diplomatic courier, and another (A/CN.4/374/Add.3) contained draft articles 30 to 32. Draft article 30 related to 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. Draft articles 31 to 39 concerned the status of the diplomatic bag; draft articles 33 to 39 were contained in the final addendum to the report (A/CN.4/374/Add.4), as well as draft articles 40 to 42 on miscellaneous provisions relating to the obligations of the transit State in the case of *force majeure*, non-recognition of States or Governments or absence of diplomatic or consular relations, and the relation of these draft articles to other conventions and international agreements. In view of the fact that the report on the entire draft articles for this topic was available to the Commission, the Special Rapporteur expressed the hope that the Commission and the Drafting Committee would allocate more time to the consideration of the topic at the thirty-sixth session of the Commission in 1984.

187. The Special Rapporteur expressed appreciation to the Codification Division of the Office of Legal Affairs for its valuable assistance to him. On the suggestion of the Special Rapporteur, the Commission requested the Secretariat: (a) to continue updating the collection of treaties relating to the topic and other relevant materials in the field of diplomatic and consular relations in general, and official communications exercised through couriers and bags in particular; (b) to renew requests 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 field of diplomatic law and with respect to the treatment of couriers and bags; (c) to update the study on State practice in the light of information and materials which may be provided by Governments or obtained through research; (d) to update the statement on the status of the four multilateral conventions in the field of diplomatic law elaborated under the auspices of the United Nations.

188. The Special Rapporteur expressed his preference that the Commission refer draft articles 20 to 23 to the Drafting Committee, but stated that he would not object to any decisions which might be taken by the Commission.

189. At its 1799th meeting, on 7 July 1983, the Commission decided to resume its debate on articles 20 to 23 at its thirty-sixth session in 1984, before referring them to the Drafting Committee.

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

190. The texts of articles 1 to 8 adopted on first reading by the Commission at the present session are reproduced below.

Article 1. Scope of the present articles

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

Commentary

(1) Article 1 adopts a comprehensive approach to the question of the scope of the draft articles, comprising all kinds of couriers and bags used by States for official communications. This comprehensive approach rests on the common denominator provided by the relevant provisions on the treatment of the diplomatic courier and the diplomatic bag contained in the multilateral conventions in the field of diplomatic law, which constitute the legal basis for the uniform treatment of the various couriers and bags. There is a basic identity of régime with very few differences between the relevant provisions of the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.²¹³

²¹³ These four Conventions, adopted under the auspices of the United Nations, are hereinafter referred to as the "conventions on codification of diplomatic law"; for references, see footnotes 198 to 201 above.

(2) Notwithstanding the foregoing, the Commission is well aware of the fact that many States are not parties to all four of the codification conventions and thus may prefer that the present draft articles not require the same treatment of the different types of couriers and bags covered by those conventions. In order to allow simplicity of drafting, while at the same time allowing States the freedom to select the types of couriers and bags to which they wish the draft articles to apply, the Commission has decided to follow the uniform or comprehensive approach mentioned above, assimilating all kinds of couriers and bags, but to include an article in the draft along the lines of article 298 of the United Nations Convention on the Law of the Sea,²¹⁴ which will permit States to designate those types of couriers and bags to which they wish the articles to apply. The definitions of the terms "diplomatic courier" and "diplomatic bag" in article 3 have been so formulated as to anticipate the inclusion in the draft of an article of this kind. It was pointed out by several members that, in adopting the assimilative approach, the Commission did not intend to suggest that it necessarily reflected or was required by customary international law.

(3) The drafting of the article deliberately brings out the two-way character of communications between the sending State and its missions, consular posts or delegations, as well as the *inter se* character of communications between those missions, consular posts or delegations.

(4) There was some discussion as to the inclusion of the words "wherever situated". While some members felt that those words could be deleted without affecting the meaning of the provision, the majority was of the view that their inclusion brought out in clearer terms the two-way and *inter se* character of the official communications referred to in the article. For instance, they made absolutely clear that the missions, consular posts or delegations of the receiving State whose official communications with each other were covered by the draft were not only those situated in the same receiving State, but also those in different receiving States.

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

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

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

Commentary

The prevailing view of the Commission and of the Sixth Committee of the General Assembly so far has

²¹⁴ *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.

been to proceed with the work on the topic under consideration, confining it to the scope spelt out in draft article 1. It was felt that there was a need to act with caution, avoiding unnecessary difficulties which might prevent quick progress in the efforts undertaken. However, the fact that the Commission decided, in principle, while developing the present set of draft articles, not to bear in mind the couriers and bags of international organizations or other entities such as national liberation movements does not preclude the possibility of an examination of their legal régime at a later stage, when a final decision would be taken by the Commission. Views to this effect were expressed by several members of the Commission, who maintained that the draft articles should also apply to couriers and bags of international organizations and national liberation movements, including provisions tending to protect the confidentiality of communications. In this connection, for instance, article 2 safeguards the possibility of a substantially similar legal régime for couriers and bags of international organizations as for those of States. It also leaves the door fully open for a later regulation of their legal régime.

Article 3. Use of terms

1. For the purposes of the present articles:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(6) "mission" means:

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

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

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

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

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

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

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

Commentary

(1) Following the example of the four conventions on codification of diplomatic law, the present draft article explains the meaning of the expressions most frequently used in the set of draft articles, so as to facilitate the interpretation and application of the articles. The definitions have been confined to the essential elements which typify the entity defined. All other elements which constitute aspects of regulation have been reserved for inclusion in the relevant substantive articles.

Subparagraph (1) of paragraph 1

(2) Subparagraph (1), in defining the diplomatic courier, has recourse to two substantive and indispensable elements: (a) his function or duty as a custodian of the diplomatic bag, charged with its transportation and delivery to its destination; (b) his official capacity or official authorization by the competent authorities of the sending State. In some instances, an officer of the sending State is entrusted for a special occasion with the mission of delivering official correspondence of that State.

(3) It was felt that the definition of the expression "diplomatic courier" should contain a specific and concrete reference to all the different kinds of courier that it was intended to cover. Although the expression "diplomatic courier" is used throughout the draft articles for reasons based both on practice and on economy of drafting, it should be made clear that the definition applies not only to the "diplomatic courier" *stricto sensu* within the meaning of the Vienna Convention on Diplomatic Relations, but also to the "consular courier", to the "courier of a special mission" and to the courier of a permanent mission, of a permanent observer mission, of a delegation or of an observer delegation, within the meaning, respectively, of the Vienna Convention on Consular Relations, the Convention on Special Missions and the Vienna Convention on the Representation of States. The detailed listing of the different kinds of couriers covered by the concept of "diplomatic courier" defined in the draft articles also purports to show clearly that a State, through an appropriate declaration, could reduce the extent of the obligations it assumes by limiting the sphere of application of the draft articles to only certain kinds of couriers. It was felt that States should be given a clear choice to apply the future articles to those couriers they deemed appropriate. In this connection, the remarks contained in paragraph (2) of the commentary to article 1 above are also relevant.

(4) The definition encompasses both the diplomatic courier employed on a regular basis and the diplomatic courier *ad hoc*. It was agreed that the expression "on a regular basis" should be interpreted as opposed to *ad hoc* or "for a special occasion" and did not intend to convey any idea related to the lawfulness of the appointment. What characterizes the diplomatic courier *ad hoc* is the specific duration of his functions. He performs all the functions of the diplomatic courier, but only for a special occasion. In the prevailing practice of States, the function of diplomatic courier *ad hoc* has been assigned to officials belonging to the foreign service or another institution of the sending State with similar functions in the field of foreign relations, such as the Ministry for Foreign Trade or Foreign Economic Relations or State organs involved in international cultural co-operation. An essential requirement is always the proper authorization by the competent authorities of the sending State. The specific duration of his functions has a consequence on the duration of enjoyment of an *ad hoc* courier's facilities, privileges and immunities as laid down in the relevant article.

(5) The cross-reference to article 1 contained in the definition is intended to clarify that it covers not only one-way communications between the sending State and its missions abroad, but also those between the missions and the sending State, as well as those between different missions of the sending State. The scope of the draft articles having already been fixed in article 1, reasons of economy of drafting make the cross-reference both appropriate and advisable.

(6) Elements of the present definition will be further elaborated in specific provisions, namely articles 7 and 11, on proof of status and functions of the diplomatic courier, respectively.

Subparagraph (2) of paragraph 1

(7) The two objective and fundamental features of the definition of the diplomatic bag are (a) its function, namely to carry official correspondence, documents or articles exclusively for official use as an instrument for communications between the sending State and its missions abroad; and (b) its visible external marks certifying its official character. These two features are essential to distinguish the diplomatic bag from other travelling containers, such as the personal luggage of a diplomatic agent or an ordinary postal parcel or consignment. It was pointed out by one member that the real, essential character of the diplomatic bag was the bearing of visible external marks of its character as such, because even if its contents were found to be objects other than packages containing official correspondence, documents or articles intended exclusively for official use, it was still a diplomatic bag deserving protection as such.

(8) The means of delivery of the bag may vary. It may be accompanied by a diplomatic courier. It may also, instead, be entrusted to the captain of a commercial aircraft, to the master of a merchant ship or to a member of the crew. Its method of delivery may also vary as to the means of dispatch and transportation used: postal or other means, whether by land, air, watercourse or sea. It was felt that these varieties of practice, not being essential to the definition of the bag, could appropriately be dealt with in a new article to be placed at the beginning of the part of the draft articles which bears on the status of the diplomatic bag.

(9) Concerning the different kinds of "diplomatic bag" encompassed by the definition and the cross-reference to article 1, subparagraph (2) is structured similarly to subparagraph (1) on the definition of "diplomatic courier". The same remarks made in the commentary to subparagraph (1), including those regarding the choice States should have with respect to the application of the present draft articles, apply also *mutatis mutandis* to the present definition of "diplomatic bag".

(10) Some members felt that, since the reference to "packages" included in the definition alluded to a single "diplomatic bag" as a legal notion, the singular should apply in some of the verbal forms contained therein.

Subparagraph (3) of paragraph 1

(11) The expressions "sending State" and "receiving State" in subparagraphs (3) and (4) follow the well-established terminology contained in all four conventions on codification of diplomatic law. This terminology has been maintained in the present draft article and the definitions have been tailored to reflect the specific situation involving the diplomatic bag, whether accompanied by a courier or not. By defining a "sending State" as a State "dispatching a diplomatic bag", the subparagraph covers all possible situations—a State dispatching an unaccompanied bag as well as a State sending a diplomatic courier whose function is precisely to accompany a bag; it also covers all other possible cases of accompanied bag referred to in the commentary to subparagraph (2). The phrase "to or from its missions, consular posts or delegations" not only spells out once more the two-way character of the official communications involved, but also makes it clear that, whatever the starting point—State, mission, consular post or delegation—the bag is always the bag of the sending State.

Subparagraph (4) of paragraph 1

(12) To use the traditional terminology of "receiving State" within the context of a set of draft articles concerning the diplomatic courier and the diplomatic bag is entirely justified on the grounds that the same receiving State that is obliged by international law to accord facilities, privileges and immunities to missions, consular posts or delegations of a sending State and their personnel is the one that is envisaged by the draft articles when regulating the facilities, privileges and immunities of the diplomatic courier and the diplomatic bag, if the sending State dispatches a courier or a bag to those same missions, consular posts or delegations. To use other terminology, such as "State of destination", would actually lead to confusion, since it would depart from the basic identity or equation between the State subject to obligations vis-à-vis foreign missions or posts and their personnel on its territory and the State subject to obligations vis-à-vis the diplomatic courier or the diplomatic bag.

(13) With reference to the case of a courier and bag of a permanent observer mission, of a delegation or of an observer delegation, the notion of "receiving State" defined here covers also the notion of "host State" within the meaning of the Vienna Convention on the Representation of States. The prevailing view in the Commission was that the similarity between the obligations of the "host State" and of the "receiving State" in the traditional meaning, in situations involving a diplomatic courier or a diplomatic bag, did not warrant such a distinction in the present draft articles, all the more so since the question of extension of their scope to couriers and bags of international organizations was still pending and the draft articles had adopted a generic term such as "mission" to cover the different situations listed in subparagraph (6).

Subparagraph (5) of paragraph 1

(14) It was widely felt in the Commission that the expression "to pass in transit" and, more precisely, the words "in transit" have acquired such a clear and unequivocal connotation in modern international relations and international communications that they are self-explanatory and that it was neither easy nor desirable to use a substitute expression in the definition of "transit State", even if, on a very superficial level, the definition might appear at first sight to be tautological.

(15) The definition is broad enough to cover not only a third State known in advance, whose territory is crossed by the diplomatic courier on his way to or from his final destination in accordance with an established itinerary and provided, if so required, with a visa; it also covers third States whose territory might be crossed by the courier in exceptional circumstances, usually in the case of *force majeure* or some fortuitous event, such as a forced landing of an aircraft, breakdown of the means of transport, natural disaster forcing a sudden deviation from the original itinerary or a situation of distress which compels the courier to make an unforeseen stopover at a port of entry of a given State. This broad range of the definition is based on the different situations contemplated by article 40 of the Vienna Convention on Diplomatic Relations, article 54 of the Vienna Convention on Consular Relations, article 42 of the Convention on Special Missions and article 81 of the Vienna Convention on the Representation of States.

(16) By mentioning the diplomatic bag separately from the diplomatic courier, the definition encompasses not only the unaccompanied bag, but also all other cases in which the bag is entrusted to a person other than a diplomatic courier (captain of a commercial aircraft, master of a merchant ship, or a member of the crew), whatever the means of transportation used (air, land, watercourse or sea).

Subparagraphs (6), (7) and (8) of paragraph 1

(17) As emerges clearly from subparagraphs (6), (7) and (8), the definitions of the expressions "mission", "consular post" and "delegation" constitute cross-references to the relevant definitions contained in the four conventions on codification of diplomatic law. This uniformity of language helps to integrate the set of draft articles on the topic of the diplomatic courier and the diplomatic bag into the whole system of provisions and the network of conventions already adopted in the area of diplomatic and consular law.

Subparagraph (9) of paragraph 1

(18) Different views were expressed in the Commission as to the drafting of subparagraph (9). It was suggested that, for reasons of symmetry with the drafting of previous subparagraphs, the text should contain a mention of the 1975 Vienna Convention on the Representation of States, from whose article 1, paragraph 1 (1), the provision had been taken. It was also wondered whether the definition given in the subparagraph should not be confined to intergovernmental organizations of a

universal character to align it with the scope of the 1975 Vienna Convention. It was widely felt that subparagraph 9 was connected with two different aspects of the draft articles under consideration. On the one hand, the notion of "international organization" is present, even if in a passive manner, in the fact that the articles are also intended to cover diplomatic couriers and bags of permanent missions, permanent observer missions, delegations or observer delegations accredited or sent to an international organization. This alone would justify the inclusion of a definition of "international organization". On the other hand, the subparagraph is also connected with the scope of the draft articles and, more precisely, with the final decision to be taken with regard to article 2. The prevailing view was that the drafting of the subparagraph should be left as it stood now. Thus the door would be left open for a broader scope of the draft articles without necessarily prejudging the final decision. The Commission could look again at the definition contained in the subparagraph in the light of what would be decided later on with regard to article 2 of the draft articles.

Paragraph 2

(19) Paragraph 2 reproduces paragraph 2 of article 1 of the Vienna Convention on the Representation of States. Its purpose is to circumscribe the applicability of the definitions included in article 3, as such definitions, to the context and system of the set of draft articles in which they are contained. This is, of course, without prejudice to the possibility that some of them may coincide with the definition of the same terms contained in other international instruments, or to the cross-references which in some cases have been made to the definitions of certain terms given by other international instruments.

Article 4. Freedom of official communications

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

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

*Commentary**Paragraph 1*

(1) The source of paragraph 1 of article 4 is to be found in the provisions of the four conventions on codification of diplomatic law, namely article 27, paragraph 1, of the Vienna Convention on Diplomatic Relations, article 35, paragraph 1, of the Vienna Convention on Consular Relations, article 28, paragraph 1, of the Convention on Special Missions and article 57, paragraph 1, of the Vienna Convention on the Representation of States. Thus the principle of freedom of communication has been universally recognized as constituting the legal foundation of modern diplomatic

law and it must also be considered as the core of the legal régime of diplomatic couriers and diplomatic bags. The safe, unimpeded and expeditious delivery of the diplomatic message and the inviolability of its confidential character constitute the most important practical aspect of that principle. It provides the legal basis for the protection of the diplomatic bag, placing upon the receiving State, whenever the courier or the bag enters its jurisdiction, the obligation to grant certain facilities, privileges and immunities so as to ensure adequate compliance with the above-stated ends.

(2) The cross-reference to article 1 explicitly clarifies that the freedom which article 4 regulates applies to the whole range of official communications already spelt out in the provision stating the scope of the draft articles.

