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### Report of the International Law Commission on the work of its forty-first session (2 May–21 July 1989)

#### CONTENTS

	<i>Page</i>
Abbreviations .....	4
Note concerning quotations .....	4
<i>Chapter</i>	
I. ORGANIZATION OF THE SESSION .....	Paragraphs 1-16      5
A. Membership .....	2      5
B. Officers .....	3-4      5
C. Drafting Committee .....	5      5
D. Secretariat .....	6      6
E. Agenda .....	7-8      6
F. General description of the work of the Commission at its forty-first session .....	9-16      6
II. STATUS OF THE DIPLOMATIC COURIER AND THE DIPLOMATIC BAG NOT ACCOMPANIED BY DIPLOMATIC COURIER .....	17-72      8
A. Introduction .....	17-65      8
1. Historical review of the work of the Commission .....	17-29      8
2. Consideration of the topic at the present session .....	30      9
3. General observations on the draft articles .....	31-65      9
(a) Purpose and scope of the draft .....	31-35      9
(b) Methodological questions .....	36-60      10
(i) Comprehensive and uniform approach: extent and limitations .....	36-49      10
(ii) Functional necessity as a basic requirement for the status of the diplomatic courier and the diplomatic bag .....	50-53      11
(iii) Relationship with other conventions and agreements in the field of diplomatic and consular relations .....	54-60      12
(c) Form of the draft .....	61-65      13
B. Recommendation of the Commission .....	66-70      13
C. Resolution adopted by the Commission .....	71      13
D. Draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and draft Optional Protocols thereto .....	72      14
1. Draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier .....	14
PART I. GENERAL PROVISIONS	
Article 1. Scope of the present articles .....	14
Commentary .....	14
Article 2. Couriers and bags not within the scope of the present articles .....	15
Commentary .....	15
Article 3. Use of terms .....	15
Commentary .....	16
Article 4. Freedom of official communications .....	18
Commentary .....	18
Article 5. Duty to respect the laws and regulations of the receiving State and the transit State .....	19
Commentary .....	19
Article 6. Non-discrimination and reciprocity .....	19
Commentary .....	19
PART II. STATUS OF THE DIPLOMATIC COURIER AND THE CAPTAIN OF A SHIP OR AIRCRAFT ENTRUSTED WITH THE DIPLOMATIC BAG	
Article 7. Appointment of the diplomatic courier .....	20
Commentary .....	20
Article 8. Documentation of the diplomatic courier .....	21
Commentary .....	21
Article 9. Nationality of the diplomatic courier .....	21
Commentary .....	21
Article 10. Functions of the diplomatic courier .....	22
Commentary .....	22

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

<i>Chapter</i>	<i>Page</i>
Article 11. End of the functions of the diplomatic courier .....	23
Commentary .....	23
Article 12. The diplomatic courier declared <i>persona non grata</i> or not acceptable .....	23
Commentary .....	24
Article 13. Facilities accorded to the diplomatic courier .....	24
Commentary .....	24
Article 14. Entry into the territory of the receiving State or the transit State .....	26
Commentary .....	26
Article 15. Freedom of movement .....	26
Commentary .....	26
Article 16. Personal protection and inviolability .....	27
Commentary .....	27
Article 17. Inviolability of temporary accommodation .....	27
Commentary .....	28
Article 18. Immunity from jurisdiction .....	29
Commentary .....	29
Article 19. Exemption from customs duties, dues and taxes .....	32
Commentary .....	32
Article 20. Exemption from examination and inspection .....	34
Commentary .....	34
Article 21. Beginning and end of privileges and immunities .....	34
Commentary .....	34
Article 22. Waiver of immunities .....	36
Commentary .....	36
Article 23. Status of the captain of a ship or aircraft entrusted with the diplomatic bag .....	37
Commentary .....	38
<b>PART III. STATUS OF THE DIPLOMATIC BAG</b>	
Article 24. Identification of the diplomatic bag .....	39
Commentary .....	39
Article 25. Contents of the diplomatic bag .....	40
Commentary .....	40
Article 26. Transmission of the diplomatic bag by postal service or any mode of transport .....	41
Commentary .....	41
Article 27. Safe and rapid dispatch of the diplomatic bag .....	42
Commentary .....	42
Article 28. Protection of the diplomatic bag .....	42
Commentary .....	43
Article 29. Exemption from customs duties and taxes .....	44
Commentary .....	44
<b>PART IV. MISCELLANEOUS PROVISIONS</b>	
Article 30. Protective measures in case of <i>force majeure</i> or other exceptional circumstances .....	44
Commentary .....	44
Article 31. Non-recognition of States or Governments or absence of diplomatic or consular relations .....	45
Commentary .....	46
Article 32. Relationship between the present articles and other conventions and agreements .....	46
Commentary .....	46
2. Draft Optional Protocol One on the Status of the Courier and the Bag of Special Missions .....	47
Commentary .....	48
3. Draft Optional Protocol Two on the Status of the Courier and the Bag of International Organizations of a Universal Character .....	48
Commentary .....	49
<i>Paragraphs</i>	
<b>III. DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND.....</b>	<b>50</b>
A. Introduction .....	73-217
	73-82
B. Consideration of the topic at the present session .....	50
1. War crimes .....	83-216
(a) Concept of gravity and definition of war crimes .....	88-141
(b) Use of terms and definition of war crimes .....	91-103
(c) Method of definition .....	104-108
(d) Specific comments on the proposed list of war crimes .....	109-121
(e) Drafting proposals on article 13 .....	122-136
	137-141
2. Crimes against humanity .....	142-210
(a) General comments .....	142-158
(b) Genocide .....	159-161
(c) <i>Apartheid</i> .....	162-168
(d) Slavery, other forms of bondage and forced labour .....	169-174
(e) Expulsion of populations, their forcible transfer and related crimes .....	175-184
(f) Other inhuman acts, including destruction of property .....	185-198
(g) Attacks on property and assets of vital importance for mankind, such as the human environment .....	199-204
(h) International traffic in narcotic drugs .....	205-210
3. Implementation of the code .....	211-216
C. Draft articles on the draft Code of Crimes against the Peace and Security of Mankind .....	66
1. Texts of the draft articles provisionally adopted so far by the Commission .....	217

<i>Chapter</i>	<i>Page</i>
2. Texts of draft articles 13, 14 and 15, with commentaries thereto, provisionally adopted by the Commission at its forty-first session .....	68
<b>CHAPTER II. ACTS CONSTITUTING CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND</b>	
<b>PART I. CRIMES AGAINST PEACE</b>	
Article 13. Threat of aggression .....	68
Commentary .....	68
Article 14. Intervention .....	69
Commentary .....	69
Article 15. Colonial domination and other forms of alien domination .....	70
Commentary .....	70
<b>IV. STATE RESPONSIBILITY</b> .....	
A. Introduction .....	218-302
B. Consideration of the topic at the present session .....	218-224
1. Comments on the proposed structure of parts 2 and 3 of the draft .....	225-301
(a) Separate treatment of the legal consequences of international delicts and of international crimes .....	231-246
(b) Substantive and procedural legal consequences .....	247-255
2. Comments on draft articles 6 and 7 of part 2 .....	256-301
Article 6 (Cessation of an internationally wrongful act of a continuing character) .....	256-276
Article 7 (Restitution in kind) .....	277-301
C. Draft articles on State responsibility .....	302
<b>PART 2. CONTENT, FORMS AND DEGREES OF INTERNATIONAL RESPONSIBILITY</b>	
Texts of the draft articles provisionally adopted so far by the Commission .....	81
<b>V. INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW</b> .....	
A. Introduction .....	303-397
B. Consideration of the topic at the present session .....	303-306
1. Introduction of the fifth report by the Special Rapporteur .....	307-397
2. Consideration of draft articles 1 to 9 by the Commission .....	310-334
(a) General comments .....	335-376
(i) Approach to the topic .....	335-350
(ii) Scope of the topic .....	336-341
(b) Comments on specific articles .....	342-350
(i) Chapter I. General provisions .....	351-376
Article 1 (Scope of the present articles) .....	352-367
Article 2 (Use of terms) .....	352-358
Article 3 (Assignment of obligations) .....	359-361
Article 4 (Relationship between the present articles and other international agreements) .....	362-363
(ii) Chapter II. Principles .....	364-367
Article 5 (Absence of effect upon other rules of international law) .....	368-376
(iii) Chapter III. Notification, information and warning by the affected State .....	368-376
Article 6 (Freedom of action and the limits thereto) .....	368
Article 7 (Co-operation) .....	369-371
Article 8 (Prevention) .....	372-373
Article 9 (Reparation) .....	374-376
3. Consideration of draft articles 10 to 17 by the Commission .....	377-397
(a) General comments .....	377-384
(b) Comments on specific articles .....	385-396
Chapter III. Notification, information and warning by the affected State .....	385-386
Article 10 (Assessment, notification and information) .....	387-388
Article 11 (Procedure for protecting national security or industrial secrets) .....	389
Article 12 (Warning by the presumed affected State) .....	389
Article 13 (Period for reply to notification. Obligation of the State of origin) .....	390
Article 14 (Reply to notification) .....	391-392
Article 15 (Absence of reply to notification) .....	393-395
Article 16 (Obligation to negotiate) .....	396
Article 17 (Absence of reply to the notification under article 12) .....	396
<b>VI. JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY</b> .....	
A. Introduction .....	398-613
B. Consideration of the topic at the present session .....	398-402
1. Draft articles provisionally adopted on first reading .....	403-613
(a) Part I. Introduction .....	414-610
Article 1 (Scope of the present articles) .....	414-452
Article 2 (Use of terms) .....	414-417
Article 3 (Interpretative provisions) .....	418-442
Article 4 (Privileges and immunities not affected by the present articles) .....	443-450
Article 5 (Non-retroactivity of the present articles) .....	451-452
(b) Part II. General principles .....	453-486
Article 6 (State immunity) .....	453-463
Article 7 (Modalities for giving effect to State immunity) .....	464-467
Article 8 (Express consent to the exercise of jurisdiction) .....	468-475
Article 9 (Effect of participation in a proceeding before a court) .....	476-480
Article 10 (Counter-claims) .....	481-486

<i>Chapter</i>		<i>Paragraphs</i>	<i>Page</i>
(c) Part III. [Limitations on] [Exceptions to] State immunity .....	.....	487-568	107
Article 11 (Commercial contracts) .....	.....	489-505	107
Article 12 (Contracts of employment) .....	.....	506-513	109
Article 13 (Personal injuries and damage to property) .....	.....	514-526	110
Article 14 (Ownership, possession and use of property) .....	.....	527-532	112
Article 15 (Patents, trade marks and intellectual or industrial property) .....	.....	533-536	112
Article 16 (Fiscal matters) .....	.....	537-540	113
Article 17 (Participation in companies or other collective bodies) .....	.....	541-544	113
Article 18 (State-owned or State-operated ships engaged in commercial service) .....	.....	545-553	113
Article 19 (Effect of an arbitration agreement) .....	.....	554-563	115
Article 20 (Cases of nationalization) .....	.....	564-568	116
(d) Part IV. State immunity in respect of property from measures of constraint .....	.....	569-590	116
Article 21 (State immunity from measures of constraint) .....	.....	569-579	116
Article 22 (Consent to measures of constraint) .....	.....	580-582	117
Article 23 (Specific categories of property) .....	.....	583-590	118
(e) Part V. Miscellaneous provisions .....	.....	591-610	118
Article 24 (Service of process) .....	.....	591-594	118
Article 25 (Default judgment) .....	.....	595-599	119
Article 26 (Immunity from measures of coercion) .....	.....	600-602	119
Article 27 (Procedural immunities) .....	.....	603-606	120
Article 28 (Non-discrimination) .....	.....	607-610	120
2. Provisions concerning the settlement of disputes .....	.....	611-613	120
<b>VII. THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES</b> .....	.....	614-685	122
A. Introduction .....	.....	614-631	122
B. Consideration of the topic at the present session .....	.....	632-683	123
1. Water-related hazards, dangers and emergency situations (part VI of the draft articles) .....	.....	636-676	124
Article 22 (Water-related hazards, harmful conditions and other adverse effects) <i>and</i> Article 23 (Water-related dangers and emergency situations) .....	.....	637-676	124
2. Parts VII and VIII of the draft articles .....	.....	677-682	128
C. Draft articles on the law of the non-navigational uses of international watercourses .....	.....		
Texts of the draft articles provisionally adopted so far by the Commission .....	.....	684	128
D. Points on which comments are invited .....	.....	685	130
<b>VIII. RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS (SECOND PART OF THE TOPIC)</b> .....	.....	686-726	131
A. Introduction .....	.....	686-703	131
B. Consideration of the topic at the present session .....	.....	704-726	133
1. General comments and definition of an international organization .....	.....	708-714	133
2. Legal capacity of international organizations .....	.....	715-718	134
3. Privileges and immunities .....	.....	719-725	135
4. Planned outline for consideration of the topic .....	.....	726	136
<b>IX. OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION</b> .....	.....	727-763	137
A. Programme, procedures and working methods of the Commission, and its documentation .....	.....	727-746	137
B. Co-operation with other bodies .....	.....	747-749	139
C. Date and place of the forty-second session .....	.....	750	139
D. Representation at the forty-fourth session of the General Assembly .....	.....	751	139
E. International Law Seminar .....	.....	752-760	139
F. Gilberto Amado Memorial Lecture .....	.....	761-763	140

#### ABBREVIATIONS

ECE	Economic Commission for Europe
IAEA	International Atomic Energy Agency
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ILA	International Law Association
ILO	International Labour Organisation
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNITAR	United Nations Institute for Training and Research
UPU	Universal Postal Union

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*I.C.J. Reports*

*ICJ, Reports of Judgments, Advisory Opinions and Orders*

#### NOTE CONCERNING QUOTATIONS

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

## Chapter I

### ORGANIZATION OF THE SESSION

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, in accordance with its statute annexed thereto, as subsequently amended, held its forty-first session at its permanent seat at the United Nations Office at Geneva from 2 May to 21 July 1989. The session was opened by the Chairman of the fortieth session, Mr. Leonardo Díaz González.

#### A. Membership

2. The Commission consists of the following members:  
Prince Bola Adesumbo AJIBOLA (Nigeria);  
Mr. Husain AL-BAHARNA (Bahrain);  
Mr. Awn AL-KHASAWNEH (Jordan);  
Mr. Riyadh Mahmoud Sami AL-QAYSI (Iraq);  
Mr. Gaetano ARANGIO-RUIZ (Italy);  
Mr. Julio BARBOZA (Argentina);  
Mr. Juri G. BARSEGOV (Union of Soviet Socialist Republics);  
Mr. John Alan BEESLEY (Canada);  
Mr. Mohamed BENNOUNA (Morocco);  
Mr. Boutros BOUTROS-GHALI (Egypt);  
Mr. Carlos CALERO RODRIGUES (Brazil);  
Mr. Leonardo DÍAZ GONZÁLEZ (Venezuela);  
Mr. Gudmundur EIRIKSSON (Iceland);  
Mr. Laurel B. FRANCIS (Jamaica);  
Mr. Bernhard GRAEFRATH (German Democratic Republic);  
Mr. Francis Mahon HAYES (Ireland);  
Mr. Jorge E. ILLUECA (Panama);  
Mr. Andreas J. JACOVIDES (Cyprus);  
Mr. Abdul G. KOROMA (Sierra Leone);  
Mr. Ahmed MAHIOU (Algeria);  
Mr. Stephen C. McCAFFREY (United States of America);  
Mr. Frank X. NJENGA (Kenya);  
Mr. Motoo OGISO (Japan);  
Mr. Stanislaw PAWLAK (Poland);  
Mr. Pemmaraju Sreenivasa RAO (India);  
Mr. Edilbert RAZAFINDRALAMBO (Madagascar);  
Mr. Paul REUTER (France);  
Mr. Emmanuel J. ROUCOUNAS (Greece);  
Mr. César SEPÚLVEDA GUTIÉRREZ (Mexico);  
Mr. Jiuyong SHI (China);  
Mr. Luis SOLARI TUDELA (Peru);  
Mr. Doudou THIAM (Senegal);  
Mr. Christian TOMUSCHAT (Federal Republic of Germany);  
Mr. Alexander YANKOV (Bulgaria).

#### B. Officers

3. At its 2095th meeting, on 2 May 1989, the Commission elected the following officers:

*Chairman:* Mr. Bernhard Graefrath;  
*First Vice-Chairman:* Mr. Pemmaraju Sreenivasa Rao;  
*Second Vice-Chairman:* Mr. Emmanuel J. Roucounas;  
*Chairman of the Drafting Committee:* Mr. Carlos Calero Rodrigues;  
*Rapporteur:* Mr. Mohamed Bennouna.

4. The Enlarged Bureau of the Commission was composed of the officers of the present session, those members of the Commission who had previously served as chairman of the Commission<sup>1</sup> and the special rapporteurs.<sup>2</sup> The Chairman of the Enlarged Bureau was the Chairman of the Commission. On the recommendation of the Enlarged Bureau, the Commission, at its 2095th meeting, on 2 May 1989, set up for the present session a Planning Group to consider the programme, procedures and working methods of the Commission, and its documentation, and to report thereon to the Enlarged Bureau. The Planning Group was composed as follows: Mr. Pemmaraju Sreenivasa Rao (Chairman), Prince Bola Adesumbo Ajibola, Mr. Riyadh Mahmoud Sami Al-Qaysi, Mr. Juri G. Barsegov, Mr. John Alan Beesley, Mr. Carlos Calero Rodrigues, Mr. Leonardo Díaz González, Mr. Gudmundur Eiriksson, Mr. Laurel B. Francis, Mr. Jorge E. Illueca, Mr. Andreas J. Jacovides, Mr. Ahmed Mahiou, Mr. Frank X. Njenga, Mr. Motoo Ogiso, Mr. Stanislaw Pawlak, Mr. Emmanuel J. Roucounas, Mr. Doudou Thiam, Mr. Christian Tomuschat and Mr. Alexander Yankov.

#### C. Drafting Committee

5. At its 2096th meeting, on 3 May 1989, the Commission appointed a Drafting Committee composed of the following members: Mr. Carlos Calero Rodrigues (Chairman), Mr. Husain Al-Baharna, Mr. Awn Al-Khasawneh, Mr. Juri G. Barsegov, Mr. John Alan Beesley, Mr. Leonardo Diaz González, Mr. Francis Mahon Hayes, Mr. Abdul G. Koroma, Mr. Stephen C. McCaffrey, Mr. Motoo Ogiso, Mr. Stanislaw Pawlak, Mr. Edilbert Razafindralambo, Mr. Paul Reuter, Mr. César Sepúlveda Gutiérrez, Mr. Jiuyong Shi and Mr. Luis

<sup>1</sup> Namely Mr. Leonardo Díaz González, Mr. Laurel B. Francis, Mr. Stephen C. McCaffrey, Mr. Paul Reuter, Mr. Doudou Thiam and Mr. Alexander Yankov.

<sup>2</sup> Namely Mr. Gaetano Arangio-Ruiz, Mr. Julio Barboza, Mr. Leonardo Diaz González, Mr. Stephen C. McCaffrey, Mr. Motoo Ogiso, Mr. Doudou Thiam and Mr. Alexander Yankov.

Solari Tudela. Mr. Mohamed Bennouna also took part in the Committee's work in his capacity as Rapporteur of the Commission.

#### D. Secretariat

6. Mr. Carl-August Fleischhauer, Under-Secretary-General, the Legal Counsel, attended the session and represented the Secretary-General. Mr. Vladimir S. Kotliar, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General. Ms. Jacqueline Dauchy, Deputy Director of the Codification Division of the Office of Legal Affairs, acted as Deputy Secretary to the Commission. Ms. Sachiko Kuwabara and Mr. Manuel Rama-Montaldo, Senior Legal Officers, served as Senior Assistant Secretaries to the Commission and Ms. Mahnoush H. Arsanjani and Mr. Igor Fominov, Legal Officers, served as Assistant Secretaries to the Commission.

#### E. Agenda

7. At its 2095th meeting, on 2 May 1989, the Commission adopted the following agenda for its forty-first session:

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

8. The Commission considered all the items on its agenda. The Commission held 54 public meetings (2095th to 2148th meetings). In addition, the Drafting Committee of the Commission held 36 meetings, the Enlarged Bureau of the Commission held 3 meetings and the Planning Group of the Enlarged Bureau held 9 meetings.

#### F. General description of the work of the Commission at its forty-first session

9. At its forty-first session, the Commission concluded the second reading of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (see chapter II).<sup>3</sup> The discussions were held on the basis of (a) the draft articles

on the topic provisionally adopted by the Commission on first reading at its thirty-eighth session, in 1986; (b) the eighth report submitted by the Special Rapporteur, Mr. Alexander Yankov, at the fortieth session, in 1988,<sup>4</sup> which contained an analytical survey of the comments and observations received from Governments<sup>5</sup> on the draft articles adopted on first reading, as well as revised texts proposed by the Special Rapporteur for consideration by the Commission on second reading; (c) the draft articles proposed by the Drafting Committee on second reading. At the conclusion of its discussions, the Commission adopted the final text of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, as well as two draft Optional Protocols thereto, dealing, respectively, with the couriers and bags of special missions and with the couriers and bags of international organizations of a universal character. The Commission also recommended to the General Assembly that it convene an international conference of plenipotentiaries to consider the three drafts and to conclude a convention on the subject.

10. The Commission devoted 12 meetings to consideration of the topic "Draft Code of Crimes against the Peace and Security of Mankind" (see chapter III).<sup>6</sup> The discussions were held on the basis of the seventh report (A/CN.4/419 and Add.1) submitted by the Special Rapporteur, Mr. Doudou Thiam, which contained in particular two draft articles entitled "War crimes" (art. 13) and "Crimes against humanity" (art. 14). At the conclusion of its discussions, the Commission referred draft articles 13 and 14 to the Drafting Committee. The Commission furthermore provisionally adopted, on the recommendation of the Drafting Committee, three draft articles on the topic, with commentaries thereto, for inclusion in part I (Crimes against peace) of chapter II of the draft, namely article 13 (Threat of aggression), article 14 (Intervention) and article 15 (Colonial domination and other forms of alien domination).

11. The Commission devoted six meetings to consideration of the topic "State responsibility" (see chapter IV).<sup>7</sup> The discussions were held on the basis of the preliminary report submitted by the Special Rapporteur, Mr. Gaetano Arangio-Ruiz, at the fortieth session, in 1988,<sup>8</sup> which contained in particular two draft articles entitled "Cessation of an internationally wrongful act of a continuing character" (art. 6) and "Restitution in kind" (art. 7). At the conclusion of its discussions, the Commission referred draft articles 6 and 7 to the Drafting Committee. The second report of the Special Rapporteur (A/CN.4/425 and Add.1) was not discussed by the Commission due to lack of time.

<sup>4</sup> *Yearbook ... 1988*, vol. II (Part One), p. 163, document A/CN.4/417.

<sup>5</sup> *Ibid.*, p. 125, document A/CN.4/409 and Add.1-5. The comments and observations received subsequently from one Government are reproduced in *Yearbook ... 1989*, vol. II (Part One), p. 75, document A/CN.4/420.

<sup>6</sup> The topic was considered at the 2096th to 2102nd, 2106th, 2107th and 2134th to 2136th meetings, held between 3 and 16 May, on 23 and 24 May and between 11 and 13 July 1989.

<sup>7</sup> The topic was considered at the 2102nd to 2105th, 2122nd and 2127th meetings, held between 16 and 19 May and on 21 and 28 June 1989.

<sup>8</sup> *Yearbook ... 1988*, vol. II (Part One), p. 6, document A/CN.4/416 and Add.1.

<sup>3</sup> The topic was considered at the 2128th to 2132nd meetings, held between 29 June and 6 July 1989.

12. The Commission devoted eight meetings to consideration of the topic "International liability for injurious consequences arising out of acts not prohibited by international law" (see chapter V).<sup>9</sup> The discussions were held on the basis of the fifth report (A/CN.4/423) submitted by the Special Rapporteur, Mr. Julio Barboza, which contained in particular 17 draft articles entitled "Scope of the present articles" (art. 1), "Use of terms" (art. 2), "Assignment of obligations" (art. 3), "Relationship between the present articles and other international agreements" (art. 4), "Absence of effect upon other rules of international law" (art. 5), "Freedom of action and the limits thereto" (art. 6), "Co-operation" (art. 7), "Prevention" (art. 8), "Reparation" (art. 9), "Assessment, notification and information" (art. 10), "Procedure for protecting national security or industrial secrets" (art. 11), "Warning by the presumed affected State" (art. 12), "Period for reply to notification. Obligation of the State of origin" (art. 13), "Reply to notification" (art. 14), "Absence of reply to notification" (art. 15), "Obligation to negotiate" (art. 16) and "Absence of reply to the notification under article 12" (art. 17). At the conclusion of its discussions, the Commission referred draft articles 1 to 9 to the Drafting Committee.

13. The Commission devoted nine meetings to consideration of the topic "Jurisdictional immunities of States and their property" (see chapter VI).<sup>10</sup> The discussions were held on the basis of (a) the draft articles on the topic provisionally adopted by the Commission on first reading at its thirty-eighth session, in 1986; (b) the preliminary report submitted by the Special Rapporteur, Mr. Motoo Ogiso, at the fortieth session, in 1988,<sup>11</sup> and the second report (A/CN.4/422 and Add.1), which both contained an analytical survey of the comments and observations received from Governments<sup>12</sup> on the draft articles adopted on first reading, as well as revised texts proposed by the Special Rapporteur for consideration by the Commission on second reading. At the conclusion of its discussions, the Commission referred articles 1 to 11 to the Drafting Committee for their second reading,

<sup>9</sup> The topic was considered at the 2108th to 2114th and 2121st meetings, held between 30 May and 7 June and on 20 June 1989.

<sup>10</sup> The topic was considered at the 2114th to 2122nd meetings, held between 7 and 21 June 1989.

<sup>11</sup> *Yearbook...1988*, vol. II (Part One), p. 96, document A/CN.4/415.

<sup>12</sup> *Ibid.*, p. 45, document A/CN.4/410 and Add.1-5.

together with the proposed new articles 6 bis and 11 bis, and agreed to consider the remaining articles 12 to 28 at the beginning of the next session.

14. The Commission devoted five meetings to consideration of the topic "The law of the non-navigational uses of international watercourses" (see chapter VII).<sup>13</sup> The discussions were held on the basis of the fifth report (A/CN.4/421 and Add.1 and 2) submitted by the Special Rapporteur, Mr. Stephen C. McCaffrey, chapter I of which contained in particular two draft articles entitled "Water-related hazards, harmful conditions and other adverse effects" (art. 22) and "Water-related dangers and emergency situations" (art. 23). At the conclusion of its discussions on chapter I of the report, the Commission referred draft articles 22 and 23 to the Drafting Committee. The Commission also heard a presentation by the Special Rapporteur of chapters II and III of his report, which contained in particular two draft articles entitled "Relationship between navigational and non-navigational uses; absence of priority among uses" (art. 24) and "Regulation of international watercourses" (art. 25). Chapters II and III of the report were not discussed by the Commission due to lack of time.

15. The Commission devoted one meeting to the topic "Relations between States and international organizations (second part of the topic)" (see chapter VIII). It heard a presentation by the Special Rapporteur, Mr. Leonardo Díaz González, of his fourth report (A/CN.4/424),<sup>14</sup> which contained in particular 11 draft articles, namely articles 1 to 4 comprising part I (Introduction), articles 5 and 6 comprising part II (Legal personality) and articles 7 to 11 comprising part III (Property, funds and assets) of the draft. The fourth report was not discussed by the Commission due to lack of time.

16. Matters relating to the programme, procedures and working methods of the Commission, and its documentation, were discussed in the Planning Group of the Enlarged Bureau and in the Enlarged Bureau itself. The relevant observations and recommendations of the Commission are to be found in chapter IX of the present report, which also deals with co-operation with other bodies and with certain administrative and other matters.

<sup>13</sup> The topic was considered at the 2123rd to 2126th and 2133rd meetings, held between 22 and 28 June and on 7 July 1989.

<sup>14</sup> The fourth report was introduced at the 2133rd meeting, on 7 July 1989.

## Chapter II

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

#### A. Introduction

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

17. The Commission began its consideration of the topic "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier" at its twenty-ninth session, in 1977, pursuant to General Assembly resolution 31/76 of 13 December 1976. At its thirtieth session, in 1978, the Commission considered the report of the Working Group on the topic which it had established under the chairmanship of Mr. Abdullah El-Erian. The results of the study undertaken by the Working Group were submitted to the General Assembly at its thirty-third session, in 1978, in the Commission's report to the Assembly.<sup>15</sup> At that session, the General Assembly, after having discussed the results of the Commission's work, recommended in resolution 33/139 of 19 December 1978 that the Commission

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

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

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

19. At its thirty-first session, in 1979, the Commission again established a Working Group, under the chairmanship of Mr. Alexander Yankov, which studied issues concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. On the recommendation of the Working Group, the Commission, at the same session, appointed Mr. Alexander Yankov Special Rapporteur for the topic and entrusted him with the preparation of a set of draft articles for an appropriate legal instrument.

20. At its thirty-second session, in 1980, the Commission had before it the preliminary report<sup>16</sup> submitted by the Special Rapporteur, as well as a working paper<sup>17</sup> prepared by the Secretariat. At that session, the Commission considered the preliminary report in a

general discussion.<sup>18</sup> The General Assembly, in resolution 35/163 of 15 December 1980, recommended that the Commission, taking into account the written comments of Governments and views expressed in debates in the General Assembly, should continue its work on the topic with a view to the possible elaboration of an appropriate legal instrument.

21. From its thirty-third session (1981) to its thirty-eighth session (1986), the Commission considered six further reports submitted by the Special Rapporteur,<sup>19</sup> which contained, among other matters, proposals and revised proposals for the texts of 43 draft articles on the topic.<sup>20</sup>

22. By the end of its thirty-eighth session, in 1986, the Commission had completed the first reading of the draft articles on the topic, having provisionally adopted a complete set of 33 articles<sup>21</sup> and commentaries thereto.<sup>22</sup>

23. At the same session, the Commission decided that, in accordance with articles 16 and 21 of its statute, the

<sup>18</sup> See *Yearbook ... 1980*, vol. I, pp. 260 *et seq.*, 1634th meeting, paras. 1-41, and pp. 274 *et seq.*, 1636th meeting, paras. 1-23, and 1637th meeting, paras. 1-56; see also *Yearbook ... 1980*, vol. II (Part Two), pp. 164-165, paras. 162-176.

