

YEARBOOK  
OF THE  
INTERNATIONAL  
LAW COMMISSION  
**1985**

*Volume II*  
*Part One*

*Documents of the thirty-seventh session*

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UNITED NATIONS





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## NOTE

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

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

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

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

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

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

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

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

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## ABBREVIATIONS

ECSC	European Coal and Steel Community
EEC	European Economic Community
EURATOM	European Atomic Energy Community
FAO	Food and Agriculture Organization of the United Nations
GATT	General Agreement on Tariffs and Trade
IAEA	International Atomic Energy Agency
IBRD	International Bank for Reconstruction and Development
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IDA	International Development Association
IFAD	International Fund for Agricultural Development
IFC	International Finance Corporation
ILA	International Law Association
ILO	International Labour Organisation
IMF	International Monetary Fund
IMO	International Maritime Organization
ITU	International Telecommunication Union
OAS	Organization of American States
PCIJ	Permanent Court of International Justice
PLO	Palestine Liberation Organization
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WMO	World Meteorological Organization

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<i>I.C.J. Reports</i>	ICJ, <i>Reports of Judgments, Advisory Opinions and Orders</i>
<i>P.C.I.J., Series B</i>	PCIJ, <i>Collection of Advisory Opinions</i> (Nos. 1-18: up to and including 1930)
<i>P.C.I.J., Series A/B</i>	PCIJ, <i>Judgments, Orders and Advisory Opinions</i> (Nos. 40-80: beginning in 1931)

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## NOTE CONCERNING QUOTATIONS

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

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

## **FILLING OF CASUAL VACANCIES (ARTICLE 11 OF THE STATUTE)**

[Agenda item 2]

**DOCUMENT A/CN.4/386**

**Note by the Secretariat**

*[Original:English]  
[21 January 1985]*

1. Following the death of Mr. Robert Q. Quentin-Baxter on 25 September 1984 and of Mr. Constantin A. Stavropoulos on 5 November 1984 and the election on 7 November 1984 of Mr. Jens Evensen and Mr. Zhengyu Ni as Judges of the International Court of Justice, four seats have become vacant in the International Law Commission.

2. Article 11 of the statute of the Commission applies to the filling of such vacancies. It provides:

In the case of a casual vacancy, the Commission itself shall fill the vacancy having due regard to the provisions contained in articles 2 and 8 of this Statute.

Article 2 reads:

1. The Commission shall consist of thirty-four members who shall be persons of recognized competence in international law.
2. No two members of the Commission shall be nationals of the same State.
3. In case of dual nationality a candidate shall be deemed to be a national of the State in which he ordinarily exercises civil and political rights.

Article 8 reads:

At the election the electors shall bear in mind that the persons to be elected to the Commission should individually possess the qualifications required and that in the Commission as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured.

3. On 23 November 1981, the General Assembly elected the 34 members of the International Law Commission for a five-year term, beginning on 1 January 1982, in accordance with the Commission's statute and pursuant to paragraph 3 of General Assembly resolution 36/39 of 18 November 1981, in which the Assembly decided:

... that the thirty-four members of the International Law Commission shall be elected according to the following pattern:

- (a) Eight nationals from African States;
- (b) Seven nationals from Asian States;
- (c) Three nationals from Eastern European States;
- (d) Six nationals from Latin American States;
- (e) Eight nationals from Western European or other States;
- (f) One national from African States or Eastern European States in rotation, with the seat being allocated to a national of an African State in the first election held after the adoption of the present resolution;
- (g) One national from Asian States or Latin American States in rotation, with the seat being allocated to a national of an Asian State in the first election held after the adoption of the present resolution.





## STATE RESPONSIBILITY

[Agenda item 3]

### DOCUMENT A/CN.4/389\*

**Sixth report on the content, forms and degrees of international responsibility (part 2 of the draft articles); and "Implementation" (*mise en œuvre*) of international responsibility and the settlement of disputes (part 3 of the draft articles), by Mr. Willem Riphagen, Special Rapporteur**

[Original: English]  
[2 April 1985]

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#### NOTE

Multilateral conventions cited in the present report:

	Source
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), hereinafter referred to as "1969 Vienna Convention"	United Nations, <i>Juridical Yearbook 1969</i> (Sales No. E.71.V.4), p. 140.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	<i>Official Records of the Third United Nations Conference on the Law of the Sea</i> , vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 151, document A/CONF.62/122.

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\* Incorporating document A/CN.4/389/Corr.1.

## Introduction

1. In his fifth report,<sup>1</sup> submitted to the International Law Commission at its thirty-sixth session, the Special Rapporteur submitted a set of 16 draft articles<sup>2</sup> intended to constitute part 2 of the draft articles on State responsibility.<sup>3</sup> Those draft articles were not accompanied by commentaries, but provisionally by references to the relevant paragraphs of earlier reports. In order to facilitate their further consideration, the Special Rapporteur submits commentaries to those draft articles in section I below.

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

<sup>2</sup> Four of those draft articles, namely articles 1, 2, 3 and 5, had been provisionally adopted by the Commission at its thirty-fifth session, article 5 subsequently being renumbered as article 4 (*Yearbook ... 1983*, vol. II (Part Two), pp. 42-43). The 12 new draft articles (arts. 5-16) submitted in the fifth report replaced all those submitted earlier by the Special Rapporteur.

<sup>3</sup> Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted in first reading, appears in *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

2. Section II of the present report is devoted to what could become part 3 of the draft articles, namely the "implementation" (*mise en œuvre*) of international responsibility and the settlement of disputes. In his fourth report, the Special Rapporteur presented an outline of the possible content of part 3 and suggested that the Commission should give early consideration to this matter, since, in his view, "the prospects for part 3 decisively influence the way in which part 2 is to be elaborated".<sup>4</sup> The Commission, however, preferred to discuss the possible content of part 3 only after having considered part 2.<sup>5</sup> Now that the Commission has referred draft articles 5 and 6 of part 2 to the Drafting Committee<sup>6</sup> and is about to consider at its thirty-seventh session the remaining articles of part 2 contained in the fifth report, it might be useful to present some proposals as to the possible content of part 3 of the draft.

<sup>4</sup> *Yearbook ... 1983*, vol. II (Part One), p. 9, document A/CN.4/366 and Add.1, para. 45.

<sup>5</sup> *Yearbook ... 1984*, vol. II (Part Two), p. 103, para. 366.

<sup>6</sup> *Ibid.*, p. 104, para. 380.

## I. Commentaries to articles 1 to 16 of part 2 of the draft articles

### Article 1<sup>7</sup>

**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<sup>8</sup>

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

#### 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—determine the legal consequences, as between them, of the internationally wrongful act involved.

<sup>7</sup> Text and commentary provisionally adopted by the Commission at its thirty-fifth session (see footnote 2 above).

<sup>8</sup> Text and commentary provisionally adopted by the Commission at its thirty-fifth session (see footnote 2 above), except for the following subsequent changes: (a) since article 5 as provisionally adopted has been renumbered as article 4, the reference to article 5 is replaced by a reference to article 4; (b) since, at its thirty-fifth session, the Commission had not yet taken any decision regarding the formulation of an article concerning peremptory norms, the reference to article 4 in the opening phrase of the provisionally adopted text was placed between square brackets; it is now replaced by a reference to article 12.

(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.

### Article 3<sup>9</sup>

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

### 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 Treaties 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.

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)*,<sup>10</sup> expressed the opinion that most articles of the Vienna Convention were declaratory of already existing customary international law.

<sup>9</sup> Text and commentary provisionally adopted by the Commission at its thirty-fifth session (see footnote 2 above), except for the subsequent changes referred to in footnote 8 above.

<sup>10</sup> *I.C.J. Reports 1971*, p. 16.

(3) In any case, part 2 may well not be exhaustive as to the legal consequences of internationally wrongful acts.<sup>11</sup>

### Article 4<sup>12</sup>

**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*<sup>13</sup> 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.<sup>14</sup>

### Article 5

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

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

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

<sup>11</sup> The Special Rapporteur suggests that, if the Commission adopts an article along the lines of article 16 (see p. 15 below), the following paragraph should be added to the commentary to article 3:

"(4) In particular, article 16 reserves certain legal consequences as falling outside the scope of the present part."

<sup>12</sup> Originally article 5, the text of and commentary to which were provisionally adopted by the Commission at its thirty-fifth session (see footnote 2 above).

<sup>13</sup> In the opinion of the competent United Nations organ.

<sup>14</sup> General Assembly resolution 3314 (XXIX) of 14 December 1974, annex, article 2.

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

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

- (i) the obligation was stipulated in its favour; or
- (ii) the breach of the obligation by one State party necessarily affects the exercise of the rights or the performance of the obligations of all other States parties; or
- (iii) the obligation was stipulated for the protection of collective interests of the States parties; or
- (iv) the obligation was stipulated for the protection of individual persons, irrespective of their nationality;

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

#### Commentary

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

(2) Obviously, this determination cannot be made independently of the origin and content of the obligation breached (the "primary rule"); indeed, that obligation is an obligation towards another State, or States, or towards the international community of States as a whole, i.e. towards all other States (*erga omnes*).

(3) In many cases the obligation of a State is merely the counterpart or mirror-image of a right of another State; the obligation is not to infringe that right. Indeed, the principle of the sovereign equality of States lies at the basis of several obligations under rules of customary international law, such as the obligation to refrain from the threat or use of force against the territorial integrity or political independence of another State, the obligation not to intervene in matters within the domestic jurisdiction of another State, the obligation not to use the territory of another State for the purpose of exercising governmental functions and the obligation of a State to respect within its territory the sovereign immunity of another State.<sup>15</sup> In such cases, the content of the obligation itself implies the determination of the "injured State" in the event of a breach of the obligation not to infringe the right of another State.<sup>16</sup>

<sup>15</sup> The formulation of these examples of primary rules is, of course, purely descriptive and not meant to convey the exact scope and content of such rules.

<sup>16</sup> The breach of such an obligation may, at the same time, be a breach of an obligation towards another State or States; but, at any rate, the State whose right is infringed is an "injured State".

(4) Not only rules of customary international law, but also a treaty may create, establish or recognize rights of States, in particular of States which are not parties to that treaty (cf. articles 34 to 38 of the 1969 Vienna Convention). So long as such rights are not validly revoked, the third State is an "injured" State in the case of infringement of those rights by a State party to the treaty.

(5) It should be recalled, in this connection, that article 38 of the 1969 Vienna Convention envisages the possibility that a rule set forth in a treaty becomes binding upon (i.e. creates an obligation of) a third State as a customary rule of international law, recognized as such.

(6) Normally, however, a treaty does not create rights (or, for that matter, obligations) for (or towards) third States, i.e. States which are not parties to the treaty (cf. article 34 of the 1969 Vienna Convention).

(7) On the other hand, a rule of customary international law does not necessarily create or recognize a right of a State, let alone a right of every State, the infringement of which makes that State an "injured" State in the sense of the present articles. It is the primary rule itself which determines, often in connection with what is called its "source", whether it creates a right of a State to which corresponds an implicit or explicit obligation of another State, or whether it follows the inverse technique of creating an obligation to which may correspond implicitly or explicitly a "status" of another State as the State towards which the obligation exists, and which consequently will be an "injured" State in the case of a breach of that obligation. The present article cannot prejudge the "sources" of primary rules nor their content. While effecting a necessary operation—the determination of the "injured State"—within the context of secondary rules, it can only make rebuttable presumptions as to what States, as creators of the primary rules, intended. Indeed, such a limited function is in accordance with article 2.

(8) For the same reason, the present article, while making no mention of "the general principles of law" or of "resolutions of United Nations organs" as independent "sources" of primary rules, does not thereby either not recognize or recognize such independent sources.

(9) Nor does the present article prejudge whether a given primary rule flows from customary law, a treaty, or any other source. Thus, for example, subparagraph (d) does not imply that obligations, as mentioned therein, could not arise from any other source than a multilateral treaty.

(10) Subparagraph (b) deals with the breach of obligations resulting from a binding dispute-settlement decision of an international court or tribunal. It is meant to cover not only the final award or judgment, but also such orders as the indication of interim measures of protection as may be binding on the parties to the dispute. It corresponds to Article 59 of the Statute of the ICJ and to similar provisions in treaties governing other courts and tribunals.

(11) Again, subparagraph (b) does not prejudge the question whether other international institutions dealing with disputes or situations may be empowered to pro-

nounce decisions binding on States not technically parties to the dispute or situation, this being a question of the origin and content of primary rules.

(12) Nor does subparagraph (b) exclude that such institutions or other primary rules expressly provide for other States acquiring the status of being empowered or even obliged to react to the fact that a party to a dispute is in breach of its obligations under a judgment binding upon it. Indeed, within the framework of an international organization of which a court or tribunal is an organ, it may well be that, either generally or in particular circumstances, States members of the organization may be legally affected by a decision of such court or tribunal even if not technically parties to the dispute. This may be based on the ground that the position of the court or tribunal within the organization is such that the authority of its decisions is a concern of all member States, or on the particular powers given to such court or tribunal.<sup>17</sup>

(13) Subparagraphs (c) and (d) deal with breaches of obligations imposed by treaties. They are without prejudice to the legal consequences of such internationally wrongful acts as regards the "validity" of the treaty itself (see article 16 (a) below), a matter dealt with in the 1969 Vienna Convention.

(14) Bilateral treaties normally give rise to bilateral legal relationships only, i.e. to reciprocal rights and obligations as between the two States parties to the treaty. Multilateral treaties often have the same effect; i.e. even if the content of the obligations imposed is uniform towards all other States parties, the legal relationships remain bilateral ones as between each pair of States parties, and the legal relationship between one pair is quite separate from the legal relationship between another pair of States parties.<sup>18</sup> This may be the case even if the uniformity of the content of the bilateral legal relationships is itself founded upon an interest common to several States parties which are in the same

position, defined in the multilateral treaty itself,<sup>19</sup> or even common to all States parties.<sup>20</sup> Indeed, treaties are often concluded in multilateral form because of the existence of such interests common to several or all States.

(15) A breach of an obligation imposed by a multilateral treaty does not, therefore, necessarily injure each other State party to the treaty individually. Actually, a primary rule may as such leave open the question towards which State or States the performance of the obligation it imposes is due; but that question must be answered within the framework of secondary rules.<sup>21</sup>

(16) The answer is often clear from the text of the treaty itself, taking into account the rules of interpretation laid down in the 1969 Vienna Convention. In this connection, it should be noted that the interest of States parties in the performance of an obligation under the treaty is often "canalized" through the right of a particular party to that treaty to such performance. Thus freedom of navigation is a flag-State right even if the interests of other States may well be affected by any infringement of that right.<sup>22</sup> In the same way, one might regard the provision of article 7, paragraph 6, of the United Nations Convention on the Law of the Sea as "canalizing" the prohibition of the application of "the system of straight baselines ... in such a manner as to cut off the territorial sea of another State from the high seas or an exclusive economic zone" as an obligation imposed towards that other coastal State, although interests of other States in maritime communications with that coastal State would no doubt also be affected by a breach of that prohibition.

(17) On the other hand, it may well be that such "canalization" is not effected by a multilateral treaty, and that the fact that a breach of an obligation imposed by that treaty affects the interests of several States, which then happen to have a common interest in the performance of that obligation, is recognized by that treaty. This is a matter of interpretation of the treaty.

(18) There are two cases in which the facts indicate an answer to the question posed in paragraph (15) above. In the first case, reference is made to the *travaux préparatoires*. Indeed, it may be established that a particular obligation imposed by a multilateral treaty was stipulated in favour of a particular other party, or group of other parties (or prospective parties) to the treaty. This case is meant to be covered by subparagraph (d) (i) of article 5.

(19) The other case is meant to be covered by subparagraph (d) (ii). Indeed, if the breach of an obligation by one State necessarily affects the exercise of the rights or the performance of the obligations of all other States

<sup>17</sup> Without entering into the interpretation of these provisions, which contain primary rules, and therefore without prejudging whether or not they involve legal consequences as outlined in the above commentary, reference may be made to Article 94, paragraph 2, of the Charter of the United Nations and to articles 174 to 176 of the Treaty Establishing the European Economic Community (United Nations, *Treaty Series*, vol. 298, p. 11; for the official English text, see *Treaties Establishing the European Communities*, (Luxembourg, Office for Official Publications of the European Communities, 1973), p. 163), which provide for the power of the Court of Justice of the European Communities to annul decisions of other institutions of the Community or to declare that decisions have to be taken by those institutions. In the latter case, as in the case where the 1982 United Nations Convention on the Law of the Sea provides in article 290, paragraph 1, that a competent court or tribunal may prescribe "any provisional measures which it considers appropriate under the circumstances ... to prevent serious harm to the marine environment ...", the obligation imposed might be regarded, in view of the common interest involved, as an obligation towards States which are not technically parties to the dispute. See, in this connection, M. Akehurst, "Reprisals by third States", *The British Year Book of International Law*, 1970, vol. 44, pp. 13-15; see also the Special Rapporteur's preliminary report, *Yearbook ... 1980*, vol. II (Part One), p. 107, document A/CN.4/330, and his second report, *Yearbook ... 1981*, vol. II (Part One), p. 79, document A/CN.4/344.

<sup>18</sup> The possibility of such separate bilateral relationships is clearly recognized in the provisions of the 1969 Vienna Convention relating to reservations (articles 19 to 23); in case of reservations, the content of the bilateral legal relationships is obviously not uniform.

<sup>19</sup> For example, as a coastal State or flag-State.

<sup>20</sup> Such as freedom of navigation, which is also an interest of States using ships under a foreign flag for their international trade; cf. also non-discrimination clauses such as article 24, paragraph 1 (b) of the United Nations Convention on the Law of the Sea.

<sup>21</sup> And, for that matter, within the framework of "tertiary rules", though not necessarily in the same way.

<sup>22</sup> In the terms of the preliminary report, those other affected States suffer injury "through" the flag-State (*Yearbook ... 1980*, vol. II (Part One), p. 119, document A/CN.4/330, paras. 62 *et seq.*).

parties, one may safely assume that all other States parties are directly affected by the breach and, therefore, are injured States.<sup>23</sup>

(20) In two other cases it is not so much the facts which indicate the answer to the question which is (or are) the injured State (or States), but rather the “law” created by the multilateral treaty. Indeed, modern treaty practice increasingly recognizes the existence<sup>24</sup>—and provides for the protection—of interests which are not allocated to particular individual States parties.

(21) On the one hand, some multilateral treaties recognize or create, as between the States parties to them, a *collective* (in contradistinction to a merely common or parallel) interest of those States, for the protection or promotion of which those States enter into obligations. A breach of such an obligation then injures the collectivity of such States parties rather than one or more individual States parties. Now it may well be that the same multilateral treaty contains secondary and even tertiary rules, which organize the way in which the promotion and protection of such collective interests are ensured (cf. article 11 below). But the absence of such rules cannot mean that there is no injured State at all in the case of a breach of the obligations entered into by States upon becoming parties to that multilateral treaty. Indeed, in the absence of particular rules in the multilateral treaty which “translate” the recognized collectivity of interests into rules of “action” in defence of such interests, one can only assume that each (other) State party to the treaty is injured by a breach of the obligations imposed by the treaty.<sup>25</sup> Obviously, since in such a case each other State party to the multilateral treaty is an “injured State”, the very nature of that treaty limits also its individual response to the breach (cf. article 11 below).

(22) The other instance of recognition, or creation, of an interest not allocated to a particular State party to the multilateral treaty is the multilateral treaty providing for obligations of States parties to respect fundamental human rights as such.<sup>26</sup> Here again, the absence from such a treaty of specific rules organizing the response to a breach of such obligations cannot mean that that breach is left with no legal consequence whatever.<sup>27</sup>

<sup>23</sup> On the different plane of validity of the treaty itself, a similar situation is referred to in article 58, paragraph 1 (b) (i), and article 60, paragraph 2 (c) of the 1969 Vienna Convention.

<sup>24</sup> Actually *creates*.

<sup>25</sup> Again, on the different plane of validity of the multilateral treaty, article 60, paragraph 2 (a), of the 1969 Vienna Convention organizes—in the case of a material breach—a residual procedure of *unanimous agreement* of the other parties “to suspend the operation of the treaty in whole or in part or to terminate it”. It is to be noted in this connection that individual States parties, under paragraph 2 (b) and (c) of article 60, can only *suspend* the operation of the treaty, and that, according to article 72, paragraph 2, of the Convention: “During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty” (an obligation comparable with that stipulated in article 18 of the Convention).

<sup>26</sup> Of course, subparagraph (d) (iv) of article 5 as proposed is not meant to imply that obligations to respect fundamental human rights can flow only from multilateral treaties.

<sup>27</sup> The European Convention on Human Rights (United Nations, *Treaty Series*, vol. 213, p. 221) illustrates the various ways in which a

(23) Subparagraph (e) of article 5 refers to an internationally wrongful act which constitutes an international crime. Paragraph 2 of article 19 of part 1 of the draft articles provides that “the international community ... as a whole” may recognize the existence of “fundamental interests” of that community, to the effect that breaches of obligations “so essential for the protection” of those interests are recognized as international crimes. In many cases—such as a breach of the obligation to refrain from aggression—there will also be an injured State (or injured States) by virtue of the *other* provisions of the present article; in other cases, the “injured interest” will (also) be a “non-allocated” one. In fact the whole definition of an international crime in article 19, paragraph 2, seems to presuppose the recognition of a collective interest of all (other) States.

(24) Again, “the international community as a whole”, while recognizing a breach as an international crime, may—and indeed probably will—at the same time determine its additional special legal consequences (secondary rules) and, possibly, the applicable tertiary rules (cf. articles 14 and 15 below). Actually, the provisions of the Charter of the United Nations, including Article 51, do just that, in so far as “acts of aggression” are concerned (cf. article 15 below).<sup>28</sup>

(25) It cannot be concluded, again, from the absence of determination of such particular secondary and/or tertiary rules that, in the case of an international crime having been committed, there is no injured State at all. The alternative is to consider every other State, in principle, an injured State.

(26) Obviously, this does not necessarily imply that, for every other State individually, the commission of an international crime entails the same “new rights”.<sup>29</sup> (See the commentary to articles 14 and 15 below.)

## Article 6

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

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

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

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

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

**2. To the extent that it is materially impossible to act in conformity with paragraph 1 (c), the injured State may require the State which has committed the inter-**

response to a breach can be organized: individual complaints or a complaint by any other State party before the European Commission of Human Rights; recourse to the European Court of Human Rights or to the Committee of Ministers of the Council of Europe.

<sup>28</sup> This is without prejudice to the meaning of the term “armed attack” as employed in Article 51 of the Charter.

<sup>29</sup> Nor, for that matter, the same “new obligations” *vis-à-vis* all States other than the author State.

nationally wrongful act to pay to it a sum of money corresponding to the value which a re-establishment of the situation as it existed before the breach would bear.

### Commentary

(1) Articles 6 and 7 deal with the "new obligations" of the author State towards the injured State or States.

(2) Generally speaking, the new obligation of the author State is to "undo" its internationally wrongful act. This is often, to a greater or lesser extent, materially impossible, and then a "substitute performance" for the obligation violated has to be indicated.

(3) Paragraph 1 of article 6 analyses this new obligation of the author State in its four elements. Subparagraph (a) describes the first element, i.e. the obligation to stop the breach. Obviously this element refers only to breaches which can be stopped, i.e. acts having continuing effects, such as the arrest of a person, the taking of property or the deprivation of an otherwise existing and continuing right. If such an act, according to applicable primary rules of international law, constitutes an internationally wrongful act, the author State should at least, if required by the injured State to do so, release and return the person or property held through that act and permit the further exercise of that right.<sup>30</sup>

(4) It is to be noted that normally, under the domestic law of the author State, there is nothing to prevent that State *proprio motu* from taking such measures *ex nunc*. On the other hand, the original internationally wrongful act may well, at the same time, be a "wrongful act" under the domestic law of the author State, which entails legal consequences in the form of "remedies" of an administrative, penal or civil character. Very often such remedies can be applied on the initiative of the authorities of the author State without any action on the part of the person affected by the wrongful act; this is normally the case, for example, with administrative and penal remedies. Subparagraph (b) then obliges the author State to apply such remedies *proprio motu*.

(5) Subparagraph (b) is, of course, without prejudice to article 22 of part 1 of the draft articles. The "exhaustion of local remedies" is there construed as a condition for the existence of a breach of an international obligation.

(6) Nor do subparagraphs (a) and (b) deviate from the principle underlying, *inter alia*, article 4 of part 1 of the draft. Surely, even if, under the domestic legal system of the author State, its authorities were not legally entitled to stop the breach,<sup>31</sup> subparagraph (a) would apply (and

subparagraph (b) *a fortiori*). The point is that the injured State may at least require that measures *ex nunc* be taken.

(7) It should be noted in this connection that, even where there are some "circumstances precluding wrongfulness" as regards the original act of the author State, such circumstances may not be applicable with regard to the new obligations referred to in subparagraphs (a) and (b).<sup>32</sup>

(8) Subparagraph (c) deals with *restitutio in integrum stricto sensu*, i.e. a re-establishment of the situation as it existed before the commission of the internationally wrongful act, in other words measures with retroactive effect (*ex tunc*). Clearly such measures—a full "undoing" of the internationally wrongful act—often raise problems of fact and of (domestic) law, since the effect of that act may be both factual and legal. On the factual plane, the passage of time obviously makes it materially impossible to re-establish fully the previous situation; time reversal is not within human capacity, and pecuniary compensation—the payment of damages or compensation in kind—is the only solution left (cf. article 6, para. 2).

(9) On the legal plane, re-establishment of the legal situation with retroactive effect is, on the contrary, always materially possible, though its translation into fact—i.e. the enjoyment and the exercise of the legal situation—raises the same problem. Nevertheless, in so far as its legal consequences are concerned, again the retroactive re-establishment of the legal situation is not materially impossible. For example, the taking of property, including a transfer of that property (in contradistinction to its physical destruction), may have given rise to legal transactions in relation to that property (or its "product") which, as such, can be nullified retroactively.<sup>33</sup>

(10) It is clear, however, that, to the extent that the legal situation is governed by the domestic law of the author State, the re-establishment of the legal situation with retroactive effect implies a *degree of direct effect* of a rule of international law within that domestic legal system.<sup>34</sup>

(11) Subparagraph (d) deals with the fourth element of the new obligation to undo the internationally wrongful

<sup>30</sup> This might be called a *restitutio in integrum lato sensu* with reference to the persons, objects and functional rights affected by the internationally wrongful act; the "temporal" element, however—i.e. the fact that, during a certain period of time, the arrest, taking or deprivation has had effects—is not covered by such "undoing" measures *ex nunc*.

<sup>31</sup> Domestic legal systems, for their part, sometimes permit a deviation from domestic rules in order to fulfil international obligations. There may even exist—but this is a matter beyond the scope of the present draft articles—a rule of international law *prescribing* the admissibility of such deviation. Cf. P. Reuter, *Droit international public*, 5th ed. (Paris, Presses universitaires de France, 1976) (*collection* "Thémis"), pp. 49 *et seq.*

<sup>32</sup> In this sense, article 35 of part 1 of the draft articles may be applicable by analogy to such measures *ex nunc*.

<sup>33</sup> And vice versa: legal transactions by the former owner of the property can retroactively be given legal effect.

<sup>34</sup> This is true even though the re-establishment itself would have to be effected through legislation of the author State and an act of legislation is in itself a proper "object" of an obligation of conduct under international law. The point is rather that the required retroactive effect of such legislation of necessity interferes with legal relationships existing by virtue of the (previous content of the) domestic legal system and, as such, comes close to the so-called "direct effect" of rules of international law upon legal relationships primarily governed by domestic law. In other words, the obligation of *restitutio in integrum stricto sensu* would go beyond the limits of legal relationships between States. By the same token, no "direct effect" is involved to the extent that the retroactivity is limited to legal relationships between States. Nor, of course, does the foregoing prejudice any question as regards the legal effect of a possible internationally wrongful act of interference with relationships under the domestic law of the author State, within the domestic legal system of another State, a question primarily within the province of the rules of conflict of laws.

act: the provision of appropriate guarantees against repetition of the act (a measure *ex ante*). What is appropriate depends on the circumstances of the case. The mere recognition by the author State that an internationally wrongful act has occurred, usually accompanied or implied by an apology, may be appropriate.<sup>35</sup> In some circumstances, where the internationally wrongful act results from a normal application of the domestic law of the author State, a modification of the relevant domestic legislation (or of the standing governmental instructions concerning its application) may be required. Again, where the act of the State and its result are governed solely by rules of international law, the "appropriate guarantees" may take other forms dealing directly with the relationship between the States concerned, such as measures affecting the existence, organization or functioning of the governmental agency through which the internationally wrongful act has been committed.

(12) As noted above (paras. (8) and (9)), article 6, paragraph 2, deals with the "substitute performance" of compensation for the effects of the internationally wrongful act which it is materially impossible to undo.

#### Article 7

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

#### Commentary

(1) As explained in the commentary to article 6 (paras. (9) and (10)), the "new obligation" of the author State to effect a *restitutio in integrum stricto sensu* raises particular problems in cases where the legal situation to be re-established with retroactive effect is governed primarily by the domestic legal system of the author State.

(2) Indeed, while there is no uniformity in the decisions of international courts and tribunals, or in the practice of States and the teachings of the most highly qualified publicists of the various nations, there is a marked tendency not to require such *restitutio in integrum stricto sensu* in the case of an internationally wrongful act consisting in the infringement—within the jurisdiction of the author State—of a right (or, more generally, a legal situation) of a natural or juridical per-

son belonging to the injured State, or at least to leave to the author State the choice between such *restitutio in integrum stricto sensu* and the substitute performance of compensation and satisfaction (i.e. reparation).

(3) In this connection, it should be recalled that, on a quite different legal plane, article 22 of part 1 of the draft articles does give legal relevance to the domestic legal system of the author State by making the existence of a breach of particular primary obligations under international law dependent upon the exhaustion of local remedies. Even more important, that article presumes that "an *equivalent*\* treatment" is allowed by the international obligation "concerning the treatment to be accorded to aliens" and that such equivalent treatment may result from the application of local remedies (cf. article 6, para. 1 (b), above).

(4) Actually, even though a treaty between the author State and the injured State may provide for a different régime, it cannot be presumed that aliens within the jurisdiction of the other State enjoy extraterritorial status.<sup>36</sup>

#### Article 8

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

#### Commentary

(1) While articles 6 and 7 deal with the new obligations of the author State ("reparation" in the larger sense of the word), articles 8 and 9 concern the "new rights" of the injured State.

(2) The injured State is entitled to suspend the performance of its obligations towards the author State. Obviously this right to take countermeasures is not unlimited. In this connection, a first distinction must be made between countermeasures having the purpose of restoring the balance in the positions of the author State and the injured State (reciprocity), and countermeasures having the purpose of influencing a decision of the author State to perform its (new) obligations (reprisal).

(3) In fact, it may not always be easy to distinguish between the two purposes and their intended effects. Indeed, the justification for the "weaker" countermeasure by way of reciprocity, or for the "stronger" countermeasure by way of reprisal, is connected with the intention and effect of the internationally wrongful act to which it is a response. Accordingly, while article 9, paragraph 2, and article 10 contain special conditions for the taking of reprisals only, the object and purpose of those conditions is also relevant for the qualification

<sup>35</sup> And, indeed, does "add" to the previous legal situation an agreement on the applicability of the "old" obligation to the facts of the case. In this connection, it should be recalled that international courts and tribunals have sometimes expressly stated that their dictum on an internationally wrongful act having occurred constitutes satisfaction for the injured State. See the Special Rapporteur's second report, *Yearbook ... 1981*, vol. II (Part One), p. 89, document A/CN.4/344, para. 85.

<sup>36</sup> This is, of course, without prejudice to the status of diplomats of, and of ships under the flag of, foreign States. Also, within the framework of international arbitration by virtue of an agreement between a State and a foreign investor, special considerations may apply.



of the measures taken as measures by way of reciprocity. After all, the ultimate purpose of both types of measures must be a restoration in effect of the "old" primary legal relationship. In other words, elements of "proportionality" and of "interim protection" are inherent in measures by way of reciprocity.

(4) By its nature, a suspension of the performance of obligations by way of reciprocity presupposes reciprocal primary rights and obligations, i.e. a *quid pro quo* relationship or an exchange of performances as the sole object and purpose of the primary relationship. Whether or not—and to what extent—such a situation exists is a matter of interpretation of the primary legal relationship in the light of the circumstances which led to its creation. In many cases, particularly if the relationship is created by a bilateral treaty, the connection between the obligation breached by the author State and the obligation whose performance is suspended by the injured State is clear enough, either because the content of the obligation is the same for both parties or because it is established that the parties intended that one performance would be the counterpart of another. Even if in actual fact, at a particular moment, the balance between the performance and non-performance of respective obligations is not completely equal, the measure by way of reciprocity could still be justified as such.<sup>37</sup>

(5) There is no reciprocity in the primary relationship, and therefore no justification for the suspension of the performance of obligations by way of reciprocity if the latter are obligations by virtue of a peremptory norm of general international law (see article 12 (b) below).<sup>38</sup>

(6) The essence of reciprocity is that the countermeasure is limited in its effect to the (alleged) author State (see article 11 and the exception thereto in article 13 below).

(7) The obligations of a receiving State regarding the immunities to be accorded to diplomatic and consular missions and staff are not a counterpart of the fulfilment of the obligations of the sending State, its missions and their staffs relating to the proper exercise of their functions. While declarations of *persona non grata* and severance of diplomatic and/or consular relations are a legitimate response to breaches of those obligations, the immunities themselves must be respected (see article 12 (a) below.)

#### Article 9

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

**2. The exercise of this right by the injured State shall not, in its effects, be manifestly disproportional to**

<sup>37</sup> Cf. paragraph 83 of the arbitral award of 9 December 1978 in the *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France* (United Nations, *Reports of International Arbitral Awards*, vol. XVIII (Sales No. E/F.80.V.7), pp. 443-444).

<sup>38</sup> Unless, of course, the same peremptory norm permits non-performance of the obligation in the case of a breach of the same obligation by another State.

**the seriousness of the internationally wrongful act committed.**

#### Commentary

(1) In the case of a countermeasure by way of reprisal, there is no *legal* connection between the obligation breached by the author State and the obligation whose performance is suspended by the injured State. Accordingly, some of the limitations on the entitlement to countermeasures, essentially applicable to both types, must be made explicit here.

(2) The element of "proportionality" is laid down in paragraph 2 of article 9, taking into account the purpose of a measure by way of reprisal, which goes further than the mere restoring of the balance in the relationship between the author State and the injured State. There must not be manifest disproportion between the effects of the reprisal and the seriousness of the internationally wrongful act to which it is a response. Indeed, the reprisal is a deliberate non-performance of an international obligation with intended effects on the author State. Accordingly, its justification should also be measured against the intention and/or effects—in short, the seriousness—of the internationally wrongful act with regard to the injured State.

#### Article 10

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

**2. Paragraph 1 does not apply to:**

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

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

#### Commentary

(1) A measure of reprisal, even if not manifestly disproportional, remains by its very purpose at least "a wager on the wisdom ... of the other Party",<sup>39</sup> a unilateral act directed ultimately at the "enforcement" of the primary relationship. From this point of view, the existence and availability of other means to ensure the performance of obligations is clearly relevant.

(2) Paragraph 1 of article 10 therefore stipulates the condition of exhaustion of international procedures for peaceful settlement of the dispute. Thus, for example, if the obligation allegedly breached is one created in a treaty containing a procedure for settlement of disputes

<sup>39</sup> See paragraph 91 of the arbitral award in the *Air Service Agreement* case (*loc. cit.* (footnote 37 above), p. 445).

concerning the interpretation and application of that treaty, which allows an injured State party unilaterally to bring its claim to performance before an international court or tribunal, that procedure should be followed.

(3) Indeed, the *compulsory* character of a third-party dispute-settlement procedure in principle excludes for the time being other means of enforcement, such as the taking of a measure of reprisal.

(4) However, here again distinctions must be made according to the effectiveness of the dispute-settlement procedure.

(5) First, it may be that the functioning of the agreed dispute-settlement procedure depends on co-operation between the States in dispute (e.g. the appointment of arbitrators). Measures designed to promote that co-operation are allowed in such a case.

(6) Secondly, the agreed powers of the third party in the dispute-settlement procedure may be limited to aspects which are not relevant in the given situation. Thus a compulsory fact-finding procedure does not help if there is no dispute about the facts, but only on the existence or extent of the legal obligation allegedly breached.

(7) Thirdly, the third party may not be empowered to order effective interim measures of protection either on behalf of the claimant State or on behalf of the defendant State. In such a case, the claimant State has no choice but to take such measures unilaterally. Even if the third party is empowered to order effective interim measures of protection, the claimant State may take measures of protection subject to the power of the third party to order their withdrawal as an interim measure of protection on behalf of the defendant State.

(8) Finally, if the interim measures of protection ordered by the third party are not complied with, the system breaks down and the right to take measures of reprisal reappears.

(9) It should be noted that non-compliance with the final and binding decision of the third party constitutes a separate breach of an international legal obligation, a separate internationally wrongful act.

(10) On the other hand, the fact that a compulsory third-party dispute-settlement procedure does not provide for a final and binding decision by the third party does not take away the compulsory character of the procedure itself; paragraph 1 of article 10 would therefore be applicable, subject of course to paragraph 2.

### *Article 11*

**1. The injured State is not entitled to suspend the performance of its obligations towards the State which has committed the internationally wrongful act to the extent that such obligations are stipulated in a multilateral treaty to which both States are parties and it is established that:**

**(a) the failure to perform such obligations by one State party necessarily affects the exercise of the rights**

**or the performance of obligations of all other States parties to the treaty; or**

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

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

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

### *Commentary*

(1) As already remarked above, modern treaty practice increasingly shows a tendency for multilateral treaties to impose obligations for the protection of "extra-State" interests (see commentary to article 5 above). Suspension by an injured State of the performance of such obligations, whether by way of reciprocity or by way of reprisal, would then also affect parties other than the State which originally committed the internationally wrongful act.

(2) This situation is often taken into account by special rules in the multilateral treaty in question, designed to organize the response to a breach of the obligation committed by a State party.

(3) While in principle such special rules are covered by the provisions of article 2, it would seem useful to elaborate on the substantive and procedural consequences of this type of multilateral treaty relationship as regards the applicable secondary rules.<sup>40</sup>

(4) As to the substance, the situation mentioned in paragraph (1) above seems to exclude, in the first instance, a unilateral suspension by the injured State of the performance of its obligations. In this connection, it should be recalled that, under the provisos of article 5, subparagraph (d) (ii), (iii) and (iv), every other State party to the multilateral treaty is an injured State (in respect of both the original breach of the obligation and the suspension of performance by way of reciprocity or reprisal).

(5) Even so, the other States parties to the multilateral treaty may not in fact all be equally affected by the original breach of the obligation or by a countermeasure in response to that breach by another State party. Clearly, some collective decision has to be taken in order to weigh the interest served by the countermeasure against the effects thereof on the interests of the individual States parties which did not commit the internationally wrongful act.

<sup>40</sup> Again, on the different level of validity of the multilateral treaty itself, the 1969 Vienna Convention deals with the matter in its article 60, paragraphs 2 to 5.

(6) If the multilateral treaty provides for a procedure of collective decision on this point, that procedure should of course be followed. That collective decision may then imply that the States legally injured by the original internationally wrongful act waive their right to object to a countermeasure otherwise objectionable under paragraph 1 (a) and (b).

(7) No such waiver is permissible regarding suspension of the performance of obligations to respect human rights under paragraph 1 (c).

(8) If the multilateral treaty does not provide for a procedure of collective decision, the substantive rule of paragraph 1 remains applicable, subject to the provision of article 13 below.

### Article 12

**Articles 8 and 9 do not apply to the suspension of the performance of the<sup>41</sup> obligations:**

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

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

#### Commentary

See paragraphs (5) and (7) of the commentary to article 8 above.

### Article 13

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

#### Commentary

(1) Article 13 deals with the case of what could be called the complete breakdown of the system established by a multilateral treaty as a consequence of an internationally wrongful act in relation to the obligations imposed by that treaty.

(2) Indeed, if there is a manifest violation which destroys the object and purpose of the multilateral treaty as a whole, there is not much sense in applying those provisions of that treaty—those parts of the system established by the treaty—which create the collective interest of the States parties thereto (article 11, para. 1 (a) and (b)), or those which call for a dispute-settlement procedure (article 10) or for collective decisions for the purpose of promoting performance of its particular obligations (article 11, para. 2). On the other hand, countermeasures must remain allowed, although in such a case the re-establishment of the “old” legal relationships is obviously unlikely, if not impossible.

<sup>41</sup> The words “the performance of the” were omitted by mistake from the text of article 12 as submitted in the Special Rapporteur’s fifth report.

(3) In a sense, the breakdown of the system established by the multilateral treaty causes a “fall back” into the bilateral relationships between the States concerned (i.e. the author State and the injured State).

(4) Obviously, such a breakdown cannot be lightly assumed. Actually, a violation by one State party which falls under the definition given in the present article must be at least a “material breach” in the sense of the 1969 Vienna Convention and, as such, may give rise to termination of the treaty itself. Such termination, however, has no retroactive effect and some obligations remain.<sup>42</sup> Furthermore, termination requires the unanimous agreement of the parties other than the author State.<sup>43</sup> Quite apart from the validity of the treaty, there is room for suspension of the performance of obligations by way of a countermeasure.

### Article 14

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

**2. An international crime committed by a State entails an obligation for every other State:**

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

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

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

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

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

#### Commentary

(1) The distinction drawn in article 19 of part 1 of the draft articles between “international delicts” and “international crimes” makes sense only if the legal consequences of the latter are different from those of the former.

(2) As to the new obligations of the author State—reparation *lato sensu*—it is hard to imagine that they would not arise in the case of the commission of an

<sup>42</sup> See article 70 of the 1969 Vienna Convention.

<sup>43</sup> See article 60, paragraph 2 (a), of the 1969 Vienna Convention.

international crime, and the same applies to the new rights of the injured States to take countermeasures.<sup>44</sup> In other words, the question is rather one of *additional* legal consequences.

(3) Such additional legal consequences may be of three different kinds. First, there may be a new "collective right" of every other State to require the author State to fulfil its normal secondary obligations. Secondly, there may be additional secondary obligations of the author State, going beyond the "undoing" of its acts qualified as an international crime. Thirdly, there may arise new obligations of the other States as between them not to recognize or support the results of such an international crime.

(4) The first kind of additional legal consequences is dealt with in article 5, subparagraph (e).

(5) As to the second kind of additional legal consequences, they can be determined only by the international community as a whole if and when it recognizes some internationally wrongful acts as constituting international crimes.<sup>45</sup> Paragraph 1 of article 14 therefore refers to "the applicable rules accepted by the international community as a whole".<sup>46</sup>

(6) The third kind of additional legal consequences is an application of the principle that all States other than the author State should practise a measure of solidarity when confronted with the commission of an international crime. Here again, both the substance of the solidarity and the international procedures for the "organization" of that solidarity—i.e. its translation into action—may well be determined by the international community as a whole if and when it recognizes some internationally wrongful act as constituting an international crime. However, a minimum of required solidarity can already be recognized as applicable in all cases of an international crime having been committed. Paragraph 2 of the present article indicates that minimum in respect of the substance of the new obligations.

(7) The procedural aspect is dealt with in paragraph 3 of the present article. It contains a residual rule, since, as noted above, the international community as a whole may determine otherwise.

(8) In particular, the international community as a whole may recognize that, although by definition its "fundamental interests" are involved, the commission of an international crime under certain circumstances affects some injured State or States more than others.

(9) An international crime is always an internationally wrongful act; accordingly, there may be an injured State or injured States under article 5, subparagraphs (a) to (d). Furthermore, a response comparable to a measure of collective self-defence may be allowed; and finally, the international community as a whole may recognize that, under certain circumstances, the matter could be more appropriately dealt with by regional action only.

(10) In the absence of such particular circumstances or arrangements, it should be recognized that an individual State which is considered to be an injured State only by virtue of article 5, subparagraph (e), enjoys this status as a member of the international community as a whole and should exercise its new rights and perform its new obligations within the framework of the organized community of States.

(11) Accordingly, paragraph 3 of the present article stipulates, as a residual rule, the application, *mutatis mutandis*, of the procedures embodied in the Charter of the United Nations with respect to the maintenance of international peace and security.

(12) It should be noted in this connection that the commission of an international crime does not necessarily affect the maintenance of international peace and security. The function of paragraph 3 of the present article is therefore quite different from that of article 4.

(13) For the same reason, Article 103 of the Charter of the United Nations will not necessarily apply and a similar rule must be stipulated with regard to the obligations under paragraphs 1, 2 and 3 of the present article.

(14) By the same token, the latter obligations may be considered obligations "under any other international agreement" in the sense of Article 103 of the Charter and, in accordance with article 3 of part 2 of the draft articles, the prevalence of the obligations under the Charter must be preserved. The result is a three-level "hierarchy" of obligations: obligations under the Charter of the United Nations, obligations under the present article, and other obligations.

### Article 15

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

### Commentary

(1) Among the international crimes listed in article 19 of part 1 of the draft articles figures "a serious breach of an international obligation ... such as that prohibiting aggression" (para. 3 (a)).

(2) The legal consequences of an act of aggression are of course dealt with, in regard to both substance and applicable procedures, in the Charter of the United Nations. To the extent that they are additional to those referred to in article 14, they should obviously be mentioned in the present article.

<sup>44</sup> Obviously, the obligation of the author State "to pay ... a sum of money corresponding to the value which a re-establishment of the situation as it existed before the breach would bear" (article 6, para. 2) can apply only to a payment to the State or States which have in fact suffered damage capable of being compensated for by such a payment. Nevertheless, every State other than the author State is entitled to require such a payment to be made to such State or States.

<sup>45</sup> It has already been recognized by the Commission that all international crimes, recognized as such, need not necessarily have the same additional legal consequences.

<sup>46</sup> In effect, this corresponds to the "legal consequences ... determined by other rules of international law relating specifically to the internationally wrongful act in question", referred to in article 2.

### Article 16

The provisions of the present articles shall not pre-judge any question that may arise in regard to:

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

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

(c) belligerent reprisals.

#### Commentary

(1) Articles 2 and 3 of part 2 of the draft articles presuppose the existence of rules of international law other than those contained or referred to in the provisions of the present part 2, determining particular legal consequences of particular internationally wrongful acts.

(2) Since articles 5 to 15 are general in the sense that they are formulated as covering *in abstracto* all new rights and obligations of States entailed by an internationally wrongful act,<sup>47</sup> it is necessary to indicate what falls outside the scope of those articles—in other words, fields of internationally wrongful acts and/or legal consequences thereof in regard to which those articles are not even meant to be residual rules.

(3) One such field of legal consequences is formed by the legal consequences of an internationally wrongful

<sup>47</sup> New obligations of the author State (reparation *lato sensu*); new rights of injured States (reciprocity and reprisal); new collective rights of injured States; new obligations of all other States as between themselves.

act on the level of the invalidity, termination and suspension of the operation of treaties, a matter dealt with in the 1969 Vienna Convention.

(4) Another such field of legal consequences is formed by the legal consequences of an internationally wrongful act on the level of the legal relationships between States in their capacity as members of an international organization. Whether and to what extent such membership rights are curtailed or withdrawn, either by the organization or in direct application of its constitution, as a consequence of the commission of an internationally wrongful act depends on that constitution and on the legal practice of member States developed thereunder. It seems impracticable to stipulate general, even residual, rules on this matter.

(5) Finally, in the case of a belligerent relationship between States, a body of rules of *jus in bello* has been developed, particularly for the purpose of ensuring respect for human rights in armed conflicts. They involve a delicate balance between “military necessity” and other interests, including extra-State interests or values. Although such interests and values are also taken into account in the provisions of the present articles relating to reciprocity and reprisal, it cannot be denied that the state of belligerence and the resulting “military necessities” add a special dimension to the general problem. The determination of the necessary balancing points would be better left, for the time being, as part of the development of this branch of international law in the relevant international conferences, which benefit from the invaluable promotion and assistance of the International Committee of the Red Cross.

## II. “Implementation” (*mise en œuvre*) of international responsibility and the settlement of disputes (part 3 of the draft articles)

3. There seems to be general agreement that an internationally wrongful act of a State entails: (a) new obligations of the author State (A); (b) new rights of other States, in particular of the injured State(s) (B); (c) in some cases, new obligations of third States (C) *vis-à-vis* the other injured State or States. This holds true even where a State is injured only in its capacity or status as a member of the international community of States as a whole.

4. All these “new legal consequences”, or new legal relationships between States, are dependent upon the commission of an internationally wrongful act by a State A, i.e. in the first instance, upon a set of facts. In order to be able to invoke those new legal relationships, the State B invoking them must consider those facts as established and, of course, claim that they constitute an internationally wrongful act by State A. This double claim of State B must be made before or at the same time as that State invokes the new legal relationships, either as a claimant or as a defendant against a claim made by another State.

5. On analysis, such a statement by a State may be objected to by the alleged author State A (or even, in the

case mentioned in paragraph 3 above under (c), by the third State C) on one or more of the following grounds: (1) the alleged facts are not “the truth, the whole truth and nothing but the truth”; (2) even if, and to the extent that, they are, they do not amount to “an act of the author State A” (in the sense of chapter II of part 1 of the draft articles); (3) even if, and to the extent that, they are, they do not constitute a “breach of an international obligation” of the author State A (in the sense of chapter III of part 1 of the draft articles); (4) even if, and to the extent that, they are, there are “circumstances precluding wrongfulness” (in the sense of chapter V of part 1 of the draft articles, other than article 30 (Countermeasures in respect of an internationally wrongful act) and article 34 (Self-defence)).<sup>48</sup>

6. If there already exists between the claimant State (i.e. the State invoking the new legal relationships) and

<sup>48</sup> Other specific objections may be raised in the cases dealt with in article 11, paragraph 2, article 12, paragraph 2, article 14, paragraphs 2 and 3, and articles 27 and 28 of part 1 of the draft articles, but they do not change the overall situation. For the cases dealt with in articles 30, 34 and 35, see footnote 52 below.

the defendant State (i.e. the State against which the claim is made), by virtue of a consensus between them, a third-party dispute-settlement procedure relating to the performance of the obligation referred to in paragraph 5 above under (3), and the claimant and defendant States are bound by the rules on State responsibility (i.e. if those rules are laid down in a multilateral convention to which those States are parties), all those provisions would have to be applied by that third party, including such rules as incidentally involved other legal relationships. Thus, for example, if two States are parties to a future convention on State responsibility and, at the same time, parties to a treaty providing that any dispute between them, or any dispute regarding the interpretation and application of a particular treaty, shall be settled in accordance with a third-party procedure indicated in that treaty (in the latter case, if the alleged breach of an obligation under that treaty is a breach of an obligation as mentioned in paragraph 5 above under (3)), the third party should be empowered to apply all relevant rules embodied in the convention, including in particular the rule corresponding to article 10 of part 2 of the draft articles.

7. If there is no such international procedure for peaceful settlement of disputes available to the injured State, the question arises whether and how to provide for the "implementation" (*mise en œuvre*) of State responsibility.

8. It could be argued that the "new obligations" of the author State are, in reality, so closely connected with its primary obligation whose breach is alleged by an injured State that to provide for a new (and possibly separate) third-party dispute-settlement procedure for the implementation of State responsibility in this case would amount to the creation of a multilateral compulsory dispute-settlement procedure relating to all (primary) obligations, present and future, under international law of States becoming parties to the future convention on State responsibility.

9. On the other hand, there is an obvious analogy between the Vienna Convention on the Law of Treaties and a possible convention on State responsibility, an analogy which militates in favour of the addition to the rules on State responsibility of a part 3 more or less corresponding to articles 65 and 66 and the annex of the 1969 Vienna Convention.

10. Indeed, one might argue that one of the main objects and purposes of the 1969 Vienna Convention is to save a treaty as such from being "nullified" by circumstances which a State party to that treaty might invoke unilaterally.<sup>49</sup>

<sup>49</sup> It should be noted here, at the outset, that the dispute-settlement procedure provided for in the 1969 Vienna Convention regarding the *validity*—this term taken in its largest sense—of a treaty presupposes that the States in dispute both recognize that there is a treaty. If the very *existence* of a treaty—in contradistinction to its *validity*—is denied, e.g. if an alleged party to that treaty maintains that the document embodying the treaty is a complete fake, the dispute-settlement procedures of the Vienna Convention cannot be applied to that dispute (unless, of course, there is not even any *prima facie* evidence of the fake). In other words, on the borderline between law and fact, the existence of a treaty may become a preliminary and "incidental" question to be looked into by the conciliation commission before it passes to the question of the validity of that treaty, if any.

11. It is, it would seem, for these reasons that the 1969 Vienna Convention, a large number of whose provisions are devoted to the "invalidity" of treaties, prescribes international procedures to be followed in case such invalidity is invoked and objected to.

12. One may well argue that the same reasoning is valid for some of the new legal relationships arising from an internationally wrongful act. Indeed, the allegation that such an internationally wrongful act has been committed by (the author) State A may cause (the allegedly injured) State B to take measures which, in themselves, are not in conformity with its obligations; State A—denying having committed an internationally wrongful act—may then allege to be itself injured by an internationally wrongful act of State B and take measures which, in themselves, are not in conformity with its obligations, and so on and so forth. The old, existing legal relationships are thus in danger of becoming, in practice, completely nullified by this oscillation (or escalation).

13. Only a compulsory third-party dispute-settlement procedure can help to stop such escalation. Several such procedures can be envisaged. For the moment, the Special Rapporteur suggests following the precedents of the 1969 Vienna Convention and the United Nations Convention on the Law of the Sea.

14. Accordingly, it is now proposed that, if a State considering itself to be an injured State wishes to invoke article 8 (reciprocity) or article 9 (reprisal) as a justification for the suspension of the performance of its obligations, it should notify the alleged author State of its reasons for doing so. If the alleged author State objects, on any of the grounds referred to in paragraph 5 above, it should inform the alleged injured State accordingly, stating its reasons for the objection.

15. Normally, notification and objection (possibly after another round or rounds of communication between the parties), taken together, will serve to narrow the issues on which the States concerned are in disagreement or dispute.

16. If, and to the extent that, such a dispute concerns the existence and breach of a primary obligation on the part of the alleged author State, that dispute can be settled only through the existing dispute-settlement procedure already binding on the parties or newly agreed between them, and paragraph 6 above would apply to the secondary rights and obligations as between the parties to that dispute (which are also parties to the future convention on State responsibility).

17. If, and to the extent that, the dispute concerns the non-performance by the alleged injured State of its primary obligation *vis-à-vis* the alleged author State (by way of invoking reciprocity or reprisal), and the interpretation or application of such primary obligation is subject to a dispute-settlement procedure already existing or newly agreed between the parties, such dispute settlement procedure should be applied to that dispute and, again, paragraph 6 above would be applicable to the secondary rights and obligations as between the parties to that dispute (which are also parties to the future convention on State responsibility).

18. If neither paragraph 16 nor paragraph 17 above applies (including the case that the third party in the agreed dispute-settlement procedure declares itself not competent to settle the dispute), the danger referred to in paragraph 12 above arises: the secondary rules tend to nullify the primary rules.