Paragraph 2

(3) Paragraph 2 recognizes the fact that the effective application of the rule of free diplomatic communication not only requires that the receiving State permit and protect free communications under its jurisdiction effected through diplomatic couriers and bags, but also places an identical obligation upon the transit State or States. For it is obvious that, in some instances, the safe, unimpeded and expeditious delivery of the diplomatic bag to its final destination depends on its passage, on its itinerary, through the jurisdiction of other States. This practical requirement is embodied as a general rule in paragraph 2, which is based on parallel provisions contained in the four conventions on codification of diplomatic law, namely article 40, paragraph 3, of the Vienna Convention on Diplomatic Relations, article 54, paragraph 3, of the Vienna Convention on Consular Relations, article 42, paragraph 3, of the Convention on Special Missions and article 81, paragraph 4, of the Vienna Convention on the Representation of States.

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

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

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

Commentary

Paragraph 1

(1) The intention of article 5 as a whole, and of paragraph 1 in particular, is to establish the required balance between the interests of the sending State in safe and unimpeded delivery of the bag, on the one hand, and the security and other legitimate considerations not only of the receiving State, but also of the transit State,

on the other. In this respect, article 5 constitutes a counterpart to article 4, which establishes obligations on the part of the receiving State and the transit State. The object and purpose of the set of draft articles is the establishment of a system fully ensuring the confidentiality of the contents of the diplomatic bag, and its safe arrival at its destination, while guarding against its abuse. All privileges, immunities or facilities accorded either to the courier or to the bag itself have only this end in view and are therefore based on a functional approach. Paragraph 1 refers specifically to the duty of the sending State to ensure that the object and purpose of those facilities, privileges and immunities are not violated. Later articles will spell out specific means whereby the sending State may exercise this control, such as recall or dismissal of its courier and termination of his functions.

(2) It was pointed out in the Commission that the expression "shall ensure" should be taken to mean "shall make all possible efforts so that", and that it was this meaning that should be given to the word *veille*, in the French text, and to the words *velará por*, in the Spanish text.

Paragraph 2

(3) Paragraph 2 extends to the diplomatic courier principles contained in parallel provisions of the four conventions on codification of diplomatic law and is based, with some modifications, on article 41 of the Vienna Convention on Diplomatic Relations, article 55 of the Vienna Convention on Consular Relations, article 47 of the Convention on Special Missions and article 77 of the Vienna Convention on the Representation of States. It refers specifically to the duty of the diplomatic courier to respect the laws and regulations of the receiving State and the transit State, without prejudice to the facilities, privileges and immunities which he enjoys. The duty of the diplomatic courier to observe the established legal order in the receiving or transit State may relate to a wide range of obligations regarding the maintenance of law and order, regulations in the field of public health and the use of public services and means of transport, or regulations with respect to hotel accommodation and the requirements for registration of foreigners, as well as regulations with respect to driving licences, etc. The duty naturally ceases to exist where the sending State or its diplomatic courier are expressly exempted by the draft articles from applying the law and regulations of the receiving or transit State.

(4) Paragraph 2 also makes express mention of the duty of the diplomatic courier not to interfere in the internal affairs of the receiving or transit State, as the case may be. In this connection, some doubt was cast as to the actual possibility of a situation in which the diplomatic courier might interfere in the internal affairs of a State, particularly, it was said, since a courier did not represent the sending State. The prevailing view, however, was that it was possible to conceive of situations of interference in the internal affairs of another State by the diplomatic courier as an official of the sending State, for example if he took part in political

campaigns in the receiving or transit State, or if he carried subversive propaganda in the diplomatic bag directed at the political régime of, and to be distributed in, the receiving or transit State.

(5) Previous versions of draft articles 5²¹⁵ contained a specific mention of the duty of the sending State and the diplomatic courier to respect the rules of international law in the receiving State and the transit State. After some discussion on the matter, the prevailing view was that the mention of international law was unnecessary, not because the duty to respect its rules did not exist, but rather because all States and their officials were obliged to respect the rules of international law regardless of their position, in specific instances, as sending States or diplomatic couriers, respectively. The mention of "international law" in this context would amount, to some extent, to restatement of the obvious.

(6) The third paragraph contained in previous versions of the draft article, concerning the temporary accommodation of the diplomatic courier and the duty to use it in accordance with certain rules, was considered unnecessary, since it was already covered by the two paragraphs of the draft article adopted.

Article 6. Non-discrimination and reciprocity

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

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

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

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

Commentary

(1) This provision is largely modelled on article 49 of the Convention on Special Missions and, to a lesser extent, on article 47 of the Vienna Convention on Diplomatic Relations, article 72 of the Vienna Convention on Consular Relations and article 83 of the Vienna Convention on the Representation of States. This article lays down the principles of non-discrimination and reciprocity which are part of the general principles underlying the four conventions on codification of diplomatic law. They stem from the fundamental principle of the sovereign equality of States. Their applica-

tion with regard to diplomatic or consular personnel leads to the establishment of a viable and coherent régime governing diplomatic and consular intercourse. The intrinsic cohesion between non-discrimination and reciprocity and their effective balance in the treatment of the above-mentioned personnel and of diplomatic couriers contribute to the attainment of a sound basis for a viable legal framework of rules governing the régime of the courier and the bag. The interplay between the treatment of non-discrimination and the treatment of reciprocity should also be considered in its realistic and dynamic perspective, taking into consideration the state of relations between the sending State and the receiving or transit State.

Paragraph 1

(2) Paragraph 1 lays down the general principle of non-discrimination mentioned above, referring not only to the receiving State but also to the transit State.

Paragraph 2

(3) Paragraph 2 introduces some exceptions to paragraph 1, based on the principle of reciprocity, which shall not be regarded as discrimination.

Subparagraph (a) of paragraph 2

(4) The first exception allows reciprocity by permitting a restrictive application of a provision of the draft articles by the receiving State or the transit State because of a restrictive application of that provision to its diplomatic couriers and diplomatic bags in the sending State. It was pointed out in the Commission that the exception, as it concerns a transit State, should be interpreted in a strictly symmetrical way as being applicable in case couriers or bags of the transit State had been the subject of restrictive application of a provision by the sending State acting, in its turn, as a transit State with respect to those couriers and bags. The option granted by this provision to the receiving and transit States reflects the inevitable impact of the state of relations between those States and the sending State in the implementation of the draft articles. However, there should be some criteria or requirements for tolerable restrictions. It should be assumed that the restrictive application in the sending State concerned is in keeping with the strict terms of the provision in question and within the limits allowed by that provision; otherwise there would be an infringement of the draft articles and the act of the receiving or transit State would become an act of reprisal. In this connection, the view was expressed that the application of subparagraph (a) should never be carried out in a manner incompatible with the object and purpose of the draft articles.

Subparagraph (b) of paragraph 2

(5) The second exception refers to the case where, by custom or agreement, States may extend to each other more favourable treatment of their diplomatic couriers or diplomatic bags. Again in this case, States may apply reciprocity, this time in an active and positive way, establishing more favourable treatment between themselves than that which they are bound to accord to

²¹⁵ For the original version, see *Yearbook ... 1982*, vol. II (Part Two), pp. 113-114, footnote 308; for the revised version, see footnote 185 above.

other States by the terms of the draft articles. The exception is based on a very similar paragraph contained in article 49 of the Convention on Special Missions and is subject to a safeguard clause, namely that the more favourable treatment should not be incompatible with the object and purpose of the draft articles and should not affect the enjoyment of the rights or the performance of the obligations of third States in accordance with the draft articles. This safeguard clause is intended to maintain certain international standards and stability regarding the scope of the facilities, privileges and immunities granted to the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. The expression "object and purpose" of the draft articles is intended to refer primarily to certain basic principles of diplomatic law, such as the principle of freedom of communication embodied in article 4.

Article 7.²¹⁶ Documentation of the diplomatic courier

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

Commentary

(1) The direct source of article 7 is to be found in the pertinent provisions on the diplomatic or consular courier contained in the four conventions on codification of diplomatic law, namely article 27, paragraph 5, of the Vienna Convention on Diplomatic Relations, article 35, paragraph 5, of the Vienna Convention on Consular Relations, article 28, paragraph 6, of the Convention on Special Missions and article 57, paragraph 6, of the Vienna Convention on the Representation of States.

(2) The prevailing State practice, particularly during the last two decades, has closely followed the pattern established by the above-mentioned Conventions of providing the courier with a special document indicating his status as such and his most essential personal data, as well as the number of and other particulars concerning his packages, such as their serial numbers, their destination, their size and their weight. Whether the document is called "official document", "courier letter", "certificate", "courier's certificate" or "special certificate", its legal nature and purpose remain essentially the same, namely an official document proving the status of the diplomatic courier. The document is issued by the competent authorities of the sending State or its diplomatic or other official missions abroad. The form of the document, its formal particulars and its denomination are entirely within the jurisdiction and discretion of the sending State in accordance with its laws, regulations and established practices. However, it would be advisable to attain a certain minimum degree of coherence and uniformity which may facilitate the safe, unimpeded and expeditious dispatch and delivery of the diplomatic bag through the establishment of generally agreed rules and regulations.

²¹⁶ Provisional numbering.

(3) In its previous version, draft article 7²¹⁷ began as follows: "The diplomatic courier shall be provided, in addition to his passport, with an official document ...". The phrase "in addition to his passport" reflected the prevailing practice of States to provide the diplomatic courier with a passport or normal travelling document in addition to a document with proof of his status. In fact, many countries provide their professional or regular couriers even with diplomatic passports or passports of official service. The Commission felt that the phrase might create the wrong impression that the possession of a passport was compulsory, including in those cases—not infrequent—in which the laws and regulations of the receiving or transit State did not require one. It was also pointed out that, if a passport was not required, then a visa was not required either on the special document certifying the status as diplomatic courier. The deletion of the phrase, however, does not release the diplomatic courier from the obligation to present a valid passport if the laws and regulations of the receiving or transit State so require.

(4) In the case of a diplomatic bag not accompanied by diplomatic courier, but entrusted to the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew, a different kind of document is issued by the sending State, certifying the status of the diplomatic bag. The issuing of this document will be covered by later provisions of the draft articles.

Article 8.²¹⁸ Appointment of the diplomatic courier

Subject to the provisions of articles [9], 10 and 14, the diplomatic courier is freely appointed by the sending State or by its missions, consular posts or delegations.

Commentary

(1) The terminology employed in article 8 indicating that the diplomatic courier may be freely appointed by the competent authorities of the sending State is consistent with that used in the corresponding provisions of the four conventions on codification of diplomatic law concerning the appointment of diplomatic or consular staff other than the head of the mission or the head of the consular post. Those provisions are article 7 of the Vienna Convention on Diplomatic Relations, article 19, paragraph 1, of the Vienna Convention on Consular Relations, article 8 of the Convention on Special Missions and article 9 of the Vienna Convention on the Representation of States.

(2) The appointment of a diplomatic courier is an act of the competent authorities of the sending State or its mission abroad directed at designating a person for the performance of an official function, namely the custody, transportation and delivery of the diplomatic bag. The appointment is an act in principle within the domestic jurisdiction of the sending State. Accordingly, the word "freely" has been used in the text of the draft article. Therefore the requirements for appointment or

²¹⁷ See footnote 187 above.

²¹⁸ Provisional numbering.

special assignment, the procedure to be followed in the issuance of the act, the designation of the relevant competent authorities and the form of act are governed by national laws and regulations and established practices.

(3) Nevertheless, the appointment of a diplomatic courier by the sending State has certain international implications affecting the receiving State or the transit State. There is a need for some international rules to strike a balance between the rights and interests of the sending State and the rights and interests of the receiving or transit States where the diplomatic courier is to exercise his functions. That is the purpose of articles 9, 10 and 14 mentioned in the present article. The commentaries to these articles will elaborate on the ways of achieving the above-mentioned balance. The mention of article 9 appears between square brackets because there were differences of opinion in the Commission as to whether such a mention was appropriate in the context of article 8. While some members felt that the process of consultation and joint decision involved in the joint appointment of a diplomatic courier detracted somewhat from the entirely free character of an appointment, others felt that in a joint appointment each State always remained entirely free as to whether to participate or not in the joint decision involved, and therefore article 9 did not affect in the least the general principle laid down in article 8.

(4) A professional and regular diplomatic courier is, as a general rule, appointed by an act of a competent organ

of the Ministry of Foreign Affairs of the sending State; he thus becomes a member of the staff of that Ministry in a permanent legal relationship with it and with rights and duties deriving from his position as a civil servant. On the other hand, a diplomatic courier *ad hoc* is not necessarily a diplomat or a member of the staff of the Ministry of Foreign Affairs. His functions may be performed by any official of the sending State or any person freely chosen by its competent authorities. His designation is for a special occasion and his legal relationship with the sending State is of a temporary nature. He may be appointed by the Ministry of Foreign Affairs of the sending State, but is very often appointed by the latter's diplomatic missions, consular posts or delegations.

(5) The previous version of draft article 8²¹⁹ contained *in fine* the phrase "and are admitted to perform their functions on the territory of the receiving State or the transit State". Without prejudice to recognizing that this statement was in itself correct, it was generally felt that its place was not in draft article 8, which dealt exclusively with the appointment of the diplomatic courier. Later articles, particularly article 16, will deal with the matter of admission into the territory of the receiving State and the transit State, or the matter could be dealt with in a separate article to follow article 11.

²¹⁹ See footnote 188 above.

Chapter VI

THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

A. Introduction

191. Paragraph 1 of General Assembly resolution 2669 (XXV) of 8 December 1970 recommended that the Commission should

take up the study of the law of the non-navigational uses of international watercourses with a view to its progressive development and codification and, in the light of its scheduled programme of work, should consider the practicability of taking the necessary action as soon as the Commission deems it appropriate.

192. At its twenty-third session, in 1971, the Commission included the topic "Non-navigational uses of international watercourses" in its general programme of work.²²⁰ In section I, paragraph 5, of resolution 2780 (XXVI) of 3 December 1971, the General Assembly recommended that the Commission

in the light of its scheduled programme of work, decide upon the priority to be given to the topic of the law of the non-navigational uses of international watercourses.

At its twenty-fourth session, in 1972, the Commission indicated its intention to take up the foregoing recommendation of the General Assembly when it came to discuss its long-term programme of work.²²¹ In section I, paragraph 5, of resolution 2926 (XXVII) of 28 November 1972, the General Assembly noted the Commission's intention, in the discussion of its long-term programme of work, to decide upon the priority to be given to the topic.

193. At its twenty-fifth session, in 1973, the Commission, taking into account the fact that a supplementary report on international watercourses would be submitted to members by the Secretariat in the near future, considered that a formal decision on the commencement of work on the topic should be taken after members had had an opportunity to review the report.²²² By paragraph 4 of resolution 3071 (XXVIII) of 30 November 1973, the General Assembly recommended that the Commission

should at its twenty-sixth session commence its work on the law of non-navigational uses of international watercourses by, *inter alia*, adopting preliminary measures provided for under article 16 of its statute.

²²⁰ *Yearbook ... 1971*, vol. II (Part One), p. 350, document A/8410/Rev.1, para. 120.

²²¹ *Yearbook ... 1972*, vol. II, p. 324, document A/8710/Rev.1, para. 77.

²²² *Yearbook ... 1973*, vol. II, p. 231, document A/9010/Rev.1, para. 175.

194. At its twenty-sixth session, in 1974, the Commission had before it the supplementary report on legal problems relating to the non-navigational uses of international watercourses submitted by the Secretary-General pursuant to General Assembly resolution 2669 (XXV).²²³ Pursuant to the recommendation contained in paragraph 4 of General Assembly resolution 3071 (XXVIII), the Commission, at its twenty-sixth session, set up a Sub-Committee on the Law of the Non-Navigational Uses of International Watercourses, composed of Mr. Richard D. Kearney (Chairman), Mr. Taslim O. Elias, Mr. Milan Sahović, Mr. José Sette Câmara and Mr. Abdul Hakim Tabibi, which was requested to consider the question and report to the Commission. The Sub-Committee submitted a report which proposed the submission of a questionnaire to States. At the same session, the Commission adopted the report of the Sub-Committee without amendment and appointed Mr. Richard D. Kearney as Special Rapporteur for the topic of the law of the non-navigational uses of international watercourses.²²⁴

195. In section I, paragraph 4 (e), of resolution 3315 (XXIX) of 14 December 1974, the General Assembly recommended that the Commission should:

Continue its study of the law of the non-navigational uses of international watercourses, taking into account General Assembly resolutions 2669 (XXV) of 8 December 1970 and 3071 (XXVIII) of 30 November 1973 and other resolutions concerning the work of the International Law Commission on the topic, and comments received from Member States on the questions referred to in the annex to chapter V of the Commission's report.

By a circular note dated 21 January 1975, the Secretary-General invited Member States to communicate to him, if possible by 1 July 1975, the comments on the Commission's questionnaire referred to in the above-mentioned paragraph of General Assembly resolution 3315 (XXIX) and the final text of which, as communicated to Member States, read as follows:²²⁵

A. What would be the appropriate scope of the definition of an international watercourse, in a study of the legal aspects of fresh water uses on the one hand and of fresh water pollution on the other hand?

²²³ *Yearbook ... 1974*, vol. II (Part Two), p. 265, document A/CN.4/274.

²²⁴ See the report on the Commission's work on the topic at its twenty-sixth session, in *Yearbook ... 1974*, vol. II (Part One), pp. 330-301, document A/9610/Rev.1, chap. V, paras. 155-159; for the report of the Sub-Committee, *ibid.*, pp. 301 *et seq.*, annex.