<sup>19</sup> These six reports of the Special Rapporteur are reproduced as follows:

Second report: *Yearbook ... 1981*, vol. II (Part One), p. 151, document A/CN.4/347 and Add.1 and 2;

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

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

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

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

Seventh report: *Yearbook ... 1986*, vol. II (Part One), p. 39, document A/CN.4/400.

<sup>20</sup> For a detailed review of the Commission's work on the topic, as well as the texts of the draft articles submitted by the Special Rapporteur and the Commission's consideration of them, see:

(a) The reports of the Commission: (i) on its thirtieth session, *Yearbook ... 1978*, vol. II (Part Two), pp. 138 *et seq.*, chap. VI; (ii) on its thirty-first session, *Yearbook ... 1979*, vol. II (Part Two), pp. 170 *et seq.*, chap. VI; (iii) on its thirty-second session, *Yearbook ... 1980*, vol. II (Part Two), pp. 162 *et seq.*, chap. VIII; (iv) on its thirty-third session, *Yearbook ... 1981*, vol. II (Part Two), pp. 159 *et seq.*, chap. VII; (v) on its thirty-fourth session, *Yearbook ... 1982*, vol. II (Part Two), pp. 112 *et seq.*, chap. VI; (vi) on its thirty-fifth session, *Yearbook ... 1983*, vol. II (Part Two), pp. 44 *et seq.*, chap. V; (vii) on its thirty-sixth session, *Yearbook ... 1984*, vol. II (Part Two), pp. 18 *et seq.*, chap. III; (viii) on its thirty-seventh session, *Yearbook ... 1985*, vol. II (Part Two), pp. 28 *et seq.*, chap. IV; (ix) on its thirty-eighth session, *Yearbook ... 1986*, vol. II (Part Two), pp. 23 *et seq.*, chap. III.

(b) The reports of the Special Rapporteur (see footnotes 16 and 19 above).

<sup>21</sup> For the texts, see *Yearbook ... 1986*, vol. II (Part Two), pp. 24 *et seq.*

<sup>22</sup> *Ibid.*, p. 24, footnote 72.

<sup>15</sup> *Yearbook ... 1978*, vol. II (Part Two), pp. 138 *et seq.*, chap. VI.

<sup>16</sup> *Yearbook ... 1980*, vol. II (Part One), p. 231, document A/CN.4/335.

<sup>17</sup> A/CN.4/WP.5.

draft articles provisionally adopted on first reading should be transmitted through the Secretary-General to the Governments of Member States for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 1988.<sup>23</sup>

24. The General Assembly, in paragraph 9 of its resolution 41/81 of 3 December 1986, and again in paragraph 10 of its resolution 42/156 of 7 December 1987, urged Governments to give full attention to the Commission's request for comments and observations on the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

25. Pursuant to the Commission's request, the Secretary-General addressed circular letters, dated 25 February and 22 October 1987, to Governments inviting them to submit their comments and observations by 1 January 1988.

26. At the time of the Commission's consideration of the topic at its fortieth session, in 1988, written comments and observations had been received from 29 States.<sup>24</sup>

27. At the fortieth session, in addition to the comments and observations of Governments, the Commission had before it the eighth report of the Special Rapporteur.<sup>25</sup>

28. In his report the Special Rapporteur analysed the written comments and observations received from Governments. For each article he summarized the main trends and the proposals made by Governments in their comments and observations, and on the basis of these proposed either to revise the text of the article concerned, to merge it with another article, to retain the article as adopted on first reading or to delete it.

29. The Commission considered the Special Rapporteur's eighth report at the same session.<sup>26</sup> After hearing the introduction by the Special Rapporteur, the Commission discussed the proposals made by him for the second reading of the draft articles. At the end of the discussion, the Commission decided to refer the draft articles to the Drafting Committee for second reading, together with the proposals made by the Special Rapporteur and those formulated in plenary during the discussion, on the understanding that the Special Rapporteur could make new proposals to the Drafting Committee, if he deemed it appropriate, on the basis of the comments and observations made in the Commission and those that might be made in the Sixth Committee of the General Assembly.<sup>27</sup>

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

30. At the present session, the Drafting Committee carried out the second reading of the draft articles. The

<sup>23</sup> *Ibid.*, para. 32.

<sup>24</sup> See *Yearbook ... 1988*, vol. II (Part One), p. 125, document A/CN.4/409 and Add.1-5. The comments and observations received subsequently from one Government are reproduced in *Yearbook ... 1989*, vol. II (Part One), p. 75, document A/CN.4/420.

<sup>25</sup> *Yearbook ... 1988*, vol. II (Part One), p. 163, document A/CN.4/417.

<sup>26</sup> For a summary of the debate, see *Yearbook ... 1988*, vol. II (Part Two), pp. 75 *et seq.*, paras. 296-488.

<sup>27</sup> *Ibid.*, p. 75, para. 292.

Drafting Committee presented a report to the Commission which was introduced by the Chairman of the Committee and considered by the Commission at its 2128th to 2132nd meetings, from 29 June to 6 July 1989. On the basis of that report, the Commission adopted the final text of a set of 32 draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. The Commission also adopted a draft Optional Protocol on the status of the courier and the bag of special missions, and a draft Optional Protocol on the status of the courier and the bag of international organizations of a universal character.<sup>28</sup> In accordance with its statute, the Commission submits the draft articles and the draft Optional Protocols herewith to the General Assembly, together with a recommendation (see paras. 66-70 below).

## 3. GENERAL OBSERVATIONS ON THE DRAFT ARTICLES

### (a) Purpose and scope of the draft

31. The main purpose of the present draft articles has been to establish a coherent and, in so far as possible, uniform régime governing the status of all kinds of couriers and bags, on the basis of the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.<sup>29</sup> This has meant, first, to consolidate, harmonize and unify existing rules and, secondly, to develop specific and more precise rules for the situations not fully covered by those conventions, in order to facilitate the normal functioning of official communications, ensuring the confidentiality of the contents of the bag and preventing its abuse. The emphasis has always been placed on the practical aspects of the régime to be established.

32. The necessity of such a régime and its practical significance have been acknowledged in the debates on the present topic held in the Sixth Committee of the General Assembly<sup>30</sup> and reiterated by several Governments in their written comments and observations.<sup>31</sup>

33. At the same time, it should be pointed out that reservations and misgivings as to the usefulness of elaborating a set of draft articles on the topic have also

<sup>28</sup> The texts of the draft articles and of the draft Optional Protocols and the commentaries thereto appear in section D of the present chapter.

<sup>29</sup> Hereinafter referred to as the "codification conventions". See footnote 54 below.

<sup>30</sup> For the views expressed in the Sixth Committee, see "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-seventh session of the General Assembly" (A/CN.4/L.352), paras. 186-187 and 189; "Topical summary ... thirty-eighth session of the General Assembly" (A/CN.4/L.369), paras. 303-304; "Topical summary ... forty-first session of the General Assembly" (A/CN.4/L.410), paras. 251-252, 257 and 266-267; "Topical summary ... forty-second session of the General Assembly" (A/CN.4/L.420), paras. 243 and 245.

<sup>31</sup> See *Yearbook ... 1988*, vol. II (Part One), p. 125, document A/CN.4/409 and Add.1-5, comments of Austria, Bulgaria, Czechoslovakia, German Democratic Republic, Federal Republic of Germany, Spain, USSR, Yugoslavia and Switzerland.

been voiced during the debates held in the Sixth Committee<sup>32</sup> and expressed in the written comments and observations of some States.<sup>33</sup> It has been maintained that the existing conventions cover adequately the relevant international rules concerning diplomatic and consular couriers and bags.

34. The general orientation of the Commission's work as regards the scope of the draft articles has been to encompass within the set of articles the legal status of couriers and bags employed for official communications of States with their diplomatic missions, consular posts, permanent missions to international organizations and delegations to international conferences. It was also agreed by the Commission during the second reading of the draft articles to provide an opportunity, through an optional protocol, to apply the provisions of the articles to couriers and bags employed for official communications of States with their special missions within the meaning of the 1969 Convention on Special Missions. The same technique has been proposed for couriers and bags employed by international organizations of a universal character for official communications with their missions and offices or with other international organizations. Thus the scope of application of the articles in practice has been widened by providing the possibility for States to apply them also, through optional protocols, and as between the parties thereto, to couriers and bags of special missions and international organizations.

35. The scope of the draft articles comprises the two-way character of official communications, namely between the sending State and its missions, consular posts and delegations, as well as between those missions, consular posts and delegations *inter se*.

#### (b) Methodological questions

##### (i) Comprehensive and uniform approach: extent and limitations

36. The comprehensive approach with a view to elaborating a coherent and, in so far as possible, uniform régime governing the status of all kinds of couriers and bags has been the subject of discussion since the initial stage of the Commission's work on the topic.

37. It may be recalled that, already in his preliminary report, submitted at the thirty-second session, in 1980, the Special Rapporteur, on the basis of the comprehensive method of equal treatment of all kinds of couriers and bags under the four codification conventions, proposed the global concept of "official courier and official bag". In requesting the guidance of the Commission on the scope and content of future work on the topic, he pointed out:

... It is hoped that such a comprehensive approach would reflect more adequately the significant developments that have taken place since the 1961 Vienna Convention. Diplomatic law in all its facets has acquired new forms and new dimensions because of the ever-increasing dynamics of international relations in which States and international organizations are involved in very active contacts through various means,

<sup>32</sup> See "Topical summary . . ." (A/CN.4/L.352), para. 188; (A/CN.4/L.369), para. 305; (A/CN.4/L.410), paras. 261-262; (A/CN.4/L.420), para. 244.

<sup>33</sup> See *Yearbook . . . 1988*, vol. II (Part One), p. 125, document A/CN.4/409 and Add.1-5, comments of Australia, Belgium, Canada, the Netherlands and the United Kingdom. See also *Yearbook . . . 1989*, vol. II (Part One), p. 75, document A/CN.4/420, comments of the United States of America.

including official couriers and official bags. In view of these developments, the international regulation of the communications between various subjects of international law and, on different occasions, through official couriers and official bags has been faced substantially with the same kind of problems and has to respond to similar challenges and practical requirements, whether the courier is diplomatic, consular or is sent to a special mission or permanent mission of a State or an international organization. The increasing number of violations of the diplomatic law, some of which have raised public concern, also warrant such a comprehensive and coherent regulation of the status of all types of official couriers and official bags. In this way, all means of communication for official purposes through official couriers and official bags would enjoy the same degree of international legal protection.<sup>34</sup>

38. The Commission, while recognizing the practical significance of such an approach, pointed out "the need for effective protection of the diplomatic courier and the diplomatic bag and the need for prevention of possible abuses".<sup>35</sup> It was further agreed that "in the work of codification and progressive development of international law on the topic under consideration, special emphasis should be placed on the application of an empirical and pragmatic method, aimed at securing a proper balance between provisions containing concrete practical rules and provisions containing general rules determining the status of the courier and the bag".<sup>36</sup>

39. After extensive discussion on the proposed concept of "official courier and official bag", the Commission, without questioning in principle the relevance of the method of comprehensive and uniform treatment of the various kinds of couriers and bags, stated that:

... a comprehensive approach leading to a coherent set of draft articles should be applied with great caution, taking into consideration the possible reservations of States. The prevailing view was that, while the draft articles should in principle cover all types of official couriers and official bags, the terms "diplomatic courier" and "diplomatic bag" should be maintained. It was also noted that the codification effort should be basically confined to communications between States. It was assumed by several speakers that, while retaining the concepts of diplomatic courier and diplomatic bag, an appropriate solution might be found through an assimilation formula . . . The main objective should be to achieve as much coherence and uniformity as possible in the legal protection of all types of official couriers and official bags, without necessarily introducing new concepts which might not be susceptible of wide acceptance by States. . . .<sup>37</sup>

40. As pointed out by the Commission in the commentary to article 1, provisionally adopted on first reading at the thirty-fifth session, in 1983: "This comprehensive approach rests on the common denominator provided by the relevant provisions on the treatment of the diplomatic courier and the diplomatic bag contained in the multilateral conventions in the field of diplomatic law, which constitute the legal basis for the uniform treatment of the various couriers and bags."<sup>38</sup>

41. With regard to the status of all kinds of couriers there is a basic identity of treatment. State practice, as evidenced by national legislation and international agreements, particularly bilateral consular conventions, provides unambiguous proof of the rule of personal inviolability of consular couriers in the same way as for

<sup>34</sup> *Yearbook . . . 1980*, vol. II (Part One), p. 245, document A/CN.4/335, para. 62.

<sup>35</sup> *Yearbook . . . 1980*, vol. II (Part Two), p. 164, para. 163.

<sup>36</sup> *Ibid.*, para. 165.

<sup>37</sup> *Ibid.*, para. 167.

<sup>38</sup> *Yearbook . . . 1983*, vol. II (Part Two), p. 53, para. (1) of the commentary.

diplomatic and other couriers. Most of these bilateral conventions and national laws grant the same rights, privileges and immunities to consular couriers as those granted to diplomatic couriers, which include, first of all, personal inviolability.<sup>39</sup>

42. The analytical survey of State practice undertaken by the Special Rapporteur covering more than 100 bilateral consular conventions and a substantive body of national rules and regulations fully substantiates this assertion.<sup>40</sup> The uniformity in the treatment of diplomatic couriers and consular couriers has acquired general support by States and may thus be considered a well-established rule in conventional and customary law.

43. In fact, the identity between the legal status of the diplomatic courier and that of the consular courier recognized by State practice was confirmed during the debate held at the United Nations Conference on Consular Relations in 1963 and was embodied in paragraph 5 of article 35 of the Vienna Convention on Consular Relations adopted by that Conference. It may be recalled that there was strong opposition at the Conference to attempts to accord to the consular courier more limited privileges and immunities than those accorded to the diplomatic courier. As pointed out by the Special Rapporteur in his second report,<sup>41</sup> the concept of double treatment was rejected by the Conference on the grounds that "it was essential for couriers to receive complete inviolability and not to have the limited inviolability given to consular officials".<sup>42</sup>

44. The relevant rules governing the status of couriers under the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character have also been modelled on article 27, paragraph 5, of the 1961 Vienna Convention on Diplomatic Relations. State practice reveals that these rules have been applied even before the entry into force of the 1969 and 1975 Conventions. Furthermore, it may be pointed out that, long before the 1961 Vienna Convention was adopted, States had employed diplomatic couriers and diplomatic bags in their official communications with the United Nations and its specialized agencies on the basis of the 1946 Convention on the Privileges and Immunities of the United Nations<sup>43</sup> and the 1947 Convention on the Privileges and Immunities of the Specialized Agencies,<sup>44</sup> respectively. These two Conventions have acquired universal recognition and have served as the legal basis of the status of couriers and bags so employed, which have

<sup>39</sup> See the information received from Governments reproduced in *Yearbook . . . 1982*, vol. II (Part One), p. 231, document A/CN.4/356 and Add.1-3.

<sup>40</sup> See the Special Rapporteur's fourth report, *Yearbook . . . 1983*, vol. II (Part One), pp. 74 *et seq.*, document A/CN.4/374 and Add.1-4, paras. 47-67.

<sup>41</sup> *Yearbook . . . 1981*, vol. II (Part One), p. 161, document A/CN.4/347 and Add.1 and 2, para. 34.

<sup>42</sup> See *Official Records of the United Nations Conference on Consular Relations*, vol. I, *Summary records of plenary meetings and of the meetings of the First and Second Committees* (United Nations publication, Sales No. 63.X.2), p. 320, Second Committee, 13th meeting, para. 15.

<sup>43</sup> United Nations, *Treaty Series*, vol. 1, p. 15.

<sup>44</sup> *Ibid.*, vol. 33, p. 261.

enjoyed the same privileges and immunities as those accorded to diplomatic couriers and diplomatic bags.

45. Thus it may be concluded that a coherent and uniform régime relating to the status of all kinds of couriers, particularly with regard to their personal inviolability, has substantial foundations in contemporary diplomatic and consular law.

46. As for the legal status of the bag used for official communications, there are some differences in standards of treatment, particularly among provisions relating to inviolability of the bag. As is well known, the 1961 Vienna Convention on Diplomatic Relations, the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character adopt the principle of complete inviolability of the bag. Only the 1963 Vienna Convention on Consular Relations, while recognizing this general rule, according to which the consular bag shall be neither opened nor detained, admits the opening of the bag under certain conditions. This particular treatment of the consular bag, provided for under paragraph 3 of article 35 of the 1963 Vienna Convention on Consular Relations, constitutes an exception to the régime established by the other codification conventions.

47. The existence of a different standard of treatment for the consular bag under the 1963 Vienna Convention on Consular Relations cannot be overlooked, although, as has been pointed out, most of the bilateral consular conventions concluded before and after that Convention entered into force stipulate that the consular bag is inviolable and may be neither opened nor detained.<sup>45</sup> However, there are some bilateral consular agreements which follow the provisions of article 35, paragraph 3, of the 1963 Vienna Convention.<sup>46</sup>

48. The question of the inviolability of diplomatic, consular and other bags will be considered in detail in the commentary to article 28 (Protection of the diplomatic bag) below. It has been broached here only in order to indicate in general terms the parameters of the comprehensive and uniform approach applied to all kinds of couriers and bags, taking into account the relevant provisions of the four codification conventions.

49. It is obvious that the comprehensive and uniform approach with regard to all kinds of couriers and bags has had an extensive field of application leading to the elaboration of as coherent a legal régime as possible. Nevertheless, this method also has its limitations determined by the pertinent provisions of the codification conventions, as is the case with paragraph 3 of article 35 of the 1963 Vienna Convention on Consular Relations with regard to the treatment of the consular bag.

#### (ii) Functional necessity as a basic requirement for the status of the diplomatic courier and the diplomatic bag

50. The other methodological problem relating to the general orientation of the Commission's work in elaborating the draft articles on the status of the

<sup>45</sup> See the consular agreements referred to in the Special Rapporteur's fourth report, *Yearbook . . . 1983*, vol. II (Part One), p. 124, document A/CN.4/374 and Add.1-4, footnote 286.

<sup>46</sup> *Ibid.*, p. 125, footnotes 287 and 288.

diplomatic courier and the diplomatic bag relates to the implementation of the functional approach and the role played by functional necessity as the basic factor in determining the status of all kinds of couriers and bags.

51. The functional approach should be considered as a method of identifying all the prerequisites for the efficient performance of the duties of the courier and for the fulfilment of the function of the bag. The courier is an official of the sending State whose functions are the custody, transportation and safe delivery of the bag to its consignee. For its part, the bag is an important tool of communication used by States to maintain contacts with or between their missions abroad. The contents of the bag, consisting of confidential materials and documents or articles for official use, should therefore be protected and be accorded the necessary facilities for speedy delivery to their destination. Equal protection should be accorded to the courier in the discharge of his duties, as a person entrusted with an official mission who has access to confidential documents.

52. Thus functional necessity should be invoked not only as a restraint in respect of facilities, privileges and immunities, but also as an indispensable condition for the efficient performance of the official functions of the diplomatic courier and the diplomatic bag. The problem is not whether the diplomatic courier is assimilated in status to a category of the members of the staff of a diplomatic mission, consular post or other mission of the sending State, but, rather, the extent to which the facilities, privileges and immunities accorded to the courier and the bag are instrumental for the fulfilment of the courier's official task. This has been the guiding consideration in the process of elaborating the present draft articles.

53. The application of the functional approach in determining the adequate means of legal protection to be accorded to the courier and the bag in the performance of their official functions will thus provide the basis for a proper balance between the rights and duties of the sending State, the receiving State and the transit State. This fundamental consideration should also serve as a guiding rule in the interpretation and application of the present articles.

*(iii) Relationship with other conventions and agreements in the field of diplomatic and consular relations*

54. The relationship between the present articles and other conventions and agreements in the field of diplomatic and consular relations may be considered at three main levels:

- (a) relationship with the codification conventions concluded under the auspices of the United Nations;
- (b) relationship with existing bilateral or regional conventions and agreements in the field of diplomatic and consular relations;
- (c) relationship with future agreements relating to the status of the courier and the bag concluded by the parties to the present articles.

55. This threefold relationship is the subject of special provisions embodied in article 32 (Relationship between the present articles and other conventions and agreements).

56. As a methodological problem, special significance has been attached to the relationship between the present articles and the codification conventions (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). These Conventions have always been considered a common legal basis for a coherent and, in so far as possible, uniform régime governing the status of all kinds of couriers and bags.

57. This aspect of the methodological problem regarding the relationship between the present articles and the codification conventions was considered extensively in the reports submitted by the Special Rapporteur, particularly his fourth, seventh and eighth reports.<sup>47</sup> In the seventh report, the Special Rapporteur emphasized that

the main objective of a provision regarding this relationship should be to achieve harmonization and uniformity between the existing provisions and the new draft articles dealing with the legal régime of official communications through the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. The progressive development and codification of the rules governing this régime should be based on the existing conventions and complement them with more specific provisions. The legal relationship should also encompass, as much as practicable, other international agreements in the field of diplomatic law. The legal relationship between the present draft articles and other international treaties in the field of diplomatic law has been considered within a certain framework of flexibility, as contemplated by articles 30 and 41 of the 1969 Vienna Convention on the Law of Treaties, regarding the application of successive treaties relating to the same subject-matter, and agreements to modify multilateral treaties between certain of the parties only, respectively. . . .<sup>48</sup>

58. It should also be indicated that, in the process of progressive development and codification of the law governing the status of the diplomatic courier and the diplomatic bag, the rules on that status contained in the four codification conventions needed to be further elaborated, as each convention contains only one article on the matter. In that connection, special emphasis had to be placed on the rights and obligations of the courier, his legal protection, and particularly the legal protection of the diplomatic bag not accompanied by diplomatic courier.

59. Thus, although the draft articles are not intended to amend the codification conventions, they do develop in greater detail the pertinent rules governing the legal régime of the functioning of official communications through diplomatic couriers and diplomatic bags.

60. The Commission did not include in the draft articles a provision on the relationship between the present articles and the rules of customary international law. Nevertheless, a view was expressed in the Commission that an additional provision on this matter might be deemed appropriate in a future instrument on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

<sup>47</sup> See, respectively, *Yearbook . . . 1983*, vol. II (Part One), pp. 133-134, document A/CN.4/374 and Add.1-4, paras. 396-403; *Yearbook . . . 1986*, vol. II (Part One), pp. 49-50, document A/CN.4/400, paras. 56-62; and *Yearbook . . . 1988*, vol. II (Part One), p. 195, document A/CN.4/417, paras. 268-274.

<sup>48</sup> *Yearbook . . . 1986*, vol. II (Part One), p. 49, document A/CN.4/400, para. 56.

(c) *Form of the draft*

61. Following a long-standing practice of the Commission, a recommendation on the future form of the final outcome of the Commission's work on the topic has been formulated at the time of the completion of the second reading of the draft articles. The final decision on this matter is within the competence of the General Assembly. The duty of the Commission consists in submitting to the Sixth Committee of the General Assembly, in the report of the Commission on its forty-first session, a proposal on the form to be given to the draft articles.

62. It may be appropriate in this connection to point out that the General Assembly, in its resolution 33/140 of 19 December 1978, while noting with appreciation the commencement of work on the present topic and indicating that it "could constitute a further development of international diplomatic law", decided in paragraph 5 that the Assembly would give further consideration to this question "when the International Law Commission submits to the Assembly the results of its work on the possible elaboration of an appropriate legal instrument on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier".

63. In the course of the debates in the Sixth Committee, views have occasionally been expressed on the form of the draft articles. At an early stage in the Commission's work, "a number of representatives supported the view that the draft should take the form of a binding instrument, preferably an international convention".<sup>49</sup> Other representatives thought that the final product of the Commission's work on the topic should be "a protocol that did not depart from the relevant conventions adopted under the auspices of the United Nations".<sup>50</sup> However, the general opinion at that time was in favour of deferring the decision on the final form of the draft until a later stage.

64. The idea of a convention on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier seems to have acquired wider support when the whole set of draft articles adopted by the Commission on first reading was considered during the debates in the Sixth Committee in 1986 and 1987.<sup>51</sup> It was also reflected in the written comments and observations received from some Governments.<sup>52</sup>

65. The Commission is of the view that a convention constituting a distinct legal instrument and keeping an appropriate legal relationship with the codification conventions would be the most appropriate form of the draft articles.

<sup>49</sup> Fifth report of the Special Rapporteur, *Yearbook ... 1984*, vol. II (Part One), p. 77, document A/CN.4/382, para. 14.

<sup>50</sup> *Ibid.*

<sup>51</sup> See "Topical summary ... forty-first session of the General Assembly" (A/CN.4/L.410), paras. 251, 253 and 267; and "Topical summary ... forty-second session of the General Assembly" (A/CN.4/L.420), para. 243.

<sup>52</sup> See *Yearbook ... 1988*, vol. II (Part One), p. 125, document A/CN.4/409 and Add.1-5, comments of Bulgaria, Czechoslovakia, German Democratic Republic, USSR, Venezuela and Yugoslavia.

**B. Recommendation of the Commission**

66. At its 2146th meeting, on 20 July 1989,<sup>53</sup> the Commission decided, in accordance with article 23 of its statute, to recommend to the General Assembly that it convene an international conference of plenipotentiaries to consider the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and the draft Optional Protocols thereto, and to conclude a convention on the subject.

67. Since the Commission decided to include a draft Optional Protocol on the status of the courier and the bag of international organizations of a universal character, the convening of a conference would also require a decision by the General Assembly as to the participation of such international organizations in the conference.

68. Apart from the issue of participation in the future convention, the conference, in addition to examining the substantive rules in the draft articles, would also have to resolve the usual problems relating to the final clauses of the convention and to the peaceful settlement of disputes.

69. Further to the considerations set out in paragraphs 61-65 above, the Commission, in making the present recommendation, has borne in mind that the adoption of the draft articles and the draft Optional Protocols thereto would complete the work on progressive development and codification of diplomatic and consular law. The previous work of the Commission in this field led to the conclusion of four codification conventions, namely the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. The conclusion of a new convention on the present topic would fittingly culminate the work of progressive development and codification in this area by means of a multilateral binding instrument.

70. The importance of the issues involved in the draft articles and the draft Optional Protocols, namely the official communications of States with their missions, consular posts and delegations, as well as those of international organizations of a universal character with their missions and offices or with other international organizations, and the fact that the other conventions in the field of diplomatic and consular law—which relate to those important issues and which the present draft articles endeavour to complement—have been adopted, with only one exception, through universal conferences of plenipotentiaries convened for that specific purpose are factors indicating that this latter solution also appears to be the most advisable in the present case.

**C. Resolution adopted by the Commission**

71. At its 2146th meeting, on 20 July 1989, the Commission, having adopted the final text of the draft

<sup>53</sup> See also the summary record of the 2132nd meeting (see *Yearbook ... 1989*, vol. I), paras. 64-70.

articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, unanimously adopted the following resolution:

*The International Law Commission,*

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

*Desires to express to the Special Rapporteur, Mr. Alexander Yankov, its deep appreciation of the invaluable contribution he has made to the preparation of the draft throughout these past years by his tireless devotion, professional expertise and incessant labour, which have enabled the Commission to bring this important task to a successful conclusion.*

**D. Draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and draft Optional Protocols thereto<sup>54</sup>**

72. The texts of articles 1 to 32 and of draft Optional Protocols One and Two, with commentaries thereto, as finally adopted by the Commission at its forty-first session are reproduced below.

**1. DRAFT ARTICLES ON THE STATUS OF THE DIPLOMATIC COURIER AND THE DIPLOMATIC BAG NOT ACCOMPANIED BY DIPLOMATIC COURIER**

**PART I  
GENERAL PROVISIONS**

**Article 1. Scope of the present articles**

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

*Commentary*

(1) The general purpose of the present draft articles is to establish, within certain limits to be mentioned below, a comprehensive and uniform régime for all kinds of couriers and bags employed by States for official communications. This comprehensive and uniform approach rests on the common denominator provided by the relevant provisions on the treatment of the diplomatic courier and the diplomatic bag contained in the multilateral conventions on diplomatic and consular law which constitute the legal basis for the uniform treatment

<sup>54</sup> In the commentaries to the following articles and protocols, the four multilateral conventions on diplomatic and consular law concluded under the auspices of the United Nations,

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

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

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

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

of the various couriers and bags. There is a basic identity of régime with very few differences between the relevant provisions of the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.

(2) Notwithstanding the foregoing, the Commission is well aware of the fact that many States are not parties to all four of the codification conventions and thus may prefer that the present articles not require the same treatment of the different types of couriers and bags covered by those conventions. While the number of parties to the 1961 Vienna Convention on Diplomatic Relations and, to a somewhat lesser extent, to the 1963 Vienna Convention on Consular Relations is very high and creates an almost universal network of legal relationships in those fields, the 1969 Convention on Special Missions, though already in force, has not yet been the subject of widespread ratification or accession. On the other hand, although it is also true that the 1975 Vienna Convention on the Representation of States does not yet enjoy wide adherence, the Commission has borne in mind the fact that, as confirmed by long-standing State practice, couriers and bags covered by that Convention, namely couriers and bags to and from permanent missions and delegations, are also covered by the provisions concerning couriers and bags of representatives of Members within the meaning of the 1946 Convention on the Privileges and Immunities of the United Nations<sup>55</sup> and the 1947 Convention on the Privileges and Immunities of the Specialized Agencies.<sup>56</sup> Both Conventions enjoy wide adherence in the international community and, in essence, they equate the legal régime of couriers and bags sent to and by representatives of Member States to that of diplomatic couriers and bags, as pointed out in paragraph (3) of the commentary to article 3. This equation or assimilation thus provides the link for extending the uniform approach referred to in paragraph (1) of the present commentary also to this kind of courier and bag.

(3) In view of all of the above, and for practical reasons connected with the need to ensure wider acceptability of the present articles without abandoning the underlying objective of providing a uniform legal régime for all couriers and bags, the Commission decided to confine the scope of the articles to diplomatic and consular couriers and bags as well as couriers and bags of permanent missions and delegations (see art. 3). As for couriers and bags of special missions, the Commission decided to keep open the possibility for States to extend the application of the present articles to those couriers and bags by means of an optional protocol, which may be signed and ratified together with the present articles (see draft Optional Protocol One and the commentary thereto).

(4) It was pointed out by several members of the Commission that, in adopting the assimilative approach, the Commission did not intend to suggest that it necessarily reflected or was required by customary international law.