19. In the comparable situation of nullification of a treaty as such, i.e. in the case of one party to a treaty invoking "a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation", the 1969 Vienna Convention, under article 42 together with articles 65 and 66, gives "any one of the parties" to the dispute the right to set in motion the special procedures of dispute settlement provided for in article 66. This is comprehensible, since all the parties presumably have the same interest in knowing whether the treaty as such is still valid.<sup>50</sup>

20. In the present case, however, where the alleged injured State—on the ground of its double claim (see para. 4 above)—suspends the performance of its obligations towards the alleged author State,<sup>51</sup> it cannot thereby force the alleged author State to submit to a dispute-settlement procedure concerning the alleged breach, which may or may not be agreed between them. Accordingly, only the alleged author State should be empowered to set in motion the procedure of dispute settlement to be provided for in part 3 of the draft articles.

21. This is particularly necessary since, in challenging the countermeasure of the alleged injured State by unilaterally setting in motion such dispute-settlement procedure, the alleged author State cannot but accept at the same time that the third party pronounces on the incidental questions of fact and law concerning the internationally wrongful act allegedly committed by it and its new obligations arising therefrom.<sup>52</sup>

22. In this connection, two points should be noted. First, it may well happen that there is a genuine divergence of opinion between the States concerned as to the interpretation of a treaty—or, for that matter, of rules of international law derived from any other source—applicable in their mutual legal relationship. A restrictive interpretation may be applied by one of them, which the other State contests, but—at least for the time being—accepts and then also applies as far as its corresponding obligations under that treaty towards the other party are concerned. This reciprocity is not that referred to in article 8 of part 2 of the draft articles; it is not a countermeasure, but rather a measure of

retortion. While there may be a dispute as to the interpretation and application of the relevant treaty or (other) rule of international law equally applicable to both parties, there is no dispute relating specifically to secondary rules.

23. Secondly, it may well happen that the States concerned have, in the past, agreed in principle to refer a future dispute as to the interpretation and application of a particular primary rule to a third-party dispute-settlement procedure, the implementation of which, however, will require further (voluntary) co-operation between the parties. In such a case, real counter-measures applied in order to arrive at such co-operation should again, as such, not be subject to the special procedure to be provided for in part 3 of the draft.

24. More generally, it should be recognized in part 3 that, in a sense, its procedural rules form an integral part of the legal consequences of an internationally wrongful act.<sup>53</sup>

25. This implies, on the one hand, that the principle of the residual character of the provisions of part 2 of the draft, which is enunciated in article 2 as provisionally adopted by the Commission,<sup>54</sup> should also apply to the relevant provisions of part 3. In other words, States, when creating primary rights and obligations between them, may at the same time, or at some later time before the established primary obligation is breached, determine that part 3 shall not apply to (alleged) breaches of that obligation.

26. On the other hand, the link between parts 2 and 3 of the draft implies that a future convention on State responsibility should not allow reservations excluding the application of part 3. Indeed, in this respect the precedent of the United Nations Convention on the Law of the Sea, which recognizes the inseparability of its substantive and its procedural provisions, should be followed.

27. There are obvious qualifications to be added to what is stated in paragraphs 23 and 24 above. In the first place, article 2 of part 2 contains the proviso "without prejudice to the provisions of articles 4 and 12", which refer, respectively, to the United Nations system relating to the maintenance of international peace and security, and to the "system" of *jus cogens*. By analogy, and following again the 1969 Vienna Convention, part 3 should also contain a provision corresponding to article 66, subparagraph (a), of that Convention and provisions dealing with the relationship between the dispute-settlement procedure of part 3 and the procedural rules to be embodied or referred to in articles 14 and 15 of part 2, concerning "international crimes" and "acts of aggression".

28. Secondly, article 2 of part 2 covers deviations from the legal consequences provided for in that part both in the direction of adding legal consequences to responsibility and in the direction of taking them away. In

<sup>50</sup> Or not valid, through the application of what could be called the "pre-primary rules" of the 1969 Vienna Convention.

<sup>51</sup> If the injured State invokes a material breach of a treaty as a ground for terminating the treaty or suspending its operation, article 66 of the 1969 Vienna Convention applies.

<sup>52</sup> Including possibly—if circumstances precluding wrongfulness other than those mentioned in article 30 (Countermeasures in respect of an internationally wrongful act) and article 34 (Self-defence) of part 1 of the draft articles are invoked—"any question that may arise in regard to compensation for damage caused by that act" (article 35); in that case, of course, it is implied that the duty to pay compensation is a condition of the recognition of a "circumstance precluding wrongfulness" rather than a result of a rule of liability for injurious consequences of acts not prohibited by international law.

<sup>53</sup> In the same way as the rules contained in article 42, together with articles 65 to 68, of the 1969 Vienna Convention are a consequence of the principle *pacta sunt servanda* (article 26).

<sup>54</sup> See p. 4 above.



part 3, the addition of legal consequences corresponds to article 65, paragraph 4, of the 1969 Vienna Convention (and to paragraphs 16 and 17 above). To the "taking away" of legal consequences then would correspond the exclusion, explicit or implicit, of the dispute-settlement procedure of part 3 (analogous to article 66, subparagraph (b), of the Vienna Convention). Such exclusion could be considered as reflecting on the nature of the primary rights and obligations created between the parties, in the sense that those rights and obligations are thereby recognized, by the States creating them, to be, or come close to, "soft law".<sup>55</sup> From this point of view, the question arises how to apply the principle underlying article 2 of part 2 to part 3, in so far as breaches of obligations originating before the adoption of the future convention on State responsibility are concerned. Surely an explicit deviation cannot be required for such application. On the other hand, implicit deviation may be hard to establish. On balance, there may be room for admitting a reservation to part 3 of the future convention on State responsibility (in so far as the dispute-settlement procedure corresponding to article 66, subparagraph (b) of the 1969 Vienna Convention is concerned) in respect of breaches of obligations entered into before the adoption of the future convention.

29. Furthermore, the impact of relevant provisions of part 3, as here proposed, on draft articles 10 and 13 of part 2 should be noted. Draft article 10, of course, refers to existing dispute-settlement procedures, relating either to all disputes or to disputes concerning the interpretation and application of the obligation allegedly breached by the author State. That draft article is in conformity with what is stated in paragraph 16 above. Draft article 13 is meant, *inter alia*, to stipulate an exception to article 10. If it is invoked by an alleged injured State and objected to by the alleged author State on the ground that the conditions of its applicability as stated therein are not fulfilled, the resulting dispute, as such, should be subject to the relevant provisions of part 3, provided that paragraph 17 above does not apply.

30. Article 19 of part 1 of the draft defines international crimes as internationally wrongful acts of a particular kind, involving the international community as a whole and, thereby—to an extent still under discussion—all other individual States as regards both their new rights and their new obligations. Draft articles 14

and 15 of part 2 relate to the legal consequences of international crimes; they refer explicitly (article 14, para. 3) or implicitly (article 15) to procedural provisions. Whatever further elaboration may be given by the Commission to the concept of an international crime, and by the international community as a whole to the recognition of an internationally wrongful act as a crime, it seems clear *a priori* that such recognition entails certain deviations from the general rules concerning the legal consequences of internationally wrongful acts. Such deviations consist of additional legal consequences, be they additional new obligations of the author State, additional new rights of other States, or additional new obligations of such other States towards each other and/or towards the international community as a whole.

31. There is an obvious connection between the concept of an international crime and the concept of *jus cogens*, as adopted in the 1969 Vienna Convention (article 53); indeed, they both imply a deviation from the bilateralism that characterizes most of the rules of international law, by virtue of what are considered to be fundamental interests of the international community. Clearly then, in addition to the "normal" questions concerning the facts of the case, there may well arise a dispute as regards the qualification of those facts as implying conduct conflicting with a rule accepted and recognized by that international community as essential for the protection of its fundamental interests. Such qualification involves both the global source of the obligation and the global consequences of its breach. Obviously this qualification cannot be left to each State individually.

32. Consequently, it is proposed that a provision analogous to that contained in article 66, subparagraph (a), of the 1969 Vienna Convention be included in part 3 of the draft articles on State responsibility—i.e. a provision stating that a dispute concerning the interpretation or application of article 19 of part 1 or article 14 of part 2 may be submitted by any one of the parties to the dispute, by a written application, to the ICJ for a decision.<sup>56</sup>

33. It will be noted that the proposal made in the previous paragraph, in contradistinction to the one made in paragraphs 18 and 19 above, would, if adopted, give a right to any one of the parties to the dispute to set in motion the procedure before the ICJ. This difference finds its explanation in the multilateral aspect of, and the common interest of all States members of the international community in, the determination to be made by the Court.

34. It will be also noted that the above proposal does not refer to the interpretation or application of article 15 of part 2. Indeed, it would seem that the (alleged) commission of the particular international crime of aggression and the claim of self-defence should be dealt with in the first instance in accordance with the relevant provisions of the Charter of the United Nations.

<sup>55</sup> In this connection, it is interesting to note the conclusions of the report on "International texts with a legal bearing in the mutual relations between their authors and texts devoid of such bearing" submitted to the Institute of International Law at its 1983 session at Cambridge (United Kingdom) by M. Virally, Rapporteur of the Institute's Seventh Committee, those conclusions having been amended by the Rapporteur in the light of the Institute's discussions (Institute of International Law, *Yearbook*, vol. 60 (Part II), pp. 139 *et seq.*, footnote 1). Those conclusions have not been adopted by the Institute, no doubt in view, *inter alia*, of the doctrinal controversies concerning the very existence of "soft law" (a term not employed by either the Institute or the Rapporteur). Whatever the point of view one takes in this controversy (cf. M. Bothe, "Legal and non-legal norms; a meaningful distinction in international relations?" *Netherlands Yearbook of International Law*, 1980, vol. XI, p. 65), the phenomenon of the creation by States of "shared expectations" falling short of the creation of full rights and obligations can hardly be denied.

<sup>56</sup> In view of the multilateral aspect of such a decision, it is proposed that the following proviso contained in article 66, subparagraph (a), of the 1969 Vienna Convention not be included: "... unless the parties by common consent agree to submit the dispute to arbitration".



Whether and to what extent the ICJ—one of the principal organs of the United Nations—has a role to play in the process is a matter of interpretation and application of the Charter itself.

35. The residual rule proposed in article 14, paragraph 3, of part 2 is rather in the nature of a condition for the exercise of the rights and the performance of the obligations of all States in the case of the commission of an international crime, and as such can be invoked in the procedure proposed in paragraph 32 above.

36. This special procedure under part 3 is, of course, not covered by article 10 of part 2 (see para. 29 above).

37. In outlining, in the foregoing paragraphs, the possible content of a part 3 of the draft articles on State responsibility, the Special Rapporteur is fully aware of operating at the borderline between codification and progressive development of international law. He re-

mains convinced of the necessity of adding a part 3 to the draft articles, for the reasons given in previous reports; nevertheless, he is conscious of the fact that, with regard to the details of its elaboration, several options are open for discussion. Consequently, and in view of the fact that most of the draft articles he has submitted for part 2 have not yet been discussed in the Commission, he has refrained at this stage from formulating draft articles for part 3. While part 1, provisionally adopted by the Commission in first reading, deals in reality with the refinement of primary rules, part 2 may be more or less compared with what, in the parlance of scientists dealing with the systems approach (in French, *la systémique*), is called “operational research” or “systems analysis”, and part 3 with what is called “systems engineering”. Even if, for one reason or another, one rejects that analogy, it cannot, it seems, be denied that there is an interaction between parts 1, 2 and 3 of the draft articles on State responsibility and that, consequently, an outline of part 3 may serve both the first reading of part 2 and the second reading of part 1.



# JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

[Agenda item 4]

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

[Original: English/French]  
[28 March 1985]

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## Introductory note

1. This report is the seventh in the series of reports on jurisdictional immunities of States and their property<sup>1</sup> submitted to the International Law Commission by the Special Rapporteur. Since the present report was begun a few months after the end of the Commission's thirty-sixth session and completed shortly after the conclusion of the thirty-ninth session of the General Assembly, it was not possible to include any account of the discussion on the topic in the Sixth Committee of the General Assembly.<sup>2</sup> However, sufficient progress has been made in the examination of the draft articles in first reading to warrant consideration of the seventh report as a direct extension of the sixth. The introductory note in the sixth report and the introduction to chapter IV of the Commission's report on its thirty-sixth session<sup>3</sup> may serve as an introduction to the present report.

2. The draft articles submitted to the Commission so far are contained in three parts. Part I, entitled "Introduction", contains articles 1 to 5; part II, entitled "General principles", contains articles 6 to 10; and part III, entitled "Exceptions to State immunity", contains articles 11 to 20. The status of work on the draft articles may be briefly stated: articles 1, 7 to 10, and 12 to 18

have been provisionally adopted by the Commission,<sup>4</sup> as have some provisions of articles 2 and 3;<sup>5</sup> the Commission has taken note of draft articles 4 and 5<sup>6</sup> and set them aside for examination after the rest of the articles have been considered; article 6 has been provisionally adopted<sup>7</sup> but the Commission subsequently decided to re-examine it and asked the Drafting Committee to revise it in the light of the new discussion and of the revision of article 1;<sup>8</sup> draft article 11, as revised by the Special Rapporteur,<sup>9</sup> will be examined after the other articles in part III have been considered; draft articles 19 and 20, submitted by the Special Rapporteur in his sixth report, are due to be considered by the Commission at its thirty-seventh session.<sup>10</sup>

3. The draft articles hereinafter submitted constitute part IV of the draft, entitled "State immunity in respect of property from attachment and execution", and part V of the draft, entitled "Miscellaneous provisions".

<sup>4</sup> The texts of these articles, and the commentaries thereto, are reproduced as follows: art. 1 (revised) and arts. 7, 8 and 9: *Yearbook ... 1982*, vol. II (Part Two), pp. 99 *et seq.*; arts. 10 and 12: *Yearbook ... 1983*, vol. II (Part Two), pp. 22 *et seq.*; arts. 13 and 14: *Yearbook ... 1984*, vol. II (Part Two), pp. 63 *et seq.*; art. 15: *Yearbook ... 1983*, vol. II (Part Two), pp. 36-38; arts. 16, 17 and 18: *Yearbook ... 1984*, vol. II (Part Two), pp. 67 *et seq.*

<sup>5</sup> For the texts of draft articles 2 and 3, see *Yearbook ... 1982*, vol. II (Part Two), pp. 95-96, footnotes 224 and 225. The provisions of these articles with commentaries thereto provisionally adopted by the Commission are reproduced as follows: art. 2, para. 1 (a): *ibid.*, p. 100; art. 2, para. 1 (g): *Yearbook ... 1983*, vol. II (Part Two), pp. 34-35; art. 3, para. 2: *ibid.*, pp. 35-36.

<sup>6</sup> For the texts, see *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnotes 226 and 227.

<sup>7</sup> For the text and commentary thereto, see *Yearbook ... 1980*, vol. II (Part Two), pp. 142 *et seq.*

<sup>8</sup> Article 6 has not yet been revised by the Drafting Committee; see *Yearbook ... 1984*, vol. II (Part Two), p. 61, footnote 206.

<sup>9</sup> See *Yearbook ... 1982*, vol. II (Part Two), p. 99, footnote 237, and *Yearbook ... 1984*, vol. II (Part Two), p. 59, footnote 200.

<sup>10</sup> For the revised text of draft article 19 submitted by the Special Rapporteur, *ibid.*, p. 61, footnote 202. For the text of draft article 20, see document A/CN.4/376 and Add.1 and 2 (see footnote 1 (f) above), para. 256.

<sup>1</sup> The six previous reports were: (a) preliminary report: *Yearbook ... 1979*, vol. II (Part One), p. 227, document A/CN.4/323; (b) second report: *Yearbook ... 1980*, vol. II (Part One), p. 199, document A/CN.4/331 and Add.1; (c) third report: *Yearbook ... 1981*, vol. II (Part One), p. 125, document A/CN.4/340 and Add.1; (d) fourth report: *Yearbook ... 1982*, vol. II (Part One), p. 199, document A/CN.4/357; (e) fifth report: *Yearbook ... 1983*, vol. II (Part One), p. 25, document A/CN.4/363 and Add.1; (f) sixth report: *Yearbook ... 1984*, vol. II (Part One), p. 5, document A/CN.4/376 and Add.1 and 2.

<sup>2</sup> See "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-ninth session of the General Assembly" (A/CN.4/L.382), sect. D.

<sup>3</sup> *Yearbook ... 1984*, vol. II (Part Two), pp. 58 *et seq.*

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

### PART IV. STATE IMMUNITY IN RESPECT OF PROPERTY FROM ATTACHMENT AND EXECUTION

#### I. Introduction

4. Part IV, concerning State immunity in respect of property from attachment and execution, constitutes the final substantive part of the set of draft articles on jurisdictional immunities of States and their property

and marks a separate phase in the study undertaken by the Commission on the topic. The title of the topic, appropriately "Jurisdictional immunities of States and their property", might, however, give the impression that there are two main types of jurisdictional immunities, one concerning States and the other their

property. As explained earlier,<sup>11</sup> however, the topic concerns exclusively State immunity and not "property immunity". Property is conceived as "object" rather than "subject" of rights or immunities. The expression "property", whether "State property" or property in the possession or control of a State or in which a State has an interest, cannot be used as indicating a holder of rights or a beneficiary of jurisdictional immunities in the same sense as a State or one of its organs, agencies or even instrumentalities. It is therefore not strictly speaking property, as such, that is entitled to immunity. Immunity belongs to States and States are immune in two sets of circumstances: when they themselves are impleaded or proceeded against *eo nomine*, as well as when measures are taken or contemplated or proceedings instituted in respect of their property. It is only in this sense that the title of the topic is so loosely worded that its meaning is wide enough to cover all types of legal proceedings, whether directed against States themselves, or entailing measures of arrest, attachment or execution against their property, even though they themselves are not named as parties to the proceedings. It may therefore be pertinent to examine some of the significant connections in which property has a central role to play in the overall concept of jurisdictional immunities of States.

#### A. Relevant connections between property and jurisdictional immunities of States

5. In the context of State immunity, State property is closely relevant in more ways than one. Before proceeding briefly to examine these connections, it is useful to recall that the expression "State property" needs little or no clarification. According to paragraph 1 (e) of draft article 2 (Use of terms), it refers to the "property, rights and interests which are owned by a State according to its internal law".<sup>12</sup> This definition may raise another question, especially in regard to property taken in violation of the generally accepted principles of international law, such as property expropriated without compensation. It is convenient to restate at this point that the question of the determination of proprietary rights or of the constitutionality of seizures of property, in the face of conflicting claims under different legal systems, belongs more appropriately to the realm of private international law. The question of illegality of method of acquisition of title or of government actions under public international law forms a separate topic and clearly lies beyond the scope of the current enquiry. The present topic is concerned directly with jurisdictional immunities of States and their property and not with the acquisition of legal titles or the legality or illegality of State acts in the seizure of property under international law.

6. The first important area of close connection between State property and State immunity was identified

by Lord Atkin in *The "Cristina"* (1938) as proceedings indirectly impleading a foreign sovereign. In an oft-cited dictum, Lord Atkin said:

The foundation for the application to set aside the writ and arrest of the ship is to be found in two propositions of international law engrafted into our domestic law which seem to me to be well established and to be beyond dispute. The first is that the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages.

The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control.<sup>13</sup>

7. The fact that proceedings affect State property or property in the possession or control of a State may constitute an important factor in determining whether a State may claim jurisdictional immunity by virtue of either of the two propositions of international law cited by Lord Atkin. Thus paragraph 2 of article 7, provisionally adopted by the Commission, contains a provision on which State property appears to have had an important bearing:<sup>14</sup>

#### Article 7. Modalities for giving effect to State immunity

...

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.

...

8. As noted with regard to part III of the draft (Exceptions to State immunity), several specific areas may deserve special attention in an effort to delineate the extent or limits of State immunity. Thus, as provided in article 15, questions of ownership, possession and use of property may, in appropriate circumstances, be determined by a court of the State where the property is situated (*forum rei sitae*) without another State which claims a right or interest in such property being able to invoke jurisdictional immunity.<sup>15</sup> Similarly, proceedings relating to intellectual or industrial property which enjoys legal protection in the State of the forum will not be barred by the rule of State immunity.<sup>16</sup>

9. In another entirely separate connection, property comes into direct contact with jurisdictional immunities of States. Under part IV of the draft, States are immune not only in respect of property belonging to them, but also invariably in respect of property in their possession or control or in which they have an interest, from attachment, arrest and execution by order of a court of another State. Property connections with State immu-

<sup>13</sup> United Kingdom, *The Law Reports, House of Lords ...*, 1938, p. 490.

<sup>14</sup> See paragraphs (19) and (20) of the commentary to article 7 (*Yearbook ... 1982*, vol. II (Part Two), p. 106).

<sup>15</sup> See the commentary to article 15 (Ownership, possession and use of property) (*Yearbook ... 1983*, vol. II (Part Two), pp. 36-38).

<sup>16</sup> See the commentary to article 16 (Patents, trade marks and intellectual or industrial property) (*Yearbook ... 1984*, vol. II (Part Two), pp. 67-69).

<sup>11</sup> See, for example, the preliminary report, document A/CN.4/323 (see footnote 1 (a) above), para. 47; and the second report, document A/CN.4/331 and Add.1 (see footnote 1 (b) above), para. 26.

<sup>12</sup> See the second report, document A/CN.4/331 and Add.1 (see footnote 1 (b) above), paras. 26 and 33.

ity in this more direct manner may occur in the form of pre-trial or rather pre-judgment attachment or arrest, or may take the form of post-judgment measures by way of execution.<sup>17</sup> The question of jurisdictional immunities relates, in this property connection, to the nature of the use of State property or the purpose to which property is devoted rather than to the particular acts or activities of States which may provide a criterion to substantiate a claim of State immunity.<sup>18</sup>

## B. Projected structure of part IV of the draft articles

10. The draft articles constituting part IV of the draft may be arranged in such a pattern as to present a vivid picture of the whole structure of the treatment of State immunities. This part is composed of only four articles.

11. Draft article 21, entitled "Scope of the present part", delineates the scope of part IV. The commentary draws some distinctions and underlines the close connection between State immunities from the jurisdiction of the courts of another State under parts II and III and State immunities from attachment and execution in respect of property by order of the courts of another State under part IV, including attachment in the pre-judgment phase and enforcement measures in aid of execution of the judgment.

12. Draft article 22, entitled "State immunity from attachment and execution", deals with the unavailability of means of enforcement of judgments against foreign States in general. Courts normally avoid issuing orders of injunction or specific performance against foreign States, since they would not be enforceable. Even the satisfaction of a judgment against a foreign State is clearly subject to the general rule of State immunity from attachment, arrest and execution. State practice will be examined, including judicial decisions, treaty practice, legal opinions and legislative enactments in the relevant fields, to justify the existence of a general rule of State immunity in respect of property from enforcement measures at various phases of legal proceedings: pre-trial, pre-judgment and post-judgment measures of detention, arrest, attachment and execution against the types of property that are susceptible to such measures with the consent of the States concerned. Of course, nothing will prevent a State from voluntarily submitting to execution or complying with the injunction or specific performance order.

13. Draft article 23, entitled "Modalities and effect of consent to attachment and execution", deals with the various methods by which a State may express consent and endeavours to place appropriate limitations on the validity or effectiveness of consent to attachment and execution. Consent may be expressed in advance in a written agreement or contract. It may be of a general nature which would allow attachment and execution against assets connected with the commercial transac-

tions in question. It may also be related to specific assets or property allocated for the purpose of satisfying judgment debts. In any event, attachment and execution may not be levied against assets forming part of the public property of a State which is qualified as *publicis usibus destinata*, or devoted to public services or public purposes.

14. Draft article 24, entitled "Types of State property permanently immune from attachment and execution", enumerates the types of public property that are usually specifically exempt from measures of attachment and execution. This provision is designed to protect the higher interests of weaker developing nations from the pressure generating from industrialized or developed countries and multinational corporations to give prior consent to possible attachment and execution against certain types of property that are entitled to protection under public international law in the form of inviolability, such as diplomatic and consular premises or assets forming part of the *instrumentum legati*. Of course, nothing will prevent a State from complying with a judgment or order by the courts of another State to perform an act or to refrain from an act, such as occupying certain premises or vacating the same following an ejectment order by the courts of the forum State. By nature, no judicial organ of one State may enforce its order of injunction or specific performance against another unwilling State. There is no machinery of justice in the State of the forum to compel another State to perform a specific act, or to deliver a specific object or to refrain from specific actions. *A fortiori*, a State is not bound to part with or submit to attachment or execution any of the types of property listed in this draft article as unattachable, regardless of any previous commitment or prior consent.

## II. Draft articles

### ARTICLE 21 (Scope of the present part)

#### A. General considerations

##### 1. DISTINCTIONS BETWEEN IMMUNITY FROM ATTACHMENT AND EXECUTION AND IMMUNITY FROM JURISDICTION

15. If part IV is to qualify as a distinct part of the draft, separate from part II (General principles) and part III (Exceptions to State immunity), it should be possible to distinguish immunity from attachment and execution from other types of jurisdictional immunities, especially immunity from jurisdiction. The need for such an exercise has become more apparent with particular regard to the different connections in which State property may come into play in considering the possible application of the rule of State immunity to a given set of circumstances. If parts II and III are concerned principally with immunity from jurisdiction as opposed to immunity from attachment and execution, then it remains to be seen in what ways and to what extent the notion of State property could be said to be relevant to State immunity.

<sup>17</sup> See the preliminary report, document A/CN.4/323 (see footnote 1 (a) above), para. 47.

<sup>18</sup> *Ibid.*, paras. 68-69.

16. As already indicated in the preliminary report,<sup>19</sup> the expression "jurisdictional immunities" can include both types of immunities, namely immunity from jurisdiction and immunity from attachment and execution. The former is essentially different from the latter in kind as well as in the stage at which it occurs. The term "jurisdiction" or *jurisdictio* literally means the pronouncement or determination of the law or right of the parties in litigation. "Immunity from jurisdiction" refers to exemption from the judicial competence of the court or tribunal having power to adjudicate or settle disputes by adjudication. On the other hand, "immunity from attachment and execution" relates more specifically to the immunities of States in respect of their property from pre-judgment attachment and arrest, as well as from execution of the judgment rendered.

17. Thus waiver of "immunity from jurisdiction"—i.e. consent to the exercise of jurisdiction by the courts of another State in accordance with article 8,<sup>20</sup> or participation in a proceeding before a court in accordance with article 9<sup>21</sup>—does not imply submission to measures of execution. Consent by a foreign State to the exercise of local jurisdiction is not consent to execution of judgment against its property. Waiver of immunity from jurisdiction does not constitute or automatically entail waiver of immunity from execution. A separate waiver will be needed at the time satisfaction of judgment is sought.<sup>22</sup> The separation of the two phases has found unequivocal support in judicial decisions of common-law as well as civil-law countries. In the United Kingdom, the House of Lords, in *Duff Development Company Ltd. v. Government of Kelantan and another* (1924),<sup>23</sup> refused to allow attachment of the property of the Sultan of Kelantan, although the Government of Kelantan had in a previous proceeding submitted to the jurisdiction of English courts on the merits. Similarly, in the United States of America, in *Dexter & Carpenter, Inc. v. Kunglig Järnvägsstyrelsen et al.* (1930),<sup>24</sup> a court refused attachment of the property of the Swedish State Railways, although Sweden had previously submitted to the jurisdiction. It was held, in both cases, that submission to the jurisdiction does not imply submission to execution. As the Court of Appeal of Aix-en-Provence has observed: "These two immunities are not interconnected, and the waiver of one has never, before French courts, entailed the loss of the right to invoke the other."<sup>25</sup>

<sup>19</sup> *Ibid.*, paras. 49-52.

<sup>20</sup> See the commentary to article 8 (Express consent to the exercise of jurisdiction) (*Yearbook ... 1982*, vol. II (Part Two), pp. 107-109).

<sup>21</sup> See the commentary to article 9 (Effect of participation in a proceeding before a court) (*ibid.*, pp. 109-111).

<sup>22</sup> See the preliminary report, document A/CN.4/323 (see footnote 1 (a) above), para. 67.

<sup>23</sup> United Kingdom, *The Law Reports, House of Lords ...*, 1924, p. 797, at pp. 809-810.

<sup>24</sup> United States of America, *The Federal Reporter*, 2d Series, vol. 43 (1931), p. 705; *Annual Digest of Public International Law Cases, 1929-1930* (London), vol. 5 (1935), p. 109, case No. 70.

<sup>25</sup> See *Socifros v. USSR* (1938) (*Annual Digest ...*, 1938-1940 (London), vol. 9 (1942), p. 237, case No. 80); see also the decision of the Court of Appeal of Aix-en-Provence in *Oficina del Aceite v. Domenech* (1938) (*ibid.*, p. 239, case No. 81).

## 2. LINKAGE BETWEEN IMMUNITY FROM ATTACHMENT AND EXECUTION AND IMMUNITY FROM JURISDICTION

18. While immunity from execution belongs to the post-judgment phase of proceedings, immunity from attachment of property may be invoked at any stage before trial or judgment or during trial, either pre-trial in order to found jurisdiction (*ad fundandam jurisdictionem*) or as security for satisfaction of judgment in the event of a decision favourable to the plaintiff, which may require seizure of property of the State judgment debtor for partial or total satisfaction of the judgment debt. The immunities of States from attachment and execution of property are distinguishable and separable from their immunities from jurisdiction. Yet there are circumstances in which the two types or phases of immunity are so closely linked that they are not clearly independent of each other. Indeed, there may be areas or circumstances in which both types or phases of immunity partially or wholly overlap.

19. The passage from immunity from jurisdiction to immunity from attachment and execution involves an increasing volume and variety of difficulties, as the complex problem areas appear to multiply. If there were difficult problems in the selection of competing criteria for determining State activities to be covered by immunity from jurisdiction and those which are in practice subject to territorial jurisdiction, there are indeed more difficulties in regard to the corresponding question of immunity from attachment and execution.<sup>26</sup> The question continues to be validly asked whether distinctions such as between *acta jure imperii* and *acta jure gestionis* persist in the practice of States beyond the immunity from jurisdiction stage. It is necessary to establish the extent to which such distinctions remain relevant in the classification of the types of State property or the nature of the uses of property by States that could determine the question of immunity from attachment and execution. The answer may well be that, in the ultimate analysis, immunity from attachment and execution is far more absolute than immunity from jurisdiction, which admits of several possible exceptions, as identified in part III. On the other hand, only express consent to execution could deprive States of this immunity and such consent is not always effective if it relates to the types of property that are not attachable. The interplay between the two types of immunity has given rise to different legal propositions.

## 3. LINKAGE AS JUSTIFICATION FOR ABSOLUTE IMMUNITY FROM JURISDICTION

20. It has sometimes been argued that, because there is no possibility of enforcing judgment against a foreign State, there should be no possibility of exercising jurisdiction against a foreign State. In other words, absolute immunity from execution breeds absolute immunity from jurisdiction. Thus there might be some—but only some—justification for the following argument advanced by an Italian writer in 1890:

<sup>26</sup> See, for example, I. Sinclair, "The law of sovereign immunity: Recent developments", *Collected Courses of The Hague Academy of International Law, 1980-II* (Alphen aan den Rijn, Sijthoff and Noordhoff, 1981), vol. 167, pp. 218-220.



... In fact, a sentence pronounced against a foreign State or sovereign cannot be executed in the foreign State; nor can it be executed in the State in which it was handed down, at least not against the foreign State. But a sentence which cannot be executed either by the judge who passed it or by another authority is a legal monstrosity. This is sufficient reason for any serious thinker to consider the doctrine which we are combating entirely false and ill-founded.<sup>27</sup>

21. Whatever the merits of this argument, the facts upon which it is based are not borne out by the current practice of States.<sup>28</sup> As will be seen, the judicial practice of several countries, such as Italy, Egypt, France, Belgium and more recently Switzerland, the Netherlands, the Federal Republic of Germany, the United Kingdom and the United States of America, appears to have permitted execution against the property of foreign States on several occasions, especially in matters *jure gestionis*,<sup>29</sup> and there appears to have been no serious objection to such execution except in regard to property covered by diplomatic immunities.<sup>30</sup>

#### 4. EXECUTION AS A COROLLARY OF THE EXERCISE OF JURISDICTION

22. Another view, different from the foregoing, has been advanced in judicial reasoning in some civil-law jurisdictions. In Belgium, the decision of the Tribunal civil of Brussels in the *Socobelge* case (1951) is a classic example;<sup>31</sup> the court rejected immunity from execution once jurisdiction was exercised on the merits. It stated:

Considering that it is not clear on what considerations the judge would be warranted in refusing to confirm a lawfully justified distraint to the benefit of a Belgian company because such confirmation might be damaging to the interests of a foreign State summoned by a Belgian national to appear in the case before Belgian courts; that, in so doing, the judge is merely carrying out his mission in its most comprehensive meaning, subject to appeal, for which in this respect

<sup>27</sup> C. F. Gabba, "De la compétence des tribunaux à l'égard des souverains et des Etats étrangers", *Journal du droit international privé* (Clunet) (Paris), vol. 17 (1890), p. 34; for the other parts of this article, *ibid.*, vol. 15 (1888), p. 180, and *ibid.*, vol. 16 (1889), p. 538.

<sup>28</sup> Sir Gerald Fitzmaurice noted in 1933 that, with the exception of Italy and, to a lesser extent, Czechoslovakia, it was not possible to proceed to actual execution of a sentence without the consent of the State concerned, in "State immunity from proceedings in foreign courts", *The British Year Book of International Law*, 1933 (London), vol. 14, pp. 119-120.

<sup>29</sup> For Italy, see, for example, *Rappresentanza commerciale dell'U.R.S.S. v. De Castro* (1935) (*Il Foro Italiano* (Rome), 1935, part 1, p. 240; *Annual Digest ... 1933-1934* (London), vol. 7 (1940), p. 179, case No. 70); for Egypt, see *Egyptian Delta Rice Mills Co. v. Comisaría General de Abastecimientos y Transportes de Madrid* (1943) (*Bulletin de législation et de jurisprudence égyptiennes* (Alexandria), vol. 55 (1942-1943), p. 114; *Annual Digest ... 1943-1945* (London), vol. 12 (1949), p. 103, case No. 27); for France, see *U.R.S.S. v. Association France-Export* (1929) (*Journal du droit international* (Clunet) (Paris), vol. 56 (1929), p. 1043; *Annual Digest ... 1929-1930* (*op. cit.*), p. 18, case No. 17); for Belgium, see the *Socobelge* case (see footnote 31 below); for Switzerland, see *State Immunity (Switzerland)* (No. 1) (1937) (*Blätter für Zürcherische Rechtsprechung*, vol. XXX-VII (1938), p. 319; *Annual Digest ... 1941-1942* (London), vol. 10 (1945), p. 230, case No. 60); for Greece, see the *Romanian legation case* (1949) (*Revue hellénique de droit international* (Athens), vol. 3 (1950), p. 331).

<sup>30</sup> See, on this subject, S. Sucharitkul, *State Immunities and Trading Activities in International Law* (London, Stevens, 1959), pp. 263-264.

<sup>31</sup> *Socobelge et Etat belge v. Etat hellénique, Banque de Grèce et Banque de Bruxelles* (*Journal du droit international* (Clunet) (Paris), vol. 79 (1952), p. 244; for a review of both the doctrinal and the jurisprudential authorities cited by the court, see pp. 248-258).

and having regard to a higher interest, [the] Belgian legislator has made provision in order to guard against any inadvertence on the part of the judge ...<sup>32</sup>

23. This view was reflected in the conclusion of the Court of Cassation in an earlier Belgian case concerning the *Société anonyme des chemins de fer liégeois-luxembourgeois* (1930)<sup>33</sup> that the power to proceed to forced execution is but the consequence of the power to exercise jurisdiction. Or, as one eminent jurist put it:

... It is at first sight difficult to admit logically that a refusal to grant jurisdictional immunity should not involve forced execution against the property of the foreign State.<sup>34</sup>

24. This view is further reflected in the case-law of some countries, such as Switzerland. Immunity from execution is rejected once jurisdiction has been exercised and judgment rendered by a Swiss court against a foreign State.<sup>35</sup> Thus, in *Kingdom of Greece v. Julius Bär & Co.* (1956),<sup>36</sup> the Swiss Federal Tribunal refused to accord absolute immunity from execution, linking absence of immunity from execution to submission to the jurisdiction. The court observed:

... As soon as one admits that in certain cases a foreign State may be a party before Swiss courts to an action designed to determine its rights and obligations under a legal relationship in which it had become concerned, one must admit also that that foreign State may in Switzerland be subjected to measures intended to ensure the forced execution of a judgment against it. If that were not so, the judgment would lack its most essential attribute, namely that it will be executed even against the will of the party against which it is rendered. ... There is thus no reason to modify the case-law of the Federal Tribunal in so far as it treats immunity from jurisdiction and immunity from execution on a similar footing.<sup>37</sup>

#### 5. INTERRELATIONSHIP BETWEEN IMMUNITY FROM JURISDICTION AND IMMUNITY FROM ATTACHMENT AND EXECUTION

25. While the two types of immunity are by nature no doubt distinguishable, as they are indeed separable in time, the interplay between the two notions, in theory as well as in practice, leaves room for considerable doubts and controversy. The complete absence of an interconnecting link between the two types of immunity is clearly not well founded, as one seems to cast a shadow on the other in more ways than one.

26. Let us consider in turn the different sets of circumstances. First, in cases where immunity from jurisdiction has been upheld, the question of seizure of property of a foreign State *ad fundandam jurisdic-*

<sup>32</sup> *Ibid.*, p. 261.

<sup>33</sup> *Société anonyme des chemins de fer liégeois-luxembourgeois v. Etat néerlandais* (Ministère du Waterstaat) (*Pasicrisie belge*, 1903 (Brussels), part 1, p. 294); the judgment of the Court of Cassation is cited in the Harvard Law School draft convention on competence of courts in regard to foreign States, see *Supplement to The American Journal of International Law* (Washington, D.C.), vol. 26 (1932), pp. 613-614.

<sup>34</sup> J.-F. Lalive, "L'immunité de juridiction des Etats et des organisations internationales", *Recueil des cours de l'Académie de droit international de La Haye*, 1953-III (Leyden, Sijthoff, 1955), vol. 84, p. 273.

<sup>35</sup> See Lalive, "Swiss law and practice in relation to measures of execution against the property of a foreign State", *Netherlands Yearbook of International Law*, 1979, vol. X, p. 154; "powers of execution are derived from powers of jurisdiction".

<sup>36</sup> *Recueil officiel des arrêts du Tribunal fédéral suisse*, vol. 82 (1956), part 1, p. 75; *International Law Reports*, 1956 (London), vol. 23 (1960), p. 195.

<sup>37</sup> *International Law Reports*, 1956 ..., pp. 198-199.

*tionem* does not arise. Nor indeed will the execution of judgment on the merits against State property be at issue. Non-exercise of jurisdiction, or the upholding of immunity from jurisdiction, clearly imports immunity from attachment and execution of property of a foreign State.

27. On the other hand if, hypothetically, jurisdiction is assumed or exercised against a foreign State, further enquiry will be necessary as to whether jurisdiction was founded on the seizure of property or otherwise, and also as to whether a judgment is rendered against or in favour of the foreign State. Only in the event that an unfavourable judgment is rendered against the foreign State can there emerge a possibility of execution and, therefore, arise the question of immunity from execution of assets or property owned by the foreign State. Since no injunction or specific performance could well be forcibly ordered against a foreign State, satisfaction of a judgment debt would have to be sought from among the available assets of the debtor State which happen to be situated within the territory of the State of the forum. It is only in this last hypothesis that the question of immunity from execution may be said to have arisen. Of the various eventualities, only one seems relevant to the consideration of a possible claim of immunity from execution. Nevertheless, it is undeniable that the examination of this immunity from execution is not totally divorced from all considerations of immunity from jurisdiction.

28. It should be added that immunity from attachment, whether *ad fundandam jurisdictionem* or as an interim measure to secure satisfaction of judgment, is inextricably tied up with immunity from jurisdiction or the absence thereof. Thus, if property is seized in order to found jurisdiction, such as the arrest of a vessel, and jurisdiction is declined on the ground of State immunity from jurisdiction, it follows that there is also immunity from seizure and detention. Pre-judgment attachment will likewise have to be vacated, either because the court declined jurisdiction or because judgment was not rendered against the foreign State. The chance of attachment being allowed could be short-lived if ultimately the judgment is favourable to the State or if the plea of sovereign immunity is upheld.

29. Apart from questions relating to State property already dealt with in the three preceding parts of the draft,<sup>38</sup> all other matters relating to immunity from attachment, arrest and execution will be examined in part IV. This part is primarily concerned with enforcement measures, both as security for satisfaction of prospective judgment and as measures in aid of execution. Parts II and III deal more explicitly with immunities of States from judicial jurisdiction rather than with exemption from arrest, detention and measures of sequestration and from execution in satisfaction of judgments of foreign courts.

<sup>38</sup> See article 2 (Use of terms); article 7 (Modalities for giving effect to State immunity); article 15 (Ownership, possession and use of property); article 16 (Patents, trade marks and intellectual or industrial property); and article 19 (Ships employed in commercial service).

## 6. POSSIBLE SCOPE OF PART IV

30. The foregoing considerations may warrant a tentative conclusion that part IV is entitled to separate treatment on the basis of the legal distinctions between the two notions of jurisdictional immunities as opposed to immunities from the application of substantive law, namely immunity from jurisdiction and immunity from execution. In between the two operates immunity from seizure and attachment, measures which are designed to provide foundation for jurisdiction or guarantee for satisfaction of payment of judgment debts.

31. The scope of part IV should cover all the possibilities of immunity from attachment, arrest and execution at all stages of a trial, before and after the rendering of judgment. Such possibilities are circumscribed by the prospect of a judgment being rendered against a foreign State. Precautionary as well as executionary measures may be taken against State property, or property in the possession or control of a State or in which a State has an interest. All the circumstances in which immunity from attachment and execution could successfully be claimed and the extent to which measures of attachment and execution are permissible deserve careful examination. So, too, does the question of the classification of State property as property that is attachable or susceptible to execution by consent of the State, or as assets and property that are beyond the reach of legal machinery to enforce compliance with, or satisfaction of, a judgment against a foreign sovereign State, irrespective of consent explicitly given or applied to specified assets or specific objects of State property.

### B. Formulation of draft article 21

32. In the light of the foregoing, article 21 might be formulated as follows:

#### *Article 21. Scope of the present part*

**The present part applies to the immunity of one State in respect of State property, or property in its possession or control or in which it has an interest, from attachment, arrest and execution by order of a court of another State.**

#### ARTICLE 22 (State immunity from attachment and execution)

### A. General considerations

#### 1. JURISDICTIONAL IMMUNITIES IN RESPECT OF STATE PROPERTY

33. In parts II and III, provisions have been made for jurisdictional immunities from legal proceedings in respect of State property or property in the possession or control of a State or in which a State has an interest, both in confirmation of the principle of State immunity and in respect of possible exceptions to that principle.<sup>39</sup> In connection with article 22, an examination will be

<sup>39</sup> See footnote 38 above.

made of State practice concerning the application of various types of immunity, not so much from judicial jurisdiction, but more particularly from attachment, arrest and execution. Three types of State immunity deserve attention for the purposes of this article.

(a) *Immunity from seizure to found jurisdiction*

34. A State is immune from seizure of its property *ad fundandam jurisdictionem*, especially if the property is *publicis usibus destinata* or devoted to public services, such as a State-owned vessel employed in governmental non-commercial service. The vessel is immune from arrest for the purpose of bringing a suit against the vessel and its owner or operator. Such a proceeding, as noted earlier,<sup>40</sup> now inevitably entails an action against the owner, so that the vessel could in practice actually be released upon deposit of a bond, and the action could proceed against the owner. The court could exercise jurisdiction in circumstances where the State has initiated or participated in the proceeding or otherwise submitted to its jurisdiction. The State may have agreed to have the dispute settled by the court of the forum State, having regard to the private or commercial nature of the subject-matter of litigation, which, in the case of a State-operated vessel, may relate to the commercial and non-governmental use of that vessel. In this context, therefore, the State owning property, such as a seagoing vessel, would have the same extent of immunity from seizure and arrest to found jurisdiction as it would immunity from a proceeding *in personam* or from a suit in admiralty against it or from other similar actions. Immunity may be limited to the public activities or services to which the property is devoted. There is a close link here between the exercise of jurisdiction involving a foreign State as property-owner and the power to seize the property in order to found jurisdiction.

(b) *Immunity from pre-judgment attachment*

35. This type of immunity in respect of State property is connected with a proceeding or litigation in progress. An order may be issued by a court to secure performance or satisfaction of a prospective judgment through the assets attached. This immunity from attachment appears to be more absolute in the sense that pre-judgment or pre-trial attachment is not normally permitted against State property or property in the possession or control of a State. Various instances may be noted in which the need for upholding immunity from pre-judgment attachment is apparent. In the first place, if the suit is directed against the State or its property, immunity could be invoked by the State to prevent the continuation of the proceeding.<sup>41</sup> Immunity from jurisdiction thus upheld would make attachment of State property pointless, as there would be no principal suit in respect of which to seek to attach assets to satisfy an eventual judicial pronouncement against the State.

36. If, on the other hand, the proceeding is not against the State in its own name, but attachment is being

sought against its property, then immunity of the State from attachment may be maintained on its own strength, especially if the property in question is public or is in use for public purposes or dedicated to public services. Immunity from attachment is sustainable even if the property is not owned by the State but is used by it or is under its control for public services, such as military aircraft, transboundary trains and other means of public transport, unless there is a special conventional régime applicable to vehicles owned or operated by one State in, over or through the territory of another State or on the high seas.

37. Because of its provisional nature, pre-judgment attachment (*saisie préliminaire ou conservatoire*) is designed to provide security or guarantee for payment or satisfaction of a judgment debt. If, however, there is no final judgment, either because the court refuses to exercise jurisdiction on the ground of State immunity or on other grounds, or because, upon judicial examination, the court rejects the claim or refuses to award the compensation requested, the *raison d'être* for the attachment would cease and the attachment order, being groundless, would have to be vacated as a matter of course. In normal circumstances, the general rule does not appear to support such attachment against State property without its consent. The possibility and duration of pre-judgment attachment could be said to bear a close relationship to State immunity from jurisdiction, with regard to both the substance of the litigation and the ultimate outcome of its adjudication.

(c) *Immunity from execution*

38. Unless a judgment is rendered against a State in such a way that it can be satisfied, the question of possible execution against State property does not arise. If and when such a judgment is delivered, the State could still raise a plea of immunity from execution to oppose an execution order. The extent to which immunity from execution is recognized and upheld in practice remains to be examined. Its rationale is to be found in the principle of the sovereignty and equality of States, as indeed is the foundation of the rule of State immunity from the jurisdiction of foreign courts.

39. It should be observed at this juncture that the ultimate objective of litigation involving a foreign State is invariably to obtain some measure of redress or compensation, since *restitutio in integrum* or an injunction or specific performance could not conceivably be forced upon a State against its will. It is true that States may consent to abide by the judgment of a court or an arbitral award. Nevertheless, the available method of enforcing the award or judgment against a State appears to be practically out of reach in the absence of an express waiver or explicit agreement by the State to the exercise of the power of execution by the forum State. Even when such consent is validly given, it is to be very restrictively construed, subject to several imperative norms; and consent is in no sense to be lightly presumed. Immunity from execution comes into question only when a judgment has been pronounced or an award given by a judicial or arbitral tribunal. Prior to such pronouncement, pre-judgment attachment is

<sup>40</sup> See the sixth report, document A/CN.4/376 and Add.1 and 2 (see footnote 1 (f) above), paras. 122-123.

<sup>41</sup> See footnote 14 above.

permissible only in exceptional circumstances, as previously stated (paras. 35 and 37).<sup>42</sup>

40. The core of the problem of jurisdictional immunities of States relates, in the final analysis, to immunity from execution. Its possible limitations, entailing possibilities of execution, remain to be explored. Reference will be made to national legislation, international agreements, treaty practice, contracts and judicial decisions relating to possible measures of execution and to the types of State property exposed to execution as well as those that are normally unattachable or absolutely unassailable, regardless of consent. Immunity from execution is, as such, separate from immunity from jurisdiction, both in substance and chronologically. Execution is subsequent to, and dependent upon, positive judgment requiring satisfaction and sometimes also upon failure on the part of the debtor to comply with the award within a reasonable time-limit. Execution is not automatic but is a process that serves to expedite and secure payment or satisfaction of a judgment debt. Immunity from execution is, in this way, linked to the existence of a judgment whereby a foreign State is an adjudged debtor.

## 2. IMMUNITY FROM ATTACHMENT, ARREST AND EXECUTION AS A GENERAL RULE

41. In part II of the draft, it has been possible, by use of the inductive method, to establish the existence of the rule of State immunity from jurisdiction, although its formulation and the precise extent of its application are still to be finalized. The rule of State immunity is founded on the equality and sovereignty of States as expressed in the maxim *par in parem imperium non habet*. The rule of State immunity from execution, although distinct from immunity from jurisdiction, is derived from the same source of authority. Once it is established that State immunity is a rule of general application subject to certain conditions and exceptions, it is not difficult to add the dimension of State property as an ancillary proposition and necessary corollary of State immunity from jurisdiction. Immunity from attachment, arrest and execution is an inevitable consequence of immunity from jurisdiction. The converse is not generally true. The exercise of jurisdiction or non-immunity from jurisdiction does not necessarily entail the power to order execution against State property or non-immunity from execution.

42. Inasmuch as immunity from attachment, arrest and execution is essentially linked to immunity from jurisdiction, its formulation and the scope of its application must be circumscribed by the conditions and exceptions applicable to the rule of State immunity from jurisdiction. For this reason, the application of article 22 will be in accordance with the qualifications, conditions and exceptions contained in parts II and III of the draft articles. A cross-reference to the two pending parts in the text of the article appears warranted.

## 3. EXTENT OF IMMUNITY FROM ATTACHMENT, ARREST AND EXECUTION

43. Proceeding from the assumption that a general rule is established in support of immunity from attach-

ment, arrest and execution, together with its close connections or linkage with various stages of immunity from judicial jurisdiction or the exercise of jurisdiction by the court in proceeding involving another State, the next question to which attention should be directed is the precise extent of this immunity. It would not be accurate to state categorically that immunity from execution is absolute, since, like other jurisdictional immunities, it is relative. It operates only when the State does not consent to the exercise of the power of execution. Nothing can prevent a State from consenting thereto. With the consent of the State, immunity from execution disappears. A State cannot invoke its immunity from execution once it has expressly consented to execution. The extent to which such an expression of consent operates as a bar to a claim of immunity from execution is a matter to be further scrutinized. It is this same extent that determines the scope of State immunity or non-immunity in respect of property from attachment, arrest and execution. Thus it is not always practicable to attempt to formulate the rule of immunity in absolute terms without regard to the inherent limitations or restricted scope of its application.

44. Relativity appears to prevail from all standpoints and in all directions. It is important none the less to begin somewhere. Since this study has started from the proposition that there exists a prevailing rule of State immunity, it seems equally convenient to pursue an enquiry from that same proposition in regard to immunity from attachment, arrest and execution. It will be seen, in the practice of States examined, that the extent of immunity is circumscribed by the expression or communication of consent and by the generality or specificity of property in regard to which consent to attachment or execution has been given. It is also further confined to the types of property or assets against which execution could be levied without undue adverse effect on the sovereign attributes of the State. For instance, attachment or execution against operating bank accounts of an embassy could not but disrupt normal diplomatic intercourse between the receiving State, which is the State of the forum, and the sending State, which is the adjudged debtor. Similarly, the seizure of the residence of an accredited ambassador would not only infringe the inviolability of diplomatic premises forming part of the *instrumentum legati* protected by the 1961 Vienna Convention on Diplomatic Relations,<sup>43</sup> but also prevent the normal performance of diplomatic functions. Finally, the taking, even as a judicial sanction, of property constituting the cultural heritage of a nation or the pillage of natural resources over which a State is entrusted with permanent sovereignty cannot be condoned by mere judicial confirmation by a municipal tribunal. A State no more has the power to alienate its own natural resources than to reduce statehood to a colonial régime. The process of decolonization is irreversible. The opposite is not permissible with or without the consent of any State. A State may consent to give up its immunity from attachment and execution up to a certain limit beyond which no national jurisdiction or power is recognized. In this connection, there exists a standard from which there can be no derogation. The seizure of a

<sup>42</sup> For State practice on this question, see paragraphs 45-67 below.

<sup>43</sup> United Nations, *Treaty Series*, vol. 500, p. 95.

gunboat or a military aircraft of another State may spark off an endless process of hostilities or international conflicts.

## B. State practice

### 1. GENERAL OBSERVATIONS

45. An examination of the current practice of States with regard to the question of immunity from execution brings us closer to the climax of the study on jurisdictional immunities. If the dignity and sovereignty of States justify their immunity from jurisdiction, the disallowance of measures that threaten the very existence and survival of a State, especially a weaker, smaller and poorer State in the long process of national development, is a matter of life and death for an independent sovereign State. Immunity is consistent not only with the dignity of a State, but also with the very concept of independent statehood. Without such immunity chaos might ensue, since States are now obliged to keep certain funds and assets abroad and to own properties in foreign lands for various representational and governmental functions in addition to their international trade or commercial activities.

46. It may be convenient for the purposes of article 22 to change the order in which State practice is usually reviewed. As immunity from execution touches more deeply the life of States, it might be pertinent to start with governmental rather than judicial practice. This might help to present legal developments in a clearer perspective, since Governments are often claimants of immunity from execution and, as such, are likely to be highly sensitive in the converse case when properties of foreign States are being attached or execution is being levied against assets of foreign Governments. In many countries, the consent of the executive branch of the Government is needed for execution to be ordered against property of a foreign State. There seems to be a parallel in this connection between the positions of local and foreign sovereigns, although the analogy cannot be stretched to its logical conclusion.

### 2. GOVERNMENTAL PRACTICE

47. Governmental practice offers a clue to the solution of some of the practical problems involved, since in the final analysis the seizure, attachment and execution of property of foreign States raise more difficulties for Governments than for the courts which order such measures. For practical considerations, the executive branch of the Government in various countries prefers to reserve a certain control over action by the judiciary in matters of enforcement against property of foreign States, as the political branch of the Government may be expected to answer certain queries from other Governments in that connection. It is also in this area of immunity from execution that the notion of reciprocity may play a prominent, if not decisive role. Governmental practice in this connection will cover national legislation and treaty practice as well as international and regional conventions. It may also serve as guidance for the examination of judicial practice, which is susceptible to vacillation due to countless factors that cannot always be identified.

### (a) National legislation

48. National legislation as a governmental measure is designed to bring the law up to date or to place judicial practice on a more consistent basis and bring it more into line with government policies or public policy in matters of execution of State property or property of a foreign Government situated in the territory of the forum State. Legislation is often a reflection of the need to correct judicial error or simply of the legal confusion caused by decisions following difficult cases. The laws of certain countries deserve special attention.