²²⁵ *Yearbook ... 1976*, vol. II (Part One), p. 150, document A/CN.4/294 and Add.1, para. 6.

- B. Is the geographical concept of an international drainage basin the appropriate basis for a study of the legal aspects of non-navigational uses of international watercourses?
- C. Is the geographical concept of an international drainage basin the appropriate basis for a study of the legal aspects of the pollution of international watercourses?
- D. Should the Commission adopt the following outline for fresh water uses as the basis of its study:
 - (a) Agricultural uses:
 - 1. Irrigation;
 - 2. Drainage;
 - 3. Waste disposal;
 - 4. Aquatic food production;
 - (b) Economic and commercial uses:
 - 1. Energy production (hydroelectric, nuclear and mechanical);
 - 2. Manufacturing;
 - 3. Construction;
 - 4. Transportation other than navigation;
 - 5. Timber floating;
 - 6. Waste disposal;
 - 7. Extractive (mining, oil production, etc.);
 - (c) Domestic and social uses:
 - 1. Consumptive (drinking, cooking, washing, laundry, etc.);
 - 2. Waste disposal;
 - 3. Recreational (swimming, sport, fishing, boating, etc.);
- E. Are there any other uses that should be included?
- F. Should the Commission include flood control and erosion problems in the study?
- G. Should the Commission take account in its study of the interaction between use for navigation and other uses?
- H. Are you in favour of the Commission taking up the problem of pollution of international watercourses as the initial stage in its study?
- I. Should special arrangements be made for ensuring that the Commission is provided with the technical, scientific and economic advice which will be required, through such means as the establishment of a Committee of Experts?

196. The Commission did not consider the topic at its twenty-seventh session, in 1975, pending receipt of the replies from Governments of Member States to the Commission's questionnaire.²²⁶ The General Assembly, by paragraph 4 (e) of its resolution 3495 (XXX) of 15 December 1975, recommended that the Commission should continue its study of the law of the non-navigational uses of international watercourses.

197. In 1976, at its twenty-eighth session, the Commission had before it replies to the questionnaire from the Governments of 21 Member States.²²⁷ It also had before it a report submitted by Mr. Richard D. Kearney, then Special Rapporteur for the topic.²²⁸ At that session, in the Commission's discussion on the topic, attention was devoted mainly to the matters raised in the replies from Governments and discussed in the report of the Special Rapporteur concerning the scope of the Commission's work on the topic and the meaning of the term "international watercourse". The report noted that there were considerable differences in the replies of Governments

to the questionnaire regarding the use of the geographical concept of the international drainage basin as the appropriate basis for the proposed study, with regard both to uses and to the special problems of pollution. Differences also appeared in the views expressed by members of the Commission in the debate on the Special Rapporteur's report. A consensus emerged that the problem of determining the meaning of the term "international watercourses" need not be pursued at the outset of the Commission's work. In its report on its twenty-eighth session, the Commission stated:

164. This exploration of the basic aspects of the work to be done in the field of the utilization of fresh water led to general agreement in the Commission that the question of determining the scope of the term "international watercourses" need not be pursued at the outset of the work. Instead, attention should be devoted to beginning the formulation of general principles applicable to legal aspects of the uses of those watercourses. 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. Further, the rules should be designed to promote the adoption of régimes for individual international rivers and for that reason should have a residual character. Efforts should be devoted to making the rules as widely acceptable as possible, and the sensitivity of States regarding their interests in water must be taken into account.

165. It would be necessary, in elaborating legal rules for water use, to explore such concepts as abuse of rights, good faith, neighbourly co-operation and humanitarian treatment, which would need to be taken into account in addition to the requirements of reparation for responsibility.²²⁹

The discussion in the Commission showed general agreement with the views expressed by Governments in response to questions dealing with other issues.

198. The General Assembly, in paragraphs 4 (d) and 5 of resolution 31/97 of 15 December 1976, recommended that the Commission should continue its work on the law of the non-navigational uses of international watercourses and urged Member States that had not yet done so to submit to the Secretary-General their written comments on the subject.

199. At its twenty-ninth session, in 1977, the Commission appointed Mr. Stephen M. Schwebel as Special Rapporteur for the topic of the law of the non-navigational uses of international watercourses, to succeed Mr. Richard D. Kearney, who had not stood for re-election to the Commission.²³⁰ In paragraph 4 (d) of resolution 32/151 of 19 December 1977, the General Assembly recommended that the Commission should continue its work on the law of the non-navigational uses of international watercourses. This recommendation was reiterated by the General Assembly in resolution 33/139 of 19 December 1978.

200. In 1978, at its thirtieth session, the Commission had before it the replies received from four Member States in accordance with General Assembly resolution 31/97.²³¹ Also at that session, the Special Rapporteur

²²⁶ *Yearbook ... 1975*, vol. II, pp. 183-184, document A/10010/Rev.1, para 138.

²²⁷ *Yearbook ... 1976*, vol. II (Part One), p. 147, document A/CN.4/294 and Add.1.

²²⁸ *Ibid.*, p. 184, document A/CN.4/295.

²²⁹ *Yearbook ... 1976*, vol. II (Part Two), p. 162.

²³⁰ *Yearbook ... 1977*, vol. II (Part Two), p. 124, para. 79.

²³¹ *Yearbook ... 1978*, vol. II (Part One), p. 253, document A/CN.4/314.

made a statement on the topic.²³² At its thirty-first session, in 1979, the Commission had before it the first report on the topic submitted by the Special Rapporteur,²³³ as well as the reply of one Member State²³⁴ to the Commission's questionnaire. In that first report, the Special Rapporteur proposed the following draft articles: "Scope of the present articles" (art. 1); "User States" (art. 2); "User agreements" (art. 3); "Definitions" (art. 4); "Parties to user agreements" (art. 5); "Relation of these articles to user agreements" (art. 6); "Entry into force for an international watercourse" (art. 7); "Data collection" (art. 8); "Exchange of data" (art. 9); "Costs of data collection and exchange" (art. 10). At that session, the Commission engaged in a general debate on the issues raised in the Special Rapporteur's report and on questions relating to the topic as a whole. The debate concerned the following matters: the nature of the topic; the scope of the topic; the question of formulating rules on the topic; the methodology to be followed in formulating rules on the topic; the collection and exchange of data with respect to international watercourses; and future work on the topic.²³⁵

201. In paragraph 4 (*d*) of resolution 34/141 of 17 December 1979, the General Assembly recommended that the Commission should continue its work on the topic, taking into account the replies from Governments to the questionnaire prepared by the Commission and the views expressed on the topic in debates in the General Assembly.

202. At its thirty-second session, in 1980, the Commission had before it the second report of the Special Rapporteur,²³⁶ as well as replies received from the Governments of four Member States.²³⁷ In his second report, the Special Rapporteur submitted the following six draft articles: "Scope of the present articles" (art. 1); "System States" (art. 2); "System agreements" (art. 4); "Parties to the negotiation and conclusion of system agreements" (art. 5); "Collection and exchange of information" (art. 6); "A shared natural resource" (art. 7). Also mentioned in the report was a draft article 3 on "Meaning of terms", the drafting of which had been deferred. After consideration of the second report, the Commission referred to the Drafting Committee the draft articles on the topic submitted by the Special Rapporteur. On the recommendation of the Drafting Committee, the Commission provisionally adopted at the same session draft articles 1 to 5 and X, which read as follows:

²³² *Yearbook ... 1978*, vol. II (Part Two), p. 148, paras. 158-159.

²³³ *Yearbook ... 1979*, vol. II (Part One), p. 143, document A/CN.4/320.

²³⁴ *Ibid.*, p. 178, document A/CN.4/324.

²³⁵ *Yearbook ... 1979*, vol. II (Part Two), pp. 163 *et seq.*, paras. 111-148.

²³⁶ *Yearbook ... 1980*, vol. II (Part One), p. 159, document A/CN.4/332 and Add.1.

²³⁷ *Ibid.*, p. 153, document A/CN.4/329 and Add.1.

Article 1. Scope of the present articles

1. The present articles apply to uses of international watercourse systems and of their waters for purposes other than navigation and to measures of conservation related to the uses of those watercourse systems and their waters.

2. The use of the waters of international watercourse systems for navigation is not within the scope of the present articles except in so far as other uses of the waters affect navigation or are affected by navigation.

Article 2. System States

For the purposes of the present articles, a State in whose territory part of the waters of an international watercourse system exists is a system State.

Article 3. System agreements

1. A system agreement is an agreement between two or more system States which applies and adjusts the provisions of the present articles to the characteristics and uses of a particular international watercourse system or part thereof.

2. A system agreement shall define the waters to which it applies. It may be entered into with respect to an entire international watercourse system, or with respect to any part thereof or particular project, programme or use provided that the use by one or more other system States of the waters of an international watercourse system is not, to an appreciable extent, affected adversely.

3. In so far as the uses of an international watercourse system may require, system States shall negotiate in good faith for the purpose of concluding one or more system agreements.

Article 4. Parties to the negotiation and conclusion of system agreements

1. Every system State of an international watercourse system is entitled to participate in the negotiation of and to become a party to any system agreement that applies to that international watercourse system as a whole.

2. A system State whose use of the waters of an international watercourse system may be affected to an appreciable extent by the implementation of a proposed system agreement that applies only to a part of the system or to a particular project, programme or use is entitled to participate in the negotiation of such an agreement, to the extent that its use is thereby affected, pursuant to article 3 of the present articles.

Article 5. Use of waters which constitute a shared natural resource

1. To the extent that the use of waters of an international watercourse system in the territory of one system State affects the use of waters of that system in the territory of another system State, the waters are, for the purposes of the present articles, a shared natural resource.

2. Waters of an international watercourse system which constitute a shared natural resource shall be used by a system State in accordance with the present articles.

Article X. Relationship between the present articles and other treaties in force

Without prejudice to paragraph 3 of article 3, the provisions of the present articles do not affect treaties in force relating to a particular international watercourse system or any part thereof or particular project, programme or use.

Draft article 6, entitled "Collection and exchange of information", was not considered by the Drafting Committee as it found that the important issues raised therein could not be adequately dealt with in the short time at its disposal. On the recommendation of the Drafting Committee, the Commission also adopted as a

working hypothesis, at least in the early stages of its work on the topic, the following note describing its tentative understanding of what was meant by the term "international watercourse system":

A watercourse system is formed of hydrographic components such as rivers, lakes, canals, glaciers and groundwater constituting by virtue of their physical relationship a unitary whole; thus, any use affecting waters in one part of the system may affect waters in another part.

An "international watercourse system" is a watercourse system, components of which are situated in two or more States.

To the extent that parts of the waters in one State are not affected by or do not affect uses of waters in another State, they shall not be treated as being included in the international watercourse system. Thus, to the extent that the uses of the waters of the system have an effect on one another, to that extent the system is international, but only to that extent; accordingly, there is not an absolute, but a relative, international character of the watercourse.

Furthermore, the Commission accepted the Drafting Committee's proposal to align the terminology used in the various language versions of the title of the topic so as to reflect the intended meaning more faithfully in the French version. Thus the French expression *voies d'eau internationales* had been changed to *cours d'eau internationaux*.²³⁸

203. In resolution 35/163 of 15 December 1980, the General Assembly, noting with appreciation the progress made by the Commission in the preparation of draft articles on the law of the non-navigational uses of international watercourses, recommended that the Commission proceed with the preparation of draft articles on the topic.

204. Due to the resignation from the Commission of the Special Rapporteur on the topic upon his election to the ICJ, the Commission was not in a position to take up the study of the topic at its thirty-third session, in 1981. In resolution 36/114 of 10 December 1981, the General Assembly recommended that the Commission, taking into account the written comments of Governments, as well as views expressed in debates in the General Assembly, should continue its work aimed at the preparation of draft articles on the topic.

205. At its thirty-fourth session, in 1982, the Commission appointed Mr. Jens Evensen Special Rapporteur for the topic.²³⁹ The Commission had before it at that session replies received from the Governments of two Member States to the Secretariat's questionnaire.²⁴⁰

²³⁸ See the report on the Commission's work on the topic at its thirty-second session, *Yearbook ... 1980*, vol. II (Part Two), pp. 108 et seq., paras. 85-98.

²³⁹ *Yearbook ... 1982*, vol. II (Part Two), p. 121, para. 250.

²⁴⁰ *Yearbook ... 1982*, vol. II (Part One), p. 192, document A/CN.4/352 and Add.1.

As of 22 July 1983, the Governments of the following 32 Member States had submitted replies to the Commission's questionnaire: Argentina; Austria; Bangladesh; Barbados; Brazil; Canada; Colombia; Ecuador; Finland; France; Germany, Federal Republic of; Greece; Hungary; Indonesia; Libyan Arab Jamahiriya; Luxembourg; Netherlands; Nicaragua; Niger; Pakistan; Philippines; Poland; Portugal; Spain; Sudan; Swaziland; Sweden; Syrian Arab Republic; United States of America; Venezuela; Yemen; Yugoslavia.

Also circulated at that session was the third report on the topic submitted by the former Special Rapporteur, who had started preparing it prior to his resignation from the Commission in 1981.²⁴¹ In resolution 37/111 of 16 December 1982, the General Assembly recommended that, taking into account the comments of Governments, whether in writing or in debates in the General Assembly, the Commission should continue its work aimed at the preparation of drafts on all topics in its current programme.

206. From the outset of its work, the Commission has recognized the diversity of international watercourse systems; their physical characteristics and the human needs they serve are subject to geographical and social variations similar to those found in other connections throughout the world. Yet it has also been recognized that certain common watercourse characteristics exist, and that it is possible to identify certain principles of international law already existing and applicable to international watercourse systems in general. Mention was made of such concepts as the principle of good-neighbourliness and *sic utere tuo ut alienum non laedas*, as well as the sovereign rights of riparian States. What was needed was a set of draft articles that would lay down principles regarding the non-navigational uses of international watercourses in terms sufficiently broad to be applied to all international watercourse systems, while at the same time providing the means by which the articles could be applied or modified to take into account the singular nature of an individual watercourse system and the varying needs of the States in whose territory part of the waters of such a system were situated.

B. Consideration of the topic at the present session

207. At the present session, the Commission had before it the first report submitted by the newly appointed Special Rapporteur (A/CN.4/367).²⁴² It contained, as a basis for discussion, an outline for a draft convention on the law of the non-navigational uses of international watercourses, consisting of 39 articles²⁴³ in six chapters as follows:

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

²⁴¹ *Ibid.*, p. 65, document A/CN.4/348. That report contained, *inter alia*, the following draft articles: "Equitable participation" (art. 6); "Determination of equitable use" (art. 7); "Responsibility for appreciable harm" (art. 8); "Collection, processing and dissemination of information and data" (art. 9); "Environmental pollution and protection" (art. 10); "Prevention and mitigation of hazards" (art. 11); "Regulation of international watercourses" (art. 12); "Water resources and installation safety" (art. 13); "Denial of inherent use preference" (art. 14); "Administrative management" (art. 15); and "Principles and procedures for the avoidance and settlement of disputes" (art. 16).

²⁴² Reproduced in *Yearbook ... 1983*, vol. II (Part One).

²⁴³ The texts of these draft articles are reproduced in footnotes 245 to 255 and 258 below.

*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**Article 37. Adjudication by the International Court of Justice, another international court or a permanent or ad hoc arbitral tribunal**Article 38. Binding effect of adjudication*

CHAPTER VI. FINAL PROVISIONS

Article 39. Relationship to other conventions and international agreements

208. The Commission also had before it a note presented by one of its members (A/CN.4/L.353) concerning 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" approved by the Governing Council of UNEP.

209. The first report of the Special Rapporteur was considered by the Commission at its 1785th to 1794th meetings, from 20 June to 1 July 1983. Noting that the Special Rapporteur's intention was to present a comprehensive outline for a draft convention, in order to facilitate concrete discussion of the scope, approach and methodology to be followed with regard to the topic, as well as of specific draft articles and the principles to be reflected therein, the Commission proceeded to a discussion of the report as a whole. Within that framework, it focused attention on the approach suggested by the Special Rapporteur concerning definition of the term "international watercourse system" (art. 1 of the outline), as well as on other general principles to be reflected in the draft. A brief indication of the main trends of the debate and possible conclusions deriving therefrom, in particular as regards the matters just mentioned, is given below for the information of the General Assembly.²⁴⁴

210. In presenting his first report, the Special Rapporteur stressed that the first point to be borne in mind was the special nature of the topic, which involved not only legal questions, but also a delicate political aspect. Each international watercourse had its own special characteristics and its own set of problems, but all international watercourses had features in common and followed general laws that must inevitably leave their imprint on the administration and management of international watercourse systems in general. He therefore agreed with the approach previously followed by the Commission that system agreements should, where necessary, be drawn up for the detailed regulation of given watercourse systems, which in no way precluded a modern framework agreement laying the foundations for system agreements of that kind.

211. In his report he presented the outline of such a framework agreement, consisting of 39 tentative draft articles, with the possibility of adding further articles if necessary. He emphasized the need to view the questions involved as a whole, not in isolation, given the delicate political nature of the topic. Specific texts were therefore presented; only from reactions thereto would he be able to judge whether he had dealt with the main issues and struck the right balance between them.