<sup>55</sup> See footnote 43 above.

<sup>56</sup> See footnote 44 above.

(5) The drafting of article 1 deliberately brings out the two-way character of communications between the sending State and its missions, consular posts or delegations, as well as the *inter se* character of communications between those missions, consular posts or delegations, i.e. lateral communications between the missions, consular posts or delegations situated in one State and the missions, consular posts or delegations situated in another State.

(6) There was some discussion in the Commission concerning the inclusion of the words "wherever situated". While some members felt that those words could be deleted without affecting the meaning of article 1, the majority was of the view that their inclusion brought out in clearer terms the two-way and *inter se* character of the official communications referred to in the article. For instance, they made it absolutely clear that the missions, consular posts or delegations of the sending State whose official communications with each other were covered by the present articles were not only those situated in the same receiving State, but also those in different receiving States.

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

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

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

#### *Commentary*

(1) The prevailing view in the Commission and in the Sixth Committee of the General Assembly has been to confine the scope of the present articles, as defined in article 1, to couriers and bags of States. Yet the fact that the articles deal only with couriers and bags of States does not preclude the possibility of substantial similarities between the legal régime of couriers and bags of international organizations, particularly those of a universal or broad regional character, and the legal régime of couriers and bags of States. Such substantial similarity may arise from norms of international law quite independent of the present articles. For example, pursuant to article III (sect. 10) of the 1946 Convention on the Privileges and Immunities of the United Nations and article IV (sect. 12) of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies, the couriers and bags of the United Nations and its specialized agencies "shall have the same immunities and privileges as diplomatic couriers and bags".

(2) Furthermore, the Commission felt that it might be appropriate to provide the possibility for States which may choose to do so to apply the present articles to couriers and bags of international organizations of a

universal character. This it did by means of an optional protocol on the status of the courier and the bag of international organizations of a universal character, as explained in more detail in the commentary to draft Optional Protocol Two below.

(3) For the reasons explained in the commentary to article 1, the Commission decided not to include in the scope of the present articles the couriers and bags of special missions. This does not affect the legal status of such couriers and bags as between the parties to the 1969 Convention on Special Missions. In this case also, the Commission decided that it was desirable to allow States wishing to do so to extend the application of the present articles to the couriers and bags of special missions, by means of an optional protocol on the status of the courier and the bag of special missions, as explained in more detail in the commentary to draft Optional Protocol One below.

#### **Article 3. Use of terms**

##### **1. For the purposes of the present articles:**

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

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

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

(c) a courier of a permanent mission, a permanent observer mission, 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; who is entrusted with the custody, transportation and delivery of the diplomatic bag and is employed for the official communications referred to in article 1;

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

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

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

(c) a bag of a permanent mission, a permanent observer mission, 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;

(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; and

(b) 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 inter-governmental organization.

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

#### *Commentary*

(1) Following the example of the four codification conventions, article 3 explains the meaning of the expressions most frequently used in the set of articles, so as to facilitate the interpretation and application of the articles. The definitions have been confined to the essential elements which typify the entity defined, leaving other definitional elements for inclusion in the relevant substantive articles.

#### *Subparagraph (1) of paragraph 1*

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

(3) It was felt that the definition of the expression "diplomatic courier" should contain a specific and concrete reference to all the different kinds of courier that it was intended to cover. Although the expression "diplomatic courier" is used throughout the articles for reasons based both on practice and on economy of drafting, it should be made clear that the definition applies not only to the "diplomatic courier" *stricto sensu* within the meaning of the 1961 Vienna Convention on Diplomatic Relations, but also to the "consular courier"

and to the courier of a permanent mission, of a permanent observer mission, of a delegation or of an observer delegation, within the meaning, respectively, of the 1963 Vienna Convention on Consular Relations and the 1975 Vienna Convention on the Representation of States. It was also understood in the Commission that the words "courier of a permanent mission" or "courier of a delegation" within the meaning of the 1975 Vienna Convention also encompassed the notion of a courier of "representatives of Members" (which includes delegates, deputy delegates, advisers, technical experts and secretaries of delegations) within the meaning of article IV (sects. 11 (c) and 16) of the 1946 Convention on the Privileges and Immunities of the United Nations and of article I (sect. 1 (v)) and article V (sect. 13 (c)) of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies.

(4) The definition encompasses both the diplomatic courier employed on a regular basis and the diplomatic courier *ad hoc*. It was agreed that the expression "on a regular basis" should be interpreted as opposed to *ad hoc* or "for a special occasion" and was not intended to convey any idea related to the lawfulness of the appointment. What characterizes the diplomatic courier *ad hoc* is the specific duration of his functions. He performs all the functions of the diplomatic courier, but only for a special occasion. In the prevailing practice of States, the function of diplomatic courier *ad hoc* has been assigned to officials belonging to the foreign service or another institution of the sending State with similar functions in the field of foreign relations, such as the Ministry for Foreign Trade or Foreign Economic Relations or State organs involved in international cultural co-operation. An essential requirement is always the proper authorization by the competent authorities of the sending State. The specific duration of his functions has a consequence on the duration of enjoyment of an *ad hoc* courier's facilities, privileges and immunities as laid down in the relevant article.

(5) The cross-reference to article 1 contained in the definition is intended to clarify that it covers not only one-way communications between the sending State and its missions abroad, but also those between the missions and the sending State, as well as those between different missions of the sending State. The scope of the present articles having already been fixed in article 1, reasons of economy of drafting make the cross-reference both appropriate and advisable.

(6) Elements of the present definition are further elaborated in specific provisions, namely articles 8 and 10 on documentation and functions of the diplomatic courier, respectively.

#### *Subparagraph (2) of paragraph 1*

(7) The two objective and fundamental features of the definition of the diplomatic bag are (a) its function, namely to carry official correspondence, documents or articles exclusively for official use as an instrument for communications between the sending State and its missions abroad; and (b) its visible external marks certifying its official character. These two features are essential to distinguish the diplomatic bag from other

travelling containers, such as the personal luggage of a diplomatic agent or an ordinary postal parcel or consignment. The real, essential character of the diplomatic bag is the bearing of visible external marks of its character as such, because even if its contents are found to be objects other than packages containing official correspondence, documents or articles intended exclusively for official use, it is still a diplomatic bag deserving protection as such.

(8) The means of delivery of the bag may vary. It may be accompanied by a diplomatic courier. It may also, instead, be entrusted to the captain of a commercial aircraft or to the master of a merchant ship. Its method of delivery may also vary as to the means of dispatch and transportation used: postal or other means, whether by land, air, watercourse or sea. It was felt that these varieties of practice, not being essential to the definition of the bag, could appropriately be dealt with in another article. Reference is made in this connection to article 26.

(9) Concerning the different kinds of "diplomatic bag" encompassed by the definition and the cross-reference to article 1, subparagraph (2) is structured similarly to subparagraph (1) on the definition of the "diplomatic courier". The same remarks made in the commentary to subparagraph (1) apply also, *mutatis mutandis*, to the present definition of the "diplomatic bag". In particular, it was understood in the Commission that the words "bag of a permanent mission" or "bag of a delegation" within the meaning of the 1975 Vienna Convention on the Representation of States also encompassed the notion of a bag of "representatives of Members" within the meaning of article IV (sects. 11 (c) and 16) of the 1946 Convention on the Privileges and Immunities of the United Nations and of article I (sect. 1 (v)) and article V (sect. 13 (c)) of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies.

(10) Elements of the present definition are further elaborated in specific provisions, namely articles 24 and 25 on identification and contents of the diplomatic bag, respectively.

#### *Subparagraph (3) of paragraph 1*

(11) The expressions "sending State" and "receiving State" in subparagraphs (3) and (4) follow the well-established terminology contained in all four codification conventions. This terminology has been maintained in article 3 and the definitions have been tailored to reflect the specific situation involving the diplomatic bag, whether accompanied by a courier or not. By defining a "sending State" as a State "dispatching a diplomatic bag", subparagraph (3) covers all possible situations—a State dispatching an unaccompanied bag as well as a State sending a diplomatic courier whose function is always connected with a bag; it also covers all other possible cases of accompanied bag referred to in the commentary to subparagraph (2) above. The phrase "to or from its missions, consular posts or delegations" not only spells out once more the two-way character of the official communications involved, but also makes it clear that, whatever the starting-point—State, mission, consular post or delegation—the bag is always the bag of the sending State.

#### *Subparagraph (4) of paragraph 1*

(12) To use the traditional terminology of "receiving State" within the context of a set of articles concerning the diplomatic courier and the diplomatic bag is entirely justified on the grounds that the same receiving State that is obliged by international law to accord facilities, privileges and immunities to missions, consular posts or delegations of a sending State and their personnel is the one that is envisaged by the present articles in regulating the facilities, privileges and immunities of the diplomatic courier and the diplomatic bag, if the sending State dispatches a courier or a bag to those same missions, consular posts or delegations. To use other terminology, such as "State of destination", would actually lead to confusion, since it would depart from the basic identity or equation between the State subject to obligations *vis-à-vis* foreign missions or posts and their personnel on its territory and the State subject to obligations *vis-à-vis* the diplomatic courier or the diplomatic bag.

(13) With reference to the case of a courier and a bag of a permanent mission, of a permanent observer mission, of a delegation or of an observer delegation, the notion of "receiving State" defined here covers also the notion of "host State" within the meaning of the 1975 Vienna Convention on the Representation of States. The prevailing view in the Commission was that the similarity between the obligations of the "host State" and of the "receiving State" in the traditional meaning, in situations involving a diplomatic courier or a diplomatic bag, did not warrant such a distinction in the present articles, especially since couriers and bags of international organizations were not within their scope and the articles employed a generic term, "mission", to cover the different situations listed in subparagraph (6).

#### *Subparagraph (5) of paragraph 1*

(14) It was widely felt in the Commission that the expression "to pass in transit" and, more precisely, the words "in transit" have acquired such a clear and unequivocal connotation in modern international relations and international communications that they are self-explanatory and that it was neither easy nor desirable to use a substitute expression in the definition of a "transit State", even if the definition might appear at first sight to be tautological.

(15) The definition is broad enough to cover the foreseen situation of a State through whose territory a courier or bag passes in transit in accordance with an established itinerary and unforeseen situations in which the provisions of paragraph 2 of article 30 will apply, with its qualifications. Except in circumstances where a visa is required, the transit State may not be aware that a courier or bag is passing through its territory. This broad concept of a transit State is based on the different situations contemplated by article 40 of the 1961 Vienna Convention on Diplomatic Relations, article 54 of the 1963 Vienna Convention on Consular Relations, article 42 of the 1969 Convention on Special Missions and article 81 of the 1975 Vienna Convention on the Representation of States.

(16) By mentioning the diplomatic bag separately from the diplomatic courier, the definition encompasses not only the unaccompanied bag, but also all other cases in

which the bag is entrusted to a person other than a diplomatic courier (captain of a commercial aircraft or master of a merchant ship), whatever the means of transportation used (air, land, watercourse or sea).

#### *Subparagraphs (6), (7) and (8) of paragraph 1*

(17) As emerges clearly from subparagraphs (6), (7) and (8), the definitions of the expressions "mission", "consular post" and "delegation" constitute cross-references to the relevant definitions contained in the codification conventions referred to in subparagraphs (1) and (2) of paragraph 1. It was also understood in the Commission that the words "permanent mission" or "delegation" within the meaning of the 1975 Vienna Convention on the Representation of States also encompassed the notion of "representatives of Members" within the meaning of article IV (sects. 11 and 16) of the 1946 Convention on the Privileges and Immunities of the United Nations and of article I (sect. 1 (v)) and article V (sect. 13) of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies. In the view of the Commission, this uniformity of language helps to integrate the set of articles on the topic of the diplomatic courier and the diplomatic bag into the whole system of provisions and the network of conventions already adopted in the area of diplomatic and consular law.

#### *Subparagraph (9) of paragraph 1*

(18) Different views were expressed in the Commission as to the drafting of subparagraph (9). It was suggested that, for reasons of symmetry with the drafting of preceding subparagraphs, the text should contain a mention of the 1975 Vienna Convention on the Representation of States, from whose article 1, paragraph 1 (1), the provision had been taken. The question was also raised whether the definition given in the subparagraph should not be confined to inter-governmental organizations of a universal character, to align it with the scope of the 1975 Vienna Convention. It was widely felt that subparagraph (9) was connected with two different aspects of the present articles. On the one hand, the notion of an "international organization" is present, even if in a passive manner, in that the articles are also intended to cover diplomatic couriers and bags of permanent missions, permanent observer missions, delegations or observer delegations accredited or sent to an international organization. This alone would justify the inclusion of a definition of an "international organization". On the other hand, subparagraph (9) is also connected with the scope of the present articles as clarified in article 2 and the commentary thereto.

#### *Paragraph 2*

(19) Paragraph 2 reproduces paragraph 2 of article 1 of the 1975 Vienna Convention on the Representation of States. Its purpose is to circumscribe the applicability of the definitions included in article 3, as such definitions, to the context and system of the set of articles in which they are contained. This is, of course, without prejudice to the possibility that some of them may coincide with the definitions of the same terms contained in other international instruments, or to the cross-references which in

some cases have been made to the definitions of certain terms given in other international instruments.

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

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

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

#### *Commentary*

##### *Paragraph 1*

(1) The source of paragraph 1 is to be found in provisions of the four codification conventions, namely article 27, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations, article 35, paragraph 1, of the 1963 Vienna Convention on Consular Relations, article 28, paragraph 1, of the 1969 Convention on Special Missions and article 57, paragraph 1, of the 1975 Vienna Convention on the Representation of States. Thus the principle of freedom of communication has been universally recognized as constituting the legal foundation of modern diplomatic law and it must also be considered as the core of the legal régime of diplomatic couriers and diplomatic bags. The safe, unimpeded and expeditious delivery of the diplomatic message and the inviolability of its confidential character constitute the most important practical aspect of that principle. It provides the legal basis for the protection of the diplomatic bag, placing upon the receiving State, whenever the courier or the bag enters its jurisdiction, the obligation to grant certain facilities, privileges and immunities so as to ensure adequate compliance with the above-stated ends.

(2) The cross-reference to article 1 explicitly clarifies that the freedom which article 4 regulates applies to the whole range of official communications already specified in the provision stating the scope of the present articles.

##### *Paragraph 2*

(3) Paragraph 2 recognizes the fact that the effective application of the rule of free diplomatic communication not only requires that the receiving State permit and protect free communications under its jurisdiction effected through diplomatic couriers and bags, but also places an identical obligation upon the transit State or States. For it is obvious that, in some instances, the safe, unimpeded and expeditious delivery of the diplomatic bag to its final destination depends on its passage, on its itinerary, through the territory of other States. This practical requirement is embodied as a general rule in paragraph 2, which is based on parallel provisions contained in the four codification conventions, namely article 40, paragraph 3, of the 1961 Vienna Convention on

Diplomatic Relations, article 54, paragraph 3, of the 1963 Vienna Convention on Consular Relations, article 42, paragraph 3, of the 1969 Convention on Special Missions and article 81, paragraph 4, of the 1975 Vienna Convention on the Representation of States.

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

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

**2. Without prejudice to the privileges and immunities accorded to him, it is the duty of the diplomatic courier to respect the laws and regulations of the receiving State and the transit State.**

#### *Commentary*

##### *Paragraph 1*

(1) The intention of article 5 as a whole, and of paragraph 1 in particular, is to establish the required balance between the interests of the sending State in the safe and unimpeded delivery of the bag, on the one hand, and the security and other legitimate considerations not only of the receiving State, but also of the transit State, on the other. In this respect, article 5 constitutes a counterpart to article 4, which establishes obligations on the part of the receiving State and the transit State. The object and purpose of the set of articles is the establishment of a system fully ensuring the confidentiality of the contents of the diplomatic bag, and its safe arrival at its destination, while guarding against its abuse. All privileges, immunities or facilities accorded either to the courier or to the bag itself have only this end in view and are therefore based on a functional approach. Paragraph 1 refers specifically to the duty of the sending State to ensure that the object and purpose of those facilities, privileges and immunities are not violated. Later articles spell out specific means whereby the sending State may exercise this control, such as recall or dismissal of its courier and termination of his functions.

(2) It was pointed out in the Commission that the expression "shall ensure that" should be taken to mean "shall make all possible efforts so that", and that it was this meaning that should be given to the word *veille*, in the French text, and to the words *velará por*, in the Spanish text.

##### *Paragraph 2*

(3) Paragraph 2 extends to the diplomatic courier principles contained in parallel provisions of the four codification conventions and is based, with some modifications, on article 41 of the 1961 Vienna Convention on Diplomatic Relations, article 55 of the 1963 Vienna Convention on Consular Relations, article 47 of the 1969 Convention on Special Missions and article 77 of the 1975 Vienna Convention on the Representation of States. It refers specifically to the duty of the diplomatic courier to respect the laws and regulations of the receiving

State and the transit State, without prejudice to the facilities, privileges and immunities which he enjoys. The duty of the diplomatic courier to observe the established legal order in the receiving or transit State may relate to a wide range of obligations regarding the maintenance of law and order, regulations in the field of public health and the use of public services and means of transport, or regulations with respect to hotel accommodation and the requirements for registration of foreigners, as well as regulations with respect to driving licences, etc. The duty naturally ceases to exist where the sending State or its diplomatic courier are expressly exempted by the present articles from applying the laws and regulations of the receiving or transit State.

(4) It was understood in the Commission that the duty embodied in paragraph 2 also encompasses the obligation to refrain from actions which might be perceived as tantamount to interference in the internal affairs of the receiving or transit State, such as taking part in political campaigns in those States or carrying subversive propaganda in the diplomatic bag directed at the political régime of, and to be distributed in, the receiving or transit State.

(5) Previous versions of article 5<sup>57</sup> contained a specific mention of the duty of the sending State and the diplomatic courier to respect the rules of international law in the receiving State and the transit State. After some discussion on the matter, the prevailing view was that the mention of international law was unnecessary, not because the duty to respect its rules did not exist, but rather because all States and their officials were obliged to respect the rules of international law regardless of their position, in specific instances, as sending States or diplomatic couriers, respectively. The mention of "international law" in this context would amount, to some extent, to restatement of the obvious.

#### **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 by custom or agreement extend to each other more favourable treatment with respect to their diplomatic couriers and diplomatic bags than is required by the present articles.**

#### *Commentary*

(1) Article 6 is largely modelled on article 49 of the 1969 Convention on Special Missions and, to a lesser extent, on

<sup>57</sup> For the original version, see *Yearbook ... 1982*, vol. II (Part Two), pp. 113-114, footnote 308; for the revised version, see *Yearbook ... 1983*, vol. II (Part Two), p. 45, footnote 185.

article 47 of the 1961 Vienna Convention on Diplomatic Relations, article 72 of the 1963 Vienna Convention on Consular Relations and article 83 of the 1975 Vienna Convention on the Representation of States. It lays down the principles of non-discrimination and reciprocity which are part of the general principles underlying the four codification conventions and which stem from the fundamental principle of the sovereign equality of States. Their application with regard to diplomatic or consular personnel leads to the establishment of a viable and coherent régime governing diplomatic and consular intercourse. The intrinsic cohesion between non-discrimination and reciprocity and their effective balance in the treatment of the above-mentioned personnel and of diplomatic couriers contribute to the attainment of a sound basis for a viable legal framework of rules governing the régime of the courier and the bag.

#### *Paragraph 1*

(2) Paragraph 1 lays down the general principle of non-discrimination mentioned above, referring not only to the receiving State but also to the transit State.

#### *Paragraph 2*

(3) Paragraph 2 introduces some exceptions to paragraph 1, based on the principle of reciprocity, which shall not be regarded as discrimination.

#### *Subparagraph (a) of paragraph 2*

(4) The first exception allows reciprocity by permitting a restrictive application of a provision of the present articles by the receiving State or the transit State because of a restrictive application of that provision to its diplomatic couriers or diplomatic bags by the sending State. The option granted by this provision to the receiving and transit States reflects the inevitable impact of the state of relations between those States and the sending State in the implementation of the articles. However, there should be some criteria or requirements for tolerable restrictions. It should be assumed that the restrictive application by the sending State concerned is in keeping with the strict terms of the provision in question and within the limits allowed by that provision; otherwise there would be an infringement of the present articles and the act of the receiving or transit State would become an act of reprisal.

#### *Subparagraph (b) of paragraph 2*

(5) The second exception refers to the case where, by custom or agreement, States may extend to each other more favourable treatment of their diplomatic couriers or diplomatic bags. Again in this case, States may apply reciprocity, this time in an active and positive way, establishing more favourable treatment between themselves than that which they are bound to accord to other States by the terms of the present articles. The word "custom" is intended to cover not only custom in a strictly juridical sense as a customary rule, but also practices *comitas gentium* which two or more States may wish to develop in their relations.

## PART II

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

#### *Article 7. Appointment of the diplomatic courier*

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

#### *Commentary*

(1) The terminology employed in article 7 indicating that the sending State or its missions, consular posts or delegations may freely appoint the diplomatic courier is consistent with that used in the corresponding provisions of the four codification conventions concerning the appointment of diplomatic or consular staff other than the head of the mission or the head of the consular post. Those provisions are article 7 of the 1961 Vienna Convention on Diplomatic Relations, article 19, paragraph 1, of the 1963 Vienna Convention on Consular Relations, article 8 of the 1969 Convention on Special Missions and article 9 of the 1975 Vienna Convention on the Representation of States.

(2) The appointment of a diplomatic courier is an act of the competent authorities of the sending State or its mission abroad directed at designating a person for the performance of an official function, namely the custody, transportation and delivery of the diplomatic bag. The appointment is an act in principle within the domestic jurisdiction of the sending State. Accordingly, the word "freely" is used in article 7. The requirements for appointment or special assignment, the procedure to be followed in the issuance of the act, the designation of the relevant competent authorities and the form of act are therefore governed by national laws and regulations and established practices.

(3) Nevertheless, the appointment of a diplomatic courier by the sending State has certain international implications affecting the receiving State or the transit State. There is a need for some international rules to strike a balance between the rights and interests of the sending State and the rights and interests of the receiving or transit States where the diplomatic courier is to exercise his functions. That is the purpose of articles 9 and 12 mentioned in article 7. The commentaries to those articles elaborate on ways of achieving the above-mentioned balance.

(4) A professional and regular diplomatic courier is, as a general rule, appointed by an act of a competent organ of the Ministry of Foreign Affairs of the sending State; he thus becomes or may become a member of the permanent or temporary staff of that Ministry, with rights and duties deriving from his position as a civil servant. On the other hand, a diplomatic courier *ad hoc* is not necessarily a diplomat or a member of the staff of the Ministry of Foreign Affairs. His functions may be performed by any official of the sending State or any person freely chosen by its competent authorities. His designation is for a special

occasion and his legal relationship with the sending State is of a temporary nature. He may be appointed by the Ministry of Foreign Affairs of the sending State, but is very often appointed by the latter's diplomatic missions, consular posts or delegations.

(5) The Commission was of the view that article 7 did not exclude the practice whereby, in exceptional cases, two or more States could jointly appoint the same person as a diplomatic courier. The Commission also considered that the foregoing should be understood subject to the provisions of articles 9 and 12, although the requirement of paragraph 1 of article 9 would be met if the courier had the nationality of at least one of the sending States.

#### ***Article 8. Documentation of the diplomatic courier***

**The diplomatic courier shall be provided with an official document indicating his status and essential personal data, including his name and, where appropriate, his official position or rank, as well as the number of packages constituting the diplomatic bag which is accompanied by him and their identification and destination.**

#### *Commentary*

(1) The direct source of article 8 is to be found in the pertinent provisions on the diplomatic or consular courier contained in the four codification conventions, namely article 27, paragraph 5, of the 1961 Vienna Convention on Diplomatic Relations, article 35, paragraph 5, of the 1963 Vienna Convention on Consular Relations, article 28, paragraph 6, of the 1969 Convention on Special Missions and article 57, paragraph 6, of the 1975 Vienna Convention on the Representation of States.

(2) The prevailing State practice, particularly during the past two decades, has closely followed the pattern established by the above-mentioned conventions of providing the courier with a special document indicating his status as such and his most essential personal data, such as his name and, where appropriate, his official position or rank, as well as the number of, and other particulars concerning, the packages constituting the bag, such as their serial numbers and destination. Whether the document is called "official document", "courier letter", "certificate", "courier's certificate" or "special certificate", its legal nature and purpose remain essentially the same, namely as an official document proving the status of the diplomatic courier. The document is issued by the competent authorities of the sending State or its diplomatic or other official missions abroad. The form of the document, its formal particulars and its denomination are entirely within the jurisdiction and discretion of the sending State in accordance with its laws, regulations and established practices. However, it would be advisable to attain a certain minimum degree of coherence and uniformity which may facilitate the safe, unimpeded and expeditious dispatch and delivery of the diplomatic bag through the establishment of generally agreed rules and regulations.

(3) In its previous version, article 8 began as follows: "The diplomatic courier shall be provided, in addition to his passport, with an official document . . .". The phrase "in addition to his passport" reflected the prevailing practice of States to provide the diplomatic courier with a passport or normal travelling document in addition to a document with proof of his status. In fact, many countries provide their professional or regular couriers even with diplomatic passports or passports of official service. The Commission felt that the phrase might create the wrong impression that the possession of a passport was compulsory, including in those cases—not infrequent—in which the laws and regulations of the receiving or transit State did not require one. If a passport is not required, then a visa is not required either on the special document certifying the status as diplomatic courier. The deletion of the phrase, however, does not release the diplomatic courier from the obligation to present a valid passport if the laws and regulations of the receiving or transit State so require.

#### ***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. However, when the diplomatic courier is performing his functions in the territory of the receiving State, withdrawal of consent shall not take effect until he has delivered the diplomatic bag to its consignee.**

**3. The receiving State may reserve the right provided for in paragraph 2 also 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.**

#### *Commentary*

(1) Paragraphs 1, 2 and 3 (b) of article 9 are modelled on article 8 of the 1961 Vienna Convention on Diplomatic Relations, article 22 of the 1963 Vienna Convention on Consular Relations, article 10 of the 1969 Convention on Special Missions and article 73 of the 1975 Vienna Convention on the Representation of States.

#### *Paragraphs 1 and 2*

(2) The similar provisions contained in the above-mentioned codification conventions point to the long-standing consideration that, as a rule, members of the diplomatic staff, consular officers and other representatives should be nationals of the sending State, owing to the political importance and confidential nature of their diplomatic functions. The question of nationality with respect to all kinds of diplomatic officials has always had great political and legal significance, and the same considerations apply to the diplomatic courier. The general rule, therefore, is that diplomatic couriers should in principle be nationals of the sending State.

(3) Paragraph 1, in keeping with the terminology used in all four codification conventions, uses the word "should" instead of "shall". This is due to the fact that the principle in question may be subject to exceptions.

(4) Paragraph 2 provides that the consent of the receiving State is required for the appointment of one of its nationals as a diplomatic courier of the sending State. The text states that this consent may be withdrawn "at any time". The words "at any time" are not intended to legitimize any arbitrary withdrawal of consent, or the interruption or interference with the performance of a mission already begun. The provision has to be interpreted in the light of the fact that the diplomatic courier performs his official functions in the territory of the receiving State and, for that purpose, is entitled to enjoy certain facilities, privileges and immunities which are normally granted by States to foreign subjects and not to its own nationals. Furthermore, due account should be taken of the protection of the diplomatic bag entrusted to the diplomatic courier and its safe delivery to its recipient. In the light of these considerations, the second sentence of paragraph 2 states in express terms that withdrawal of consent, when the diplomatic courier is performing his functions in the territory of the receiving State, shall not take effect until the courier has delivered the diplomatic bag to its consignee.

### *Paragraph 3*

(5) In accordance with paragraph 3, the receiving State may extend the legal régime established in paragraph 2 concerning the need for consent and the possibility of withdrawal of consent at any time to two other categories of persons: (a) nationals of a third State who are not also nationals of the sending State; (b) nationals of the sending State who are permanent residents of the receiving State. The expression "permanent residents of the receiving State" is to be understood in the light of the internal law of the receiving State, since the determination of the status of permanent resident is a matter of domestic law rather than of international law.

(6) As explained in paragraph (5) of the commentary to article 7, the Commission was of the view that, in the case in which two or more States jointly appoint the same person as a diplomatic courier, the requirement of paragraph 1 of article 9 would be met if the courier had the nationality of at least one of the sending States.

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

**The functions of the diplomatic courier consist in taking custody of the diplomatic bag entrusted to him and transporting and delivering it to its consignee.**

#### *Commentary*

(1) The existing codification conventions do not contain adequate definitions regarding the scope and content of the official functions of the diplomatic courier, although they may be inferred from certain provisions of those

conventions and remarks of the Commission on the draft articles which formed the basis for those provisions. It was therefore necessary to devise an adequate formulation of those functions, which has been attempted in article 10, as well as in paragraph 1 of article 3.

(2) A careful definition of the scope and content of the official functions of the diplomatic courier is of great importance for distinguishing between activities inherent in the courier's status and necessary for the performance of his task, and activities which may go beyond or abuse his functions. The latter case may prompt the receiving State to declare the courier *persona non grata* or not acceptable. Although, in accordance with article 12, such a declaration is a discretionary right of the receiving State, the latter in its own interest does not usually exercise this right in an unwarranted or arbitrary manner, since an adequate definition of the official functions provides States with a reasonable criterion for the exercise of this right.

(3) The main task of the diplomatic courier is the safe delivery of the diplomatic bag at its final destination. To that end, he is in charge of the custody and transportation of the accompanied bag from the moment he receives it from the competent organ or mission of the sending State until he delivers it to the consignee indicated in the official document and on the bag itself. The diplomatic bag, as a means of the freedom of official communications, is the main subject of legal protection, for the legal status of the diplomatic bag derives from the principle of the inviolability of the official correspondence of the diplomatic mission. The facilities, privileges and immunities accorded to the diplomatic courier are closely connected with his functions.