#### (i) Italy

49. Italy has enacted two pieces of legislation on immunity from execution: Executive Order No. 1621 of 30 August 1925 and Law No. 1263 of 15 July 1926. These measures were prompted by the institution of sequestration proceedings against Greece<sup>44</sup> and against the trade delegation of the USSR.<sup>45</sup> Article 1 of the *decreto-legge* of 30 August 1925<sup>46</sup> provides:

No steps shall be taken for the sequestration, attachment or sale of, or in general for the execution of any measure directed against, the movable or immovable property, the vessels, the funds, the securities or any other assets of a foreign State without the authorization of the Minister of Justice.

This provision shall apply only in respect of those States which accord reciprocity.<sup>47</sup>

50. This text, after amendment, became Law No. 1263 of 15 July 1926,<sup>48</sup> article 1 of which reads:

No steps shall be taken for the sequestration or attachment of, or in general for the execution of any measure directed against, the movable or immovable property, the vessels, the funds, the securities, the investments or any other assets of a foreign State without the authorization of the Minister of Justice.

Actions already in course may not be continued without the aforesaid authorization.

The above provisions shall apply only in respect of States which accord reciprocity, which must be declared by a decree of the Minister.

No action, neither in the civil nor in the administrative courts, shall lie to challenge the above-mentioned authorization.

51. It should be noted that in the law of 15 July 1926, the verification of reciprocity is placed within the exclusive competence of the Government. Both the certificate of the Government establishing the existence of reciprocity and the authorization or refusal of execution are regarded as political acts against which no appeal or remedy is to be allowed. Execution is not possible without leave from the executive. There appears to be virtually complete immunity from execution once

<sup>44</sup> See A. Klitsche de la Grange, "Giustizia e Ministro della Giustizia nei processi contro gli Stati esteri (Il caso Castiglioni-Jugoslavia)", *Rivista trimestrale di diritto e procedura civile* (Milan), vol. VII (1953), p. 1152.

<sup>45</sup> See R. Provinciali, *L'immunità giurisdizionale degli Stati stranieri* (Padua, Milano, 1933), p. 163.

<sup>46</sup> A *decreto-legge* (executive order) is a normative act with the force of law emanating from the Government in cases of emergency following a summary procedure. See A. Rocco, "Limitazioni agli atti esecutivi e cautelari contro Stati esteri", *Rivista di diritto processuale civile* (Padua), vol. III-I (1926), p. 1.

<sup>47</sup> See *Rivista di diritto internazionale* (Rome), 18th year (1926), p. 159, "Atti esecutivi sopra beni di Stati esteri nel Regno".

<sup>48</sup> *Ibid.*, p. 407; see also the proceedings of the twenty-seventh legislature of the Italian Senate (1924-1925), *Atti parlamentari, Senato*, Leg. XXVII, document No. 279.

reciprocity is established. This principle appears to be based on comity of nations and national interest rather than on a pre-existing rule of international law.<sup>49</sup> Such reciprocity has been established for a number of States.<sup>50</sup> This fact could not be so interpreted as to exclude the application of immunity to States for which reciprocity has not yet been established. The Ministry of Foreign Affairs could provide a certificate declaring the existence of a reciprocal rule once a note verbale is issued by the embassy confirming the principle of immunity from execution in the foreign State concerned.

## (ii) Union of Soviet Socialist Republics

52. The relevant law of the Soviet Union is directly applicable. Article 61 of the Fundamentals of Civil Procedure of the USSR and the Union Republics, of 8 December 1961, provides:

### Article 61. Suits against foreign States. Diplomatic immunity

The filing of a suit against a foreign State, the collection of a claim against it\* and the attachment of the property located in the USSR\* may be permitted only with the consent of the competent organs of the State concerned.

Diplomatic representatives of foreign States accredited in the USSR and other persons specified in relevant laws and international agreements shall be subject to the jurisdiction of the Soviet court in civil cases only within the limits determined by the rules of international law or in agreements with the States concerned.

Where a foreign State does not accord to the Soviet State, its representatives or its property\* the same judicial immunity which, in accordance with the present article, is accorded to foreign States, their representatives or their property\* in the USSR, the Council of Ministers of the USSR or other authorized organ may impose retaliatory measures in respect of that State, its representatives or that property\* of that State.<sup>51</sup>

53. The Soviet law confirms the same principle of State immunity from execution as does the Italian legislation, but its application is more positive and does not depend on proof of a reciprocal legislative provision. Rather, reciprocity provides a reason for the State to withhold immunity from attachment and execution in respect of property of another State which does not recognize the same extent of immunity. In practice, State immunity is a general rule and non-application is excusable only on the ground of reciprocity, which is not presented as a *sine qua non* of immunity.

54. The Soviet legislation also underlines the importance of consent of the State concerned, whereas the Italian law refers to consent of the executive. In Italian practice, as in the practice of many other States, this requirement opens the door for intervention by the political branch of the Government, such as the Minister of Justice or the Ministry of Foreign Affairs. The question of immunity could therefore be raised at the political or executive level rather than in court. If the

State concerned consents or does not raise a plea of immunity, it is not unlikely that the court will proceed to levy execution unopposed.

## (iii) Netherlands

55. A Netherlands law<sup>52</sup> contains one provision specifically affecting State immunity from jurisdiction and from execution in matters of private law. Article 13a *Wet AB* reads:

The judicial jurisdiction of the courts and the execution of court decisions and of legal instruments drawn up by legally authorized officials (*authentieke akte*) are subject to the exceptions acknowledged under international law.<sup>53</sup>

56. This provision led to the amendment of article 13 of the *Deurwaardersreglement* (Regulations concerning the bailiff), paragraph 4 of which now reads:

The *deurwaarder* [bailiff] shall be bound to refuse the service of a writ where he has been informed by or on behalf of [the Minister of Justice] that the service of a writ would be contrary to the obligations of the State under international law. Such refusal shall not entail liability to the parties involved.<sup>54</sup>

57. A rule has also been introduced in article 438a of the Netherlands Code of Civil Procedure,<sup>55</sup> as well as in a number of special provisions, barring enforcement proceedings which are liable to affect the public interest. This rule exempts "property intended for public service" from seizure and, consequently, from all forms of execution performed through seizure. This provision apparently applies to State-owned property and has been enacted for domestic purposes. Yet its scope has in practice been extended to cover foreign public property, not just State-owned but all forms of property intended for public service (*publicis usibus destinata*). Netherlands law therefore does not allow attachment or execution of property owned by a foreign State and "intended for public service", even though it is situated in the Netherlands.

## (iv) United States of America

58. The *Foreign Sovereign Immunities Act of 1976*<sup>56</sup> contains one directly pertinent provision, which reads:

### Section 1609. Immunity from attachment and execution of property of a foreign State

Subject to existing international agreements to which the United States is a party at the time of enactment this Act, the property in the United States of a foreign State shall be immune from attachment, arrest and execution except as provided in sections 1610 and 1611 of this chapter.

<sup>49</sup> Entitled *Wet Algemene Bepalingen (Wet AB)* (Statute containing general provisions on legislation).

<sup>50</sup> See C. C. A. Voskuil, "The international law of State immunity, as reflected in the Dutch civil law of execution", *Netherlands Yearbook of International Law*, 1979, vol. X, p. 260. Cf. the Code of Civil Procedure of Colombia, art. 336 (Execution against public entities): "Execution shall not be levied against the nation" (*Código de Procedimiento Civil*, 13th ed. (Bogotá, Temis, 1982), p. 150; English trans. in United Nations, *Materials on Jurisdictional Immunities* ..., p. 13).

<sup>51</sup> Voskuil, *loc. cit.*, p. 261.

<sup>52</sup> *Ibid.*, pp. 261-264.

<sup>53</sup> *United States Code*, 1976 Edition, vol. 8, title 28, chap. 97; text reproduced in United Nations, *Materials on Jurisdictional Immunities* ..., pp. 55 *et seq.*

<sup>49</sup> See L. Condorelli and L. Sbolci, "Measures of execution against the property of foreign States: the law and practice in Italy", *Netherlands Yearbook of International Law*, 1979, vol. X, p. 197.

<sup>50</sup> For example, Yugoslavia, the United Kingdom, Saudi Arabia, Argentina and Hungary.

<sup>51</sup> English translation in United Nations, *Materials on Jurisdictional Immunities of States and their Property* (Sales No. E/F.81.V.10), p. 40. The Code of Civil Procedure of the Byelorussian SSR contains identical provisions in article 395 (*ibid.*, p. 6).

59. The same law sets out exceptions to State immunity from attachment and execution in section 1610 and enumerates the types of property immune from execution in section 1611. Both sections deserve closer examination in connection with the scope or extent of immunity and the types of property that are permanently unattachable, despite apparent consent (see paras. 107-108 below).

(v) *United Kingdom*

60. Section 13, subsection (2), of the *State Immunity Act 1978*<sup>57</sup> provides as follows:

*Procedure*

...

13. ...

(2) Subject to subsections (3) and (4)<sup>58</sup> below:

(a) relief shall not be given against a State by way of injunction or order for specific performance or for the recovery of land or other property; and

(b) the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action *in rem*, for its arrest, detention or sale.<sup>59</sup>

...

(vi) *Canada*

61. Section 11 of Canada's *State Immunity Act, 1982*<sup>60</sup> contains a provision similar to that of the United Kingdom:

11. (1) Subject to subsections (2) and (3), property of a foreign State that is located in Canada is immune from attachment and execution and, in the case of an action *in rem*, from arrest, detention, seizure and forfeiture ...

(vii) *Pakistan*

62. Section 14 of Pakistan's *State Immunity Ordinance, 1981*,<sup>61</sup> which closely resembles the corresponding provision of the United Kingdom Act, provides:

*Procedure*

...

14. *Other procedural privileges.*

...

(2) Subject to subsections (3) and (4),

...

(b) the property of a State, not being property which is for the time being in use or intended for use for commercial purposes, shall not be

subject to any process for the enforcement of a judgment or arbitration award or, in an action *in rem*, for its arrest, detention or sale.

...

(viii) *Yugoslavia*

63. As pointed out earlier in connection with Italian legislation (para. 51), the laws of Yugoslavia, Saudi Arabia, Argentina and Hungary also recognize State immunity from attachment and execution. Thus article 13 of Yugoslavia's Law on Executive Procedure<sup>62</sup> provides:

The property of a foreign State in the Socialist Federal Republic of Yugoslavia is not subject to execution, nor attachment, without the prior consent of the Federal Organ for Administration of Justice, except in case that a foreign State explicitly agreed to the execution, that is attachment.

(ix) *Norway*

64. The law of 17 March 1939 providing various regulations for foreign State-owned vessels<sup>63</sup> contains the following interesting provision:

§3. Enforcements and interim orders relating to claims as mentioned in §1 may not be executed within this realm when relating to:

(1) Men-of-war and other vessels which are owned by or used by a foreign Government or chartered by them exclusively on time or for a voyage, when the vessel is used exclusively for government purposes of a public nature.

(2) Cargo which belongs to a foreign Government and is carried in vessels as mentioned under (1) or by merchantmen for government purposes of a public nature.<sup>64</sup>

...

(b) *International and regional conventions*

(i) *1972 European Convention on State Immunity and Additional Protocol*

65. The 1972 European Convention on State Immunity<sup>65</sup> stipulates in article 23:

No measures of execution or preventive measures against the property of a Contracting State may be taken in the territory of another Contracting State except where and to the extent that the State has expressly consented thereto in writing in any particular case.

66. This provision in effect reconfirms the classic position in favour of immunity from attachment and execution of property of a State in the absence of its consent. It may, however, be argued that this reaffirmation is based on mutual confidence within a close community. This confidence is further strengthened by an undertaking on the part of each contracting State to honour a judgment given against it. This firm undertaking is contained in article 20, paragraph 1, of the Convention, which provides:

1. A Contracting State shall give effect to a judgment given against it by a court of another Contracting State:

(a) if, in accordance with the provisions of articles 1 to 13, the State could not claim immunity from jurisdiction; and

(b) if the judgment cannot or can no longer be set aside if obtained by default, or if it is not or is no longer subject to appeal or any other form of ordinary review or to annulment.

<sup>57</sup> United Kingdom, *The Public General Acts, 1978*, part 1, chap. 33, p. 715; text reproduced in United Nations, *Materials ...*, pp. 41 *et seq.*

<sup>58</sup> Subsection (3) deals with written consent by the State concerned, and subsection (4) with property intended for use for commercial purposes.

<sup>59</sup> This provision is reproduced in section 15, subsection (2), of Singapore's *State Immunity Act, 1979* (text reproduced in United Nations, *Materials ...*, pp. 28 *et seq.*), and in section 14, subsection (1), of South Africa's *Foreign States Immunities Act, 1981*, (*ibid.*, pp. 34 *et seq.*).

<sup>60</sup> "Act to provide for State immunity in Canadian courts", *The Canada Gazette, Part III* (Ottawa), vol. 6, No. 15 (22 June 1982), p. 2949, chap. 95.

<sup>61</sup> *The Gazette of Pakistan* (Islamabad), 11 March 1981; text reproduced in United Nations, *Materials ...*, pp. 20 *et seq.*

<sup>62</sup> United Nations, *Materials ...*, p. 69.

<sup>63</sup> *Norges Lov, 1682-1961* (Oslo, Grondahl & Sons, 1962), p. 1939; English trans. in United Nations, *Materials ...*, pp. 19-20.

<sup>64</sup> Cf. 1926 Brussels Convention, especially article 3 (see para. 69 below).

<sup>65</sup> See Council of Europe, *European Convention on State Immunity and Additional Protocol*, European Treaty Series (Strasbourg), No. 74 (1972).



67. The undertaking by a contracting State under article 20, paragraph 1, is limited by paragraph 2, which exonerates a contracting State from giving effect to a judgment given against it where it is manifestly contrary to public policy of that State to do so or where proceedings between the same parties, based on the same facts and having the same purpose, are pending before another court. Paragraph 3 contains a further provision exempting the contracting State from giving effect to such a judgment in regard to a right to movable or immovable property arising by way of succession, gift or *bona vacantia* if the court would not have been entitled to assume jurisdiction or if it had applied a law other than that applicable under the rules of private international law of that State. Thus the undertaking to give effect to an adverse judgment contains many loopholes and saving clauses, and a contracting State can find several excuses for not complying with the judgment. Read together with article 23, article 20 of the European Convention clearly recognizes an almost absolute rule of State immunity from execution.

(ii) *Other multilateral treaties on enforcement of arbitral awards*

68. Among earlier multilateral treaties containing a guarantee to enforce arbitral awards may be mentioned the 1923 Protocol on Arbitration Clauses (art. 3),<sup>66</sup> the 1927 Convention on the Execution of Foreign Arbitral Awards (art. 1),<sup>67</sup> the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (art. III)<sup>68</sup> and the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (art. 54).<sup>69</sup>

(iii) *1926 Brussels Convention and 1934 Additional Protocol*

69. Another example of an international convention of more than regional character which provides for uniform rules relating to immunity from attachment and execution for certain types of public property is the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels—commonly referred to as the 1926 Brussels Convention—and its Additional Protocol of 1934.<sup>70</sup> Article 3, paragraph 1, confirms the rule that

... ships of war, government yachts, patrol vessels, hospital ships, auxiliary vessels, supply ships, and other craft owned or operated by a State, and used at the time a cause of action arises exclusively on governmental and non-commercial service ... shall not be subject to seizure, attachment or detention by any legal process, nor to judicial proceedings *in rem*.<sup>71</sup>

<sup>66</sup> Signed at Geneva on 24 September 1923 (League of Nations, *Treaty Series*, vol. XXVII, p. 157).

<sup>67</sup> Signed at Geneva on 26 September 1927 (*ibid.*, vol. XCII, p. 301).

<sup>68</sup> Signed at New York on 10 June 1958 (United Nations, *Treaty Series*, vol. 330, p. 3).

<sup>69</sup> Signed at Washington on 18 March 1965 (*ibid.*, vol. 575, p. 159).

<sup>70</sup> Convention signed at Brussels on 10 April 1926; Additional Protocol signed at Brussels on 24 May 1934 (League of Nations, *Treaty Series*, vol. CLXXVI, pp. 199 and 215; reproduced in United Nations, *Materials on Jurisdictional Immunities* ..., pp. 173 *et seq.*).

<sup>71</sup> Article 1, however, assimilates the position of State-owned and State-operated seagoing vessels engaged in the carriage of cargoes to that of privately owned ships, cargoes and equipment.

Paragraph 3 of the same article provides:

§3. State-owned cargoes carried on board merchant vessels for governmental and non-commercial purposes shall not be subject to seizure, attachment, or detention, by any legal process, nor to judicial proceedings *in rem*.

...

Thus ships and cargoes of certain types and classifications owned by States are immune from attachment, arrest and execution.

(iv) *Other multilateral treaties regulating immunity from attachment and execution*

70. Other specialized conventions contain provisions similar to those of the 1926 Brussels Convention relating to the special status of public ships or men-of-war or other State-owned or State-operated vessels used, for the time being, only on governmental non-commercial service. The 1940 Treaty on International Commercial Navigation Law<sup>72</sup> contains a typical provision (art. 35). The 1969 International Convention on Civil Liability for Oil Pollution Damage<sup>73</sup> illustrates clearly the principle of immunity from seizure (art. XI, para. 1). The 1982 United Nations Convention on the Law of the Sea<sup>74</sup> also contains a comparable provision (art. 236).<sup>75</sup> With the consent of the State owning the property, an aircraft may also be the object of precautionary attachment.<sup>76</sup> The same applies to seagoing ships under the 1952 International Convention relating to the Arrest of Seagoing Ships<sup>77</sup> (art. 1, para. 3, and arts. 2 and 3), subject to the prescribed conditions.

(c) *Bilateral treaties*

71. It is difficult to demonstrate the existence of a general treaty practice of States from an examination of treaty provisions alone. However, a study has been made of some 85 treaties, including 10 multilateral treaties, containing provisions on immunity from attachment and execution as well as on enforcement of or undertaking to give effect to arbitral awards. The examination of the 75 bilateral treaties appears to show the emergence of a trend to the effect that, while States recognize and respect the general rule of State immunity from attachment, arrest and execution, there are some specified areas in which they may agree to allow certain measures of execution against property used or intended

<sup>72</sup> Signed at Montevideo on 19 March 1940 (see *Supplement to The American Journal of International Law* (Washington, D.C.), vol. 37 (1943), p. 109; United Nations, *Materials* ..., pp. 177-178).

<sup>73</sup> Signed at Brussels on 29 November 1969 (United Nations, *Treaty Series*, vol. 973, p. 3).

<sup>74</sup> Signed at Montego Bay (Jamaica) on 10 December 1982 (*Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 151, document A/CONF.62/122).

<sup>75</sup> Cf. article 9 of the Convention on the High Seas, and articles 21 and 22 of the Convention on the Territorial Sea and the Contiguous Zone, both signed at Geneva on 29 April 1958 (United Nations, *Treaty Series*, vol. 450, p. 11, and vol. 516, p. 205, respectively).

<sup>76</sup> See article 3, para. 1 (a), of the Convention for the Unification of Certain Rules relating to the Precautionary Attachment of Aircraft, signed at Rome on 29 May 1933 (League of Nations, *Treaty Series*, vol. CXCI, p. 289).

<sup>77</sup> Signed at Brussels on 10 May 1952 (United Nations, *Treaty Series*, vol. 439, p. 193).



for use at the time for commercial purposes. Nevertheless, immunity is jealously guarded, so that not only are vessels of war immune, but also public ships and even State-operated or State-owned merchantmen employed in governmental non-commercial service are not subject to arrest, detention or execution.<sup>76</sup> Provisions in several treaties prohibit or discourage interim measures or pre-judgment attachment against State property of any kind.<sup>79</sup> Even when bilateral treaty provisions allow sequestration of State property, it is invariably confined to proceedings relating to acts *jure gestionis* as opposed to acts *jure imperii*, and to claims in private law having a close connection with the country in which the property is located.<sup>80</sup>

72. As already noted, multilateral treaties providing for voluntary execution and also forced execution of judgments are numerous. Most of these treaties deal with special types of property, for example the arrest of State-owned commercial ships other than warships or other public ships in aid of maritime claims,<sup>81</sup> or pre-judgment attachment of ordinary commercial aircraft.<sup>82</sup> Bilateral treaties have also been concluded which are designed to express the consent of States for possible execution against property in respect of guaranteed transactions,<sup>83</sup> often on the basis of reciprocity.<sup>84</sup> Several such treaties also regulate the types of property specifically allocated for satisfaction of judgments, while reserving unattachability of other types of assets.<sup>85</sup> Such treaties deserve further consideration as

<sup>76</sup> See, for example, the agreements on maritime transport concluded by the USSR with the following States: Netherlands (1969), art. 16 (*ibid.* vol. 815, p. 159; cf. Voskuil in *Netherlands Yearbook of International Law*, 1979, vol. X, pp. 266-268); Bulgaria, Czechoslovakia, German Democratic Republic, Hungary, Poland and Romania (1971), art. 13 (*Sbornik mezhdunarodnykh dogovorov SSSR* [Collected international treaties concluded by the USSR], vol. 29, p. 363); Algeria (1973), art. 16 (United Nations, *Treaty Series*, vol. 990, p. 211); Iraq (1974), art. 15 (*Sbornik ...*, vol. 31, p. 434); and Portugal (1974), art. 15 (*ibid.*, p. 468). Concerning the four latter agreements, cf. M. M. Boguslavsky, "Foreign State immunity: Soviet doctrine and practice", *Netherlands Yearbook ... 1979*, pp. 173-174.

<sup>79</sup> The agreements concluded by the USSR with the following eight States prohibit interim attachment: Switzerland (1948) (United Nations, *Treaty Series*, vol. 217, p. 87); France (1951) (*ibid.*, vol. 221, p. 79); Lebanon (1954) (*ibid.*, vol. 226, p. 109); Togo (1961) (*ibid.*, vol. 730, p. 187); Netherlands (1969) (*ibid.*, vol. 815, p. 159); Belgium and Luxembourg (1971) (*ibid.*, vol. 883, p. 83); and Czechoslovakia (1973) (*ibid.*, vol. 904, p. 17).

<sup>80</sup> The agreements concluded by Switzerland with the following five States contain a requirement of close territorial connection between the claim and the *forum rei sitae*: Czechoslovakia (1953), art. 13 (*Recueil des lois fédérales*, 1954, p. 745); Bulgaria (1972), art. 9 (United Nations, *Treaty Series*, vol. 915, p. 9); Romania (1972), letter 1 of the exchange of letters relating to the Agreement (*ibid.*, vol. 890, p. 153); Poland (1973), art. 4 (*ibid.*, vol. 1000, p. 211); and Hungary (1973), art. 5 (*Recueil des lois fédérales*, 1973, p. 2261).

<sup>81</sup> See, for example, the 1926 Brussels Convention and its 1934 Additional Protocol (footnote 70 above), and the treaties referred to in paragraph 71 above.

<sup>72</sup> See the 1933 Rome Convention (footnote 76 above).

<sup>83</sup> See, for example, the series of treaties and agreements concluded by the Soviet Union before 1945 with 10 States, including Norway (1921), art. 4, para. 2 (League of Nations, *Treaty Series*, vol. VII, p. 293); Denmark (1923), art. 3, para. 4 (*ibid.*, vol. XVIII, p. 15); and Austria (1923), art. 12 (*ibid.*, vol. XX, p. 153).

<sup>84</sup> See the agreements concluded by the Soviet Union with Norway (1921) and Denmark (1923), mentioned in footnote 83 above.

<sup>85</sup> This is the case with the series of treaties and agreements dealing with trade delegations and maritime transport concluded by the Soviet Union after 1945 with 21 States, including Switzerland (1948), arts. 4 and 5 (see footnote 79 above), and France (1951), art. 10 (*ibid.*).

illustrations of waiver of immunity or, more precisely, of the expression by States of consent to execution.

### 3. JUDICIAL PRACTICE

73. Judicial practice concerning immunity from attachment, arrest and execution of property of foreign States is not as plentiful as the case-law on immunity from jurisdiction, since for obvious reasons the questions are treated as separate and not interconnected,<sup>86</sup> despite some judicial declarations to the contrary,<sup>87</sup> and the question of immunity from execution does not arise in the absence of the exercise of judicial jurisdiction resulting in a final judgment against a State.

#### (a) International adjudication and arbitration

74. Occasionally international decisions may lead to execution, although international tribunals are not equipped with enforcement measures, except perhaps that to an appreciable extent non-compliance with decisions of the ICJ may constitute or lead to a threat to the peace.<sup>88</sup> International arbitration often provides for some means of "self-execution" or voluntary undertaking of compliance with or satisfaction of the award.<sup>89</sup> Actual forced execution invariably depends on the machinery of justice existing at the local or national level. Thus, in the *Socobelge* case,<sup>90</sup> actual execution was initiated by a Belgian court.<sup>91</sup> International politics or comity of nations may also operate to prevent such enforcement measures from being brought to fruition, having regard to the multifaceted problems connected with international adjudication and international co-operation for national economic development.<sup>92</sup>

#### (b) The case-law of States

75. It will be seen, in connection with the question of consent and of the types of property not subject to

<sup>86</sup> See, for example, *Oficina del Aceite v. Domenech* (1938) (footnote 25 above); see also *Socifros v. USSR* (1938) (*ibid.*); and *Rap-presentanza commerciale dell'U.R.S.S. v. De Castro* (1935) (footnote 29 above).

<sup>87</sup> See, for example, *Kingdom of Greece v. Julius Bär & Co.* (1956) (footnote 36 above); *République arabe unie v. Dame X.* (1960) (*Recueil officiel des arrêts du Tribunal fédéral suisse*, 1960, vol. 86, part 1, p. 23; *The American Journal of International Law*, vol. 55 (1961), p. 167); and *Trendtex Trading Corporation Ltd. v. Central Bank of Nigeria* (1977) (*The All England Law Reports*, 1977, vol. 1, p. 881).

<sup>88</sup> See Article 59 of the Statute of the ICJ and Chapter VII of the Charter of the United Nations.

<sup>89</sup> See, for example, the multilateral treaties concerning enforcement of arbitral awards mentioned in paragraph 68 above.

<sup>90</sup> In this case, involving a dispute between the Société commerciale de Belgique and the Greek Government, the PCIJ, in its judgment of 15 June 1939, recognized the definitive and obligatory character of the arbitral awards of 3 January and 25 July 1936 given in favour of the Société commerciale de Belgique (*P.C.I.J., Series A/B, No. 78*, p. 160).

<sup>91</sup> Judgment of the Tribunal civil of Brussels of 30 April 1951 (see footnote 31 above).

<sup>92</sup> In the longer run, the large sums deposited in Belgian banks on behalf of the Greek Government included certain Marshall Aid funds allotted to Greece and attachment could indeed have jeopardized the United States plan for European economic recovery. The Organisation for European Economic Co-operation threatened cessation of Marshall Aid to Belgium. The Belgian Government thereupon agreed to seek a friendly arrangement by way of conciliation between Socobelge and the Greek Government, so that the Greek Marshall Aid funds could go solely for new equipment for the Greek railways.

attachment, arrest or execution, that reference to case-law has not given any indication of an emerging trend with regard to restriction of State immunity when it comes to the execution of judicial decisions and arbitral awards. Immunity has consistently been upheld. Absolute immunity was confirmed in a number of important decisions, as early as 1910 by the Prussian court of jurisdictional conflicts in *Hellfeld v. den Fiskus des russischen Reiches*,<sup>93</sup> in 1930 by the Swiss Federal Court in *Greek Republic v. Walder and others*,<sup>94</sup> in 1933 by the Court of Appeal of Brussels in *Brasseur et consorts v. République hellénique*,<sup>95</sup> in 1938 by the Court of Appeal of Paris in *Hertzfeld v. USSR*<sup>96</sup> and in 1959 by the Supreme Court of the United States of America in *Weilamann et al. v. Chase Manhattan Bank*,<sup>97</sup> although many of these decisions have since been qualified or become subject to legislative changes.

76. As will be seen in connection with draft article 23 on the modalities and effect of consent to attachment and execution, and in connection with draft article 24 on the classification of unattachable State property, the case-law of many States, mostly European, may be said to have begun an upward trend in favour of allowing execution in respect of property in use or intended for use in commercial transactions or for commercial purposes,<sup>98</sup> especially where there has been an expression or explicit indication of consent to such a measure, or waiver of immunity from attachment or execution, as the case may be. Thus so-called absolute immunity from attachment and execution may be subject to some qualifications, such as consent or prior acceptance of

jurisdiction, including enforcement,<sup>99</sup> or, if the object is immovable property situated in the forum State,<sup>100</sup> immunity could be upheld for lack of jurisdiction due to inadequacy of the territorial connection<sup>101</sup> or because the object of attachment is a general embassy account or public funds, or diplomatic premises.<sup>102</sup>

77. While the case-law of States has not unsettled the general rule of State immunity from attachment and execution, it may furnish ample grounds for supporting the distinction between certain types of property that are not normally subject to attachment or execution, such as property devoted to public service (*publicis usibus destinata*), and other types of property in use or intended for use in commercial transactions or for commercial purposes, which are clearly intended for possible seizure if the need arises: attachment or execution with such consent customarily given would not offend the sovereign dignity of the consenting State in the ordinary conduct of commercial transactions. Questions concerning title to property, movable or immovable, situated in the territory of the forum State, including titles arising by way of succession, gift or *bona vacantia*, would not involve immunity from enforcement of judgment unless the property in question was in the hands of a foreign State or in premises occupied by its agents or representatives and the State was not willing to release it or to vacate the property. Specific performance or injunction could not be forcibly ordered against a foreign State. Immunity thus takes precedence, since physical compulsion against a foreign State, even with judicial sanction, is still unwelcome.

#### 4. INTERNATIONAL OPINION

78. Legal opinions are far from uniform on this as well as on other phases and facets of jurisdictional immunities. Perhaps in this particular area there is a little less controversy over the more absolute nature of the rule of State immunity from attachment and execution, having regard to the fact that the problem arises at a later stage and that there is a much smaller likelihood of an order of attachment or execution being levied against property or assets of a foreign Government. Nevertheless, the controversy began to flare up as soon as some European courts and judicial decisions of the United States started to expand the categories and types of property that could be seized, arrested, detained and sold or executed for satisfaction of judgments in practice. Contemporary writers appear to be hesitant and seem more disposed to set specific limits to the power to attach and levy execution in respect of foreign State property. Immunity from attachment and execution continues to be recognized in general legal opinion,

<sup>93</sup> *Zeitschrift für Internationales Recht* (Erlangen), vol. XX (1910), p. 416; *The American Journal of International Law*, vol. 5 (1911), p. 490.

<sup>94</sup> *Recueil officiel des arrêts du Tribunal fédéral suisse*, 1930, vol. 56, p. 237; *Annual Digest ...*, 1929-1930 (*op. cit.*), p. 121, case No. 78.

<sup>95</sup> *Pasicrisie belge*, 1933 (Brussels), part 2, p. 197; *Annual Digest ...*, 1931-1932 (London), vol. 6 (1938), p. 164, case No. 85. The Court of Appeal of Brussels confirmed the judgment of the Tribunal civil of Anvers (1932) (*Journal du droit international* (Clunet) (Paris), vol. 59 (1932), p. 1088).

<sup>96</sup> *Journal du droit international* (Clunet) (Paris), vol. 65 (1938), p. 1034; *Annual Digest ...*, 1938-1940 (*op. cit.*), p. 243, case No. 82. See also the judgment of the Court of Appeal of Paris in *Clerget v. Représentation commerciale de la République démocratique du Viet Nam* (1969) (*Annuaire français de droit international*, 1970 (Paris), vol. 16, p. 931); and the judgment of the Court of Appeal of Aix-en-Provence in *Banque d'Etat tchécoslovaque v. Englander* (1966) (*ibid.*, 1967, vol. 13, p. 825; *International Law Reports* (London), vol. 47 (1974), p. 157).

<sup>97</sup> *New York Supplement, 2d Series*, vol. 192 (1960), p. 469; *International Law Reports* (London), vol. 28 (1963), p. 165.

<sup>98</sup> See, for example, the cases: *Hertzfeld v. USSR* (1938) (footnote 96 above); *Socobelge* (1951) (footnote 31 above); *Soviet Distillery in Austria* (1954) (*International Law Reports*, 1954 (London), vol. 21 (1957), p. 101); *Neustein v. Republic of Indonesia* (1958) (*Netherlands Yearbook of International Law*, 1979, vol. X, p. 107); *N. V. Cabolent v. National Iranian Oil Company* (1968) (*Nederlandse Jurisprudentie* (Zwollen, 1969), No. 484; English trans. in *United Nations, Materials on Jurisdictional Immunities ...*, pp. 344 *et seq.*); *The "Philippine Admiral"* (1975) (*The Law Reports, House of Lords ...*, 1977, p. 373); *Hispano Americana Mercantil S.A. v. Central Bank of Nigeria* (1979) (*Lloyd's Law Reports*, 1979, vol. 2, p. 277; reproduced in *United Nations, Materials ...*, pp. 449 *et seq.*); *National Iranian Oil Company v. British and United States companies* (1983) (*Entscheidungen des Bundesverfassungsgerichts* (Tübingen), vol. 64 (1984), p. 2; *International Legal Materials* (Washington, D.C.), vol. XXII, No. 6 (November 1983), p. 1279).

<sup>99</sup> *Austrian Minister of Finance v. Dreyfus* (1918) (*Recueil officiel des arrêts du Tribunal fédéral suisse*, vol. 44, part I, p. 49); and *Turkish Purchases Commission case* (1920) (*Annual Digest ...*, 1919-1922 (London), vol. 1 (1932), p. 114, case No. 77).

<sup>100</sup> *Enforcement of International Awards (Czechoslovakia) case* (1928) (*Annual Digest ...*, 1927-1928 (London), vol. 4 (1931), p. 174, case No. 111).

<sup>101</sup> See *Kingdom of Greece v. Julius Bär & Co.* (1956) (footnote 36 above); *République italienne v. Beta Holding S.A.* (1966) (*Annuaire suisse de droit international*, 1975, vol. XXXI, p. 219).

<sup>102</sup> See footnote 100 above.

although the precise extent of such immunity is a matter for individual conjecture.<sup>103</sup>

79. It is interesting, in this regard, to gain an idea of international opinion by examining various draft articles at the different stages in their preparation. For example, at its session in Hamburg in September 1891, the Institute of International Law adopted a draft resolution entitled "Draft international regulations on the competence of courts in proceedings against foreign States, sovereigns or heads of State",<sup>104</sup> which contained the following provisions:

#### Article 1

The movable property, including horses, carriages, railway carriages and ships, belonging to a foreign sovereign or head of State and intended directly or indirectly for the current use of that sovereign or head of State or of the persons accompanying him in his service cannot be attached.

#### Article 2

The movable and immovable property belonging to a foreign State and used in the service of that State with the express or implicit approval of the State in whose territory it is situated is likewise exempt from attachment.<sup>105</sup>

80. Sixty years later, in June 1951, the same Institute of International Law adopted an updated resolution entitled "Draft provisional convention on the immunity of foreign States from jurisdiction and forced execution",<sup>106</sup> section B of which reads:

#### B. IMMUNITY OF FOREIGN STATES FROM FORCED EXECUTION

##### Article 14

States have the right to immunity from forced execution in foreign territory only with respect to movable and immovable property belonging to them which is situated in that territory and used in the exercise of their public powers.

However, such immunity cannot be invoked with respect to property that they have expressly given as security or mortgaged.

Immunity from forced execution cannot be invoked with respect to property, rights and interests originating in acts relating to the administration of property.

When execution is possible it must be implemented by diplomatic means.

<sup>103</sup> See, for example, L. J. Bouchez, "The nature and scope of State immunity from jurisdiction and execution", *Netherlands Yearbook of International Law*, 1979, vol. X, p. 3; see also the papers contributed by several authors on the practice followed by various States, *ibid.*, pp. 35 *et seq.* See further M. Brandon, "Immunity from attachment and execution", *International Financial Law Review* (London), July 1982, p. 32.

<sup>104</sup> The Institute entrusted the topic of "Competence of courts in proceedings against foreign States or sovereigns" to a study-group having as rapporteurs L. von Bar and J. Westlake: see *Annuaire de l'Institut de droit international*, 1891-1892 (Brussels), vol. 11, pp. 408 *et seq.*; see in the same *Annuaire* (pp. 414 *et seq.*) the report by L. von Bar, followed by the observations of J. Westlake. The articles published on the topic by two other members of the study-group had also been taken into consideration: see C. F. Gabba, *loc. cit.* (footnote 27 above), and A. Hartmann, "De la compétence des tribunaux dans les procès contre les Etats et souverains étrangers", *Revue de droit international et de législation comparée* (Brussels), vol. XXII (1890), p. 425.

<sup>105</sup> Text revised in 1892. See Institute of International Law, *Tableau général des résolutions (1873-1956)* (Basel, 1957), pp. 14-15.

<sup>106</sup> *Annuaire de l'Institut de droit international*, 1952 (Basel), vol. 44, part 1, pp. 39 *et seq.*

#### Article 15

A State cannot be subject to any precautionary attachment in foreign territory unless the debt originates in acts relating to the administration of property.

#### Article 16

If a State deliberately refuses to execute the judgment of a foreign court arising from an act relating to the administration of property, attachment or forced execution measures may be taken against it in its own territory or in the territory of the State of which the creditor is a national, once diplomatic negotiations have demonstrated that the State refuses to meet its obligations of its own accord.

Thus, in this latest resolution, the Institute does not advocate outright exercise of power of execution but seems to prefer diplomatic negotiations and exhaustion of other means of persuasion, execution being viewed as a possible remote measure of last resort.

81. More recently, the International Law Association, at its Sixtieth Conference in Montreal from 29 August to 4 September 1982, adopted a draft convention on State immunity.<sup>107</sup> In so far as the content of this draft may reflect the contemporary thinking of writers, or *opinioes doctorum*, it may be of interest to cite the following provision:

#### Article VII. Immunity from attachment and execution

A foreign State's property in the forum State shall be immune from attachment, arrest and execution, except as provided in article VIII.

82. Article VIII of the draft convention, which deals with exceptions to immunity from attachment and execution, contains the following three exceptions in section A: (i) if there has been a waiver of immunity, for example in the case of commercial activities; (ii) if the property in question is in use for commercial purposes; (iii) if the property in question has been taken in violation of international law or has been exchanged for such property. Section B of the article deals with mixed bank accounts and limits unattachability to that proportion of an account duly identified as used for non-commercial activities. Section C gives a list of the types of property in respect of which attachment or execution shall not be permitted. Finally, section D provides for the possibility of pre-judgment attachment in exceptional circumstances.

#### C. Formulation of draft article 22

83. In the light of the foregoing examination of State practice and legal opinions, it is possible to identify some of the salient factors that should be taken into account in formulating draft article 22 to express or restate the general rule of State immunity from attachment, arrest and execution.

(a) The general rule of immunity of State property from attachment, arrest and execution is a valid one.

(b) The notion of forced execution when applied to State property, or to property in the possession or control of a State or in which it has an interest, may cover a wider field than mere seizure, arrest or detention. It may take the form of an injunction or specific performance

<sup>107</sup> See ILA; *Report of the Sixtieth Conference, Montreal, 1982* (London, 1983), pp. 5-10, resolution No. 6: "State Immunity".

order, such as an order to return or vacate a movable or immovable property. State immunity should also cover this type of situation, except of course where title is at stake and where its acquisition is by way of succession, gift or *bona vacantia* as provided for in article 15 of the draft (Ownership, possession and use of property).

(c) Property in use or intended for use for commercial purposes or specifically for satisfaction of judgment debts, or plainly for payment of the claim, must be regarded as attachable by consent expressly given or indicated by clear conduct.

(d) Property that is not normally subject to attachment or does not form an object against which to levy execution includes all types of property devoted by the State to public service. It is the nature of the use or dedication of the property that determines the immunity to be accorded—not necessarily proprietorship, but the use to which the property is devoted, *publicis usibus destinata*.

(e) Precautionary or pre-judgment attachment is not permissible and should be discouraged. There is no need to over-protect creditors *vis-à-vis* a State debtor. Compulsion of whatever form cannot afford an ideal solution to any difference with a foreign State. The existence of a final judgment is enough ground in support of diplomatic negotiations.

84. Article 22 might thus be formulated as follows:

*Article 22. State immunity from attachment and execution*

1. In accordance with the provisions of the present articles, State property, or property in the possession or control of a State, or property in which a State has an interest, is protected by the rule of State immunity from attachment, arrest and execution by order of a court of another State, as an interim or precautionary pre-judgment measure, or as a process to secure satisfaction of a final judgment of such a court, unless:

(a) the State concerned has consented to such attachment, arrest or execution against the property in question; or

(b) the property is in use or intended for use by the State in commercial and non-governmental service; or

(c) the property, being movable or immovable, intellectual or industrial, is one in respect of which it is the object of the proceeding to determine the question of ownership by the State, its possession or use, or any right or interest arising for the State by way of succession, gift or *bona vacantia*; or

(d) the property is identified as specifically allocated for satisfaction of a final judgment or payment of debts incurred by the State.

2. A State is also immune in respect of its property, or property in its possession or control or in which it has an interest, from an interim or final injunction or specific performance order by a court of another State, which is designed to deprive the State of its enjoyment, possession or use of the property or other interest, or otherwise to compel the State against its will to vacate the property or to surrender it to another person.

**ARTICLE 23 (Modalities and effect of consent to attachment and execution)**

**A. General considerations**

**1. CONSENT AS A SOUND BASIS FOR THE EXERCISE OF THE POWER OF ATTACHMENT AND EXECUTION**

85. Consent provides a clue to a number of hypotheses made in the analysis of rules applicable to the exercise of jurisdiction, whether before, during or after trial and judgment. Consent constitutes a firm basis upon which the judicial authority of a State may exercise jurisdiction in a proceeding against or affecting another State. As has been seen, consent is required at two separate levels in two successive phases or stages. First, consent to the jurisdiction is needed, which may be express, implied by conduct, or presumed by law in the form of accepted exceptions that prove the validity and general applicability of the rule of jurisdictional immunity.<sup>108</sup> A second consent is required once a judgment has been rendered to permit measures of execution to proceed.<sup>109</sup> In normal circumstances, the application of the rule of State immunity from attachment, arrest and execution means that no attachment, arrest or execution can be effectively ordered by a court of another State, unless the State against which the attachment or execution will be levied has intimated or given its consent.

86. In a way, consent removes some of the hardship inherent in enforcing an attachment order or execution against State property or property in the possession or control of a State. Consenting to attachment or execution is tantamount to tolerating or agreeing to an enforcement measure, whether or not, willingly or involuntarily, the absence of objection will have to be reinforced by a more positive indication of concurrence, or even tolerance, which is more than mere tacit acquiescence, although possibly short of active approbation. Once a trace of consent is established in respect of attachment, arrest and execution, the authorities of another State may proceed with an interim measure of seizure, detention or prejudgment attachment or a more definite measure of forced execution of a final judgment. Consent, once given, cannot be revoked or withdrawn, since a sound basis has thereby been created for the exercise of the power of jurisdiction to attach, arrest and execute against State property that is open to attachment and execution.

**2. CONSENT INSUFFICIENT TO FOUND JURISDICTION WHERE NONE EXISTS**

87. Consent is an important element for the exercise of jurisdiction or of the power to attach and execute against State property. But consent alone should not be construed as creating or constituting jurisdiction. Consent as such cannot afford a sound basis on which to found jurisdiction where none exists. Thus consent to

<sup>108</sup> See part III of the draft: "Exceptions to State immunity".

<sup>109</sup> See, for example, the judgment of the Court of Appeal of Aix-en-Provence in *Banque d'Etat tchécoslovaque v. Englander* (1966) (footnote 96 above); see, however, the judgment of the Court of Cassation in *Englander v. Banque d'Etat tchécoslovaque* (1969) (*Journal du droit international* (Clunet) (Paris), vol. 96 (1969), p. 923; *International Law Reports* (Cambridge), vol. 52 (1979), p. 335); and *Clerget v. Représentation commerciale de la République démocratique du Viet Nam* (1969) (footnote 96 above).

attachment of State property *ad fundandam jurisdictionem* is inoperative or ineffective to permit the exercise of jurisdiction or of the power to attach and execute, which are not constituted or created by the mere fact of consent. Jurisdiction and the power to execute, which is a consequence of the power to say what the law is, are linked in the sense that they must have foundation in the law and not be based purely on the consent of the parties. In many countries, a court may have jurisdiction as a *forum pro rogatum*, but courts often decline to exercise such jurisdiction on the grounds of being a *forum non conveniens*, or of there being other *fora* more competent, with closer connection. Thus even the Swiss Federal Courts, whose practice goes very far in exercising the power to attach and execute, would hesitate to assume such power where the cause of action or the object to be seized or attached or against which execution was to be levied did not bear the closest connection with the forum State, even if it were situated in its territory. Being a *forum rei sitae* does not oblige a court to examine either jurisdiction or the power that flows from it, namely the power of attachment and execution, especially when the cause of action is far removed from the judicial interest of the State of the forum. The Swiss Federal Courts are correct in not encouraging the judicial authorities to seek international litigations.<sup>110</sup>

### 3. EXPRESSION OF CONSENT OR WAIVER OF IMMUNITY FROM ATTACHMENT AND EXECUTION

88. The expression of consent to attachment and execution is sometimes referred to as waiver of immunity from attachment and execution. In each case, immunity may be waived or waiver may be contained in an agreement, such as a private-law contract or a bilateral or multilateral treaty, with or without a condition of reciprocity. The expression of consent operating as a waiver of such immunity may take several different forms. Consent has to be clearly expressed and explicit. It can be implied by conduct only in very limited and exceptional circumstances, such as placing funds or other assets specially for the purpose of settling disputes or making payments for the obligations or debts incurred in relation to a particular transaction or set of transactions. It will be seen how consent is given in practice or what the modalities are for waiving immunity, as well as the effect of waiver and the extent of the consequences entailed by a waiver of immunity from execution.

### B. Modalities of expressing consent to attachment and execution of State property

89. There are several ways of expressing consent to attachment and execution of State property. An examination of State practice is revealing in this regard. The in-

struments in which consent is expressed by States may take different forms, such as multilateral treaties or conventions, bilateral treaties with regard to specific property or transactions of bodies or enterprises, commercial contracts and loan agreements. It would be useful to give some illustrations of each category of such instruments.

### 1. MULTILATERAL TREATIES OR INTERNATIONAL CONVENTIONS

90. As noted earlier in connection with draft article 22, there are at least half a dozen multilateral treaties or international conventions which contain provisions on execution of judicial decisions affecting State property (see paras. 69-70 above). The 1926 Brussels Convention and a few other treaties provide for the possibility of arrest of State-owned commercial ships other than warships and public ships employed in governmental non-commercial service. One treaty even permits pre-judgment attachment of commercial aircraft. Those provisions amount to an expression of waiver of immunity from attachment, arrest and execution or an indication of consent to attachment and execution in respect of special types of property, while maintaining immunity for other types of State property.<sup>111</sup>

91. Four multilateral treaties have also been concluded containing provisions recognizing the binding effect of arbitral awards, either in accordance with the rules of procedure of the country in which the award is invoked, or in accordance with the provisions of that country's national laws (see para. 68 above). One of these treaties specifies that the parties agree to enforce the award "as if it were a final judgment of a court".<sup>112</sup>

No specific reference is made, however, to the property in respect of which attachment or execution may be permitted.

### 2. BILATERAL TREATIES

92. State practice is rich in bilateral treaties containing provisions amounting to an expression of consent to attachment and execution in respect of special types of property in connection with particular transactions. Thus, before 1945, 9 out of 10 treaties concluded by the USSR contained provisions making Soviet State property of certain types liable to final execution in respect of guaranteed transactions.<sup>113</sup> Six of these treaties

<sup>111</sup> See the treaties mentioned in paragraph 70 and in footnotes 75 and 76 above.

<sup>112</sup> Article 54, paragraph 1, of the 1965 Washington Convention (see footnote 69 above).

<sup>113</sup> With the exception of the treaty it concluded with Italy (1924), art. 3 (*British and Foreign State Papers*, 1924, part II, vol. CXX, p. 659), the USSR concluded treaties or agreements with the following ten States providing for the possibility of execution against State property: Norway (1921), art. 4, para. 2 (see footnote 83 above); Denmark (1923), art. 3, para. 4 (*ibid.*); Austria (1923), art. 12 (*ibid.*); Germany (1925), arts. 6, 7 and 9 (League of Nations, *Treaty Series*, vol. LIII, p. 7); Latvia (1927), art. 5, para. 7, and art. 6 (*ibid.*, vol. LXVIII, p. 321); Sweden (1927), art. 6 (*ibid.*, vol. LXXI, p. 411); Greece (1929), art. 7, para. 14 (*British and Foreign State Papers*, 1929, part II, vol. CXXXI, p. 480); United Kingdom (1934), art. 5, paras. 6, 7 and 8 (League of Nations, *Treaty Series*, vol. CXLIX, p. 445); Belgium and Luxembourg (1935), arts. 11, 14 and 15 (*ibid.*, vol. CLXXXIII, p. 169).

<sup>110</sup> The distinction is drawn in Switzerland between acts *jure imperii* and acts *jure gestionis*; execution is based on the existence of a sufficient connection with Swiss territory; cf., for example, *Greek Republic v. Walder and others* (1930) (footnote 94 above). See Lalive, *loc. cit.* (footnote 35 above), p. 160; Sinclair, *loc. cit.* (footnote 26 above), p. 236; and Lord Denning's observations in *Thai-Europe Tapioca Service Ltd. v. Government of Pakistan et al.* (1975) (*The All England Law Reports*, 1975, vol. 3, pp. 963 *et seq.*).

excluded interim attachment.<sup>114</sup> Two regulated immunities between the parties on a reciprocal basis.

93. Another series of treaties or agreements concluded by the USSR after 1945 with 21 States deal with trade delegations and maritime transport.<sup>115</sup> All the treaties concerning trade delegations, with the exception of one,<sup>116</sup> provide for enforcement of a final court decision and assumption of responsibility for all transactions concluded by the trade representation.<sup>117</sup> However, seven treaties stipulate that enforcement is applicable to funds of the trade delegations and to goods being their property,<sup>118</sup> while another eight treaties permit execution against all State property of the USSR,<sup>119</sup> excluding only property necessary for the exercise of sovereign authority or official, diplomatic and consular functions.<sup>120</sup> Seven treaties prohibit interim attachment.<sup>121</sup>

94. Soviet treaty practice on shipping is less explicit but also worth citing. Thus the Agreement concerning shipping signed with the Netherlands in 1969<sup>122</sup> provides, in article 16, paragraph 2, for execution of judgments rendered in proceedings relating to the operation of ships engaged in commercial activities, including transportation of passengers and cargoes. This provision reads:

2. No ship belonging to one Contracting Party may be seized in the territory of the other Contracting Party in connection with a civil action within the meaning of paragraph 1 if the defendant designates a representative in the territory of the latter Contracting Party.

<sup>114</sup> See the treaties or agreements with Norway (1921), Denmark (1923), Italy (1924), Latvia (1927), Greece (1929) and Belgium and Luxembourg (1935) cited in footnote 113 above.

<sup>115</sup> For example, with Switzerland (1948), art. 5 (see footnote 79 above); with France (1951), art. 10 (*ibid.*); and with Singapore (1966), art. 16 (United Nations, *Treaty Series*, vol. 631, p. 125).

<sup>116</sup> See the 1965 Protocol on Trade Representation of the USSR in the Republic of Cyprus, art. 4 (*ibid.*, vol. 673, p. 25).

<sup>117</sup> See, for example, the treaties mentioned in footnotes 114 and 115 above.

<sup>118</sup> See, for example, the treaties or agreements concluded by the USSR with Switzerland (1948), art. 5 (see footnote 79 above); with Lebanon (1954), letter III annexed to the agreement (*ibid.*); with the Republic of Egypt (1956), art. 6 (*b*) (United Nations, *Treaty Series*, vol. 687, p. 221); with Iraq (1958), art. 6 (*ibid.*, vol. 328, p. 117); with Singapore (1966), art. 16 (see footnote 115 above); and with Czechoslovakia (1973), art. 4 (*b*) (see footnote 79 above). Execution is permissible in respect of funds of the trade delegation or goods belonging to it.

<sup>119</sup> See the agreements concluded by the USSR with France (1951), art. 10 (see footnote 79 above); with Togo (1961), art. 4 (*ibid.*); with Ghana (1961), art. 6 (United Nations, *Treaty Series*, vol. 655, p. 171); with Brazil (1963), art. 5 (*ibid.*, vol. 646, p. 277); with Costa Rica (1970), art. 4 (*b*) (*ibid.*, vol. 957, p. 347); with Bolivia (1970), art. 6, para. 2 (*ibid.*, p. 373); with the Netherlands (1971), art. 6 (*ibid.*, vol. 965, p. 423); and with Belgium and Luxembourg (1971), art. 7 (see footnote 79 above).

<sup>120</sup> See, for example, the agreements concluded by the USSR with the Netherlands: Agreement of 28 May 1969 concerning shipping, art. 6 (see footnote 79 above); and Protocol of 14 July 1971 concerning the status of the trade mission of the USSR in the Netherlands, art. 6 (see footnote 119 above).

<sup>121</sup> These are the agreements concluded by the USSR with Switzerland (1948), arts. 4 and 5; with France (1951), art. 10; with Lebanon (1954), letter III annexed to the agreement; with Togo (1961), art. 4; with the Netherlands (1971), art. 6; with Belgium and Luxembourg (1971), art. 7; and with Czechoslovakia (1973), art. 4 (*b*). (The references relating to these agreements are given in footnote 79 above.)

<sup>122</sup> See footnote 79 above.

95. Four other Soviet treaties on shipping<sup>123</sup> uphold the immunity of State merchant vessels by excluding attachment and seizure of such vessels in the ports of the other party in connection with civil-law disputes, although in two treaties seizure is prohibited provided that the plaintiff instructs his agent in the territory of the first party to accept any resulting legal obligation.<sup>124</sup>

96. Between 1946 and 1958, the United States of America concluded with 14 States treaties of friendship, commerce and navigation containing provisions voluntarily waiving or disclaiming immunity in respect of State enterprises from execution of judgment and other liability.<sup>125</sup> The 1972 Agreement between the United States and the USSR regarding trade also provides for non-immunity from execution of judgment and other liability with respect to commercial transactions.<sup>126</sup> In addition, the treaties concluded by Switzerland with five Eastern European States permit sequestration of the property of the other party in relation to "claims in private law having a close connection with the country in which the property is located".<sup>127</sup> Another example is provided by the 1958 exchange of notes between Romania and Iraq, in which the two parties, having agreed that litigious problems regarding the commercial transactions concluded in Iraq by Romania's Commercial Agency would be subject to the jurisdiction of Iraqi courts, stipulated that execution of the final sentences of such courts "will affect only the goods, debts and other assets of the Commercial Agency directly relating to the commercial transactions concluded by it".<sup>128</sup>

97. An examination of multilateral and bilateral treaties appears to confirm the proposition that the law, in this connection, is not regulated by a common general rule governing in every detail the fullest extent of immunity or non-immunity in respect of various types of State property in accordance with the significant nature of their use. Diversity in State treaty practice justifies the conclusion that, in the absence of a homogeneous trend, States prefer to regulate on a strictly bilateral or State-by-State basis questions that affect them so

<sup>123</sup> Agreements with Bulgaria, Czechoslovakia, etc. (1971), art. 13; with Algeria (1973), art. 16; with Iraq (1974), art. 15; and with Portugal (1974), art. 15. (The references relating to these agreements are given in footnote 78 above.)