²⁴⁴ Thus detailed comments concerning the structure of the outline, the arrangement or drafting of articles and detailed analyses of various provisions are excluded from this general indication of the main trends which emerged from the debate.

212. The Special Rapporteur explained that the draft framework agreement included articles setting forth provisions based on extensive State practice, on general principles of international law and on the provisions of the Charter of the United Nations, as well as provisions reflecting the progressive development of international law in matters pertaining to problems inherent in the use, management and administration of international watercourse systems. At the same time, it contained provisions that were to be regarded not as strictly mandatory rules but as provisions that might serve as guidelines for system States with regard to the organization, management and administration of such resources, jointly or unilaterally.

213. Certain basic principles were taken into account in preparing the outline, the Special Rapporteur stressed. Among those he mentioned were: the obligation of States to engage in negotiations in solving outstanding issues; the concept of an international watercourse system as a shared natural resource; and the obligation to co-operate in the management and administration of an international watercourse system. He referred to the sovereignty of States, but also to a number of principles which he termed "legal standards". They applied throughout the draft and States would be required to observe them, although a measure of discretion would be inherent in the notion. One such standard related to "reasonable and equitable participation" in, or sharing in a "reasonable and equitable manner", the watercourse system and its uses. Another standard was that problems connected with the management and administration of an international watercourse, and negotiations and differences of view in that regard, had to be resolved "on the basis of good faith and good-neighbourly relations". He also referred to the standard relating to the attainment of "optimum utilization" and to that relating to the requirement that States should refrain from uses or activities that caused "appreciable harm" to the rights or interests of neighbouring States.

214. Turning to the specific draft articles, the Special Rapporteur referred in detail to the contents of some of them and to their relationship to the principles and standards just described. He invited members of the Commission to react to his general approach and to the general principles and standards he had outlined, to indicate whether any additional, essential issues needed to be covered and whether he had struck a reasonable balance between the various interests. The attention of members was drawn to certain specific articles or chapters upon which comment was requested (such as articles 1 and 6 and chapters II and V).

1. GENERAL APPROACH SUGGESTED BY THE SPECIAL RAPPORTEUR

215. Virtually all members who spoke on the topic stressed its importance and special nature. It was emphasized by a number of speakers that fresh water was a source of life for all living things and that its quantity and quality were of fundamental importance for most

countries, particularly the developing countries. References were made to the vital role of fresh water resources—both in the past and at present—in various regions of the world, and to the increasing demands placed on fresh water resources by the ever-expanding uses of watercourses due to such factors as population growth, the impact of technology and the rate and promotion of economic development. When international watercourses were involved, these often competing demands could entail serious consequences, give rise to disputes between States, and even threaten peace. Thus emphasis was also placed on the political delicacy and difficulty of the task entrusted to the Commission.

216. With regard to the *methodology* to be followed in continuing its work on the topic, there was on the whole general agreement on the approach advocated by the Special Rapporteur that the Commission should follow the course begun in 1980, namely the preparation of draft articles for inclusion in a framework agreement which would contain general, residual rules applicable to all international watercourse systems, designed to be supplemented where necessary by distinct and detailed system agreements between States of an international watercourse system which would take into account their particular needs and the characteristics of the watercourse system concerned. By adopting that approach, it was stressed, the unique nature and legal circumstances of each international watercourse would be preserved, while at the same time the features common to all international watercourses would be recognized. That practical and flexible approach was seen as fostering co-operation among riparian States, rather than creating divisions among them. The risk that not all relevant States would accept the framework agreement was one common to multilateral treaty-making in general and could not detract from the influence such an agreement would have as regards both the codification of the relevant law and its progressive development.

217. Certain members, however, urged that a fresh approach to the topic be taken. A framework agreement such as that envisaged could, at the most, lay down only the most general of rules and could probably contain only guidelines for the conduct of States. In addition, such an agreement was of doubtful utility, since it would require acceptance by all riparian States of an international watercourse system in order to have any practical effect.

218. In summarizing the debate, the Special Rapporteur concluded that certain *basic elements* had emerged from the discussion as being necessary or desirable features of the framework agreement to be prepared: the framework agreement should be a comprehensive one, covering most of the important issues that could arise; the principles embodied in it should be framed as general principles, partly in the form of legal standards; system agreements for special watercourses, for special uses, for specific installations or specific parts of a watercourse should be encouraged (there could also be system agreements of a regional nature); and the framework agreement should involve both the

codification and progressive development of international law.

219. As to the question of the *character* of the provisions to be included in a framework agreement, many members agreed with the Special Rapporteur that the draft should include not only binding provisions, embodying elements of codification based on existing State practice, decisions of tribunals and the writings of learned scholars, but also provisions entailing guidelines of a general nature embodying, *inter alia*, progressive development. Such principles, pertaining, for example, to what was practical or necessary in a given case, could prove indispensable in shaping practice regarding fluvial administration and co-operation, as well as progressive development of rules of law, and could also provide States with the legal and political impetus to draw up modern system agreements.

220. None the less, some members voiced doubts. According to one view, the Commission, as a body of experts which traditionally drafted texts that later formed the basis for treaties setting out legal rights and obligations, should not prepare a draft containing recommendations or guidelines. Also, the inclusion of qualifying phrases (such as "to the extent possible" or "where deemed appropriate") only highlighted the need for effective machinery for the settlement of disputes. Another member maintained that the draft could only take the form of a set of guidelines for co-riparian States to assist them in drawing up system agreements.

221. According to a number of speakers, the Special Rapporteur's outline and his suggested articles seemed on the whole acceptable and offered reasonable and moderate solutions which struck a balance between all interests involved. The draft appeared to reflect the fact that, apart from the State at the source of an international watercourse and the State at its mouth, riparian States were both upstream and downstream States. On the other hand, certain members feared that a proper balance had not yet been struck and that the concept of sovereignty, particularly of upstream States, had not been given sufficient attention. In addition, it was said that there appeared to be a lack of balance between substance and procedure: while the provisions on substance did not provide States with adequate guidance as to their substantive rights, the provisions on triggering dispute-settlement machinery were perhaps too detailed and concrete. The Special Rapporteur indicated that, in his future work, he would bear in mind the comments made regarding whether the draft articles struck a reasonable balance between the various interests involved.

222. There was broad agreement that the Special Rapporteur's outline could, generally speaking, be taken as the basis for further work on the topic. While comments were directed towards various principles, standards and provisions reflected in the outline, it appeared to most members that it touched upon the essential issues to be addressed in formulating a framework agreement on the topic.

223. Other elements for inclusion in the outline were mentioned by a few members, such as a reference to contiguous or successive rivers or to the legality of diversion of water from an international watercourse. Also suggested was the inclusion of a provision on international watercourses which formed international boundaries, although doubts were expressed in that regard.

224. As to work in the future, the Special Rapporteur said he hoped to revise his proposals in the light of the proceedings in the Commission and in the Sixth Committee of the General Assembly and to submit his second report to the Commission for consideration at its next session.

2. CHAPTERS AND ARTICLES INCLUDED IN THE OUTLINE PRESENTED BY THE SPECIAL RAPPORTEUR

(a) CHAPTER I. INTRODUCTORY ARTICLES

ARTICLE 1 (Explanation (definition) of the term "international watercourse system" as applied in the present Convention)²⁴⁵

225. In introducing article 1, the Special Rapporteur stated that, in response to requests made in the Sixth Committee of the General Assembly, he had endeavoured to formulate in a new article 1 a definition or explanation of the term "international watercourse system". He recalled that, at its thirty-second session, in 1980, the Commission had included in its report a note describing its tentative understanding of what was meant by that expression (see para. 202 above). In his view, such a definition should be concrete and avoid doctrinaire concepts which had not been accepted by some States, such as the "drainage basin" concept. It was not the purpose of the suggested new article 1 to create a superstructure from which legal principles could be derived, as that would defeat the object of drafting principles sufficiently flexible for adaptation to the special features of each individual international watercourse. Similarly, he had not itemized the consti-

²⁴⁵ Article 1 of the proposed outline read as follows:

"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."

tuent elements of an international watercourse system as had been done in the 1980 note. However, he had maintained the expressions "international watercourse system" and "system States" as being convenient descriptive tools sufficiently comprehensive to provide the necessary guidance.

226. The concept of "international watercourse system" was on the whole found acceptable. Emphasis was placed on the need to define the term in a purely descriptive manner, with no legal rules or principles being deduced therefrom. Some members stressed that the notion was flexible and relative; its use would not create an unduly rigid conceptual framework. It was evident that the term provided for as many systems as there were uses and that, within a given system, those parts in one riparian State which were not affected by uses of another riparian State were not treated as part of the international watercourse system governed by the articles. Thus, according to those members, the concept of "watercourse system" could be distinguished from the concept of "drainage basin", which depended on composite elements of a geographical, territorial and hydrological nature.

227. Most members agreed that the Commission, in its previous work on the topic, and the Special Rapporteur had been correct in not employing the concept of "drainage basin", which, though perhaps useful for geographical or scientific studies, was too wide and imprecise for the purposes of the draft articles. The term "drainage basin" was also apt to create a notion of a superstructure from which to draw the legal principles concerned. For these and other reasons, it was unlikely to attract wide support among States. It was noted by certain members, however, that in dealing with specific issues, such as pollution, the functional concept of "international watercourse system" might require taking into account activities occurring on land or the environment of the watercourse system in a broader sense. One view expressed was that the "drainage basin" concept was the preferred one, as watercourses were now coming to be viewed, particularly by countries which pursued a policy of economic integration, as a unit to be exploited jointly by the co-riparian States according to jointly formulated rules.

228. On the other hand, certain members found the use of the term "international watercourse system" unacceptable. In their view, the expression was synonymous with, if not slightly broader than, the concept of a "drainage basin"; both concepts had unacceptable consequences and were not justified in theory or practice. No State, it was argued, would agree to a national watercourse becoming international by virtue of the articles, or to a State unrelated to a watercourse being considered a "system State" and thus empowered to participate in decisions concerning its uses. According to this view, it was preferable to regard international watercourses as rivers crossing the territories of two or more States. It was also urged that the expression must be discarded, since it necessarily implied a unitary concept, which the Commission itself had recognized with

regard to the "drainage basin" concept, and was not a sound basis for preparing draft articles. The purported flexibility and relativity imported into the term rendered the very concept devoid of any meaning. According to some members, attempting to formulate a definition at this stage, before the provisions of the draft had been agreed upon, only hampered the Commission's work.

229. As to the text of article 1 of the Special Rapporteur's outline, a number of members expressed tentative agreement with its contents. It was considered quite adequate in its simplicity for the purpose for which it was intended. Support was expressed for the Special Rapporteur not having listed in the text the fresh water components of an international watercourse, which would inevitably have generated disagreements.

230. On the other hand, several other members indicated a preference not to draft a definitional article at this stage in view of the difficulties involved, but rather to proceed on the basis of a tentative understanding or working hypothesis of what the expression meant, as had been done by the Commission in 1980. In that connection, the desirability of maintaining the elements of the 1980 note of tentative understanding was pointed out by certain members, who referred in particular to the indication of fresh water components and the fuller exposition of the relative nature of the concept found in that note.

231. Yet other members urged caution in attempting to draft a definition of an "international watercourse system" that sought to be both descriptive and functional. The complexity of the issue was evidenced by the need to draft a unified definition of the term in order to avoid using it in different senses in the draft, and at the same time by the need to recognize that the idea of interdependence in a watercourse system must be understood in relative, not absolute terms. The remark was also made that, in fact, the problem of defining an "international watercourse system" or "drainage basin" was merely a quarrel over words; it was a problem of responsibility—defining the obligations of a State which disturbed the balance of nature—that lay at the root of the Commission's concern.

ARTICLE 2 (Scope of the present Convention) and ARTICLE 3 (System States)²⁴⁶

232. The Special Rapporteur noted that articles 2 and 3 of the outline reproduced with minor changes the texts of articles 1 and 2 provisionally adopted by the Com-

²⁴⁶ Articles 2 and 3 of the proposed outline read as follows:

"Article 2. Scope of the present Convention"

"1. The present Convention applies to uses of international watercourse systems and of their waters for purposes other than navigation and to measures of administration, management and conservation related to the uses of those watercourse systems and their waters.

"2. The use of the waters of international watercourse systems for 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."

mission at its thirty-second session (see para. 202 above). In article 2, paragraph 1, the words "administration, management and" had been added, and in article 3, the word "components" had been added. Neither article was extensively discussed, although divergent views were expressed by a few speakers as to the desirability of incorporating the changes suggested by the Special Rapporteur.

ARTICLE 4 (System agreements) and ARTICLE 5 (Parties to the negotiation and conclusion of system agreements)²⁴⁷

233. Articles 4 and 5 of the Special Rapporteur's outline reproduced verbatim the texts of articles 3 and 4 provisionally adopted by the Commission at its thirty-second session (see para. 202 above). Although their importance was noted, the articles were the subject of only limited comment. With regard to article 4, comments were made concerning the ambiguity of paragraph 3, in particular the opening phrase "In so far as the uses of an international watercourse system may require". With regard to article 5, it was suggested that the qualification "to an appreciable extent" in paragraph 2 be deleted as being imprecise and thus an unreliable guideline.

234. Several members expressed the opinion that articles 1 to 5 and X and the note, provisionally adopted by the Commission at its thirty-second session, should no longer be considered in the first reading of the draft, and that the Special Rapporteur should begin his next report with the new article 6. Other members expressed

(Footnote 246 continued.)

"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."

²⁴⁷ Articles 4 and 5 of the proposed outline read as follows:

"Article 4. System agreements

"1. A system agreement is an agreement between two or more system States which applies and adjusts the provisions of the present Convention to the characteristics and uses of a particular international watercourse system or part thereof.

"2. A system agreement shall define the waters to which it applies. It may be entered into with respect to an entire international watercourse system, or with respect to any part thereof or particular project, programme or use, provided that the use by one or more other system States of the waters of an international watercourse system is not, to an appreciable extent, affected adversely.

"3. In so far as the uses of an international watercourse system may require, system States shall negotiate in good faith for the purpose of concluding one or more system agreements."

"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."

their concern with regard to certain aspects of the articles provisionally adopted.

(b) CHAPTER II. GENERAL PRINCIPLES: RIGHTS AND DUTIES OF SYSTEM STATES

235. It was generally recognized that the provisions to be included in chapter II of the outline would be among the most important of the draft, as they would set out the rights and obligations of States. The general principles and standards which the Special Rapporteur had indicated as guiding his preparation of the outline (see para. 213 above) were commented on and found in principle to constitute an acceptable starting-point for the drafting of concrete provisions. The general principles should, it was said, be carefully drafted, bearing in mind State practice and other relevant principles, such as the right of permanent sovereignty over natural resources and the maxim *sic utere tuo ut alienum non laedas*. Certain members, however, indicated that the provisions included in the chapter created great difficulties and were too rigid.

ARTICLE 6 (The international watercourse system—a shared natural resource. Use of this resource)²⁴⁸

236. It was recalled that article 6 of the Special Rapporteur's outline was based on article 5 as provisionally adopted by the Commission at its thirty-second session (see para. 202 above). Certain drafting modifications were introduced by the Special Rapporteur in his revised text of the article and a second sentence had been added to paragraph 1, reading: "Each system State is entitled to a reasonable and equitable participation (within its territory) in this shared resource".

237. A number of members supported the inclusion of article 6 in the envisaged framework agreement. According to this view, it constituted a concept of paramount importance for the administration and management of international watercourse systems and was a vital and living example of the interdependence of States and their activities. It represented the core of the Special Rapporteur's draft and provided the basis upon which the other articles of chapter II were built. Article 6 highlighted the fact that system States' rights were not absolute, but correlative, at least to the extent that a use of the waters in one system State affected their use in

²⁴⁸ Article 6 of the proposed outline read as follows:

"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."

another. It was also said that the idea of sharing underlay the right to development; the exercise of permanent sovereignty over natural resources should not preclude the obligation of States to share a watercourse system with other States. The concept of sharing was not new, it was noted, and reference was also made to the support expressed in the Sixth Committee of the General Assembly for article 5 provisionally adopted by the Commission in 1980, as well as to the UNEP draft principles referred to earlier (see para. 208 above) and to relevant resolutions adopted in various United Nations forums.

238. According to one view expressed, the draft seemed to constitute the beginning of a substantial contribution to the formulation of rules to govern the common heritage of mankind; water of a watercourse formed part of the common heritage of the co-riparian States and must be used equitably. Several members, however, felt that the concept of the common heritage of mankind was entirely outside the scope of the topic under consideration. That concept concerned resources beyond the limits of national jurisdiction, applied to wholly different circumstances and was designed to meet needs entirely different from those related to the concept of shared natural resources.