(4) Article 10 should be read in conjunction with the scope of the present articles as defined in article 1 and referred to in paragraph 1 (2) of article 3, which defines the diplomatic bag. In diplomatic practice, the sender and the consignee of the bag may be not only States and their diplomatic missions, but also consular posts, special missions and permanent missions or delegations. This arises clearly from the fact that all four codification conventions, dealing respectively with diplomatic relations, consular relations, special missions and the representation of States, contain provisions on the diplomatic courier. Furthermore, there has been a widespread practice by States to use the services of one diplomatic courier to deliver and/or collect different kinds of official bags from diplomatic missions, consular posts, special missions, etc. of the sending State situated in several countries or in several cities of the receiving State on his way to or from an official assignment for the sending State. For reasons of economy of drafting, the Commission deleted from the original draft article the words which tended to reflect those varieties of practice. However, this was done on the understanding that the deletion in no way affected the two-way as well as the *inter se* character of the communications between the sending State and its missions, consular posts or delegations by means of a diplomatic bag entrusted to the diplomatic courier, as reflected in article 1 and the commentary thereto.

(5) The courier is performing his functions even when he is not carrying a diplomatic bag but is proceeding to a mission, consular post or delegation in order to take possession of a bag, or is leaving a receiving State after having delivered a bag without taking custody of another one.

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

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

- (a) fulfilment of his functions or his return to the country of origin;**
- (b) notification by the sending State to the receiving State and, where necessary, the transit State that his functions have been terminated;**
- (c) notification by the receiving State to the sending State that, in accordance with paragraph 2 of article 12, it ceases to recognize him as a diplomatic courier.**

#### *Commentary*

(1) Although none of the existing codification conventions contains any specific provision on the end of the functions of the diplomatic courier, the wording of article 11 was inspired by several provisions contained in those conventions regarding the end of the functions of the diplomatic agent or the consular officer, namely article 43 of the 1961 Vienna Convention on Diplomatic Relations, article 25 of the 1963 Vienna Convention on Consular Relations, article 20 of the 1969 Convention on Special Missions and articles 40 and 69 of the 1975 Vienna Convention on the Representation of States.

(2) It is to be noted that, while a clear determination of the end of the courier's functions is useful for establishing greater certainty with respect to his status at any specific moment in time, the end of his privileges and immunities is regulated by a specific provision, namely article 21, paragraph 2, in accordance with criteria which are explained in the commentary thereto. It is also to be noted that, while article 11 enumerates the most frequent or conspicuous cases of the end of the courier's functions, the words "*inter alia*" in the introductory clause clearly indicate, as further explained in paragraph (6) below, that the list is not exhaustive but indicative.

#### *Subparagraph (a)*

(3) The end of the courier's functions may come about in the first place through his own personal actions. The most frequent and usual fact having such an effect is the fulfilment of his mission by completion of his itinerary. In the case of the regular or professional courier, this fact would be marked by the return of the courier to the country of origin. The words "country of origin" should be interpreted as referring to the country from which the courier started his mission. In the case of the diplomatic courier *ad hoc* who is a resident of the receiving State, his mission ends upon the delivery of the diplomatic bag entrusted to him. Subparagraph (a) also contemplates the possibility that the functions of the courier may end without having been fulfilled, because of an urgent and

unforeseen return to the country of origin. This may be caused, *inter alia*, by natural events, such as earthquakes or floods, which prevent the courier from reaching the consignee, or by a decision of the sending State not to deliver a bag which is already on its way.

#### *Subparagraph (b)*

(4) The end of the courier's functions may also come about through acts of the sending State. Subparagraph (b) is directly modelled on article 43, subparagraph (a), of the 1961 Vienna Convention on Diplomatic Relations. Although the acts of the competent authorities of the sending State which could bring about the termination of the courier's functions may vary in their substance or motivation and may take the form of recall, dismissal, etc., *vis-à-vis* the receiving State they should be expressed by a notification to the courier service or relevant unit of the Ministry of Foreign Affairs of the receiving State or, where necessary, of the transit State.

#### *Subparagraph (c)*

(5) The end of the courier's functions may also come about through an act of the receiving State. Subparagraph (c) is directly modelled on article 43, subparagraph (b), of the 1961 Vienna Convention on Diplomatic Relations. The act of the receiving State is a notification to the effect that the diplomatic courier is either *persona non grata* or not acceptable, as explained in more detail in the commentary to article 12. If the sending State does not recall the courier or terminate his functions, the receiving State may refuse to recognize him as a courier with effect from the time of notification to the sending State.

(6) As evidenced by the words "*inter alia*" in its introductory clause, article 11 does not purport to present an exhaustive rehearsal of all the possible reasons leading to the end of the courier's functions. The end of the courier's functions may also come about through other events or facts, such as his death during the performance of his functions. It must be pointed out that, in such a case, in spite of the termination of the courier's functions, the protection of the diplomatic bag must still be secured by the receiving or transit State, as explained in more detail in the commentary to article 30.

#### **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, the receiving State may cease to recognize the person concerned as a diplomatic courier.

### Commentary

#### *Paragraph 1*

(1) Paragraph 1 of article 12 extends to the legal régime of the diplomatic courier the institution of the declaration of *persona non grata*. This right of the receiving State established by international customary law has been reiterated in various provisions of the codification conventions, namely article 9 of the 1961 Vienna Convention on Diplomatic Relations, article 23 of the 1963 Vienna Convention on Consular Relations and article 12 of the 1969 Convention on Special Missions.

(2) This institution, in principle, constitutes one form of termination of the diplomatic courier's functions and represents an effective means at the disposal of the receiving State to protect its interests by terminating the functions of a foreign official in its territory. But it may also serve the purpose of preventing a foreign official objectionable to the receiving State from effectively assuming his functions. Since the diplomatic courier is not a head of mission, the institution of *agrément* prior to his appointment does not apply. As explained in the commentary to article 7, the courier is in principle freely chosen by the sending State and therefore his name is not submitted in advance to the receiving State for approval. But if the receiving State, before the courier's arrival in its territory, finds that it has objections to him, it may, as in the case of a head of mission who has not been approved, inform the sending State that he is *persona non grata* or not acceptable, with the same effect as in the case of the head of mission. This might happen, for instance, if the sending State deemed it suitable to notify the receiving State of the appointment of the courier, or in the event of an application for an entry visa if such a visa were required by the receiving State. This is why the Commission considered it advisable to add to the text of paragraph 1 as originally submitted by the Special Rapporteur a third sentence stating: "A person may be declared *non grata* or not acceptable before arriving in the territory of the receiving State." This sentence is to be found in the parallel provisions of the codification conventions mentioned in paragraph (1) of the present commentary.

(3) In accordance with the terminology used in article 9 of the 1961 Vienna Convention on Diplomatic Relations, article 12 speaks of a declaration of "*persona non grata* or not acceptable", depending on whether the diplomatic courier objectionable to the receiving State possesses diplomatic rank (*persona non grata*) or not (not acceptable).

(4) Whether the decision of the receiving State to declare a diplomatic courier *persona non grata* or not acceptable takes place before he enters its territory or after his entry during his stay there, in both cases the solution arising from article 12 is that the receiving State is not obliged to explain or justify its decision, unless it decides otherwise. This discretion is not only an expression of the sovereignty of the receiving State but, in many instances, is justified by political or security interests or other considerations.

(5) As provided in paragraph 1, the declaration by the receiving State that a diplomatic courier is *persona non grata* or not acceptable should lead the sending State to recall its courier. The possibility also exists that the

courier cannot be recalled because he is a national of the receiving State, as contemplated in paragraph 2 of article 9. That is why paragraph 1 of article 12 provides the alternative that the sending State shall "terminate his functions to be performed in the receiving State". The latter clause also covers the case in which the courier is not yet in the territory of the receiving State but in transit towards it. The clause also conveys the notion that the termination of functions relates to those to be performed in the specific receiving State which has declared the courier *persona non grata* or not acceptable and does not relate to those functions that a courier with multiple missions may perform in another receiving State.

#### *Paragraph 2*

(6) Paragraph 2 is based on comparable provisions contained in the corresponding articles of the codification conventions cited in paragraph (1) of the present commentary. Paragraph 2 should be read in conjunction with article 11 (c) and article 21, paragraph 2, and the commentaries thereto. The commentary to paragraph 2 of article 21 explains in greater detail the interrelationship between paragraph 2 of article 12 and the above-mentioned provisions. Paragraph 2 of article 12 refers to the refusal or failure of the sending State to carry out its obligations under paragraph 1. It is therefore concerned with the termination of the functions of the courier. It is only after the sending State has failed to comply with its obligation to recall the courier or terminate his functions that the receiving State may cease to recognize the person concerned as a diplomatic courier and treat him as an ordinary foreign visitor or temporary resident. The second part of the first sentence of paragraph 2 of article 21 refers to the cessation of the courier's privileges and immunities when he has not left the territory of the receiving State within a reasonable period.

### **Article 13. Facilities accorded to the diplomatic courier**

**1. The receiving State or the transit State shall accord to the diplomatic courier the facilities necessary for the performance of his functions.**

**2. The receiving State or 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.**

### Commentary

(1) Article 13 deals with the general facilities to be accorded to the diplomatic courier in the exercise of his functions relating to the freedom of communication as well as with some other more specific facilities connected with his temporary accommodation and the establishment of any contacts with the sending State and its missions.

### Paragraph 1

(2) Paragraph 1 is of a general character and is inspired by article 25 of the 1961 Vienna Convention on Diplomatic Relations, article 28 of the 1963 Vienna Convention on Consular Relations, article 22 of the 1969 Convention on Special Missions and articles 20 and 51 of the 1975 Vienna Convention on the Representation of States.

(3) The diplomatic courier, as an official of the sending State, may, while exercising his functions in the territory of the receiving State or transit State, need some assistance in connection with his journey. The facilities which he may need could include various means of help or co-operation from the authorities of the receiving State or transit State in order for him to perform his duties expeditiously and without undue difficulties. Some of these facilities could be anticipated well in advance, due to their essential and repetitive character, while others might be unpredictable in nature, so that their explicit formulation in an article is neither easy nor convenient. The main requirement with respect to the nature and scope of the facilities is their close dependence upon the courier's need to be able to perform his functions properly. The facilities could be granted by the central or the local authorities, as the case may be. They may be of a technical or administrative nature, relating to admission or entry into the territory of the transit State or the receiving State, or to the provision of assistance in securing the safety of the diplomatic bag. As the Commission stated in paragraph (2) of the commentary to the corresponding provision (art. 33) of its 1961 draft articles on consular relations:

It is difficult to define the facilities which this article has in view, for this depends on the circumstances of each particular case. It should, however, be emphasized that the obligation to provide facilities is confined to what is reasonable, having regard to the given circumstances.<sup>58</sup>

It should be added that the nature and scope of the facilities accorded to the diplomatic courier for the performance of his functions constitute a substantial aspect of his legal status and they must be regarded as an important legal means for the protection of the freedom of communication between the sending State and its missions, consular posts and delegations.

### Paragraph 2

(4) Paragraph 2 deals with two specific facilities to be granted to the courier by the receiving State or the transit State. Its subject-matter was the object of two separate draft articles submitted by the Special Rapporteur, namely draft article 18, on freedom of communication, and draft article 19, on temporary accommodation. The Commission felt that reasons of logic as well as of economy of drafting made it advisable to combine both provisions into a single one as a second paragraph of article 13.

(5) Within the scope of the practical facilities which may be accorded by the receiving State or the transit State to the diplomatic courier for the performance of his functions in their territories, paragraph 2 refers specifically to the assistance to be rendered to him in obtaining temporary accommodation when requested

under certain circumstances. Normally, the diplomatic courier has to resolve himself all the practical problems that may arise during his journey, including his accommodation. However, in certain special situations the diplomatic courier may not be able to find suitable temporary accommodation for himself and for the protection of the diplomatic bag, for example when he is compelled either to change his original itinerary or to stop over in a certain place. In that exceptional case, the receiving State or the transit State may be requested to assist him in obtaining such temporary accommodation. It is of great importance that the diplomatic courier and the diplomatic bag carried by him be housed in a safe and secure place, hence this provision providing for facilities to be rendered by the receiving State or the transit State for the proper performance of his functions. The words "to the extent practicable" used in paragraph 2 point to the fact that the obligation to provide this facility is to be understood within reasonable limits, the obligation being one of providing the means rather than ensuring the result. The Commission felt that, while the internal organization of some States might be such that an intervention from a State organ could ensure the easy availability of a hotel room or other accommodation, this was not necessarily so in other States. In the latter case, the obligation to assist couriers in obtaining temporary accommodation might prove on certain occasions or under certain circumstances to be a particularly burdensome one and therefore had to be kept within reasonable bounds.

(6) The other facility expressly mentioned in paragraph 2 is the obligation for the receiving State or the transit State, as the case may be, to assist the courier at his request and to the extent practicable in establishing contact through the telecommunications network with the sending State and its missions, consular posts or delegations, wherever situated. The diplomatic courier *en route* or at a certain point on his temporary stopover might need to communicate directly with the competent authorities of the sending State or its missions abroad to seek instructions or inform them about delays or deviations from the original way-bill, or to convey any other information in connection with the performance of his functions. This assistance by the receiving State or transit State entails the facilitation, when necessary, of the courier's use of the appropriate means of telecommunication, including telephone, telegraph, telex and other available services. Assistance should in principle not be requested from the receiving or transit State in normal circumstances, when the means of communication are generally accessible. The request for assistance must be justified on the grounds of existing difficulties or obstacles which the courier could not overcome without the direct help or co-operation of the authorities of the receiving State or transit State. In this connection, a possible implementation of the obligation of assistance might be the ensuring of a priority call for the diplomatic courier over the public telecommunications network or, in urgent cases, the placing of other telecommunications networks (such as the police network, etc.) at the courier's disposal. It should also be noted that the qualification introduced by the words "to the extent practicable", as explained in paragraph (5) of the present commentary, also applies to this obligation of assistance.

<sup>58</sup> Yearbook ... 1961, vol. II, p. 111, document A/4843, chap. II, sect. IV.

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

1. The receiving State or 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.

*Commentary*

(1) Article 14 is basically modelled on article 79 of the 1975 Vienna Convention on the Representation of States.

*Paragraph 1*

(2) The admission of the diplomatic courier into the territory of the receiving State or his crossing the territory of the transit State is an indispensable condition for him to perform his functions. It is obvious that, if a diplomatic courier is refused entry into the territory of the receiving State, then he is prevented from performing his functions. For this reason, the obligation of States to permit the entry into their territory of diplomatic couriers has become well established in international law and State practice as an essential element of the principle of freedom of communication for official purposes effected through diplomatic couriers and diplomatic bags and as a corollary of the freely appointed character of the courier, as stated in article 7 and the commentary thereto, particularly its paragraph (2). The phrase "in the performance of his functions" should be interpreted as meaning "in the course of the performance of his functions", which includes entry into the territory of the receiving or transit State in order to pick up a bag for later delivery.

*Paragraph 2*

(3) The facilities for entry into the territory of the receiving State or the transit State rendered by those States to the diplomatic courier depend very much on the régime established by them for admission across their frontiers of foreigners in general, and members of foreign diplomatic and other missions and official delegations in particular. The main purpose of those facilities is to ensure unimpeded and expeditious passage through the immigration and other checking offices at the frontier. Where the régime for admission requires an entry or transit visa for all foreign visitors or for nationals of some countries, it should be granted to the diplomatic courier by the competent authorities of the receiving or transit State as promptly as possible and, where possible, with reduced formalities. There has been abundant State practice—established through national regulations and international agreements—on simplified procedures for the issuance of special visas to diplomatic couriers valid for multiple journeys and long periods of time.

**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 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.

*Commentary*

(1) The direct source of article 15 is to be found in the pertinent provisions of the four codification conventions, namely article 26 of the 1961 Vienna Convention on Diplomatic Relations, article 34 of the 1963 Vienna Convention on Consular Relations, article 27 of the 1969 Convention on Special Missions and articles 26 and 56 of the 1975 Vienna Convention on the Representation of States.

(2) Freedom of movement and travel within the territory of the receiving or transit State is another essential condition for the proper performance of the functions of the diplomatic courier. It also constitutes an important element of the general principle of freedom of diplomatic communication. Any impediment to the exercise of free movement and travel of the courier in the performance of his functions inevitably leads to retardation of the delivery of the diplomatic correspondence and thus adversely affects official communications. To ensure this freedom of movement and travel, the authorities of the receiving or transit State should, save in exceptional circumstances, assist the diplomatic courier in overcoming possible difficulties and obstacles which could be caused by routine police, customs or other inspection or control during his travel. As a rule, the diplomatic courier has to make all the necessary travel arrangements for his entire journey in the exercise of his tasks. In exceptional circumstances, the courier may be compelled to address a request for assistance to the authorities of the receiving or transit State to obtain an appropriate means of transportation when he has to face insurmountable obstacles which may delay his journey and which could be overcome, to the extent practicable, with the help or co-operation of the local authorities.

(3) Freedom of movement and travel entails the right of the diplomatic courier to use all available means of transportation and any appropriate itinerary in the territory of the receiving State or transit State. However, having in mind the fact that the freedom of movement and travel of the diplomatic courier is subordinated to his function of carrying the diplomatic bag, it should be assumed that he has to follow the most appropriate itinerary, which usually should be the most convenient journey for the safe, speedy and economical delivery of the bag to its destination. It was to emphasize this functional approach of article 15 that the Commission replaced the original formulation submitted by the Special Rapporteur, "shall ensure freedom of movement in their respective territories to the diplomatic courier in the performance of his official functions", by the more precise wording, "shall ensure to the diplomatic courier such freedom of movement and travel in its territory as is necessary for the performance of his functions", which reproduces the formulation of the corresponding provision of the 1969 Convention on Special Missions (art. 27). As for the interpretation of this phrase, the obligation of the receiving State or the transit State, as it

arises from article 15, with regard to the freedom of movement and travel ensured to the diplomatic courier is confined to his journey or movement relating to the performance of his functions. In all other instances, the courier would enjoy the normal freedoms accorded to foreign visitors by the laws and regulations of the receiving or transit State.

(4) Furthermore, certain limitations could be established on the courier's freedom of movement and travel with regard to certain zones in the receiving State or transit State into which entry is prohibited or regulated for reasons of national security. Such a restriction on freedom of movement and travel has been generally acknowledged by international law and State practice with regard to foreign nationals, including members of diplomatic and other missions, and is explicitly recognized in the provisions of the existing codification conventions cited in paragraph (1) of the present commentary. It was precisely for the sake of maintaining uniformity with the texts of those provisions that the Commission introduced certain amendments to the original formulation submitted by the Special Rapporteur. The phrase "zones where access is prohibited or regulated for reasons of national security" was replaced by "zones entry into which is prohibited or regulated for reasons of national security". It was felt that the Commission should keep to that formula, if only to avoid possible misinterpretations. By the same token, the phrase at the end of the original draft article, "or when returning to the sending State", was deleted. In the view of the Commission, that phrase added nothing to the meaning of the article and could lead to misguided interpretations of the conventions which contained no corresponding phrase. On the other hand, the point should also be made, in accordance with the commentary to the corresponding provision (art. 24) of the Commission's 1958 draft articles on diplomatic intercourse and immunities,<sup>59</sup> that the establishment of prohibited zones must not be so extensive as to render freedom of movement and travel illusory.

#### **Article 16. Personal protection and inviolability**

The diplomatic courier shall be protected by the receiving State or 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.

#### *Commentary*

(1) The direct source of article 16, as regards obligations of both the receiving State and the transit State, is to be found in the following provisions of the codification conventions, which deal with the personal inviolability of the courier: article 27, paragraph 5, and article 40, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations; article 35, paragraph 5, and article 54, paragraph 3, of the 1963 Vienna Convention on Consular Relations; article 28, paragraph 6, and article 42, paragraph 3, of the 1969 Convention on

Special Missions; and article 27, paragraph 5, article 57, paragraph 6, and article 81, paragraph 4, of the 1975 Vienna Convention on the Representation of States.

(2) A comparison between the above-mentioned provisions on which article 16 is based and the provision on personal inviolability of the diplomatic agent in article 29 of the 1961 Vienna Convention on Diplomatic Relations leads to the conclusion that the personal inviolability of the diplomatic courier comes very close in its scope and legal implications to that of a diplomatic agent. This is justified by the nature of the courier's function with regard to the custody, transportation and delivery of the diplomatic bag and the legal protection of the confidential character of official correspondence. This inviolability of the courier arises not only from the provisions of the codification conventions cited above, but also from numerous other manifestations of State practice, such as bilateral consular conventions and provisions of national legislation.

(3) The principle of the inviolability of the courier has a twofold nature. On the one hand, it implies for the receiving State and the transit State obligations of a preponderantly negative nature, where the duties of abstention predominate. Thus the courier shall not be liable to arrest, detention or any other form of restriction on his person and is exempted from measures that would amount to direct coercion. The other aspect of the twofold nature of the courier's personal inviolability entails a positive obligation on the part of the receiving and transit States. The concept of protection embodied in article 16 includes the duty of the receiving and transit States to take all appropriate measures to prevent any infringement of the courier's person, freedom or dignity. The receiving State and the transit State have the obligation to respect and to ensure respect for the person of the diplomatic courier. They must take all reasonable steps to that end.

(4) Notwithstanding the broad character of the duty of protection and respect for the inviolability of the diplomatic courier, some qualifications are in order. As provided in article 16, the courier shall be protected by the receiving State or the transit State "in the performance of his functions". Furthermore, and in accordance with paragraph (1) of the commentary to article 27 of the Commission's 1958 draft articles on diplomatic intercourse and immunities<sup>60</sup> (which served as the basis for article 29 of the 1961 Vienna Convention on Diplomatic Relations, dealing with the personal inviolability of the diplomatic agent), it should be understood that the principle of the courier's inviolability does not exclude in respect of him either measures of self-defence or, in exceptional circumstances, measures to prevent him from committing crimes or offences.

#### **Article 17. Inviolability of temporary accommodation**

1. The temporary accommodation of the diplomatic courier carrying a diplomatic bag shall, in principle, be inviolable. However:

<sup>59</sup> Yearbook ... 1958, vol. II, p. 96, document A/3859, chap. III, sect. II.

<sup>60</sup> Ibid., p. 97.

**(a) prompt protective action may be taken if required in case of fire or other disaster;**

**(b) inspection or search may be undertaken where serious grounds exist for believing that there are in the temporary accommodation articles the possession, import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State or the transit State.**

**2. In the case referred to in paragraph 1 (a), measures necessary for the protection of the diplomatic bag and its inviolability shall be taken.**

**3. In the case referred to in paragraph 1 (b), inspection or search shall be conducted in the presence of the diplomatic courier and on condition that it be effected without infringing the inviolability either of the person of the diplomatic courier or of the diplomatic bag and would not unduly delay or impede the delivery of the diplomatic bag. The diplomatic courier shall be given the opportunity to communicate with his mission in order to invite a member of that mission to be present when the inspection or search takes place.**

**4. 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.**

#### *Commentary*

(1) There are no specific rules regarding the inviolability of the temporary accommodation of the diplomatic courier in any of the four codification conventions or in other international agreements in the field of diplomatic or consular law. However, there exist in those conventions provisions relating to the status of the private residence of a member of a diplomatic mission, and of the private accommodation of members of special missions, permanent missions to international organizations or members of delegations to international conferences. Those provisions are article 30 of the 1961 Vienna Convention on Diplomatic Relations, article 30 of the 1969 Convention on Special Missions and articles 29 and 59 of the 1975 Vienna Convention on the Representation of States.

(2) Couriers are often housed in the premises of the mission, in private apartments owned or used by the mission or in the private accommodation of a member of the mission. In such instances, the inviolability of the temporary accommodation of the diplomatic courier will be protected under the relevant provisions of the above-mentioned conventions or customary international law. When the courier's temporary accommodation happens to be in a hotel, motel, guest house, private apartment or other similar common facilities for lodging visitors on a temporary stay, special rules on the inviolability of the temporary accommodation of the diplomatic courier apply.

#### *Paragraph 1*

(3) Paragraph 1 lays down the general principle of the inviolability of the temporary accommodation of a diplomatic courier carrying with him a diplomatic bag as well as the two specific cases in which this inviolability may be limited. These exceptions are aimed at striking a

realistic and workable balance between respect for the inviolability of the temporary accommodation of the diplomatic courier carrying with him a diplomatic bag and the need of the receiving State or transit State to take prompt protective action in emergency situations such as a fire or disaster which threatens the temporary accommodation of the courier, as well as to dispel or confirm the suspicion that the bag is being used for introducing forbidden articles.

(4) From the point of view of the receiving State and the transit State, the inviolability of the courier's temporary accommodation provided for in the first sentence of paragraph 1 has two aspects. In the negative sense, they are obliged to prevent their agents from entering the premises for any official purpose whatsoever, except with the consent of the courier. This covers immunity from any search, requisition, attachment or execution and therefore the accommodation may not be entered even in pursuance of a judicial order. Of course, measures of execution could be taken against the private owner of the accommodation, provided that it is not necessary to enter the temporary accommodation. The inviolability of the courier's temporary accommodation also implies for the receiving and transit States a more positive obligation. They should secure the inviolability of the accommodation from any intrusion by unauthorized persons. Moreover, the official functions of the courier, and more particularly the protection of the diplomatic bag carried by him, might in exceptional circumstances warrant the undertaking of special measures of protection.

(5) Subparagraphs (a) and (b) of paragraph 1 tend to establish a balance between the interest of the sending State in protecting the courier and the bag and the interest of the receiving or transit State in protecting its safety and security. They create some limitations under certain conditions to the rule of inviolability of the temporary accommodation. Both subparagraphs should be read in conjunction with their respective counterparts, namely paragraphs 2 and 3, as each subparagraph establishing a possible exception to the principle of inviolability of the temporary accommodation is counterbalanced by a paragraph laying down the strict modalities or conditions under which such an exception may apply. Furthermore, the fact that paragraph 1 refers to a courier "carrying a diplomatic bag" is an explicit indication that the purpose of the inviolability of the temporary accommodation is not so much the protection of the courier as, first and foremost, the protection of the bag.

#### *Paragraph 1 (a) and paragraph 2*

(6) The language used in subparagraph (a) of paragraph 1, stating that prompt protective action may be taken if required in case of fire or other disaster, can be traced to article 31 of the 1963 Vienna Convention on Consular Relations and also, to some extent, to article 25 of the 1969 Convention on Special Missions. Such action as may be taken should obviously be directed only at the suppression of the disaster—which may constitute a public hazard jeopardizing public safety or the safety of the courier himself and the bag—and should stop short of any measure which would exceed this original purpose. The exception laid down in subparagraph (a) concerns only the inviolability of the temporary accommodation as such and does not affect the inviolability of the diplomatic

bag, which should be protected at all times. That is why paragraph 2 makes it clear that the prompt protective action taken if required in case of fire or other disaster should be accompanied by measures necessary for the protection of the diplomatic bag and its inviolability.

#### *Paragraph 1 (b) and paragraph 3*

(7) Subparagraph (b) of paragraph 1 provides for the possibility that the temporary accommodation of the courier may be inspected and searched when there exist serious grounds for believing that it contains articles the possession, import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State or the transit State. The provision is therefore aimed at ensuring observance of the laws and regulations of the receiving or transit State and respect for their legitimate interests. Paragraph 3, however, counter-balances the above-mentioned provision by requiring that such an inspection or search be conducted in the presence of the diplomatic courier and on condition that it be effected without infringing the inviolability either of the person of the diplomatic courier or of the diplomatic bag and without unduly delaying or impeding the delivery of the diplomatic bag.

(8) The second sentence of paragraph 3 provides that the diplomatic courier shall be given the opportunity to communicate with his mission in order to invite a member of that mission to be present when the inspection or search takes place. The rationale behind this provision is that, under normal circumstances, the hypothesis contemplated in paragraph 1 (b) does not constitute an emergency requiring prompt action and there may be situations in which the presence of a member of the mission may be useful and helpful to the courier, for example if the courier is not fluent in the language of the receiving or transit State. However, it should be noted that the provision does not make the presence of a member of the mission a condition for carrying out the inspection or search. While in many cases it will be possible to wait for him to be present, in other cases (for example if the presence of explosives in the temporary accommodation is suspected) such a delay might prove contradictory to the main purpose of paragraph 1 (b), namely to ensure compliance with the safety regulations of the receiving or transit State.

#### *Paragraph 4*

(9) Compliance by the receiving State and the transit State with the obligations deriving from the first sentence of paragraph 1 has to be facilitated by the courier's informing the States concerned of the location of his temporary accommodation. Paragraph 4 is therefore mainly aimed at facilitating the discharge by the authorities of the receiving and transit States of their obligations in implementing the inviolability of the courier's temporary accommodation. The Commission felt that, in the case of a violation of those obligations, the international responsibility of the States concerned might not exist if the requirement of paragraph 4 had not been met. The words "to the extent practicable" point to the fact that, in exceptional circumstances, the courier might be prevented from giving such information.

(10) In cases where a courier employs an individual means of transport of his own in the exercise of his functions, a question could arise as to the application of a special rule concerning the inviolability of that means of transport. The Commission, while of the view that no special provision was necessary, felt that the commentary to article 17 should reflect the notion that, whenever the diplomatic courier uses a means of transport in the performance of his functions, that means of transport should not be subject to measures which might impede or delay such performance, particularly the delivery of the bag. Paragraph (7) of the commentary to article 18 contains further explanations relevant to this question.

### ***Article 18. Immunity from jurisdiction***

**1. The diplomatic courier shall enjoy immunity from the criminal jurisdiction of the receiving State or the transit State in respect of acts performed in the exercise of his functions.**

**2. He shall also enjoy immunity from the civil and administrative jurisdiction of the receiving State or the transit State in respect of acts performed in the exercise of his functions. This immunity shall not extend to an action for damages arising from an accident involving a vehicle the use of which may have entailed the liability of the courier to the extent that those damages are not recoverable from insurance. Pursuant to the laws and regulations of the receiving State or the transit State, the courier shall, when driving a motor vehicle, be required to have insurance coverage against third-party risks.**

**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 and provided that the measures concerned can be taken without infringing the inviolability of his person, his temporary accommodation or the diplomatic bag entrusted to him.**

**4. The diplomatic courier is not obliged to give evidence as a witness on matters connected with the exercise of his functions. He may, however, be required to give evidence on other matters, provided that this would not unduly delay or impede the delivery of the diplomatic bag.**

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

#### *Commentary*

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

#### *Paragraph 1*

(2) Paragraph 1, which refers to the immunity from criminal jurisdiction of the diplomatic courier, represents a compromise solution between two distinct bodies of opinion in the Commission: the opinion that the granting

of absolute immunity from criminal jurisdiction to the courier was essential and entirely justified because of his position and his functions, and the opinion that such granting of immunity was superfluous and functionally unnecessary. The article therefore differs from the text initially submitted by the Special Rapporteur in that the granting of immunity from criminal jurisdiction is qualified by the phrase "in respect of acts performed in the exercise of his functions", the same phrase as that adopted in paragraph 2 for immunity from civil and administrative jurisdiction.