<sup>124</sup> See the agreements with Iraq and Portugal (*ibid.*).

<sup>125</sup> Treaties concluded by the United States of America with Italy (1948), art. XXIV, para. 6 (United Nations, *Treaty Series*, vol. 79, p. 171); with Uruguay (1949), art. XVIII, para. 5 (not ratified); with Ireland (1950), art. XV, para. 3 (*ibid.*, vol. 206, p. 269); with Colombia (1951), art. XV, para. 2 (not ratified); with Greece (1951), art. XIV, para. 5 (*ibid.*, vol. 224, p. 279); with Israel (1951), art. XVIII, para. 3 (*ibid.*, vol. 219, p. 237); with Denmark (1951), art. XVIII, para. 3 (*ibid.*, vol. 421, p. 105); with Japan (1953), art. XVIII, para. 2 (*ibid.*, vol. 206, p. 143); with the Federal Republic of Germany (1954), art. XVIII, para. 2 (*ibid.*, vol. 273, p. 3); with Haiti (1955), art. XVIII, para. 2 (not ratified); with Iran (1955), art. XI, para. 4 (*ibid.*, vol. 284, p. 93); with Nicaragua (1956), art. XVIII, para. 3 (*ibid.*, vol. 367, p. 3); with the Netherlands (1956), art. XVIII, para. 2 (*ibid.*, vol. 285, p. 231); and with Korea (1956), art. XVIII, para. 2 (*ibid.*, vol. 302, p. 281).

<sup>126</sup> Article 6, para. 2, of the Agreement (not ratified); text published in *The Department of State Bulletin* (Washington, D.C.), vol. LXVII, No. 1743 (20 November 1972), p. 595.

<sup>127</sup> See footnote 80 above.

<sup>128</sup> See the exchange of notes relating to the 1958 Trade Agreement between Romania and Iraq, note I, third paragraph (United Nations, *Treaty Series*, vol. 405, p. 243).

closely, such as waiver of immunity from attachment and execution or the expression of consent, depending on the degree of confidence placed in particular bilateral relations, which vary from country to country, requiring readjustment from time to time.<sup>129</sup>

### 3. GOVERNMENT CONTRACTS

98. The flexibility and variety of the modalities of expressing consent are further enhanced by the *ad hoc* or specific nature of particular transactions requiring a special degree of tailor-made consent. This mode of expressing consent deserves even more meticulous consideration than State-to-State or multilateral treaties; it is regulated by the terms of commercial transactions or special agreements concluded on an *ad hoc* or contract-by-contract basis. For simplicity and convenience, this category of transactions is termed "government contracts".

99. Among contracts concluded by Governments or State agencies with private companies, the most common type concerns petroleum exploration and production. Of the 57 such government contracts that may be consulted at the United Nations Centre on Transnational Corporations, 20 contain provisions relating to the enforcement of arbitral awards. Among these contracts, some expressly provide for judicial enforcement,<sup>130</sup> while others merely specify that the award is final and binding.<sup>131</sup> In the latter group there is one contract which stipulates that the parties shall comply with the award in good faith.<sup>132</sup>

100. Government contracts other than those relating to petroleum exploration or production may be classified as "management contracts", "construction contracts", "service contracts", "production-sharing contracts", "investment contracts" or "contracts of

loan", including "guarantees".<sup>133</sup> An example is the agreement concerning the advance of credit to Thai Airways International by the Banque française du commerce extérieur for the purchase of Airbus aircraft, repayment of which is guaranteed by the Ministry of Finance of Thailand. This agreement provides that, for the purposes of jurisdiction and execution or enforcement of any judgment or award, the guarantor certifies that he waives any right to assert before an arbitration tribunal or court of law or any other authority any defence or exception based on his sovereign immunity.<sup>134</sup> This is a very sweeping expression of consent, the effect of which needs to be more circumscribed.

### 4. JUDICIAL DECISIONS

101. The case-law on waiver of immunity or expression of consent does not indicate the ways in which consent may be validly expressed. It merely seeks to determine the existence of genuine consent and, if need be, the extent of its effect. In other words, case-law does not normally settle the question of the choice of modalities in a particular case, but merely illustrates the extent to which waiver is effective in respect of the types of property against which execution may be levied.

#### C. Effect of the expression of consent to attachment and execution of State property

102. Effect may be given to the expression of consent to attachment and execution of State property by means of any one of the modalities listed—multilateral or bilateral treaties and government contracts. If the wording is too general and bears no relation to any specific property, it is to be assumed that the application of consent is limited to the types of State property that are not devoted to public or governmental service but are used or intended for use for commercial purposes, and to property which is situated in the territory of the forum State and which should also have a close connection with the principal claim. If consent relates to specific property, it is easier to apply, subject to further limitations to be discussed in connection with article 24.

#### D. Formulation of draft article 23

103. Article 23 might be worded as follows:

##### *Article 23. Modalities and effect of consent to attachment and execution*

**1. A State may give its consent in writing, in a multilateral or bilateral treaty or in an agreement or**

<sup>129</sup> In this connection, see, for example, the 1972 European Convention on State Immunity, art. 23, and its Additional Protocol (footnote 65 above); the Protocol of 1 March 1974 to the Treaty of Merchant Navigation of 3 April 1968 between the United Kingdom and the USSR, arts. 2 and 3 (United Kingdom, *Treaty Series No. 104* (1977) (Cmd. 7040)); the Agreement on Merchant Shipping of 4 August 1978 between the USSR and Ethiopia, art. XIII, para. 2 (to be published in United Nations, *Treaty Series*, No. 18997).

<sup>130</sup> For example, the following contracts provide for enforceable arbitral awards: Petroleum/Sale and Purchase, between Iran, National Iranian Oil Company, Gulf Oil Corp. and others (1973), art. 28 (F); Petroleum Exploration and Production/Production Sharing, between Sudan and Chevron Oil Co. of Sudan (1975), art. XXIII (g) and (h); Petroleum, Natural Gas/Sale and Purchase, between Pertamina (Indonesia) and Pacific Lighting International S.A. (1973), art. 15 (1); Petroleum, Refinery/Technical and Management Services, between Agip SpA and Indeni Petroleum Refinery Co. Ltd. (1978), art. 9.

<sup>131</sup> For example, the following contracts provide for non-enforceable arbitral awards: Petroleum/Production Sharing, Exploration and Production, between Pertamina (Indonesia), Phillips Petroleum Co. of Indonesia and Tenneco Indonesia Inc. (1975), sect. XI, art. 1.3; Petroleum (Offshore)/Concession, Joint Venture, between Thailand and Weeks Petroleum (Thailand) Ltd. (1972), clause 13 (12); Petroleum, Exploration and Production/Concession (Management), Export and Marketing, between Iran and National Iranian Oil Company (1954), art. 45 (A) and (B).

<sup>132</sup> Petroleum, Exploration and Production/Production Sharing contract between Pertamina (Indonesia), Virginia International Co. and Roy M. Hutton Inc. (1968), sect. X.

<sup>133</sup> See J.-F. Lalive, "Contrats entre Etats ou entreprises étatiques et personnes privées—Développements récents", *Collected Courses* ..., 1983-III (The Hague, Martinus Nijhoff, 1984), vol. 181, pp. 172-175.

<sup>134</sup> Art. III, para. 3.04, of the agreement signed on 23 March 1978 in Paris by the authorized representative of the Minister of Finance and Thailand (see S. Sucharitkul, "Immunity from attachment and execution of the property of foreign States: Thai practice", *Netherlands Yearbook of International Law*, 1979, vol. X, p. 151, footnote 21). With regard to clauses waiving sovereign immunity, see A. O. Adede, "Legal trends in international lending and investment in the developing countries", *Collected Courses* ..., 1983-II (The Hague, Martinus Nijhoff, 1984), vol. 180, pp. 65-69.



contract concluded by it or by one of its agencies with a foreign person, natural or juridical, not to invoke State immunity in respect of State property, or property in its possession or control or in which it has an interest, from attachment, arrest and execution, provided that the property in question, movable or immovable, intellectual or industrial:

(a) forms part of a commercial transaction or is used in connection with commercial activities, or is otherwise in use for non-public purposes unconnected with the exercise of governmental authority of the State; and

(b) is identified as being situated in the territory of the State of the forum.

2. The effect of paragraph 1 is further limited by the provisions of article 24.

#### ARTICLE 24 (Types of State property permanently immune from attachment and execution)

##### A. General considerations

###### 1. LIMITED EFFECT OF CONSENT

104. Consent to attachment and execution does not confer general licence to attach or levy execution against any type of State property, whatever the nature of its use, or wherever it is situated, or indeed regardless of its public or governmental purpose. States parties to multilateral or bilateral treaties or to government contracts are often pressured into concluding agreements containing a clause waiving sovereign immunity not only from jurisdiction, but also from attachment and execution.

105. Protection should be accorded to developing countries, which might otherwise be lured into including in an agreement an expression of consent affecting certain types or property which should under no circumstances be seized or detained, owing to the vital nature of their predominantly public use (such as warships), or to their inviolability (such as diplomatic premises), or to their vulnerability (such as the funds of central banks).

###### 2. TYPES OF UNATTACHABLE STATE PROPERTY

106. Draft article 24 deals with the categories of property that are unattachable irrespective of prior consent or explicit waiver. The reasons why they should be treated as entitled to permanent immunity, being otherwise inviolable or of an unattachable national value, such as a special cultural heritage, are examined below. The permanence of such unattachability or un-touchability by legal process is based on State practice. It is therefore particularly important to examine the practice of States in this domain.

##### B. Governmental practice

###### 1. NATIONAL LEGISLATION

107. The legislation of several countries contains provisions regarding the unattachability of certain types of property, for which waiver of immunity will have no ef-

fect. In the United States of America, the *Foreign Sovereign Immunities Act of 1976*<sup>135</sup> contains such provisions. Thus section 1610 provides a preliminary time-lapse requirement:

#### Section 1610. Exceptions to the immunity from attachment or execution

...

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608 (e) of this chapter.

...

108. Section 1611 provides:

#### Section 1611. Certain types of property immune from execution

...

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign State shall be immune from attachment and from execution, if:

- (1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign Government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or Government may purport to effect in accordance with the terms of the waiver; or
- (2) the property is, or is intended to be, used in connection with a military activity and
  - (A) is of a military character, or
  - (B) is under the control of a military authority or defense agency.

109. Similarly, section 11, subsections (3) and (4), of Canada's *State Immunity Act, 1982*<sup>136</sup> provide:

(3) Property of a foreign State

(a) that is used or is intended to be used in connection with a military activity, and

(b) that is military in nature or is under the control of a military authority or defence agency

is immune from attachment and execution and, in the case of an action *in rem*, from arrest, detention, seizure and forfeiture.

(4) Subject to subsection (5), property of a foreign central bank or monetary authority that is held for its own account and is not used or intended for a commercial activity is immune from attachment and execution.

###### 2. INTERNATIONAL AND REGIONAL CONVENTIONS

110. Various international conventions contain provisions protecting the inviolability of official premises. Thus the 1961 Vienna Convention on Diplomatic Relations<sup>137</sup> provides:

#### Article 22

...

3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

111. Articles 24 and 30 of the 1961 Vienna Convention also deal with the inviolability of the archives and documents of the mission and of the private residence of

<sup>135</sup> See footnote 56 above.

<sup>136</sup> See footnote 60 above. See also sect. 14, subsect. (2) (b), of Pakistan's *State Immunity Ordinance, 1981* (para. 62 above).

<sup>137</sup> United Nations, *Treaty Series*, vol. 500, p. 95.



a diplomatic agent. Similar provisions are found in the 1963 Vienna Convention on Consular Relations<sup>138</sup> (art. 31, para. 4, and arts. 33 and 61), the 1969 Convention on Special Missions<sup>139</sup> (art. 25, para. 3, and arts. 26 and 30) and the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character<sup>140</sup> (art. 23, para. 3, and arts. 25 and 29).

112. A number of conventions, such as the 1926 Brussels Convention (art. 3, para. 1),<sup>141</sup> the 1958 Convention on the Territorial Sea and the Contiguous Zone (art. 22)<sup>142</sup> and the 1982 United Nations Convention on the Law of the Sea (art. 236),<sup>143</sup> provide some protection from seizure, attachment, arrest and execution for certain types of vessels, particularly warships and public ships, as well as other ships employed in governmental non-commercial service.

### 3. BILATERAL TREATIES

113. A great many bilateral treaties relating to shipping also exempt ships in use or intended for use in governmental non-commercial service from arrest, attachment and execution.<sup>144</sup>

### 4. JUDICIAL PRACTICE

114. The case-law of States is far from settled. National legislation and governmental practice represent efforts to harmonize judicial practice (see paras. 107-109 above). The most controversial issue appears to relate to bank accounts of embassies. On this question, State practice varies: attachment of mixed bank accounts is sometimes allowed, for an embassy can easily protect its government funds by segregating its "public purpose funds from commercial activity funds".<sup>145</sup> In this connection, the practice of the Federal Republic of Germany in the case involving the Philippine Embassy<sup>146</sup> was the right solution and was confirmed by the House of Lords in its decision in *Alcom Ltd. v. Republic of Colombia* (1984).<sup>147</sup> Canadian case-law appears to have reached virtually the same conclusion regarding the premises of a diplomatic mission. Execution was regarded as improper since the leased premises were for governmental use and the funds attached were in the possession of the Republic of Cuba.<sup>148</sup> United States

case-law appears to depend on judicial interpretation of the *Foreign Sovereign Immunities Act of 1976*, requiring reasonably explicit wording of the waiver and not verbatim recitation of the legislative provision.<sup>149</sup>

115. The practice of the courts of various countries has not lent itself to simplified conclusions. There is a tendency in the practice of some highly developed countries, such as Austria, the Federal Republic of Germany, the Netherlands, Switzerland and the United States of America, to allow attachment or execution against foreign State property to a greater extent than hitherto warranted, provided that certain conditions are fulfilled.<sup>150</sup> The developing countries are in need of authoritative protection to arrest this trend.

## C. International opinion

116. The most recent opinion on this question is articulately expressed in the draft convention on State immunity adopted by the International Law Association in 1982.<sup>151</sup> The relevant provision reads:

### *Article VIII. Exceptions to immunity from attachment and execution*

...

C. Attachment or execution shall not be permitted if:

1. The property against which execution is sought to be had is used for diplomatic or consular purposes; or
2. The property is of a military character or is used or intended for use for military purposes; or
3. The property is that of a State central bank held by it for central banking purposes; or
4. The property is that of a State monetary authority held by it for monetary purposes; ...

...

## D. Formulation of draft article 24

117. The preceding survey of State practice and opinion may be considered to provide the elements for a list of the types of State property that lie beyond the reach of judicial or administrative machinery to arrest, freeze, attach, detain or execute. It is possible to classify the different categories of property according to the relative absoluteness of their immunity from attachment and execution regardless of consent, or according to the rationale behind their unattachability or exemption from execution, whether it concerns open hostility or *casus belli*, disruption of diplomatic relations, or interference with the normal functioning of the fiscal authorities of a State. Article 24 might thus be formulated as follows:

<sup>149</sup> See, for example, *Maritime International Nominees Establishment v. Republic of Guinea* (1981) (*Federal Supplement*, vol. 505 (1981), p. 141); decision reversed on appeal (1982) (*Federal Reporter*, 2d Series, vol. 693 (1983), p. 1094), the Court having concluded that agreement to ICSID arbitration did not constitute a waiver of immunity. For a judgment in the opposite direction, see *Libra Bank Ltd. v. Banco Nacional de Costa Rica* (1982) (*Federal Reporter*, 2d Series, vol. 676 (1982), p. 47).

<sup>150</sup> See *Netherlands Yearbook of International Law*, 1979, vol. X; and Sinclair, *loc. cit.* (footnote 26 above), pp. 218-242.

<sup>151</sup> See footnote 107 above. See also the draft resolutions of the Institute of International Law mentioned in paragraphs 79 and 80 above.

<sup>138</sup> *Ibid.*, vol. 596, p. 261.

<sup>139</sup> United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), p. 125.

<sup>140</sup> *Ibid.* 1975 (Sales No. E.77.V.3), p. 87.

<sup>141</sup> See paragraph 69 above.

<sup>142</sup> See footnote 75 above.

<sup>143</sup> See footnote 74 above.

<sup>144</sup> See, for example, the treaties and agreements mentioned in footnotes 78, 79, 80 and 83 above.

<sup>145</sup> See *Birch Shipping Corp. v. Embassy of Tanzania* (1980) (*Federal Supplement*, vol. 507 (1981), p. 311, at p. 313).

<sup>146</sup> See the decision of the Federal Constitutional Court of 13 December 1977 in *X v. Republic of the Philippines* (United Nations, *Materials on Jurisdictional Immunities* ..., p. 297).

<sup>147</sup> *The All England Law Reports*, 1984, vol. 2, p. 6.

<sup>148</sup> See *Corriveau v. Republic of Cuba* (1979) (*Dominion Law Reports*, 3d Series, vol. 103 (1980), p. 520); *Re Royal Bank of Canada and Corriveau et al.* (1980) (*ibid.*, vol. 117 (1981), p. 199); cf. *Intpro Properties (UK) Ltd. v. Sauvel and others* (1983) (*The All England Law Reports*, 1983, vol. 2, p. 495).

**Article 24. Types of State property permanently immune from attachment and execution**

1. Notwithstanding article 23 and regardless of consent or waiver of immunity, the following property may not be attached, arrested or otherwise taken in forced execution of the final judgment by a court of another State:

(a) property used or intended for use for diplomatic or consular purposes or for the purposes of special missions or representation of States in their relations with international organizations of universal character internationally protected by inviolability; or

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

managed by the military authority or defence agency of the State; or

(c) property of a central bank held by it for central banking purposes and not allocated for any specified payments; or

(d) property of a State monetary authority held by it for monetary and non-commercial purposes and not specifically earmarked for payments of judgment or any other debts; or

(e) property forming part of the national archives of a State or of its distinct national cultural heritage.

2. Nothing in paragraph 1 shall prevent a State from undertaking to give effect to the judgment of a court of another State, or from consenting to the attachment, arrest or execution of property other than the types listed in paragraph 1.

## PART V. MISCELLANEOUS PROVISIONS

### I. Introduction

118. A draft convention on jurisdictional immunities of States covers a wide variety of fields and subject-matter, which are not easily grouped under the same meaningful headings. At the end of this long and arduous task, it seems necessary to group a number of provisions in a final part entitled "Miscellaneous provisions". They include areas not covered by articles in the preceding parts, notably the immunities of personal sovereigns or heads of State, which have two aspects: *ratione materiae*, already considered for State organs, and *ratione personae*, which remains to be examined. Other questions that should be dealt with concern procedural matters such as the service of writs or other documents to institute proceedings against a foreign State, the costs to be awarded, immunity or exemption of States from the requirement to give security for costs, other procedural privileges, and the final clauses. A general saving clause may also be in order providing for the possibility of granting more or wider immunity from jurisdiction, as well as from attachment and execution, than otherwise required under customary international law or stipulated in the present draft articles.

### II. Draft articles

#### ARTICLE 25 (Immunities of personal sovereigns and other heads of State)

##### A. Immunities *ratione personae*

119. It is not the intention of the present draft articles to exclude consideration of questions relating to the immunities enjoyed by personal sovereigns and other heads of State, not in their official capacity as State organs, but in their personal capacity. Personal sovereigns and other heads of State enjoy in their personal capacity a certain degree of jurisdictional immunity *ratione personae*, in the same manner as ambassadors and other diplomatic agents. This means, in effect, that immunities follow the person of the head of

State only so long as he remains in office. Once he is divested of that office and becomes an ex-sovereign or ex-head of State, he may be sued like any ex-ambassador for all the personal acts performed during his office that were unconnected with the official functions covered by his immunities *ratione materiae* or State immunities.

##### B. State practice and opinion

120. Personal sovereigns and other heads of State have been identified with the States of which they are the heads and also representatives. Their role beyond the confines of their national territory has recently widened. Although not residing abroad, as is ordinarily the case with ambassadors or diplomats, sovereigns and other heads of State do frequently visit by invitation, at other times unofficially with or without invitation, and at other times also *incognito* or privately for recreation. Some measure of immunity *ratione personae* is recognized and accorded in practice.

121. Writers have often treated foreign sovereigns in the same category as foreign States<sup>152</sup> and not in that of accredited diplomats. In the United Kingdom, the immunity of foreign sovereigns has been the result of an extended application of English constitutional practice, in which the domestic sovereign cannot be sued in his own courts.<sup>153</sup> Few distinctions have been made between the private and public capacities of the foreign sovereign,<sup>154</sup> in spite of an earlier dictum by Lord Stowell in *The "Swift"* (1813)<sup>155</sup> tending to limit the ap-

<sup>152</sup> See, for example, the Harvard Law School draft convention on competence of courts in regard to foreign States, art. I (a) (*op. cit.* (footnote 33 above), p. 475).

<sup>153</sup> See, for example, *De Haber v. Queen of Portugal* (1851) (*Queen's Bench Reports*, vol. XVII (1855), p. 171).

<sup>154</sup> See, for example, *Mighell v. Sultan of Johore* (1893) (*The Law Reports, Queen's Bench Division*, 1894, vol. I, p. 149).

<sup>155</sup> J. Dodson, *Reports of Cases Argued and Determined in the High Court of Admiralty* (London), vol. I (1815), p. 320.

plication of immunity in the case of the private trading activities of a foreign sovereign.<sup>156</sup>

122. Immunities accorded to foreign sovereigns in their private capacity do not appear to have been unlimited even at an early date. The classic dictum of Chief Justice Marshall in *The Schooner "Exchange" v. McFaddon and others* (1812) may be cited:

... there is a manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; ...<sup>157</sup>

123. The case-law of other countries inclines towards a more restrictive interpretation, recognizing immunity only for public, and not for private, acts of a foreign sovereign. Italian practice is typical in this regard.<sup>158</sup>

124. Granting, therefore, that heads of State should be, as they often are in practice, accorded no less jurisdictional immunities *ratione personae* than ambassadors, it is now accepted that even diplomatic immunities are subject to certain exceptions, such as trading<sup>159</sup> and actions relating to movable or immovable property, including ownership of shares and participation in corporate bodies.<sup>160</sup> The duration of jurisdictional immunities *ratione personae* is necessarily limited to the tenure of the office of head of State, beyond which no immunity *ratione personae* survives as a matter of law or of right.<sup>161</sup>

### C. Formulation of draft article 25

125. In accordance with the scope of the immunities of diplomatic representatives, the immunities *ratione personae* of heads of State might be formulated as follows:

#### *Article 25. Immunities of personal sovereigns and other heads of State*

**1. A personal sovereign or head of State is immune from the criminal and civil jurisdiction of a court of another State during his office. He need not be accorded immunity from its civil and administrative jurisdiction:**

<sup>156</sup> Lord Stowell stated:

"The utmost that I can venture to admit is that, if the King traded, as some sovereigns do, he might fall within the operation of these statutes (Navigation Acts). Some sovereigns have a monopoly of certain commodities, in which they traffick on the common principles that other traders traffick; and, if the King of England so possessed and so exercised any monopoly, I am not prepared to say that he must not conform his traffick to the general rules by which all trade is regulated." (*Ibid.*, p. 339.)

<sup>157</sup> W. Cranch, *Reports of Cases Argued and Adjudged in the Supreme Court of the United States*, vol. VII, 3rd ed. (New York, 1911), p. 145.

<sup>158</sup> See, for example, *Carlo d'Austria v. Nobili* (1921) (*Giurisprudenza Italiana* (Turin), vol. I (1921), p. 472; *Annual Digest ... 1919-1922* (*op. cit.*), p. 136, case No. 90).

<sup>159</sup> See, for example, art. 31, para. 1 (c), of the 1961 Vienna Convention on Diplomatic Relations (footnote 137 above).

<sup>160</sup> According to article 18 (Participation in companies or other collective bodies) of the draft articles, States are also subject to the jurisdiction of the courts of the State in which the company is incorporated or has its principal place of business.

<sup>161</sup> There is nothing to prevent a court from according immunity to an ex-sovereign as a matter of courtesy.

(a) in a proceeding relating to private immovable property situated in the territory of the State of the forum, unless he holds it on behalf of the State for governmental purposes; or

(b) in a proceeding relating to succession to movable or immovable property in which he is involved as executor, administrator, heir or legatee as a private person; or

(c) in a proceeding relating to any professional or commercial activity outside his sovereign or governmental functions.

**2. No measures of attachment or execution may be taken in respect of property of a personal sovereign or head of State if they cannot be taken without infringing the inviolability of his person or of his residence.**

### ARTICLE 26 (Service of process and judgment in default of appearance)

#### A. Service of process

126. The practical question relates to the procedure by which process should be served against a foreign State. By definition, a foreign State is physically outside the territory of the forum State, and extraterritorial service of process is difficult and should be done through proper diplomatic channels. In this connection, there is growing practice—endorsed by recent national legislation<sup>162</sup>—in support of the proposition that service of any writ or other document instituting proceedings against a foreign State should be transmitted through the Ministry of Foreign Affairs of the forum State to the Ministry of Foreign Affairs of the State against which the proceeding is instituted, and that service is deemed to have been effected when the writ or document is received at the Ministry. Other means of service, more complex, have been prescribed, including bilaterally agreed methods, internationally agreed procedures, use of the diplomatic channel, and registered mail addressed to the head of the Ministry of Foreign Affairs of the State against which the proceeding is instituted.<sup>163</sup>

127. A reasonable period of time is allowed to elapse, such as two months after the date of receipt of process, to enable the foreign State to enter an appearance. Should the State enter an appearance even though service was not properly effected, it may not later object to that defect in the service of process.

128. There appears to be an established practice requiring proof of compliance with the procedure for service of process and of the expiry of the time-limit before any judgment may be rendered against a foreign State in default of appearance. There is also a further requirement that such a judgment, when rendered in default of appearance, should be communicated to the State concerned through the same procedure or channel as the service of process.

<sup>162</sup> See, for example, sect. 12, subsect. (1), of the United Kingdom *State Immunity Act 1978* (footnote 57 above).

<sup>163</sup> See, for example, sect. 1608 of the United States *Foreign Sovereign Immunities Act of 1976* (footnote 56 above), dealing with service, time to answer and default.

## B. Formulation of draft article 26

129. Article 26 might be worded as follows:

### *Article 26. Service of process and judgment in default of appearance*

1. Service of process by any writ or other document instituting proceedings against a State may be effected in accordance with any special arrangement or international convention binding on the forum State and the State concerned or transmitted by registered mail requiring a signed receipt or through diplomatic channels addressed and dispatched to the head of the Ministry of Foreign Affairs of the State concerned.

2. Any State that enters an appearance in proceedings cannot thereafter object to non-compliance of the service of process with the procedure set out in paragraph 1.

3. No judgment in default of appearance shall be rendered against a State except on proof of compliance with paragraph 1 above and of the expiry of a period of time which is to be reasonably extended.

4. A copy of any judgment rendered against a State in default of appearance shall be transmitted to the State concerned through one of the channels as in the case of service of process, and any time for applying to have the judgment set aside shall begin to run after the date on which the copy of the judgment is received by the State concerned.

## ARTICLE 27 (Procedural privileges)

### A. General considerations

130. Since States are accorded immunities from jurisdiction as well as from attachment and execution in respect of their property, other fringe benefits also accrue in their favour. States are accorded a number of procedural privileges in proceedings before a court of another State. Although, strictly speaking, such privileges are incidental to their jurisdictional immunities, it might be useful to group them under the heading of procedural privileges.

#### 1. EXEMPTION FROM UNENFORCEABLE ORDERS

131. As has been seen in connection with the formulation of paragraph 2 of draft article 22, some orders of a court designed to compel a foreign State to perform a specific act or to refrain, under an injunctive order or interdict, from certain acts would be difficult to enforce or, indeed, unenforceable against any State. These two types of remedial measures have been included in paragraph 2 of article 22 (see para. 84 above), but may be reiterated in this separate but related connection.

#### 2. EXEMPTION FROM CERTAIN PENALTIES

132. Unlike an individual, and in a manner not too dissimilar to the case of a national sovereign in connection with the Crown's privileges, a foreign State cannot

be fined or penalized by way of committal in respect of any failure or refusal to disclose or produce any document or other information for the purposes of proceedings to which it is a party.<sup>164</sup>

#### 3. EXEMPTION FROM SECURITY FOR COSTS

133. The question of costs is one closely related to jurisdictional immunities and may be covered by a brief provision exempting a State party to proceedings before a court of another State from the requirement to provide security for costs. The meaning of "costs" varies widely in the different legal systems; it would not be practical to attempt to regulate the question of the awarding of costs, which is best left to the discretion of the judicial authority concerned.

## B. Formulation of draft article 27

134. Article 27 might be worded as follows:

### *Article 27. Procedural privileges*

1. A State is not required to comply with an order by a court of another State compelling it to perform a specific act or interdicting it to refrain from specified action.

2. No fine or penalty shall be imposed on a State by a court of another State by way of committal in respect of any failure or refusal to disclose or produce any document or other information for the purposes of proceedings to which the State is a party.

3. A State is not required to provide security for costs in any proceedings to which it is a party before a court of another State.

## ARTICLE 28 (Restriction and extension of immunities and privileges)

### A. General considerations

135. To maintain a desirable degree of flexibility for readjustment, it would be useful to add a provision enabling a State to accord the correct amount of jurisdictional immunities and privileges to another State, whether or not on the basis of reciprocity. As State immunity is accorded in varying circumstances and the practice of States will require further adjustments, it is not unlikely that a State may find itself giving more or fewer immunities than are otherwise required of it. In the circumstances, the door will be left open for a State to readjust its practice accordingly, either by revising its law so as to add more immunity where such is required, or by withholding immunity where none is desirable.<sup>165</sup> Such a provision seems a necessary adjustment at this point.

<sup>164</sup> See, for example, sect. 13, subsect. (1), of the United Kingdom *State Immunity Act 1978* (footnote 57 above).

<sup>165</sup> See, for example, sect. 15 of the United Kingdom Act (*ibid.*).

**B. Formulation of draft article 28**

136. Article 28 might be worded as follows:

*Article 28. Restriction and extension of immunities and privileges*

**A State may restrict or extend with respect to another**

**State the immunities and privileges provided for in the present articles to the extent that appears to it to be appropriate for reasons of reciprocity, or conformity with the standard practice of that other State, or the necessity for subsequent readjustments required by treaty, convention or other international agreement applicable between them.**



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

[Agenda item 5]

DOCUMENT A/CN.4/390\*

**Sixth report on the status of the diplomatic courier and the diplomatic bag not accompanied  
by diplomatic courier, by Mr. Alexander Yankov, Special Rapporteur**

[Original: English]  
[15 April 1985]

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\* Incorporating document A/CN.4/390/Corr.1.

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## NOTE

Multilateral conventions referred to in the present report:

	<i>Source</i>
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961) Hereinafter referred to as the 1961 Vienna Convention	United Nations, Treaty Series, vol. 500, p. 95.
Vienna Convention on Consular Relations (Vienna, 24 April 1963) Hereinafter referred to as the 1963 Vienna Convention	<i>Ibid.</i> , vol. 596, p. 261.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	United Nations, <i>Juridical Yearbook 1969</i> (Sales No. E.71.V.4), p. 140.
Convention on Special Missions (New York, 8 December 1969)	<i>Ibid.</i> , p. 125.
Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975) Hereinafter referred to as the 1975 Vienna Convention	<i>Ibid.</i> 1975 (Sales No. E.77.V.3), p. 87.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	<i>Official Records of the Third United Nations Conference on the Law of the Sea</i> , vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 151, document A/CONF.62/122.

## Introduction

1. The present report is the sixth submitted by the Special Rapporteur on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. The last two reports, namely the fourth and the fifth,<sup>1</sup> contained a complete set of 42 draft articles proposed by the Special Rapporteur. Some of these draft articles were provisionally adopted by the Commission, while others were considered by the Commission and referred to its Drafting Committee. Some draft articles

were partially examined by the Commission but are still to be considered at the thirty-seventh session.<sup>2</sup>

2. Therefore, one of the objectives of this report is to update the present status of the draft articles and indicate the attitudes of Governments towards the proposed draft as evidenced by the debates in the Sixth Commit-

<sup>2</sup> For further details on the consideration of the topic by the Commission up to 1984, see:

(a) The reports of the Commission: (i) on its thirty-first session, *Yearbook ... 1979*, vol. II (Part Two), pp. 170 *et seq.*, chap. VI;

<sup>1</sup> See footnote 2 (b) (iv) and (v) below.



tee at the thirty-ninth session of the General Assembly. It is the Special Rapporteur's view that at this stage of the work priority should be given to identifying the comments and observations by Governments with re-

(ii) on its thirty-second session, *Yearbook ... 1980*, vol. II (Part Two), pp. 162 *et seq.*, chap. VIII; (iii) on its thirty-third session, *Yearbook ... 1981*, vol. II (Part Two), pp. 159 *et seq.*, chap. VII; (iv) on its thirty-fourth session, *Yearbook ... 1982*, vol. II (Part Two), pp. 112 *et seq.*, chap. VI; (v) on its thirty-fifth session, *Yearbook ... 1983*, vol. II (Part Two), pp. 44 *et seq.*, chap. V; (vi) on its thirty-sixth session, *Yearbook ... 1984*, vol. II (Part Two), pp. 18 *et seq.*, chap. III.

(b) The previous reports of the Special Rapporteur: (i) preliminary report, *Yearbook ... 1980*, vol. II (Part One), p. 231, document A/CN.4/335; (ii) second report, *Yearbook ... 1981*, vol. II (Part One), p. 151, document A/CN.4/347 and Add.1 and 2; (iii) third report, *Yearbook ... 1982*, vol. II (Part One), p. 247, document A/CN.4/359 and Add.1; (iv) fourth report, *Yearbook ... 1983*, vol. II (Part One), p. 62, document A/CN.4/374 and Add.1-4; (v) fifth report, *Yearbook ... 1984*, vol. II (Part One), p. 72, document A/CN.4/382.

## I. Present status of the draft articles

5. The draft articles submitted by the Special Rapporteur in his fourth report, in 1983, and further elaborated in his fifth report, in 1984, may be classified, according to their present status, in the following categories:

(a) Draft articles provisionally adopted by the Commission on first reading: articles 1 to 17, 19 and 20;

(b) Draft articles considered by the Commission and referred to the Drafting Committee; articles 28 to 35;

(c) Draft articles completing the series, consideration of which is to be resumed by the Commission: articles 23 and 36 to 42.

### A. Draft articles provisionally adopted by the Commission on first reading

6. The 19 draft articles (1 to 17, 19 and 20) provisionally adopted by the Commission on first reading are in fact derived from draft articles 1 to 27 successively submitted by the Special Rapporteur in his second, third and fourth reports. Their number has been reduced as a result of the deletion of certain articles and the merging of others. That is the case with draft articles 9, 12, 22, 26 and 27,<sup>3</sup> which were deleted, and draft ar-

<sup>3</sup> Draft articles 9 and 12, submitted by the Special Rapporteur in his third report, read as follows:

*"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*."

*"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."

Draft articles 22, 26 and 27 submitted by the Special Rapporteur in his fourth report read as follows:

*"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

guard to pending issues and draft articles on which consideration has not been completed. It is believed that such a consistent review will reveal the consolidated trends emerging from the debate in the Sixth Committee, with a view to providing possible options for formulae that would enjoy wider acceptance.

3. The evolving work of the Commission will thus follow closely the progress made during the debate in the Sixth Committee, where the views of Governments are expressed on matters under consideration.

4. In conformity with such an approach, it is suggested first of all to establish the various categories of draft articles in accordance with their present status. Taking into account the comments and observations made both in the Commission and in the Sixth Committee, the Special Rapporteur will attempt to offer his suggestions with regard to the remaining draft articles still to be examined by the Commission.

articles 15, 18 and 19,<sup>4</sup> which were merged during their consideration by the Drafting Committee.

7. The texts of draft articles 1 to 17, 19 and 20, provisionally adopted by the Commission on first reading at its thirty-fifth and thirty-sixth sessions,<sup>5</sup> 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.

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."

*"Article 26. Exemption from personal and public services"*

"The receiving State or the transit State shall exempt the diplomatic courier from all personal and public services of any kind."

*"Article 27. Exemption from social security provisions"*

"The diplomatic courier shall be exempt from the social security provisions which may be in force in the receiving State or the transit State with respect to services rendered for the sending State."

<sup>4</sup> Some provisions of draft articles 18 (Freedom of communication) and 19 (Temporary accommodation) were incorporated in draft article 15 (General facilities), which was provisionally adopted as article 13.

<sup>5</sup> The texts of articles 1 to 8 and the commentaries thereto, provisionally adopted at the thirty-fifth session, are reproduced in *Yearbook ... 1983*, vol. II (Part Two), pp. 53 *et seq.*; the texts of articles 9 to 17, 19 and 20 and the commentaries thereto, provisionally adopted at the thirty-sixth session, are reproduced in *Yearbook ... 1984*, vol. II (Part Two), pp. 43 *et seq.*

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

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

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

*Article 3. Use of terms*

1. For the purposes of the present articles:

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

- (a) a diplomatic courier within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;
- (b) a consular courier within the meaning of the Vienna Convention on Consular Relations of 24 April 1963;
- (c) a courier of a special mission within the meaning of the Convention on Special Missions of 8 December 1969; or
- (d) a courier of a permanent mission, of a permanent observer mission, of a delegation or of an observer delegation, within the meaning of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975,

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

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

- (a) a diplomatic bag within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;
- (b) a consular bag within the meaning of the Vienna Convention on Consular Relations of 24 April 1963;
- (c) a bag of a special mission within the meaning of the Convention on Special Missions of 8 December 1969; or
- (d) a bag of a permanent mission, of a permanent observer mission, of a delegation or of an observer delegation, within the meaning of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975;

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

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

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

(6) "mission" means:

- (a) a permanent diplomatic mission within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;
- (b) a special mission within the meaning of the Convention on Special Missions of 8 December 1969; and
- (c) a permanent mission or a permanent observer mission within the meaning of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975;

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

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

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

2. The provisions of paragraph 1 of the present article regarding the use of terms in the present articles are without prejudice to the use

of those terms or to the meanings which may be given to them in other international instruments or the internal law of any State.

*Article 4. Freedom of official communications*

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

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

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

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

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

*Article 6. Non-discrimination and reciprocity*

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

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

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

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

*Article 7. Documentation of the diplomatic courier*

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

*Article 8. Appointment of the diplomatic courier*

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

*Article 9. Nationality of the diplomatic courier*

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

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

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

- (a) nationals of the sending State who are permanent residents of the receiving State;
- (b) nationals of a third State who are not also nationals of the sending State.

*Article 10. Functions of the diplomatic courier*

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

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

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

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

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

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

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

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

*Article 13. Facilities*

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

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

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

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

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

*Article 15. Freedom of movement*

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

*Article 16. Personal protection and inviolability*

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

*Article 17. Inviolability of temporary accommodation*

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

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

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

will not cause unreasonable delays or impediments to the delivery of the diplomatic bag.

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

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

2. The receiving State or, as the case may be, the transit State shall, in accordance with such laws and regulations as it may adopt, permit entry of articles for the personal use of the diplomatic courier imported in his personal baggage and shall grant exemption from all customs duties, taxes and related charges on such articles other than charges levied for specific services rendered.

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

*Article 20. Exemption from dues and taxes*

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

**B. Draft articles considered by the Commission and referred to the Drafting Committee**

8. The second category comprises draft articles 28 to 35, which were submitted by the Special Rapporteur in his fourth report and which, after consideration by the Commission at its thirty-sixth session, were referred to the Drafting Committee.<sup>6</sup> Three of these draft articles relate to the status of the diplomatic courier and the captain of a commercial aircraft or the master of a merchant ship, namely: "Duration of privileges and immunities" (art. 28),<sup>7</sup> "Waiver of immunity" (art. 29)<sup>8</sup>

<sup>6</sup> *Yearbook ... 1984*, vol. II (Part Two), p. 20, para. 76.

<sup>7</sup> Draft article 28 submitted by the Special Rapporteur read:

*"Article 28. Duration of privileges and immunities"*

"1. The diplomatic courier shall enjoy privileges and immunities from the moment he enters the territory of the receiving State or the transit State in order to perform his official functions.

"2. If the official functions of a diplomatic courier come to an end, his privileges and immunities shall normally cease when he leaves the territory of the receiving State or, as applicable, the transit State, or on the expiry of a reasonable period in which to do so. However, with respect to acts performed by the courier in the exercise of his official functions, immunity shall continue to subsist."

<sup>8</sup> Draft article 29 submitted by the Special Rapporteur read:

*"Article 29. Waiver of immunity"*

"1. The sending State may waive the immunity of the diplomatic courier from jurisdiction. The waiver of immunity may be authorized by the head or a competent member of the diplomatic mission, consular post, special mission, permanent mission or delegation of that State in the territory of the receiving State or transit State.

"2. The waiver must always be express.

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

and "Status of the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew" (art. 30).<sup>9</sup> The remaining draft articles concern the status of the diplomatic bag, namely: "Indication of status of the diplomatic bag" (art. 31),<sup>10</sup> "Content of the diplomatic bag" (art. 32),<sup>11</sup> "Status of the diplomatic bag entrusted to the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew" (art. 33),<sup>12</sup> "Status of the diplo-

(footnote 8 continued.)

<sup>9</sup> "4. The waiver of immunity from jurisdiction for the purposes of civil or administrative proceedings shall not be deemed to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary.

<sup>10</sup> "5. If the sending State does not waive the immunity of the diplomatic courier in respect of a civil suit, it shall make every effort to settle the matter justly."

<sup>11</sup> Draft article 30 submitted by the Special Rapporteur read:

*"Article 30. Status of the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew"*

"1. The captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew under his command may be employed for the custody, transportation and delivery of the diplomatic bag of the sending State to an authorized port of entry on his scheduled itinerary in the territory of the receiving State, or for the custody, transportation and delivery of the bag of the diplomatic mission, consular post, special mission, permanent mission or delegation of the sending State in the territory of the receiving State addressed to the sending State.

"2. The captain, the master or the authorized member of the crew entrusted with the diplomatic bag shall be provided with an official document indicating the number of packages constituting the bag entrusted to him.

"3. The captain, the master or the authorized member of the crew shall not be considered to be a diplomatic courier.

"4. The receiving State shall accord to the captain, the master or the authorized member of the crew carrying the diplomatic bag the facilities for free and direct delivery of the diplomatic bag to members of the diplomatic mission of the sending State who are allowed by the receiving State to have access to the aircraft or ship in order to take possession of the diplomatic bag."

<sup>12</sup> Draft article 31 submitted by the Special Rapporteur read:

*"Article 31. Indication of status of the diplomatic bag"*

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

"2. The packages constituting the diplomatic bag, if unaccompanied by a diplomatic courier, shall also bear a visible indication of their destination and consignee, as well as of any intermediary points on the route or transfer points.

"3. The maximum size or weight of the diplomatic bag allowed shall be determined by agreement between the sending State and the receiving State."

<sup>13</sup> Draft article 32 submitted by the Special Rapporteur read:

*"Article 32. Content of the diplomatic bag"*

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

"2. The sending State shall take appropriate measures to prevent the dispatch through its diplomatic bag of articles other than those referred to in paragraph 1, and shall prosecute and punish any person under its jurisdiction responsible for misuse of the diplomatic bag."

<sup>14</sup> Draft article 33 submitted by the Special Rapporteur read:

*"Article 33. Status of the diplomatic bag entrusted to the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew"*

matic bag dispatched by postal services or other means" (art. 34)<sup>13</sup> and "General facilities accorded to the diplomatic bag" (art. 35).<sup>14</sup>

### C. Draft articles the consideration of which is to be resumed by the Commission

9. The third category comprises draft articles the consideration of which the Commission decided to resume at the thirty-seventh session, namely draft article 23 (Immunity from jurisdiction), which was considered by the Drafting Committee, but on which the Commission could reach no agreement at its thirty-sixth session;<sup>15</sup> and draft articles 36 to 42, consideration of which was begun at the thirty-sixth session and is to be resumed.<sup>16</sup> Having in mind the unsettled position of these draft articles, it is the intention of the Special Rapporteur to focus the Commission's attention on them and to try to offer certain modifications, taking into consideration the comments and suggestions advanced in the debate both in the Commission and in the Sixth Committee of the General Assembly.

"The diplomatic bag entrusted to the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew shall comply with all the requirements set out in articles 31 and 32, and shall enjoy the facilities, privileges and immunities, specified in articles 35 to 39, accorded to the diplomatic bag by the receiving State or the transit State while on its territory.

<sup>15</sup> Draft article 34 submitted by the Special Rapporteur read:

*"Article 34. Status of the diplomatic bag dispatched by postal services or other means"*

"1. The diplomatic bag dispatched by postal services or other means, whether by land, air or sea, shall comply with all the requirements set out in article 31, and shall enjoy the facilities, privileges and immunities, specified in articles 35 to 39, accorded to the diplomatic bag by the receiving State or the transit State while on its territory.

"2. The conditions and requirements for the international conveyance of the diplomatic bag by postal services, including its visible external marks, maximum size and weight, shall conform to the international regulations established by the Universal Postal Union or be determined in accordance with bilateral or multilateral agreements between the States or their postal administrations. The postal authorities of the receiving State or the transit State shall facilitate the safe and expeditious transmission of the diplomatic bag conveyed through their postal services.

"3. The conditions and requirements for the dispatch of diplomatic bags by ordinary means of transportation, whether by land, air or sea, shall conform to the rules and regulations applicable to the respective means of transportation, and the bill of lading shall serve as a document indicating the official status of the diplomatic bag. The competent authorities of the receiving State or the transit State shall facilitate the safe and expeditious transmission of the diplomatic bag dispatched through the ports of those States."

<sup>16</sup> Draft article 35 submitted by the Special Rapporteur read:

*"Article 35. General facilities accorded to the diplomatic bag"*

"The receiving State and the transit State shall accord all necessary facilities for the safe and speedy transportation and delivery of the diplomatic bag."

<sup>15</sup> *Yearbook ... 1984*, vol. II (Part Two), p. 42, para. 193.

<sup>16</sup> *Ibid.*, p. 41, para. 186.

## II. Consideration of the draft articles at the thirty-seventh session of the Commission

### A. Introductory note

10. Perhaps due to the fact that a complete set of draft articles on the topic had been submitted by 1983 and that a significant number of those articles had been provisionally adopted on first reading, the debate which took place in the Sixth Committee during the thirty-ninth session of the General Assembly covered the topic as a whole, including specific draft articles. This comprehensive discussion encompassed the general aspects of the topic and the draft articles provisionally adopted, as well as the draft articles considered by the Commission and referred to the Drafting Committee or those whose examination was to be resumed at the thirty-seventh session.<sup>17</sup>

11. The significant progress achieved so far in the consideration of the topic and in the elaboration of draft articles was acknowledged with appreciation. The view was expressed that, within its present term of membership, the Commission might be in a position to complete a first reading of the full set of draft articles on the topic.

12. The comments and observations made on the topic as a whole and on individual draft articles are of great benefit to the work of the Commission. However, it is suggested that at this stage the reference be confined to the draft articles which are to be examined at the thirty-seventh session, namely draft articles 23 and 36 to 42 of the set of articles submitted by the Special Rapporteur in his fourth report.

### B. The jurisdictional immunity of the diplomatic courier (art. 23)<sup>18</sup>

#### 1. COMMENTS AND OBSERVATIONS MADE IN THE COMMISSION AND IN THE SIXTH COMMITTEE OF THE GENERAL ASSEMBLY

13. Draft article 23 was the subject of prolonged discussion, both in the Commission and in the Sixth Com-

mittee.<sup>19</sup> It was generally recognized that the draft article was an important and complex provision concerning the privileges and immunities to be accorded to the diplomatic courier. Immunity from the criminal jurisdiction of the receiving State or the transit State constituted the most essential element of the degree of legal protection that the diplomatic courier should enjoy.

14. The discussion centred mainly on paragraph 1, concerning immunity from criminal jurisdiction, and to a lesser extent on paragraph 4, which provided that the diplomatic courier was not obliged to give evidence as a witness. Comments and observations of a drafting nature were made on some other paragraphs and on the article as a whole.

15. Opposing views on the necessity, importance and scope of draft article 23 and, more specifically, on paragraph 1, were expressed both in the Commission and in the Sixth Committee.

16. According to one view, the diplomatic courier was an official agent of the sending State, exercising official State functions in connection with the custody and transportation of the diplomatic bag. It was stressed that the protection of the courier was a functional necessity enabling the courier to carry out his official mission. Absolute immunity from criminal jurisdiction was considered as a guarantee of adequate legal protection in line with prevailing State practice and in accordance with the four conventions codifying diplomatic and consular law.<sup>20</sup> It was also maintained that draft article 23 completed draft article 16, on the personal protection and inviolability of the diplomatic courier, who should not be liable to any form of arrest or detention. According to this view, denial of immunity from jurisdiction would seem to run counter to the personal inviolability which the courier enjoyed under article 27, paragraph 5, of the 1961 Vienna Convention on Diplomatic Relations, which stipulated that the diplomatic courier was not liable to any form of arrest or detention. It was further pointed out that, if draft article 23 was intended to be complementary to the codification conventions, including the 1961 Vienna Convention, it would be logical to grant to the courier not only personal protection and inviolability, but also immunity from criminal juris-

<sup>17</sup> See "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-ninth session of the General Assembly" (A/CN.4/L.382), sect. C.

<sup>18</sup> Draft article 23 as proposed by the Drafting Committee 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, as the case may be, the transit State in respect of all acts performed in the exercise of his functions. This immunity shall not extend to an action for damages arising from an accident caused by a vehicle the use of which may have involved the liability of the courier where those damages are not recoverable from insurance.]

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

"[4. The diplomatic courier is not obliged to give evidence as a witness.]

"[5. Any immunity of the diplomatic courier from the jurisdiction of the receiving State or the transit State does not exempt him from the jurisdiction of the sending State.]"

<sup>19</sup> For the discussion in the Commission at its thirty-sixth session, see *Yearbook ... 1984*, vol. II (Part Two), pp. 21, 29-30, 38 and 41-42, paras. 84, 122, 162 and 188-193. For the comments and observations made in the Sixth Committee at the thirty-ninth session of the General Assembly, see "Topical summary ..." (A/CN.4/L.382), paras. 141-159.

<sup>20</sup> These four conventions adopted under the auspices of the United Nations (hereinafter referred to as "codification conventions") are: 1961 Vienna Convention on Diplomatic Relations; 1963 Vienna Convention on Consular Relations; 1969 Convention on Special Missions; 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.

diction. In many cases, it was further argued, the courier's mission was not confined to one destination and he had to provide communications in both directions; therefore the grounds for protecting the diplomatic courier from arrest and detention were also grounds for granting him immunity from the criminal jurisdiction of the receiving or the transit State.

17. Opposing that view, serious doubts and reservations were expressed concerning draft article 23 as a whole, and particularly its paragraph 1. It was pointed out that draft article 16, on personal protection and inviolability, was sufficient to ensure that the courier would not be disturbed in the fulfilment of his mission to deliver the bag safely and speedily. Jurisdictional immunity had to be justified by functional need. Consequently, the courier's immunity from criminal jurisdiction had to be limited to acts committed in the performance of his functions, as was the case in respect of immunity from civil and administrative jurisdiction. According to that view, the status of the diplomatic courier should not be assimilated to that of a diplomatic staff member. Therefore, to grant a diplomatic courier immunity from criminal jurisdiction would exceed what the discharge of his duties warranted. On the basis of those considerations, the deletion of paragraphs 1 and 4 was suggested, or even of draft article 23 as a whole. There were some suggestions that immunity from criminal jurisdiction should be limited only in regard to "serious offences" committed by the diplomatic courier. Some representatives, however, considered that such limitations would appear to be inconsistent with article 27, paragraph 5, of the 1961 Vienna Convention.<sup>21</sup>

18. Paragraph 2 of draft article 23, providing that the courier enjoys immunity from the civil and administrative jurisdiction of the receiving State or the transit State, was generally acceptable. Most of the specific comments made were in favour of the draft.

19. The same attitude was shown with regard to paragraph 3, dealing with immunity from measures of execution in respect of the diplomatic courier.

20. Paragraph 4, providing that the diplomatic courier shall be dispensed from the obligation to give evidence as a witness, was the subject of a number of comments and observations on the part of representatives in the Sixth Committee.

21. Some representatives expressed support for the text as proposed by the Special Rapporteur. They thought that it was a logical consequence of the jurisdictional immunity accorded to the courier, which otherwise would become meaningless.<sup>22</sup> This view was advanced particularly in relation to immunity from criminal jurisdiction. It was maintained that, without the provisions of paragraphs 1 and 4 of draft article 23, the sending State would suffer considerable injury because its messenger would be forbidden to exercise his mission completely in several destinations, since he might be called upon to appear in courts of a transit State or a re-

ceiving State as a witness<sup>23</sup>. Thus the provision set forth in paragraph 4 was justified by functional necessity.

21. Some representatives expressed support for the text as proposed by the Special Rapporteur. They thought that it was a logical consequence of the jurisdictional immunity accorded to the courier, which otherwise would become meaningless.<sup>22</sup> This view was advanced particularly in relation to immunity from criminal jurisdiction. It was maintained that, without the provisions of paragraphs 1 and 4 of draft article 23, the sending State would suffer considerable injury because its messenger would be forbidden to exercise completely his mission in several destinations, since he might be called upon to appear in courts of a transit State or a receiving State as a witness<sup>23</sup>. Thus the provision set forth in paragraph 4 was justified by functional necessity.

22. Other representatives were of the view that, since immunity from criminal jurisdiction should be confined to acts performed in the exercise of official functions, there was no reason why the diplomatic courier should not be called upon to give evidence as a witness, as long as that did not interfere with the performance of those functions.<sup>24</sup> It was therefore suggested that paragraph 4 should be considerably attenuated by limiting the exemption to evidence on questions relating to the exercise of his functions and that, in requesting him to give evidence, the competent authorities should avoid interfering with the exercise of those functions.<sup>25</sup>

23. Taking into consideration some practical reasons, one representative thought that the principle that the courier did not have to give evidence as a witness should be retained, but that the commentary to that provision should indicate that it would be desirable for a diplomatic courier who had witnessed a traffic accident to leave a letter explaining the circumstances.<sup>26</sup> It was also suggested that the words "except in the cases envisaged in paragraph 2" be added at the end of paragraph 4.