239. Certain members believed that, while the underlying concept of an international watercourse constituting a shared natural resource might have its place in the draft, the formulation presented in article 6 of the Special Rapporteur's outline required clarification and further refinement. It was maintained that, if the concept was employed solely in order to stress the duty of the upstream State to allow the water to flow downstream, it might be acceptable for the purpose of bringing out the respective rights and duties of the States concerned, but it could never be the basis of new rights and obligations. The article should provide that each State was entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international watercourse system. In that connection, it was said that the text of article 5 as provisionally adopted in 1980 was to be preferred to the modified version presented by the Special Rapporteur. The earlier version made clear that it was the waters of an international watercourse that were to be treated as a shared natural resource and that it was in the beneficial use of such waters that each riparian State was entitled to a reasonable and equitable share. The use of the term "shared" should not lead to the mistaken conclusion that sharing must be equal, which was not possible, since a watercourse was not equally divided among the States through which it flowed. Only distributive, not commutative, justice was possible because States equitably shared their rights and obligations according to their location. Thus another basic principle was involved, that of equity, or, in other words, proportionality.

240. To certain other members, the drafting of article 6 was completely tautological. According to that view, if no principles or rules of international law on

shared resources existed at present, the concept should not be employed; but if such principles did exist, it was preferable to adopt a simple formulation stating that the international watercourse system was governed by the principles and rules common to shared natural resources. The law in the field was developing and it was not advisable for the Commission to go any further into the question.

241. Some members felt that article 6 should be left aside or not included in the draft. It was stressed by certain members that the precise contours and parameters of the concept had not yet been adequately defined. The concept was deemed to be unclear and its consequences even more so. In addition, it had proven to be highly controversial, as evidenced by the relevant background to the decisions taken by the General Assembly concerning the UNEP draft principles referred to earlier (para. 208). In addition, it was said that the consequences of such an ill-defined concept could have an adverse impact on the fundamental right of permanent sovereignty over natural resources and on the new international economic order. In the context of the sharing principle, while it was no doubt true that the downstream State had a right to something, it was nevertheless neither realistic nor fair to ask any other riparian State to accept an absolute denial of its own sovereign right to use the water within its territory while it was there. The view was also expressed that it was completely pointless to treat an international watercourse as a shared natural resource, since rules of international law applicable to such a concept did not exist.

ARTICLE 7 (Equitable sharing in the uses of an international watercourse system and its waters) and ARTICLE 8 (Determination of reasonable and equitable use)²⁴⁹

242. Certain members referred specifically to articles 7 and 8 of the Special Rapporteur's outline. It was noted

²⁴⁹ Articles 7 and 8 of the proposed outline read as follows:

"Article 7. *Equitable sharing in the uses of an international watercourse system and its waters*

"An international watercourse system and its waters shall be developed, used and shared by system States in a reasonable and equitable manner 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."

"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;

(Continued on next page.)

that the legal standards laid down in article 7 were amplified by the non-exhaustive list of factors in article 8 relevant in determining equitable sharing. The link between these two articles and article 9 was also noted.

243. As to the legal standards reflected in articles 7 and 8, support was expressed by some members for the use of such expressions as "reasonable and equitable manner" and "optimum utilization". On the other hand, some members found the expressions vague or unnecessary. As to the expressions "good faith" and "good-neighbourly relations", it was said that, while it was impossible to impose good will on States, it was essential to the solution of international watercourse problems and providing an obligation to act in good faith was probably as much as could be achieved in that direction. It was, moreover, urged that more prominence be given to the principle of good-neighbourliness, the importance of which was evident from the inclusion of the item on the General Assembly's agenda. On the other hand, doubts were voiced about accepting that concept as a legal principle on a par with that of good faith; nothing would be added to the latter notion by involving good-neighbourly relations as a supplementary guide which was less relevant than the concept of sharing. The need to refer to good faith was also questioned as, in any event, it was a universal concept governing the conduct of all States.

(Footnote 249 continued.)

"(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 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."

244. While some members expressed support for article 7 as a whole, others found the article defective and suggested new formulations. The opinion was expressed that the framework agreement should recognize the right of each State to use its share of water, as well as the international watercourse system within its territory, in accordance with its own policies, programmes and principles.

245. Regarding article 8, and particularly paragraph 1, certain members favoured the inclusion of an article such as that presented, which would indicate a range of policy factors, not rigid rules, providing guidance as to what constituted reasonable and equitable use. It was noted, however, that the list of such factors required careful reviewing so as to make it objective and to give due weight to the rights of upper and lower riparian States. One element mentioned as a possible addition to the list of factors was that of compensation extended by one system State to other system States, such compensation not necessarily being linked to the watercourse system in question. Other members believed the article as presented did not provide much guidance for solving problems as it was too long, too complicated and repetitive and mixed both subjective and objective factors. It was stressed that each State determined its own priorities in the light of its requirements.

ARTICLE 9 (Prohibition of activities with regard to an international watercourse system causing appreciable harm to other system States)²⁵⁰

246. Article 9 of the Special Rapporteur's outline was approved by most members who spoke about it. It was considered essential to emphasize the duty of system States to refrain from uses or activities that might cause appreciable harm to the rights or interests of other system States. It was said that, taken together with article 7, the two articles constituted a legal standard: reasonable and equitable use must not cause appreciable harm. Certain members, however, felt that the term "appreciable harm" was too vague and required clarification or replacement, such as by the term "material harm".

247. It was also stressed that the system States concerned should agree on what constituted appreciable harm, since a simple overall definition was not possible. Such a joint determination would be facilitated, it was said, by relying on fact-finding or technical experts at the initial stage, rather than the immediate invocation of procedures for dispute settlement. Furthermore, the need was stressed to formulate a positive rule calling for

²⁵⁰ Article 9 of the proposed outline read as follows:

"Article 9. Prohibition of activities with regard to an international watercourse system causing appreciable harm to other system States

"A system State shall refrain from and prevent (within its jurisdiction) uses or activities with regard to a watercourse system that may cause appreciable harm to the rights or interests of other system States, unless otherwise provided for in a system agreement or other agreement."

co-operation among the States concerned; States had a legal duty to co-operate in the solution of problems resulting from uses of the waters of international watercourses.

248. Certain members also pointed to the link between, *inter alia*, article 9 and problems of State responsibility and international liability for injurious consequences arising out of acts not prohibited by international law. Those relationships would require further careful study as the outline was discussed in detail.

(c) CHAPTER III. CO-OPERATION AND MANAGEMENT IN REGARD TO INTERNATIONAL WATERCOURSE SYSTEMS

249. The Special Rapporteur, in introducing his first report, stressed that a principle of fundamental importance was the obligation to co-operate in the joint management and administration of an international watercourse system, a legal obligation that stemmed from the broader and somewhat elusive principles of good-neighbourly relations and the principles laid down in Articles 1 and 2 and Chapters VI and IX of the Charter of the United Nations, under which Member States undertook to achieve international co-operation and to settle their international disputes by peaceful means and in good faith. The principle of co-operation in the joint management of watercourses enjoyed wide support in the practice of States, although it obviously had to be made conditional upon what was practical, reasonable and necessary in each instance. Article 10²⁵¹ of the proposed outline set out general principles of co-operation and management.

250. In the Special Rapporteur's view, one essential aspect of international co-operation involved notification of programmes planned by one system State that might cause appreciable harm to the rights or interests of another system State. The relevant provisions were to be found in articles 11 to 14²⁵² of the proposed outline

²⁵¹ Article 10 of the proposed outline read as follows:

"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."

²⁵² Articles 11 to 14 of the proposed outline read as follows:

"Article 11. *Notification to other system States.*
Content of notification

"1. Before a system State undertakes, authorizes or permits a project or programme or alteration or addition to existing projects and programmes with regard to the utilization, conservation, protection or management of an international watercourse system

and their basic elements derived from established principles of international law, such as the obligation to act

which may cause appreciable harm to the rights or interests of another system State or other system States, the system State concerned shall submit at the earliest possible date due notification to the relevant system State or system States about such projects or programmes.

"2. The notification shall contain *inter alia* sufficient technical and other necessary specifications, information and data to enable the other system State or States to evaluate and determine as accurately as possible the potential for appreciable harm of such intended project or programme."

"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."

"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 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."

"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

(Continued on next page.)

in good faith and in keeping with good-neighbourly relations, the obligation not to cause appreciable harm to neighbouring States, and the obligation to solve outstanding issues exclusively by peaceful means.

251. A significant matter with regard to the co-operation and joint management of international watercourse systems was, according to the Special Rapporteur, the clear trend in State practice and in the work of United Nations organizations towards institutionalization of the requisite machinery, something that frequently involved the establishment of joint commissions and the collection, processing and exchange of information and data on a regular basis. Since those issues were highly relevant, he had dealt with them in some detail in articles 15 to 19.²⁵³

(Footnote 252 continued.)

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."

²⁵³ Articles 15 to 19 of the proposed outline read as follows:

*"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."

*"Article 16. Collection, processing and dissemination
of information and data"*

"1. In order to ensure the necessary co-operation between

252. Most members of the Commission agreed that a framework agreement along the lines envisaged should include provisions on co-operation and management in regard to international watercourse systems. Without examining the details raised in the discussions, it may be noted that, while some members believed that the provisions of chapter III struck the right balance between conflicting concerns and thus could be supported, others commented that certain provisions relating to the procedures for notification, protests, etc. (arts. 11 to 14) appeared too rigid and went too far in providing for the suspension or blockage by one system State of projects or programmes planned by another system State.

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 transit to the United Nations or the relevant specialized agencies the information and data available under this article."

"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."

*"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."

"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."

253. Some members proposed that articles 11 to 14 should be placed in chapter II, in the light of the clear obligation not to cause appreciable harm (art. 9), instead of in chapter III (Co-operation and management), in which the obligations set forth had less clear outlines.

254. It was suggested that chapter III could be supplemented by ensuring that a State which ran the risk of being harmed should not be able to veto the execution of a project or programme by another State, that delays should be avoided which might be prejudicial to the State making a notification of its intention to undertake a project or programme, and that the assessment of appreciable harm which might be caused by such a project or programme should not be left to the sole discretion of either the State making the notification or the State receiving such a notification. It was also suggested by certain members that the provisions of chapter III should be subject to some form of compulsory dispute-settlement procedure.

255. It was generally agreed that these provisions, both in detail and as a whole, should be re-examined by the Special Rapporteur with a view to balancing equitably the interests of the States concerned.

(d) CHAPTER IV. ENVIRONMENTAL PROTECTION, POLLUTION, HEALTH HAZARDS, NATURAL HAZARDS, REGULATION AND SAFETY, USE PREFERENCES, NATIONAL OR REGIONAL SITES

256. While chapter IV of the Special Rapporteur's outline was not the subject of detailed debate, it was generally agreed by those members of the Commission who addressed themselves to it that its provisions, articles 20 to 30,²⁵⁴ dealt with a vital and important issue

²⁵⁴ Articles 20 to 30 of the proposed outline read as follows:

"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 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."

"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;

relating to international watercourses. It was noted that the provisions in chapter IV concerned not only an in-

"(b) To maintain the quality and quantity of the waters of the international watercourse system at the level necessary for the use thereof for potable and other domestic purposes;

"(c) To permit the use of the waters for irrigation purposes and industrial purposes;

"(d) To safeguard the conservation and development of aquatic resources, including fauna and flora;

"(e) To permit to the extent possible the use of the watercourse system for recreational amenities, with special regard to public health and aesthetic considerations;

"(f) To permit to the extent possible the use of the waters by domestic animals and wildlife."

"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."

"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."

"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."

"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 en-

(Continued on next page.)

ternational watercourse system itself, but also the surrounding area, which formed an ecological whole with

(Footnote 254 continued.)

vironment, 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."

"Article 26. Control and prevention of water-related hazards"

"1. System States shall co-operate in accordance with the provisions of the present Convention with a view to the prevention and mitigation of water-related hazardous conditions and occurrences, as the special circumstances warrant. Such co-operation should, *inter alia*, entail the establishment of joint measures and régimes, including structural or non-structural measures, and the effective monitoring in the international watercourse system concerned of conditions susceptible of bringing about hazardous conditions and occurrences such as floods, ice accumulation and other obstructions, sedimentation, avulsion, erosion, deficient drainage, drought and salt-water intrusion.

"2. System States shall establish an effective and timely exchange of information and data and early warning systems that would contribute to the prevention or mitigation of emergencies with respect to water-related hazardous conditions and occurrences relating to an international watercourse system."

"Article 27. 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."

"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."

the system concerned. It was urged that caution be exercised in this field in order to avoid establishing rules which might lead to unnecessary constraints or complications in the uses of international watercourses.

257. Some members made reference to various specific articles included in chapter IV of the outline and welcomed the Special Rapporteur's suggestions. Support was expressed for the definition of pollution (art. 22), the rejection of the distinction between "existing" and "new" pollution (art. 23) and the exclusion of a provision dealing with the protection of watercourses in the event of armed conflict (art. 28). A few members, however, made suggestions or expressed hesitations with regard to the last-mentioned issue.

(e) CHAPTER V. SETTLEMENT OF DISPUTES

258. In his introduction, the Special Rapporteur explained that, in articles 31 to 38²⁵⁵ of chapter V of the

"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."

"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."

²⁵⁵ Articles 31 to 38 of the proposed outline read as follows:

"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."

outline, relating to the settlement of disputes, he had used as a natural point of departure the obligations laid

"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."

"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."

"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

down in Articles 2 and 33 of the Charter of the United Nations. Having examined a large number of multilateral and bilateral treaties, he had concluded that the provisions of part XV and annexes V to VIII of the United Nations Convention on the Law of the Sea²⁵⁶ were relevant, although they could not always be ap-

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."

"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."

"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."

"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."

"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."

²⁵⁶ *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.

plied uncritically to international waterways. He also referred to other international instruments, including the 1949 Revised General Act for the Pacific Settlement of International Disputes²⁵⁷ and regional arrangements which had afforded him useful guidance. While not anticipating at this stage a detailed consideration of the various articles in the chapter, the Special Rapporteur invited comments, in the light of experience drawn from the Third United Nations Conference on the Law of the Sea, as to whether provision should be made for compulsory conciliation procedures (on a general basis or only for specific issues) or even for compulsory procedures entailing binding decisions with regard to certain disputes. In addition, he drew attention to another type of settlement procedure, that of establishing an expert body or commission to make recommendations to system States in cases of dispute.

259. Although a few members of the Commission felt it was premature or inadvisable to include provisions on settlement of disputes in the proposed outline, most members who spoke on the subject stressed the necessity of including such provisions. General support was expressed for the basic provision contained in article 31 regarding the obligation of system States to settle their disputes by peaceful means. While the Commission did not embark on a detailed consideration of the articles contained in chapter V, most members agreed that they

should be supplemented by provisions on compulsory conciliation procedures. In addition, members generally welcomed the suggestion that provision be made for expert fact-finding procedures, such as through recourse to expert or technical commissions prior to the invocation of more formal procedures. Certain members, moreover, supported the inclusion of binding third-party dispute-settlement provisions. Some suggested such provisions should apply to the framework agreement as a whole, while others suggested that they might apply to only certain articles or chapters of the draft. In that regard, mention was made in particular of issues pertaining to the management and administration of an international watercourse system.

(f) CHAPTER VI. FINAL PROVISIONS

260. Few remarks, if any, were made concerning the text of article 39²⁵⁸ of the Special Rapporteur's outline, which was based on the text of article X as provisionally adopted by the Commission at its thirty-second session (see para. 202 above).

²⁵⁸ Article 39 of the proposed outline read as follows:

"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."

²⁵⁷ United Nations, *Treaty Series*, vol. 71, p. 101.

Chapter VII

RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS (SECOND PART OF THE TOPIC)

A. Introduction

261. The topic entitled "Relations between States and international organizations" has been studied by the Commission in two parts. The first part, relating to the status, privileges and immunities of the representatives of States to international organizations, was completed by the Commission at its twenty-third session, in 1971, when it adopted a set of draft articles and submitted them to the General Assembly.²⁵⁹

262. That set of draft articles on the first part of the topic was subsequently referred by the General Assembly to a diplomatic conference which was convened in Vienna in 1975 and adopted the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.²⁶⁰

263. At its twenty-eighth session, in 1976, the Commission began its consideration of the second part of the topic, namely "Relations between States and international organizations", which deals with the status, privileges and immunities of international organizations, their officials, experts and other persons engaged in their activities who are not representatives of States.²⁶¹

264. The second part of the topic has been the subject of two reports submitted by the previous Special Rapporteur, the late Judge Abdullah El-Erian.

265. The first (preliminary) report was submitted by the Special Rapporteur at the twenty-ninth session of the Commission, in 1977.²⁶² At the conclusion of its discussion, the Commission authorized the Special Rapporteur to continue the study of the second part of the topic along the lines indicated in the preliminary report. The Commission also agreed that the Special Rapporteur should seek additional information and expressed the hope that he would carry out research in the normal way, including investigations into the agreements and practices of international organizations, whether within or outside the United Nations family,

and also the legislation and practice of States.²⁶³ These conclusions by the Commission regarding its work on the second part of the topic were subsequently endorsed by the General Assembly in paragraph 6 of its resolution 32/151 of 19 December 1977.