(3) As indicated in paragraph (2) above, views in the Commission were divided on the need for a special provision on immunity from criminal jurisdiction and the scope of such immunity.

(4) On the one hand, reservations were expressed concerning paragraph 1 on the ground that article 16, on the inviolability of the diplomatic courier, already provided the courier with all the protection he needed to perform his functions. On the other hand, reservations were expressed as to the addition of the words "in respect of acts performed in the exercise of his functions", on the ground that the granting of immunity from criminal jurisdiction to the diplomatic courier should be unqualified. The addition of that phrase might create difficulties of interpretation.

(5) The addition of the phrase "in respect of acts performed in the exercise of his functions" is intended to make it clear that the immunity from criminal jurisdiction would not apply to any act performed by the courier not directly related to the performance of his functions. Acts not covered by immunity from criminal jurisdiction would range from the most obvious offences, such as theft or murder, to cases of serious abuse of the diplomatic bag, for example the act of intentionally carrying articles prohibited under article 25, such as weapons for terrorists or narcotic drugs. It was pointed out in that connection that paragraph 1 should be interpreted in the light of and in conjunction with the following: article 5, on the duty to respect the laws and regulations of the receiving State and the transit State; article 10, on the functions of the diplomatic courier, which consist in taking custody of, transporting and delivering the bag; article 12, on the diplomatic courier declared *persona non grata* or not acceptable; and article 25, on the contents of the diplomatic bag. Further observations on the interpretation and practical application of the phrase "in respect of acts performed in the exercise of his functions" are contained in paragraphs (6) to (11) of the present commentary.

#### *Paragraph 2*

(6) The first sentence of paragraph 2 is modelled on the second part of paragraph 1 of article 60 of the 1975 Vienna Convention on the Representation of States. Although the four codification conventions adopt a functional approach in respect of immunity from the civil and administrative jurisdiction of the receiving or transit State, most of them do so by enumerating exceptions to the principle of immunity, the underlying rationale being that those exceptions constitute clear cases of acts performed outside the functions of the person enjoying the immunity concerned, for example an action relating

to any professional or commercial activity exercised by the person in question in his personal capacity. Paragraph 2, like article 43 of the 1963 Vienna Convention on Consular Relations and article 60, paragraph 1, of the 1975 Vienna Convention on the Representation of States, reflects the functional approach to immunity from civil and administrative jurisdiction in a non-specific manner by means of a general formula, namely "in respect of acts performed in the exercise of his functions". This is also the approach taken by the codification conventions mentioned in paragraph (1) of the present commentary with regard to members of the administrative and technical staff of the mission concerned, which stipulate that such immunity "shall not extend to acts performed outside the course of their duties".

(7) The next question, as in the case of paragraph 1, is the determination of the legal nature and scope of an act "performed in the exercise of his functions" as distinct from the private activity of the person concerned. The functional approach in this case presupposes that the immunity is recognized in fact by the sending State and is therefore limited to the acts performed by the courier as an authorized official fulfilling a mission for the sending State. The character of such acts could be determined by multilateral or bilateral treaties or conventions, by customary international law or by the internal laws and regulations of States. Clear examples of acts outside the performance of his functions are those enumerated in the provisions of the codification conventions, such as article 31 of the 1961 Vienna Convention on Diplomatic Relations. However, there could be other acts performed by the person enjoying immunity from local civil jurisdiction, such as contracts concluded by him which were not expressly or implicitly concluded in his capacity as an authorized official performing a mission for the sending State. This may be the case in respect of the renting of a hotel room, the renting of a car, the use of services for cartage and storage or the conclusion of a lease or purchase contract by a diplomatic courier during his journey. The obligation to settle a hotel bill or purchases made by and services rendered to the diplomatic courier, although arising during and even in connection with the exercise of his official functions, is not exempt from the application of local laws and regulations. The main reason for such a conclusion is that, in all these instances, purchases are made by and services of a general commercial nature are rendered to the person concerned which have to be paid for by anyone benefiting from them. The same rule applies to charges levied for specific services rendered, as provided for in article 34 (e) of the 1961 Vienna Convention and the corresponding articles in the other codification conventions. Consequently, acts relating to such purchases or services cannot be considered *per se* to be acts performed in the exercise of the official functions of the courier and therefore covered by the immunity from local civil and administrative jurisdiction.

(8) As regards the interpretation of the words "acts performed in the exercise of his functions" within the context of the administrative jurisdiction of the receiving State or the transit State, it was widely held, in the first place, that the concept itself of "administrative jurisdiction" depended largely on the internal law of the

receiving or transit State and that it certainly covered administrative tribunals. Furthermore, the same act might or might not be subject to the administrative jurisdiction of the receiving or transit State depending on the context in which it had been performed. Illegal parking could certainly lead to fines and even withdrawal of the driving licence if such an act had been performed while the courier was *en route* to a private party. The evaluation of the same act should be different if it had been necessary in the context of the urgent and timely delivery of a diplomatic bag. As explained in paragraph (10) of the commentary to article 17, the real criterion should be that "whenever the diplomatic courier uses a means of transport in the performance of his functions, that means of transport should not be subject to measures which might impede or delay such performance, particularly the delivery of the bag".

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

(10) Accidents caused by a vehicle the use of which may have entailed the courier's liability where the damages are not recoverable from insurance may give rise to two kinds of situation. An accident may occur outside the performance of the courier's functions, in which case, by application of the general rule in the first sentence of paragraph 2, the courier does not enjoy immunity. But an accident may also occur during the performance of the courier's functions. In this situation, in which by application of the rule contained in the first sentence of paragraph 2 the courier would in principle enjoy immunity from the civil and administrative jurisdiction of the receiving or transit State, an exception is made, and the paragraph specifically provides that this immunity shall not extend to an action for damages arising from such an accident. There are weighty reasons for this exception. The use of motor vehicles for personal or professional purposes has become a part of daily life. Traffic accidents and offences have inevitably increased, giving rise to a growing number of claims. The need to regulate questions of liability for personal injuries and damage to property arising from traffic accidents in which diplomatic agents and other persons enjoying diplomatic immunities are involved has become obvious. Nevertheless, it was some time before the proper codification of international law occurred in this field. While the 1961 Vienna Convention on Diplomatic Relations contains no provision to that effect, later conventions include specific norms regulating the matter, namely article 43, paragraph 2 (b), of the 1963 Vienna Convention on Consular Relations, article 31, paragraph

2 (d), of the 1969 Convention on Special Missions and article 60, paragraph 4, of the 1975 Vienna Convention on the Representation of States.

(11) An earlier version of article 18 contained the expression "vehicle used or owned by the courier". It was considered in the Commission that these words might be of questionable interpretation under certain legal systems and might encroach upon the assignment of civil and administrative responsibility under the internal law of certain countries. The expression "vehicle the use of which may have entailed the liability of the courier", although less concrete, was considered to be generically more accurate and more acceptable, since it referred to the internal law of the receiving or transit State the determination of the conditions under which a person was liable in a given accident.

(12) It is also to be noted that paragraph 2 goes a step beyond the codification conventions mentioned in paragraph (10) above. Its third sentence lays down the general principle that, pursuant to the laws and regulations of the receiving State or the transit State, the courier shall, when driving a motor vehicle, be required to have insurance coverage against third-party risks. This is also why, in the second sentence of paragraph 2, the words "where those damages are not recoverable" contained in an earlier version were replaced by the words "to the extent that those damages are not recoverable", bearing in mind that the damages may be partially or totally recoverable from insurance.

### *Paragraph 3*

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

### *Paragraph 4*

(14) Paragraph 4 is inspired by article 31, paragraph 2, of the 1961 Vienna Convention on Diplomatic Relations and the corresponding provisions of the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States as to the basic principle it lays down, namely that the diplomatic courier is not

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

(15) Paragraph 4 states that the diplomatic courier is not obliged to give evidence as a witness "on matters connected with the exercise of his functions". In that connection two points deserve particular attention. In the first place, the expression "on matters connected with the exercise of his functions" should be interpreted with the same reservations and qualifications as those applying under paragraphs 1 and 2 and reflected in the relevant paragraphs of the present commentary above. Secondly, paragraph 4 refers to cases in which the courier is called upon to give evidence on his having witnessed someone else's acts or behaviour. It does not refer to cases concerning his own acts as an accused or indicted person, as in the second sentence of paragraph 2, in which instance he might be called upon to give evidence in a case arising from an accident involving a vehicle the use of which might have entailed his liability.

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

#### *Paragraph 5*

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

(18) However, to state, as does paragraph 5, that the courier's immunity in the receiving or transit State does not exempt him from the jurisdiction of his own country is not the same as to affirm the existence of such jurisdiction. As pointed out in the commentary to the corresponding provision of the Commission's 1958 draft articles on diplomatic intercourse and immunities, namely article 29, on which article 31 of the 1961 Vienna Convention on Diplomatic Relations was based:

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

action can be brought. In the provisional draft the Commission had meant to fill this gap by stipulating that in such a case the competent court would be that of the seat of the Government of the sending State. This proposal was, however, opposed on the ground that the *locus* of the jurisdiction is governed by municipal law. . .<sup>61</sup>

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

#### *Article 19. Exemption from customs duties, dues and taxes*

**1. The receiving State or 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 carried in his personal baggage and grant exemption from all customs duties, taxes and related charges on such articles other than charges levied for specific services rendered.**

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

#### *Commentary*

##### *Paragraph 1*

(1) The direct sources for paragraph 1 of article 19 are article 36, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations, article 50, paragraph 1, of the 1963 Vienna Convention on Consular Relations, article 35, paragraph 1, of the 1969 Convention on Special Missions and article 35, paragraph 1, and article 65, paragraph 1, of the 1975 Vienna Convention on the Representation of States.

(2) The main reason for according to the diplomatic courier permission to carry across the frontier in his personal baggage articles for his personal use exempt from customs duties, taxes and related charges has been the recognition of his official functions, deriving from the fundamental principle of freedom of communication of States for official purposes. National laws and regulations and other forms of State practice have shaped a distinct trend to accord to diplomatic couriers customs privileges and immunities similar to those granted to members of diplomatic missions, although tailored in some aspects to the specific situation of the courier. The commentaries to the draft articles which served as the basis for the provisions cited in paragraph (1) of the present commentary are therefore, *mutatis mutandis*, useful for the interpretation of paragraph 1 of article 19.

<sup>61</sup> *Ibid.*, p. 99, para. (12) of the commentary.

(3) Given the characteristically short stay of the courier in the receiving or transit State, the permission for entry and customs exemption applies to articles for personal use imported by the courier in his personal baggage only, and does not apply to other imports. This, however, should not be interpreted as excluding the case of unaccompanied personal luggage, which, because of the means of transport chosen, traffic delays or mix-ups, or other circumstances, may arrive later than the courier himself.

(4) Paragraph 1 is qualified by the expression "in accordance with such laws and regulations as [the receiving State or transit State] may adopt". It was understood in the Commission that that expression referred to those laws and regulations which might be in force at the time of the courier's entry into the receiving or transit State. The laws and regulations for admission of persons and goods across the frontier, including immigration, customs and sanitary control at frontier check-points, are within the national jurisdiction of the State. They are aimed at protecting the security, economic, fiscal and other legitimate interests of the State. Although not specified in the article, it should be understood that they relate basically to the formal and other procedural requirements aimed at preventing possible abuses of the exemptions. As stated in paragraph (3) of the commentary to article 34 of the Commission's 1958 draft articles on diplomatic intercourse and immunities (which served as the basis for article 36 of the 1961 Vienna Convention on Diplomatic Relations):

Because these exemptions are open to abuses, States have very frequently made regulations, *inter alia*, restricting the quantity of goods imported or the period during which the imported articles for the establishment of the agent must take place, or specifying a period within which goods imported duty-free must not be resold. Such regulations cannot be regarded as inconsistent with the rule that the receiving State must grant the exemption in question. . .<sup>62</sup>

The same principles, *mutatis mutandis*, should apply to the diplomatic courier.

(5) The exception to the exemption from duties, which in the sources indicated in paragraph (1) of the present commentary read "charges other than charges for storage, cartage and similar services", was replaced by the phrase "charges on such articles other than charges levied for specific services rendered" because the latter was felt to be better adapted to the situation of the courier, who would normally not need storage or cartage services but only contingent and incidental services for which he was supposed to pay. This change of wording is also in keeping with the terminology used in paragraph 2 of article 19.

#### *Paragraph 2*

(6) There is no specific provision in the codification conventions concerning the exemption from dues and taxes of the diplomatic courier. Paragraph 2 is based on the consideration that the diplomatic courier should be accorded in all respects treatment befitting his status as a person exercising official functions and that, with reference to tax exemption, the courier's status should not be inferior to that of a member of the administrative or

technical staff of a mission who is neither a national of, nor permanently resident in, the receiving State. Taking the foregoing into account, the sources for this provision are article 34 of the 1961 Vienna Convention on Diplomatic Relations, article 49 of the 1963 Vienna Convention on Consular Relations, article 33 of the 1969 Convention on Special Missions and articles 33 and 63 of the 1975 Vienna Convention on the Representation of States.

(7) Notwithstanding the foregoing, paragraph 2 has been drafted bearing in mind that the short stay of the diplomatic courier in a given country places him in a somewhat different position from that of members of a mission and renders much less likely and almost impossible the exercise by him of certain activities or his entering into legal relationships which would expose him to liability for particular forms of taxation. Therefore the drafting technique used has been less casuistic with respect to the exceptions to the principle of exemption than the technique adopted for the above-mentioned source provisions, and certain qualifications have been introduced in the general statement of the exemption principle. In this connection, the expression "in the performance of his functions" has been used to indicate clearly the functional approach to the exemptions concerned, which excludes all possible private activities of the courier and compensates for the reduction of the number of express exceptions to the exemption principle provided for in paragraph 2. Furthermore, there is no specific mention of "personal or real" taxes as there is in the source provisions mentioned in paragraph (6) above, since that expression does not seem to fit the specific factual situation of the short stay of the courier, which could hardly afford him the opportunity, for instance, to exercise private rights relating to real property. Paragraph 2 should be interpreted in the sense that the exemption principle would apply to those dues and taxes which the diplomatic courier might encounter in the course of his travels in his capacity as a courier, but not to those for which he would become liable only after a period of residence in the receiving or transit State.

(8) Two exceptions to the exemption principle are expressly provided for in paragraph 2. The taxes and charges contemplated in those exceptions are to be paid by the courier irrespective of whether he is acting in the performance of his functions. They are indirect taxes of a kind which are normally incorporated in the price of goods or services, and charges levied for specific services rendered. Both exceptions are also to be found in the relevant provisions of the codification conventions mentioned in paragraph (6) above.

(9) The Commission did not include in the present articles any specific provision on exemption from personal and public services or on exemption from social security provisions. It felt that the sojourn of a courier in the receiving or transit State was so short that, in practice, the possibility was extremely remote that a courier might be called upon to perform personal or public services, of whatever nature, or that social security provisions might be invoked with regard to him. Express articles for hypothetical situations far removed from reality were not warranted.

<sup>62</sup> *Ibid.*, p. 100.

### **Article 20. Exemption from examination and inspection**

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

**2. 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 the transit State. An inspection in such a case shall be conducted in the presence of the diplomatic courier.**

#### *Commentary*

##### *Paragraph 1*

(1) There is no specific provision in the codification conventions concerning the exemption from personal examination of diplomatic and consular agents. In practice, however, such an exemption is always upheld as it is considered to derive from the principle of personal inviolability. Similarly, the main reason behind the exemption of a diplomatic courier from personal examination has been the recognition of his official functions, deriving from the fundamental principle of freedom of communication of States for official purposes, and the inviolability of the person entrusted with carrying out those functions. Exemption from personal search has also been considered as a courtesy accorded to a State official.

(2) The words "personal examination" refer to bodily examination and do not rule out metal or other detectors employed for security purposes in airports or at other points of departure or arrival. It should be recalled in this connection that the original text of paragraph 1 contained the phrase "including examination carried out at a distance by means of electronic or other mechanical devices". There was a general feeling in the Commission that that phrase represented an unjustified extension of the principle, which would run counter to security measures adopted by almost all States and to which, in usual practice, even diplomatic agents submit without protest. Apart from certain forms of delinquency which had reached alarming dimensions, such as illicit traffic in foreign currency, narcotic drugs, arms and other goods, the spread of international terrorism and the unlawful seizure of aircraft and other forms of air piracy had justified special measures of increased scrutiny of passengers and their baggage, including the regular use of electronic and mechanical devices for examination and screening.

##### *Paragraph 2*

(3) The direct sources for paragraph 2 are article 36, paragraph 2, of the 1961 Vienna Convention on Diplomatic Relations, article 50, paragraph 3, of the 1963 Vienna Convention on Consular Relations, article 35, paragraph 2, of the 1969 Convention on Special Missions and article 35, paragraph 2, and article 65, paragraph 2, of the 1975 Vienna Convention on the Representation of States.

(4) Paragraph 2, which provides for exemption from inspection of the personal baggage of the diplomatic courier, seeks to curtail abuses of this privilege when there are serious grounds for presuming that the baggage contains articles not for personal use, but for lucrative or other improper purposes, or 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. However, there is one important requirement and safeguard for the courier specifically indicated in the case when such an exception becomes operative: it stipulates that the inspection shall be conducted only in the presence of the courier.

### **Article 21. Beginning and end 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 functions, or, if he is already in the territory of the receiving State, from the moment he begins to exercise his functions.**

**2. The privileges and immunities of the diplomatic courier shall cease at the moment when he leaves the territory of the receiving State or the transit State, or on the expiry of a reasonable period in which to do so. However, the privileges and immunities of the diplomatic courier *ad hoc* who is a resident of the receiving State shall cease at the moment when he has delivered to the consignee the diplomatic bag in his charge.**

**3. Notwithstanding paragraph 2, immunity shall continue to subsist with respect to acts performed by the diplomatic courier in the exercise of his functions.**

#### *Commentary*

(1) Although none of the codification conventions contains any specific provision on the duration of the privileges and immunities of the diplomatic courier, the wording of article 21 has been inspired by several provisions contained in those conventions regarding the duration of the privileges and immunities of the diplomatic agent or consular officer, namely article 39 of the 1961 Vienna Convention on Diplomatic Relations, article 53 of the 1963 Vienna Convention on Consular Relations, article 43 of the 1969 Convention on Special Missions and articles 38 and 68 of the 1975 Vienna Convention on the Representation of States.

##### *Paragraph 1*

(2) Paragraph 1 acknowledges the close link between the beginning of the privileges and immunities of the diplomatic courier and the performance or exercise of his functions. As a general rule, the diplomatic courier enjoys privileges and immunities from the moment he enters the territory of the receiving State or the transit State in order to perform his functions. The moment of commencement of the privileges and immunities is thus the moment when the diplomatic courier crosses the frontier of the territory, the objective of the crossing being the performance of his functions. In such a case, the functions of the courier may well, of course, have commenced before the crossing, for

example if he had previously received the bag to be transported, but the reason or need for the privileges and immunities arises only when, having left the territory of the sending State, he enters the territory of the transit or receiving State. This would normally be the case of a permanent courier appointed by the Ministry of Foreign Affairs who finds himself at the time of the appointment in the territory of the sending State. But the situation may arise in which the person appointed as a courier already finds himself in the territory of the receiving State at the time of his appointment. This would usually happen in the case of an *ad hoc* courier appointed by the mission, consular post or delegation of the sending State in the receiving State. In this case the article provides that the courier's privileges and immunities shall commence from the moment he actually begins to exercise his functions. The expression "from the moment he begins to exercise his functions" should be interpreted as referring to the moment of the courier's appointment and receipt of the documentation referred to in article 8. Although for drafting reasons paragraph 1 contains the phrase "if he is already in the territory of the receiving State", that phrase should be understood as meaning that the person in question, when appointed a courier, should already be in the territory of the receiving State.

#### *Paragraph 2*

(3) The first part of the first sentence of paragraph 2 adopts with regard to the normal, or most usual, moment at which the privileges and immunities of the diplomatic courier cease a criterion or rationale symmetric to that adopted in paragraph 1 for their commencement. It lays down that such privileges and immunities shall cease at the moment when the diplomatic courier leaves the territory of the receiving State or the transit State. This would be the case of a permanent courier. If the courier is no longer in the receiving State or the transit State, the foundation for his privileges and immunities disappears.

(4) The second part of the first sentence of paragraph 2, namely the words "or on the expiry of a reasonable period in which to do so", may refer to two different situations. The most likely situation in which this phrase may find an application has to do with the possible declaration of the courier as *persona non grata* or not acceptable. In connection with this possible situation, the words "or on the expiry of a reasonable period in which to do so" should be read in conjunction with article 11 (c) and article 12, paragraph 2, and the commentaries thereto. Those provisions lay down that a diplomatic courier may be declared *persona non grata* or not acceptable by the receiving State. His functions do not end *ipso facto* but, as a consequence of that declaration, there arises for the sending State the obligation either to recall its courier or, for example in the case of a multiple-mission courier, to terminate his functions in the receiving State which has declared him *persona non grata* or not acceptable. If the sending State refuses or fails within a reasonable period to carry out those obligations, the receiving State may notify the sending State that, in accordance with article 12, paragraph 2, it ceases to recognize the person concerned as a diplomatic courier. This notification by the receiving State ends the courier's functions in accordance with article 11 (b). Although the courier's functions have ceased, his privileges and immunities continue to subsist,

in principle, until he leaves the territory of the receiving State by application of the general rule laid down in the first part of the first sentence of paragraph 2 of the present article. But given the very specific factual situation of a *persona non grata* declaration, the receiving State is likely to have an interest in ensuring that the person concerned leaves its territory as rapidly as possible, that is to say on the expiry of a reasonable time-limit. If the courier fails to leave the territory of the receiving State within the given time-limit, his privileges and immunities cease at the moment of expiration of the time-limit.

(5) Although the case of a declaration of *persona non grata* is the most likely situation in which a receiving State may request that the diplomatic courier leave its territory on the expiry of a reasonable time-limit, article 21 does not rule out the possibility that such a time-limit could be set by the receiving State for reasons other than a declaration of *persona non grata*. This would be the case, for instance, of a receiving State which did not want to have recourse to a *persona non grata* declaration and yet wished to curtail possible abuses of privileges and immunities of couriers in its territory during long stays after the bag had been delivered and a courier's mission had been fulfilled.

(6) The second sentence of paragraph 2 contemplates an exception to the general rule laid down in the first sentence. The solution adopted follows article 27, paragraph 6, of the 1961 Vienna Convention on Diplomatic Relations, article 35, paragraph 6, of the 1963 Vienna Convention on Consular Relations, article 28, paragraph 7, of the 1969 Convention on Special Missions and article 27, paragraph 6, and article 57, paragraph 7, of the 1975 Vienna Convention on the Representation of States. It is uniformly provided for in those conventions that the privileges and immunities of the diplomatic courier *ad hoc* cease at the moment when he has delivered to the consignee the diplomatic bag in his charge. Taking everything into account, the Commission was of the view that the differentiation of permanent couriers and *ad hoc* couriers as regards the end of their privileges and immunities was justified in the special case in which the *ad hoc* courier was a member of the staff of the mission or the consular post in the receiving State or was otherwise a resident of the receiving State. Bearing this in mind, the Commission has confined the applicability of the second sentence of paragraph 2 to the *ad hoc* courier "who is a resident of the receiving State", which also covers the cases in which the *ad hoc* courier is a member of the staff of the mission or the consular post.

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

#### *Paragraph 3*

(8) Paragraph 3 is modelled on the corresponding provisions of the codification conventions referred to in paragraph (1) of the present commentary. This provision, which prolongs the immunity of the courier for acts performed in the exercise of his functions after those functions have ended and subsequent to his departure

from the receiving State, refers only to the immunity from jurisdiction provided for in article 18. Its *raison d'être* is to be found in the official nature of the mission performed by the courier, which corresponds to a sovereign function of the sending State.

### **Article 22. Waiver of immunities**

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

**2. The waiver shall, in all cases, be express and shall be communicated in writing to the receiving State or the transit State.**

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

**4. The waiver of immunity from jurisdiction in respect of judicial proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment or decision, for which a separate waiver shall be necessary.**

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

#### *Commentary*

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

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

#### *Paragraph 1*

(3) Paragraph 1 states the general principle that the immunities of the diplomatic courier may be waived only by the sending State. The waiver of immunities must emanate from the sending State because the object of the immunities is that the diplomatic courier should be able to discharge his duties in full freedom.<sup>63</sup>

<sup>63</sup> See paragraph (1) of the commentary to article 30 of the Commission's 1958 draft articles on diplomatic intercourse and immunities, which served as the basis for article 32 of the 1961 Vienna Convention on Diplomatic Relations (*ibid.*, p. 99).

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

(5) While paragraph 1 states the principle that the immunities of the diplomatic courier may be waived by the sending State, it does not say which is the competent authority within the sending State to give such a waiver. There has been a great deal of diversity in State practice and in doctrinal views regarding the authority entitled to exercise the right of waiver. The question has been raised whether it should in all cases be the central authority, for example the Ministry of Foreign Affairs, or whether the head of the mission, another diplomatic agent, or the member of the mission involved in a particular case should also have the right to waive jurisdictional immunity. The Commission was of the view that the possible solutions to this problem depended essentially on the relevant domestic laws and regulations of the sending State, where such laws and regulations had been enacted, or on established practice and procedures where no special legislation existed. Some States confer the power to waive jurisdictional immunity on heads of missions or members of missions, but only on instructions from the Ministry given prior to or on the occasion of a specific case. In such instances, heads of diplomatic and other missions or members of such missions may be required to seek instructions before making a statement of waiver.

(6) Extensive State practice and the relevant commentaries to articles which formed the basis for similar provisions in the codification conventions<sup>64</sup> indicate that proceedings, in whatever court or courts, are regarded as an indivisible whole and that, consequently, a waiver given in accordance with the relevant requirements and recognized or accepted by the court concerned precludes the right to plead immunity either before the judgment is pronounced by that court or on appeal.

#### *Paragraph 2*

(7) Paragraph 2, which closely follows paragraph 2 of article 45 of the 1963 Vienna Convention on Consular Relations, lays down the principle that the waiver must be express and that it must be communicated in writing as the most appropriate and unequivocal manifestation of its express character. An earlier version of paragraph 2 included the words "except as provided in paragraph 3". The Commission decided to delete those words on the ground that, as explained below, the situation contemplated in paragraph 3 is not an implied waiver but an

<sup>64</sup> See, in particular, paragraph (5) of the commentary cited in footnote 63 above.

absence of immunity and therefore does not constitute a true exception to the principle that the waiver must always be express.

#### *Paragraph 3*

(8) Paragraph 3 provides that 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. The rationale behind this provision is that, under such circumstances, the courier is deemed to have accepted the jurisdiction of the receiving State as fully as may be required in order to settle the dispute in regard to all aspects closely linked to the basic claim.<sup>65</sup> In this connection, it is the understanding of the Commission that the lack of immunity to which paragraph 3 refers is related to civil and administrative proceedings, since an express waiver communicated in writing should always be required in order to subject the courier to criminal proceedings. It is also to be noted in connection with paragraph 3 that the regulations of the sending State usually require that its diplomatic agents as well as couriers obtain prior authorization from the central authorities before instituting legal proceedings in the receiving State; but, if they do institute proceedings, they are presumed to have the necessary authorization.<sup>66</sup>

#### *Paragraph 4*

(9) Paragraph 4 draws a distinction between waiver of immunity from jurisdiction and waiver of immunity in respect of execution of the judgment. It stipulates that waiver of immunity from jurisdiction in respect of judicial proceedings shall not be held to imply waiver of immunity in respect of execution of the judgment, for which a separate waiver is required. This rule was established in customary international law prior to the 1961 Vienna Convention on Diplomatic Relations and has been confirmed by State practice. Although some members of the Commission questioned the advisability of this rule, the Commission was of the view that its inclusion in all provisions relating to waiver of immunities contained in all four codification conventions mentioned in paragraph (1) of the present commentary was sufficient demonstration of its existence as an accepted norm of international law.

(10) An earlier version of paragraph 4 spoke of "waiver of immunity from jurisdiction in respect of civil or administrative proceedings", which was closer to the terminology used in the corresponding provisions of the codification conventions mentioned in paragraph (1) above. The present wording, which speaks of "judicial proceedings", is intended to cover not only civil or administrative proceedings, but also criminal proceedings, and reflects the Commission's feeling that the double-waiver requirement should also apply in criminal proceedings.

#### *Paragraph 5*

(11) Paragraph 5 reproduces a provision first introduced by articles 31 and 61 of the 1975 Vienna

Convention on the Representation of States. As stated in paragraph (2) of the commentary to article 62 (Waiver of immunity) of the Commission's 1971 draft articles on the representation of States in their relations with international organizations:

... the provision set forth in paragraph 5 places the sending State, in respect of a civil action, under the obligation of using its best endeavours to bring about a just settlement of the case if it is unwilling to waive the immunity of the person concerned. If, on the one hand, the provision of paragraph 5 leaves the decision to waive immunity to the discretion of the sending State which is not obliged to explain its decision, on the other, it imposes on that State an objective obligation which may give to the host State grounds for complaint if the sending State fails to comply with it. . .<sup>67</sup>

(12) Paragraph 5 should be considered as a practical method for the settlement of disputes in civil matters. It may offer, in some instances, effective ways to resolve problems. Taking into account the specific features of the legal status and official functions of the diplomatic courier, the extrajudicial method of amicable settlement of a dispute may be appropriate. It compensates for the eventuality that a sending State may refuse to waive the courier's immunity, offering the possibility of arriving at a just settlement through negotiation of an equitable resolution.

(13) Paragraph 5 should be interpreted as referring to any stage of a civil action and it therefore applies equally to cases in which a sending State does not waive the courier's immunity in respect of execution of a judgment.

(14) The paragraph deals with the case of a civil action because it is in that context that matters of compensation most frequently arise. However, the possibility of resorting to paragraph 5 in connection with minor criminal cases should not be entirely ruled out, particularly in cases of civil actions arising out of criminal acts.

(15) It should also be recalled in connection with paragraph 5 that, as provided in paragraph 5 of article 18, the immunity of the diplomatic courier from the jurisdiction of the receiving State or the transit State does not exempt him from the jurisdiction of the sending State.