24. As has been pointed out (para. 17 above), it was suggested that paragraph 4, together with paragraph 1, should be deleted.<sup>27</sup>

25. The comments on the substance of paragraph 5 were altogether favourable, although there were some critical observations of a drafting nature.<sup>28</sup>

## 2. PROPOSED REVISED TEXT OF ARTICLE 23

26. As has been pointed out, draft article 23 was the subject of lengthy debates in 1983 and 1984 both in the

<sup>21</sup> See "Topical summary ..." (A/CN.4/L.382), paras. 144-147; see also *Official Records of the General Assembly, Thirty-ninth Session, Sixth Committee*, 35th meeting, para. 34 (Jamaica).

<sup>22</sup> See "Topical summary ..." (A/CN.4/L.382), para. 151; see also *Official Records of the General Assembly, Thirty-ninth Session, Sixth Committee*, 43rd meeting, para. 51 (Romania).

<sup>23</sup> See "Topical summary ..." (A/CN.4/L.382), para. 152; see also *Official Records of the General Assembly, Thirty-ninth Session, Sixth Committee*, 39th meeting, para. 9 (Algeria).

<sup>24</sup> See "Topical summary ..." (A/CN.4/L.382), para. 153; see also *Official Records of the General Assembly, Thirty-ninth Session, Sixth Committee*, 36th meeting, para. 41 (Italy).

<sup>25</sup> See "Topical summary ..." (A/CN.4/L.382), para. 153; see also *Official Records of the General Assembly, Thirty-ninth Session, Sixth Committee*, 37th meeting, para. 5 (Greece).

<sup>26</sup> See "Topical summary ..." (A/CN.4/L.382), para. 154; see also *Official Records of the General Assembly, Thirty-ninth Session, Sixth Committee*, 38th meeting, para. 53 (Madagascar).

<sup>27</sup> See "Topical summary ..." (A/CN.4/L.382), para. 155; see also *Official Records of the General Assembly, Thirty-ninth Session, Sixth Committee*, 36th meeting, para. 31 (United States of America).

<sup>28</sup> See "Topical summary ..." (A/CN.4/L.382), paras. 157-159.

Commission and in the Sixth Committee of the General Assembly, and gave rise to numerous comments, observations and suggestions.<sup>29</sup>

27. From an analysis of the debates on draft article 23 in the Commission and in the Sixth Committee, the following trends of opinion emerge:

(a) To maintain the text submitted by the Special Rapporteur or the amended version proposed by the Drafting Committee with the deletion of the square brackets in paragraphs 1 and 4;

(b) To delete draft article 23 altogether;

(c) To amend the text proposed by the Drafting Committee, especially with regard to paragraphs 1 and 4. Accordingly, with regard to paragraph 1, it was suggested that the words "except for serious offences" or "in respect of all acts performed in the exercise of his functions" should be added at the end of the paragraph. As to the text of paragraph 4, several suggestions were advanced, namely the addition of the words "in cases involving the exercise of his functions" or "except in the cases envisaged in paragraph 2". One representative suggested that paragraph 4 should be redrafted to provide that the diplomatic courier might be called upon to give evidence on condition that he was not obliged to do so concerning matters connected with the exercise of his functions, and that the competent authorities of the receiving State or the transit State avoided interfering with the exercise of his functions so as not to cause unreasonable delays or impediments to the delivery of the diplomatic bag.

28. The Special Rapporteur, who expressed his views on the question in his fourth and fifth reports,<sup>30</sup> is of the view that the Commission, in its effort to achieve an appropriate solution to the critical issues relating to the jurisdictional immunities of the diplomatic courier, should endeavour to strike a balance between the legal protection of the courier and the bag and the legitimate interests of the States concerned. In so doing, special attention should be given to the intrinsic relationship between the principle of the personal inviolability of the courier and the principle of the courier's immunity from criminal jurisdiction. The draft articles should be considered as a coherent legal framework relating to the status of the courier and the bag, in which there should be consistency between the various provisions. It is also understood that, in the search for a practical solution, the Commission should take into account the comments of Member States with a view to achieving wider acceptance of the draft articles on the topic.

29. In view of the above general considerations, the Special Rapporteur would venture to suggest that the most appropriate option would perhaps be the adoption of draft article 23 as proposed by the Drafting Committee,<sup>31</sup> by deleting the brackets in paragraph 1 and amending paragraph 4 to read:

**4. The diplomatic courier is not obliged to give evidence as a witness in cases involving the exercise of his**

**functions. He may be required to give evidence in other cases, provided that this would not cause unreasonable delays or impediments to the delivery of the diplomatic bag.**

### C. Inviolability of the diplomatic bag (art. 36)<sup>32</sup>

#### 1. COMMENTS AND OBSERVATIONS MADE IN THE COMMISSION AND IN THE SIXTH COMMITTEE OF THE GENERAL ASSEMBLY

30. Draft article 36 on the inviolability of the diplomatic bag was called by some members of the Commission the key provision of the whole set of draft articles.<sup>33</sup> Considering the significance of the inviolability of the diplomatic bag for the proper functioning of official communications, both the Commission and the Sixth Committee devoted much of the debate to the substance and drafting of draft article 36. Here again conflicting opinions were expressed and numerous comments and suggestions were made.<sup>34</sup>

31. Some representatives supported the text of draft article 36 as submitted by the Special Rapporteur in his fourth report.<sup>35</sup> It was maintained that the principle of absolute inviolability was set forth in the 1961 Vienna Convention on Diplomatic Relations and fully conformed to customary law and the established practice of States. The possibility of opening the bag was envisaged only in the 1963 Vienna Convention on Consular Relations and only under special circumstances and with special guarantees. It was pointed out in that connection that the unification of the law applicable to all types of official bags implied a choice between the régime of inviolability under the 1961 Vienna Convention and the régime of the 1963 Vienna Convention. Such a choice created uncertainty affecting official communications, which had to be avoided.

32. Some of the representatives who favoured the absolute inviolability of the diplomatic bag expressed opposition to the possibility of subjecting the bag to examination by means of electronic or mechanical devices. They maintained that the use of modern electronic technology would make it possible to extract confidential information from the diplomatic bag, thus undermining the very foundation and main objective of the

<sup>32</sup> Draft article 36 submitted by the Special Rapporteur read:

"Article 36. *Inviolability of the diplomatic bag*

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

"2. The receiving State or the transit State shall take all appropriate measures to prevent any infringement of the inviolability of the diplomatic bag, and shall also prosecute and punish persons under its jurisdiction responsible for such infringement."

<sup>33</sup> *Yearbook ... 1984*, vol. II (Part Two), p. 34, para. 136.

<sup>34</sup> For the discussion in the Commission, *ibid.*, pp. 25-26, paras. 101-103, and pp. 34-35, paras. 136-143. For the discussion in the Sixth Committee of the General Assembly, see "Topical summary ..." (A/CN.4/L.382), paras. 184-191.

<sup>35</sup> Document A/CN.4/374 and Add.1-4 (see footnote 2 (b) (iv) above), paras. 326-349.

<sup>29</sup> See footnote 19 above.

<sup>30</sup> Document A/CN.4/374 and Add.1-4 (see footnote 2 (b) (iv) above), paras. 81-139; and document A/CN.4/382 (see footnote 2 (b) (v) above), para. 39.

<sup>31</sup> See footnote 18 above.



principle of the inviolability of the bag as a prerequisite for the confidentiality of its contents. It was also pointed out that the prohibition to subject the bag to electronic screening properly addressed also the legitimate interests of the developing countries, which were not in a position to acquire sophisticated electronic devices; such prohibition reaffirmed the principle of equality between all States and avoided any discrimination against States that did not possess advanced technology.

33. Other representatives considered that draft article 36 should be worded in such a manner as to reflect a more adequate balance between the interests of the sending State and those of the receiving and transit States. In that connection, it was argued that the main difficulty in dealing with the crucial issue of the inviolability of the diplomatic bag lay in balancing the need to protect diplomatic communications and the need to prevent abuse.<sup>36</sup> Therefore, a more balanced solution, similar to that embodied in article 35 of the 1963 Vienna Convention, was preferable. It was also maintained that States tempted to abuse the inviolability of the bag would be deterred by the possibility that the diplomatic bag could be either opened with the consent of the sending State or, if the latter refused, returned to its place of origin. In that case the effectiveness of the rule of reciprocity would probably prevent a State from making improper use of the inviolability of the diplomatic bag. It was also thought that a compromise solution might be found in certain bilateral consular conventions which provided that, if there was serious reason to believe that a consignment contained something other than official correspondence, documents or articles for official use, it could be returned to its place of origin.<sup>37</sup>

34. The provision relating to the examination of the bag directly or through screening or other electronic or mechanical devices was the subject of particular discussion. On that issue views were also divided.

35. One body of opinion supported the present text as proposed by the Special Rapporteur for the reasons already indicated (para. 32 above).

36. Other representatives considered that the diplomatic bag might be subjected to electronic or mechanical screening or examination. It was pointed out that the well-known abuses which had taken place involving diplomatic bags and the safety of air navigation justified the recognition of a certain right of verification of the bag by the competent authorities of the receiving or transit States. It was argued that only in the most exceptional cases would the passage of the diplomatic bag be delayed.

37. Some representatives who could accept an extension to all bags of the provision set forth in article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations found it difficult to support the idea that the diplomatic bag might be subjected to electronic or

other mechanical devices, since that might infringe the confidentiality of the bag.<sup>38</sup>

38. Having in mind the two different régimes in respect of the inviolability of the bag established under article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations and article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations, some representatives suggested that States parties to a convention on the status of the diplomatic courier and the diplomatic bag should have the right to make a declaration to the effect that they would apply to all bags the provision contained in article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations.<sup>39</sup> This issue will be further considered in the present report (paras. 60-63 below).

## 2. PROPOSED REVISED TEXT OF ARTICLE 36

39. In order to take account of the comments and observations advanced during the debates in the Commission and in the Sixth Committee and to propose a possible compromise, the Special Rapporteur submits for examination a revised version of draft article 36, relating to the inviolability of the diplomatic bag.

40. First of all, it should be pointed out that the inviolability of the diplomatic bag should be considered as a fundamental principle. The modalities of its practical implementation should not conflict with its main objective, namely the normal functioning of official communications. At the same time, the implementation of the principle of the inviolability of the diplomatic bag should not be prejudicial to the legitimate interests of the receiving State or the transit State and should not provide an opportunity for making improper use of that principle. In exceptional circumstances, when there are serious grounds for believing that the bag contains something other than correspondence, documents or articles for official use, the bag may be returned to its place of origin without being examined or opened.

41. Taking account of some suggestions for drafting improvements, such as the deletion of paragraph 2, the Special Rapporteur is of the view that paragraph 2 of the present text could be deleted.

42. In the light of the above considerations, the Special Rapporteur submits for examination and approval the following revised text of draft article 36:

### *Article 36. Inviolability of the diplomatic bag\**

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

**2. Nevertheless, if the competent authorities of the receiving State or the transit State have serious reason to believe that the bag contains something other than of-**

<sup>36</sup> See "Topical summary ..." (A/CN.4/L.382), para. 189; see also *Official Records of the General Assembly, Thirty-ninth Session, Sixth Committee, 36th meeting, para. 43 (Italy)*.

<sup>37</sup> See "Topical summary ..." (A/CN.4/L.382), para. 189; see also *Official Records of the General Assembly, Thirty-ninth Session, Sixth Committee, 42nd meeting, para. 81 (Austria)*.

\* Text orally amended by the Special Rapporteur at the 1903rd meeting of the Commission (see *Yearbook ... 1985*, vol. 1, p. 166, para. 9).

<sup>38</sup> See *Official Records of the General Assembly, Thirty-ninth Session, Sixth Committee, 40th meeting, para. 27 (Spain)*.

<sup>39</sup> See "Topical summary ..." (A/CN.4/L.382), para. 189.



official correspondence, documents or articles intended for official use, referred to in article 32,<sup>40</sup> they may request that the bag be returned to its place of origin.

**D. Exemption from customs and other inspections, customs duties and dues and taxes (arts. 37 and 38)<sup>41</sup>**

**1. COMMENTS AND OBSERVATIONS MADE IN THE COMMISSION AND IN THE SIXTH COMMITTEE OF THE GENERAL ASSEMBLY**

43. In the debate held in the Commission,<sup>42</sup> the view was expressed that draft article 37 was unnecessary, since the diplomatic bag was inviolable. It was also suggested that draft article 37 should be brought into line with article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations. With regard to draft article 38, it was stated that such a provision was not necessary, since by definition the bag contained only official correspondence or documents and articles for official use which were, in principle, exempt from customs duties. Taking into consideration the close connection between the subject-matters of draft articles 37 and 38, dealing respectively with customs inspection and customs duties and taxes, it was suggested that they might be merged into one article.

44. Similar views were expressed by representatives in the Sixth Committee. The comments and suggestions focused on possible abuses of the facilities and exemptions accorded to the diplomatic bag, including customs and other inspections, and fiscal privileges. It was pointed out that measures had to be taken to avoid such abuses as the use of the bag for the illicit importation of guns, explosives and drugs. At the same time, there was recognition of the general need for the protection of communications between States and their diplomatic posts abroad and for Governments to engage in friendly relations and deal with one another on a basis of trust.<sup>43</sup>

**2. PROPOSED NEW ARTICLE 37 TO REPLACE PRESENT DRAFT ARTICLES 37 AND 38**

45. The considerations on the substance and drafting of draft articles 37 and 38 were contained in the fourth

<sup>40</sup> Draft article 32 (Content of the diplomatic bag) was referred by the Commission to the Drafting Committee at its thirty-sixth session (see *Yearbook ... 1984*, vol. II (Part Two), p. 20, para. 76).

<sup>41</sup> Draft articles 37 and 38 submitted by the Special Rapporteur read:

*"Article 37. Exemption from customs and other inspections*

*"The diplomatic bag, whether accompanied or not by diplomatic courier, shall be exempt from customs and other inspections."*

*"Article 38. Exemption from customs duties and all dues and taxes*

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

<sup>42</sup> *Yearbook ... 1984*, vol. II (Part Two), pp. 35-36, paras. 145-146.

<sup>43</sup> See *Official Records of the General Assembly, Thirty-ninth Session, Sixth Committee*, 40th meeting, para. 22 (United Kingdom).

and fifth reports of the Special Rapporteur.<sup>44</sup> In submitting a revised text, the Special Rapporteur took into consideration the comments and observations made in the Commission and in the Sixth Committee of the General Assembly.<sup>45</sup>

46. In the light of the above considerations, the Special Rapporteur submits for examination and approval a revised text embracing the two draft articles in a new draft article 37, which reads:

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

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

**E. Protective measures in circumstances preventing the delivery of the diplomatic bag (art. 39)<sup>46</sup>**

**1. COMMENTS AND OBSERVATIONS MADE IN THE COMMISSION AND IN THE SIXTH COMMITTEE OF THE GENERAL ASSEMBLY**

47. Draft article 39 did not give rise to substantive objections in the Commission or in the Sixth Committee.<sup>47</sup> Most of the comments and observations related to possible drafting improvements. There were some suggestions that the text should be shortened and the two paragraphs merged in one.

48. During the debates both in the Commission and in the Sixth Committee, the considerations advanced by the Special Rapporteur in his fourth report<sup>48</sup> met with general support. Perhaps it would be appropriate to explain the exceptional circumstances, such as an illness or an accident, that might prevent the diplomatic

<sup>44</sup> Document A/CN.4/374 and Add.1-4 (see footnote 2 (b) (iv) above), paras. 350-360; and document A/CN.4/382 (see footnote 2 (b) (v) above), paras. 80-81.

<sup>45</sup> See footnote 42 above; see also "Topical summary ..." (A/CN.4/L.382), paras. 192-193.

<sup>46</sup> Draft article 39 submitted by the Special Rapporteur read:

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

*"1. In the event of termination of the functions of the diplomatic courier before the delivery of the diplomatic bag to its final destination, as referred to in articles 13 and 14, or of other circumstances preventing him from performing his functions, the receiving State or the transit State shall take the appropriate measures to ensure the integrity and safety of the diplomatic bag, and shall immediately notify the sending State of that event."*

*"2. The measures provided for in paragraph 1 shall be taken by the receiving State or the transit State with regard to the diplomatic bag entrusted to the captain of a commercial aircraft or the master of a merchant ship in circumstances preventing the delivery of the diplomatic bag to its final destination."*

<sup>47</sup> See *Yearbook ... 1984*, vol. II (Part Two), p. 36, para. 147; see also "Topical summary ..." (A/CN.4/L.382), para. 194.

<sup>48</sup> Document A/CN.4/374 and Add.1-4 (see footnote 2 (b) (iv) above), paras. 361-365.

courier from performing his functions. It might also be necessary to clarify the position of a professional courier or an *ad hoc* courier who was declared *persona non grata* or not acceptable by the receiving State or the transit State while in its territory. The words "appropriate measures to ensure the integrity and safety of the diplomatic bag", in paragraph 1, referred only to measures to protect the diplomatic bag, not measures designed to facilitate the courier's own journey, which were dealt with in draft article 40. The wording of the draft article should make it clear that the obligation provided for in article 39 was an obligation only under civil law, not one that would entail the international responsibility of the receiving State or the transit State.

## 2. PROPOSED REVISED TEXT OF ARTICLE 39

49. Taking into consideration the comments and observations made during the debates in the Commission and the Sixth Committee, the Special Rapporteur submits for examination and approval the following text of draft article 39:

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

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

## **F. Obligations of the transit State in case of *force majeure* or fortuitous event (art. 40)**

### 1. COMMENTS AND OBSERVATIONS MADE IN THE COMMISSION AND IN THE SIXTH COMMITTEE OF THE GENERAL ASSEMBLY

50. Draft article 40, dealing with the obligations of the transit State in case of *force majeure* or fortuitous event, was submitted by the Special Rapporteur in his fourth report.<sup>49</sup>

51. The debate on this draft article in the Commission<sup>50</sup> was concentrated on drafting points. The comments were directed towards the clarification of the scope and content of the obligations incumbent on a State which had not been initially foreseen as a transit State, but which, due to *force majeure* or fortuitous event had to extend certain facilities in order to ensure the inviolability and protection of the diplomatic bag and the continuation of the journey of the diplomatic courier.

52. Support was expressed for draft article 40 in its present form during its consideration in the Sixth Committee.<sup>51</sup> A comment was also made to the effect that

the element of protection of the bag and its movement provided for in the case of non-recognition of States or Governments (draft article 41) should be extended to the situations envisaged in draft article 40.<sup>52</sup>

## 2. PROPOSED TEXT OF ARTICLE 40

53. In view of the general acceptance of draft article 40 in substance, the Special Rapporteur submits it for consideration and approval in its present form:

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

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

## **G. Non-recognition of States or Governments or absence of diplomatic or consular relations (art. 41)**

### 1. COMMENTS AND OBSERVATIONS MADE IN THE COMMISSION AND IN THE SIXTH COMMITTEE OF THE GENERAL ASSEMBLY

54. During the debate in the Commission, the need for such a provision was stressed, especially in the case where the diplomatic bag, whether accompanied or not by a diplomatic courier, was dispatched to or by a special mission or delegation in the receiving State. Furthermore, that provision might acquire special significance in a situation of non-recognition of States or Governments or of absence of diplomatic or consular relations between the transit State, on the one hand, and the sending State or the receiving State, on the other, when the territory of the transit State had to be used for the dispatch of the diplomatic bag.<sup>53</sup>

55. During the debate in the Sixth Committee, it was pointed out that the provisions of draft article 41 were necessary to guarantee the freedom of communication of a State with its missions or delegations abroad. It was also stressed that cases where those provisions would apply were not rare in practice, particularly in communications of States with their missions to international organizations.<sup>54</sup>

## 2. PROPOSED TEXT OF ARTICLE 41

56. In view of the support expressed for draft article 41 both in the Commission and in the Sixth Committee, the Special Rapporteur submits it for examination and approval in its present form:

<sup>49</sup> *Ibid.*, paras. 369-380.

<sup>50</sup> *Yearbook ... 1984*, vol. II (Part Two), p. 36, para. 148.

<sup>51</sup> See "Topical summary ..." (A/CN.4/L.382), para. 195.

<sup>52</sup> *Ibid.*, para. 196.

<sup>53</sup> *Yearbook ... 1984*, vol. II (Part Two), p. 36, para. 149.

<sup>54</sup> See "Topical summary ..." (A/CN.4/L.382), para. 197.

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

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

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

**H. Relation of the present articles to other conventions and international agreements (art. 42)<sup>55</sup>**

**1. COMMENTS AND OBSERVATIONS MADE IN THE COMMISSION AND IN THE SIXTH COMMITTEE OF THE GENERAL ASSEMBLY**

57. Draft article 42 was submitted by the Special Rapporteur in his fourth report.<sup>56</sup>

58. The comments and observations made in the Commission on draft article 42<sup>57</sup> emphasized its supplementary nature. It was pointed out that its provisions should make clear what would be the effect of the agreements that might be concluded on matters relating to the status of the diplomatic courier and the diplomatic bag. A suggestion was made that the text be simplified by deleting paragraph 1 and that paragraph 2 be redrafted as follows:

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

<sup>55</sup> Draft article 42 submitted by the Special Rapporteur read:

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

“1. The present articles shall complement the provisions on the courier and the bag in the Vienna Convention on Diplomatic Relations of 18 April 1961, the Vienna Convention on Consular Relations of 24 April 1963, the Convention on Special Missions of 8 December 1969 and the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975.

“2. The provisions of the present articles are without prejudice to other international agreements in force as between States parties thereto.

“3. Nothing in the present articles shall preclude States from concluding international agreements relating to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.”

<sup>56</sup> Document A/CN.4/374 and Add.1-4 (see footnote 2 (b) (iv) above), paras. 396-403.

<sup>57</sup> *Yearbook ... 1984*, vol. II (Part Two), pp. 36-37, para. 150.

59. In the discussion in the Sixth Committee, one representative, while acknowledging the importance of draft article 42, raised certain doubts concerning its current version and said that the text required further thorough examination, especially in the light of the 1969 Vienna Convention on the Law of Treaties.<sup>58</sup> It was also stated that certain improvements needed to be introduced in paragraph 1 of the draft article.<sup>59</sup>

60. Draft article 42 could be modelled on article 73 of the 1963 Vienna Convention on Consular Relations, which refers to the Convention's relationship with other international agreements.

**2. PROPOSED REVISED TEXT OF ARTICLE 42**

61. In the light of the above considerations, and taking into account the suggestion made in the Commission that the present text of draft article 42 should be shortened, the Special Rapporteur submits for examination the following revised text:

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

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

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

**I. Declaration of optional exceptions to applicability in regard to designated types of couriers and bags: proposed new article 43**

62. In the course of the examination of the scope of the draft articles and the régimes to be applied in respect of various types of couriers and bags, the question was raised as to the possibility of introducing some flexibility which would permit States to designate those types of couriers and bags to which they wished the articles to apply. Reference to that option was explicitly made in the commentary to article 1 of the present set of draft articles, and it was suggested that an article along the lines of article 298 of the 1982 United Nations Convention on the Law of the Sea should be included in the draft articles.<sup>60</sup>

63. An article providing for optional exceptions to applicability with regard to designated types of couriers and bags would be justified also in view of the fact that not all parties to the instrument on the status of the diplomatic courier and the diplomatic bag would be parties to all the codification conventions.

<sup>58</sup> See “Topical summary ...” (A/CN.4/L.382), para. 198; see also *Official Records of the General Assembly, Thirty-ninth Session, Sixth Committee*, 42nd meeting, para. 43 (Poland).

<sup>59</sup> See “Topical summary ...” (A/CN.4/L.382), para. 199; see also *Official Records of the General Assembly, Thirty-ninth Session, Sixth Committee*, 36th meeting, para. 66 (Bulgaria).

<sup>60</sup> *Yearbook ... 1983*, vol. II (Part Two), p. 54, para. (2) of the commentary to article 1 (Scope of the present articles).

64. The declaration of optional exceptions to applicability with regard to designated types of couriers and bags should be in written form. Such a declaration could be withdrawn at any time by the State author of that declaration. The optional exceptions should be applied as between States parties on the basis of reciprocity.

65. In the light of the above considerations, the Special Rapporteur submits for examination a new draft article 43, to read as follows:

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

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

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

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

**J. Conclusion**

66. The draft articles submitted for consideration in the present report should be regarded as a continuation of their presentation in the Special Rapporteur's fourth and fifth reports. In order to avoid repetition of the arguments and analysis of State practice already contained in the preceding reports, it was considered that mere reference to the specific parts of those reports would be sufficient.

67. It is hoped that, pursuant to suggestions and recommendations made in the Commission and in the Sixth Committee of the General Assembly, the Commission may be in a position to complete the examination of all the remaining draft articles and adopt them on first reading in the course of its thirty-seventh session.

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

[Agenda item 6]

DOCUMENT A/CN.4/387\*

## Third report on the draft Code of Offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur

[Original: French]  
[8 April 1985]

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## Introduction

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

2. The general view which emerged from the debate in the Sixth Committee of the General Assembly was that, in the current circumstances, the draft should be limited to offences committed by individuals.

3. It should also be recalled that the Commission took the 1954 draft code<sup>1</sup> as the basis for its work, subject to certain adjustments and additions. Some of those additions are more generally accepted than others, which remain controversial. They will be considered in the course of the elaboration of the draft. In any event there is a general tendency to favour the minimum content which had been proposed.<sup>2</sup>

4. On the basis of these guidelines, it now seems feasible to present a possible outline for the future code, which would consist of two parts:

A. The first part would deal with:

- (a) the scope of the draft articles;
- (b) the definition of an offence against the peace and security of mankind;
- (c) the general principles governing the subject.

B. The second part would deal with the acts constituting an offence against the peace and security of mankind. In that context, the traditional division of such offences into crimes against peace, war crimes and crimes against humanity will be reviewed.

5. As already noted in the second report,<sup>3</sup> the general principles will be included in the final draft in the place

indicated in the aforementioned outline. It seems difficult to list them at the current stage. Reference can, of course, be made to the principles which the Commission formulated on the basis of the Charter and the Judgment of the Nürnberg Tribunal.<sup>4</sup> However, those principles will have to be reviewed.

6. Some of those principles go beyond the simple formulation of a general rule or a basic proposition. That is so in the case of Principle VI, which contains a list of acts defined as offences against the peace and security of mankind. Moreover, subparagraph (c) of this principle linked crimes against humanity to so-called "war" crimes, and this is no longer valid today.

7. Some of these principles do not seem applicable to the subject-matter as a whole. An examination of the judicial precedents, especially the decisions of the tribunals which rendered judgment in application of

<sup>4</sup> The "Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal", formulated by the Commission at its second session, in 1950 (see *Yearbook ... 1950*, vol. II, pp. 374-378, document A/1316, paras. 95-127), read as follows:

### *"Principle I"*

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

### *"Principle II"*

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

### *"Principle III"*

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

### *"Principle IV"*

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

<sup>1</sup> See *Yearbook ... 1954*, vol. II, pp. 151-152, document A/2693, para. 54; text reproduced in *Yearbook ... 1984*, vol. II (Part Two), p. 8, para. 17.

<sup>2</sup> *Yearbook ... 1984*, vol. II (Part Two), pp. 15 *et seq.*, paras. 52-62.

<sup>3</sup> *Yearbook ... 1984*, vol. II (Part One), p. 100, document A/CN.4/377, para. 83.

Law No. 10 of the Allied Control Council,<sup>5</sup> shows that the *moral* element (criminal intent, mental condition of the perpetrator) or the *intellectual* element (error regarding the wrongful character of the act) was taken into consideration when culpability with regard to crimes against humanity was evaluated, and that the various courts evaluated them in different ways.

8. On the other hand, it would seem difficult to take these elements into consideration in the case of colonialism, *apartheid* or aggression, for example. Generally speaking, all the part of the draft relating to justifying facts, exculpatory excuses, extenuating circumstances and so on should be considered with the greatest care, for the principles flowing therefrom do not all have the same scope. It will be necessary to delve deeper in order to ascertain the precise limits to be assigned to these concepts and determine in which cases they could or could not be applied.

9. All these considerations make it necessary to defer until a later stage the formulation of the general principles governing the subject. In effect, although, as

noted above, some of these principles seem to be universally applicable, such as the principle of the non-applicability of statutory limitations, or the principle of universal competence for the punishment of the offences in question, or its corollary, the obligation of every State to prosecute and punish the offenders unless they are extradited, others seem to be more limited in their application.

10. These general observations having been made, this report seeks to specify the category of individuals to be covered by the draft and to define an offence against the peace and security of mankind. Next, it studies the offences mentioned in article 2, paragraphs (1) to (9), of the 1954 draft code and possible additions to those paragraphs. Lastly, it proposes a number of draft articles relating to those offences. The report comprises three chapters: chapter I delimits the scope of the subject *ratione personae* and defines an offence against the peace and security of mankind; chapter II deals with the acts constituting offences against the peace and security of mankind (paras. (1) to (9) of article 2 of the 1954 draft code); chapter III presents the draft articles.

#### "Principle V

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

#### "Principle VI

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

##### "(a) Crimes against peace:

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

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

##### "(b) War crimes:

"Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of

prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

##### "(c) Crimes against humanity:

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

#### "Principle VII

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

<sup>5</sup> Law relating to the punishment of persons guilty of war crimes, crimes against peace and against humanity, enacted at Berlin on 20 December 1945 (Allied Control Council, *Military Government Legislation* (Berlin, 1946)).

## CHAPTER I

### Delimitation of scope *ratione personae* and definition of an offence against the peace and security of mankind

#### A. Delimitation of scope *ratione personae*: authorities of a State or individuals?

11. As already indicated, the draft code under consideration deals only with the criminal responsibility of individuals. But which individuals are involved? The problem is to determine whether individuals can be the principal perpetrators of offences against the peace and

security of mankind. Complicity is left aside for the time being. The question deserves to be asked, for the 1954 draft code refers in article 2, paragraph (10), to "private individuals" and in paragraph (11) of the same article to "private individuals acting at the instigation or with the toleration of ... [the] authorities [of a State]".

12. There seems to be no doubt that the answer is negative in the case of all offences jeopardizing the in-

dependence, safety or territorial integrity of a State. In effect, these offences involve means whose magnitude is such that they can be applied only by State entities. Moreover, it is difficult to see how aggression, the annexation of a territory, or colonial domination could be the acts of private individuals. These offences can be committed only by individuals invested with a power of *command*, in other words the *authorities* of a State, persons of high rank in a political, administrative or military hierarchy who give or receive orders, who execute government decisions or have them executed. These are *individuals-organs*, and the offences they commit are often analysed in terms of abuse of sovereignty or misuse of power. Consequently, individuals cannot be the perpetrators of these offences.

13. What about the category of offences mentioned in paragraphs (10) and (11) of article 2 of the 1954 draft code? These paragraphs deal with crimes against humanity, that is, genocide and other inhuman acts. In these cases, the participation of individuals, which is unimaginable in theory, seems to be impossible in practice. Genocide is the outcome of a systematic large-scale effort to destroy an ethnic, national or religious group. In the modern world, private individuals would find it difficult to carry out such an undertaking single-handed. The same is true, moreover, of all crimes against humanity, which require the mobilization of means of destruction which the perpetrators can obtain only through the exercise of power. Some of these crimes—*apartheid*, for example—can only be the acts of a State. In short, it seems questionable whether individuals can be the principal perpetrators of offences against the peace and security of mankind.

14. What about complicity? This question deserves closer consideration. When individuals are the tools used by a State to commit an international offence, what is the legal nature of the acts they have committed? For example, mercenaries invade the territory of a State. The offence committed by these mercenaries is not, strictly speaking, an act of complicity. It is an autonomous offence, which does not have the same legal basis as the offence committed by the State authorities which used them. A man assassinates a head of State in exchange for a sum of money paid by the authorities of another State. Is this an act of complicity? The offences committed do not have the same basis.

15. In the case of the assassin, what is involved is a criminal offence, a violation of the provisions of the national legislation of the country where the crime was committed or of the country of which the victim was a national. But for the status of the victim, the murder might have been no more than a news item. In the case of the authorities which instigated the offence, what is involved is a serious breach of an international obligation. In fact, the two offences fall within the ambit of two different legal systems, one internal, the other international. Moreover, the motives for the two offences are quite different: political in the one case, criminal in the other. It would be inappropriate here to consider in depth the problem of complicity. That will be discussed at length later. The criminality of groups is complex. In any event, the massiveness which often characterizes crimes against humanity makes it unlikely that private

individuals will be the principal perpetrators of offences in this category.

16. In studying this subject, it must never be forgotten that the aim is also—and indeed primarily—to erect a barrier against the irrational and lawless acts to which the exercise of power may give rise, and that what must be prevented are the crimes and exactions of those who possess the formidable means of destruction and annihilation that threaten mankind today. Even if the subject of law, in the case of offences against the peace and security of mankind, is the individual, it must always be remembered that the individual in question is, first and foremost, an authority of a State.

17. It is for that reason that two alternative versions of article 2 of the draft code have been proposed. The first poses the general principle of the responsibility of individuals, without drawing a distinction between authorities and private individuals. The second poses the principle of the responsibility of the authorities of a State, the case of the complicity of individuals being reserved for the chapter dealing with that subject. It is true that the distinction between “authorities of a State” and “individuals” does not always seem to be absolutely necessary. Both can be categorized as individuals. However, it seems that the idea behind the draft code is to highlight the primordial responsibility of those who wield power in the commission of acts constituting offences against the peace and security of mankind. In any event, the question deserves to be debated.

#### **B. Definition of an offence against the peace and security of mankind**

18. The 1954 code confined itself to stating, in the relevant part of article 1, that “offences against the peace and security of mankind, as defined in this Code, are crimes under international law”. As can be seen, this is not strictly speaking a definition. To state that offences against the peace and security of mankind are crimes under international law is simply to refer to the category in which they belong, without stating what distinguishes them from other similar notions. It is as if a naturalist were to say that tigers were wild animals without stating what distinguishes them from other wild animals.

19. The Commission wished to study this notion in more depth. The first question that comes to mind is whether “offences against peace” and “offences against the security of mankind” constitute one and the same concept, or whether they are separate concepts. If the answer is in the affirmative, an attempt will be made to give a general definition of an offence against the peace and security of mankind.

#### **1. DO OFFENCES AGAINST PEACE AND OFFENCES AGAINST MANKIND CONSTITUTE ONE AND THE SAME CONCEPT?**

20. To reply to this question, it is necessary first to go back to the origin of this expression and to consider the controversies to which it has given rise.



(a) *Origin of the expression*

21. The expression originated in a report of 9 November 1946 addressed by Justice Francis Biddle to President Truman in which he suggested that the time seemed to have come to "reaffirm the principles of the Nürnberg Charter in the context of a general codification of offences against the peace and security of mankind". He saw in such a measure a means of perpetuating the principle that war of aggression was the supreme crime. But going beyond war of aggression, Justice Biddle was also thinking of sanctions against what he called "lesser violations of international law".<sup>6</sup>

22. Justice Biddle understood the word "lesser" not in an absolute sense, but clearly in a relative sense, that is to say, compared with aggression. But such offences nevertheless constituted very serious violations of international law.

23. President Truman endorsed Justice Biddle's recommendation and, at his initiative, on 15 November 1946, the delegation of the United States of America submitted to the General Assembly of the United Nations a proposal directing the United Nations "to treat as a matter of primary importance the formulation of the principles of the Charter of the Nürnberg Tribunal and of the Tribunal's judgment in the context of a general codification of offences against the peace and security of mankind or in an international criminal code".<sup>7</sup> The United States proposal already foresaw the possibility of two codes: "the code of offences against the peace and security of mankind" and "the international criminal code". However, it did not indicate any criteria for distinguishing between the two.

24. A discussion on this important problem therefore began in the Committee on the Progressive Development of International Law and its Codification. The representative of France, H. Donnedieu de Vabres, maintained that the code of offences against the peace and security of mankind would concern what he called *crimes interétatiques*, as opposed to crimes connected with ordinary lawlessness, the international nature of which lay only in the problems of conflicting laws or competence between States to which they sometimes gave rise.<sup>8</sup>

25. The distinction made by the eminent jurist between international crimes proper, which he called *crimes interétatiques*, and other crimes, which concern international order only because of the conflicts to which they give rise, is correct. However, it does not suffice to throw light on the subject. While no one doubts that offences against the peace and security of

mankind come within the category of international crimes, what is their specific nature? What are their particular characteristics? What is the justification for the special place that they occupy within this category? That is the problem that will be dealt with. But first a question arises: do the concepts of "offences against peace" and "offences against the security of mankind" have a different content? Are they distinct or identical?

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

26. The problem has already been raised by certain members of the Commission, and it is important to dwell on it for a moment.

27. It may be noted that the Commission was already concerned with this problem as long ago as 1954; the late Jean Spiropoulos, the first Special Rapporteur to whom the draft code of offences against the peace and security of mankind was entrusted, attempted to deal with it, saying:

... we should dispose of the question of whether under this term we are to understand two separate categories of offences, namely, acts affecting the "peace" and acts affecting the "security of mankind". In our view ... both terms express the same idea. The term "peace and security of mankind" is a correlative to the expression "international peace and security" contained in the Charter of the United Nations. Both expressions refer to the same offences, i.e. to offences against peace. The contrary view would overlook the fact that any offence against "peace" is necessarily also an offence against the "security of mankind".<sup>9</sup>

28. As will be seen below, the two expressions "international peace and security" and "peace and security of mankind" do not coincide exactly. However, the conclusion of the previous Special Rapporteur cannot be rejected. The vast majority of jurists who have voiced an opinion on this question have fully endorsed it.

29. Justice Biddle, who had originated the United States initiative, declared, in his reply to a questionnaire on this topic<sup>10</sup> from the International Association for Penal Law and the International Bar Association: "I think the phrase 'peace and security of mankind' is indivisible and should not be split". H. Donnedieu de Vabres replied to the same questionnaire: "I consider that the term 'offences against the peace and security of mankind' covers, on the one hand, war of aggression and, on the other, war crimes and offences against humanity".

30. The German jurist, Adolf Schönke, for his part, said: "I am inclined to regard these two types of acts as forming a unity; they should not be separated." Justice Joseph Y. Dautricourt of Belgium affirmed: "It is impossible to distinguish clearly between offences against peace and offences against the security of mankind. This is why the two notions which in practice cover the same acts are indivisible and should be replaced by the unified concept of universal public order."

<sup>6</sup> United States of America, *The Department of State Bulletin* (Washington, D.C.), vol. XV, No. 386 (24 November 1946), pp. 956-957; see also the first report of the first Special Rapporteur, J. Spiropoulos, on the draft code of offences against the peace and security of mankind (*Yearbook ... 1950*, vol. II, p. 255, document A/CN.4/25, para. 9).

<sup>7</sup> That proposal was endorsed in substance in General Assembly resolution 95 (I) of 11 December 1946 (see *Yearbook ... 1950*, vol. II, p. 256, document A/CN.4/25, paras. 11-13).

<sup>8</sup> *Ibid.*, p. 257, paras. 29-32.

<sup>9</sup> *Ibid.*, p. 258, para. 34.

<sup>10</sup> The replies to the questionnaire cited in the present report are taken from the memorandum of V. V. Pella, document A/CN.4/39, para. 41 (see footnote 11 below).

31. Vespasien V. Pella, in an important memorandum which he had prepared at the request of the United Nations Secretariat,<sup>11</sup> also took a stand on the question:

It has been asked whether the expression "offences against the peace and security of mankind" is generic and denotes an *indivisible concept* or whether, on the contrary, it should be held to refer to *two distinct types of offences*: on the one hand, offences against peace and, on the other hand, offences against ... mankind. The first would seem to be the correct interpretation.<sup>12</sup>

To support his line of thinking, Pella cited the fact that the terms *peace* and *security* were linked and constituted a single expression in the Yalta Agreements of 11 February 1945<sup>13</sup> and in several Articles of the Charter of the United Nations. According to Pella, it was an expression *sui generis* covering one and the same reality and applying to any clear breach of international public order.

32. Only two dissenting voices were raised amid this general agreement, those of Sir David Maxwell Fyfe and the Swiss jurist, Jean Graven.

33. According to the former, the concept was not an indivisible whole:

... It appears to me possible to threaten or disturb the security of mankind without war. For instance, the German Anschluss with Austria in 1937, and perhaps some more recent examples, could be cited. But the question must depend on the meaning attributed to the words "peace" and "security".<sup>14</sup>

34. According to the latter:

It seems ... necessary to distinguish between *the two values* which are to be protected, by trying to define them in legal terms, or at least by determining and defining *separately* the offences against each which are to be punishable ... Offences against the *peace* of mankind ... are likely to or in fact lead to "aggression" or "hostilities" within the meaning of international law. This is also in conformity with popular feeling and with language, in which "peace" in the true sense is "the position of a State which has no war to wage or to carry on" and which lives in a state of "concord" with the rest of the world. Offences against the *security* of mankind are more particularly those which are likely to or in fact lead to "disorders" or "disturbances" and impair public "tranquillity"; the term "security" is also, in its usual meaning, synonymous with such "peace of mind" and ... with an internal feeling of "confidence", on the part of an individual, a community, or a State.<sup>15</sup>

35. In fact, an analysis of the two opinions makes it clear that they are only apparently discordant. The two last-mentioned writers seem to have wanted to demonstrate that behind the general concept of peace and security of mankind there is necessarily a diversity resulting from the specific nature of each violation included in the category of offences against the peace and security of mankind. This was clearly expressed by Brigadier-General Telford Taylor of the United States and by the Argentine jurist, L. A. Podesta Costa.

36. For Taylor, the unity of the concept

does not prevent the recognition of various categories of offences within the scope of the concept. Just as murder, rape, arson and rob-

bery can be distinguished within the concept "law and order", so can (and must) various categories be recognized within the concept "peace and security of mankind". Thus some acts may be criminal because they are committed with the deliberate intention of instigating war ("offences against the peace"), whereas other acts may be criminal because of their atrocious character (genocide, etc.), even though not committed with intention to precipitate war.<sup>16</sup>

37. According to Podesta Costa:

The expression "the peace and security of mankind" is indivisible. In practice, it may happen that certain specified concrete acts impair peace or security in a given case; however, it is not possible to specify in advance that these acts will, in a general way, produce a particular effect. Nevertheless, it is beyond doubt that the consequences are the same, because peace is conditioned by security.<sup>17</sup>

38. To sum up, the expression "peace and security of mankind" has a certain unity, a certain comprehensiveness, linking the various offences. Although each offence has its own special characteristics, they all belong to the same category, and are marked by the same degree of extreme seriousness.

39. These considerations on the unity of the concept do not exhaust the subject.<sup>18</sup> They make it possible, however, now that this fact has been established, to approach the problem of definition. Is it possible to define an offence against the peace and security of mankind? Is it possible to go further than the Commission did in 1954?

## 2. MEANING OF THE CONCEPT OF AN OFFENCE AGAINST THE PEACE AND SECURITY OF MANKIND

40. Nothing is more difficult to define than the concept of crime. Many criminal codes have abandoned the attempt. The fact is that this conceptual entity is characterized by the variability of the criteria to which it is connected. What makes "the concept of crime hard to pin down is the mobility and inconstancy of the legislative criteria, the judicial criteria and the popular criteria which cover its definition".<sup>19</sup> Anti-crime legislation is subject to variations in time and space. Judicial criteria are subject to the deep-rooted convictions and tendencies of the men who dispense justice, popular criteria to the impulses of the inconstant and fluctuating masses. As Merle and Vitu put it: "the focal points of concern move". It is a challenge indeed to discover behind all this the traits of the concept of crime that are constant.

41. Many penal codes have abandoned the attempt. They rate criminal transgressions by the severity of the punishment imposed on transgressors. Article 1 of the French Penal Code establishes a three-tier hierarchy of transgressions in order of seriousness, simply determined by the severity of the punishment imposed: *contraventions* (petty offences), *délits* (correctional offences) and *crimes* (criminal offences).

42. But the passage from the least serious to the most serious is often imperceptible. At what moment is the

<sup>11</sup> Reproduced in the original French version in *Yearbook ... 1950*, vol. II, p. 278, document A/CN.4/39.

<sup>12</sup> *Ibid.*, p. 296, para. 41.

<sup>13</sup> See *The Department of State Bulletin* (Washington, D.C.), vol. XII, No. 295 (18 February 1945), p. 213.

<sup>14</sup> See *Yearbook ... 1950*, vol. II, p. 297, document A/CN.4/39, para. 41.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*, p. 298.

<sup>17</sup> *Ibid.*

<sup>18</sup> On the question of the unity or diversity of the concept, see Pella (*ibid.*, pp. 296-298).

<sup>19</sup> R. Merle and A. Vitu, *Traité de droit criminel*, vol. I: *Problèmes généraux de la science criminelle, droit pénal général*, 4th ed. (Paris, Editions Cujas, 1981).

borderline crossed? Some correctional offences are punished as petty offences, and criminal offences are sometimes liable to a correctional penalty. It is to be noted, moreover, that this tripartite distinction is not unanimously accepted. The Spanish, Italian and Portuguese penal codes, to take only countries with a Roman-law tradition, have preferred a two-tier division into correctional and criminal offences. It is not intended to linger unduly over this aspect of the problem.

43. If the concept of crime is not easy to define in domestic law, the task is even more difficult in international law. This is because criminal law has only recently been of interest in matters of public international law. The discipline which has been of most interest to jurists and which has been applied in a good number of cases is that which has as its frame of reference conflicts of laws and jurisdictions. However, this discipline, wrongly termed international criminal law, is international in name only. The rules applicable to conflicts are defined by domestic legislation, and those rules have effect at the international level only through the channel of agreements or treaties.

44. International crime, as a concept peculiar to international law and relating exclusively thereto, is a concept that is still imprecisely defined and that has been applied in few cases. The Nürnberg and Tokyo trials appear as accidents of history and, even today, odious and monstrous acts remain unsanctioned at the international level. However, serious efforts are being made to bring international criminal law into the arena of events. This development will not be referred to again; it was described in detail in the Special Rapporteur's first report.<sup>20</sup> It should merely be pointed out that the progress achieved in the codification of international responsibility has provided a better standpoint from which to view the concept of international crime (article 19 of part I of the draft articles on State responsibility).<sup>21</sup>

45. The task now is to try to define this special category of international crimes known as "offences against the peace and security of mankind". On what criterion is it based?

46. In the early stages of its work, the Commission used the criterion of extreme seriousness as a characteristic of an offence against the peace and security of mankind.<sup>22</sup> The comment was made, not without cause, that that criterion was too subjective and too vague.

47. But such criticism appears to be unavoidable. Criminal law—whether domestic or international—is steeped in subjectivity. The seriousness of a transgression is gauged according to the public conscience, that is to say the disapproval it gives rise to, the shock it provokes, the degree of horror it arouses within the national or international community. Thus paragraph 2 of article 19 of part I of the draft articles on State responsibility reads as follows:

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.

Such recognition rests essentially on subjective considerations.

48. As for the vagueness of the criterion, an attempt can be made to correct it in part. But in reality a criterion, because of its general and synoptic nature, can unite or group together only the general aspects of a given concept. Care must be taken not to confuse *criterion* and *definition*. The value of the latter is measured by its precision. It is more analytical than synthetic, and it seeks to incorporate all the particular aspects of a concept. Murder, assassination, arson, etc. are included, in domestic law, in the concept of crime, but each of these transgressions has its own particular aspect, its distinctive constituent elements, and it is impossible to define the concept of crime in general by enumerating all the aspects of the individual crimes of which it is composed.

49. That being so, it is nevertheless possible to attempt to improve the criterion of seriousness and to state how it can be recognized. First of all, it should be noted that seriousness can be measured by several elements, some subjective, others objective. With regard to subjective elements, seriousness is measured by the intention or motive, by the transgressor's degree of awareness, by his personality, etc. But alongside these moral elements there exist other elements which have a more objective content. Seriousness may, in fact, also be measured in relation to the interests or the property protected by law. In that case, it may be a matter of transgressions against *rights, physical persons or property*. In respect of persons, what is at stake is the life and physical well-being of individuals and groups. As for property, public or private property, a cultural heritage, historical interests, etc., may be affected.

50. A thorough review will be made in due course of the judicial precedents established by the Nürnberg judgments and by those handed down in the occupied zones of Germany, by virtue of Law No. 10 of the Allied Control Council.<sup>23</sup> Of course, the field covered by the Charter and the Judgment of the Nürnberg International Military Tribunal and by the judgments of the tribunals in the occupied zones is today too limited in view of developments subsequent to the Second World War. There are those who say, when they look at these developments, that Nürnberg is out of date. The term is inappropriate. Rather, the field of application of Nürnberg has been broadened by the appearance of new transgressions, new international crimes which were not envisaged by the Charter of the Nürnberg Tribunal, but which are today reprehensible to the universal conscience. This, moreover, explains why the task of bringing the 1954 draft code up to date is being undertaken.

51. The subjective element and the objective element are therefore inextricably linked in the definition of any criminal act. This is true for domestic law as it is for

<sup>20</sup> *Yearbook ... 1983*, vol. II (Part One), p. 137, document A/CN.4/364, chap. I.

<sup>21</sup> *Yearbook ... 1976*, vol. II (Part Two), p. 95.

<sup>22</sup> *Yearbook ... 1983*, vol. II (Part Two), pp. 13-14, paras. 47-48.

<sup>23</sup> See footnote 5 above.

international law, and acts considered as crimes under international law are often also indictable under national legislation, on the basis of the same criteria and the same definitions. In both cases, the subjective element (intention to commit an offence) is accompanied by a material element (an attempt on a life, an act affecting physical well-being or intellectual and material possessions). It is the combination of these two elements that characterizes a transgression.

52. Without at this point going into the dispute whether an offence can or cannot be committed by a State, the present report being limited to the criminal responsibility of individuals, it must be agreed that the approach taken in article 19 is correct in principle. It measures the seriousness of a transgression according to both a subjective element (the fact that the transgression is *recognized* as a crime by the international community) and an objective element (the *subject-matter of the obligation* breached); the subject-matter in question must be one whose protection is essential for the international community.

53. These general considerations make it possible to ask the following question: is it possible to define an offence against the peace and security of mankind and, if so, what definition should be proposed?

54. The search for the specific elements of an offence against the peace and security of mankind must proceed from the definition of an international crime contained in article 19. A concern for logic and coherence makes such a procedure obligatory, to the extent that it is desirable to maintain a certain unity of approach and a single guiding theme in the Commission's work.

55. Not surprisingly, the doctrinal approach in the search for the specific characteristics of an offence against the peace and security of mankind is relatively new, for the expression itself dates back only to the end of the Second World War. It was after 1945 that a development in this area began, marked first by the search for the specific characteristics of international crime. That development was authoritatively described in the Commission's report on the work of its twenty-eighth session, in 1976. In paragraph (15) of the commentary to article 19 of part 1 of the draft articles on State responsibility, the Commission made the point that:

The need to distinguish, in the general category of internationally wrongful acts ... a separate category comprising exceptionally serious wrongs has in any case become more and more evident since the end of the Second World War.<sup>24</sup>

And the Commission noted further:

It was in the 1960s and 1970s that the idea took shape, and was formulated academically, in the writings of international jurists, that different kinds of internationally wrongful acts should be distinguished according to the *importance of the subject-matter*\* of the breached obligation.<sup>25</sup>

There is no need to reproduce here the abundant doctrinal sources quoted in that commentary. It is sufficient to refer to the text.

56. Generally speaking, significant developments are to be noted in the period following the Second World War, marked by:

(a) The emergence of the individual as a subject of international criminal law;

(b) The recognition of *jus cogens* as a source of obligations of a special nature;

(c) The appearance of a new category of internationally wrongful acts for which mere material compensation is not sufficient redress, but which, in addition, involve penal consequences.

57. Until recently the difficulty has been to find a synoptic formula sufficiently broad to encompass these transgressions. The Charter of the International Military Tribunal<sup>26</sup> simply differentiated them in three distinct categories and classified them within those categories. Article 6 of that Charter considered the following to be crimes against the peace and security of mankind:

(a) Crimes against peace;

(b) War crimes;

(c) Crimes against humanity.

58. The same classification was used in Principle VI of the "Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal" formulated by the Commission at its second session, in 1950.<sup>27</sup>

59. Finally, the draft code elaborated in 1954 uses this same classification, without indicating the general criterion common to these different transgressions.

60. Is it possible to go any further in the present state of affairs? It is not easy, but it is worth trying.

61. Because of its generality, the definition of an international crime given in article 19 of part 1 of the draft articles on State responsibility encompasses offences against the peace and security of mankind; these form only a category of international crimes characterized by their extreme seriousness, and seriousness is measured according to the subject-matter of the obligation breached. Thus it is in relation to this subject-matter that it appears possible to characterize an offence against the peace and security of mankind. *The more important the subject-matter, the more serious the transgression.* An offence against the peace and security of mankind covers transgressions arising from the breach of an obligation the subject-matter of which is of special importance to the international community. It is true that all international crimes are characterized by the breach of an international obligation that is essential for safeguarding the fundamental interests of mankind. But some interests should be placed at the top of the hierarchical list. These are international peace and security, the right of self-determination of peoples, the safeguarding of the human being and the preservation of the human environment. Those are the four cardinal points round which the most essential concerns revolve, and these concerns constitute the summit of the pyramid on

<sup>24</sup> *Yearbook ... 1976*, vol. II (Part Two), p. 101.

<sup>25</sup> *Ibid.*, p. 115, para. (47) of the commentary to article 19.

<sup>26</sup> United Nations, *Treaty Series*, vol. 82, p. 279.

<sup>27</sup> See footnote 4 above.

account of their primordial importance. It will be noted, moreover, that because of this primordial importance, article 19 cites them as examples in subparagraphs (a) to (d) of paragraph 3. Offences against the peace and security of mankind might also have been defined in article 19, which might have included a subcategory consisting of the breaches referred to in those four subparagraphs. But that was not the purpose of the article.

62. However, if article 19 cites these breaches as examples, it is because they constitute the most serious violations of international law. The commentary to article 19 in the Commission's report leaves no doubt on this point:

The four spheres mentioned respectively in subparagraphs (a), (b), (c) and (d) of paragraph 3 are those corresponding to the pursuit of the *four fundamental aims*\* of the maintenance of international peace and security, the safeguarding of the right of self-determination of peoples, the safeguarding of the human being, and the safeguarding and preservation of the human environment ... The rules of international law which are now of greater importance than others for safeguarding the fundamental interests of the international community are to a large extent those which give rise to the obligations comprised within the four main categories mentioned.\*\*

63. Offences against the peace and security of mankind might therefore be defined in the following way:

Offences against the peace and security of mankind are international crimes which result from:

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

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

\* *Yearbook ... 1976*, vol. II (Part Two), p. 120, paragraph (67) of the commentary to article 19.

(c) a serious breach on an extensive scale of an obligation of essential importance for safeguarding the human being;

(d) a serious breach on an extensive scale of an obligation of essential importance for the safeguarding and preservation of the human environment.

64. It will be noted that the provisional list of offences against the peace and security of mankind, established by the Commission at its thirty-sixth session,<sup>29</sup> can fit perfectly into any subparagraph of this definition.

65. Of course, a more synoptic definition might be proposed along the following lines:

Any breach of an international obligation recognized as such by the international community as a whole is an offence against the peace and security of mankind.