266. Having been authorized to seek additional information to assist the Special Rapporteur and the Commission, the legal Counsel of the United Nations, in a letter of 13 March 1978²⁶⁴ addressed to the heads of the specialized agencies and IAEA, circulated a questionnaire aimed at eliciting information concerning the practice of the specialized agencies and IAEA relating to the status, privileges and immunities of such organizations and of their officials, experts and other persons engaged in their activities not being representatives of States. The replies to the questionnaire were intended to supplement the information gathered from a similar questionnaire circulated to the same organizations on 5 January 1965, which formed the basis of a study prepared by the Secretariat in 1967 entitled "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities".²⁶⁵

267. The previous Special Rapporteur for the topic submitted his second report to the Commission at its thirtieth session, in 1978.²⁶⁶

268. The Commission discussed the second report of the Special Rapporteur at that same session.²⁶⁷ Among the questions raised in the course of the discussion were: definition of the order of work on the topic and advisability of conducting the work in different stages, beginning with the legal status, privileges and immunities of international organizations; special position and regulatory functions of operational international organizations established by Governments for the express purpose of engaging in operational—and sometimes even commercial—activities, and difficulty of applying to them the general rules of international

²⁵⁹ *Yearbook ... 1971*, vol. II (Part One), pp. 284 *et seq.*, document A/8410/Rev.1, chap. II, sects. C and D.

²⁶⁰ See footnote 201 above.

²⁶¹ *Yearbook ... 1976*, vol. II (Part Two), p. 164.

²⁶² *Yearbook ... 1977*, vol. II (Part One), p. 139, document A/CN.4/304.

²⁶³ *Yearbook ... 1977*, vol. II (Part Two), p. 127, paras. 93-95.

²⁶⁴ *Yearbook ... 1978*, vol. II (Part Two), p. 146, paras. 152-153.

²⁶⁵ *Yearbook ... 1967*, vol. II, p. 154, document A/CN.4/L.118 and Add.1 and 2.

²⁶⁶ *Yearbook ... 1978*, vol. II (Part One), p. 263, document A/CN.4/311 and Add.1.

²⁶⁷ *Yearbook ... 1978*, vol. I, pp. 260-269, 1522nd meeting, paras. 22-45, 1523rd meeting, paras. 6-49, 1524th meeting, para. 1; and *Yearbook ... 1978*, vol. II (Part Two), pp. 146-147, paras. 155-156.

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.

269. At the end of its debate, the Commission approved the conclusions and recommendations set out in the second report of the previous Special Rapporteur.²⁶⁸ From those conclusions it was evident that:

(a) General agreement existed both in the Commission and in the Sixth Committee of the General Assembly on the desirability of the Commission taking up the study of the second part of the topic "Relations between States and international organizations";

(b) The Commission's work on the second part of the topic should proceed with great prudence;

(c) For the purposes of its initial work on the second part of the topic, the Commission should adopt a broad outlook, inasmuch as the study should include regional organizations. The final decision on whether to include such organizations in the eventual codification could be taken only when the study was completed;

(d) The same broad outlook should be adopted in connection with the subject-matter, inasmuch as the question of priority would have to be deferred until the study was completed.

270. At its thirty-first session, in 1979, the Commission appointed Mr. Leonardo Díaz González Special Rapporteur for the present topic to succeed Mr. Abdullah El-Erian, who had resigned on his election to the ICJ.²⁶⁹

271. Owing to the priority that the Commission had, upon the recommendation of the General Assembly, assigned to the conclusion of its studies on a number of topics in its programme of work with respect to which the process of preparing draft articles was already advanced, the Commission did not take up the study of the present topic during its thirty-second session, in 1980, or during subsequent sessions, and only resumed its work on it at the present session.

B. Resumption of the consideration of the topic at the present session

272. The Commission resumed its consideration of the topic at the present session on the basis of a preliminary

report (A/CN.4/370)²⁷⁰ submitted by the present Special Rapporteur.

273. In the preliminary report, the Special Rapporteur gave a concise history of the work done by the Commission so far on the topic, indicating the major questions which had been raised during consideration of the two previous reports and outlining the major decisions taken by the Commission concerning its approach to the study of the topic (see paras. 268-269 above).

274. The report was designed to offer an opportunity to the Commission in its present enlarged membership, and especially to its new members, to express views, opinions and suggestions on the approach the Special Rapporteur should follow in his study of the topic, having regard to the issues raised and the conclusions reached by the Commission during the discussion of the two previous reports mentioned above.

275. The Commission considered the Special Rapporteur's preliminary report at its 1796th to 1799th meetings, from 4 to 7 July 1983. It emerged from the discussion that nearly all members of the Commission were in agreement with the conclusions endorsed by the Commission at its thirtieth session, in 1978 (see para. 268 above), and referred to by the Special Rapporteur in his report.

276. Virtually all the members of the Commission who spoke during the debate emphasized that the Special Rapporteur should be allowed considerable latitude and should proceed with great caution, endeavouring to adopt a pragmatic approach to the topic in order to avoid protracted discussions of a doctrinaire, theoretical nature.

277. In accordance with the Special Rapporteur's summing-up at the end of the discussion, the Commission reached the following conclusions:

(a) The Commission should take up the study of the second part of the topic "Relations between States and international organizations";

(b) This work should proceed with great prudence;

(c) For the purposes of its initial work on the second part of the topic, the Commission should adopt a broad outlook, since the study should include regional organizations. The final decision on whether to include such organizations in a future codification could be taken only when the study was completed;

(d) The same broad outlook should be adopted in connection with the subject-matter, as regards determination of the order of work on the topic and the desirability of carrying out that work in different stages;

(e) The Secretariat should be requested to revise the study prepared in 1967 on "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities" and to update that study in

²⁶⁸ *Yearbook ... 1978*, vol. II (Part One), p. 282, document A/CN.4/311 and Add.1, chap. V.

²⁶⁹ *Yearbook ... 1979*, vol. II (Part Two), p. 189, para. 196.

²⁷⁰ Reproduced in *Yearbook ... 1983*, vol. II (Part One).

the light of replies to the further questionnaire sent out on 13 March 1978 by letter of the Legal Counsel of the United Nations addressed to the legal counsels of the specialized agencies and IAEA in connection with the status, privileges and immunities of those organizations, except in matters pertaining to representatives of States, and which complemented the questionnaire on the same topic sent out on 5 January 1965;

(f) The Legal Counsel of the United Nations should be requested to send the legal counsels of regional organizations a questionnaire similar to that circulated to the legal counsels of the specialized agencies and IAEA, with a view to gathering information of the same kind as that acquired through the two questionnaires sent to the United Nations specialized agencies and IAEA in 1965 and 1978.

Chapter VIII

INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

A. Introduction

278. The topic entitled "International liability for injurious consequences arising out of acts not prohibited by international law" was included in the current programme of work of the Commission at its thirtieth session, in 1978. At that session, the Commission established a Working Group to consider future work on the topic; it also appointed Mr. Robert Q. Quentin-Baxter Special Rapporteur for the topic.²⁷¹ In paragraph 5 of resolution 34/141 of 17 December 1979, the General Assembly requested the Commission to continue its work on the remaining topics in its current programme of work, among them being the present topic.

279. At its thirty-second session, in 1980, the Commission considered the preliminary report²⁷² which the Special Rapporteur had submitted on the topic. A summary of the Commission's debate was set out in the relevant section of its report on that session.²⁷³

280. The second report²⁷⁴ of the Special Rapporteur, submitted to the Commission at its thirty-third session in 1981, was the subject of a debate which was summarized in the report on the work of that session.²⁷⁵

281. At its thirty-fourth session, in 1982, the Commission had before it the third report of the Special Rapporteur.²⁷⁶ The report contained two chapters, the second of which contained the text, preceded by an introduction, of a schematic outline of the topic. Chapter I traced the relationship between the schematic outline and principles that had been identified, and had gained

majority support, in earlier debates both in the Commission and in the Sixth Committee of the General Assembly.

282. A summary of the Commission's consideration of the third report at its thirty-fourth session was set out in the relevant section of its report on that session.²⁷⁷ In paragraph 3 of resolution 37/111 of 16 December 1982, the General Assembly recommended that, taking into account the comments of Governments, whether in writing or expressed orally in debates in the Assembly, the Commission should continue its work aimed at the preparation of draft articles on all the topics in its current programme.

B. Consideration of the topic at the present session

283. At its present session, the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/373),²⁷⁸ containing a single chapter entitled "Delineation of the topic". As the report noted (*ibid.*, paras. 58 *et seq.* and para. 75), the reasons for presenting another general report were both circumstantial and substantive. The programme of work settled by the Commission during 1982 did not make it possible for this topic to be discussed in depth, or for any draft articles which might be presented to be considered by the Drafting Committee, during the present session. Moreover, the third and last parts of the Secretariat's valuable study of State practice in the field under examination had not reached the Special Rapporteur in time for his consideration before the present session; and the three parts of that study—dealing, respectively, with multilateral and bilateral treaty practice, and with settlements and claims practice—were not yet available as Commission documents.

284. On the other hand, the schematic outline of the topic, presented in the Special Rapporteur's third report and reproduced in the report of the Commission on its thirty-fourth session²⁷⁹ had given rise to a rich discus-

²⁷¹ For a historical review of the Commission's work on the topic up to 1982, see *Yearbook ... 1978*, vol. II (Part Two), pp. 149 *et seq.*, paras. 170-178; *Yearbook ... 1980*, vol. II (Part Two), pp. 158 *et seq.*, paras. 123-144; *Yearbook ... 1981*, vol. II (Part Two), pp. 146 *et seq.*, paras. 162-194; *Yearbook ... 1982*, vol. II (Part Two), pp. 83 *et seq.*, paras. 104-156.

²⁷² *Yearbook ... 1980*, vol. II (Part One), p. 247, document A/CN.4/334 and Add.1 and 2.

²⁷³ *Yearbook ... 1980*, vol. II (Part Two), pp. 158 *et seq.*, paras. 131-144. For the summary records of the discussion, see *Yearbook ... 1980*, vol. I, pp. 240-259, 1630th to 1633rd meetings.

²⁷⁴ *Yearbook ... 1981*, vol. II (Part One), p. 103, document A/CN.4/346 and Add.1 and 2.

²⁷⁵ *Yearbook ... 1981*, vol. II (Part Two), pp. 146 *et seq.*, paras. 165-199. For the summary records of the discussion, see *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.

²⁷⁶ *Yearbook ... 1982*, vol. II (Part One), p. 83, document A/CN.4/360.

²⁷⁷ *Yearbook ... 1982*, vol. II (Part Two), pp. 83 *et seq.*, paras. 109-156. For the summary records of the discussion, see *Yearbook ... 1982*, vol. I, pp. 224-230, 1735th meeting, pp. 242-250, 1739th meeting, and pp. 271-292, 1741st meeting, paras. 27-46, and 1742nd to 1744th meetings.

²⁷⁸ Reproduced in *Yearbook ... 1983*, vol. II (Part One).

²⁷⁹ *Yearbook ... 1982*, vol. II (Part Two), pp. 83-85, para. 109.

sion in the Sixth Committee of the General Assembly, at its thirty-seventh session in 1982, during consideration of the Commission's report on the work of its thirty-fourth session (see A/CN.4/L.352, sect. c). The main purpose of the fourth report was to take into account the views expressed in the Sixth Committee, and in the Commission, in 1982; to re-evaluate the schematic outline in the light of those views; and to provide a better and more complete commentary. The Special Rapporteur indicated that, while he would be most grateful for any preliminary observations that Commission members felt able to make in the limited time available during the present session, members might also choose to regard the fourth report as early documentation for the Commission's 1984 session. At that session, the materials prepared by the Secretariat should be available to members of the Commission, and the Special Rapporteur planned to present a further report, dealing with the procedures for fact-finding mentioned in section 2 of the schematic outline. He would also provide, either as a preface to that report or as an addendum to the fourth report, a chapter on scope and other matters dealt with in section 1 of the schematic outline.

285. Although not a great deal could be done on the consideration of the topic in 1983, the Special Rapporteur submitted that 1984—the mid-point of the present quinquennium—should, as some speakers in the Sixth Committee had proposed, be a year for taking decisions concerning the future of the topic. In that connection, he noted that, although there continued to be strong support, both in the Commission and in the Sixth Committee, for developing the topic along the lines canvassed in annual reports and debates from 1980 onwards, there were also opposing viewpoints which regarded the topic as misconceived, or as too broadly stated, or as having no warrant in existing law. Nothing would be gained by glossing over real differences in position, but they should at least be clearly identified, and needless misunderstandings should be eliminated. Those were the themes on which the Special Rapporteur proposed to concentrate in this year's necessarily brief debate; but he said he would be glad to respond to any other questions that might be raised.

286. The topic was considered by the Commission at its 1800th and 1801st meetings, on 11 and 12 July 1983. A number of members of the Commission took part in the short debate. At the end of the discussion, it was agreed, as the Special Rapporteur had proposed in his fourth report (A/CN.4/373, para. 58), that the third part of the Secretariat's review of State practice should be put in the form of an analytical study, so that it would correspond more closely with the two earlier parts, and that the three parts of the study—in which a number of members of the Commission and representatives in the Sixth Committee had expressed interest—should be made widely available. It was also agreed, in response to another proposal contained in the fourth report (*ibid.*, para. 64) that the Special Rapporteur should, with the help of the Secretariat, prepare a questionnaire to be addressed to selected international organizations. The main reason for this course was that

the obligations which States owe each other and discharge as members of international organizations may, to that extent, fulfil or replace some of the procedures indicated in sections 2, 3 and 4 of the schematic outline.

1. THE SPECIAL RAPPORTEUR'S APPRAISAL OF THE SITUATION

287. The question of scope had been determined by positions taken in the Commission and in the Sixth Committee of the General Assembly in 1982. It had been the predominant view in both bodies that the scope of the present topic should be confined to the duty to avoid, minimize and repair physical transboundary harm resulting from physical activities within the territory or control of a State. It was, however, also necessary to show that this restriction of scope did not disregard the legitimate interest of developing countries in promoting rules to mitigate the harmful effects that might arise from international economic activities. In past debates, it had been acknowledged that economic affairs and physical transboundary harm were the two areas in which the rules engaging State responsibility for a wrongful act or omission were least effective. The reason in both cases was that, in order to reconcile freedom of action with freedom from transboundary harm, there was a need to adjust and accommodate competing interests, rather than to rely on general rules of prohibition.

288. It was not doubted that the strict liability principle offered the only alternative to the system of State responsibility for wrongful acts and omissions. Therefore it would have been a serious step to deny the possible application of the strict liability principle in the area of harm arising from international economic activities. It was also necessary, however, to take into account a completely different viewpoint, which denied the existence in customary international law of any new principle relevant to the present topic, maintaining that strict liability was always the product of a particular conventional régime. Instead of asserting such a disputed principle, the present topic had been built upon the most fundamental considerations—namely the duties that States owe each other in return for the exclusive or dominant authority which international law gives them over their territory and their citizens. There was wide recognition, in the Commission and in the Sixth Committee, that States have a duty to avoid, minimize and repair physical transboundary harm. This distinguished the case of physical transboundary harm from that of harm arising from international economic activity; for, in the latter case, the guidelines identifying fair and unfair competition have yet to be fully developed.

289. Nevertheless, in some cases there was no acceptance—or only qualified acceptance—of the duty to avoid, minimize and repair physical transboundary harm. This difference in standpoint did not correspond to a division between East and West or North and South, or between the civil-law and common-law tradi-

tions. It was more a difference between the new world and the old. For some States of Eastern and Western Europe—and perhaps of other regions—it was held either that States had no general obligation to avoid transboundary harm, except in particular contexts in which a pattern of conventional obligations had developed, or that the obligation to avoid transboundary harm was heavily qualified by questions of attribution or of long usage, or even by repudiation of State responsibility for the conduct of private activities. By contrast, there was a tendency in North America—with considerable support in other regions of the world, including Europe—to characterize any foreseeable transboundary harm as a violation of sovereignty, so that the principle of avoiding, minimizing and repairing physical transboundary harm assumed the hard lineaments of a legal rule.²⁸⁰

290. From the latter starting-point, it is a very small step to enunciate a rule of strict liability, when an element of risk cannot be eliminated from the legitimate operation of a beneficial activity. From the former starting-point, however, it is a very large step indeed. Moreover, examples of an unqualified rule of strict liability in State treaty practice are few and rather special. There is therefore no easy way of persuading States to adopt a uniform policy regarding the place of strict liability as a rule of customary law. Moreover, attitudes towards proposals to accept new rules or guidelines sometimes change radically, as the general interest in increased co-operation is weighed against reluctance to assume new obligations.

291. On the other hand, there is a widespread, diversified and growing State practice—exemplified in treaties and in claims and settlements—to recognize the general duty to avoid, or minimize and repair, physical transboundary harm, and to implement that duty within limits which take into account the balance of interest between freedom to act and freedom from transboundary harm. Even the North American preference for clear-cut rules of obligation is not so adamant as to exclude margins of appreciation: often these are bundled into the threshold test of “substantial” or “significant” or “appreciable” harm, and the margins of appreciation assume larger proportions whenever there is an element of duty to share or to reconcile competing uses.