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

1. **The captain of a ship or aircraft in commercial service which is scheduled to arrive at an authorized port of entry may be entrusted with the diplomatic bag.**

2. **The captain shall be provided with an official document indicating the number of packages constituting the bag entrusted to him, but he shall not be considered to be a diplomatic courier.**

3. **The receiving State shall permit a member of a mission, consular post or delegation of the sending State to have unimpeded access to the ship or aircraft in order to take possession of the bag directly and freely from the captain or to deliver the bag directly and freely to him.**

<sup>65</sup> See paragraph (6) of the commentary cited in footnote 63 above.

<sup>66</sup> See paragraph (3) of the commentary cited in footnote 63 above.

<sup>67</sup> Yearbook ... 1971, vol. II (Part One), p. 321, document A/8410/Rev.1, chap. II, sect. D.

### *Commentary*

(1) With the exception of a few complementary elements and drafting adjustments, the basic components of article 23 are contained in the corresponding provisions of the four codification conventions, namely article 27, paragraph 7, of the 1961 Vienna Convention on Diplomatic Relations, article 35, paragraph 7, of the 1963 Vienna Convention on Consular Relations, article 28, paragraph 8, of the 1969 Convention on Special Missions and article 27, paragraph 7, and article 57, paragraph 8, of the 1975 Vienna Convention on the Representation of States.

#### *Paragraph 1*

(2) The relevant provisions of the above-mentioned multilateral conventions, as well as of numerous bilateral agreements, which are confirmed by an examination of the behaviour of States, demonstrate that the practice dealt with in article 23 of employing the captain of a ship or aircraft in commercial service for the custody, transportation and delivery of diplomatic bags forms part of modern international law. The practice of entrusting the diplomatic bag to the captain of a commercial aircraft, in particular, is widespread today. This practice has proved its advantages, which may be summarized as economy, speed and reasonable safety, since the bag, although not accompanied by a courier, is still in the custody or the care of a responsible person. The employment of the captain of a passenger or other merchant ship, although not so frequent, has been resorted to where sea-borne transport is the most convenient means of communication or where the shipment of sizeable consignments is more economical by sea. It was understood in the Commission that, although not expressly stated in the present text of paragraph 1, the diplomatic bag to which it refers may be the bag of a sending State or of a mission, consular post or delegation of that State, in accordance with the scope of the present articles as defined in article 1.

(3) The draft article originally submitted by the Special Rapporteur spoke of the "captain of a commercial aircraft" and the "master of a merchant ship", whereas the article as now worded refers to the "captain of a ship or aircraft in commercial service". The word "captain" has been retained to apply to both a ship and an aircraft for the sake of uniformity with the language used in the provisions contained in three of the codification conventions referred to in paragraph (1) of the present commentary, namely the 1963 Vienna Convention on Consular Relations, the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States. The word is intended to describe the functions of the person in command and in charge of a ship or aircraft, irrespective of the particular meaning it may have under the domestic law of any country. By conveying the actual meaning in which the word is used, the Commission also intends to relieve the eventual semantic tension that the use of the same word, "captain", for both a ship and an aircraft may create in some of the language versions. As to the expression "in

commercial service", it has been used to categorize both a ship and an aircraft in order to eliminate any possible restrictive connotation that the term "merchant ship" may have had as compared with the term "commercial aircraft", as used in the article originally proposed.

(4) The phrase "which is scheduled to arrive at an authorized port of entry" refers to ships or aircraft in regular service or belonging to a regular line between the States and the port of entry concerned, rather than voyages or flights undertaken by any ship or aircraft on an *ad hoc* basis. It was accepted in the Commission that, under the regulations of certain airlines and the arrangements made with certain countries, "charter flights" could offer all the characteristics of a regular flight, except for the booking system, and could be considered as covered by the phrase "scheduled to arrive". It was, however, also pointed out that the phrase was designed to take into account the fact that article 23 established certain obligations on the part of the receiving State under paragraph 3, and that the receiving State might have difficulties in fulfilling those obligations in the case of non-scheduled flights or voyages. Yet nothing in paragraph 1 should be interpreted as precluding the possibility that States, by mutual agreement, might decide to entrust their bags to the captain of a ship or aircraft on a non-scheduled flight or voyage or of a nature other than "in commercial service".

(5) Although this is not expressly mentioned in the text of paragraph 1 itself, the wording of the paragraph does not preclude the existing practice of several States to entrust the unaccompanied bag to a member of the crew of a ship or aircraft, either by decision of the central authorities of the State or by delegation from the captain of the ship or aircraft to the crew member.

#### *Paragraph 2*

(6) The captain of a ship or aircraft to whom a bag is entrusted is provided with an official document indicating the number of packages constituting the diplomatic bag entrusted to him. This document may be considered as having the same character as the official document issued to a diplomatic courier, as elaborated upon in the commentary to article 8. It should, however, be noted (and all the above-mentioned codification conventions are clear on this point) that the captain is not to be considered a diplomatic courier, either permanent or *ad hoc*. Therefore the provisions of the present articles which concern the personal status of the diplomatic courier do not apply to the captain of a ship or aircraft.

#### *Paragraph 3*

(7) Whenever a diplomatic bag is entrusted by the sending State to the captain of a ship or aircraft in commercial service, the overriding obligation of the receiving State is to facilitate the free and direct delivery of the bag to the authorized members of the diplomatic mission or other authorized officials of the sending State, who are entitled to have access to the ship or aircraft in order to take possession of the bag. The receiving State should enact relevant rules and regulations and establish appropriate procedures in order to ensure the prompt and free

delivery of the diplomatic bag at its port of entry. Unimpeded access to the ship or aircraft should be provided for the receipt of the incoming diplomatic bag at the authorized port of entry or for the handing over of the outgoing diplomatic bag to the captain of the ship or aircraft. In both instances the persons entitled to receive or hand over the diplomatic bag should be authorized members of the diplomatic mission, consular post or delegation of the sending State. This two-way facility for receiving the bag from the captain or handing it over to him should be reflected in the relevant provisions of the rules governing the dispatch of a diplomatic bag entrusted to the captain of a ship or aircraft in commercial service. The drafting changes undergone by paragraph 3 since its original submission by the Special Rapporteur are intended to stress the above-mentioned obligation of the receiving State, shifting the emphasis from the facilities accorded to the captain to the obligation of the receiving State to permit unimpeded access to the ship or aircraft. In order to carry out its obligations under paragraph 3, the receiving State must know of the arrival of the bag, either because of the scheduled and regular nature of the flight or voyage involved or because of the mutual agreements concluded with specific States, as explained in paragraph (4) of the present commentary.

(8) As stated in paragraph 3, the purpose of the receiving State granting unimpeded access to the ship or aircraft to a member of a mission, consular post or delegation of the sending State is to enable the latter "to take possession of the bag directly and freely from the captain or to deliver the bag directly and freely to him". The words "directly and freely" should be interpreted as meaning literally "from the hands of the captain to those of the designated official", and vice versa, without interference from any intermediary individual. The expressions used in the Spanish and French texts, namely *de manos del* and *des mains du*, respectively, reflect faithfully the idea which the English text intends to convey by the words "directly and freely".

(9) It was discussed in the Commission whether the obligation of the receiving State laid down in paragraph 3 should be qualified by the words "by arrangement with the appropriate authorities of the sending State", mention of which was to be found in the corresponding provisions of the codification conventions referred to in paragraph (1) of the present commentary. The Commission decided against incorporating those words in the paragraph so as not to create the impression that such an arrangement would constitute a pre-condition for the existence of the said obligation of the receiving State. Such arrangements could, instead, regulate the modalities of the practical implementation of that obligation.

(10) Although not expressly stated, it should be understood that the member of the mission, consular post or delegation who is to take possession of the bag from the captain, or to deliver it to him, must be duly authorized by the appropriate authorities of the sending State. The determination of the material aspects of such authorization might constitute a matter for special arrangements between the receiving State and the sending State.

### PART III

#### STATUS OF THE DIPLOMATIC BAG

##### **Article 24. Identification of the diplomatic bag**

1. The packages constituting the diplomatic bag shall bear visible external marks of their character.
2. The packages constituting the diplomatic bag, if not accompanied by a diplomatic courier, shall also bear visible indications of their destination and consignee.

#### *Commentary*

##### *Paragraph 1*

(1) Paragraph 1 is modelled on the initial part of the following provisions of the four codification conventions: article 27, paragraph 4, of the 1961 Vienna Convention on Diplomatic Relations; article 35, paragraph 4, of the 1963 Vienna Convention on Consular Relations; article 28, paragraph 5, of the 1969 Convention on Special Missions; and article 27, paragraph 4, and article 57, paragraph 5, of the 1975 Vienna Convention on the Representation of States.

(2) In conformity with long-standing State practice, the diplomatic bag has always been identified through certain visible external marks. The most common visible external feature of the packages constituting a diplomatic bag is a tag or a stick-on label with an inscription such as "diplomatic correspondence", "official correspondence" or *expédition officielle*. In particular, the diplomatic bag must be sealed by the competent authority of the sending State by means of the official stamp imprinted with wax or lead seals, or of padlocks, or in other ways which may be agreed upon between the sending and the receiving States. The existence of such seals operates not only in the interest of the sending State, to ensure the confidentiality of the bag's contents, but also in the interest of the receiving State. The seals, on the one hand, help the receiving State to ascertain the *bona fide* character and authenticity of the diplomatic bag and, on the other hand, can provide the receiving State with evidence to refute possible accusations of having tampered with the bag.

(3) The provisions of paragraph 1 apply to all kinds of bags, whether accompanied or not.

##### *Paragraph 2*

(4) The diplomatic bag not accompanied by diplomatic courier, with which paragraph 2 is especially concerned, has acquired a prominent place in modern diplomatic communications. The frequency of the use of this kind of diplomatic bag reflects widespread State practice of increasing dimensions and significance. Article 23 and the commentary thereto deal with one form of unaccompanied bag, that which has been entrusted to the captain of a ship or aircraft in commercial service. But diplomatic bags are also frequently transmitted by postal service or by any mode of transport, as explained in article 26 and the commentary thereto. The use of unaccompanied bags for the diplomatic mail has become

almost a regular practice of developing countries, for economic considerations, but this practice has now become widespread among many other States.

(5) The unaccompanied bag must meet the same requirements in respect of its external features as a bag accompanied by a courier; it should be sealed by the official stamp with wax or lead seals by the competent authority of the sending State. Because the bag is not carried by a professional or *ad hoc* courier, even greater care may be required for proper fastening, or the use of special padlocks, since it is forwarded as a consignment entrusted to the captain of a ship or aircraft. Also in connection with the visible external marks, it is necessary to provide the diplomatic bag with a tag or stick-on label with an indication of its character. But given the greater likelihood that an unaccompanied bag may be lost, a clear indication of the destination and consignee is necessary. In that connection, it was thought in the Commission that, although the latter requirement might be considered necessary only in the case of the unaccompanied diplomatic bag, it might also be helpful in the case of bags accompanied by courier, since the possibility always existed, as some cases of international practice had shown, that a bag might be separated from the courier and be stranded. In those cases, a clear indication of destination and consignee could greatly facilitate speedy and safe delivery. Although paragraph 2 provides for an additional requirement for the practical purpose of ensuring the delivery of the unaccompanied bag, the lack of any such additional indication should not detract from the status of the bag as a diplomatic bag.

(6) The wording "the packages constituting the diplomatic bag" is used for the sake of uniformity with the language of article 27, paragraph 4, of the 1961 Vienna Convention on Diplomatic Relations. It is intended to cover the various physical elements constituting the diplomatic bag, as a unified legal notion, but not the individual pieces constituting the contents of the bag.

(7) The original text of paragraph 2 submitted by the Special Rapporteur contained an additional clause to the effect that the unaccompanied bag must also bear a visible indication of "any intermediary points on the route or transfer points". While some members of the Commission thought that the indication of transfer points was very useful, particularly in cases of loss of the bag, and that therefore the said clause should be retained in the text, other members thought that the question of transfer points fell more within the realm of airline itineraries, which could be changed by airlines without prior notice. The Commission as a whole, although recognizing that the practice of some States was to indicate the transfer points and that such a practice could be useful on some occasions, did not deem it advisable to include such a requirement in the text of paragraph 2.

(8) The draft article originally submitted by the Special Rapporteur contained a paragraph 3 stating that "the maximum size or weight of the diplomatic bag allowed shall be determined by agreement between the sending State and the receiving State". After carefully considering that paragraph, as well as proposals for its amendment, the Commission decided not to include it. It was considered that, if drafted in optional terms, as suggested

in one amendment, the paragraph would be superfluous, while if adopted in mandatory terms, as originally proposed, it might convey the mistaken impression that such an agreement was a pre-condition for the granting of facilities for a diplomatic bag by the receiving State. The Commission agreed, however, that it was advisable to determine by agreement between the sending State and the receiving State the maximum size or weight of the diplomatic bag and that that procedure was supported by widespread State practice.

### **Article 25. Contents 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 items other than those referred to in paragraph 1.

#### *Commentary*

##### *Paragraph 1*

(1) Paragraph 1 is modelled on the second part of paragraph 4 of article 35 of the 1963 Vienna Convention on Consular Relations. Its wording is also closely related to article 27, paragraph 4, of the 1961 Vienna Convention on Diplomatic Relations, article 28, paragraph 5, of the 1969 Convention on Special Missions and article 27, paragraph 4, and article 57, paragraph 5, of the 1975 Vienna Convention on the Representation of States.

(2) The paragraph defines the permissible contents of the diplomatic bag by the criterion of the official character of the correspondence or documents included therein or the official use for which the articles contained in the bag are intended. Under this rule, which is based on extensive State practice as well as on the above-mentioned conventions, the bag may contain official letters, reports, instructions, information and other official documents, as well as cypher or other coding or decoding equipment and manuals, office materials such as rubber stamps or other articles used for office purposes, wireless equipment, medals, books, pictures, cassettes, films and *objets d'art* which could be used for the promotion of cultural relations. The adverbs "only" and "exclusively" emphasize the official character of the permissible items in question in view of recent abuses committed with regard to the contents of the diplomatic bag.

##### *Paragraph 2*

(3) The rules governing the contents of the diplomatic bag should comprise not only provisions dealing with the permissible contents, as in paragraph 1 of article 25, but also provisions on the appropriate preventive measures to be taken in order to ensure compliance with the rules on the contents of the diplomatic bag and to avoid any abuses of the facilities, privileges and immunities accorded by international and domestic law to the bag. These two elements, namely the rule for the legally admissible contents of the bag and its efficient

implementation, have practical significance for the proper functioning of official communications in the interests of international co-operation and understanding. Their strict observance would prevent mutual suspicions on the part of the receiving State, when the diplomatic bag is admitted into its territory, and on the part of the sending State, when procedures for inspection, including the use of sophisticated devices for examination, are required by the receiving State. None of the codification conventions has so far offered a viable solution to the problem of verifiability in respect of the legally admissible contents of the diplomatic bag. The increasing number of abuses has given particular importance to this problem, with certain political, economic and other implications. For these reasons, the Commission has deemed it advisable to state expressly in a separate paragraph the duty of the sending State to take appropriate measures to prevent the dispatch through its diplomatic bag of items other than those referred to in paragraph 1. Paragraph 2 should be read in conjunction with article 28 and the commentary thereto.

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

**The conditions governing the use of the postal service or of any mode of transport, established by the relevant international or national rules, shall apply to the transmission of the packages constituting the diplomatic bag in such a manner as to ensure the best possible facilities for the dispatch of the bag.**

#### *Commentary*

(1) Article 26, which deals with the transmission of the diplomatic bag by postal service or by any mode of transport, concerns types of unaccompanied bag other than the unaccompanied bag entrusted to the captain of a ship or aircraft. While this latter type is expressly provided for in specific provisions of the codification conventions referred to in paragraph (1) of the commentary to article 23, the types of unaccompanied bag referred to in article 26 must be considered as covered by the expression "all appropriate means" to be used by missions, consular posts and delegations in communications with the sending State, an expression used in all the relevant provisions of the codification conventions, namely article 27, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations, article 35, paragraph 1, of the 1963 Vienna Convention on Consular Relations, article 28, paragraph 1, of the 1969 Convention on Special Missions and article 27, paragraph 1, and article 57, paragraph 1, of the 1975 Vienna Convention on the Representation of States.

(2) The rules establishing the conditions governing the use of the postal service for the transmission of a diplomatic bag may be of more than one kind: there are multilateral agreements such as the international postal regulations established by the Universal Postal Union; there also exist consular or other bilateral agreements which may mention the postal service among the means of communication between the sending State and its

missions or consular posts; and there are special agreements for the transmission by post of diplomatic correspondence or the exchange of diplomatic correspondence through postal channels by air mail. Besides these international regulations there are also national administrative and postal regulations adopted by some States. In accordance with the terms of article 26, the UPU international postal regulations would apply whenever appropriate between the States concerned. If not ruled out by such regulations, other international regulations would also apply, for example bilateral agreements. Finally, national rules would apply if they were not in contradiction with the international rules in force between the States concerned or in the absence of such international rules. Among national rules, there may be provision for the transmission of bags by commercial means of transportation, in accordance with the internal legislation and administrative rules of each State.

(3) With regard to the "mode of transport" to which article 26 refers, this expression replaces the phrase "whether by land, air or sea" used in an earlier version of the article. The dispatch of diplomatic bags as cargo consignments through commercial means of transportation, whether by land, air or sea, was common practice among States long before the 1961 Vienna Convention on Diplomatic Relations. This kind of official communication has been used particularly for heavy and sizeable consignments and for non-confidential correspondence, documents and other articles, such as books, exhibits, films and other items for the official use of diplomatic missions, consular posts and other missions. In this case again, the article refers to international or national rules governing the conditions of transmission of the bag by such modes of transport. In this connection, the 1980 United Nations Convention on International Multimodal Transport of Goods,<sup>68</sup> which is concerned with the multilateral regulation of various modes of transport, should be noted. There also exist other international conventions, including regional ones, regulating the carriage of goods by land, air or sea. If any of those conventions are applicable between the States concerned, then such international regulations would apply. National rules would apply in the absence of applicable international regulations.

(4) Article 26 states that the conditions referred to in the article shall apply to the diplomatic bag "in such a manner as to ensure the best possible facilities for the dispatch of the bag". In drafting this part of the provision, the Commission bore in mind that a proposal to introduce a new category of postal items under the denomination of "diplomatic bags" in the international postal service by amending article 18 of the international regulations of the Universal Postal Union had been rejected by the UPU Congress held at Rio de Janeiro in 1979.<sup>69</sup> Consequently, the diplomatic bag has to be treated in the same way as other letter-post items, unless the postal administrations could enter into bilateral or

<sup>68</sup> See UNCTAD, *United Nations Conference on a Convention on International Multimodal Transport*, vol. I, *Final Act and Convention on International Multimodal Transport of Goods* (United Nations publication, Sales No. E.81.II.D.7 (vol. I)).

<sup>69</sup> See the Special Rapporteur's fourth report, *Yearbook ... 1983*, vol. II (Part One), pp. 120-121, document A/CN.4/374 and Add.1-4, paras. 312-317.

multilateral agreements for a more favourable treatment of diplomatic bags conveyed by the postal service. In practice, however, a measure of greater care could be—and often is—dispensed to the diplomatic bag. This part of the article has therefore been drafted with the purpose that, in applying the relevant rules for the transmission of the bag, the authorities of the postal service or of any other mode of transport accord to the bag the best possible treatment under those rules.

(5) The Commission has not deemed it necessary to include an article stating that all provisions of the present articles dealing with the status and protection of the diplomatic bag also apply to all kinds of unaccompanied bags, as this emerges clearly from the texts of the articles concerned. In some instances, the unaccompanied bag is the subject of an additional specific regulation or mention, as is the case in article 24, paragraph 2, and article 30, paragraph 2. The Commission also considered it unnecessary to refer in article 26 to the bill of lading (as the original draft article had done) or to the postal receipt “as a document indicating the official status of the diplomatic bag”. It was considered that article 24 and the commentary thereto, which also applies to the bags referred to in article 26, provided sufficient regulation on the identification of those bags. Although the Commission was of the view that the inclusion of such a reference was not necessary in the text of the article itself, it recognized that the bill of lading or the postal receipt was frequently used in practice as evidence of the nature of the consignment as a diplomatic bag. Although those documents were not strictly necessary for the identification of the diplomatic bag as such, they could serve to facilitate the evidence or proof of such identification.

#### ***Article 27. Safe and rapid dispatch of the diplomatic bag***

**The receiving State or the transit State shall facilitate the safe and rapid dispatch of the diplomatic bag and shall, in particular, ensure that such dispatch is not unduly delayed or impeded by formal or technical requirements.**

#### *Commentary*

(1) Article 27, which deals with the obligation of the receiving State or the transit State to facilitate the safe and rapid dispatch of the diplomatic bag, is inspired by considerations similar to those that led to the adoption of article 13. It may therefore be said that the sources for article 27 are, *mutatis mutandis*, those indicated in paragraph (2) of the commentary to article 13.

(2) Although article 27 applies to all kinds of diplomatic bags, whether accompanied by diplomatic courier, entrusted to the captain of a ship or aircraft or transmitted by postal service or by any mode of transport, the existence of a specific provision on facilities for the diplomatic courier, a provision which is in practice intended to make easier the safe and speedy transportation and delivery of the accompanied bag, makes the present article even more important for unaccompanied bags, particularly those dispatched by

postal service or any mode of transport, which in practice require greater care for their safe and expeditious dispatch.

(3) The facilities accorded to the bag should be conceived also in close relationship with all other provisions containing explicit or implicit reference to the need for the receiving State or the transit State and their authorities to grant certain assistance or extend co-operation for the proper functioning of official communications through the use of the diplomatic bag. Like the facilities accorded to the diplomatic courier, those accorded to the diplomatic bag should always be considered on the basis of functional necessity and the actual need for assistance, depending on the various modes of transport and the concrete circumstances, and they should be guided by the principle of reasonableness.

(4) Although in many cases the facilities to be accorded to the diplomatic bag would entail duties of abstention on the part of the receiving or transit State, in other instances more positive obligations might be involved, such as favourable treatment in case of transportation problems or, again, the speeding up of the clearance procedures and formalities applied to incoming and outgoing consignments. It would seem neither advisable nor possible to provide a complete listing of the facilities to be accorded to the diplomatic bag. It would rather seem preferable to define the circumstances in which the need for according such facilities would arise. In general terms it may be affirmed that the scope of the facilities should be determined by the official function of the diplomatic bag and the conditions required for the safe and speedy transmission or delivery of the bag to its final destination. Therefore the general criterion would be that the need for facilities could or would arise whenever the safe or speedy dispatch, transmission or delivery of the bag is endangered. In this connection, article 27 stresses that the receiving State or the transit State shall ensure that the dispatch of the bag is not unduly delayed or impeded by formal or technical requirements. Ways to comply with this part of the provision are the easing of, or exemption from, paperwork, clearance formalities and customs procedures, or granting admission to certain places, for example through the issuance of a special pass to members of the mission to receive the bag on the airport tarmac, etc.

(5) Article 27 and the present commentary should be read in conjunction with paragraph 3 of article 23 and the commentary thereto and article 26 and the commentary thereto, in particular its paragraph (4).

#### ***Article 28. Protection of the diplomatic bag***

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

**2. Nevertheless, if the competent authorities of the receiving State or the transit State have serious reason to believe that the consular bag contains something other than the correspondence, documents or articles referred to in paragraph 1 of article 25, they may request that the bag be opened in their presence by an authorized representative of**

**the sending State. If this request is refused by the authorities of the sending State, the bag shall be returned to its place of origin.**

#### Commentary

(1) Article 28 has been considered the key provision of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

#### Paragraph 1

(2) The part of paragraph 1 consisting of the words "The diplomatic bag shall . . . not be opened or detained" is a reproduction of the relevant provisions of the four codification conventions, namely article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations, article 35, paragraph 3 (first sentence), of the 1963 Vienna Convention on Consular Relations, article 28, paragraph 4, of the 1969 Convention on Special Missions and article 27, paragraph 3, and article 57, paragraph 4, of the 1975 Vienna Convention on the Representation of States. This basic concept, already contained in the above-mentioned conventions, is characterized as "inviolability" of the diplomatic bag in article 28 and is clarified, in the text, by the words "and shall be exempt from examination directly or through electronic or other technical devices".

(3) The principle that the diplomatic bag is inviolable wherever it may be and therefore shall not be opened or detained constitutes the most important aspect of this means of communication and has been upheld as a rule with wide-ranging recognition. The immunity of the bag from search has been considered the reflection of the basic principle of the inviolability of diplomatic and consular correspondence and of the archives and documents of the mission or consular office, generally recognized by customary international law and reflected in the codification conventions, namely in article 24 of the Vienna Convention on Diplomatic Relations, article 33 of the Vienna Convention on Consular Relations, article 26 of the Convention on Special Missions and articles 25 and 55 of the Vienna Convention on the Representation of States.

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

(5) The other substantive element of the rule is the obligation of the receiving State or, as the case may be, the transit State not to detain the diplomatic bag while it is in its territory. The detention of the bag constitutes an infringement of the freedom of communication by means of diplomatic correspondence. Furthermore, the detention of the bag would mean that, for a certain period of time, it would be under the direct control of the authorities of the transit State or the receiving State. This could give rise to suspicion that, during this period, the bag had undergone an unauthorized examination incompatible with the requirements for observance of its confidential character. It is obvious that any detention of

the bag may upset the intended time-schedule for its transportation, thus delaying its delivery. Finally, the detention of the bag may compromise its safety, as the receiving or transit State might not be in a position at all times to ensure its integrity and guarantee the continuation of its journey.

(6) The extent of the principle of inviolability of the diplomatic bag is further clarified by the words "and shall be exempt from examination directly or through electronic or other technical devices". The view prevailed in the Commission that the inclusion of this phrase was necessary as the evolution of technology had created very sophisticated means of examination which might result in the violation of the confidentiality of the bag, means which furthermore were at the disposal of only the most developed States. On the other hand, paragraph 1 does not extend to an external examination of the bag and of its visible marks or indications of its character as such, to the extent that such an external examination would be conducted for identification purposes only and with a view to ascertaining that a given container claimed to be a diplomatic bag actually had such a character. The paragraph does not rule out non-intrusive means of examination, such as sniffer dogs, in the case of suspicion that the bag is being used for the transport of narcotic drugs.

#### Paragraph 2

(7) Paragraph 2, except for the cross-reference contained therein, is a textual reproduction from article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations and therefore applies only to the consular bag *stricto sensu*. It introduces, in connection with the consular bag, a balance between the interests of the sending State in ensuring the protection, safety and confidentiality of the contents of its bag and the security interests of the receiving or transit State.

(8) In this connection, the Commission has been fully aware that cases of possible abuse of the bag are not confined to the consular bag but may extend also to the diplomatic bag *stricto sensu* or to the bags of missions or delegations. Contemporary international practice has witnessed cases of diplomatic bags being used or attempted to be used for the illicit import or export of currency, narcotic drugs, arms or other items, and even for the transport of human beings, which have violated the established rules regarding the permissible contents of the bag and adversely affected the legitimate interests of receiving or transit States. The Commission is of the view that, while the protection of the diplomatic bag is a fundamental principle for the normal functioning of official communications between States, the implementation of this principle should not provide an opportunity for abuse which may affect the legitimate interests of receiving or transit States.

(9) The Commission considered the possibility of extending to all diplomatic bags the régime of the consular bag reflected in paragraph 2. Some members, however, were of the view that a uniform régime for all bags should be established on the basis of the existing régime for the diplomatic bag *stricto sensu* as reflected in the 1961 Vienna Convention on Diplomatic Relations, which does not provide the receiving or transit State with

the right laid down in paragraph 2. Some intermediate solutions were also considered. In the end, and after extensive consideration of the problem, the Commission opted for the present formulation, which maintains the existing régime as contained in the four codification conventions as a compromise solution capable of ensuring better prospects of wide adherence by States to the present articles.

(10) It was made clear in the Commission that, subject to article 6 on non-discrimination and reciprocity, nothing precluded States from introducing by agreement, in their mutual relations, other practices regarding the diplomatic bag. In particular, they could agree to submit the consular bag to the régime of the diplomatic bag, or vice versa.

(11) It was also recalled in the Commission that, in accordance with article 58, paragraph 4, of the 1963 Vienna Convention on Consular Relations, the exchange of consular bags between two consular posts headed by honorary consular officers in different States was not allowed without the consent of the two receiving States concerned.

#### **Article 29. Exemption from customs duties 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 and departure of the diplomatic bag and grant exemption from customs duties, taxes and related charges other than charges for storage, cartage and similar services rendered.

#### *Commentary*

(1) There is no specific provision in the codification conventions concerning the exemption from customs duties and taxes of the diplomatic bag. Article 29 is based on the consideration that the bag and its contents are articles for the official use of missions, consular posts and delegations, since, according to the definition provided in article 25, the diplomatic bag "may contain only official correspondence, and documents or articles intended exclusively for official use". Taking the foregoing into account, the sources for the present provision are article 36 of the 1961 Vienna Convention on Diplomatic Relations, article 50 of the 1963 Vienna Convention on Consular Relations, article 35 of the 1969 Convention on Special Missions and articles 35 and 65 of the 1975 Vienna Convention on the Representation of States.

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

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

### **PART IV MISCELLANEOUS PROVISIONS**

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

1. Where, because of reasons of *force majeure* or other exceptional circumstances, the diplomatic courier, or the captain of a ship or aircraft in commercial service to whom the diplomatic bag has been entrusted, or any other member of the crew, is no longer able to maintain custody of the bag, the receiving State or the transit State shall inform the sending State of the situation and take appropriate measures with a view to ensuring the integrity and safety of the bag until the authorities of the sending State recover possession of it.

2. Where, because of reasons of *force majeure* or other exceptional circumstances, the diplomatic courier or the unaccompanied diplomatic bag is present in the territory of a State not initially foreseen as a transit State, that State, where aware of the situation, shall accord to the courier and the bag the protection provided for under the present articles and, in particular, extend facilities for their prompt and safe departure from its territory.