66. This second definition has the advantage of being brief and concise, but it does not sufficiently emphasize the various subject-matters to which a breach of the obligation in question may apply. The first definition, although long, has the merit of being coherent. It takes as its starting-point the same approach and formulation as article 19. It emphasizes the two elements that are at the basis of a criminal transgression: the subjective element (the opinion of the international community) and the objective element (the subject-matter of the obligation violated). In this respect, it is more analytical. It will be for the Commission to assess the respective merits of the two formulas and make a choice.

67. Now that an offence against the peace and security of mankind has been defined, it is necessary to proceed to an examination of the acts constituting such an offence.

<sup>29</sup> *Yearbook ... 1984*, vol. II (Part Two), p. 17, para. 65 (c).

## CHAPTER II

### Acts constituting an offence against the peace and security of mankind

68. The present report will be confined to the crimes envisaged in subparagraphs (a) and (b) of the definition given above (para. 63), that is to say crimes resulting from a breach of an international obligation of essential importance for the maintenance of international peace and security.

69. The crimes envisaged in subparagraph (a) were the subject of paragraphs (1) to (9) of article 2 of the 1954 draft code. They have the common characteristic of constituting a group of offences which directly threaten the independence, sovereignty or territorial integrity of a State and are, as a consequence, serious threats to its status. Moreover, they are offences which come within the framework of inter-State relations, whereas war crimes or crimes against humanity may involve the direct responsibility of individuals, independently of that of the State. Sometimes there are crimes for which only the responsibility of individuals is involved, even if they acted as agents of a State. For example, most

national military codes prohibit war crimes. But there are times when soldiers infringe the provisions of such codes in circumstances which in no way involve the responsibility of their State or of their superiors. There will be an opportunity of considering such situations at leisure.

70. However, the cases envisaged here have nothing to do with the category of personal transgressions that can be divorced from official functions, since the acts emanate from authorities whose actions are inseparable from those of the State. Moreover, in such cases the injured party can only be a State. It follows that such offences endanger international peace and security.

71. The time has now come to stress the difference between the two concepts of "international peace and security" and "peace and security of mankind". The first expression is synonymous with non-belligerence. It refers to peaceful relations between States, each of

which avoids behaviour likely to endanger international peace and security.

72. The expression "peace and security of mankind", for its part, encompasses a wider terrain. It goes beyond relations between States. It covers not only acts committed by one State against another, but also acts committed against peoples (violations of the right of self-determination, systematic violations of human rights), against populations (violations of humanitarian law) or against ethnic groups (acts of genocide), etc.

73. Only offences of the first type, namely those committed against a State, which are the subject of the paragraphs of article 2 of the 1954 draft referred to above (para. 69), will be dealt with here. A number of general remarks may be formulated concerning them. First of all, it should be noted that the acts envisaged in some of those paragraphs are now covered by the Definition of Aggression.<sup>30</sup> This will be seen later on. The paragraphs in question are paragraph (4) of article 2, relating to "armed bands", and paragraph (8) of the same article. The paragraphs relating to armed bands and to the annexation of territory are covered, respectively, by paragraphs (g) and (a) of article 3 of the Definition of Aggression.

74. It does not appear necessary, therefore, to retain paragraphs (4) and (8) of article 2 of the 1954 draft code. The other paragraphs are open to discussion and have been the subject of criticism in the Commission, in particular paragraph (3), relating to the preparation of aggression, paragraph (7), concerning the violation of treaties which are designed to ensure peace by means of restrictions or limitations on armaments, and paragraph (9), relating to intervention in the internal or external affairs of another State. Those paragraphs will be discussed later. For the time being, the focus will be upon aggression, which is the subject of section A of draft article 4 submitted in this report.

### A. Aggression

75. Much has been written about this concept, which has created controversy. But some aspects of the controversy are now only of historical interest. In fact, the debate surrounding the concept of aggression took on a certain importance mainly after the Kellogg-Briand Pact.<sup>31</sup> Previously, war had been legal, in principle; only the means and methods of warfare could be controlled or limited. Similarly, rules were imposed on belligerents, in particular to protect prisoners, the sick or wounded, civilians or certain public property that did not come within the category of military means. All this is the subject of humanitarian law, which will be considered in a future report.

76. The prohibition of war, affirmed even more clearly by the Charter of the United Nations, sparked renewed interest in the concept of aggression. The

<sup>30</sup> General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

<sup>31</sup> General Treaty for Renunciation of War as an Instrument of National Policy of 27 August 1928 (League of Nations, *Treaty Series*, vol. XCIV, p. 57).

Kellogg-Briand Pact was limited to a general prohibition of war and left it to each State to determine unilaterally and exclusively what constituted self-defence. This gap was filled by the Charter, which provides that action for the purpose of self-defence is legitimate only until such time as the Security Council has taken measures necessary to maintain international peace and security. The right of self-defence is therefore no longer unlimited in time. Moreover, the Security Council may also determine whether the operation in question was appropriate and really constituted an act of self-defence. Of course, these principles should not obscure the real state of affairs, which is much more complex. The Dean Acheson resolution, also known as the "resolution on the maintenance of peace",<sup>32</sup> was one of the developments emphasizing the difficulties encountered in implementing the principles set forth above.

77. The debate to which the concept of aggression gave rise centred in the first place on the appropriateness of the definition itself. Was the definition of aggression possible and opportune?

78. According to some, the definition of aggression required the availability of some procedure for identifying with certainty which party was the aggressor. However, both antagonists would declare that they were waging a defensive war, and thus each would claim that it was acting in self-defence.

79. Others took the view, on the other hand, that the most serious of international crimes could not remain without definition. According to that view, a control system, albeit imperfect, existed for self-defence, linked to the Charter of the United Nations (Article 51). Under that system, a State could exercise the right of self-defence only until such time as the Security Council had taken measures necessary to maintain peace. After such time, the act of self-defence was comparable to aggression.

80. The disadvantage of this definition, derived *a contrario* from Article 51 of the Charter, is that it ultimately left the field wide open to the use of armed force, because the Security Council is often paralysed by the use of the veto.

81. However, those who considered that there was need for a definition carried the day. But among them there existed two schools of thought.

#### 1. DEFINITION BASED ON ENUMERATION

82. One group was in favour of a rigid definition, consisting of an exhaustive list of acts of aggression. That method had been adopted in the definition of aggression prepared by the Committee for Security Questions of the Disarmament Conference in 1933. It was also adopted by the Convention for the Definition of Aggression signed in London in that year.<sup>33</sup> It was the text put forward as a basis for discussion at the 1945 London Conference that led to the Charter of the Nürnberg Tribunal, article 6 of which refers to the "planning,

<sup>32</sup> General Assembly resolution 377 (V) of 3 November 1950.

<sup>33</sup> League of Nations, *Treaty Series*, vol. CXLVII, p. 67.

preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances". The questionable aspects of these formulas will be examined later.

## 2. DEFINITION BASED ON A GENERAL CRITERION

83. Those who favoured a flexible definition considered that the exhaustive list did not fit in with the way the world was evolving. They wished to have a flexible law, with less precise outlines, that would be capable of responding to new and unforeseen situations. They took the view that it was the responsibility of the competent body—jurisdiction or political entity—to assess the circumstances surrounding the outbreak of an armed conflict, circumstances that were too varied and delicate to be provided for in a list, however exhaustive it might aspire to be.

84. They also stressed that Article 51 of the Charter of the United Nations, by not defining self-defence, made an *a contrario* definition of aggression itself difficult. It can be noted, today, that this argument was not decisive, since the lack of precision did not prevent a definition of aggression from being adopted. The Commission itself, although in part 1 of the draft articles on State responsibility it devoted article 34 to the concept of self-defence, also and deliberately took care not to define that concept. It stated in the commentary to article 34 that:

... this article does not seek to define a concept that, as such, goes beyond the framework of State responsibility. There is no intention of entering into the continuing controversy regarding the scope of the concept of self-defence and, above all, no intention of replacing or even simply interpreting the rule of the Charter that specifically refers to this concept.<sup>34</sup>

## 3. AGGRESSION AS DEFINED BY THE GENERAL ASSEMBLY (RESOLUTION 3314 (XXIX) OF 14 DECEMBER 1974)

85. The existing Definition of Aggression takes a middle path between those two schools of thought. It is a general definition of aggression as being "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations" (art. 1). But it also uses the enumerative method, and cites a number of acts which constitute cases of aggression. However, it specifies that the acts enumerated are "not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter" (art. 4).

86. That, then, was the method chosen by the General Assembly in its Definition of Aggression. It should be noted that that Definition itself limits its innovatory scope. Its point of reference is strictly the Charter and the principles set forth therein. Article 6 states:

Nothing in this Definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful.

87. This definition of aggression must be taken into account in the elaboration of the new draft code. It is

therefore proposed that article 2, paragraph (1), of the 1954 draft should be replaced by the complete text of the Definition adopted on 14 December 1974.

## B. The threat of aggression

88. Article 2, paragraph (2), of the 1954 draft code concerns the threat of aggression. It refers to "any threat by the authorities of a State to resort to an act of aggression against another State".

89. The term "threat" may be understood in two ways. It sometimes means a "sign" or "presage" of something that may constitute a danger or a source of fear, a risk. It may also mean words, gestures or acts whereby one person warns another of his intention to do him wrong or cause him harm. The Charter uses the word "threat" in both senses.

90. The word has the first meaning in all the provisions of the Charter in which the danger results from "disputes" or "situations" such as those to which Chapters VI and VII refer, in particular Article 33 (any dispute, the continuance of which is likely to endanger the maintenance of international peace and security), Article 34 (any dispute or any situation likely to endanger international peace and security) and Article 39 (the existence of any threat to the peace).

91. The term "threat" as used in this draft must be understood as having the second meaning. It does not result from a dispute or a situation which, in itself, constitutes a danger to peace. Rather it is the intention expressed or manifested by a State to commit an act of aggression. The concrete evidence of this intention is blackmail or intimidation, either oral or written. The threat may also consist of material deeds: the concentration of troops near a State's borders, a mobilization effort widely publicized by the media, etc. It is in this second sense that the term is used in Article 2, paragraph 4, of the Charter, in accordance with which Member States "shall refrain in their international relations from the *threat*\* or use of force". In this sense, there seems to be no doubt that the threat of aggression constitutes an offence against peace, as does aggression itself.

92. It has sometimes been asked whether a threat of itself, not followed up, could be comparable with aggression. Certainly, the threat is not the act of aggression, but the use of threats is designed to bring pressure to bear on States and to disrupt international relations.

## C. The preparation of aggression

93. The preparation of aggression is referred to in article 2, paragraph (3), of the 1954 draft code, according to which "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" constitutes an offence against the peace and security of mankind.

94. The problem here is to determine what constitutes preparation. The term "preparation" was used in

<sup>34</sup> *Yearbook ... 1980*, vol. II (Part Two), p. 52, para. (1) of the commentary.



article 6 of the Charter of the Nürnberg International Military Tribunal. It was used again by the Commission in Principle VI<sup>35</sup> of the "Principles of international law" which it formulated on the basis of the Charter and Judgment of the Nürnberg Tribunal. That principle refers to the "planning, *preparation*, \* initiation or waging" of a war of aggression. The expression "preparation of aggression" has in fact often been used in conventions or draft conventions.

95. As early as 1924, the preparation of aggression was referred to in a draft treaty on disarmament and security prepared by an American group. Article IV of that draft read:

The High Contracting Parties solemnly declare that acts of aggression, even when not resulting in war, and *preparations*\* for such acts of aggression, are hereafter to be deemed forbidden by international law.<sup>36</sup>

96. But if the term "preparation" is often used, what it covers is not easy to define. What is meant by "preparation"? At what point can the existence of preparations for aggression be determined? What are the indisputable signs of preparation? What are its constituent factors? The territory is uncharted. The question had been raised whether preparation should not be distinguished from *préparatifs* (preparatory measures). Preparation can have a more abstract content than preparatory measures. It is sometimes more difficult to notice preparation than preparatory measures. To prepare oneself is "to make oneself fit for", "to make oneself capable of". This can be a purely intellectual operation: thinking about how to proceed, establishing a plan, a method of action. It often involves abstract operations that are hard to discern. As for preparatory measures, these can entail a host of practical operations, arrangements, movement of objects (*matériel*, arms, etc.). However, in the final analysis, only nuances of meaning separate the two terms, and the above distinction between them is far from definitive. In any case, the question is whether the preparation of aggression should be retained among the offences against the peace and security of mankind.

97. The concept of "preparation of a war of aggression" is to be found in the Charter of the Nürnberg Tribunal. Its inclusion in the code was defended by writers who wished to broaden the scope of the concept of offences against the peace and security of mankind. Pella, in the memorandum already referred to (para. 31), had raised the problem in the following terms:

An important question in connection with offences against peace, in the strict sense of the term, is whether acts preparatory to international aggression and acts likely to lead to a breach of the peace ought to be defined separately.

In the light of Article I, paragraph I, of the Charter of the United Nations, it is our view that the reply should be in the affirmative.<sup>37</sup>

Pella recalled further that, in 1925, the Inter-Parliamentary Conference at Washington had annexed

to its resolution III, relating to the criminality of a war of aggression and the organization of international repression, the "Fundamental principles of an international legal code for the repression of international crimes". Paragraph 2 of that text provided:

2. Measures of repression should apply not only to the act of declaring a war of aggression, but also to all acts on the part of individuals or of bodies of persons with a view to the preparation or the setting in motion of a war of aggression.<sup>38</sup>

Pella also said that Hjalmar Hammarskjöld, Chairman of the League of Nations Committee of Experts for the progressive codification of international law, had taken the same view, saying that, "if no war imitates peace, one sometimes finds oneself faced with situations, acts and gestures that claim to be peaceful, but that bear a singular resemblance to war".<sup>39</sup>

98. After the Second World War, this trend of thinking was reinforced because of the methods of blackmail and intimidation of which Hitler had been a master. Barcikowski, the first President of the Supreme Court of Poland, considered that "proceedings should also be instituted in respect of the preparations connected with the attempt to carry them out and with the armed blackmail with which almost all wars begin".<sup>40</sup> According to Donnedieu de Vabres, "the other violations of international law which are likely to disturb peace"<sup>41</sup> should be taken into consideration.

99. This trend towards extending the scope of the concept of offences against the peace and security of mankind finds its basis in article 9 of the Commission's draft declaration on rights and duties of States,<sup>42</sup> which provides:

Every State has the duty to refrain from resorting to war as an instrument of national policy, and to refrain from the *threat*\* or use of force against the territorial integrity or ... independence of another State, or in *any other manner*\* inconsistent with international law and order.

100. Taking the opposite view are those who think that an excessive extension of the scope of the concept of offences against peace gives rise to confusion. Francis Biddle, for example, although he had been a judge at Nürnberg, was in favour of deleting the words "preparation" and "waging" used in the Charter of the Nürnberg Tribunal. He considered that the object was to declare criminal

the country which, and the men who, start aggressive war ... Why then all the talk about planning, preparation and waging? Doesn't every country plan for aggressive action in case of war, and how does this differ from planning an aggressive war? Why also add the words 'in violation of international treaties'? If this is a war of aggression, how do the words add anything to the definition? If not, what is the crime?<sup>43</sup>

<sup>38</sup> See the report of the Twenty-third Conference of the Inter-Parliamentary Union, *Compte rendu de la XXIII<sup>e</sup> Conférence*, Washington and Ottawa, 1925, p. 47.

<sup>39</sup> See footnote 37 above.

<sup>40</sup> "Les Nations Unies et l'organisation de la répression des crimes de guerre", *Revue internationale de droit pénal* (Paris), vol. 17, Nos. 3-4 (1946), p. 304.

<sup>41</sup> "De l'organisation d'une juridiction pénale internationale" (*ibid.*, vol. 20, No. 1 (1949), p. 3).

<sup>42</sup> *Yearbook ... 1949*, p. 286, document A/925, para. 46.

<sup>43</sup> See *Yearbook ... 1950*, vol. II, p. 332, document A/CN.4/39, para. 97.

<sup>35</sup> See footnote 4 above.

<sup>36</sup> See "A practical plan for disarmament: Draft treaty of disarmament and security, prepared by an American group", *International Conciliation* (Greenwich, Conn.), No. 201 (August 1924), p. 343.

<sup>37</sup> *Yearbook ... 1950*, vol. II, p. 298, document A/CN.4/39, para. 42.



101. Those, then, are the two schools of thought. The definition of a crime against peace given in the Charter of the Nürnberg Tribunal was over-influenced by Hitlerism. In stressing the “planning, preparation, initiation or waging of a war of aggression” (art. 6 (a)), in emphasizing those different operations, the bill of indictment sought to underline in a special way the responsibility of the Nazi leaders. But such an accumulation of nouns does not seem relevant from the legal point of view. Any war initiated in violation of international law constitutes aggression. The concept of preparation does not appear to add much, apart from an element of confusion, and it could be eliminated.

102. The choice is between two possibilities: either preparation was not followed by implementation, in which case it cannot be seen specifically what the consequences are; or else it was followed up, in which case there is an example of aggression. Aggression is always, by its very nature, premeditated, that is to say prepared.

103. It must also be borne in mind that preparing is not the same as attempting, and that to exclude *preparation* of aggression from offences against the peace and security of mankind leaves untouched the problem of attempted action, which will be studied in due course.

104. As an argument in favour of characterizing the preparation of aggression as an offence, it may be noted that, in some cases, it would allow preventive measures to be taken as soon as there was serious presumptive evidence that a State was preparing aggression. What, however, constitutes presumptive evidence of such preparation? Would the door not then be opened to abuse, or simply to errors of judgment in a particularly delicate area?

105. Moreover, preventive measures, consisting of recommendations and enforcement of action of varying scope, are provided for in Chapters VI and VII of the Charter of the United Nations. Criminal law, for its part, sanctions offences and does not authorize preventive measures designed to prevent an offence. Such measures belong in the political arena, and to consider preparation as a distinct offence, without being able to determine what characterizes it or what are its constituent elements, is to give this concept disproportionate or even dangerous legal import and consequences.

#### D. Interference in internal or external affairs

106. A phenomenon that is more and more in evidence today is interference in the internal or external affairs of countries, an offence covered by article 2, paragraph (9), of the 1954 draft code.

107. Internal affairs relate to a country's particular form of government and institutions. They also cover economic and social life, and the activities of individuals or groups. External affairs should similarly be understood in the broad sense. These involve the fundamental choices that guide international relations as well as specific decisions based on those choices, or diplomatic action giving practical effect to such decisions. In both areas—internal and external af-

fairs—each State's competence is based on its independence and sovereignty.

108. The condemnation of interference by one State in the internal or external affairs of another had already been formulated by the Seventh International Conference of American States, in 1933, by the Inter-American Conference for the Maintenance of Peace, in 1936, by the Yalta Agreements,<sup>44</sup> and by article 18 of the Charter of OAS,<sup>45</sup> which provides:

#### Article 18

No State or group of States has the right to intervene, directly or indirectly, ... in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements.

109. The affirmation of this principle constantly features in the work of the United Nations and its organs; witness the call in General Assembly resolution 290 (IV) of 1 December 1949 to refrain from “fomenting civil strife and subverting the will of the people in any State”, or article 4 of the draft declaration on rights and duties of States,<sup>46</sup> which provides:

Every State has the duty to refrain from fomenting civil strife in the territory of another State, and to prevent the organization within its territory of activities calculated to foment such civil strife.

110. Today, the problem of interference is of particular relevance. The emergence of a multitude of small States on the international scene, the fragility of many of them, and greed for their resources, sometimes tempt powerful States to seek ways of challenging their independence—not at the formal level, of course, since colonialism has officially been buried, but by devious and insidious routes. Using mercenaries, fomenting civil strife and exerting pressure on States, for various reasons, especially political or economic pressure, are forms of interference sometimes aimed at destabilizing young States. Likewise, all practices that can be grouped under the general term “subversion” and that take various forms (financing of political parties and covert supply of arms or ammunition, trainers, instructors and the like), are well-known aspects of the phenomenon of interference.

111. The forms of interference are very varied. The 1954 draft code envisaged two situations in particular:

(a) The fomenting of civil strife (art. 2, para. (5));

(b) Intervention in internal or external affairs by means of coercive measures of an economic or political character (art. 2, para. (9)).

112. However, consideration of these two situations gives rise to a number of questions. First, it may be asked why the fomenting of civil strife in a State and interference in the internal or external affairs of that State should be the subject of two separate provisions. After all, the fomenting of civil strife in a State is only one

<sup>44</sup> See footnote 13 above.

<sup>45</sup> Signed at Bogotá on 30 April 1948 (United Nations, *Treaty Series*, vol. 119, p. 3), as amended by the Protocol of Buenos Aires of 27 February 1967 (*ibid.*, vol. 721, p. 324).

<sup>46</sup> See footnote 42 above.

among many forms of interference. Furthermore, it may be asked whether the distinction between internal affairs and external affairs is always justified.

113. Concerning the first point, it is somewhat surprising to see that the fomenting of civil strife constitutes an offence that is separate and distinct from other forms of interference. Presumably civil strife still draws attention because it is a convenient way of weakening a State by setting its nationals against one another; and it is also a simple device to use, no doubt, inasmuch as political life in most countries always involves rival tendencies (whether in the pluralistic democracies or in one-party régimes, where rivalries more often occur within the party). It is easy to play on these rivalries. But it must also be remembered that there are historical reasons for fearing civil strife as a means of undermining the integrity of the State.

114. For a long time, the metropolitan countries refused to consider wars of national liberation as wars, regarding them simply as internal conflicts in areas within their own sovereignty. Likewise, dictatorships have often tried, and today still try, to put down opposition movements, particularly through bloody repression, in the name of so-called exclusive sovereignty. In all such cases, it has been claimed that internal disturbances were no more than civil strife in areas within the exclusive sovereignty of the States concerned. It so happens that in 1954, at the time when the first draft code was elaborated, the uprisings which had broken out in many colonial territories revived interest in the problem of civil strife. No doubt this is one explanation for the importance which the problem took on at the time. It should be said, however, that even today the question has not lost its interest, especially in view of the emergence of newly independent States. These, as has already been said, have been subjected to all kinds of schemes aimed at their destabilization. And civil strife, for such purposes, is an ideal weapon. The plurality of ethnic groups and the rivalries which they generate in many young States make them a perfect target for subversion.

115. But the most difficult problem is to distinguish between civil strife and certain related concepts. It has just been said that it has sometimes been difficult to distinguish between such strife and certain international conflicts. Wars of national liberation have been mentioned in this regard, and there are also partisan movements, especially resistance movements opposing alien occupation, etc. As is known, wars of national liberation have been recognized as international conflicts by Additional Protocol I to the 1949 Geneva Conventions,<sup>47</sup> under article 1, paragraph 4, of which the situations referred to in article 2 common to the Geneva Conventions are taken to include "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination ...".

116. But if civil strife is difficult to distinguish from certain international conflicts, it is also difficult to distinguish from some internal conflicts, at least for the

purposes of the present draft. What distinguishes civil strife from a number of related phenomena? In principle, civil strife sets factions within the same national population against each other. But the definition of civil strife leaves certain grey areas where no easy distinction can be made.

117. For the purposes of the present draft, the question is where the offence of fomenting civil strife begins and ends. Would the authorities which provoked disturbances other than civil strife be exempt from all responsibility only if such disturbances did not constitute civil strife? What about other forms of popular unrest, ranging from simple disturbances to riots or insurrection? Is incitement to commit or help to commit such acts less grave than fomenting civil strife? Should only this latter act be regarded as punishable? What is the dividing line between these various kinds of breach of the public order of a State? What, for the purposes of the present draft, are the merits of such a distinction? They are not readily apparent.

118. Thus, rather than considering civil strife in isolation, it seemed preferable to deal in the draft code with interference in the internal or external affairs of a State, civil strife, riots or insurrection provoked by the authorities of one State in another State being only individual aspects of such interference.

119. The other question that was raised concerned the distinction between the "internal affairs" and "external affairs" of a State. This distinction nowadays seems rather antiquated. In any case, it is not an easy one to make. The concept of State sovereignty is crumbling in some areas. The example of human rights is typical in this respect. Independently of the Universal Declaration of Human Rights,<sup>48</sup> the draft declaration on rights and duties of States<sup>49</sup> stipulates, in article 6, that:

Every State has the duty to treat all persons under its jurisdiction with respect for human rights and fundamental freedoms, without distinction as to race, sex, language, or religion.

The same draft stipulates further, in article 14, that "the sovereignty of each State is subject to the supremacy of international law". Lastly, reference should be made to the role of *jus cogens* in international law.

120. Considering all these factors, the distinction between internal affairs and external affairs becomes increasingly blurred. As far as South Africa is concerned, *apartheid* is a purely internal matter. In the eyes of many dictatorships, as has just been said, massive and systematic violations of human rights are internal matters. The competence of a State in its internal affairs is often limited by its membership of international organizations. For example, the fixing of milk or meat prices, although by nature an internal matter, is at times subject to decisions or directives originating from outside organizations. The example of oil prices need hardly be mentioned.

121. This would seem to be a good time to reflect on the vocabulary of international law, in which certain expressions now appear outdated or at least questionable.

<sup>47</sup> United Nations, *Juridical Yearbook* 1977 (Sales No. E.79.V.1), p. 95.

<sup>48</sup> General Assembly resolution 217 (A) (III) of 10 December 1948.

<sup>49</sup> See footnote 42 above.

The present report makes no claim, of course, to offer a new vocabulary in a field where respect for conventions and their essential stability require considerable continuity. It aims only to provide food for thought and, where possible, to establish whether the vocabulary corresponds exactly to the norm that is being proposed.

122. The scope of the "external affairs of the State", already limited by international law, tends also to be circumscribed for other reasons. Many more areas are emerging in which the State has less and less exclusive competence, for example areas which are covered by treaties or in which such competence is exercised within multilateral organizations. In short, the State is increasingly being drawn into an orbit of shared competence, and at times of delegated or even transferred competence. The distinction between internal affairs and external affairs is therefore hard to make. But there is a growing tendency for external affairs themselves to go beyond the bounds of what was until only recently considered the exclusive competence of the State.

123. Assuming that, for want of anything better, the distinction between internal and external affairs is retained, the relative value of these concepts must nevertheless be taken into account. A country's domestic and foreign policies are in many respects two sides of an indivisible reality, two pans of the same scales, and the various forms of interference are all directed against a single reality: the personality of the State. This holds true for interference as it does for terrorism, which will now be discussed.

### E. Terrorism

124. Terrorism is a far from new phenomenon, but it has gained renewed topical interest in recent years. The first, and the most significant, effort to combat terrorism was made at the initiative of the League of Nations. Following the attack on King Alexander I of Yugoslavia at Marseilles, in 1934, a convention was drafted under the auspices of the League of Nations; it was signed at Geneva on 16 November 1937.<sup>50</sup> The problem has acquired renewed significance today primarily because of the activities of various political movements (minorities demanding autonomy or independence, ideological or political disputes, regional conflicts, etc.).

125. Terrorism takes on various forms depending on the perspective from which it is viewed. There is terrorism under ordinary law and there is political terrorism. There is domestic terrorism and there is international terrorism. Terrorism under ordinary law, practised by criminals, is simple lawlessness and is outside the scope of the draft under consideration. Domestic terrorism is practised within a State and undermines the relationship between that State and its nationals. This type of terrorism is equally irrelevant to the draft.

126. The kind of terrorism dealt with here is that which is liable to endanger international peace and security. Such terrorism may be practised either by an

individual or by a group. It is characterized and given an international dimension by State participation in its conception, inspiration or execution. There is also the fact that it is directed against another State. When these two elements are combined, terrorism falls within the scope of the draft. Nevertheless, it should be distinguished from a kind of terrorism known as "terrorism in armed conflicts", which falls within the purview of humanitarian law. That form of terrorism does not concern the draft either.

127. Terrorism manifests itself in various ways. Terrorist acts may be aimed at objects, or persons, or both. With reference to objects, terrorists have their preferred targets. These may be aircraft and trains, or they may be certain strategic points (surface communications, bridges, tunnels, railways, etc.). Terrorism involves violence (destruction, fires, explosions, etc.). With reference to persons, the victims selected are more often than not prominent figures (heads of State, members of Government, diplomats, and the like). Where they are not, the desired psychological effect is sought in the number of victims. The heavy toll then creates the impact: planting of explosives in public auditoriums, airports, aircraft, trains, etc.

128. The terrorist approach is to impress, to create a climate of fear through spectacular acts. The weapon is intimidation. The chosen terrain is the collective psyche.

129. The phenomenon of terrorism has long been of concern to jurists, Governments and international organizations.<sup>51</sup> But it is particularly since the Second World War, and more especially over the past two decades, that terrorism and counter-terrorism have become the favourite weapons of a number of movements of various persuasions, which have revived interest in the phenomenon.

130. The Organization of American States drafted a Convention, signed at Washington on 2 February 1971,<sup>52</sup> aimed at preventing and punishing terrorism. The Convention is concerned more particularly with acts against "persons to whom the State has the duty according to international law to give special protection" (art. 1). For its part, the Council of Europe, in accordance with recommendation 703 (1973) of the Consultative Assembly, providing that "international terrorist acts ..., regardless of their cause, should be

<sup>51</sup> The 1937 Geneva Convention for the Prevention and Punishment of Terrorism (see footnote 50 above) inspired a number of writers, including the following: Q. Saldaña, "Le terrorisme", *Revue internationale de droit pénal* (Paris), vol. 13 (1936), p. 26; A. Sottile, "Le terrorisme international", *Recueil des cours de l'Académie de droit international de La Haye, 1938-III* (Paris, Sirey), vol. 65, p. 91; H. Donnedieu de Vabres, "La répression internationale du terrorisme. Les Conventions de Genève (16 Novembre 1937)", *Revue de droit international et de législation comparée* (Brussels), 3rd series, vol. XIX (1938), p. 37; V. V. Pella, "La répression du terrorisme et la création d'une cour internationale", *Nouvelle Revue de droit international privé* (Paris), vol. V (1938), p. 785, and vol. VI (1939), p. 120; J. Waciórski, *Le terrorisme politique* [thesis] (Paris, Pedone, 1939), preface by H. Donnedieu de Vabres; G. Levasseur, "Les aspects répressifs du terrorisme international", *Terrorisme international* (Paris, Pedone, 1977), p. 59.

<sup>52</sup> Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance (OAS, Treaty Series, No. 37 (Washington, D.C.), 1971).

<sup>50</sup> Convention for the Prevention and Punishment of Terrorism (League of Nations, document C.546.M.383.1937.V.).

punished as serious criminal offences involving the killing, kidnapping or endangering of the lives of innocent people",<sup>53</sup> adopted, on 27 January 1977, the European Convention on the Suppression of Terrorism.<sup>54</sup>

131. International terrorism thus concerns the legal as much as the political world. The 1954 draft code confines itself to referring to "terrorist activities", without defining terrorism. But criminal law, by reason of its coercive and punitive nature, should be able to bear strict interpretation, in the very interests of those liable to punishment, and in principle every offence must be so defined as to enable the judge to identify it.

132. In that respect, an interesting debate arose concerning the definition of terrorism. A draft convention introduced by the United States of America on 25 September 1972, at the twenty-seventh session of the General Assembly,<sup>55</sup> was not adopted. Third-world delegations considered that it was necessary first to study the underlying causes of terrorism. The draft attempted to define the phenomenon, but it offered too broad a definition, which included terrorism by individuals as well as State-sponsored terrorism.

133. Legal associations too have long been concerned with terrorism. The 1935 Copenhagen Conference for the Unification of Criminal Law adopted a strong statement on terrorism, probably as a result of the Marseilles assassination in 1934. The statement referred to acts that created "a general danger or a state of terror, aimed either at changing or disrupting the functioning of government or at disturbing international relations".<sup>56</sup>

134. An examination of the various resolutions and conventions reveals a number of elements involved in the definition of terrorism. Some relate to means, others to methods, others again to objectives. It will be noted that terrorism, whether domestic or international, whether practised by States or by individuals, whether motivated by politics or by mere villainy, has a number of common characteristics in terms of the *effect* sought (to cause shock, fear, dread or panic within a community), in terms of *means* (violence), and in terms of *methods* (the preferred targets are always those of major human or material interest: attacks on prominent figures, on targets of strategic interest, on places where crowds gather, etc.).

135. But these common characteristics are outweighed by differences concerning the goal, the perpetrators, or the victims. As far as motivation is concerned, acts of terrorism organized by a national liberation movement have nothing in common with terrorism under ordinary law. Acts of terrorism organized by the authorities of a State differ from those organized by individuals in terms of their juridical character.

<sup>53</sup> See *European Yearbook*, vol. XXI (1973) (The Hague, Martinus Nijhoff, 1975), p. 374.

<sup>54</sup> Council of Europe, European Treaty Series No. 90 (Strasbourg), 1977.

<sup>55</sup> A/CN.6/L.850.

<sup>56</sup> See *Actes de la VI<sup>e</sup> Conférence internationale pour l'unification du droit pénal* (Paris, Pedone, 1938), p. 420, annex A.III, "Terrorisme", art. 1.

136. What this draft is concerned with is State-sponsored terrorism, which is differentiated from the other forms of terrorism by the status of the perpetrators and of the victims. It involves the participation of the authorities of one State, and it must be directed against another State. These are the two elements that give it its international dimension. It must be distinguished from another form of terrorism, which is also known as State terrorism, but which has nothing to do with the subject treated here; this brand of terrorism is reflected in the relations between a State and its nationals when that State uses terror as an instrument of government, as dictatorships often do.

137. Given these specific features, how can terrorism be defined for the purposes of the draft code? And above all, is it necessary to give a general definition of terrorism or simply to enumerate the various acts that constitute the crime of terrorism?

138. The Rapporteur who had prepared the draft which led to the 1937 Geneva Convention<sup>57</sup> recommended the enumerative method to the League of Nations Committee of Experts:<sup>58</sup> "between the method involving an *initial definition of terrorism* and the method of simply *enumerating the various acts which constitute such terrorism*, I opted for the latter. In fact," he said,

... far from manifesting itself in a single and immutable form, terrorism appears rather in a series of heinous acts of cruelty or vandalism which frighten and demoralize a community by rendering it powerless to react and by eliminating its leaders.

139. Sottile, in his lectures at the Academy of International Law, said:

... in addition to their vagueness, the definitions proposed were all tautological because of the need to resort to the word *terror*. Attempts were indeed made to use the terms *intimidation* or *fear*, but, as we have seen, they do not convey the idea of *terror* ... On the other hand, even if a legal and precise definition could be easily formulated, ... such a definition would be quite appropriate in treatises on criminal law intended for experts, but not in a convention to which all the participants in an international conference would be expected to accede ...<sup>59</sup>

140. The approach taken in the 1937 Geneva Convention in the end represented a middle course, a general definition being combined with an exhaustive list of offences deemed to be terrorist.

141. The general definition contained in article 1, paragraph 2, of the Convention characterizes as terrorist "criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public". The problem with that definition is that it can apply to any form of terrorism, whether domestic or international, whether in violation of ordinary law or political in nature; moreover, the *purpose* of terrorism is not to spread terror. Terror is a means, not an end. The purpose of terrorism, depending upon its form, is either political, ideological or villainous.

142. For the purposes of the present draft, any definition of terrorism must highlight its international

<sup>57</sup> See footnote 50 above.

<sup>58</sup> Pella, "La répression du terrorisme et la création d'une cour internationale", *Nouvelle Revue de droit international privé* (Paris), vol. V (1938), pp. 788-789.

<sup>59</sup> Sottile, *loc. cit.* (footnote 51 above), p. 123.

character, which is linked to the nature of the targets, in this case States. But what about international organizations? There have sometimes been attacks directed against organizations. The PLO, not long ago, and UNESCO, more recently, have been the targets of attacks in the form of the taking of hostages or arson. It should be noted that, by agreement, the safety of an international organization is the responsibility of the State in which the organization has its headquarters. Hence any attack on the safety of an organization is an attack on that State.

143. In the enumerative method used in the 1937 Geneva Convention, five categories of acts considered to be terrorist are listed in article 2:

(1) Any wilful act causing death or grievous bodily harm or loss of liberty to:

(a) Heads of States, persons exercising the prerogatives of the head of the State, their hereditary or designated successors;

(b) The wives or husbands of the above-mentioned persons;

(c) Persons charged with public functions or holding public positions when the act is directed against them in their public capacity.

(2) Wilful destruction of, or damage to, public property or property devoted to a public purpose belonging to or subject to the authority of another High Contracting Party.

(3) Any wilful act calculated to endanger the lives of members of the public.

(4) Any attempt to commit an offence falling within the foregoing provisions of the present article.

(5) The manufacture, obtaining, possession, or supplying of arms, ammunition, explosives or harmful substances with a view to the commission in any country whatsoever of an offence falling within the present article.

144. The above categories call for some comments. In paragraph (2), it is provided that the property must belong to a State other than the one in whose territory the act has been committed. This provision is surprising because the State in which the act was committed is also directly concerned, its public order having been disturbed by the terrorist action; but the drafters of the Convention were undoubtedly influenced by the assassination of King Alexander of Yugoslavia, which had taken place in France, i.e. outside Yugoslav territory.

145. Paragraph (3) raises the question: when is a common injury sustained? Does shooting at a head of State constitute an isolated danger or a common danger? It is difficult to reply in the negative to the second term of that question because the head of State embodies the nation. Also, the head of State is very often surrounded by a large entourage of bodyguards, who face the same danger.

146. Article 3 of the 1937 Convention deals with complicity. Under that article, the following are to be considered acts of complicity:

(1) Conspiracy to commit any such act [of terrorism];

(2) Any incitement to any such act, if successful;

(3) Direct public incitement to any act mentioned under heads (1), (2) or (3) of article 2, whether the incitement be successful or not;

(4) Wilful participation in any such act;

(5) Assistance, knowingly given, towards the commission of any such act.

147. Several questions arise regarding this definition. The first concerns the victim. Under article 1, the act

must be directed against a State. Some writers have maintained that "throwing a bomb at a bus is not a terrorist act unless a State-operated public service is involved".<sup>60</sup> Nothing could be more debatable. What is really at stake here is not a public service, but the public order of the State in which the terrorist act took place—the public order for which the State is directly responsible.

148. Another problem has to do with the exhaustiveness of the proposed list. Of course criminal law, as has been said, is subject to restrictive interpretation, but the range of offences is so broad that it may be asked whether anything may have been omitted from the proposed list and whether it can cover all the new developments resulting from technological progress and changing customs. The seizure of aircraft, for example, is a recent phenomenon in terms of the 1937 Convention; attacks on diplomats are the order of the day; and hostages are being taken on an unprecedented scale. It is true that article 2, paragraph (3), refers to wilful acts calculated to endanger the lives of members of the public; and acts directed against aircraft undoubtedly belong in this category, as does the taking of hostages, particularly when the personnel of a diplomatic mission is involved. Sometimes, however, one person taken as a hostage is enough (for example, the head of the mission); in such cases, there does not seem to be a danger to the public.

149. In the light of these observations, consideration might be given to adding the words *inter alia* to certain paragraphs and referring to certain acts which today preoccupy international public opinion. It is in that spirit that some articles of the 1937 Convention have been included in amended form in the new draft submitted to the Commission.

150. Another important question arises which involves both substance and form. Why devote a separate article to terrorism? Should not terrorism be included among the category of acts constituting interference in the affairs of another State? Why treat it differently from civil strife?

151. Terrorism is close to civil strife in some respects, but different in others. Civil strife and terrorism often have the same causes. It may be a case of friction between the members of the same national community. Dissidents often attack established régimes by fomenting civil strife as well as by practising terrorism. Hence they are two combined means to the same end.

152. But acts of terrorism, as understood in the draft, are organized from outside and involve elements that are not always domestic, such as hired killers who are not nationals of the State concerned. Moreover, terrorism—and this is the problem with which the draft is concerned—may find support in a foreign State which makes its territory and resources available to the terrorist enterprise. Above all, however, a State may be the direct author of an act of terrorism through orders given to agents directly under its authority, which is impossible in the case of civil strife.

<sup>60</sup> *Ibid.*, p. 124.

153. Still in the matter of the distinction between civil strife and terrorism, it may be said that civil strife is the preferred weapon against weak States, whereas terrorism is more often used against well-organized States with great national unity. But obviously this distinction is not at all absolute. It is quite relative. Lastly, terrorism sometimes has goals that transcend mere interference in the affairs of another State. It is sometimes aimed against the State itself in terms of its individual identity and in its capacity as a juridical person, whereas civil strife is caused, in principle, by internal friction, and only régimes or Governments are attacked.

154. For all these reasons, it seems advisable to keep terrorism in a separate category.

#### F. Violations of the obligations assumed under certain treaties

155. This offence is covered by article 2, paragraph (7), of the 1954 draft code, which reads as follows:

(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.

This text is intended to cover:

- (a) The strength of land, sea and air forces;
- (b) Armaments, munitions and war material in general;
- (c) Presence of land, sea and air forces, armaments, munitions and war material;
- (d) Recruiting and military training;
- (e) Fortifications.

156. This list, which was the one submitted by the first Special Rapporteur, J. Spiropoulos,<sup>61</sup> gave rise to some objections with regard to the use of the word "fortifications", which was considered outdated and no longer relevant to present-day realities. Actually, in its earlier meaning, the word "fortification" referred to a specific type of military structure around a town or castle. Remains of fortifications from the Middle Ages to the eighteenth century can still be seen all across Europe. Today, although boiling oil and molten lead have vanished together with the fortifications from behind which they were employed, and although drawbridges are nothing more than curiosities, strategic military structures have in fact lost none of their interest. They have, however, been adapted to the specifications of modern times. The word "fortifications" might be replaced by the term "strategic structures".

#### G. Colonial domination

157. The unanimity with which colonialism is condemned today makes it unnecessary to discuss the subject at any length in the present report. The fundamental Declaration of the General Assembly of 1960 on the

granting of independence to colonial countries and peoples<sup>62</sup> was already referred to in the second report.<sup>63</sup>

158. The criticism voiced in the Commission related to terminology. It was argued that the word "colonialism" tended to describe an historical phenomenon and a political development, and that it was not relevant to the juridical context. Some members of the Commission proposed that the word "colonialism" should be replaced by "violation of the right to self-determination". It was pointed out, however, that the term "self-determination" was at times ambiguous and could have different meanings, depending on the context. Thus its meaning when the reference was to minorities seeking to separate themselves from the national community—in which case it was synonymous with "secession"—was different from its meaning when the reference was to colonized peoples struggling for their independence. That is why it is preferable, for the sake of terminological consistency, to use the same expression as in article 19, paragraph 3 (b), of part I of the draft articles on State responsibility: "the establishment or maintenance by force of colonial domination".

#### H. Mercenarism

159. The subject of mercenarism gave rise to lengthy debates during the thirty-sixth session of the Commission. It was pointed out that mercenarism was an ancient phenomenon and that it was not reprehensible in all cases. For a very long time, States had been using foreigners to make up a part of their army, which was not reprehensible in the least.

160. However, this is clearly not the type of mercenarism that is meant. What is meant here is the use of foreigners who have no connection with a national army, but who have been specially recruited for the purpose of attacking a country in order to destabilize or overthrow the established authorities, for any number of reasons, generally of an economic or political nature. Viewed from this perspective, mercenarism ranks among the means of subversion used against small and newly independent States, or among the means of hampering the action of national liberation movements.

161. The Commission had asked that this phenomenon should be studied in the light of the work of the United Nations *Ad Hoc* Committee on the question of mercenarism. It should be noted, however, that the problem of mercenarism comprises several aspects, which are not of equal relevance to the topic under study.

162. From the perspective of humanitarian law, the problem lies in deciding whether or not mercenaries should be considered as combatants, and so be entitled to the guarantees accorded to combatants under the 1949 Geneva Conventions. Additional Protocol I<sup>64</sup> to the Geneva Conventions seeks to define the term

<sup>62</sup> General Assembly resolution 1514 (XV) of 14 December 1960.

<sup>63</sup> *Yearbook ... 1984*, vol. II (Part One), p. 96, document A/CN.4/377, paras. 48-49.

<sup>64</sup> See footnote 47 above.

<sup>61</sup> See *Yearbook ... 1950*, vol. II, p. 263, document A/CN.4/25, para. 64.

“mercenary” in its article 47. Among the conditions required for a person to be considered a mercenary, it is provided in article 47, paragraph 2 (e) and (f), that such a person “is not a member of the armed forces of a party to the conflict” and “has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces”.

163. However, this definition does not eliminate all ambiguity. In the General Assembly, some delegations remarked that it failed to emphasize the fact that the goal of mercenarism was to oppose national liberation movements through the use of armed force. They also pointed out that the text did not refer to the responsibility of States which organized, equipped and trained mercenaries and provided them with transit facilities. Yet it is precisely this aspect of the problem that concerns the draft, and not the individual criminal responsibility of the mercenary himself.

164. The discussion in the Commission made it possible to raise several other questions, the most important being whether the reference to “armed bands” in article 2, paragraph (4), of the 1954 draft code applied also to mercenaries. According to that provision, the use of armed bands to violate the territorial integrity of another State constituted an act of aggression. The

whole problem was whether the term “armed bands” could be construed as applying also to mercenaries. However, the problem was settled by the Definition of Aggression, which in article 3, paragraph (g), refers specifically to mercenaries as well as to armed bands.

### I. Economic aggression

165. This phenomenon was described during the thirty-ninth session of the General Assembly as being characterized by attacks on the principle of permanent sovereignty over natural resources, which can appear in two forms: military intervention in the name of vital interests, or coercion exerted on a Government to compel it to take or to refrain from taking economic decisions, as in the case of a nationalization. The former instance is covered by the Definition of Aggression. The latter is covered by article 2, paragraph (9), of the 1954 draft code, which condemns coercive measures of an economic or political character designed to force the will of a State and thereby obtain advantages of any kind. Thus what is actually involved is a form of interference in the internal affairs of another State, and it is in this category that the phenomenon in question has been placed in the new draft articles.

## CHAPTER III

### Draft articles

#### PART I

##### SCOPE OF THE PRESENT ARTICLES

#### *Article 1*

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

#### PART II

##### PERSONS COVERED BY THE PRESENT ARTICLES

#### *Article 2*

##### FIRST ALTERNATIVE

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

##### SECOND ALTERNATIVE

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

#### PART III

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

#### *Article 3*

##### FIRST ALTERNATIVE

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

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

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

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

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

##### SECOND ALTERNATIVE

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

#### PART IV

##### GENERAL PRINCIPLES (PENDING)

#### PART V

##### ACTS CONSTITUTING AN OFFENCE AGAINST THE PEACE AND SECURITY OF MANKIND

#### *Article 4*

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

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



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

*Explanatory note.* In this definition, the term "State"

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

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

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

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

(c) Acts constituting aggression

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

- (i) the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (ii) bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (iii) the blockade of the ports or coasts of a State by the armed forces of another State;
- (iv) an attack by the armed forces of a State on the land, sea or air forces or marine and air fleets of another State;
- (v) the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (vi) the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (vii) the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein;

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

(d) Consequences of aggression

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

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

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

(e) Scope of this definition

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

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

(f) Interpretation of the present articles

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

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

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

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

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

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

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

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



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

(b) The following constitute terrorist acts:

- (i) any wilful act causing death or grievous bodily harm to a head of State, persons exercising the prerogatives of the head of State, the successors to a head of State, the spouses of such persons, or persons charged with public functions or holding public positions when the act is directed against them in their public capacity;
- (ii) acts calculated to destroy or damage public property or property devoted to a public purpose;
- (iii) any wilful act calculated to endanger the lives of members of the public, in particular the seizure

of aircraft, the taking of hostages and any other form of violence directed against persons who enjoy international protection or diplomatic immunity;

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

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

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

**DOCUMENT A/CN.4/392 and Add.1 and 2**

**Observations of Member States and intergovernmental organizations  
received pursuant to General Assembly resolution 39/80**

[Original: Arabic, English, French, Russian]  
[8 May, 14 June and 8 July 1985]

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**NOTE**

The text of the draft Code of Offences against the Peace and Security of Mankind, prepared by the Commission in 1954, is reproduced in *Yearbook ... 1984*, vol. II (Part Two), p. 8, para. 17.

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**Introduction**

1. On 13 December 1984, the General Assembly adopted resolution 39/80 on the draft Code of Offences against the Peace and Security of Mankind. The operative paragraphs of the resolution read as follows:

*The General Assembly,*

...

1. *Requests* the International Law Commission to continue its work on the elaboration of the draft Code of Offences against the Peace and Security of Mankind by elaborating an introduction as well as a list of the offences, taking into account the progress made at its thirty-sixth session, as well as the views expressed during the thirty-ninth session of the General Assembly;

2. *Requests* the Secretary-General to seek the views of Member States and intergovernmental organizations regarding the conclusions contained in paragraph 65 of the report of the International Law Commission and to include them in a report to be submitted to the General Assembly at its fortieth session with a view to adopting, at the appropriate time, the necessary decision thereon;

3. *Decides* to include in the provisional agenda of its fortieth session the item entitled "Draft Code of Offences against the Peace and

Security of Mankind", to be considered in conjunction with the consideration of the report of the International Law Commission.

2. The Secretary-General, on 20 March 1985, addressed a note to Governments of Member States and a letter to the relevant intergovernmental organizations inviting them, pursuant to paragraph 2 of resolution 39/80, to communicate to him before 15 August 1985 any observations they might wish to submit.

3. The replies received as at 3 July 1985 from the Governments of four Member States<sup>1</sup> are reproduced below.

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<sup>1</sup> The replies received after this date from the Governments of nine other Member States (Australia, Byelorussian Soviet Socialist Republic, German Democratic Republic, Malawi, Mexico, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, Uruguay and Venezuela) were circulated to the General Assembly, at its fortieth session, in document A/40/451 and Add.1-3.

## Egypt

[Original: Arabic]  
[3 July 1985]

The Arab Republic of Egypt has already had occasion to state its views regarding the content of paragraph 69 of the report of the Commission on the work of its thirty-fifth session,<sup>1</sup> pursuant to paragraph 2 of General Assembly resolution 38/132.

In response to General Assembly resolution 39/80, the Government of Egypt wishes to present its views concerning paragraph 65 of the Commission's report on the work of its thirty-sixth session,<sup>2</sup> relating to the draft Code of Offences against the Peace and Security of Mankind, as follows:

1. Although the Commission's intention to limit its work at the current stage to the criminal liability of individuals, without prejudice to subsequent consideration of the possible application to States of the notion of international criminal responsibility (para. 65, subpara. (a)), does not take fully into consideration Egypt's previously stated position regarding the possibility of holding States criminally responsible, the Government of Egypt can agree to this approach at present, provided that the criminal responsibility of States remains open for discussion in the future.

2. It is therefore only logical that the Commission should begin (as indicated in paragraph 65, subparagraph (b)) by drawing up a provisional list of offences constituting a threat to the peace and security of mankind, while bearing in mind the need to draft, at an appropriate stage, an introduction summarizing the general principles of international criminal law relating to such offences.

3. In addition, the Government of Egypt considers that a list of offences must necessarily be based on the list prepared by the Commission in 1954. However, the study of this list will naturally lead to the introduction of amendments and the addition of new types of offences which have emerged as a result of international and legal developments since 1954, and which, by a sort of common international conviction, must be considered criminal.

4. Hence the Commission must, at the current stage, work on reaching agreement concerning offences internationally recognized as criminal, with a view to including them in the list of offences; perhaps the most serious are *apartheid* and the use of nuclear weapons, which States cannot but unanimously consider as offences against the peace and security of all mankind.

5. To quote the examples of *apartheid* and the use of nuclear weapons is not to minimize the seriousness of the other offences referred to in paragraph 65, subparagraph (c). The Government of Egypt merely thinks that these two should be given priority as the least controversial offences, following which the Commission could proceed to examine colonialism, economic aggression, etc., as mentioned in the report.

6. Lastly, the Government of Egypt attaches special importance to setting a time-limit for completion of the Commission's work on the list of offences. This is a

matter which should be dealt with by the Commission when it next examines this topic.

## Gabon

[Original: French]  
[27 June 1985]

1. The Gabonese Republic considers that the preparation of a code of offences against the peace and security of mankind is a step forward in the process of the progressive development and codification of international law. In order to move ahead and arrive at concrete results, the Commission should continue its work on the basis of the views expressed by Member States during the discussion in the Sixth Committee of the General Assembly and in the written replies from Governments.

2. For the purpose of harmonizing the various views expressed by Member States, a cautious and realistic approach on the part of the Commission is therefore essential. In the circumstances now prevailing in the international community, the draft Code of Offences against the Peace and Security of Mankind raises controversial issues at both the legal and the political levels.

3. With regard to the content *ratione personae* of the draft code, Gabon endorses the Commission's pragmatic decision to limit itself at the current stage to the criminal liability of individuals, as indicated in paragraph 65, subparagraph (a), of the Commission's report on the work of its thirty-sixth session.<sup>1</sup>

4. This circumspect approach is in keeping with the principles underlying the Charter and Judgment of the Nürnberg Tribunal. The Commission's intention to draw up a provisional list of offences and draft an introduction summarizing the general principles of international criminal law relating to such offences is in conformity with its mandate.

5. With regard to the content *ratione materiae*, the Gabonese Republic is of the view that the 1954 draft code is an acceptable point of departure for preparing the list of offences.

6. Offences which have emerged since 1954, such as colonialism, *apartheid* and all other forms of foreign domination, should also be included in the list of offences, since they are a violation of one of the most fundamental of human rights, namely the right of peoples to self-determination, and constitute a threat to international peace and security. The same is true of the offence of mercenarism and hegemony.

7. The necessary updating of the draft Code of Offences against the Peace and Security of Mankind should be based on the "minimum content" set out in paragraphs 52 to 62 of the Commission's report.<sup>2</sup>

8. In this connection, the Gabonese Republic endorses the view that the draft code would be weakened if it were too broad in scope.

<sup>1</sup> Yearbook ... 1983, vol. II (Part Two), p. 16.

<sup>2</sup> Yearbook ... 1984, vol. II (Part Two), p. 17.

<sup>1</sup> Yearbook ... 1984, vol. II (Part Two), p. 17.

<sup>2</sup> Ibid., pp. 15-17.

**Mongolia**

[Original: Russian]  
[10 June 1985]

In addition to the comments transmitted to the United Nations in 1980,<sup>1</sup> the Mongolian People's Republic wishes to state the following:

1. In the current complex international situation, marked by an increased risk of nuclear war as a result of the actions of the aggressive forces of imperialism, the completion of the work on the draft Code of Offences against the Peace and Security of Mankind as quickly as possible is extremely important for the conservation of peace on Earth.
2. Generally speaking, the draft code prepared by the Commission in 1954 represents a good basis for the code. However, in further work on the draft code, account must be taken of the relevant provisions of the extremely important resolutions adopted by the General Assembly in recent years. These include the Declaration on the Prevention of Nuclear Catastrophe (resolution 36/100 of 9 December 1981), resolution 38/75 of 15 December 1983 on the condemnation of nuclear war, and the Declaration on the Right of Peoples to Peace (resolution 39/11 of 12 November 1984).
3. The idea of the draft code, based on the principle of the criminal responsibility of the individual for serious

<sup>1</sup> See A/35/210/Add.1.

crimes against peace and on the imperative nature of punishment for such crimes, must be maintained.

4. The code could include a provision whereby countries would enter into an obligation to incorporate definitions of international crimes into their national legislation and to introduce severe penalties for persons committing such crimes.