292. The Special Rapporteur noted that many of the ingredients could be illustrated by reference to the draft articles presented to the Commission at the present session by the Special Rapporteur for the law of the non-navigational uses of international watercourses, Mr. Evensen.²⁸¹ In those draft articles, article 6²⁸²

represented the sharing principle and article 9²⁸³ represented the duty to avoid appreciable harm. The articles that followed article 9 exhibited the procedural rules which must figure prominently in any draft dealing with the avoidance and repair of physical transboundary harm; for, even when the rule was itself expressed in clear-cut terms, there would be margins of appreciation governing the application of the rule to any given factual situation. Among points established in the discussion of the watercourses topic during the Commission’s present session, two in particular were of equal value in the broader context of the present topic. First, it had been pointed out that the duty of co-operation, however vague its content, was a positive legal obligation. Secondly, it had been recognized that there was no universal yardstick for measuring the threshold of “substantial” or “significant” or “appreciable” harm: harm which was devastating in an urban environment might be of no account in an unpopulated area. As far as possible, the initial question of threshold should be distinguished from the subsequent question of balancing interests.

293. It needed to be re-emphasized that rules made pursuant to this topic could not substitute for any existing rules about the wrongfulness of causing harm. The objectives of the topic were to make existing rules work, despite the margins of appreciation that their application usually entailed; to encourage the making of régimes, composed of more precise rules, tailored to the requirements of particular situations; and, when no régime applied, to insist that harm should be repaired, unless the balance of factors shifted the burden from the source State, or distributed it between the source State and the affected State. The topic stressed a “soft approach” to accommodate competing interests and to ward off confrontation, first, through fact-finding procedures, and then, if the circumstances warranted, by the construction of an agreed régime of prevention and reparation. The model was the standard obligation relating to the treatment of aliens, which postponed the question of wrongfulness as long as any avenue for repairing injury remained open, giving the receiving State opportunity after opportunity to ensure that justice was done. Nevertheless, there was an ultimate obligation to repair physical transboundary loss or injury; and if there were no shared interests, and the loss or injury was of a kind that was foreseeable, the burden would not be shifted from the source State.

294. The Special Rapporteur noted that there had been consistent majority support, both in the Sixth Committee of the General Assembly and in the Commission, for the view that the topic should deal with prevention as well as reparation. There had been equally strong support for the view that no distinction should be made between losses or injuries arising from public and from private activities, because the topic concerned the duties of States to regulate activities within their territory or control. The schematic outline appeared to need modification in three important respects. First, for

²⁸⁰ See, in addition to the materials cited in the fourth report (A/CN.4/373), American Law Institute, *Restatement of the Foreign Relations Law of the United States (Revised)*, Tentative Draft No. 4 (1983), Part VI (The Law of the Environment), chap. 1, “Protection of environment”, sect. 601.

²⁸¹ See chapter VI above.

²⁸² See footnote 248 above.

²⁸³ See footnote 250 above.

the reasons indicated in paragraphs 287 and 288 above, the scope of the topic, set out in section 1 of the schematic outline, would be limited to physical activities, within the territory or control of a State, giving rise to physical transboundary effects. Secondly, the statement of principles in section 5 of the schematic outline would be strengthened by reference to the detailed examination of State practice which could now be undertaken. Finally, more attention would be paid to the role of international organizations in relation to the procedures indicated in sections 2, 3 and 4 of the schematic outline.

2. THE COMMISSION'S DISCUSSION

295. Members who took part in the discussion indicated that their comments were of a preliminary character. Most observed that consideration of the topic was entering a new phase, in which attention must turn from the broad outlines to questions of detail, as the procedures for fact-finding were elaborated in the light of State practice. The completion of the Secretariat's study of State practice was welcomed, and the proposal that it be more widely circulated was warmly endorsed. A number of speakers noted that adequate time must be allocated at the Commission's 1984 session to assess the future of the topic. Several remarked that there would be advantage, and economy of effort, in co-ordinating the Commission's work on this topic with that on the watercourses topic.

296. One member said he persisted in his previous view that there was no rule of international law entailing the liability of the State for harmful consequences arising from activities that were not prohibited by international law. In the case of certain easily identified activities—for example, hazardous activities in relation to which one could envisage disastrous consequences—States did make special agreements of a global, regional or bilateral character. He referred in that connection to the 1972 Convention on International Liability for Damage Caused by Space Objects.²⁸⁴ In his opinion, however, it was not possible to enunciate an obligation of unlimited generality attaching to the harmful consequences of any legitimate activity, whether for the development of industry or agriculture, or to counteract some threat of nature. In most cases, the first to suffer from such an activity would be those in the source State itself; but it did not follow that the source State would be ready to provide reparation for victims in neighbouring States. To sum up, that member considered that a State had no obligation to repair harm arising from activities that were not prohibited by international law unless provision was made therefor by a relevant convention to which it was a party.

297. Several members took issue with this conclusion, some of them saying that it appeared to reflect a difference of policy rather than a conceptual problem, and others insisting upon the general proposition that the State in which harm was generated had at least a prima

facie obligation to repair that harm. Some stressed the concept of *bon voisinage*, pointing out that the issue was not one of wrongfulness or of strict liability, but simply one of equity or fairness. The source State had, in their view, an obligation to co-operate in good faith, in order to ensure just recompense for those who had suffered loss or injury. Most speakers expressed the view that it would usually be the poorer and less developed States which sustained physical transboundary harm, and that it was they that stood most in need of clearly stated rules of law.

298. The Special Rapporteur, though disagreeing that the duty to repair transboundary harm always had its origin in a convention, said that he did not dissent from many of the propositions advanced in support of that view. It was precisely because of the need not to encroach upon States' freedom of action that the present topic was conceived as a framework for avoiding and repairing injurious transboundary consequences without engaging the responsibility of the source State for a wrongful act or omission. Again, it was because the source State often had the same interest as the affected State in avoiding and repairing harmful consequences that rules made pursuant to the present topic could advocate a "soft" approach, beginning with non-discriminatory access to the remedies provided by the municipal law of the source State. If there were shared or reciprocal interests, States would often be content with such arrangements; but the assessment of dangers and the steps needed to meet them were clearly a matter for all the States concerned, not merely for the source State. If the source State chose to act unilaterally, it could not at the same time deny a prima facie liability for any harm that resulted. If there were agreement upon a régime of prevention and reparation, it would be because a danger of transboundary harm had been foreseen, not necessarily as inevitable, but as a risk inherent in the conduct of an activity.

299. With the exception of the member whose views were indicated in paragraph 296, members expressed general support for the revision of the schematic outline (see para. 294 above). It was specifically agreed by most speakers that neither rules of wrongfulness nor rules of strict liability were in themselves an answer to the problem of avoiding and repairing physical transboundary harm. One speaker noted that the *Poplar River Project* case,²⁸⁵ concerning transboundary pollution caused by hydroelectric power generation, illustrated almost every phase of the procedural rules on fact-finding contained in section 2 of the schematic outline. Several speakers stressed the continuum of prevention and reparation, and the need for flexibility in seeking solutions. Thus, for example, the *Colorado River* case²⁸⁶ had identified reparation with measures to avoid

²⁸⁵ See *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.

²⁸⁶ *Case concerning the salinity of the Colorado River*, settled by agreement of 30 August 1973 between the United States of America and Mexico. See *United States Treaties and Other International Agreements*, vol. 24, part 2 (1973), p. 1968.

²⁸⁴ United Nations, *Treaty Series*, vol. 961, p. 187.

future loss or injury, rather than with compensation for loss or injury already suffered. Similarly, the *Showa Maru* case,²⁸⁷ involving a tanker which spilled oil in the Straits of Malacca after an accident, had led to an agreement which, among other things, barred the use of the Straits to tankers of more than a certain tonnage. Several members underlined the advantage of a pattern of obligation which imposed no restriction upon a State's freedom of action, but insisted that this freedom of action should not be at the expense of other States.

300. Though most speakers endorsed, and none disapproved of, the restriction of scope to physical transboundary harm, there were various incidental questions relating to scope and to the title of the topic. The Special Rapporteur agreed that the long title of the topic²⁸⁸ gave rise to conceptual difficulties, both in English and in French; but he suggested that it had served well in the initial stages of inquiry, and would need to be reviewed in due course as a result of the restriction of scope to physical transboundary harm. One member asked for reassurance that this restriction of scope did not exclude from consideration the economic consequences of physical harm. The Special Rapporteur confirmed that economic factors were always of major importance, both in the assessment of loss or injury suffered and in the balancing of interests. One member made the different point that, as in the *Lake Lanoux* arbitral award,²⁸⁹ the assessment of physical harm should exclude extraneous factors, such as the increased capacity of an upstream State to control the flow of an international watercourse. One member wondered about the usefulness of the term "transboundary"; but, as earlier reports had noted, it was this term which distinguished the scope of the present topic from that of responsibility for the treatment of aliens.

²⁸⁷ See Koh Kheng-lian, *Contemporary Issues Relating to Straits Used for International Navigation*, thesis submitted to the *Institut universitaire de hautes études internationales*, Geneva, 1980.

²⁸⁸ The origins of the topic are reviewed in the fourth report (A/CN.4/373), para. 20 and footnote 48.

²⁸⁹ United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), p. 281; see also *Yearbook ... 1974*, vol. II (Part Two), pp. 194 *et seq.*, document A/5409, paras. 1055-1068.

301. Other comments served to focus attention on the broad distinction which the Special Rapporteur had discerned between some "new world" and some "old world" approaches to the topic (see paras. 289-290 above). One member said that—as long as care was taken to prevent the duty of compensation from becoming a tariff for causing transboundary harm—it was, as he saw it, largely an academic issue whether one spoke of "wrongful" harm or of harm permitted subject to a duty to compensate. This standpoint comes easily to a disciple of the "new world" approach, which tends to see "no fault" liability as the constant shadow of a general rule about the wrongfulness of causing harm; and lawyers trained in common law may be especially attracted to this approach. Another member noted that it was difficult for jurists to envisage liability except in terms of what was prohibited—though he felt it was essential that the effort be made. There is no doubt at all that this conceptual barrier is huge for those who inherit what the Special Rapporteur has called the "old world" approach. Moreover—as the "mixed régime" of C. G. Caubet, discussed in the fourth report (A/CN.4/373, paras. 52-54 and 56 *et seq.*), may suggest—this conceptual barrier is largest for those whose basic legal training is in civil law.

302. Nevertheless, every international lawyer understands and accepts the compound primary obligation which is typical of State responsibility for the treatment of aliens—that is, an obligation which postpones the engagement of responsibility for a wrongful act or omission until the State whose conduct is in question has exhausted every opportunity to meet its commitments without incurring wrongfulness. It is this form of obligation that enables the source State to preserve its freedom of action, and yet gives other States protection and redress for any significant harm that the source State's freedom of action may entail. This flexible framework also provides the necessary conditions for the emergence of other rules engaging the responsibility of the State for a wrongful act or omission. These other rules may be detailed obligations forming part of a conventional régime regulating a particular problem, or they may be general rules, developed through conformity of State treaty practice, forbidding exposure to an identified, excessive risk.

Chapter IX

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

A. Programme and methods of work of the Commission

303. At its 1760th meeting, on 13 May 1983, the Commission decided to establish a Planning Group of the Enlarged Bureau for the present session. The Group was composed of the First Vice-Chairman, Mr. Alexander Yankov (Chairman), Mr. Mikuin Leliel Balanda, Mr. Julio Barboza, Mr. Leonardo Díaz González, Mr. Andreas J. Jacovides, Mr. Chafic Malek, Mr. Stephen C. McCaffrey, Mr. Paul Reuter, Mr. Constantin A. Stavropoulos, Mr. Doudou Thiam and Mr. Nikolai A. Ushakov. The Group was entrusted with the task of considering the programme and methods of work of the Commission and reporting thereon to the Enlarged Bureau. The Planning Group met on 19 and 31 May and twice on 19 July 1983. Special rapporteurs and other members of the Commission who were not members of the Planning Group were invited to attend its meetings. A number of them did so and took part in the discussions.

304. On the recommendation of the Planning Group, the Enlarged Bureau recommended that the Commission include paragraphs 305-314, below, in its report to the General Assembly on the work of its present session. At its 1813th meeting, on 22 July 1983, the Commission considered the recommendations of the Enlarged Bureau and, on the basis of those recommendations, adopted the following paragraphs.

305. At the current session, the Planning Group devoted four meetings to questions related to the Commission's present procedures and methods of work. It did so on the basis of relevant questions which had been raised within the Group during the Commission's thirty-fourth session,²⁹⁰ certain questions mentioned in the Sixth Committee of the General Assembly during its consideration of the report of the Commission on the work of that session (see A/CN.4/L.352, paras. 223-260), as well as questions mentioned in the report of the Working Group of the Sixth Committee on the item "Review of the multilateral treaty-making process".²⁹¹ The questions related broadly to the following subject areas: organization of the Commission's sessions (in general and with reference to the use of subsidiary organs); preparation of draft articles and their form; the work of special rapporteurs; co-operation with Governments and the Sixth Committee; documentation;

Secretariat assistance in the form of research and studies.

306. It was recognized that all the questions were interrelated and affected the achievement by the Commission of the general objectives and priorities guiding its programme during the term of office of its present membership.²⁹² Thus, for example, the accomplishment of the goal of advancing work on a particular topic was a function of a number of interrelated factors, such as the amount of time allocated during a session to the consideration of particular topics; the stage of work on the draft articles on the topic before the Drafting Committee; the timely distribution of essential documents, such as the relevant records of the Sixth Committee, the reports of the special rapporteurs and, during the Commission's sessions, its summary records; and Secretariat assistance in the form of research and studies requested by the Commission or by the special rapporteurs on their topic.

307. One of the suggestions to which the Planning Group accorded a large measure of interest and support was that more thought might be given to staggering from year to year in-depth consideration of topics in the current programme of work. While it was recognized that the Commission might find it desirable—as it had done at the present session—to give some consideration to every topic in its current programme, it could, by confining in-depth consideration to a limited number of topics, allow more time for special rapporteurs to develop their reports and for members of the Commission to study them. This would, it was suggested, also allow, as appropriate, for a greater degree of advance planning of the time and priorities to be allocated to the consideration of various topics at any one session and during a five-year term of office as a whole, thus facilitating the organization of sessions in advance with a view to achieving the general objectives and following the guidelines set by the Commission for work to be accomplished during that period.

308. The Commission considered necessary, and would welcome, a further expansion and intensification of the research work and studies undertaken by the Codification Division of the Office of Legal Affairs. The Under-Secretary-General, the Legal Counsel, who attended and addressed the meeting of the Planning Group on 31 May 1983, and the Director of the Codification Division stated that the Secretariat ap-

²⁹⁰ *Yearbook ... 1982*, vol. II (Part Two), p. 123, para. 266.

²⁹¹ See A/C.6/37/L.29, paras. 32-42.

²⁹² *Yearbook ... 1982*, vol. II (Part Two), p. 122, para. 263.

preciated that recent developments, including the increase in the membership of the Commission and the growing number of topics with which it dealt, were conducive to increasing the amount and level of assistance in the form of research and studies expected of the Secretariat. They emphasized that the Secretariat would consider it important that requests for new research projects and studies should be as specific as possible, in order to provide the Codification Division with the authority for action to be taken when required pursuant to such requests. That would, in their view, also make the task easier for the Codification Division and would allow for more economical, rational and speedy work. Several members of the Group also suggested that senior experts, preferably at the principal officer level, should be added to the staff of the Codification Division with a view to assisting special rapporteurs with research and studies, analysis and assistance in compiling and classifying relevant State practice, doctrine and judicial decisions.

309. The Commission expressed satisfaction at the assistance that the Secretariat rendered both in the course of its sessions as well as to special rapporteurs, particularly through the assignment of staff, whose experience and qualifications have so far been demonstrated to be indispensable in order to ensure the necessary continuity for the good conduct of the Commission's work. Appreciation was also expressed for the fact that, at the present session, the Secretariat had increased the number of professional officials providing substantive servicing to the Commission during the session. The view was expressed that the current staffing pattern should be maintained, as the number of members of the Secretariat assisting the Commission in the course of its session should match the increase in its membership and its work-load, as well as the ever-increasing assistance in the form of research and studies to be provided to special rapporteurs.

310. General concern was expressed about the situation regarding documentation. The translation and reproduction, even of those reports or studies which had been submitted in advance of the Commission's session, were in fact completed only at the beginning of the session or, indeed, thereafter. It was also indicated that, in order to expedite the preparation, and thus distribution, of the reports of special rapporteurs, the issuing of summary records of meetings of the Sixth Committee of the General Assembly at which the Commission's report had been discussed should be accelerated. The Commission also expressed the view that the competent services of the Secretariat should accord to the distribution of those records the same degree of priority as that given to the records of the First and Special Political Committees of the General Assembly. The Commission also noted the practical convenience of keeping the footnotes to special rapporteurs' reports on the pages of the report to which they referred, and asked that this practice—which was always followed in the past—be reinstated.

311. The Commission stressed the need for special rapporteurs to submit their reports as soon as possible.

In any case, the Enlarged Bureau would, as in the past, take into account the date of submission and the availability of special rapporteurs' reports and other essential documentation in recommending to the Commission whether consideration of a topic, or of a particular report, should be postponed or deferred to a later session. The Commission wishes to stress the importance of its members receiving essential documentation well in advance of its sessions, in particular the reports of special rapporteurs, in order to allow sufficient time for the study of such documents, which always involve complex legal and political issues, with the necessary care and attention. The Commission also emphasized the need for timely preparation and submission of the entire pre-session documentation, including the reports of special rapporteurs, so that the Secretariat could dispatch as much as possible to members in time to reach them before the session began. Care should be taken to avoid placing an undue burden on the documents services in the course of the session, when those services are expected to concentrate on the processing of in-session rather than pre-session documentation.