#### *Commentary*

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

#### *Paragraph 1*

(2) Paragraph 1 refers to the case where *force majeure* or other exceptional circumstances, such as death,

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

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

(4) Three clarifications were made in the Commission with regard to the conditions under which the above-mentioned obligations might arise for the receiving State or the transit State. First, it is understood that such obligations can arise only when the receiving or transit State has knowledge of the existence of the exceptional circumstances referred to in paragraph 1. Secondly, in the case of a bag entrusted to the captain of a ship or aircraft, the obligation would arise for the receiving or transit State only when there was no one in the line of command, or no other member of the crew, in a position to maintain custody of the bag. Thirdly, the point was also made that the obligations imposed by paragraph 1 on the receiving or transit State are of conduct rather than result, that is to say that the States concerned have the duty to take all the appropriate measures reasonably necessary with a view to ensuring the integrity and safety of the bag, even though sometimes this end result might not be attained for reasons beyond their control.

#### *Paragraph 2*

(5) The source of the provision set out in paragraph 2 is to be found in article 40, paragraph 4, of the 1961 Vienna Convention on Diplomatic Relations, article 54, paragraph 4, of the 1963 Vienna Convention on

Consular Relations, article 42, paragraph 5, of the 1969 Convention on Special Missions and article 81, paragraph 5, of the 1975 Vienna Convention on the Representation of States.

(6) As a rule, and in normal circumstances, the transit States through which a diplomatic courier or an unaccompanied bag will pass on their way to their final destination are known in advance. However, there may be cases, as stated in paragraphs (14) to (16) of the commentary to article 3, in which the courier or the bag is compelled to enter or stay for some time in the territory of a State which had not been foreseen as part of the normal itinerary. This may happen in cases of *force majeure* or other exceptional circumstances such as adverse weather conditions, the forced landing of an aircraft, the breakdown of the means of transport, a natural disaster, or other events beyond the control of the courier or the carrier of the bag. Unlike a transit State known in advance which has granted a transit visa, if so required, a State through which a bag transits due to *force majeure* cannot be foreseen: it comes into the picture only in extraordinary situations. This is precisely the situation envisaged in paragraph 2 of the present article.

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

(8) The obligations arising for an unforeseen transit State in a case of *force majeure* or other exceptional circumstances fall into two main categories. First and foremost, there is the duty of protection, so as to ensure the inviolability of the courier and the safety and confidentiality of the bag. Secondly, the unforeseen transit State should accord the courier or the bag all the facilities necessary "for their prompt and safe departure from its territory". This expression should be understood as giving the transit State the option to allow the courier or the bag to continue their journey to their destination or to facilitate their return to the sending State. In this connection, the extent of the facilities to be accorded should be dictated by the underlying purpose of this provision, namely the protection of unimpeded communications between States, and the principle of good faith in the fulfilment of international obligations and in the conduct of international relations. These obligations exist only when the transit State is aware of the situation.

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

The State on whose territory an international organization has its seat or an office or a meeting of an

**international organ or a conference is held shall grant the facilities, privileges and immunities accorded under the present articles to the diplomatic courier and the diplomatic bag of a sending State directed to or from its mission or delegation, notwithstanding the non-recognition of one of those States or its Government by the other State or the non-existence of diplomatic or consular relations between them.**

#### *Commentary*

(1) The basic concept that the rights and obligations of the sending State and of the host State of an international organization are not affected by non-recognition or by the non-existence of diplomatic or consular relations between them is contained in article 82 of the 1975 Vienna Convention on the Representation of States, which is therefore one of the sources for article 31. In drafting the present provision, the Commission's main concern has been clearly and precisely to define its object and scope. This is why it focuses specifically on the granting of facilities, privileges and immunities accorded under the present articles to the diplomatic courier and the diplomatic bag of a sending State directed to or from its mission or delegation and why it opens with the definition of a "host State" as contained in paragraph 1 (15) of article 1 of the 1975 Vienna Convention.

(2) Weighty reasons have led the Commission to the adoption of article 31. The importance and significance of the functions of the courier and the purpose of the bag as practical means for the operation of official communications of States justify special protection and treatment irrespective of problems of recognition of States or Governments or the existence or absence of diplomatic or consular relations. The proper functioning of official communications is in the interest of the maintenance of international co-operation and understanding and should therefore be facilitated.

(3) Article 31 refers both to "non-recognition" and to "non-existence of diplomatic or consular relations" because recognition, whether of States or of Governments, does not necessarily imply the establishment of diplomatic or consular relations.<sup>70</sup> Furthermore, it covers both the non-recognition of the sending State by the host State and vice versa. The article also covers, as reflected in article 1, the *inter se* aspect of communications between a sending State and its missions and delegations and vice versa.

(4) The granting of the facilities, privileges and immunities referred to in the present article does not by itself imply recognition of the sending State or of its Government by the States granting them. *A fortiori*, it does not imply either recognition by the sending State of the States granting those facilities, privileges and immunities.

<sup>70</sup> See *Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.75.V.12), pp. 52-53, para. (7) of the commentary to article 79.

#### **Article 32. Relationship between the present articles and other conventions and agreements**

1. The present articles shall, as between Parties to them and to the conventions listed in subparagraph (1) of paragraph 1 of article 3, supplement the rules on the status of the diplomatic courier and the diplomatic bag contained in those conventions.

2. The provisions of the present articles are without prejudice to other international agreements in force as between parties to them.

3. Nothing in the present articles shall preclude the Parties thereto from concluding international agreements relating to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, provided that such new agreements are not incompatible with the object and purpose of the present articles and do not affect the enjoyment by the other Parties to the present articles of their rights or the performance of their obligations under the present articles.

#### *Commentary<sup>71</sup>*

(1) The purpose of article 32 is to establish the legal relationship between the rules governing the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier contained in the present articles and those contained in various categories of agreements on the same subject-matter, which categories are dealt with separately in each paragraph.

#### *Paragraph 1*

(2) Paragraph 1 refers to the relationship between the present articles and the three codification conventions mentioned in article 3, paragraph 1 (1), namely the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations and the 1975 Vienna Convention on the Representation of States. In this connection, it should be noted that the main purpose of the elaboration of the present articles was the establishment of a coherent and uniform régime governing the status of the courier and the bag. The desired harmonization and uniformity of the rules governing the legal régime of official communications through the diplomatic courier and the diplomatic bag have been sought by means of the progressive development and codification of additional, more elaborate and more specific rules further regulating the matter. The present articles therefore do not purport to amend the above-mentioned conventions, something which could be done only by the States parties to them, but rather to supplement the rules on the courier and the bag contained in the codification conventions. Nevertheless, the application of some of the provisions of those conventions may be affected because of the supplementary character of the present articles, which harmonize and develop the rules governing the legal régime of the courier and the bag. If this is the case, resort should be had to the rules of the 1969 Vienna Convention on the Law of Treaties<sup>72</sup> concerning the application of successive treaties relating to the same subject-matter.

<sup>71</sup> See also paragraphs 54-60 above.

<sup>72</sup> United Nations, *Treaty Series*, vol. 1155, p. 331.

(3) The words "as between Parties to them and to the conventions listed in . . . article 3" indicate that the supplementary character attributed to the present articles applies only when the States concerned are also parties to the conventions in question.

#### *Paragraph 2*

(4) The direct source for paragraph 2 is article 73, paragraph 1, of the 1963 Vienna Convention on Consular Relations, with the exception of the words "are without prejudice to", which have been taken from article 4 (a) of the 1975 Vienna Convention on the Representation of States.

(5) Paragraph 2 regulates the legal relationship between the present articles and existing agreements other than those referred to in paragraph 1. It is possible that, at the time of becoming parties to the present articles, States may already be parties to bilateral or multilateral agreements on the same subject-matter other than the codification conventions. The numerous consular conventions or agreements regulating consular relations between some States are a case in point. The purpose of paragraph 2 is to reserve the position of those agreements regulating the same subject-matter and it acts as a safeguard clause in respect of the rights and obligations of States deriving from those agreements. The paragraph should be interpreted in the light of article 30 of the 1969 Vienna Convention on the Law of Treaties.

#### *Paragraph 3*

(6) Paragraph 3 draws its inspiration from article 4 (b) of the 1975 Vienna Convention on the Representation of States, but the source of the conditions contained therein is article 41, paragraph 1 (b), of the 1969 Vienna Convention on the Law of Treaties.

(7) Paragraph 3 deals with the legal relationship between the present articles and possible future agreements that certain States parties to the articles may wish to conclude on the same subject-matter in order to confirm, supplement, extend or amplify the provisions thereof among those States parties. The paragraph recognizes the right of States to conclude such new agreements but it sets some limitations intended to safeguard the basic rules contained in the present articles. Thus the new agreements cannot be incompatible with the object and purpose of the present articles and cannot affect other parties in the enjoyment of their rights or the performance of their obligations under the articles. As indicated in paragraph (10) of the commentary to article 28, an agreement whereby two States parties agreed to submit the consular bag to the régime of the diplomatic bag, or vice versa, would not be contrary to the object and purpose of the present articles. The same would be true of an agreement whereby two States stipulated that their bags were to be subject to means of electronic or mechanical examination.

(8) The provisions of paragraph 3 should be read in conjunction with the rules on non-discrimination and

reciprocity laid down in article 6, and with the commentary thereto.

#### **2. DRAFT OPTIONAL PROTOCOL ONE ON THE STATUS OF THE COURIER AND THE BAG OF SPECIAL MISSIONS**

#### **DRAFT OPTIONAL PROTOCOL ONE ON THE STATUS OF THE COURIER AND THE BAG OF SPECIAL MISSIONS**

The States Parties to the present Protocol and to the articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, hereinafter referred to as "the articles",

Have agreed as follows:

#### **Article I**

The articles also apply to a courier and a bag employed for the official communications of a State with its special missions within the meaning of the Convention on Special Missions of 8 December 1969, wherever situated, and for the official communications of those missions with the sending State or with its other missions, consular posts or delegations.

#### **Article II**

For the purposes of the articles:

(a) "mission" also means a special mission within the meaning of the Convention on Special Missions of 8 December 1969;

(b) "diplomatic courier" also means a person duly authorized by the sending State as a courier of a special mission within the meaning of the Convention on Special Missions of 8 December 1969 who is entrusted with the custody, transportation and delivery of a diplomatic bag and is employed for the official communications referred to in article I of the present Protocol;

(c) "diplomatic bag" also means the packages containing official correspondence, and documents or articles intended exclusively for official use, whether accompanied by a courier or not, which are used for the official communications referred to in article I of the present Protocol and which bear visible external marks of their character as a bag of a special mission within the meaning of the Convention on Special Missions of 8 December 1969.

#### **Article III**

1. The present Protocol shall, as between Parties to it and to the Convention on Special Missions of 8 December 1969, supplement the rules on the status of the diplomatic courier and the diplomatic bag contained in that Convention.

2. The provisions of the present Protocol are without prejudice to other international agreements in force as between parties to them.

3. Nothing in the present Protocol shall preclude the Parties thereto from concluding international agreements relating to the status of the diplomatic courier and the

**diplomatic bag not accompanied by diplomatic courier, provided that such new agreements are not incompatible with the object and purpose of the articles and do not affect the enjoyment by the other Parties to the articles of their rights or the performance of their obligations under the articles.**

### Commentary

(1) As explained in the commentary to article 1, the Commission decided not to include in the scope of the draft articles the couriers and bags of special missions as defined in the 1969 Convention on Special Missions. Taking into account views expressed in the Commission and by some Governments, and given the relatively small number of parties to the 1969 Convention, the Commission felt that the inclusion of such couriers and bags in the scope of the articles might jeopardize wider acceptability of the articles among States not yet parties to that Convention. Yet, conscious of the fact that the ultimate goal of the present effort of progressive development and codification in the field of diplomatic and consular law is the creation of a comprehensive, coherent and uniform régime for all couriers and bags, the Commission did not wish to prevent States so wishing from applying the régime of the draft articles also to couriers and bags of special missions. It therefore adopted the present draft optional protocol, whose only purpose is to provide States with the legal instrument to extend the application of the draft articles also to the above-mentioned couriers and bags. This solution is more consistent with the goals and reasons stated above than the solution adopted on first reading of the draft articles, whereby, despite the comprehensive scope of the articles, which covered all couriers and bags, States could, by means of an optional declaration provided for in article 33 (later deleted), make at any time a written declaration specifying any category of diplomatic courier and corresponding category of diplomatic bag to which they would not apply the articles. The present solution introduces a more appropriate and finely tuned balance between the need to ensure the realization of the above-mentioned goals in the progressive development and codification of this area of diplomatic and consular law and the interest of the international community in ensuring the widest possible acceptability of the draft articles.

(2) Each article of draft Optional Protocol One has its counterpart, *mutatis mutandis*, in a provision of the draft articles. Article I corresponds to article 1 of the draft articles, article II to article 3, paragraph 1 (1), (2) and (6), of the draft articles, and article III to article 32 of the draft articles. The commentaries to the relevant draft articles are therefore also applicable, *mutatis mutandis*, to the corresponding provisions of the present draft protocol.

(3) Article I, in defining the scope of the draft protocol, also lays down its object and purpose, namely the application of the draft articles also to couriers and bags of special missions within the meaning of the 1969 Convention on Special Missions. Except for the specific mention of couriers and bags of special missions within the meaning of that Convention, it adopts the same formulation as article 1 of the draft articles.

(4) Article II defines the concepts which constitute the specificity of article I on the scope of the draft protocol as compared to article 1 on the scope of the draft articles. These concepts are “special mission”, “courier of a special mission” and “bag of a special mission”. The purpose of article II is to widen, for parties to the protocol, the interpretation of the expressions “mission”, “diplomatic courier” and “diplomatic bag”, wherever they appear in the draft articles, to include also special missions and their couriers and bags. The article thus complements the definitions contained in article 3, paragraph 1 (1), (2) and (6), of the draft articles.

(5) Article III establishes the legal relationship between, on the one hand, the rules governing the status of the diplomatic courier and the diplomatic bag as they apply to couriers and bags of special missions by virtue of the draft protocol and, on the other hand, the rules contained in various categories of agreements on the same subject-matter. The article adopts, *mutatis mutandis*, the structure and formulation of article 32 of the draft articles, various categories of agreements being dealt with separately in each paragraph.

### 3. DRAFT OPTIONAL PROTOCOL TWO ON THE STATUS OF THE COURIER AND THE BAG OF INTERNATIONAL ORGANIZATIONS OF A UNIVERSAL CHARACTER

#### DRAFT OPTIONAL PROTOCOL TWO ON THE STATUS OF THE COURIER AND THE BAG OF INTERNATIONAL ORGANIZATIONS OF A UNIVERSAL CHARACTER

The States Parties to the present Protocol and to the articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, hereinafter referred to as “the articles”,

Have agreed as follows:

##### Article I

The articles also apply to a courier and a bag employed for the official communications of an international organization of a universal character:

(a) with its missions and offices, wherever situated, and for the official communications of those missions and offices with each other;

(b) with other international organizations of a universal character.

##### Article II

For the purposes of the articles:

(a) “diplomatic courier” also means a person duly authorized by the international organization as a courier who is entrusted with the custody, transportation and delivery of the bag and is employed for the official communications referred to in article I of the present Protocol;

(b) “diplomatic bag” also means the packages containing official correspondence, and documents or articles intended exclusively for official use, whether

**accompanied by a courier or not, which are used for the official communications referred to in article I of the present Protocol and which bear visible external marks of their character as a bag of an international organization.**

### Article III

**1. The present Protocol shall, as between Parties to it and to the Convention on the Privileges and Immunities of the United Nations of 13 February 1946 or the Convention on the Privileges and Immunities of the Specialized Agencies of 21 November 1947, supplement the rules on the status of the diplomatic courier and the diplomatic bag contained in those Conventions.**

**2. The provisions of the present Protocol are without prejudice to other international agreements in force as between parties to them.**

**3. Nothing in the present Protocol shall preclude the Parties thereto from concluding international agreements relating to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, provided that such new agreements are not incompatible with the object and purpose of the articles and do not affect the enjoyment by the other Parties to the articles of their rights or the performance of their obligations under the articles.**

#### Commentary

(1) Under article I of the draft articles, the scope of those articles is confined to couriers and bags employed by States. Yet at different stages of the Commission's work on the present topic, the question was raised as to the possibility of extending the scope of the draft articles to couriers and bags employed by international organizations in their official communications. The practice whereby international organizations employ couriers and bags in their official communications is widespread and has been recognized in important multilateral conventions regulating the status of international organizations. Thus article III (sect. 10), on facilities in respect of communications, of the 1946 Convention on the Privileges and Immunities of the United Nations<sup>73</sup> states that "the United Nations shall have the right to use codes and to dispatch and receive its correspondence by courier or in bags, which shall have the same immunities and privileges as diplomatic couriers and bags". For its part, article IV (sect. 12), on facilities in respect of communications, of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies<sup>74</sup> states that "the specialized agencies shall have the right to use codes and to dispatch and receive correspondence by courier or in sealed bags, which shall have the same immunities and privileges as diplomatic couriers and bags". It is to be noted that a great number of States are parties to these two Conventions, which not only recognize for the United Nations and its specialized agencies the right to employ couriers and bags, but also equate those couriers and bags with diplomatic couriers and bags as far as their status is concerned.

<sup>73</sup> See footnote 43 above.

<sup>74</sup> See footnote 44 above.

(2) However, since opinions had been divided, both in the Commission and in the comments and observations received from Governments, as to the advisability of enlarging the scope of the draft articles to cover also couriers and bags employed by international organizations, the Commission opted for confining the scope to couriers and bags employed by States, in order not to jeopardize the acceptability of the draft articles. Yet it also believed it appropriate, in the light of the considerations set out in paragraph (1) of the present commentary, that States should be given the choice, if they so wished, to extend the application of the draft articles to couriers and bags of, at least, international organizations of a universal character. This was done by means of the present draft optional protocol.

(3) Article I defines the scope of draft Optional Protocol Two as well as its object and purpose, namely the application of the draft articles to couriers and bags employed for the official communications of an international organization of a universal character. The 1975 Vienna Convention on the Representation of States (art. I, para. 1 (2)) defines the concept of an "international organization of a universal character" as follows: "the United Nations, its specialized agencies, the International Atomic Energy Agency and any similar [inter-governmental] organization whose membership and responsibilities are on a world-wide scale". The article encompasses the two-way or *inter se* character of the official communications (a) of an international organization with its missions and offices, wherever situated; and (b) of those missions and offices with the organization or with each other. The scope also covers communications by means of couriers and bags between international organizations of a universal character.

(4) The purpose of article II is to widen, for parties to the protocol, the interpretation of the expressions "diplomatic courier" and "diplomatic bag", wherever they appear in the draft articles, to include also "the courier of an international organization" and "the bag of an international organization". It thus complements the definitions contained in article 3, paragraph 1 (1) and (2), of the draft articles.

(5) Article III establishes the legal relationship between, on the one hand, the rules governing the status of the diplomatic courier and the diplomatic bag as they apply to couriers and bags of international organizations of a universal character by virtue of the draft protocol and, on the other hand, the rules contained in various categories of agreements on the same subject-matter. The article adopts, *mutatis mutandis*, the structure and formulation of article 32 of the draft articles, various categories of agreements being dealt with separately in each paragraph. It is to be noted that paragraph 1 of article III specifically mentions the 1946 Convention on the Privileges and Immunities of the United Nations and the 1947 Convention on the Privileges and Immunities of the Specialized Agencies, as those Conventions, because of the large number of parties thereto, may be considered truly universal codification conventions in the area of privileges and immunities of the United Nations and its specialized agencies. The commentary to the various paragraphs of article 32 of the draft articles is also applicable, *mutatis mutandis*, to article III of the draft protocol.

## Chapter III

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

#### A. Introduction

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

74. On the basis of the reports of the Special Rapporteur, the Commission, at its second session, in 1950, adopted a formulation of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal<sup>75</sup> and submitted those principles, with commentaries, to the General Assembly; then, at its sixth session, in 1954, the Commission adopted a draft Code of Offences against the Peace and Security of Mankind<sup>76</sup> and submitted it, with commentaries, to the General Assembly.<sup>77</sup>

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

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

77. By its resolution 36/106 of 10 December 1981, the General Assembly invited the Commission to resume its work with a view to elaborating the draft Code of Offences against the Peace and Security of Mankind and to examine it with the required priority in order to review it, taking duly into account the results achieved by the process of the progressive development of international law.<sup>78</sup>

<sup>75</sup> Hereinafter referred to as the "Nürnberg Principles" (*Yearbook ... 1950*, vol. II, pp. 374-378, document A/1316, paras. 95-127).

<sup>76</sup> *Yearbook ... 1954*, vol. II, pp. 150-152, document A/2693, paras. 49-54.

<sup>77</sup> The texts of the 1954 draft code and of the Nürnberg Principles are reproduced in *Yearbook ... 1985*, vol. II (Part Two), p. 8, para. 18, and p. 12, para. 45, respectively.

<sup>78</sup> Subsequently, in its resolution 42/151 of 7 December 1987, the General Assembly endorsed the Commission's recommendation that the title of the topic in English be amended. Thus the title of the topic in

78. At its thirty-fourth session, in 1982, the Commission appointed Mr. Doudou Thiam Special Rapporteur for the topic. At its thirty-fifth session, in 1983, and its thirty-sixth session, in 1984, the Commission considered two reports submitted by the Special Rapporteur.<sup>79</sup>

79. By the end of its thirty-sixth session, in 1984, the Commission had reached the following stage in its work on the topic. It was of the opinion that the draft code should cover only the most serious international offences. These offences would be determined by reference to a general criterion and also to the relevant conventions and declarations on the subject. As to the subjects of law to which international criminal responsibility could be attributed, the Commission wished to have the views of the General Assembly on that point, because of the political nature of the problem of the international criminal responsibility of States. As to the implementation of the code, since some members considered that a code unaccompanied by penalties and by a competent criminal jurisdiction would be ineffective, the Commission requested the General Assembly to indicate whether the Commission's mandate extended to the preparation of the statute of a competent international criminal jurisdiction for individuals.<sup>80</sup> The General Assembly was requested to indicate whether such a jurisdiction should also be competent with respect to States.<sup>81</sup>

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

English now reads: "Draft Code of Crimes against the Peace and Security of Mankind".

<sup>79</sup> These reports are reproduced as follows:

First report: *Yearbook ... 1983*, vol. II (Part One), p. 137, document A/CN.4/364;

Second report: *Yearbook ... 1984*, vol. II (Part One), p. 89, document A/CN.4/377.

<sup>80</sup> On the question of an international criminal jurisdiction, see the report of the Commission on its thirty-seventh session, *Yearbook ... 1985*, vol. II (Part Two), pp. 8-9, para. 19 and footnotes 16 and 17.

<sup>81</sup> *Yearbook ... 1983*, vol. II (Part Two), p. 16, para. 69 (c) (ii).

81. As regards the content *ratione materiae* of the draft code, the Commission intended to include the offences covered by the 1954 draft code, with appropriate modifications of form and substance which it would consider at a later stage. As of the thirty-sixth session, in 1984, a general trend had emerged in the Commission in favour of including in the draft code colonialism, *apartheid* and possibly serious damage to the human environment and economic aggression, if appropriate legal formulations could be found. The notion of economic aggression was further discussed at the thirty-seventh session, in 1985, but no definite conclusions were reached. As regards the use of nuclear weapons, the Commission had discussed the problem at length, but intended to examine the matter in greater depth in the light of any views expressed in the General Assembly. With regard to mercenarism, the Commission considered that, in so far as the practice was used to infringe State sovereignty, undermine the stability of Governments or oppose national liberation movements, it constituted an offence against the peace and security of mankind. The Commission considered, however, that it would be desirable to take account of the work of the *Ad Hoc* Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries. With regard to the taking of hostages, violence against persons enjoying diplomatic privileges and immunities, etc. and the hijacking of aircraft, the Commission considered that these practices had aspects which could be regarded as related to the phenomenon of international terrorism and should be approached from that angle. With regard to piracy, the Commission recognized that it was an international crime under customary international law. It doubted, however, whether in the present international community the offence could be such as to constitute a threat to the peace and security of mankind.<sup>82</sup>

82. From its thirty-seventh session (1985) to its fortieth session (1988), the Commission considered four further reports submitted by the Special Rapporteur.<sup>83</sup> It also referred to the Drafting Committee draft articles 1 to 11 as submitted in those reports. At its thirty-ninth and fortieth sessions, the Commission provisionally adopted articles 1 (Definition), 2 (Characterization), 3 (Responsibility and punishment), 4 (Obligation to try or extradite), 5 (Non-applicability of statutory limitations), 6 (Judicial guarantees), 7 (*Non bis in idem*), 8 (Non-retroactivity), 10 (Responsibility of the superior), 11 (Official position and criminal responsibility) and 12 (Aggression),<sup>84</sup> with commentaries thereto.<sup>85</sup>

<sup>82</sup> *Yearbook ... 1984*, vol. II (Part Two), p. 17, para. 65.

<sup>83</sup> These reports are reproduced as follows:

Third report: *Yearbook ... 1985*, vol. II (Part One), p. 63, document A/CN.4/387;

Fourth report: *Yearbook ... 1986*, vol. II (Part One), p. 53, document A/CN.4/398;

Fifth report: *Yearbook ... 1987*, vol. II (Part One), p. 1, document A/CN.4/404;

Sixth report: *Yearbook ... 1988*, vol. II (Part One), p. 197, document A/CN.4/411.

<sup>84</sup> The texts of these articles are reproduced in section C.1 of the present chapter.

<sup>85</sup> For a more detailed account of the Commission's work on the topic at its thirty-seventh to fortieth sessions, see *Yearbook ... 1988*, vol. II (Part Two), p. 56-57, paras. 201-214.

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

83. At the present session, the Commission had before it the seventh report of the Special Rapporteur on the topic (A/CN.4/419 and Add.1). In the report, the Special Rapporteur had recast the draft articles on war crimes and crimes against humanity which he had submitted in his fourth report, in 1986.<sup>86</sup> The new draft articles 13 (War crimes) and 14 (Crimes against humanity)<sup>87</sup> were accompanied by comments summarizing the doctrinal debate and the debate within the Commission and explaining the reasons that had prompted the Special Rapporteur to propose new texts. With regard to war crimes, the Special Rapporteur gave special attention in his report to the question of definition, problems of terminology and the question of the degree of gravity of war crimes and the distinction between war crimes and grave breaches. In his comments on crimes against humanity, the Special Rapporteur focused in particular on the concepts of crimes against humanity and the crime of genocide, as well as on the concept of inhuman acts, particularly on attacks on persons, attacks on property and the mass or systematic nature of inhuman acts. He also dealt with other crimes, including *apartheid*, slavery and forced labour.

84. The Commission considered the seventh report of the Special Rapporteur at its 2096th to 2102nd, 2106th and 2107th meetings, from 3 to 16 May and on 23 and 24 May 1989. After hearing the Special Rapporteur's introduction, the Commission considered draft articles 13 and 14 as contained in the report and decided at its 2102nd meeting to refer them to the Drafting Committee. The comments and observations of members of the Commission regarding those draft articles are reflected in paragraphs 88 to 210 below.

85. At the end of the debate, the Commission was generally agreed that each crime in the draft code should be dealt with in a separate provision.

86. At its 2134th to 2136th meetings, from 11 to 13 July 1989, the Commission, after having considered the report of the Drafting Committee, provisionally adopted articles 13 (Threat of aggression), 14 (Intervention) and 15 (Colonial domination and other forms of alien domination).

87. Views expressed by members of the Commission on these articles are reflected in the commentaries thereto, which are reproduced with the texts of the articles in section C.2 of the present chapter.

### 1. WAR CRIMES

88. In introducing draft article 13,<sup>88</sup> the Special Rapporteur indicated that the question of the definition

<sup>86</sup> See *Yearbook ... 1986*, vol. II (Part Two), pp. 43-44, footnote 105, draft articles 13 and 12, respectively.

<sup>87</sup> The numbering of these articles is as proposed by the Special Rapporteur and will eventually have to be changed, since the Commission later provisionally adopted other articles numbered 13 and 14 (see para. 86 below).

<sup>88</sup> The two alternatives of draft article 13 submitted by the Special Rapporteur in his seventh report read (see also footnote 107 below):

(Continued on next page.)

of a war crime gave rise to three problems. The first was whether the concept of gravity should or should not be included in the definition.

89. The second problem related to terminology—although it also had legal implications—and concerned the choice of the expression to be used to designate the legal rules whose breach could constitute a war crime. The two possible expressions were “the laws or customs of war” and “the rules of international law applicable in armed conflict”.

90. The third problem related to the method of definition, namely whether the definition should be of a general nature or whether it should be a list and, if so, whether the list should be exhaustive or indicative.

(a) *Concept of gravity and definition of war crimes*

91. The Special Rapporteur noted that both alternatives of draft article 13 introduced the concept of gravity in the definition of a war crime. He pointed out, however, that no distinction between acts regarded as war crimes on the basis of their degree of gravity was made in the 1907 Hague Convention,<sup>89</sup> the Charter of the Nürnberg International Military Tribunal,<sup>90</sup> the Charter of the International Military Tribunal for the Far East (Tokyo Tribunal)<sup>91</sup> or Law No. 10 of the Allied Control Council.<sup>92</sup> The word “crime” in the expression “war crime” was not used in its technical and legal sense as applying to the gravest breaches, but in the general sense of a breach, regardless of the degree of gravity.

(Footnote 88 continued.)

“CHAPTER II  
“ACTS CONSTITUTING CRIMES AGAINST  
THE PEACE AND SECURITY OF MANKIND  
“...

“Article 13. War Crimes

FIRST ALTERNATIVE

“(a) Any [serious] violation of the laws or customs of war constitutes a war crime.

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

SECOND ALTERNATIVE

“(a) Within the meaning of the present Code, any [serious] violation of the rules of international law applicable in armed conflict constitutes a war crime.

“(b) The expression ‘rules of international law applicable in armed conflict’ means the rules laid down in the international agreements to which the parties to the conflict have subscribed and the generally recognized principles and rules of international law applicable to armed conflicts.”

<sup>89</sup> Convention (IV) respecting the Laws and Customs of War on Land, of 18 October 1907 (see J. B. Scott, ed., *The Hague Conventions and Declarations of 1899 and 1907*, 3rd ed. (New York, Oxford University Press, 1918), p. 100).

<sup>90</sup> Charter annexed to the London Agreement of 8 August 1945 for the prosecution and punishment of the major war criminals of the European Axis (United Nations, *Treaty Series*, vol. 82, p. 279).

<sup>91</sup> *Documents on American Foreign Relations*, vol. VIII (July 1945–December 1946) (Princeton University Press, 1948), pp. 354 *et seq.*

<sup>92</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)).