**Qatar**

[Original: English]  
[18 April 1985]

1. The Government of the State of Qatar is in agreement with the conclusions reached by the Commission with regard to the draft Code of Offences against the Peace and Security of Mankind, as contained in paragraph 65 of the Commission's report on the work of its thirty-sixth session.<sup>1</sup>
2. With regard to the use of nuclear weapons in particular, the Government of Qatar concurs with the view that the Commission cannot remain indifferent to the legal characterization to be given to the use, at least in the case of a first strike, of such weapons of mass destruction causing incalculable long-term harm to the planet and its inhabitants.

<sup>1</sup> Yearbook ... 1984, vol. II (Part Two), p. 17.

# THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

[Agenda item 7]

DOCUMENT A/CN.4/393

## Preliminary report on the law of the non-navigational uses of international watercourses, by Mr. Stephen C. McCaffrey, Special Rapporteur

[Original: English]  
[5 July 1985]

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### Introduction

1. Upon his election to the International Court of Justice on 7 November 1984, Mr. Jens Evensen, Special Rapporteur for the topic of the law of the non-navigational uses of international watercourses, resigned as a member of the International Law Commission. At its thirty-seventh session, the Commission appointed the present Special Rapporteur to succeed him. The Commission also requested the Special Rapporteur to submit a preliminary report during the same session indicating the current status of the Commission's work on the topic and a future programme of work.<sup>1</sup> The Special Rapporteur is pleased to submit the present report in response to that request.

<sup>1</sup> See *Yearbook ... 1985*, vol. I, p. 203, 1910th meeting, para. 2.

## I. Present status of the Commission's work on the topic

### A. Background

2. The Commission included the topic "Non-navigational uses of international watercourses" in its general programme of work at its twenty-third session, in 1971,<sup>2</sup> in response to the recommendation made by the General Assembly in its resolution 2669 (XXV) of 8 December 1970. At its twenty-sixth session, in 1974, the Commission had before it a supplementary report by the Secretary-General on legal problems relating to the non-navigational uses of international watercourses.<sup>3</sup> At the same session, the Commission established a Sub-Committee on the Law of the Non-Navigational Uses of International Watercourses, chaired by Mr. Richard D. Kearney. The Sub-Committee submitted a report<sup>4</sup> which proposed the submission of a questionnaire to States. The Commission adopted the report of the Sub-Committee at the same session and also appointed Mr. Kearney Special Rapporteur for the topic.<sup>5</sup>

3. At its twenty-eighth session, in 1976, the Commission had before it replies from the Governments of 21 Member States<sup>6</sup> to the questionnaire<sup>7</sup> which had been circulated to Member States by the Secretary-General, as well as a report submitted by the Special Rapporteur.<sup>8</sup> At that session, in the Commission's discussion on the topic, attention was devoted mainly to the matters raised in the replies from Governments, and dealt with in the report of the Special Rapporteur, concerning the scope of the Commission's work on the topic and the meaning of the term "international watercourse". The Commission's consideration of the topic at that session

led to general agreement ... that the question of determining the scope of the term "international watercourses" need not be pursued at the outset of the work. Instead, attention should be devoted to beginning the formulation of general principles applicable to legal aspects of the uses of those watercourses.<sup>9</sup>

4. At its twenty-ninth session, in 1977, the Commission appointed Mr. Stephen M. Schwebel Special

Rapporteur to succeed Mr. Kearney, who had not stood for re-election to the Commission.<sup>10</sup> Mr. Schwebel made a statement to the Commission in 1978 and, at the Commission's thirty-first session, in 1979, submitted his first report,<sup>11</sup> which contained 10 draft articles. At that session, the Commission held a general debate on the issues raised in the Special Rapporteur's report and on questions relating to the topic as a whole.

5. Mr. Schwebel submitted a second report, containing six draft articles, at the Commission's thirty-second session, in 1980.<sup>12</sup> At that session, the six articles were referred to the Drafting Committee after discussion of the report by the Commission. On the recommendation of the Drafting Committee, the Commission at the same session provisionally adopted draft articles 1 to 5 and X, which read as follows:

#### *Article 1. Scope of the present articles*

1. The present articles apply to uses of international watercourse systems and of their waters for purposes other than navigation and to measures of conservation related to the uses of those watercourse systems and their waters.

2. The use of the waters of international watercourse systems for navigation is not within the scope of the present articles except in so far as other uses of the waters affect navigation or are affected by navigation.

#### *Article 2. System States*

For the purposes of the present articles, a State in whose territory part of the waters of an international watercourse system exists is a system State.

#### *Article 3. System agreements*

1. A system agreement is an agreement between two or more system States which applies and adjusts the provisions of the present articles to the characteristics and uses of a particular international watercourse system or part thereof.

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 en-

<sup>2</sup> See *Yearbook ... 1971*, vol. II (Part One), p. 350, document A/CN.4/Rev.1, para. 120.

<sup>3</sup> *Yearbook ... 1974*, vol. II (Part Two), p. 265, document A/CN.4/274.

<sup>4</sup> *Yearbook ... 1974*, vol. II (Part One), p. 301, document A/9610/Rev.1, chap. V, annex.

<sup>5</sup> *Ibid.*, p. 301, para. 159.

<sup>6</sup> *Yearbook ... 1976*, vol. II (Part One), p. 147, document A/CN.4/294 and Add.1. At subsequent sessions, the Commission had before it replies received from the Governments of 11 additional Member States; see *Yearbook ... 1978*, vol. II (Part One), p. 253, document A/CN.4/314; *Yearbook ... 1979*, vol. II (Part One), p. 178, document A/CN.4/324; *Yearbook ... 1980*, vol. II (Part One), p. 153, document A/CN.4/329 and Add.1; and *Yearbook ... 1982*, vol. II (Part One), p. 192, document A/CN.4/352 and Add.1.

<sup>7</sup> The final text of the questionnaire, as communicated to Member States, is reproduced in *Yearbook ... 1976*, vol. II (Part One), p. 150, document A/CN.4/294 and Add.1, para. 6; see also *Yearbook ... 1984*, vol. II (Part Two), pp. 82-83, para. 262.

<sup>8</sup> *Yearbook ... 1976*, vol. II (Part One), p. 184, document A/CN.4/295.

<sup>9</sup> *Yearbook ... 1976*, vol. II (Part Two), p. 162, para. 164.

<sup>10</sup> *Yearbook ... 1977*, vol. II (Part Two), p. 124, para. 79.

<sup>11</sup> *Yearbook ... 1979*, vol. II (Part One), p. 143, document A/CN.4/320.

<sup>12</sup> *Yearbook ... 1980*, vol. II (Part One), p. 159, document A/CN.4/332 and Add.1.

titled 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.

As further recommended by the Drafting Committee, the Commission also accepted at its thirty-second session a provisional working hypothesis as to what was meant by the term "international watercourse system". The hypothesis was contained in a note which read as follows:

A watercourse system is formed of hydrographic components such as rivers, lakes, canals, glaciers and groundwater constituting by virtue of their physical relationship a unitary whole; thus, any use affecting waters in one part of the system may affect waters in another part.

An "international watercourse system" is a watercourse system components of which are situated in two or more States.

To the extent that parts of the waters in one State are not affected by or do not affect uses of waters in another State, they shall not be treated as being included in the international watercourse system. Thus, to the extent that the uses of the waters of the system have an effect on one another, to that extent the system is international, but only to that extent; accordingly, there is not an absolute, but a relative, international character of the watercourse.<sup>13</sup>

6. In its report to the General Assembly on its thirty-second session, the Commission drew attention to the fact that, from the outset of its work on the topic, it had recognized the diversity of international watercourses, in terms both of their physical characteristics and of the human needs they served. It also noted, however, that the existence of certain common watercourse characteristics had been recognized, and that it was possible to identify certain principles of international law already existing and applicable to international watercourses in general. Mention was made in that regard of such concepts as the principle of good-neighbourliness and *sic utere tuo ut alienum non laedas*, as well as of the sovereign rights of riparian States.

7. By its resolution 35/163 of 15 December 1980, the General Assembly, noting with appreciation the progress made by the Commission in the preparation of draft articles on the law of the non-navigational uses of international watercourses, recommended that the Commission proceed with the preparation of draft articles on the topic.

8. The Commission did not consider the topic at its thirty-third session, in 1981, owing to the resignation of Mr. Schwebel from the Commission upon his election to

the ICJ. At its thirty-fourth session, in 1982, the Commission appointed Mr. Jens Evensen Special Rapporteur for the topic.<sup>14</sup> Also at that session, the Commission had before it the third report of Mr. Schwebel, who had begun its preparation prior to his resignation from the Commission.<sup>15</sup>

9. At its thirty-fifth session, in 1983, the Commission had before it the first report submitted by Mr. Evensen.<sup>16</sup> That report contained an outline for a draft convention, to serve as a basis for discussion, consisting of 39 articles arranged in six chapters. At that session, the Commission discussed the report as a whole, focusing in particular on the question of the definition of the term "international watercourse system" and on that of an international watercourse system as a shared natural resource.

**B. Consideration of the topic by the Commission at its thirty-sixth session<sup>17</sup>**

10. At its thirty-sixth session, in 1984, the Commission had before it the second report submitted by Mr. Evensen.<sup>18</sup> That report contained the revised text of the outline for a draft convention on the law of the non-navigational uses of international watercourses; that text consisted of 41 draft articles arranged in six chapters, as follows:

CHAPTER I. INTRODUCTORY ARTICLES

*Article 1. Explanation (definition) of the term "international watercourse" as applied in the present Convention*

*Article 2. Scope of the present Convention*

*Article 3. Watercourse States*

*Article 4. Watercourse agreements*

*Article 5. Parties to the negotiation and conclusion of watercourse agreements*

CHAPTER II. GENERAL PRINCIPLES, RIGHTS AND DUTIES OF WATERCOURSE STATES

*Article 6. General principles concerning the sharing of the waters of an international watercourse*

*Article 7. Equitable sharing in the uses of the waters of an international watercourse*

*Article 8. Determination of reasonable and equitable use*

<sup>14</sup> *Yearbook ... 1982*, vol. II (Part Two), p. 121, para. 250.

<sup>15</sup> *Yearbook ... 1982*, vol. II (Part One), p. 65, document A/CN.4/348. That report contained, *inter alia*, the following draft articles: "Equitable participation" (art. 6); "Determination of equitable use" (art. 7); "Responsibility for appreciable harm" (art. 8); "Collection, processing and dissemination of information and data" (art. 9); "Environmental pollution and protection" (art. 10); "Prevention and mitigation of hazards" (art. 11); "Regulation of international watercourses" (art. 12); "Water resources and installation safety" (art. 13); "Denial of inherent use preference" (art. 14); "Administrative management" (art. 15); and "Principles and procedures for the avoidance and settlement of disputes" (art. 16).

<sup>16</sup> *Yearbook ... 1983*, vol. II (Part One), p. 155, document A/CN.4/367.

<sup>17</sup> A brief summary of the Commission's debate on the topic at its 1984 session. A full account is given in the Commission's report on that session (*Yearbook ... 1984*, vol. II (Part Two), pp. 87 *et seq.*, paras. 279-343).

<sup>18</sup> *Yearbook ... 1984*, vol. II (Part One), p. 101, document A/CN.4/381.

<sup>13</sup> *Yearbook ... 1980*, vol. II (Part Two), p. 108, para. 90.

*Article 9. Prohibition of activities with regard to an international watercourse causing appreciable harm to other watercourse States*

#### CHAPTER III. CO-OPERATION AND MANAGEMENT IN REGARD TO INTERNATIONAL WATERCOURSES

*Article 10. General principles of co-operation and management*

*Article 11. Notification to other watercourse States. Content of notification*

*Article 12. Time-limits for reply to notifications*

*Article 13. Procedures in case of protest*

*Article 14. Failure of watercourse States to comply with the provisions of articles 11 to 13*

*Article 15. Management of international watercourses. Establishment of commissions*

*Article 15 bis. Regulation of international watercourses*

*Article 15 ter. Use preferences*

*Article 16. Collection, processing and dissemination of information and data*

*Article 17. Special requests for information and data*

*Article 18. Special obligations in regard to information about emergencies*

*Article 19. Restricted information*

#### CHAPTER IV. ENVIRONMENTAL PROTECTION, POLLUTION, HEALTH HAZARDS, NATURAL HAZARDS, SAFETY AND NATIONAL AND REGIONAL SITES

*Article 20. General provisions on the protection of the environment*

*Article 21. Purposes of environmental protection*

*Article 22. Definition of pollution*

*Article 23. Obligation to prevent pollution*

*Article 24. Co-operation between watercourse States for protection against pollution. Abatement and reduction of pollution*

*Article 25. Emergency situations regarding pollution*

*Article 26. Control and prevention of water-related hazards*

[Article 27 of the original draft was replaced by article 15 bis]

*Article 28. Safety of international watercourses, installations and constructions, etc.*

*Articles 28 bis. Status of international watercourses, their waters and constructions, etc. in armed conflicts*

[Article 29 of the original draft was replaced by article 15 ter]

*Article 30. Establishment of international watercourses or parts thereof as protected national or regional sites*

#### CHAPTER V. PEACEFUL SETTLEMENT OF DISPUTES

*Article 31. Obligation to settle disputes by peaceful means*

*Article 31 bis. Obligations under general, regional or bilateral agreements or arrangements*

*Article 32. Settlement of disputes by consultations and negotiations*

*Article 33. Inquiry and mediation*

*Article 34. Conciliation*

*Article 35. Functions and tasks of the Conciliation Commission*

*Article 36. Effects of the report of the Conciliation Commission. Sharing of costs*

*Article 37. Adjudication by the International Court of Justice, another international court or a permanent or ad hoc arbitral tribunal*

*Article 38. Binding effect of adjudication*

#### CHAPTER VI. FINAL PROVISIONS

*Article 39. Relationship to other conventions and international agreements*

11. On the suggestion of the Special Rapporteur, the Commission focused its discussion on draft articles 1

to 9 as contained in the second report and on questions related thereto. At the conclusion of the discussion, the Commission decided to refer draft articles 1 to 9 to the Drafting Committee. It was understood that the Drafting Committee would also have available the text of the provisional working hypothesis accepted by the Commission at its thirty-second session, in 1980 (see para. 5 above), the texts of articles 1 to 5 and X provisionally adopted by the Commission at the same session (*ibid.*) and the texts of draft articles 1 to 9 submitted by the Special Rapporteur in his first report.<sup>19</sup>

#### 1. THE GENERAL APPROACH SUGGESTED BY THE SPECIAL RAPPORTEUR

12. The outline for a draft convention proposed by the Special Rapporteur in his first report had seemed broadly acceptable. Consequently, the Special Rapporteur had made only minor changes in and a few additions to the outline itself in his second report. More significant changes were proposed, however, in the texts of certain draft articles, as indicated below.

13. The "framework agreement" approach had likewise seemed to be broadly acceptable to the Commission and was also the approach that had been endorsed by the Sixth Committee of the General Assembly (see paras. 32-33 below). The Special Rapporteur believed that the term "framework agreement" should be applied in a broad and flexible manner, and shared the position of his predecessor, Mr. Schwebel, that

... the product of the Commission's work should serve to provide ... the general principles and rules governing international watercourses in the absence of agreement among the States concerned and to provide guidelines for the negotiation of future specific agreements. ...<sup>20</sup>

It seemed to be generally recognized by the Commission that, in a framework text, it would be necessary or useful to use, to a reasonable extent, general legal formulations or standards such as "good-neighbourly relations", "good faith", participation in the benefits of a resource "in a reasonable and equitable manner" and the duty not to cause "appreciable harm" to the rights or interests of others. While some members supported this broad approach to the topic, others believed that the legal principles proposed were formulated too generally. Furthermore, certain members felt that recommendations and guidelines did not belong in a framework agreement, while others were of the view that recommendations and guidelines might be useful for the elaboration of specific watercourse agreements.

14. Finally, it was recognized that the general approach suggested by the Special Rapporteur in his second report was based on certain changes which he had introduced in his revised draft articles, most notably in article 1, where the term "international watercourse system" had been replaced by the term "international watercourse", and in article 6, where the expression "the watercourse system and its waters are ... a shared natural resource" had been changed to "the water-

<sup>19</sup> *Yearbook ... 1983*, vol. II (Part Two), pp. 68 *et seq.*, footnotes 245 to 250.

<sup>20</sup> *Yearbook ... 1982*, vol. II (Part One), p. 67, document A/CN.4/348, para. 2.



course States concerned shall share in the use of the waters of the watercourse in a reasonable and equitable manner". These changes also were the subject of different views within the Commission, as indicated below. While no final resolution of the various issues was achieved during the thirty-sixth session, in 1984, it was expected that further discussions on those issues would assist the Commission in its future work. As stated in the Commission's report on its thirty-sixth session:

... the Commission anticipates that it will continue its work on this topic in the light of the debate to be held in the Sixth Committee of the General Assembly on the report of the Commission on the work of its present session, in the light of future proposals and suggestions to be made by the Special Rapporteur, and on the basis of future reports of the Drafting Committee on its consideration of draft articles 1 to 9.<sup>21</sup>

## 2. ARTICLES 1 TO 9 AS SUBMITTED BY THE SPECIAL RAPPORTEUR IN HIS SECOND REPORT

15. As proposed by the Special Rapporteur, articles 1 to 9 comprise the first two chapters of the draft. Chapter I, entitled "Introductory articles", contains articles 1 to 5, and chapter II, entitled "General principles, rights and duties of watercourse States", contains articles 6 to 9. As indicated above (para. 11), the Commission focused its discussion at its thirty-sixth session, in 1984, on draft articles 1 to 9 and referred those articles to the Drafting Committee. Consequently, the present summary of the Commission's consideration of the topic at its 1984 session will concentrate on those articles.

16. Views were divided in the Commission on the revised text of draft article 1<sup>22</sup> submitted in the Special Rapporteur's second report. While article 1 as submitted in his first report<sup>23</sup> had been patterned closely on the provisional working hypothesis adopted by the Commission in 1980 as to what was meant by the expression "international watercourse system" (see para. 5, *in fine*, above), the Special Rapporteur, in his second report, had recommended abandonment of the "system" concept in favour of the simpler notion of an "international watercourse". The Special Rapporteur had recommended this change because of his conclusion that there was opposition to the "system" concept, both in the Commission and in the Sixth Committee of the

General Assembly, on the ground that it represented a doctrinal approach similar to the "drainage basin" concept earlier discarded by the Commission.

17. Some members of the Commission endorsed the change in approach suggested by the Special Rapporteur in the revised text of article 1. They believed the abandonment of the "system" concept removed a major stumbling-block to progress on the topic and resulted in a purely geographical definition which could form the basis of a comprehensive draft, while avoiding the territorial connotations which, in their view, the "system" concept had implied.

18. Some members viewed the abandonment of the "system" concept as regrettable but indicated that they did not object to the suggested change, provided it represented nothing more than a change of wording. In their view, however, the elimination of the "system" concept presented the conceptual problem of dealing with the relativity aspect highlighted in the provisional working hypothesis adopted by the Commission in 1980: there could be different systems with respect to different uses of the same watercourse at one and the same time.

19. To other members, the revised draft article 1 represented a major departure from the approach adopted by the Commission at its thirty-second session, in 1980. Those members were of the view that the articles provisionally adopted in 1980 (see para. 5 above) constituted a coherent whole and that the elimination of the "system" concept necessitated a rethinking of all the provisions, in particular articles 4, 5 and 6.

20. Finally, certain members questioned the omission from the text proposed by the Special Rapporteur of an indication, even a non-exhaustive one, of the possible hydrographic components of an international watercourse. Those members thought it preferable to include in the text of the article the examples given in the Special Rapporteur's second report (rivers, lakes, canals, tributaries, streams, brooks and springs, glaciers and snow-capped mountains, swamps, ground water and other types of aquifers),<sup>24</sup> with a view to determining whether they should form the subject of separate articles or at least a very detailed commentary.

21. Draft articles 2<sup>25</sup> and 3<sup>26</sup> as submitted in the Special Rapporteur's second report did not give rise to

<sup>21</sup> *Yearbook ... 1984*, vol. II (Part Two), p. 89, para. 290, *in fine*.

<sup>22</sup> Revised draft article 1 as submitted in the second report read as follows:

"Article 1. *Explanation (definition) of the term 'international watercourse' as applied in the present Convention*

"1. For the purposes of the present Convention, an 'international watercourse' is a watercourse—ordinarily consisting of fresh water—the relevant parts or components of which are situated in two or more States (watercourse States).

"2. To the extent that components or parts of the watercourse in one State are not affected by or do not affect uses of the watercourse in another State, they shall not be treated as being included in the international watercourse for the purposes of the present Convention.

"3. 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.

"4. Deltas, river mouths and other similar formations with brackish or salt water forming a natural part of an international watercourse shall likewise be governed by the provisions of the present Convention."

<sup>23</sup> *Yearbook ... 1983*, vol. II (Part Two), p. 68, footnote 245.

<sup>24</sup> *Yearbook ... 1984*, vol. II (Part One), p. 106, document A/CN.4/381, para. 24.

<sup>25</sup> Revised draft article 2 as submitted in the second report read as follows:

"Article 2. *Scope of the present Convention*

"1. The present Convention applies to uses of international watercourses and of their waters for purposes other than navigation and to measures of administration, management and conservation related to the uses of those watercourses and their waters.

"2. The use of the waters of international watercourses 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."

<sup>26</sup> Revised draft article 3 as submitted in the second report read as follows:

"Article 3. *Watercourse States*

"For the purposes of the present Convention, a State in whose territory relevant components or parts of the waters of an international watercourse exist is a watercourse State."

significant differences of view. Draft article 4<sup>27</sup> was the subject of some comment, principally on the question whether the revised text of paragraph 1 was preferable to that submitted in the first report.<sup>28</sup> There was general agreement, however, that the article should safeguard and protect existing agreements and give every possible encouragement to States to enter into agreements concerning international watercourses.

22. Comments on draft article 5<sup>29</sup> focused particularly on paragraph 2. The usefulness of the criterion of "an appreciable extent", although it had been taken verbatim from article 4, paragraph 2, as provisionally adopted by the Commission in 1980 (see para. 5 above), was questioned by some members of the Commission. Others expressed doubts concerning the fact that paragraph 1 allowed watercourse States to become parties to watercourse agreements, whereas paragraph 2 allowed them only to participate in the negotiation thereof.

23. Chapter II, containing articles 6 to 9, was considered by some members to be the most important chapter of the draft articles, since it set out the rights and obligations of watercourse States. Draft article 6<sup>30</sup>

<sup>27</sup> Revised draft article 4 as submitted in the second report read as follows:

*"Article 4. Watercourse agreements"*

"1. Nothing in the present Convention shall prejudice the validity and effect of a special watercourse agreement or special watercourse agreements which, taking into account the characteristics of the particular international watercourse or watercourses concerned, provide measures for the reasonable and equitable administration, management, conservation and use of the international watercourse or watercourses concerned or relevant parts thereof.

"The provisions of this article apply whether such special agreement or agreements are concluded prior to or subsequent to the entry into force of the present Convention for the watercourse States concerned.

"2. A special watercourse agreement should define the waters to which it applies. It may be entered into with respect to an international watercourse in its entirety, or with respect to any part thereof or particular project, programme or use, provided that the use by one or more other watercourse States of the waters of such international watercourse is not, to an appreciable extent, affected adversely.

"3. In so far as the uses of an international watercourse may require, watercourse States shall negotiate in good faith for the purpose of concluding one or more watercourse agreements or arrangements."

<sup>28</sup> For the text of draft article 4 submitted in the first report, see *Yearbook ... 1983*, vol. II (Part Two), p. 70, footnote 247.

<sup>29</sup> Revised draft article 5 as submitted in the second report read as follows:

*"Article 5. Parties to the negotiation and conclusion of watercourse agreements"*

"1. Every watercourse State is entitled to participate in the negotiation of and to become a party to any watercourse agreement that applies to that international watercourse as a whole.

"2. A watercourse State whose use of the waters of an international watercourse may be affected to an appreciable extent by the implementation of a proposed watercourse agreement that applies only to a part of the watercourse 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."

<sup>30</sup> Revised draft article 6 as submitted in the second report read as follows:

*"Article 6. General principles concerning the sharing of the waters of an international watercourse"*

"1. A watercourse State is, within its territory, entitled to a reasonable and equitable share of the uses of the waters of an international watercourse.

was the subject of extensive discussion relating in particular to the replacement of the words "the watercourse system and its waters are ... a shared natural resource"<sup>31</sup> by the words "the watercourse States concerned shall share in the use of the waters of the watercourse in a reasonable and equitable manner". The Special Rapporteur indicated that, while it had been accepted in the Commission and in the Sixth Committee that watercourse States were entitled to a reasonable and equitable share of the benefits arising from an international watercourse, the use of the term "shared natural resource" as a concept had given rise to strong objection.

24. Some members of the Commission considered that the revised text of article 6 constituted a major improvement, since the new wording provided a more acceptable basis for an equitable international watercourse régime. Some members, however, thought it should not be excluded that a watercourse agreement for a particular project could be facilitated by using the concept of shared natural resources, if the watercourse States concerned so agreed.

25. Other members of the Commission questioned the deletion of the "shared natural resource" concept. According to this view, the proposition that water constituted a shared natural resource was supported by various international instruments and was only a reflection of a fact of nature. It was also remarked that it would be necessary to determine how the removal of this central concept would affect the remainder of the draft.

26. In his summing-up on draft article 6, the Special Rapporteur said that the deletion of the "shared natural resource" concept in the revised text appeared to be generally acceptable. He stated, however, that he could not accept the suggestion made during the debate that all reference to "sharing" be deleted from article 6. According to the Special Rapporteur, the whole idea of drawing up a framework agreement was that there existed a unity of interests and an interdependence between watercourse States which, by their very nature, entailed the sharing of the utilization and benefits of the waters of an international watercourse.

27. Draft article 7<sup>32</sup> was generally supported by some members, who noted that it introduced the important

"2. To the extent that the use of the waters of an international watercourse within the territory of one watercourse State affects the use of the waters of the watercourse in the territory of another watercourse State, the watercourse States concerned shall share in the use of the waters of the watercourse in a reasonable and equitable manner in accordance with the articles of the present Convention and other agreements and arrangements entered into with regard to the management, administration or uses of the international watercourse."

<sup>31</sup> For the text of draft article 6 submitted in the first report, see *Yearbook ... 1983*, vol. II (Part Two), p. 70, footnote 248.

<sup>32</sup> Revised draft article 7 as submitted in the second report read as follows:

*"Article 7. Equitable sharing in the uses of the waters of an international watercourse"*

"The waters of an international watercourse shall be developed, used and shared by watercourse 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 international watercourse and its components."

concept of development, use and sharing of the waters of an international watercourse in a reasonable and equitable manner. Different views were expressed on the inclusion in the article of the principles of good faith and good-neighbourly relations: while certain members approved of their inclusion, certain others considered those concepts, particularly the latter, to be too vague and uncertain. Doubts were also voiced concerning the reference to "optimum utilization". The Special Rapporteur concluded that at least the first part of the article had received considerable support and thus merited retention. He recognized that the second part posed certain difficulties, which he hoped could be satisfactorily resolved. He also expressed the view that the notion of "good-neighbourly relations" had emerged as a concept of international law.

28. Draft article 8<sup>33</sup> was viewed by some members of the Commission as an important element of the draft,

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<sup>33</sup> Revised draft article 8 as submitted in the second report read as follows:

*"Article 8. Determination of reasonable and equitable use"*

"1. In determining whether the use by a watercourse State of the waters of an international watercourse 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 international watercourse concerned. Among such factors are:

"(a) the geographic, hydrographic, hydrological and climatic factors together with other relevant circumstances pertaining to the watercourse concerned;

"(b) the special needs of the watercourse State concerned for the use or uses in question in comparison with the needs of other watercourse States;

"(c) the attainment of a reasonable and equitable balance between the relevant rights and interests of the watercourse States concerned;

"(d) the contribution by the watercourse State concerned of waters to the international watercourse in comparison with that of other watercourse States;

"(e) development and conservation by the watercourse State concerned of the international watercourse and its waters;

"(f) the other uses of the waters of an international watercourse by the State concerned in comparison with the uses by other watercourse States, including the efficiency of such uses;

"(g) co-operation with other watercourse States in projects or programmes to obtain optimum utilization, protection and control of the watercourse and its waters, taking into account cost-effectiveness and the costs of alternative projects;

"(h) pollution by the watercourse State or States concerned of the international watercourse in general or as a consequence of the particular use, if any;

"(i) other interference with or adverse effects, if any, of such use for the uses, rights or interests of other watercourse States including, but not restricted to, the adverse effects upon existing uses by such States of the waters of the international watercourse and its impact upon protection and control measures of other watercourse States;

"(j) availability to the State concerned and to other watercourse States of alternative water resources;

"(k) the extent and manner of co-operation established between the watercourse State concerned and other watercourse States in programmes and projects concerning the use in question and other uses of the waters of the international watercourse in order to obtain 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 watercourse

since it would facilitate the determination of what constituted "reasonable and equitable" use in concrete situations. Other members considered a non-exhaustive list of factors such as that contained in article 8 to be of limited value. The latter members were of the view that article 8 should be limited essentially to the first sentence of paragraph 1.

29. Draft article 9<sup>34</sup> was the subject of extensive comment. Certain members generally approved of the text submitted in the Special Rapporteur's second report and considered that the entire draft could be built upon the basic principle enunciated in this article, namely *sic utere tuo ut alienum non laedas*, which was the basis of the principles contained in articles 7 and 8. Some members, however, urged that the article be clarified in order to specify that the obligation to refrain from an activity that might cause "appreciable harm" was not applicable where a watercourse agreement provided for the equitable apportionment of benefits resulting from that activity. Moreover, certain members believed that the criterion of "appreciable harm" was too strict and that a formula such as "exceeding a State's equitable share" or "depriving another State of its equitable share" would be preferable. It was pointed out in that connection that the use of the term "harm" could give rise to a conflict between the concept of an "equitable share" under article 6 and that of not causing "appreciable harm" under article 9. It was suggested that those two articles could be reconciled by having article 9 prohibit the infliction of appreciable harm except to the extent allowable under an agreed determination of equitable allocation of the watercourse concerned. Finally, it was pointed out that the article as drafted did not clearly cover future harm in the sense of lost opportunity to construct a project or to put the water to a given use.

30. In his summing-up of the discussion on the topic at the thirty-sixth session, the Special Rapporteur recognized that, on certain basic issues concerning draft articles 1 to 9, opinions seemed to vary considerably. He therefore proposed that those articles be "provisionally referred" to the Drafting Committee so as to give him the opportunity to receive guidance from the Committee as to the drafting of formulations that might be more acceptable to the Commission for its future work. It was so agreed by the Commission.<sup>35</sup>

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States concerned shall negotiate in a spirit of good faith and good-neighbourly relations in order to resolve the outstanding issues.

"If the watercourse 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."

<sup>34</sup> Revised draft article 9 as submitted in the second report read as follows:

*"Article 9. Prohibition of activities with regard to an international watercourse causing appreciable harm to other watercourse States"*

"A watercourse State shall refrain from and prevent (within its jurisdiction) uses or activities with regard to an international watercourse that may cause appreciable harm to the rights or interests of other watercourse States, unless otherwise provided for in a watercourse agreement or other agreement or arrangement."

<sup>35</sup> *Yearbook ... 1984*, vol. II (Part Two), p. 98, para. 343.

**C. Comments and observations in the Sixth Committee of the General Assembly on the Commission's consideration of the topic at its thirty-sixth session<sup>36</sup>**

**1. GENERAL OBSERVATIONS**

31. The Commission was congratulated for having achieved appreciable progress in its consideration of the topic. It was stressed that, despite certain conceptual difficulties which had arisen both in the Commission and in the Sixth Committee, the revised draft articles provided a general basis on which further work on the topic could be pursued. Despite certain disagreements which seemed to remain within the Commission, it appeared that the draft articles had already reached an advanced stage and that work on the topic constituted a priority task for the Commission.

**2. COMMENTS ON THE GENERAL APPROACH SUGGESTED BY THE SPECIAL RAPPOREUR**

32. Many representatives who addressed themselves to the issue commended the "framework agreement" approach to the topic, which followed the approach adopted by the Commission in 1980. It was said that, since political relationships and disposition to co-operate among riparian States varied greatly, the general rules included in a framework agreement should be precise and detailed enough to safeguard the rights of interested parties in the absence of specific agreements. With regard to whether the framework agreement should consist strictly of legal rules, some representatives supported the Special Rapporteur's view that such an agreement should contain, in addition to such rules, guidelines and recommendations which might be adapted to specific watercourse agreements. But it was stated that the general concepts and language had to be complemented by precise mechanisms that could give them specific content and avoid conflict in actual cases.

33. Certain representatives expressed doubts concerning the framework agreement approach. One view was that it was difficult to envisage cases in which all States sharing the same watercourse would become parties to the framework agreement and not conclude a specific watercourse agreement. The idea that the draft articles could serve as a set of model rules still had some appeal. Whatever their final form, however, the draft articles could serve as a guide for the conclusion of watercourse agreements and for crystallizing the few substantive rules on the subject. The view was expressed that it was far from evident that the draft under consideration quite fitted the definition of a framework agreement that States could adapt to their particular needs. According to that view, such an agreement should be a more flexible and freer text.

34. Some representatives expressed concern that the Special Rapporteur had reworked some of the basic concepts underlying the draft articles, such as the "system" concept, the definition of an "international watercourse" and the concept of "shared natural

resources". It was asked whether the new definitions really constituted progress. Finally, the Commission and the Special Rapporteur were urged to avoid an annual reconsideration of texts that had already been provisionally adopted by the Commission.

**3. COMMENTS ON ARTICLES 1 TO 9 AS SUBMITTED BY THE SPECIAL RAPPOREUR IN HIS SECOND REPORT**

35. Comments in the Sixth Committee on draft articles 1 to 9 largely paralleled the views expressed in the Commission. A brief summary will be provided here for ease of reference. Particular attention will be devoted to the articles that received most attention both in the Commission and in the Sixth Committee, namely articles 1, 6 and 9.

36. Views expressed in the Sixth Committee on draft article 1, and specifically on the deletion of the "system" concept, varied. Some representatives endorsed the Special Rapporteur's replacement of the term "international watercourse system" by the term "international watercourse". Specifically, it was said that the use of the "system" concept had been somewhat ambiguous because it might have connoted the idea of jurisdiction over land areas. Certain representatives welcomed the Special Rapporteur's assurances that the new wording in draft article 1 was a purely terminological and not a conceptual change. Other representatives, however, expressed regret at the abandonment of the "system" concept, which they considered to be a rich, modern notion. The abandonment of that concept, in their view, meant that one of the corner-stones of the draft had been removed. It was thus urged that the Commission return to the "system" approach, since the natural connection between various elements—namely that they formed a system—could not be overlooked.

37. The few observations made in the Sixth Committee on draft articles 2 and 3 largely echoed those made in the Commission. Among other comments on draft article 4, some representatives criticized the new paragraph 1 as going too far towards giving the provisions of the framework agreement a status from which watercourse States would be unable to derogate by special agreement. With regard to paragraph 2 of article 4, several representatives criticized the vague import of the expression "to an appreciable extent" and suggested that criteria be set down to clarify the expression. Similar observations were made with respect to the same expression appearing in draft article 5. With regard to draft article 5 as a whole, certain representatives expressed their qualified approval of it, whereas others expressed doubts or reservations.

38. Several representatives welcomed the Special Rapporteur's replacement in draft article 6 of the concept of a "shared natural resource" by the notion of "sharing in the use of waters in a reasonable and equitable manner" and considered the revised text a major improvement which struck a better balance in the article as a whole. Some representatives welcomed the Special Rapporteur's assurances that the changes introduced were of a terminological nature and not intended to affect substance. They considered that, while the notion of sharing still formed the basis of the draft, it did so in a

<sup>36</sup> This survey is based on section F of the "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-ninth session of the General Assembly" (A/CN.4/L.382), to which the reader is referred for a more detailed account.

more general manner and avoided the doctrinal overtones implicit in the concept of a "shared natural resource".

39. Certain representatives believed that the revised draft still did not strike the right balance, since it appeared to place more emphasis on the "sharing" notion than on the principle of permanent sovereignty over natural resources, on which greater emphasis was required. Thus, according to certain representatives, the notion of sharing in any form should be eliminated altogether from the article.

40. On the other hand, certain other representatives regretted or deplored the elimination of the concept of a "shared natural resource". In their view, the concept underlined the necessary interrelationship between the rights of adjacent riparian States and was the basis for certain essential obligations in that area. They believed that the abandonment of the concept, coupled with the deletion of the "system" concept in draft article 1, called into question the arguments underlying some of the draft articles. Doubts were also voiced with regard to the notion of "reasonable and equitable" sharing.

41. Draft article 7 was supported by some representatives as a necessary corollary to draft article 6. Doubts were, however, expressed regarding the terms "optimum utilization", "good-neighbourly", "protection and control" and "shared", because they could give rise to misinterpretation or abuse. Draft article 8 was the subject of mixed views. Certain representatives considered that the factors laid down therein could provide non-binding, non-exhaustive reference points for determining whether waters were used in a reasonable and equitable manner. Other representatives questioned the utility of including a long non-exhaustive list of factors and requested the Commission to re-examine the matter.

42. Draft article 9 was approved of by some representatives, who considered it to be one of the core provisions of the draft as a whole. They believed that the maxim *sic utere tuo ut alienum non laedas* should occupy a privileged place in the draft, since the obligation not to cause harm to other States was a basic obligation which was recognized as a generally accepted principle of international law. At the same time, the draft reflected modern trends by excluding from the scope of the prohibition those injurious effects which did not exceed the threshold of "appreciable harm", thus creating a link between the article and the topic of international liability for injurious consequences arising out of acts not prohibited by international law.

43. Certain representatives considered that the term "appreciable harm" required further clarification in order to become acceptable. Other representatives

found the notion of "appreciable harm" to be too vague to be appropriately employed in article 9. Finally, certain representatives referred to a potential conflict between the determination of reasonable and equitable use of a watercourse under articles 6 to 8 and the prohibition of activities causing appreciable harm under article 9.

44. Chapters III, IV, V and VI of the Special Rapporteur's revised draft were also commented upon in the Sixth Committee, although less extensively than chapters I and II. Since attention was focused on the first two chapters both in the Commission and in the Sixth Committee, the comments on the other chapters are not summarized in this preliminary report.

#### **D. Summary of the present status of the Commission's work on the topic**

45. As indicated earlier (paras. 2 *et seq.* above), the topic of the law of the non-navigational uses of international watercourses has been on the Commission's active agenda since 1974. At its thirty-second session, in 1980, the Commission provisionally adopted a set of six articles (para. 5 above). Certain modifications to those articles were proposed by the previous Special Rapporteur, Mr. Evensen, who submitted a first report containing a complete set of 39 draft articles to the Commission at its thirty-fifth session, in 1983, and a second report containing a revised set of 41 draft articles at the thirty-sixth session, in 1984. The Commission discussed the draft articles at both of those sessions, concentrating in 1984 on articles 1 to 9 and related questions.

46. At its 1984 session, the Commission referred to the Drafting Committee draft articles 1 to 9 as submitted in Mr. Evensen's second report. It was understood that the Drafting Committee would also have available the texts of the provisional working hypothesis accepted by the Commission in 1980, of the six articles provisionally adopted in 1980, and of draft articles 1 to 9 submitted in Mr. Evensen's first report (see para. 11 above).

47. The outline for a draft convention proposed by Mr. Evensen seems to be broadly acceptable, both in the Commission and in the Sixth Committee, as a general basis on which further work on the topic could proceed. At the same time, it is recognized in both bodies that certain conceptual difficulties remain to be resolved. The "framework agreement" approach to the topic also seems to have been generally endorsed as the most practical way of taking into account the special requirements relating to specific watercourses and allowing ample latitude for specific watercourse agreements, while providing general standards applicable to international watercourses in general.

## II. Future programme of work

48. As noted in the introduction to this report, upon the appointment of the present Special Rapporteur during its thirty-seventh session, the Commission requested that he submit a preliminary report indicating the status of its work on the topic and lines of further action.<sup>37</sup> Bearing in mind the importance and delicacy of the subject, and pending a full study of the topic as a whole, the Special Rapporteur offers below his preliminary views as to the general lines along which the Commission's work on the topic might proceed.

49. The survey of the present status of the Commission's work on the topic contained in section I of this report reveals that considerable time and effort have already been devoted to the elaboration of draft articles and commentaries. While certain issues have not been fully resolved, there is broad agreement on the vital nature of the topic itself. That being the case, the Special Rapporteur believes that the Commission's future work on the topic should build as much as possible upon such progress as has already been achieved and should be aimed at making further concrete progress in the form of the provisional adoption of draft articles.

50. Accordingly, while it would seem appropriate for the Special Rapporteur to provide in his second report, in 1986, a brief statement of his views concerning the articles referred to the Drafting Committee in 1984, he would recommend that those articles not be the subject of another general debate in 1986. Rather, it would appear that the Commission's work could be expedited most effectively if any discussion of those articles in plenary were confined, in principle, to any responses

there might be to the views expressed on them in the Special Rapporteur's second report. Of course, if the Commission, as a result of its discussion of the topic at its thirty-seventh session, should wish the Special Rapporteur to include in his second report observations or proposals concerning specific issues raised by articles before the Drafting Committee, he would naturally be prepared to do so.

51. Moreover, in the light of the fact that the outline, if not all the draft articles, formulated by the previous Special Rapporteur seems broadly acceptable as a general basis for further work, the present Special Rapporteur would propose, for the time being at least, following the general organizational structure provided by the outline in elaborating further draft articles. Specifically, he would propose that the body of his second report be devoted to the formulation of draft articles on a limited number of the issues dealt with in chapter III of the outline—i.e. the chapter immediately following those containing the nine articles referred to the Drafting Committee in 1984. In this way, the Special Rapporteur would hope to be able to submit to the Commission at its thirty-eighth session in 1986, a set of draft articles of manageable size and scope, together with commentaries reviewing their legal basis.

52. The Special Rapporteur considers it a high honour to have been entrusted with the important task of assisting the Commission in its work on the law of the non-navigational uses of international watercourses. He recognizes that the Commission's task is a challenging one and looks forward to working closely with the Commission to produce legal texts which are generally acceptable on a topic of great importance to the international community.

<sup>37</sup> See footnote 1 above.

# INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

[Agenda item 8]

## DOCUMENT A/CN.4/394

### Preliminary report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Julio Barboza, Special Rapporteur

[Original: Spanish]  
[5 July 1985]

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#### Updating of the topic

##### A. Status of the work done so far

1. In order to avoid any unnecessary waste of time now that the Sixth Committee of the General Assembly has shown an interest in the topic and some sense of urgency has been reflected in the statements made by Member States, and in particular by developing countries, at recent sessions of the General Assembly, the Special Rapporteur has followed the recommendation by the Enlarged Bureau of the International Law Commission that he should prepare a paper making an appraisal of the status of work on the topic to date and giving a preliminary indication of the direction future work will take.

2. A brief look at the work done by the Commission and the Sixth Committee shows, in the view of the present Special Rapporteur, that there have been two quite separate stages in the consideration of the topic. The first stage runs from the report submitted to the Commission at its thirtieth session, in 1978, by the Working Group it had established,<sup>1</sup> which was chaired by Robert Q. Quentin-Baxter—appointed Special Rapporteur at the same session—to the latter's third report

(containing a schematic outline), submitted to the Commission at its thirty-fourth session, in 1982. The second stage runs from the Sixth Committee's discussion of the topic in 1982 to the fifth and last report by the late R. Q. Quentin-Baxter, submitted to the Commission at its thirty-sixth session, in 1984.<sup>2</sup>

3. The first stage, which involved a rather lengthy and complicated general debate on a number of basic concepts, helped the members of the Commission to understand the most important problems with which the previous Special Rapporteur had to deal in his study of the topic and clarified the concepts on which he had begun to work.

4. In his preliminary report, the previous Special Rapporteur made strenuous efforts to draw as clear a distinction as possible between his topic and the topic of

<sup>1</sup> A/CN.4/L.284 and Corr.1. Section II of the report of the Working Group is reproduced in *Yearbook ... 1978*, vol. II (Part Two), pp. 150-152.

<sup>2</sup> The previous Special Rapporteur submitted to the Commission, at its thirty-second to thirty-sixth sessions, the following reports:

Preliminary report: *Yearbook ... 1980*, vol. II (Part One), p. 247, document A/CN.4/334 and Add.1 and 2;

Second report: *Yearbook ... 1981*, vol. II (Part One), p. 103, document A/CN.4/346 and Add.1 and 2;

Third report: *Yearbook ... 1982*, vol. II (Part One), p. 51, document A/CN.4/360;

Fourth report: *Yearbook ... 1983*, vol. II (Part One), p. 201, document A/CN.4/373;

Fifth report: *Yearbook ... 1984*, vol. II (Part One), p. 155, document A/CN.4/383 and Add.1.

State responsibility for wrongful acts. Those efforts were entirely necessary because the principles governing the two topics are very different and because his topic also required him to include obligations to prevent and minimize possible loss or injury arising out of acts which are not prohibited by international law, obligations which could in no way be admitted in the context of responsibility for wrongful acts.

The alternative to responsibility for wrongful conduct represented by strict liability was, however, not an appropriate basis for his work because it eliminated what was regarded as the most important component, namely the duty of care, and because quite a few risks would be involved in basing the entire draft on a type of responsibility on whose normative foundations in customary international law no consensus existed.

5. The previous Special Rapporteur therefore decided to base his work on a broader legal foundation whose fundamental principle was, in his view, "a necessary ingredient of any legal system", namely a primary rule stated at the level of greatest generality and reflected in the maxim *sic utere tuo ut alienum non laedas*.<sup>3</sup> A special process of adaptation was required if a rule of such generality was to apply to particular situations and, for the purposes of such a process, the pattern which appeared to emerge from State practice was to try to reach agreement on the procedures to be followed and the levels of protection to be ensured in respect of activities which might cause transboundary loss or damage.<sup>4</sup>

The main thrust of the new topic was thus to minimize the possibility of loss or damage and to provide means of redress if loss or damage did occur, without, if possible, prohibiting or hampering activities which were carried out in the territory or under the control of a State and which might be useful or beneficial. In the modern-day world,

it was neither possible to prohibit useful activities that might give rise to transboundary loss or injury, nor to allow such activities to proceed without regard to their effect upon conditions of life in other countries. The balance of interest test reflected in principle 21 of the United Nations Declaration on the Human Environment (Stockholm Declaration) was an expression of that situation. ...<sup>5</sup>

6. The previous Special Rapporteur used two main guidelines to draw a conceptual distinction between his

topic and that of State responsibility. The first is based on the distinction between "primary" and "secondary" rules which has traditionally been made by the Commission.<sup>6</sup> The second emphasizes the duties of prevention and "due care" which linked the topic to the classical rules of international law and brought it closer to the field of strict liability.<sup>7</sup> It was, however, later made clear that the duty of care implied only the duty to take account of the interests of other States.<sup>8</sup>

With the schematic outline of the topic submitted in his third report the previous Special Rapporteur considered that he had found an appropriate legal framework for the draft and that that framework clearly distinguished his topic from the topic of responsibility for wrongful acts.

7. Some objections were raised at that first stage. Although a clear majority in the Commission and the Sixth Committee of the General Assembly was in basic agreement with the broad outline proposed by the previous Special Rapporteur and there was also firm support for continuing the consideration of the topic on the basis of the approach indicated, a few members of both bodies stated that, for various reasons, they were opposed to the idea that the Commission should continue to consider the topic. Some members of the Commission stated, in particular, that the Special Rapporteur was dealing with the topic in a way which did not fully correspond to the mandate assigned to the Commission by the General Assembly, since the concepts he had introduced included, *inter alia*, obligations of prevention which had nothing to do with responsibility.<sup>9</sup> Those members therefore expressed the view that the Commission should decide to inform the General Assembly of that problem and request it either to confirm or to reconsider the scope and content of the topic.<sup>10</sup>

8. It was in these circumstances that, at its thirty-fourth session, in 1982, the Commission had before it the schematic outline of the topic, contained in the third report of the previous Special Rapporteur.<sup>11</sup> In the present Special Rapporteur's view, the schematic

<sup>3</sup> "... That rule—the duty to exercise one's own rights in ways that did not harm the interests of other subjects of law—was a necessary ingredient of any legal system: it was implicit in the aims and purposes of the United Nations Charter, and explicit in the principle of good-neighbourliness enunciated in the final communiqué of the Afro-Asian Conference held in Bandung in 1955. The rule had been expressed in various contexts, including the *Trail Smelter* arbitral award, the judgment of the International Court of Justice in the *Corfu Channel* case, principle 21 of the Declaration of the United Nations Conference on the Human Environment held in Stockholm in June 1972, and article 30 of the Charter of Economic Rights and Duties of States." (*Yearbook ... 1980*, vol. II (Part Two), pp. 159-160, para. 135.)

<sup>4</sup> "... The pattern that had seemed to emerge was that, as States became aware of situations in which their activities—or activities within their jurisdiction or under their control—might give rise to injurious consequences in areas outside their territory, they took steps to reach agreement with the States to which the problem might extend about the procedures to be followed and the levels of protection to be covered. ..." (*Ibid.*, p. 160, para. 136.)

<sup>5</sup> *Yearbook ... 1982*, vol. II (Part Two), p. 86, para. 116.

<sup>6</sup> "... According to this distinction, 'secondary' rules are those engaged by the occurrence of a wrongful act: therefore an act which is not prohibited can give rise to responsibility (or liability) only when a 'primary' rule of obligation so provides. The value of maintaining this technical distinction was simply that it kept a correct relationship between the present topic and that of State responsibility. The two topics are not on the same plane, and rules developed under the present topic may not purport to derogate from the universal rules of State responsibility." (*Yearbook ... 1981*, vol. II (Part Two), p. 147, para. 170.)

<sup>7</sup> "In any case, as some Commission members noted, the main purpose of the Special Rapporteur's emphasis on the duty of care was to strengthen the linkage between the present topic and the classical rules of international law, so that the issue of 'strict' liability could be conservatively assessed. ..." (*Ibid.*, p. 148, para. 174.)

<sup>8</sup> "... The description had, however, also caused misunderstanding because, in the context of the present topic, the duty of care did not imply an obligation to prohibit any conduct that might give rise to loss or injury to other States or their citizens: it implied only the duties, reviewed in the preceding paragraphs of this report, to take due account of the interests of other States." (*Yearbook ... 1982*, vol. II (Part Two), p. 87, para. 122.)

<sup>9</sup> See *Yearbook ... 1982*, vol. I, p. 284, 1743rd meeting, para. 40, and p. 289, 1744th meeting, para. 26.

<sup>10</sup> *Ibid.*, p. 290, 1744th meeting, paras. 32 and 35-36.

<sup>11</sup> *Yearbook ... 1982*, vol. II (Part One), p. 62, document A/CN.4/360, para. 53.



outline, which was given careful consideration by the Commission and the Sixth Committee, marked a turning-point in the discussions because, from then on, no further attempts were made to define the basis and scope of the topic: the aim now was to determine its content. In addition, the schematic outline described the scope and breadth of the topic in unambiguous terms. Although the ideas embodied in the schematic outline had been referred to in earlier reports, it was because of the novelty of the subject-matter and the seemingly unorthodox concepts introduced to explain it that the Commission had not fully grasped all the implications of the topic and exactly what the previous Special Rapporteur had had in mind. With the schematic outline, however, the Commission and the General Assembly had a clear idea of the Special Rapporteur's intentions with regard to the topic and the reaction to the outline was at least as favourable as the generally favourable consideration given to his earlier reports.<sup>12</sup>

9. In the present Special Rapporteur's opinion, this represented tacit approval on the part of the General Assembly—which had given the Commission its mandate—of the work done and was, as far as the Commission was concerned, an expression of its satisfaction with the fulfilment of its original mandate. There seemed to be a clear indication that higher approval had been given to the approach of considering transboundary loss or injury as a topic of discussion, to including prevention as an integral part of that topic, as well as to the other procedures and concepts referred to in the outline. The topic, for which a sound basis thus exists, is of concern to a large number of countries and will apparently have an interesting role to play in contemporary international law.

10. Another important development was the publication of the "Survey of State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law", prepared by the Secretariat.<sup>13</sup> This research on multilateral and bilateral agreements, State practice and judicial and arbitral decisions in the field under consideration reveals what the experts already knew, namely that there have been important normative developments in this area and that the way States react, as reflected in the practice they follow, is the result of a pressing need created by modern technology and the challenge it represents to the maintenance of international relations based on justice, tolerance and a spirit of co-operation. The valuable material contained in the survey holds out good prospects for the possibility of identifying positive rules of general international law governing the topic or, at any rate, good prospects for determining the lawfulness of State policy with regard to future conduct.<sup>14</sup>

<sup>12</sup> See *Yearbook ... 1984*, vol. II (Part Two), pp. 76-77, para. 235.

<sup>13</sup> Document A/CN.4/384.

<sup>14</sup> *Ibid.*, para. 10. See also "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-ninth session of the General Assembly" (A/CN.4/L.382), para. 317:

"... [Many representatives] noted, in that connection, the law of outer space, the law of the sea and, in particular, marine pollution as a result of oil spillage, etc., which, they stated, provided firm foundation for the principle that States were under an obligation, first, to prevent damage and, secondly, to provide compensation where damage was caused. ..."

11. As a result of the two developments referred to in paragraphs 8 and 10 above, the topic gained momentum that would be difficult to check. Thus, in his fourth report, the Special Rapporteur indicated certain changes to the schematic outline<sup>15</sup> and then stated that the general debate had been concluded. In his fifth report, he submitted to the Commission the following five draft articles: article 1 (Scope of the present articles), article 2 (Use of terms), article 3 (Relationship between the present articles and other international agreements), article 4 (Absence of effect upon other rules of international law) and article 5 (Cases not within the scope of the present articles).<sup>16</sup>

The Commission's good progress on the topic and the start of its consideration of the articles on the basis of which the schematic outline would be developed were then interrupted by the Special Rapporteur's untimely death.

## **B. The Special Rapporteur's proposals for future work**

12. Given the special characteristics of the traditional institution of special rapporteurs' reports for the treatment of topics studied by the Commission, it is usual, when a special rapporteur takes over a subject on which work has already begun, to start with an assessment of all that has been done, after which he will give his work the particular stamp of his own perceptions and will finally give the whole topic unity of concept and style. But it is also easy to see that some ground has already been covered, since a number of concepts which are not part of a special rapporteur's subjective view have been established by their mere existence, proposed to the Commission and the General Assembly, considered by them and found to be useful working tools, so that they cannot now be ignored. A first comparison of the earlier reports already mentioned with the materials setting out the practice of States seems to indicate that certain trends and general lines exist independently of any personal conceptions, and that many of the courses proposed by the previous Special Rapporteur have already been marked out in State practice.