312. The Commission intends at future sessions to keep its procedures and working methods under review.

313. While maintaining the general objectives and priorities determined during its thirty-fourth session,²⁹³ the Commission will keep open the question as to whether greater progress can be made on certain topics in the current programme within that period, taking into account resolutions of the General Assembly, the state of progress on a given topic and other practical considerations. In this context, and bearing in mind the current backlog of work in the Drafting Committee, the Commission decided that priority should be given to the work of that Committee during the Commission's thirty-sixth session.

314. At its thirty-sixth session, in the light of the considerations mentioned above and in accordance with relevant resolutions of the General Assembly, the Commission intends to continue its work aimed at the preparation of draft articles on all topics in its current programme. At the beginning of that session, the Commission will take the appropriate decision as to the allocation of time for consideration of the various topics in its current programme when arranging for the organization of work of the session.

B. Co-operation with other bodies

1. INTER-AMERICAN JURIDICAL COMMITTEE

315. Mr. Laurel B. Francis attended as Observer for the Commission the session of the Inter-American Juridical Committee held in January-February 1983 at Rio de Janeiro and made a statement before the Committee.

316. The Inter-American Juridical Committee was represented at the Commission's thirty-fifth session by

²⁹³ *Ibid.*

Mr. Galo Leoro, who addressed the Commission at its 1774th meeting, on 3 June 1983.

317. Mr. Galo Leoro reviewed the topics considered by the Inter-American Juridical Committee at its August 1982 and January 1983 sessions, including questions relating to the American Convention on Human Rights;²⁹⁴ the forms of development of environmental law; the scope of the Committee's competence as a legal consultative body; personality and capacity in private international law; international shipping, with particular reference to bills of lading; bases for a draft convention on the international transport of goods by land; and the right to information. He drew particular attention to the Inter-American Draft Convention on Jurisdictional Immunity of States,²⁹⁵ adopted by the Committee at its January 1983 session, to be considered by the Third Inter-American Specialized Conference on Private International Law, to be held in April 1984. Mr. Galo Leoro noted that the draft was designed to fill a gap on the American continent by providing States with legal guidelines which they could follow when dealing with the sensitive problem of immunity from their jurisdiction. He observed that, in its preparation, the Committee had taken into account the 1972 European Convention on State Immunity,²⁹⁶ recent legislation enacted by certain States, as well as the draft articles on the topic provisionally adopted by the Commission and those proposed by its Special Rapporteur for the topic. He reviewed in detail the contents of the draft convention, comparing it with, *inter alia*, similar provisions prepared by the Commission or proposed by its Special Rapporteur for the topic.

318. The Commission, having a standing invitation to send an observer to the sessions of the Inter-American Juridical Committee, requested its Chairman, Mr. Laurel B. Francis, to attend the next session of the Committee or, if he were unable to do so, to appoint another member of the Commission for that purpose.

2. ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

319. The Asian-African Legal Consultative Committee was represented at the Commission's thirty-fifth session by its Secretary-General, Mr. B. Sen, who addressed the Commission at its 1775th meeting, on 6 June 1983.

320. Mr. Sen remarked that, during the past two years, interest in the work of the Commission had increased in the countries of the region represented by the Asian-African Legal Consultative Committee. Particular interest was shown in the topics "The law of the non-navigational uses of international watercourses", "Jurisdictional immunities of States and their

property" and "International liability for injurious consequences arising out of acts not prohibited by international law". He indicated the issues related to those three topics which were of concern to Governments of the Asian-African region. Mr. Sen also explained the Committee's current programme of work and activities. He noted that the Committee had expanded its activities by supporting the work of the United Nations and focusing attention on technical infrastructure, including the legal framework for economic co-operation. In that regard, he mentioned in particular the Committee's work in relation to the United Nations Convention on the Law of the Sea²⁹⁷ (including questions related to the legal position when the Convention came into force, the position during the interim period and the Committee's future role in implementing the Convention), the promotion and protection of investments, reciprocal assistance in honouring commitments under service or trade contracts, protection of the environment and promotion of multilateral conventions adopted under the auspices of the United Nations.

321. The Commission, having a standing invitation to send an observer to the sessions of the Asian-African Legal Consultative Committee, requested its Chairman, Mr. Laurel B. Francis, to attend the next session of the Committee or, if he were unable to do so, to appoint another member of the Commission for that purpose.

3. EUROPEAN COMMITTEE ON LEGAL CO-OPERATION

322. Mr. Paul Reuter, Chairman of the Commission at its thirty-fourth session, attended as Observer for the Commission the thirty-eighth session of the European Committee on Legal Co-operation, held in November-December 1982 at Strasbourg, and made a statement before the Committee.

323. The European Committee on Legal Co-operation was represented at the Commission's thirty-fifth session by Mr. Ferdinando Albanese, who addressed the Commission at its 1801st meeting, on 12 July 1983.

324. Mr. Albanese informed the Commission that, in 1982, a Committee of Experts on public international law was established by the Council of Europe to assist the European Committee on Legal Co-operation. Its tasks are, first, to exchange views and collect information on the positions of States members of the Council of Europe on issues of public international law discussed outside the framework of the Council; and secondly, to study specific issues of public international law calling for action at the level of the Council of Europe. As to the public international law issues dealt with outside the Council's ambit, he noted that the Committee of Experts had examined items which were before the Sixth Committee of the General Assembly, such as the review of the multilateral treaty-making process and the Commission's draft articles on the law of treaties between States and international organizations or between international organizations.²⁹⁸ It had also

²⁹⁴ The "Pact of San José, Costa Rica", signed on 22 November 1969, to be published in United Nations, *Treaty Series*, No. 17955.

²⁹⁵ The text of the draft convention was circulated to the Commission in connection with the item "Jurisdictional immunities of States and their property" as document ILC (XXXV)/Conf.Room Doc.4. See also footnote 127 above.

²⁹⁶ See footnote 77 above.

²⁹⁷ See footnote 256 above.

²⁹⁸ See *Yearbook ... 1982*, vol. II (Part Two), pp. 17 *et seq.*

considered, in preparation for the United Nations Conference held in Vienna in March-April 1983 on the subject, the Commission's draft articles on succession of States in respect of State property, archives and debts.²⁹⁹ As to those issues to be studied with a view to possible action at the Council of Europe level, Mr. Albanese noted that the Committee of Experts had discussed the question of the procedures followed by member States of the Council to express their consent to be bound by treaties, with a view to harmonizing and rationalizing such procedures. The Committee had also discussed, he said, issues relating to the privileges and immunities of members of the families of diplomatic and consular staff who are gainfully employed in the host State. Finally, he informed the Commission of the status of recent Council of Europe conventions dealing with questions of public international law.

325. The Commission, having a standing invitation to send an observer to the sessions of the European Committee on Legal Co-operation, requested its Chairman, Mr. Laurel B. Francis, to attend the next session of the Committee or, if he were unable to do so, to appoint another member of the Commission for that purpose.

4. ARAB COMMISSION FOR INTERNATIONAL LAW

326. The Arab Commission for International Law was represented at the Commission's thirty-fifth session by Mr. Mahmoud El Baccouche, who addressed the Commission at its 1810th meeting, on 21 July 1983.

327. Mr. El Baccouche recalled that the Arab Commission for International Law was one of the technical advisory committees of the Council of the League of Arab States. By its statute, the Arab Commission was entrusted with tasks similar to those of the International Law Commission, but at the level of the group of Arab States belonging to a geographical area having a distinct Arab civilization and Islamic heritage. It had assumed a special responsibility with regard to the progressive development of international law in its region. He stressed that the Arab region had been the scene of successive episodes of war and peace which had had a direct impact on international relations and on the rules of international law, which they had even enriched.

Mr. El Baccouche said that the Arab Commission for International Law called upon the International Law Commission, in view of the vital nature of its task, to lay the foundations of a new international legal system which would bring peace and justice to all peoples and decisively to reject the traditional rules of law which legitimized war, aggression, the forceful seizure of territory and the subjugation of peoples. He also remarked that the Arab Commission noted the potential for co-operation with the International Law Commission in strengthening the role of international and regional organizations in the safeguarding of international peace and security; in serving the cause of development, par-

ticularly in developing countries; in struggling against colonialist policies and combating discrimination and *apartheid*; and in guaranteeing human rights and protecting man's fundamental freedoms.

Finally, Mr. El Baccouche noted that the Council of the League of Arab States had entrusted the Arab Commission for International Law with the task of following the work of the International Law Commission; the Arab Commission was currently considering a number of topics on the agenda of the International Law Commission and had appointed a special rapporteur from among its members for each of those items.

C. Date and place of the thirty-sixth session

328. The Commission decided to hold its next session at the United Nations Office at Geneva from 7 May to 7 July 1984.

D. Representation at the thirty-eighth session of the General Assembly

329. The Commission decided that it should be represented at the thirty-eighth session of the General Assembly by its Chairman, Mr. Laurel B. Francis.

E. Gilberto Amado Memorial Lecture

330. With a view to honouring the memory of Gilberto Amado, the illustrious Brazilian jurist and former member of the Commission, it was decided in 1971 that a memorial should take the form of a lecture to which the members of the Commission, the participants in the session of the International Law Seminar and other experts in international law would be invited.

331. Thanks to another grant from the Brazilian Government, the sixth Gilberto Amado Memorial Lecture took place after a dinner on 3 June 1983. The lecture, which was delivered by H.E. Mr. G. E. do Nascimento e Silva, Brazilian Ambassador to Austria and Permanent Representative to the Office of the United Nations in Vienna, was on "The Influence of Science and Technology on International Law". The Commission hopes that, as in the case of the five previous lectures, the text of this lecture will be published in English and French and so made available to the largest possible number of specialists in the field of international law.

332. The Commission is grateful to the Brazilian Government for this renewed gesture and hopes that the Gilberto Amado commemoration will be continued. The Commission asked Mr. Calero Rodrigues to convey its gratitude to the Brazilian Government.

F. International Law Seminar

333. Pursuant to paragraph 8 of General Assembly resolution 37/111 of 16 December 1982, the Office of Legal Affairs, acting in conjunction with the United Nations Office at Geneva, organized the nineteenth session of the International Law Seminar during the thirty-fifth session of the Commission. The Seminar is intended for advanced students of the subject and

²⁹⁹ The draft articles form the basis of the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, adopted on 8 April 1978; see A/CONF.117/14.

junior government officials who normally deal with questions of international law in the course of their work.

334. A selection committee met on 30 March 1983 under the chairmanship of Mr. Erik Suy, Director-General of the United Nations Office at Geneva; the committee comprised Mr. M. A. Boisard (UNITAR), Mr. E. Chrispeels (UNCTAD), Mr. K. Herndl (Centre for Human Rights) and Mr. M. Sebti (Division of Administration of the Office). Twenty-four participants, all of different nationalities and a majority being from developing countries, were selected from among 64 candidates. Two other persons attended the session of the Seminar as observers.

335. During the session, which was held at the Palais des Nations from 24 May to 10 June 1983, the participants had access to the facilities of the United Nations Library and attended a film show given by the United Nations Information Service. They were given copies of the basic documents necessary for following the discussions of the Commission and the Seminar lectures and were also able to obtain, or to purchase at reduced cost, United Nations printed documents which were unavailable or difficult to find in their countries of origin. At the end of the session, the Chairman of the Commission and the Director-General of the United Nations Office at Geneva presented participants with a certificate testifying to their diligent work at the nineteenth session of the Seminar.

336. During the three weeks of the session, the following four members of the Commission gave lectures, which were followed by discussions: Mr. J. Barboza, on "Circumstances precluding State responsibility"; Mr. M. L. Balanda, on "Problems associated with the Code of Offences against the Peace and Security of Mankind"; Mr. R. Q. Quentin-Baxter, on "International liability for injurious consequences arising out of acts not prohibited by international law"; Mr. W. Riphagen, on "Aspects of State responsibility".

337. In addition, lectures were given by Judge Ago of the ICJ, on "Some thoughts on the codification of State responsibility"; by Mr. D. I. Carter and Mr. H. J. Chowdhury, on "The activities of the Office of the United Nations Disaster Relief Co-ordinator"; by Mr. J. L. Duquesne, on "The activities of the Economic Commission for Europe in the field of transport"; by

Mr. C. Masouyé, on "The activities of the World Intellectual Property Organization"; and by Mr. K. Herndl, on "The Centre for Human Rights".

338. As in 1982, the City of Geneva gave an official reception for the Seminar participants in the Alabama Room at the Hôtel de Ville. During the reception, Mr. R. Vieux, Chief of Protocol of the City of Geneva, gave a talk on the international aspects of Geneva. The Seminar programme included a visit to the headquarters of ICRC. The participants took part in a round table session under the chairmanship of Mr. Y. Sandoz, Director of the Department of Principles and Law of ICRC, and were then received by Mr. Alexandre Hay, President of the International Committee.

339. As in the past, none of the costs of the Seminar fell on the United Nations, which was not asked to contribute to the travel or living expenses of participants. The Governments of Austria, Denmark, Finland, the Federal Republic of Germany, the Netherlands and Viet Nam made fellowships available to participants from developing countries. Funds were also made available for that purpose by the Dana Fund for International and Comparative Legal Studies (of Toledo, Ohio). With the award of fellowships it is possible to achieve adequate geographical distribution of participants and to bring from distant countries deserving candidates who would otherwise be prevented from participating, solely for lack of funds. This year, fellowships were awarded to 14 participants. Of the 425 participants, representing 106 nationalities, who have been accepted since the beginning of the Seminar, 198 have been awarded fellowships.

340. The Commission wishes to stress the importance it attaches to the sessions of the Seminar, which give the young lawyers selected the possibility of familiarizing themselves with the Commission's work and with the activities of the many international organizations which have their headquarters in Geneva. In order to ensure the continuance and growth of the Seminar, and in particular to enable a larger number of fellowships to be awarded, the Commission urges that as many States as possible should make a contribution, even a token one, to the travel and living expenses which may have to be met, thus demonstrating their interest in the sessions of the International Law Seminar.

CHECK-LIST OF DOCUMENTS OF THE THIRTY-FIFTH SESSION

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/361	Provisional agenda	Mimeographed. For the agenda as adopted, see p. 6, para. 8, above.
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 <i>Yearbook ... 1983</i> , vol. II (Part One).
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	<i>Idem.</i>
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	<i>Idem.</i>
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 <i>Yearbook ... 1983</i> , vol. II (Part One).
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	<i>Idem.</i>
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 <i>Yearbook ... 1983</i> , vol. II (Part One).
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	<i>Idem.</i>
A/CN.4/371	Jurisdictional immunities of States and their property: memorandum presented by Mr. Nikolai A. Ushakov	<i>Idem.</i>
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	<i>Idem.</i>
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	<i>Idem.</i>
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	<i>Idem.</i>
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 <i>Yearbook ... 1983</i> , vol. II (Part One).
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 <i>Official Records of the General Assembly, Thirty-eighth Session, Supplement No. 10 (A/38/10)</i> . For the final text, see p. 5 above.
A/CN.4/L.355	<i>Idem.</i> : chapter II (Draft Code of Offences against the Peace and Security of Mankind)	Mimeographed. See A/CN.4/L.366.

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.356 [and Corr.1] and Add.1-3 [and Add.3/Corr.1]	<i>Idem</i> : chapter III (Jurisdictional immunities of States and their property)	Mimeographed. For the final text, see p. 17 above.
A/CN.4/L.357 and Add.1 [and Add.1/Corr.1]	<i>Idem</i> : chapter IV (State responsibility)	<i>Idem</i> , see p. 39 above.
A/CN.4/L.358 and Add.1 [and Add.1/Corr.1]	<i>Idem</i> : chapter V (Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier)	<i>Idem</i> , see p. 44 above.
A/CN.4/L.359 and Add.1	<i>Idem</i> : chapter VI (The law of the non-navigational uses of international water-courses)	<i>Idem</i> , see p. 62 above.
A/CN.4/L.360	<i>Idem</i> : chapter VII (Relations between States and international organizations (second part of the topic))	<i>Idem</i> , see p. 79 above.
A/CN.4/L.361	<i>Idem</i> : chapter VIII (International liability for injurious consequences arising out of acts not prohibited by international law)	<i>Idem</i> , see p. 82 above.
A/CN.4/L.362 and Add.1 and 2	<i>Idem</i> : chapter IX (Other decisions and conclusions of the Commission)	<i>Idem</i> , see p. 87 above.
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 <i>Yearbook ... 1983</i> , vol. I, summary record of the 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	<i>Idem</i> , 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	<i>Idem</i> , 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 final text, see p. 10 above.
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	<i>Idem</i> . For a summary, see pp. 6-8, paras. 12-20, above
A/CN.4/SR.1753-A/CN.4/SR.1813	Provisional summary records of the 1753rd to 1813th meetings of the International Law Commission	Mimeographed. The final text appears in <i>Yearbook ... 1983</i> , vol. I.

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