13. It will therefore be the task of the present Special Rapporteur to review carefully all that has been done, in order to confirm the proposals of his predecessor or propose the changes dictated by his own conception of the problems, but proceeding from a starting-point that permits the topic to be developed with proper continuity. Thus he does not intend to reopen the general discussion. Certain basic concepts arrived at in the first three reports are already accepted. This will not prevent the Special Rapporteur from re-examining all that has been done, and if, in his opinion, some theoretical construction is necessary which appears more appropriate in regard to specific aspects, he will propose it to the Commission. The foregoing is more in the nature of a reservation of rights than a formal announcement of changes, and it should be reiterated here that the Special

<sup>15</sup> *Yearbook ... 1983*, vol. II (Part One), p. 220, document A/CN.4/373, paras. 63 *et seq.*

<sup>16</sup> *Yearbook ... 1984*, vol. II (Part One), pp. 155-156, document A/CN.4/383 and Add.1, para. 1.

Rapporteur does not intend in any way to reopen the door to a general debate.

14. But what should undoubtedly be the most important raw material of his future work is the schematic outline, not because of any idea of revising it—since it was precisely the more general notions of the outline which motivated the above-mentioned tacit confirmation of what has been done—but simply because some aspects of the outline elicited differing opinions in the discussions which have taken place, and they may offer material for changes. In addition, the concepts forming it are the immediate source of the draft articles which, as can be seen from the five articles proposed (see para. 11 above), will provide the substance for the conceptual skeleton. At the same time, the execution of this work shows that it is appropriate or necessary to make additions or deletions. An example is provided by draft article 1, which with respect to section 1.1 of the schematic outline offers some important changes: the introduction of the expressions “situations”, “physical consequence” and “use or enjoyment” of certain “affected” areas (without including the notion “adversely”).<sup>17</sup>

15. As a method of carrying out this work it seems essential, at the first stage, to make a rigorous comparison between the rules and procedures contained in the schematic outline and the practice of States, for which purpose the Secretariat study already mentioned (para. 10 above) will be a valuable aid.

16. There are some points which met with objections in the discussions held or raised doubts in the mind of the present Special Rapporteur, and they will therefore be specially examined. Some, but not all of them, will be taken up and in any case they are the result of a first examination of the subject with a new approach. This means that there may be many other such points and that, on subsequent reflection, some of those mentioned will not be taken up again by the Special Rapporteur in his next report or in following reports.

(a) It would be useful to give some attention to the study of a matter not considered exhaustively in previous discussions, namely the point at which a State can be considered responsible for the consequences of activities carried out in its territory. This question was raised in the debate at the Commission's thirty-fourth session, in 1982, and taken up in its report on that session.<sup>18</sup> It appears to relate to the distinction usually made in the law of some countries between immediate or direct consequences and indirect consequences, which are more remote in the chain of cause and effect, or “accidental”, being produced by the intervention of other facts. In any case, this matter is usually connected with the foreseeability of certain effects.

(b) It would also be worth making a special examination of the criterion of “shared expectations” men-

tioned in section 4, paragraph 4, of the schematic outline, which is explained in the Commission's report on its thirty-fourth session.<sup>19</sup> The previous Special Rapporteur admitted that the reception given to that criterion in the Commission had not been entirely favourable, as was shown by the discussion.<sup>20</sup>

(c) The discussions in the Commission also showed that some members had doubts about the effectiveness or value of certain procedures set out in the schematic outline, such as those which in no way engaged the responsibility of the State if they were neglected by the State of origin or source State.<sup>21</sup>

(d) The duty to make reparation is somewhat lost among the procedures established in section 4 of the schematic outline; perhaps it should be given a better position to bring out its importance in the draft.<sup>22</sup>

(e) The role of international organizations within the framework of the concepts proposed will have to be analysed in all its aspects, since it is clear that the Commission did not examine this matter exhaustively, even though the previous Special Rapporteur's fifth report contains interesting considerations, particularly in connection with draft article 5 submitted therein.

As is known, the questionnaire prepared by the previous Special Rapporteur with the assistance of the Secretariat and sent to selected international organizations relates to sections 2, 3 and 4 of the schematic outline, since its underlying intention was to ascertain whether the mutual obligations of States as members of an international organization could, to some extent, take the place of the procedures indicated in those sections.<sup>23</sup>

(f) Until a more advanced study of the topic consolidates our knowledge, certain basic questions remain open, such as the definitive scope of the topic, which so far appears to have attracted a certain consensus as regards draft article 1 submitted in the fifth report, and the concept of “control”, etc. All this comes within the intention expressed above that the whole topic will be entirely reviewed, with a view not to making changes, but to seeking the certainty which alone gives inner conviction.

(g) As regards the five draft articles submitted in the fifth report, it need hardly be said that the Special Rapporteur intends to re-examine them and possibly re-submit them with the changes he may consider appropriate, having regard, among other elements, to the comments made in the discussions on them both in the Commission and in the Sixth Committee of the General Assembly.

<sup>19</sup> *Ibid.*, p. 87, para. 119.

<sup>20</sup> “The Special Rapporteur noted that the concept of ‘shared expectations’—contained in paragraph 4 of section 4 of the schematic outline ... had had a rather mixed reception in the Commission. Some saw it as a valuable concept, others as adding little to the schematic outline. ...” (*Ibid.*, p. 91, para. 145.)

<sup>21</sup> “... Some doubted the value of procedures which could be neglected without engaging the responsibility of the State for wrongfulness; ...” (*ibid.*, para. 148).

<sup>22</sup> “... The duty to provide reparation, now rather lost in the procedural mass of section 4, was one candidate for certain elevation; ...” (*ibid.*, p. 92, para. 152).

<sup>23</sup> The replies to that questionnaire, received in 1984, are reproduced in *Yearbook ... 1984*, vol. II (Part One), p. 129, document A/CN.4/378.

<sup>17</sup> *Ibid.*

<sup>18</sup> “... One Commission member noted with approval that the use of the phrase ‘give rise to’ in the scope clause, in paragraph 1 of section 1 of the schematic outline, established a broad connecting link between activities within the territory or control of a State and the loss or injury suffered outside that State's territory and control. Several members referred to the question of remoteness of consequences, and the need for further attention to this point was noted. ...” (*Yearbook ... 1982*, vol. II (Part Two), p. 90, para. 142.)

17. In developing the topic, the Special Rapporteur will give careful attention to the concern repeatedly expressed in those bodies about the interests of the developing countries, and to the degree of progressive

development of international law which may be required by the novelty of the topic and the demands of equity, provided that those demands secure the necessary consensus among States.



# RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS (SECOND PART OF THE TOPIC)

[Agenda item 9]

**DOCUMENT A/CN.4/391 and Add.1\***

**Second report on relations between States and international organizations  
(second part of the topic), by Mr. Leonardo Díaz González,  
Special Rapporteur**

[Original: Spanish]  
[10 May and 28 June 1985]

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## NOTE

Multilateral conventions cited in the present report:

	Source
Convention on the Privileges and Immunities of the United Nations (adopted by the General Assembly on 13 February 1946)	United Nations, <i>Treaty Series</i> , vol. 1, p. 15.
Convention on the Privileges and Immunities of the Specialized Agencies (adopted by the General Assembly on 21 November 1947)	<i>Ibid.</i> , vol. 33, p. 261.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	United Nations, <i>Juridical Yearbook 1969</i> (Sales No. E.71.V.4), p. 140.
Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975)	<i>Ibid.</i> 1975 (Sales No. E.77.V.3), p. 87.

\* Incorporating document A/CN.4/391/Add.1/Corr.2.

## I. Background

1. At its twenty-eighth session, in 1976, the International Law Commission, having decided to take up the study of the second part of the topic "Relations between States and international organizations",<sup>1</sup>

... requested the Special Rapporteur on the topic, Mr. Abdullah El-Erian, to prepare a preliminary report to enable to it take the necessary decisions and to define its course of action on the second part of the topic ..., namely the status, privileges and immunities of international organizations and their officials, experts and other persons engaged in their activities who are not representatives of States.<sup>2</sup>

2. In accordance with that request, the Special Rapporteur submitted to the Commission at its twenty-ninth session, in 1977, a report<sup>3</sup> intended as a preliminary study of the scope of and the approach to the second part of the topic of relations between States and international organizations, namely the legal status, privileges and immunities of international organizations, their officials, experts and other persons engaged in their activities not being representatives of States.

3. The purpose of the preliminary report was: (a) to trace the evolution of legal norms which govern that branch of international law; (b) to point out some recent developments in other related subjects which have their bearing on the subject-matter of the present study; (c) to examine a number of general questions of a preliminary character with a view to defining and identifying the course of action and method of work to be submitted to the Commission for its consideration.<sup>4</sup>

4. At that session, the Commission decided to authorize the Special Rapporteur to continue with his study on the lines indicated in his preliminary report and to prepare a further report on the second part of the topic, having regard to the views expressed and the questions raised during the debate. The Commission also agreed to the Special Rapporteur seeking additional information and expressed the hope that he would carry out research in the usual way, including investigations into the agreements and practices of international organizations, whether within or outside the United Nations system, and also the legislation and practice of States.<sup>5</sup>

5. In paragraph 6 of its resolution 32/151 of 19 December 1977, the General Assembly endorsed "the conclusions reached by the International Law Commission regarding the second part of the topic of relations between States and international organizations".

6. Pursuant to those decisions, the Special Rapporteur submitted his second report<sup>6</sup> to the Commission at its thirtieth session, in 1978. Among the questions raised during the Commission's discussion of the report at that session<sup>7</sup> were: definition of the order of work on the topic and advisability of conducting the work in different stages, beginning with the legal status, privileges and immunities of international organizations; special position and regulatory functions of operational international organizations established by Governments for the express purpose of engaging in operational—and sometimes even commercial—activities, and difficulty of applying to them the general rules of international immunities; relationship between the privileges and immunities of international organizations and their responsibilities; responsibility of States to ensure respect by their nationals for 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; and need to analyse the relationship between the scope of the privileges and immunities of international organizations and their particular functions and objectives. The Commission approved the conclusions and recommendations set out in the second report.<sup>8</sup>

7. At its thirty-first session, in 1979, the Commission appointed the present Special Rapporteur to replace Mr. Abdullah El-Erian, who had resigned upon his election as a Judge of the ICJ.<sup>9</sup>

8. 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 at its thirty-second session, in 1980, or at subsequent sessions, and resumed its work on it only at its thirty-fifth session, in 1983.

9. Since the discussions which the Sixth Committee held at the thirty-eighth session of the General Assembly on the second part of the topic of relations between States and international organizations were in their early stages, they gave rise only to some brief comments and observations.<sup>10</sup> Representatives generally welcomed

<sup>1</sup> The first part of the topic, relating to the status, privileges and immunities of representatives of States to international organizations, had been the subject of the Convention on the Representation of States in their Relations with International Organizations of a Universal Character, adopted at Vienna on 14 March 1975 (hereinafter referred to as "1975 Vienna Convention on the Representation of States").

<sup>2</sup> *Yearbook ... 1976*, vol. II (Part Two), p. 164, para. 173.

<sup>3</sup> *Yearbook ... 1977*, vol. II (Part One), p. 139, document A/CN.4/304.

<sup>4</sup> *Ibid.*, pp. 141-142, para. 9.

<sup>5</sup> *Yearbook ... 1977*, vol. II (Part Two), p. 127, para. 95.

<sup>6</sup> *Yearbook ... 1978*, vol. II (Part One), p. 263, document A/CN.4/311 and Add.1.

<sup>7</sup> *Yearbook ... 1978*, vol. I, pp. 260 *et seq.*, 1522nd meeting (paras. 22 *et seq.*), 1523rd meeting (paras. 6 *et seq.*) and 1524th meeting (para. 1).

<sup>8</sup> *Yearbook ... 1978*, vol. II (Part Two), p. 147, para. 156.

<sup>9</sup> *Yearbook ... 1979*, vol. II (Part Two), p. 189, para. 196.

<sup>10</sup> See "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-eighth session of the General Assembly" (A/CN.4/L.369), sect. G.

the fact that the Commission had resumed its work on the topic after several years of interruption. It was noted in particular that the study and analysis of the status, privileges and immunities of international organizations and their officials, as well as of their property and assets, would supplement the work which had already been done in that area and which had culminated in the 1975 Vienna Convention on the Representation of States.<sup>11</sup>

10. Most of the representatives who took part in the debate in the Sixth Committee noted with satisfaction that the Commission had, on the basis of the preliminary report<sup>12</sup> of the present Special Rapporteur, endorsed the conclusions it had previously reached regarding the orientation of its work on the topic. In view of the complexity of the issues at stake, the Commission's intention to proceed with great caution was

<sup>11</sup> See footnote 1 above.

<sup>12</sup> *Yearbook ... 1983*, vol. II (Part One), p. 227, document A/CN.4/370.

also generally approved, as was the recommendation that a pragmatic approach should be adopted with a view to formulating specific draft articles and avoiding protracted discussions of a theoretical or doctrinaire nature.

11. Following its consideration of the report of the Commission on its thirty-fifth session, the General Assembly recommended, in paragraph 3 of its resolution 38/138 of 19 December 1983, that "taking into account the comments of Governments, whether in writing or expressed orally in debates in the General Assembly, the International Law Commission should continue its work on all the topics in its current programme".

12. It is on the basis of that recommendation by the General Assembly and in accordance with the conclusions and directives adopted by the Commission and approved by the General Assembly that work will proceed on the second part of the topic of relations between States and international organizations, as defined above (paras. 1-2).

## II. Legal status, privileges and immunities of international organizations

13. In his preliminary report, the previous Special Rapporteur referred to three categories of privileges and immunities which might form the subject-matter of the present study: (a) those of the organization; (b) those of officials of the organization; (c) those of experts on mission for the organization and of persons having official business with the organization who are not representatives of States. He also referred to resident representatives and observers, who may be sent by one international organization to another international organization.<sup>13</sup>

14. The Commission agreed to that proposal by the Special Rapporteur, and one member suggested "that a few problems should be selected for consideration at the first stage, such as those concerning international organizations, and that the much more delicate problems, such as those relating to international officials, should be left till later".<sup>14</sup>

### A. Notion of an international organization

15. Virtually all the members of the Commission who spoke during the debate on the preliminary report of the present Special Rapporteur took the view that the Special Rapporteur "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".<sup>15</sup> It does not therefore

seem appropriate to try to work out and propose a precise definition of what an international organization is, particularly since the Commission's task is not to draw up a treaty on such organizations, but first to formulate draft articles embodying general rules governing the legal capacity, privileges and immunities of international organizations.

16. It would, however, be appropriate to make a few comments on the meaning to be given to the term "international organization" in the draft articles under consideration.

17. The second half of the twentieth century is characterized by the growing interdependence of all human societies. Extraordinary technological advances and rapid developments in communications and transport have brought peoples together and made them feel closer, so that they are now aware of belonging to a single human family. Such increased awareness has been reflected in the efforts being made by States to co-operate in resolving and coping with political, social, economic, humanitarian and technological problems that are far too difficult and complex for any one member of the international community to deal with on its own.

18. In order to regulate, channel and engage in such co-operation, States have to resort to the only instrument at their disposal in international law, namely the treaty, a structural framework which enables them to define, restrict and implement the co-operation they have decided to establish. They thus set up independent and permanent functional agencies with a view to the achievement of their goals. This is what Reuter and Combacau call the "regulatory power" vested in

<sup>13</sup> *Yearbook ... 1977*, vol. II (Part One), pp. 153-155, document A/CN.4/304, paras. 70-73 and 78.

<sup>14</sup> *Yearbook ... 1977*, vol. I, p. 210, 1453rd meeting, para. 13 (Mr. Reuter).

<sup>15</sup> *Yearbook ... 1983*, vol. II (Part Two), p. 80, para. 276.

organs that are more rapid and effective than traditional diplomatic conferences".<sup>16</sup>

19. Since the Second World War, there have been far-reaching changes in international relations as a result of the establishment of so many international organizations of a universal or regional character. There is no denying the fact that the formulation and development of the new international law are based on multilateral co-operation among States. The new international economic law, international penal law and even diplomatic law are changing and developing as a result of such new multilateral relations, of the concept of inter-State co-operation—in short, as a result of international organizations.

20. According to the terminology most commonly used by writers on international law, an international organization is a permanent grouping of States with organs which are intended, in matters of common interest, to express views that differ from those of the member States. In United Nations terminology, moreover, international organizations are described as intergovernmental organizations, as opposed to non-governmental organizations (Article 57 of the Charter).

21. The two French writers cited above have described an international organization as "an entity which has been set up by means of a treaty concluded by States to engage in co-operation in a particular field and which has its own organs that are responsible for engaging in independent activities".<sup>17</sup>

22. The Convention on the Privileges and Immunities of the Specialized Agencies does not refer to international organizations. Article I (Definitions and scope), section 1, provides that the term "specialized agencies" means the agencies referred to therein and "any other agency in relationship with the United Nations in accordance with Articles 57 and 63 of the Charter".

23. In the light of the foregoing comments, the Special Rapporteur believes that the Commission should continue to follow the pragmatic approach it adopted during its consideration of the first part of the topic, which culminated in the 1975 Vienna Convention on the Representation of States, and during its consideration of the draft articles on the law of treaties between States and international organizations or between international organizations, which was completed at its thirty-fourth session, in 1982, with the adoption of the draft.<sup>18</sup>

24. The definition of the term "international organization" given in article 2, paragraph 1 (i), of the draft articles on the law of treaties between States and international organizations or between international organizations is identical with that given in article 2, paragraph 1 (i), of the 1969 Vienna Convention on the Law of Treaties: an international organization is simply identified as an "intergovernmental organization". In

paragraph (14) of the commentary to article 2 of the draft articles on the law of treaties (which were the source of the 1969 Vienna Convention), the Commission stated:

... The term "international organization" is here defined as an *intergovernmental* organization in order to make it clear that the rules of non-governmental organizations are excluded.<sup>19</sup>

25. In the commentary to article 2 (adopted in first reading) of the draft articles on treaties concluded between States and international organizations or between international organizations,<sup>20</sup> the Commission also stated that:

(7) ... This definition [of the term "international organization"] should be understood in the sense given to it in practice: that is to say, as meaning an organization composed mainly of States, and in some cases having associate members which are not yet States or which may even be other international organizations; some special situations have been mentioned in this connection, such as that of the United Nations within ITU, EEC within GATT or other international bodies, or even the United Nations acting on behalf of Namibia, through the Council for Namibia, within WHO after Namibia became an associate member of WHO.

(8) It should, however, be emphasized that the adoption of the same definition of the term "international organization" as that used in the Vienna Convention has far more significant consequences in the present draft than in that Convention.

(9) In the present draft, this very elastic definition is not meant to prejudice the régime that may govern, within each organization, entities (subsidiary or connected organs) which enjoy some degree of autonomy within the organization under the rules in force in it. Likewise no attempt has been made to prejudice the amount of legal capacity which an entity requires in order to be regarded as an international organization within the meaning of the present draft. The fact is ... that the main purpose of the present draft is to regulate not the status of international organizations, but the régime of treaties to which one or more international organizations are parties. The present draft articles are intended to apply to such treaties irrespective of the status of the organizations concerned.

... <sup>21</sup>

26. For the purposes of the draft articles under consideration, the Commission should maintain its position that an "international organization" means an intergovernmental or inter-State organization. This term will be included in an introductory draft article that will be prepared either upon completion of the study or during the course of the Commission's work when it becomes necessary to define the meaning of the most frequently used terms, as has been done in other sets of draft articles prepared by the Commission.

27. The question whether international organizations should be classified as being of a universal or a regional character and whether, as one member suggested, the Commission should confine itself to organizations which form part of the United Nations system should, in accordance with the view expressed by virtually all the members who took part in the debate on the preliminary report of the present Special Rapporteur, be decided only when the study has been completed. As will be recalled, the Commission reached the conclusion at its thirty-fifth session that:

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 in-

<sup>16</sup> P. Reuter and J. Combacau, *Institutions et relations internationales*, 3rd ed. (Paris, Presses universitaires de France, 1985) (collection "Thémis"), p. 277.

<sup>17</sup> Reuter and Combacau, *op. cit.*, p. 278.

<sup>18</sup> For the texts of the draft articles and the commentaries thereto, see *Yearbook ... 1982*, vol. II (Part Two), pp. 17 *et seq.*

<sup>19</sup> *Yearbook ... 1966*, vol. II, p. 190, document A/6309/Rev.1, part II, chap. II.

<sup>20</sup> Original title of the draft articles that were adopted in 1982.

<sup>21</sup> *Yearbook ... 1974*, vol. II (Part One), pp. 295-296, document A/9610/Rev.1, chap. IV, sect. B.



clude regional organizations. The final decision on whether to include such organizations in a future codification could be taken only when the study was completed.<sup>22</sup>

28. During the Commission's debate on the topic at its twenty-ninth session, in 1977, one member pointed out that

... it was not so much between the universal or regional character of international organizations that it was necessary to distinguish as between the major administrative and political organizations, such as the United Nations and its specialized agencies and the ever-increasing number of organizations of a more or less operational character which performed banking or commercial functions. ...<sup>23</sup>

29. As the previous Special Rapporteur indicated in his second report,<sup>24</sup> the Commission has consistently adopted an approach in dealing with topics relating to international organizations of not favouring the course of engaging itself in theoretical notions. The Commission has preferred instead to deal with the practical aspects and concrete issues of the rules which govern relations between States and international organizations. The beneficiaries of privileges and immunities—the organization; officials of the organization; experts on missions for, and persons having official business with, the organization; and resident representatives and observers sent by international organizations to States or by one international organization to another international organization—are institutions which exist at present within the framework of international organizations of a regional character. Moreover, the legislative sources—whether in the form of international instruments, national law or practice—in the area of regional organizations have become comparatively rich as a result of the increasing network of regional organizations and their subsidiary organs. The theory of functionalism has had its impact also in the domain of these organizations, as shown by the five-volume compilation of the principal legal instruments published by UNCTAD entitled “Economic co-operation and integration among developing countries”,<sup>25</sup> which contains an impressive list of organs established at the regional level and the texts of a number of conventions on their privileges and immunities.

30. When the time comes to prepare the draft article on the scope of the future draft articles, it will have to be decided to which organizations the draft applies. The first part of the topic dealt only with international organizations of a universal character; but a reservation is contained in article 2, paragraph 2, of the 1975 Vienna Convention to the effect that the limitation of the scope of the Convention to the representation of States in their relations with international organizations of a universal character does not affect the application to the relations of States with other organizations of any of the rules set forth in the Convention which would be ap-

plicable under international law independently of the Convention.<sup>26</sup>

## B. Legal capacity of international organizations

31. Once an international organization has been established by the will of States, that body, distinct from the member States which form it, acts and operates in the international community with its own personality. An international organization, regardless of any legal theory, must, for the purpose of fulfilling its task and the aims for which it has been established, operate even though its personality is not clearly defined. Here lies the criterion of the functional independence that an international organization must enjoy *vis-à-vis* the States which establish it.

32. However, the greatest difficulties arise precisely in determining the personality of the organization under general international law. This is what the member States acknowledge with great reticence. It is what compels Reuter to affirm that “there is no precise scope to the statement that international organizations possess legal personality, since each of them possesses a personality with a content of its own”.<sup>27</sup>

33. International law now accepts, alongside States—the original subjects of international law—other categories of subjects of such law. These new subjects of international law are: (a) bodies (organs, movements) which claim to represent a State that is in the process of formation and which are able to obtain recognition of some rights (belligerents, insurgents, national liberation movements) from some States; (b) international organizations, which, as subjects of international law, have specific and limited rights; (c) individuals, to whom the machinery of international organizations makes it possible to grant direct access to international relations, thereby converting them within certain limits into subjects of international law.<sup>28</sup>

34. Soviet thinking on international law also acknowledges that “the reciprocal relations between the United Nations and its Members assume forms that are completely specific under international law”. According to one Soviet writer, “the United Nations” (and one could equally say it of international intergovernmental organizations)

forms a subsidiary subject derived from international law, one that is created by the will of sovereign States, which are the primary and traditional subjects. The United Nations, viewed as a centre for harmonizing the activities of States on behalf of peace and the development of international co-operation on democratic foundations, enjoys

<sup>22</sup> *Yearbook ... 1983*, vol. II (Part Two), p. 80, para. 277 (c).

<sup>23</sup> *Yearbook ... 1977*, vol. I, p. 209, 1453rd meeting, para. 11 (Mr. Reuter).

<sup>24</sup> *Yearbook ... 1978*, vol. II (Part One), p. 283, document A/CN.4/311 and Add.1, para. 121.

<sup>25</sup> TD/B/609/Add.1, vols. I-V (1976).

<sup>26</sup> See paragraph (3) of the Commission's commentary to article 2 of the draft articles which were the source of the Convention (*Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.75.V.12), pp. 7-8, document A/CONF.67/4).

<sup>27</sup> P. Reuter, *Institutions internationales* (Paris, Presses universitaires de France, 1975) (collection “Thémis”), p. 263.

<sup>28</sup> P. Reuter, *Droit international public*, 5th ed. (Paris, Presses universitaires de France, 1976) (collection “Thémis”), p. 30.

a limited international legal personality which is absolutely indispensable for it to perform its functions.<sup>29</sup>

35. The ICJ, in its advisory opinion of 11 April 1949 on *Reparation for Injuries Suffered in the Service of the United Nations*, stated:

The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights,

and reached the conclusion that the United Nations

is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.<sup>30</sup>

36. Clearly, the freedom of action essential to an international organization in order for it to carry out with complete independence the functions assigned to it by the States which have established it may be hindered by the laws and regulations in force in the territory of a State in which the organization has to act.

37. States, by establishing an inter-State or intergovernmental organization, have to realize that, if the organization is to fulfil its task, they will have to relinquish certain prerogatives of sovereignty so that the organization, when it has to act in their respective territories, can do so with full independence. Furthermore, in this way some equality of treatment is established between the member States of the organization.

38. When the League of Nations was established in Geneva, it was Article 7 of its Covenant that led to an urgent study of the legal capacity of the organization. The Article specified that:

...

4. Representatives of the Members of the League and officials of the League when engaged on the business of the League shall enjoy diplomatic privileges and immunities.

5. The buildings and other property occupied by the League or its officials or by Representatives attending its meetings shall be inviolable.

This led to a *modus vivendi*, the outcome of negotiations between the League of Nations and the Swiss Federal Political Department in 1921, followed by a second *modus vivendi* in 1926 and another which was slightly amended in 1928. It was the corollary to Article 7 of the Covenant.

39. The message addressed on 28 July 1955 by the Swiss Federal Council to the Federal Assembly of the Confederation in connection with the legal status in Switzerland of the various international organizations with their headquarters in that country included the following statement:

An international organization, founded by a treaty between States, enjoys, in keeping with international law, a number of privileges in the State in which it has established its headquarters; it is the custom to conclude with that State an agreement specifying the terms and conditions of such privileges. It is not possible to subject the organization, whose members are States, to all the provisions of the national law of the State in which the organization has its principal headquarters or a subsidiary office. Otherwise, the State would be entitled to intervene directly or indirectly in the activities of the organization. A State

which has the honour to act as host on its territory to an international organization thus has the corresponding obligation embodied in international law of furnishing it with the means for it to carry out its activities with all the necessary independence.<sup>31</sup>

40. As to the United Nations, the Charter establishing it contains two Articles, namely Articles 104 and 105, relating to the legal capacity of the Organization and to privileges and immunities, respectively. Article 104 states:

The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

41. The constitutions (or whatever term may be used to describe the international constituent instruments) of most intergovernmental organizations include provisions similar to those in the Charter of the United Nations. In the case of UNESCO, for example, article XII of its Constitution<sup>32</sup> merely stipulates:

The provisions of Articles 104 and 105 of the Charter of the United Nations Organization concerning the legal status of that Organization, its privileges and immunities shall apply in the same way to this Organization.

42. Similar provisions can be found in the constituent instruments of ILO, articles 39 and 40; FAO, article XVI; WHO, articles 66 and 67; WMO, article 27; ICAO, article 47; IAEA, article XV; IMO, appendix II to the Convention; WIPO, article 12; IFAD, article 10; OAS, article 139 of the Charter; the Danube Commission, article 14; and EEC, article 211 and the various Protocols.

43. In some of the treaties establishing international organizations, reference is made to national law in regard to the legal capacity of the organization. For example, in the Treaties establishing EEC (art. 211) and EURATOM (art. 185) the personality of the Communities is defined as follows:

In each of the Member States, the Community shall enjoy the most extensive legal capacity accorded to legal persons under their laws; ...<sup>33</sup>

44. Most of the English-speaking States, in their legislation on international organizations, use the expression "body corporate", a category equivalent in internal law to "corporation", which is a somewhat broader concept than "company". In the Spanish-speaking countries it would be the equivalent of *sociedad* or *mutualidad*, although it cannot, generally speaking, be affirmed that such terms have the same legal connotation in the various national laws as do the English expressions. In Venezuela, for example, a *corporación* is usually a State body, such as the *Corporación de Fomento* or the *Corporación de Guayana*. The term "body corporate" is found in the legislation

<sup>29</sup> R. L. Bobrov, "0 pravovoy prirode OON" [the legal nature of the United Nations], *Sovetsky ezhegodnik mezhdunarodnogo prava*, 1959 [Soviet Yearbook of International Law, 1959] (Moscow), pp. 238-239. See also B. Dutoit, *Coexistence et droit international à la lumière de la doctrine soviétique* (Paris, Pedone, 1966), p. 105.

<sup>30</sup> *I.C.J. Reports 1949*, pp. 178-179.

<sup>31</sup> *Feuille fédérale de la Confédération suisse*, 107th year, vol. II, No. 35 (2 September 1955).

<sup>32</sup> UNESCO, *Manual of the General Conference*, 1984 edition.

<sup>33</sup> Treaties of Rome of 25 March 1957 establishing EEC and EURATOM (*Treaties Establishing the European Communities* (Luxembourg, Office for Official Publications of the European Communities, 1973), pp. 327 and 617). Article 6, third paragraph, of the Treaty of Paris of 18 April 1951 establishing ECSC (*ibid.*, p. 22) employs similar wording. See J. Duffar, *Contribution à l'étude des privilèges et immunités des organisations internationales* (Paris, Librairie générale de droit et de jurisprudence, 1982), p. 14.

on international organizations of Australia,<sup>34</sup> Canada,<sup>35</sup> Ghana,<sup>36</sup> New Zealand<sup>37</sup> and the United Kingdom.<sup>38</sup>

45. The four financial institutions established in the United States of America have availed themselves even more of this right and inserted in their constituent instruments a detailed description of the legal capacity they enjoy from the moment of establishment. This can be seen from article IX of the Articles of Agreement of IMF, article VII of those of IBRD, article VI of those of IFC and article VIII of those of IDA.

46. Generally speaking, the legal capacity of international organizations is defined in a separate diplomatic instrument negotiated on the basis of the right to such capacity, to which such organizations are deemed to be entitled.

47. In the past, some agreements establishing international organizations have bound the relevant organizations even more to national law, as did, for example, the Convention regarding the Régime of Navigation on the Danube (Belgrade, 18 August 1948),<sup>39</sup> which states (article 14) that the Danube Commission "shall have the rights of a legal entity in accordance with the laws of the State in which the Commission has its seat".

48. In some countries, the right of organizations to acquire movable or immovable property must be exercised in conformity with local legislation, as in the case of Egypt,<sup>40</sup> or in accordance with the country's constitution, as in the case of Mexico (article 27) and Venezuela (article 8).

49. Sometimes, an intergovernmental organization is granted legal personality under a unilateral instrument enacted by a member State. Such is the case with the United States, which promulgated the following instruments on international organizations:

*International Organizations Immunities Act*, of 29 December 1945, better known as Public Law 291;<sup>41</sup> Executive Order No. 9698, of 19 February 1946, designating public international organizations entitled to enjoy certain privileges, exemptions and immunities, as amended by Executive Order No. 10083, of 10 October 1949.<sup>42</sup>

These two instruments were freely granted and not negotiated. In the first of these texts, the United States expressly recognized (title I, sect. 2 (a)) that international organizations covered by the Act, to the extent consistent with the instrument creating them, have the

capacity (i) to contract; (ii) to acquire and dispose of real and personal property; (iii) to institute legal proceedings.

50. The Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946, clarifies in article I the meaning of Article 104 of the Charter as follows:

Section 1. The United Nations shall possess juridical personality. It shall have the capacity:

- (a) to contract;
- (b) to acquire and dispose of immovable and movable property;
- (c) to institute legal proceedings.

51. As has been seen, the constituent instruments of universal international organizations, like the Convention on the Privileges and Immunities of the Specialized Agencies and its Annexes, as well as the constituent instruments and other documents of various regional international organizations, include provisions concerning the legal capacity of those organizations that may vary as regards form but are analogous as regards substance. The Convention on the Privileges and Immunities of the Specialized Agencies, like the Convention on the Privileges and Immunities of the United Nations, establishes in article II that:

The specialized agencies shall possess juridical personality. They shall have the capacity (a) to contract, (b) to acquire and dispose of immovable and movable property, (c) to institute legal proceedings.

52. Switzerland has expressly recognized the international personality of the United Nations and its legal capacity in the Interim Arrangement on Privileges and Immunities of the United Nations,<sup>43</sup> article I of which states: "The Swiss Federal Council recognizes the international personality and legal capacity of the United Nations. ..."

53. Despite what has been said above, the precise extent of the legal capacity of international organizations, and in particular their capacity to conclude treaties, is still a matter of controversy in theory and in legal thinking. Some writers adhere to the restrictive theory known as "delegation of powers", whereby the capacity of international organizations is confined to such acts and rights as are specified in their respective constituent instruments. Other writers uphold the theory of "implied or inherent rights".<sup>44</sup> The ICJ has recognized that the capacities of the United Nations are not confined to those specified in its constituent instrument. In its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*, the Court stated:

... Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.<sup>45</sup>

Similarly, in its advisory opinion of 13 July 1954 on *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, the ICJ pointed out

<sup>34</sup> See United Nations, *Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations*, vol. II (Sales No. 61.V.3), p. 4.

<sup>35</sup> *Ibid.*, pp. 18 and 21.

<sup>36</sup> *Ibid.*, p. 28.

<sup>37</sup> *Ibid.*, p. 38.

<sup>38</sup> *Ibid.*, pp. 54, 61, 65, 71, 77, 81 and 82.

<sup>39</sup> United Nations, *Treaty Series*, vol. 33, p. 197.

<sup>40</sup> See article II of the Agreement of 27 August 1953 between ICAO and Egypt regarding privileges, immunities and facilities in Egyptian territory (*ibid.*, vol. 215, p. 371).

<sup>41</sup> *United States Statutes at Large*, 1945, vol. 59, part 1, p. 669, chap. 652.

<sup>42</sup> *Federal Register* (Washington, D.C.), vol. 14, p. 6161, No. 197 (12 October 1949).

<sup>43</sup> United Nations, *Treaty Series*, vol. 1, p. 163.

<sup>44</sup> See the substantial study by F. Seyersted, "International personality of intergovernmental organizations: Do their capacities really depend upon their constitutions?", *The Indian Journal of International Law* (New Delhi), vol. 4, No. 1 (1964), p. 1.

<sup>45</sup> *I.C.J. Reports 1949*, p. 182.

that, in the Charter of the United Nations, there was "no express provision for the establishment of judicial bodies or organs and no indication to the contrary"; but it held that the capacity to establish a tribunal, to do justice as between the Organization and the staff members, "arises by necessary intendment out of the Charter".<sup>46</sup>

54. A scrutiny of the various instruments in which international organizations are granted or recognized as having legal personality and capacity enables them to be grouped in five major categories, according to their form:

(1) The Convention on the Privileges and Immunities of the United Nations, of 13 February 1946, and the Convention on the Privileges and Immunities of the Specialized Agencies, of 21 November 1947;

(2) Headquarters agreements;

(3) Constitutions which incorporate matters pertaining to the legal personality and capacity of the organization as an integral part of the instrument;

(4) Laws or acts unilaterally promulgated under national legislation;

(5) Technical assistance contracts which contain a bilaterally agreed clause referring to an existing convention to which the State in receipt of the technical assistance is not a party.

55. A detailed examination of the replies to the questionnaire sent by the Legal Counsel of the United Nations to the specialized agencies and IAEA on 13 March 1978, pursuant to the Commission's decision at its twenty-ninth session, in 1977,<sup>47</sup> as well as to the questionnaire sent to regional organizations on 5 January 1984, pursuant to the Commission's decision at its thirty-fifth session in 1983,<sup>48</sup> reveals that virtually all international (intergovernmental) organizations enjoy legal personality and possess legal capacity.<sup>49</sup> In practice, no major drawbacks have been encountered in this regard. Indeed, there is a positive trend towards increased affirmation of the recognition of the legal personality and capacity of international organizations.

56. From what has been established by reviewing the five groups of instruments enumerated above (para. 54) and from a scrutiny of the replies to the above-mentioned questionnaires the conclusion can be reached that international organizations are recognized, although in some instances with certain limitations, as having legal personality and capacity and that, in practice, both internationally and internally, no major difficulties have been encountered in using such powers.

57. In the light of the foregoing, the draft articles on the second part of the topic should include a provision on the legal personality of international organizations and on the capacity derived therefrom. The Special Rapporteur therefore suggests that this question should be the subject of title I of the draft articles; the text

which he submits for the Commission's consideration appears at the end of the present report (para. 74 below).

58. As explained above (para. 26), the term "international organization" used in the present draft articles will, of course, have the meaning given to it in the introductory article, which will be drafted in due course.

59. Title I of the draft would be incomplete without a reference to the capacity of international organizations to conclude treaties. As already seen (paras. 32 *et seq.* above), the internal personality of international organizations is accepted by member States without great difficulty. This is explicable. For even though the principle of this personality emanates from general international law, it operates within the ambit of the territorial sovereignty of those States, that is to say under their exclusive control.

60. Where international personality is concerned, States are more reticent. Their reticence varies according to the States concerned and according to their conception of international organizations (see paras. 33 *et seq.* above). The consequences of the possession of international personality are, of course, of the greatest importance. States lose control over the determination and exercise of the international legal capacity of international organizations. The determination and exercise of their international legal capacity will depend on international law alone. They will thus, to some extent, be placed on the same level as States themselves, as subjects of international law and active members of the international community.

61. Legal doctrine and jurisprudence show a marked tendency to recognize that, although international organizations enjoy international legal competence, that enjoyment is neither general nor complete. It has certain limitations, since, unlike States, international organizations are not sovereign entities. These limitations are defined by the purposes for which the organization was established. The legal régime of the limitations is determined by the special function of the organization. The organization is a medium for carrying out the purposes of general interest of its creators. This is shown by all constituent instruments of international organizations.

62. International organizations, according to their speciality, exercise the powers attributed to them within the framework of their functions, which depend on the purposes assigned to them by their creators. Thus, as has already been seen, their powers are functional.

63. In case this was not sufficient, the theory of implied powers has been developed, which would seem to be no more than an amplified interpretation of functionalism.<sup>50</sup> Although international organizations can be given only functions and powers which are related to their purposes, they must be given all the powers necessary for the realization of those purposes. This goes beyond the limits set by the texts which this theory seeks to supplement.

<sup>46</sup> *I.C.J. Reports 1954*, pp. 56-57.

<sup>47</sup> *Yearbook ... 1977*, vol. II (Part Two), p. 127, para. 95.

<sup>48</sup> *Yearbook ... 1983*, vol. II (Part Two), p. 81, para. 277 (f).

<sup>49</sup> See the supplementary study prepared by the Secretariat in the light of the replies to the questionnaire of 13 March 1978, document A/CN.4/L.383 and Add.1-3.

<sup>50</sup> See Nguyen Quoc Dinh, *Droit international public*, 2nd ed., rev. by P. Daillier and A. Pellet (Paris, Librairie générale de droit et de jurisprudence, 1980), pp. 486 *et seq.*

64. The theory has its origin in an old judgment of the Supreme Court of the United States of America. In its decision on the powers attributed to the Federation and the powers reserved to the constituent states, the Court, following the opinion of Chief Justice Marshall, recognized that the Federation had the right to carry out acts not expressly authorized in the Federal Constitution, on the following condition:

Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution are constitutional.<sup>31</sup>

The PCIJ embodied this reasoning in the sphere of international organizations in two well-known advisory opinions. The first of these opinions is that relating to the *Competence of the ILO to Regulate Incidentally the Personal Work of the Employer*, delivered on 23 July 1926.<sup>32</sup> The second, delivered on 8 December 1927, relates to the *Jurisdiction of the European Commission of the Danube*. In the latter opinion, the PCIJ stated:

As the European Commission is not a State, but an international institution with a special purpose, it only has the functions bestowed upon it by the Definitive Statute with a view to the fulfilment of that purpose, but it has power to exercise these functions to their full extent, in so far as the Statute does not impose restrictions upon it.<sup>33</sup>

The ICJ, in its advisory opinion of 11 April 1949 on *Reparation for Injuries Suffered in the Service of the United Nations*, cited earlier (paras. 35 and 53 above), used terms which some writers consider to have been the starting-point of the theory of the "implied powers" of international organizations. What is certain is that, since then, the jurisprudence of the ICJ has been consistent, as is shown by its advisory opinions in the following cases: *International Status of South West Africa*, 11 July 1950;<sup>34</sup> *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, 13 July 1954;<sup>35</sup> *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, 20 July 1962;<sup>36</sup> and *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, 21 June 1971.<sup>37</sup>

65. The ICJ even managed to apply similar reasoning to itself, when it invoked its "inherent powers". In its judgment of 2 December 1963 in the *Northern Cameroons* case, it stated that:

There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore.<sup>38</sup>

Similarly, in the *Nuclear Tests* case, the Court based its judgments of 20 December 1974 on the same idea, recognizing that it had

an inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction

over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the "inherent limitations on the exercise of the judicial function" of the Court, and to "maintain its judicial character" ...<sup>39</sup>

66. The Court nevertheless imposes a limit on this concept, in that it recognizes only implied powers confirmed, and not contradicted by, the practice of the organization in question. As Reuter points out,<sup>40</sup> in its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*, the Court, by recognizing a very wide legal personality of the United Nations,<sup>41</sup> laid the basis of the theory of the international organization. The legal basis for this opinion of the Court is to be found in the dictum referring to "practice", which reads:

... the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.<sup>42</sup>

This same basis is to be found in the 1962 advisory opinion of the Court on *Certain Expenses of the United Nations* and in its 1971 advisory opinion on *Namibia*, both already cited (para. 64 above).

67. Article 6 of the draft articles on the law of treaties between States and international organizations or between international organizations<sup>43</sup> provides:

The capacity of an international organization to conclude treaties is governed by the relevant rules of that organization.

and article 2, paragraph 1 (j), of that draft, which reproduces unchanged article 1, paragraph 1 (34), of the 1975 Vienna Convention on the Representation of States, provides:

(j) "rules of the organization" means, in particular, the constituent instruments, relevant decisions and resolutions, and established practice of the organization.

68. It is thus a matter of the "practice of the organization"; and that practice must be "established". Lastly, it must be a practice that is not contested by the member States, which also makes it a practice of those States (custom).<sup>44</sup>

69. All that has been said in the preceding paragraphs about the international personality of international organizations may be summed up by the conclusion of the ICJ in its frequently cited advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*. The arguments set out by the Court in that opinion, rightly considered to be of the greatest importance for the development of what has come to be called the law of international organizations, have been discussed, analysed and amplified by legal doctrine and jurisprudence. The literature on the subject grows more extensive every day in studies on international law. As is known, the General Assembly, in accordance with its

<sup>31</sup> *McCulloch v. State of Maryland* (1819) (H. Wheaton, *Reports of Cases Argued and Adjudged in the Supreme Court of the United States* (New York, 1910), vol. IV, 4th ed., p. 316, at p. 421).

<sup>32</sup> *P.C.I.J., Series B, No. 13*, p. 18.

<sup>33</sup> *P.C.I.J., Series B, No. 14*, p. 64.

<sup>34</sup> *I.C.J. Reports 1950*, p. 128.

<sup>35</sup> *I.C.J. Reports 1954*, p. 47.

<sup>36</sup> *I.C.J. Reports 1962*, p. 151.

<sup>37</sup> *I.C.J. Reports 1971*, p. 16.

<sup>38</sup> *I.C.J. Reports 1963*, p. 29.

<sup>39</sup> *I.C.J. Reports 1974*, p. 259, para. 23 (*Australia v. France*), and p. 463, para. 23 (*New Zealand v. France*).

<sup>40</sup> P. Reuter, "Quelques réflexions sur la notion de 'pratique internationale', spécialement en matière d'organisations internationales", *Studi in onore di Giuseppe Sperduti* (Milan, Giuffrè, 1984), p. 200.

<sup>41</sup> *I.C.J. Reports 1949*, pp. 178-179.

<sup>42</sup> *Ibid.*, p. 180.

<sup>43</sup> See footnote 18 above.

<sup>44</sup> See Reuter, "Quelques réflexions sur la notion de 'pratique internationale' ...", *loc. cit.*, pp. 204-205.

resolution 258 (III) of 3 December 1948, consulted the ICJ on the question whether the United Nations, as an Organization, had the capacity to bring an international claim against a Government; in other words, whether the United Nations had international legal personality, i.e. whether it was a subject of international law. In its well-reasoned opinion, the Court stated, with respect to the United Nations, that "it must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged", and that "accordingly, the Court has come to the conclusion that the Organization is an international person".<sup>65</sup> The Court went even further by stating quite unequivocally that the international personality of the United Nations could be effective against non-member States regardless of any recognition of the Organization on their part, by reason of the pre-eminence of the Charter, since

the Court's opinion is that fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone ...<sup>66</sup>

70. Although the Court was referring to the United Nations, the solution recommended in the case of that Organization now extends to all international (intergovernmental) organizations, subject of course to the limitations imposed by the mission and functions of each organization. This extension, accepted in a general form by doctrine, is in accordance with reality, since all international (intergovernmental) organizations are legal persons to which a specific mission is entrusted; and while that mission may differ in importance for each of them, it is identical in so far as it concerns their international character.

71. Since international organizations possess international personality, although it is limited by the principle of specialization, which means that they exercise only the powers deriving from the functions entrusted to them by their constituent instruments, i.e. functional competence, they possess legal powers at the international level. *Inter alia*, they have the right to active and passive diplomatic representation, the right to conclude international agreements in their relations with their member States and with other organizations, the right to exercise functional protection of their agents (similar to diplomatic protection, as will be seen later in the Special Rapporteur's study) and the right to bring international legal actions, although in the case of the ICJ they can only request advisory opinions (Article 65 of the Statute of the Court).<sup>67</sup>

72. As has already been said, one of the most important consequences deriving from the international personality accorded to international organizations is, of course, the capacity they acquire to conclude treaties, a question with which the Commission has already con-

cerned itself. By adopting article 6 of the draft articles on the law of treaties between States and international organizations or between international organizations (cited above, para. 67), the Commission took it as settled that international organizations have the capacity to conclude treaties. The purpose of article 6 is to establish the régime governing that capacity.

73. It seems pertinent to reproduce here the part of the Commission's commentary to article 6 that sets out the factors which determined its wording:

(1) When the question of an article dealing with the capacity of international organizations to conclude treaties was first discussed in the Commission, members were divided on the matter; varied and finely differentiated views were expressed on this subject. With some slight simplification, these may be reduced to two general points of view. According to the first, such an article would be of doubtful utility, or should at least be limited to stating that an organization's capacity to conclude treaties depends only on the organization's rules. According to the second point of view, the article should at least mention that international law lays down the principle of such capacity; from this it follows, at least in the opinion of some members of the Commission, that, in the matter of treaties, the capacity of international organizations is the ordinary law rule, which can be modified only by express restrictive provisions of constituent instruments.

(2) The wording eventually adopted by the Commission for article 6 is the result of a compromise based essentially on the finding that this article should in no way be regarded as having the purpose or effect of deciding the question of the status of international organizations in international law; that question remains open, and the proposed wording is compatible both with the concept of general international law as the basis of international organizations' capacity and with the opposite concept. The purpose of article 6 is merely to lay down a rule relating to the law of treaties; the article indicates, for the sole purposes of the régime of treaties to which international organizations are parties, by what rules the capacity to conclude treaties should be assessed.

(3) Thus set in context, article 6 is nevertheless of great importance. It reflects the fact that every organization has its own distinctive legal image which is recognizable, in particular, in the individualized capacity of that organization to conclude international treaties. Article 6 thus applies the fundamental notion of "rules of any international organization" already laid down in article 2, paragraph 2, of the present draft. The addition in article 6 of the adjective "relevant" to the expression "rules of that organization" is due simply to the fact that, while article 2, paragraph 2, relates to the "rules of any organization" *as a whole*, article 6 concerns only *some* of those rules, namely those which are relevant in settling the question of the organization's capacity.<sup>68</sup>

74. From all the foregoing it may be concluded that it is appropriate to supplement title I of the draft articles as proposed by the Special Rapporteur (see para. 57 above) with a provision on the capacity of international organizations to conclude treaties. This provision, reproducing the content of article 6 of the draft articles on the law of treaties between States and international organizations or between international organizations, could be included either as paragraph 2 of article 1 of the draft, or as a separate article which would become article 2. The Special Rapporteur therefore submits the following two alternatives:

## TITLE I

### LEGAL PERSONALITY

#### ALTERNATIVE A

##### Article 1

**1. International organizations shall enjoy legal personality under international law and under the internal**

<sup>65</sup> *I.C.J. Reports 1949*, p. 179.

<sup>66</sup> *Ibid.*, p. 185.

<sup>67</sup> For an analysis of the concept and preconditions of the international legal personality of international organizations and of the legal powers deriving from that personality, see M. Rama-Montaldo, "International legal personality and implied powers of international organizations", *The British Year Book of International Law*, 1970 (London), vol. 44, p. 111.

<sup>68</sup> *Yearbook ... 1982*, vol. II (Part Two), pp. 23-24.

law of their member States. They shall have the capacity, to the extent compatible with the instrument establishing them, to:

- (a) contract;
- (b) acquire and dispose of movable and immovable property; and
- (c) institute legal proceedings.

2. The capacity of an international organization to conclude treaties is governed by the relevant rules of that organization.

ALTERNATIVE B

*Article 1*

International organizations shall enjoy legal personality under international law and under the internal

law of their member States. They shall have the capacity, to the extent compatible with the instrument establishing them, to:

- (a) contract;
- (b) acquire and dispose of movable and immovable property; and
- (c) institute legal proceedings.

*Article 2*

The capacity of an international organization to conclude treaties is governed by the relevant rules of that organization.





## CHECK-LIST OF DOCUMENTS OF THE THIRTY-SEVENTH SESSION

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/384	Survey of State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law, prepared by the Secretariat	Mimeographed.
A/CN.4/385	Provisional agenda	<i>Idem.</i> For the agenda as adopted, see <i>Yearbook ... 1985</i> , vol. II (Part Two), chap. I, para. 9.
A/CN.4/386	Filling of casual vacancies (article 11 of the statute): note by the Secretariat	Reproduced in the present volume (p. 1).
A/CN.4/386/Add.1	<i>Idem</i> —Addendum to the note by the Secretariat: list of candidates and curricula vitae	Mimeographed.
A/CN.4/387 [and Corr.1]	Third report on the draft Code of Offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur	Reproduced in the present volume (p. 63).
A/CN.4/388 [and Corr.1]	Seventh report on jurisdictional immunities of States and their property, by Mr. Sompong Sucharitkul, Special Rapporteur	<i>Ibid.</i> (p. 21).
A/CN.4/389 [and Corr.1]	Sixth report on the content, forms and degrees of international responsibility (part 2 of the draft articles); and “Implementation” ( <i>mise en œuvre</i> ) of international responsibility and the settlement of disputes (part 3 of the draft articles), by Mr. Willem Riphagen, Special Rapporteur	<i>Ibid.</i> (p. 3).
A/CN.4/390 [and Corr.1]	Sixth report on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, by Mr. Alexander Yankov, Special Rapporteur	<i>Ibid.</i> (p. 49).
A/CN.4/391 and Add.1 [and Add.1/Corr.2]	Second report on relations between States and international organizations (second part of the topic), by Mr. Leonardo Díaz González, Special Rapporteur	<i>Ibid.</i> (p. 103).
A/CN.4/392 and Add.1 and 2	Draft Code of Offences against the Peace and Security of Mankind: observations of Member States and intergovernmental organizations received pursuant to General Assembly resolution 39/80	<i>Ibid.</i> (p. 84).
A/CN.4/393	Preliminary report on the law of the non-navigational uses of international watercourses, by Mr. Stephen C. McCaffrey, Special Rapporteur	<i>Ibid.</i> (p. 87).
A/CN.4/394	Preliminary report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Julio Barboza, Special Rapporteur	<i>Ibid.</i> (p. 97).
A/CN.4/L.382	Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-ninth session of the General Assembly	Mimeographed.
A/CN.4/L.383 and Add.1-3	Relations between States and international organizations (second part of the topic). The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities: supplementary study prepared by the Secretariat	<i>Idem.</i>
A/CN.4/L.384	Draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. Texts adopted by the Drafting Committee: articles 28 to 32, 34 and 35	Texts reproduced in <i>Yearbook ... 1985</i> , vol. I, summary records of the 1911th to 1913th meetings.
A/CN.4/L.386	Draft report of the International Law Commission on the work of its thirty-seventh session: chapter I (Organization of the session)	Mimeographed. For the adopted text, see <i>Official Records of the General Assembly, Fortieth Session, Supplement No. 10</i> (A/40/10). The final text appears in <i>Yearbook ... 1985</i> , vol. II (Part Two).
A/CN.4/L.387 and Add.1	<i>Idem</i> : chapter II (Draft Code of Offences against the Peace and Security of Mankind)	<i>Idem.</i>
A/CN.4/L.388 and Add.1	<i>Idem</i> : chapter IV (Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier)	<i>Idem.</i>
A/CN.4/L.389 and Add.1 [and Add.1/Corr.1] and Add.2 and 3	<i>Idem</i> : chapter V (Jurisdictional immunities of States and their property)	<i>Idem.</i>

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.390 and Add.1	<i>Idem</i> : chapter III (State responsibility)	<i>Idem</i> .
A/CN.4/L.391	<i>Idem</i> : chapter VI (Relations between States and international organizations (second part of the topic))	<i>Idem</i> .
A/CN.4/L.392	<i>Idem</i> : chapter VII (The law of the non-navigational uses of international watercourses)	<i>Idem</i> .
A/CN.4/L.394 and Add.1-3	<i>Idem</i> : chapter VIII (Other decisions and conclusions of the Commission)	<i>Idem</i> .
A/CN.4/L.395	Draft articles on State responsibility (part 2 of the draft articles). Text adopted by the Drafting Committee: article 5	Text reproduced in <i>Yearbook ... 1985</i> , vol. I, summary record of the 1929th meeting, para. 26.
A/CN.4/L.396	Draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. Text adopted by the Drafting Committee: article 23	<i>Idem</i> , 1930th meeting, para. 27.
A/CN.4/L.397	Draft articles on jurisdictional immunities of States and their property. Texts adopted by the Drafting Committee: articles 19 and 20	<i>Idem</i> , 1931st meeting, para. 12.
A/CN.4/SR.1875-A/CN.4/SR.1939	Provisional summary records of the 1875th to 1939th meetings of the International Law Commission	Mimeographed. The final text appears in <i>Yearbook ... 1985</i> , vol. I.



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