92. The Special Rapporteur indicated that the distinction between grave breaches and other breaches, or ordinary breaches, had appeared only later, in the 1949 Geneva Conventions<sup>93</sup> and in Additional Protocol I<sup>94</sup> thereto. Under those instruments, legal consequences derived from that distinction, since only grave breaches gave rise to an obligation on the part of States to impose penal sanctions. The Geneva Conventions introduced the concept of gravity in referring to breaches of humanitarian law and stated that grave breaches of that law constituted war crimes.

93. However, in the 1954 draft code, the Commission had not made any distinction between war crimes on the basis of their gravity. There was thus a difference of approach between the 1949 Geneva Conventions and Additional Protocol I, on the one hand, and the above-mentioned legal instruments which the Commission had used as a basis for the 1954 draft code, on the other.

94. The Special Rapporteur also indicated that the problem of gravity had not escaped the attention of the Commission in the 1950s. At its meeting on 4 July 1950, a debate had taken place on the “Hudson” proposal to introduce the element of gravity in the definition of a war crime.<sup>95</sup> That proposal had, however, not been adopted.

95. However, he stressed that, among the acts commonly termed “war crimes”, some were merely ordinary offences. That was why some of the military tribunals, particularly those of the British Zone, had been criticized for sometimes applying Law No. 10 to trifling offences. One explanation for that situation had been the desire of those tribunals to adopt a broad interpretation of that Law so as not to allow reprehensible actions to go unpunished, even if they did not fall into the category of crimes *stricto sensu*. Moreover, Law No. 10, unlike the Charters of the Nürnberg and Tokyo Tribunals, had defined war crimes as “atrocities or offences” (art. II, para. 1 (b)). The word “crime” thus did not have its technical meaning, but its general meaning of a breach.

96. In conclusion, in the Special Rapporteur’s opinion it might now be appropriate, for the sake of greater legal accuracy, to restore to the word “crime” its meaning of a “grave breach”. In draft article 13, however, the word “serious” was provisionally between square brackets because it would be up to the Commission to make its choice: either to call any violation of the laws of war a war crime or to include only serious violations.

97. Many members of the Commission considered that a violation of the laws of war had to be extremely serious to be regarded as a crime against the peace and security of mankind. In their view, since the Commission had defined crimes against the peace and security of mankind as very serious offences, only war crimes of a very serious nature should be included. War crimes would then come within the purview of, and become part of, a broader concept—that of crimes against the peace and security of mankind. It was hard to imagine how acts which were not highly serious could be considered crimes against the peace and

<sup>93</sup> Geneva Conventions of 12 August 1949 for the Protection of War Victims (United Nations, *Treaty Series*, vol. 75).

<sup>94</sup> Protocol I relating to the protection of victims of international armed conflicts, adopted at Geneva on 8 June 1977 (*ibid.*, vol. 1125, p. 3).

<sup>95</sup> See *Yearbook ... 1950*, vol. I, p. 148, 60th meeting, para. 12.

security of mankind. In the opinion of these members, it was essential to retain the adjective "serious" without square brackets, to ensure that minor violations of the rules of armed conflict would not fall within the ambit of the code. In that connection, they referred to articles 146 and 147 of the Fourth Geneva Convention<sup>96</sup> and to article 85 of Additional Protocol I.<sup>97</sup>

98. It was pointed out that there were two ways of defining the concept of gravity, one being to base it on the nature of the crime and the other being to take account of its consequences. The 1949 Geneva Conventions and the Additional Protocols thereto had adopted the first approach, which related to the nature of the crime.

99. Some members were of the opinion that there were two ways of determining gravity. On the one hand, that could be done in the code itself by including in it a list of the offences to be covered. The determination of gravity was incumbent on the Commission, which therefore had to provide a list of the grave breaches which constituted war crimes. On the other hand, no matter how an act was characterized by the code on the basis of its inherent nature, it was for a court to consider mitigating or aggravating circumstances in order to determine responsibility. In the view of these members, it would be better to refer in draft article 13 to "breaches" rather than to "violations".

100. Some members nevertheless preferred not to use the expression "grave breaches", which bore the imprint of the Geneva Conventions and did not, in their view, cover all war crimes or even all serious war crimes. In their view, it would be preferable for article 13 to refer to "serious violations" of the rules of international law applicable in armed conflict.

101. In analysing the relevant provisions of the 1949 Geneva Conventions and the Additional Protocols thereto, it was stressed that the concept of a "war crime" was broader than that of a "grave breach". However, the distinction between "grave breaches" and "serious violations" was not clear. The Conventions and the Protocols seemed to use those two concepts synonymously, except in article 90, paragraph 2 (c) (i), of Protocol I, in which a distinction might have been made, although the text did not fully dispel doubts.

102. Some members were opposed to the introduction of the concept of gravity in the definition of a war crime. One member in particular pointed out that the concept of gravity was not to be found in the international law which had governed war crimes for a century or more. According to that member, the rules of international law in force entitled a belligerent State which had apprehended a member of the enemy's armed forces for a violation of some rule of the laws of war to try him, even if the violation was a minor one. Another member stressed that any individual, whether military or civilian, who committed an act in violation of the rules of international law applicable in armed conflict had to be liable to punishment as a war criminal and that that precluded the criterion of gravity.

<sup>96</sup> Geneva Convention of 12 August 1949 relative to the Protection of Civilian Persons in Time of War (United Nations, *Treaty Series*, vol. 75, p. 287).

<sup>97</sup> See footnote 94 above.

103. With reference to the comments mentioned in the preceding paragraph, it was stated that the intention was not to change the usual meaning of the expression "war crime" or the régime applicable to "war crimes", but only to determine which "war crimes" should be included in the draft code.

#### (b) *Use of terms and definition of war crimes*

104. In introducing his seventh report, the Special Rapporteur pointed out that some people thought that the expression "war crime" was outmoded and that the word "war" should be replaced by the expression "armed conflict". He noted, however, that the traditional expression "laws or customs of war" was used in a very large number of conventions and other international instruments, in particular in the 1907 Hague Convention, the Charter of the Nürnberg Tribunal and the Charter of the Tokyo Tribunal. He had therefore proposed two alternatives for article 13. The traditional term "war" was used in the first, while, in the second, it had been replaced by the expression "armed conflict". It was for the Commission to choose between those alternatives.

105. There was a definite trend in the Commission in favour of the second alternative, which used the expression "rules of international law applicable in armed conflict". It was pointed out in that connection that the traditional expression "laws or customs of war" in the first alternative was no longer satisfactory, since, with developments in international law, the classical concept of war was outdated because it now applied to situations that were not wars in the traditional sense of the term. The expression "armed conflict", on the other hand, was clear and precise and required no explanation. The definition of war crimes as violations of the "rules of international law applicable in armed conflict" covered both conventional law and customary law, as well as all types of armed conflict, to the extent that international law was applicable to them. Some members pointed out that, since the law of war was largely codified, it would be preferable not to refer any longer to the "customs of war". In their view, that was particularly true in the sensitive area of criminal law.

106. It was also pointed out in support of the second alternative that an aggressor sometimes used terms such as "incident" or "conflict" instead of the term "war" in order to avoid having to apply humanitarian law to its victims.

With regard to the content of the concept of armed conflict, it was noted that, in defining war crimes, account had to be taken of the situation in the contemporary world, where wars between States increasingly gave way to internal conflicts and external intervention in those conflicts. In the opinion of some members, the concept of armed conflict referred not only to conflicts between sovereign States, but also to the struggles of peoples against colonial domination, foreign occupation or racist régimes in the exercise of the right to self-determination.

107. In the view of another member, however, the fact that the expression "armed conflict" covered not only international conflicts, but also non-international conflicts, meant that the Commission should consider carefully the question of its inclusion in draft article 13. .

108. Referring to the scope of the expression "armed conflict" on the basis of the applicable texts, another member said that Additional Protocol I covered not only international armed conflicts, in other words the situations referred to in article 2 common to the four Geneva Conventions, but also armed conflicts in which peoples were struggling against colonial domination, alien occupation or racist régimes in the exercise of the right to self-determination. Additional Protocol II,<sup>98</sup> which related to the protection of victims of non-international armed conflicts, developed and supplemented article 3 common to the four Geneva Conventions and applied to armed conflicts which took place in the territory of a contracting party and involved the armed forces of that party and "dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol" (art. 1, para. 1). It did not, however, apply to situations of internal disturbances, such as riots and acts of violence, which were not considered to be armed conflicts.

### (c) *Method of definition*

109. The Special Rapporteur pointed out that the two alternatives of draft article 13 which he had submitted were only general definitions, rather than lists of acts constituting war crimes. In his opinion, a list would give rise to the problem of determining whether or not it was exhaustive.

110. He noted that it would be difficult, if not impossible, to reach agreement on the offences to be included in a list of war crimes and that a list would constantly be called in question because of the rapid development of the methods and technology of armed conflict. In that connection, he referred to the famous Martens clause set forth in the preamble to the 1907 Hague Convention<sup>99</sup> and reproduced in Additional Protocol I<sup>100</sup> to the 1949 Geneva Conventions (art. 1, para. 2).

111. He also referred to the commentary by ICRC on article 1, paragraph 2, of Additional Protocol I, which stated:

There were two reasons why it was considered useful to include this clause yet again in the Protocol. First, despite the considerable increase in the number of subjects covered by the law of armed conflicts, and despite the detail of its codification, it is not possible for any codification to be complete at any given moment; thus the Martens clause prevents the assumption that anything which is not explicitly prohibited by the relevant treaties is therefore permitted. Secondly, it should be seen as a dynamic factor proclaiming the applicability of the principles mentioned regardless of subsequent developments of types of situation or technology.<sup>101</sup>

<sup>98</sup> Protocol II relating to the protection of victims of non-international armed conflicts, adopted at Geneva on 8 June 1977 (United Nations, *Treaty Series*, vol. 1125, p. 609).

<sup>99</sup> *Op. cit.* (footnote 89 above), pp. 101-102.

<sup>100</sup> See footnote 94 above.

<sup>101</sup> ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, Martinus Nijhoff, 1987), pp. 38-39.

112. In addition, he recalled the position of the first Special Rapporteur for the draft code, Mr. Jean Spiropoulos, who had stated in his first report:

... To embark on such a venture now will render the attainment of our present goal, namely the drafting and adoption by the Governments of such a code in the near future, illusory. What the Commission can do, in our opinion, is to adopt a general definition of the above crimes, leaving to the judge the task of investigating whether, in the light of the recent development of the laws of war, he is in the presence of "war crimes". ...<sup>102</sup>

113. According to the Special Rapporteur, that opinion was particularly worthy of note because the various breaches of the law of armed conflict were mentioned in the relevant conventions, including the 1907 Hague Convention, the 1949 Geneva Conventions (Convention I, art. 50; Convention II, art. 51; Convention III, art. 130; Convention IV, art. 147) and Additional Protocol I (arts. 11 and 85). It would be pointless and tedious to reproduce those texts in the draft code.

114. The Special Rapporteur also referred to the judgment of the Nürnberg Tribunal,<sup>103</sup> which had stated that the law of war was to be found in customs and practices which had gradually obtained universal recognition and in the general principles of justice applied by jurists and practised by military courts; that that law was not static but, by continual adaptation, followed the needs of a changing world; and that in many cases treaties did no more than express and define the principles of law already existing.

115. Lastly, he pointed out that jurists themselves had come to support the idea that an exhaustive list of war crimes was impossible.

116. Referring to some of the arguments put forward by the Special Rapporteur and set out in the preceding paragraphs, some members of the Commission were opposed to the establishment of a detailed list of war crimes and preferred a general definition. They drew attention, in particular, to the practical problems involved in including in the draft code all the provisions on war crimes contained in the 1949 Geneva Conventions and the Additional Protocols thereto. It was, moreover, particularly true in the case of those Additional Protocols that they had not been widely acceded to by States and were thus not instruments of a universal character on which to base a list of crimes. In addition, a number of States parties had made reservations or interpretative declarations when signing. One of these members of the Commission stressed that he could not agree that the Commission should adopt a text which would imply that the Additional Protocols to the Geneva Conventions embodied rules of customary law. That member firmly rejected any idea of basing the draft code on recent conventions or General Assembly resolutions on the pretext that they enunciated rules of customary international law. In support of a general definition, it was also pointed out that the question of war crimes was not static and that new conventions might come to characterize as war crimes acts which were not regarded as such at present. A general definition would make it possible for the code to keep pace with future developments.

<sup>102</sup> *Yearbook ... 1950*, vol. II, pp. 266-267, document A/CN.4/25, para. 82.

<sup>103</sup> See United Nations, *The Charter and Judgment of the Nürnberg Tribunal. History and analysis* (memorandum by the Secretary-General) (Sales No. 1949.V.7).

117. The majority of the members of the Commission were, however, in favour of the inclusion in the definition of war crimes of a list of acts constituting such crimes. It was noted in that regard that, although the implementation of the code would be either wholly or partly the task of national courts, those courts had to be given specific guidelines with regard to the characterization of war crimes, in order to prevent any contradictions between national laws and thus guarantee some uniformity in the implementation of the code. With regard to the status of ratifications of or accessions to the Additional Protocols to the 1949 Geneva Conventions, these members were of the opinion that the reasons why some States might or might not have ratified them or acceded to them were not necessarily linked to the list of war crimes they contained and that non-ratification or non-accession by many States was the result of inertia or the slowness of Government procedures.

118. A few members preferred an exhaustive list of war crimes because they thought that a purely indicative list would be of little use and devoid of legal purpose, since it would not make it possible to achieve the degree of precision required in criminal law.

119. Most members nevertheless stated that they were in favour of a general definition followed by an indicative list of war crimes. In that connection, it was noted that such a solution would offer the advantage both of keeping the door open for the future and of avoiding the practical difficulties involved in drawing up an exhaustive list. The Commission might thus list the crimes which were not controversial, but leave the list open. That solution had been adopted by the Commission in 1950, when it had codified Principle VI of the Nürnberg Principles.<sup>104</sup> To show that the acts listed were indicative in nature, the words "in particular" had been used in the case of aggression<sup>105</sup> and the words "but are not limited to" in the list contained in Principle VI (b) of the Nürnberg Principles.

120. One member was, however, in favour of an indicative list not preceded by a general definition, because it would be impossible for him to accept such a general definition without conferring upon the judge a power that did not belong to him to determine the gravity of breaches.

121. Referring to the various ideas expressed during the discussion and to the majority trend in the Commission, the Special Rapporteur recalled that the first definition of war crimes which he had proposed in his fourth report, in 1986 (art. 13),<sup>106</sup> had contained a general definition, followed by a non-exhaustive list. That approach had given rise to reservations in the Commission. In order to take account of the current trend in the Commission, however, the Special Rapporteur at the present session proposed an addition to the second alternative of draft article 13 contained in his seventh report. The additional

paragraph (c) incorporated the list of war crimes proposed in the fourth report, amended to reflect the ideas expressed in the Commission.<sup>107</sup>

(d) *Specific comments on the proposed list of war crimes*

122. With regard to the opening phrase of paragraph (c) of draft article 13, some members considered that the non-exhaustive nature of the list would be better indicated by the words "*inter alia*" than by the words "in particular".

123. Referring to the drafting of the list as a whole, one member questioned whether the adjective was really necessary in the expression "serious attacks" in subparagraph (i), since the crimes listed were, by definition, serious offences. The same applied to the adjective "intentional" qualifying some crimes. The absence of that word in the case of other crimes might give the impression that they could be committed unintentionally.

124. As regards subparagraph (i), it was suggested that the word "persons" should be qualified by the adjective "protected" and that that concept should be clarified by indicating, according to one member, that such persons were protected by the rules of international law applicable in war and, according to another member, that the expression applied to both combatants and non-combatants.

125. With regard to the destruction or appropriation of property, one member suggested that those words should be replaced by the formula used in article 6 (b) of the Charter of the Nürnberg Tribunal,<sup>108</sup> namely "wanton destruction" or "plunder of public or private property". In his view, such a formulation would make it clear that it was the gravity of the destruction that made it a war crime. One member considered that the concepts of "suffering" and "military necessity" required careful study by the Commission, in order to determine criteria by which they could be better defined.

126. Some members suggested the addition of other crimes to subparagraph (i). One member observed that subparagraph (i) did not mention attacks against a civilian population, which were covered by article 85, paragraph 3 (a), of Additional Protocol I to the 1949 Geneva Conventions. In his view, subparagraph (i) referred indirectly to that matter, but it was essential that such attacks should be explicitly prohibited. The same member considered that the ill-treatment or inhuman

<sup>107</sup> Paragraph (c) of the second alternative of draft article 13 proposed by the Special Rapporteur (A/CN.4/419/Add.1) read:

"(c) The following acts, in particular, constitute war crimes:

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

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

<sup>108</sup> See footnote 90 above.

<sup>104</sup> See footnotes 75 and 77 above.

<sup>105</sup> See paragraph 4 of article 12 (Aggression), provisionally adopted by the Commission at its fortieth session (*Yearbook ... 1988*, vol. II (Part Two), p. 72).

<sup>106</sup> See footnote 86 above.

treatment of prisoners of war, including their use for forced labour during or after hostilities, should be expressly mentioned in the draft article. Lastly, another member suggested that the deportation of persons and the destruction of defenceless towns and villages should also be mentioned, as in the Charter of the Nürnberg Tribunal.

127. As regards *subparagraph (ii)*, it was pointed out that the adjective in the expression "unlawful use" might suggest that certain prohibited weapons or certain uses made of them were lawful, for instance in cases of self-defence.

128. The expression "military and non-military targets" seemed to one member to be contradictory, since it was difficult to imagine that there could be targets which were non-military in time of war.

129. It was also pointed out that subparagraph (ii) made no mention of one of the most serious crimes referred to in article 85 of Additional Protocol I, namely making the civilian population the object of attack.

130. Most of the comments on subparagraph (ii) related to the question of the use of weapons of mass destruction, in particular nuclear weapons.

131. It was pointed out that it would be quite pertinent to include in the list of war crimes the use of weapons prohibited by the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare<sup>109</sup> and by the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction.<sup>110</sup>

132. One member pointed out that a weapon directed against a military target could also reach the civilian population; hence it was necessary to prohibit expressly weapons that could be used to attack and destroy whole cities.

133. There was a discussion on the question whether the use of nuclear weapons should be expressly referred to in subparagraph (ii). Some members thought that the Commission was not the most appropriate body to discuss that question, which should be left to the appropriate political forums. It was also pointed out that, so long as no rule of absolute prohibition of nuclear weapons had crystallized, even in the case of self-defence, it would seem impossible to make the use of nuclear weapons a crime and to provide for individual criminal responsibility. Some members were particularly opposed to characterizing the first use of nuclear weapons as a crime.

134. Other members could not conceive that what they characterized as the most atrocious and inhuman means of war could be omitted from a code of crimes against the peace and security of mankind intended to punish the most serious offences. It was suggested that the use of nuclear weapons was not only a war crime, but also a crime against humanity.

135. It was also observed that, although it was true that the question had strong political implications, the Commission should assume the responsibility incumbent on it to contribute to the progressive development and codification of international law. It was proposed that the use of nuclear weapons should be included in the list of war crimes, or in a separate article, without linking it to the idea of first use. The Commission should take the opportunity of dealing with that important issue in the new climate of understanding and trust between States and benefit from the awareness of international public opinion of the dangers of nuclear accidents.

136. Lastly, one member was in favour of deleting subparagraph (ii). In his opinion, the unlawful use of weapons was already partly prohibited by some international conventions and that prohibition could certainly be extended by the conferences on disarmament.

#### (e) Drafting proposals on article 13

137. Some members proposed that draft article 13 should be reformulated along the lines they indicated in detail during the discussion.

138. One member suggested that the second alternative of the article should be amended as follows. In paragraph (a), the general definition of war crimes should be followed by a list, possibly non-exhaustive, of the main acts and conduct that were considered to be war crimes, based on the 1949 Geneva Conventions and Additional Protocol I thereto; paragraph (b) would be retained, perhaps with a few drafting changes; lastly, a new paragraph (c) would be added containing a definition of the expression "armed conflict", the substance of which would be taken from paragraph (b) of the first alternative and which would read: "The expression 'armed conflict' is understood to have the meaning defined in the Geneva Conventions . . .". Thus the two important expressions "rules of international law applicable in armed conflict" and "armed conflict" would be clearly defined.

139. Another member proposed adopting the second alternative of draft article 13, adding to the list of war crimes proposed by the Special Rapporteur the words "in particular the use of nuclear weapons". The enumeration would be followed by a general provision specifying that the expression "war crimes" covered all other serious violations of the laws or customs of war, of the rules of international law applicable in armed conflict to which the parties to the conflict had subscribed, and of the generally recognized principles and rules of that law.

140. In the opinion of another member, the general definition of war crimes in the second alternative proposed by the Special Rapporteur should be followed by an indicative list which might distinguish three categories of war crimes as follows:

(a) Paragraph (a) of the second alternative would be followed by a subparagraph on crimes against persons, reading:

"(i) wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing

<sup>109</sup> League of Nations, *Treaty Series*, vol. XCIV, p. 65.

<sup>110</sup> United Nations, *Treaty Series*, vol. 1015, p. 163.

great suffering or serious injury to body or health, unlawful confinement, the taking of hostages, if directed against protected persons (sick and wounded, prisoners of war, *parlementaires*, soldiers *hors de combat*, women, children, etc.), and the deportation or transfer of civilian populations from and into occupied territories".

(b) The second subparagraph would refer to crimes committed on the battlefield in violation of the rules of war, but without citing the sources. It would read:

"(ii) making the civilian population, individual civilians or other protected persons the object of attack, launching an indiscriminate attack affecting civilian and other protected persons and objects, launching an attack against works or installations containing dangerous forces, in the knowledge that such an attack will cause loss of life or injury to protected persons, mass destruction and appropriation of goods not justified by military necessity".

(c) The third subparagraph would cover all crimes constituted by the use of prohibited weapons. It would be based on existing law and might read:

"(iii) the unlawful use of weapons, means and methods of warfare, and particularly of weapons, means and methods of warfare which by their nature cause unnecessary suffering or strike indiscriminately at military and non-military targets; the perfidious use of the distinctive emblem of the red cross or other protective signs".

141. According to the drafting proposal made by another member, article 13 would appear under the heading "War crimes" and would read as follows: "The present Code applies to any serious violation of the rules of international law applicable in armed conflict", which was approximately the formulation used in paragraph (a) of the second alternative proposed by the Special Rapporteur. In the opinion of that member, paragraph (b) of the second alternative was unnecessary and its substance could be placed in the commentary.

## 2. CRIMES AGAINST HUMANITY

### (a) General comments

142. In his seventh report and in introducing draft article 14 on crimes against humanity,<sup>111</sup> the Special Rapporteur pointed out that crimes against humanity had been dealt with in article 2, paragraphs (10) and (11), of the 1954 draft code. Paragraph (10) had dealt with acts constituting genocide, and paragraph (11) with inhuman acts. The 1954 draft, however, had used neither the expression "crime against humanity" nor the word "genocide" and the Special Rapporteur thought it useful to restore those expressions to their rightful place in the present draft articles.

143. With regard to inhuman acts and their possible distinction from acts of genocide, the Special Rapporteur observed that the 1954 draft code gave no definition of an

inhuman act, only an enumeration based solely on the motives of the act (political, racial, religious, cultural motives, etc.).

144. The Special Rapporteur emphasized that it was not by chance that the expression "crimes against humanity" had appeared in the Charters of the International Military Tribunals set up after the Second World War, but as a result of thorough consideration. Reference could be made to the work of the United Nations War Crimes Commission, established in London on 20 October 1943. (The expression "United Nations" as there used bore no relation to the Organization later established at San Francisco: it referred only to the Allied nations at war with the Axis Powers.) The question quickly arose in that Commission whether the investigations should be restricted to "war crimes" in the classical, traditional sense of that expression, or whether they should be extended to include other offences. The United Nations War Crimes Commission first attempted to extend the list of offences drawn up previously by another commission, namely the 1919 Commission on Responsibilities, on the basis of the Martens clause in the preamble to the 1907 Hague Convention.<sup>112</sup> But it soon became clear that recourse to that clause would not make it possible to cover all the categories of crimes committed during the Second World War. For, however broad the concept of a war crime, some offences could not be included in that category. That applied particularly to crimes whose perpetrators and victims were of the same nationality or whose victims had the nationality of a State allied to that of the perpetrator. That was true of Nazi crimes against German, Austrian and other nationals, and of crimes against stateless persons and against other persons on the basis of racial, religious, political or other motives.

145. The Special Rapporteur also observed that the United Nations War Crimes Commission had proposed to term such offences "crimes against humanity", considering that they were breaches of a particular kind which, even though committed during the war, had original characteristics which set them apart, in certain respects, from war crimes. With the signing of the London Agreement on 8 August 1945,<sup>113</sup> the concept of crimes against humanity was definitively incorporated in the Charter of the Nürnberg Tribunal (art. 6 (c)), and later in the Charter of the Tokyo Tribunal (art. 5 (c)) and in Law No. 10 of the Allied Control Council (art. II, para. 1 (c)). Having at first been linked to the state of belligerency, the concept of a crime against humanity had gradually become autonomous and was today quite separate from that of a war crime. Thus not only the 1954 draft code, but even conventions which had entered into force (on genocide and *apartheid*), no longer linked that concept to the state of war.

146. The Special Rapporteur stressed that, while it was true that a single act could be both a war crime and a crime against humanity if committed in time of war (thus article 85, paragraph 4 (c), of Additional Protocol I to the 1949 Geneva Conventions includes the practice of *apartheid* among war crimes), that fact did not in any way lead to confusion of the two concepts.

<sup>111</sup> *Op. cit.* (footnote 89 above), pp. 101-102.

<sup>113</sup> See footnote 90 above.

<sup>111</sup> For the text, see footnotes 118, 120, 122, 128, 134 and 144 below.

147. The Special Rapporteur emphasized that the concept of a crime against humanity could be applied both to attacks on individuals and to attacks on property. He also pointed out that, for such attacks to constitute crimes against humanity, they need not necessarily be mass attacks. Sometimes an inhuman act committed against a single person might constitute a crime against humanity if it was part of a system or was carried out according to a plan or was of a repetitive nature that left no doubt as to the intentions of the author. The mass nature of the crime implied a plurality of victims, which was often made possible by the plurality of authors and the mass nature of the means employed. Crimes against humanity were often committed by individuals making use of a State apparatus or of means placed at their disposal by large financial groups. In the case of *apartheid*, the State apparatus was used; in the case of genocide or mercenarism, either or both of those means. But an individual act could constitute a crime against humanity if it was part of a coherent system and of a series of repeated acts having the same political, racial, religious or cultural motive.

148. The Special Rapporteur observed that the conflict between the supporters of the "mass crime" concept and those of the "individual crime" concept seemed to be a non-debate. Indeed, an examination of the Charter of the Nürnberg Tribunal (art. 6 (c)), the Charter of the Tokyo Tribunal (art. 5 (c)) and Law No. 10 of the Allied Control Council (art. II, para. 1 (c)) showed that they applied both to mass crimes (extermination, enslavement, deportation) and to cases involving individual victims (murder, imprisonment, torture, rape). The Special Rapporteur also cited the United Nations War Crimes Commission, which had expressed its views in the following terms:

... As a rule systematic mass action, particularly if it was authoritative, was necessary to transform a common crime, punishable only under municipal law, into a crime against humanity, which thus became also the concern of international law. Only crimes which, either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at different times and places, endangered the international community or shocked the conscience of mankind warranted intervention by States other than that on whose territory the crimes had been committed, or whose subjects had become their victims.<sup>114</sup>

149. The Special Rapporteur also pointed out that Meyrowitz, for example, had written that "crimes against humanity must in fact be interpreted as comprising not only acts directed against individual victims, but also acts of participation in mass crimes, according to one of the methods specified in article II, paragraph 2 [of Law No. 10]".<sup>115</sup>

<sup>114</sup> *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London, H. M. Stationery Office, 1948), p. 179; cited in H. Meyrowitz, *La répression par les tribunaux allemands des crimes contre l'humanité et de l'appartenance à une organisation criminelle en application de la loi n° 10 du Conseil de contrôle allié* (Paris, Librairie générale de droit et de jurisprudence, 1960), p. 253.

<sup>115</sup> Meyrowitz, *op. cit.*, p. 255. That law was based on a memorandum by the British Military Government (Zonal Office of the Legal Adviser) stating that it was neither the number of victims nor who they were which allowed an act to be characterized as a crime against humanity, but rather the fact that the act was linked "to systematic persecution of a community or a part thereof". An inhuman act committed against a single person might thus constitute a crime against humanity "if the motive for that act resides wholly or partly in systematic persecution directed against a specific group of persons" (*ibid.*, p. 281). See also the Special Rapporteur's fourth report, document A/CN.4/398 (see footnote 83 above), paras. 31-51.

150. Several members of the Commission supported the distinction between war crimes and crimes against humanity proposed by the Special Rapporteur and the conclusion that crimes against humanity constituted a separate category, even though some acts included in it could also be placed in the category of war crimes if committed in time of war. It was pointed out that several of the proposed crimes against humanity were already dealt with in separate treaties which described them in detail, and that it would suffice to reproduce the relevant provisions in the corresponding articles of the code, as had already been done in article 12 (Aggression), provisionally adopted by the Commission at its previous session.<sup>116</sup>

151. Several members suggested that draft article 14 should be accompanied by a definition of a crime against humanity. The discussions in the Commission concerning that definition dealt with two particular aspects, namely the meaning of the word "humanity" and the distinction between the intention and the motives of crimes against humanity.

152. It was generally recognized that the word "humanity" should be interpreted as meaning the "human race", rather than as a moral concept whose opposite is "inhumanity". Crimes against humanity would thus be crimes directed against the human race as a whole and involving the essential values of human civilization.

153. Summing up the Commission's debate on the subject, the Special Rapporteur observed that, in the expression "crimes against humanity", the word "humanity" signified neither philanthropy nor humanism as the expression of a form of culture, but referred rather to the values and principles of civilization. In that sense, the expression "crimes against humanity" referred to the protection of humanity against barbarism and, in general, against any act contrary to the dignity of man.

154. With regard to the concepts of "intention" and "motive" as constituent elements of the definition of a crime against humanity, some members considered that intention was a concept well established as a constituent element of such crimes, in particular genocide and *apartheid*. The same did not, however, apply to motive, which meant rather the feeling that inspired the act and incited the author to perform it. It was pointed out in that connection that article III of the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid*<sup>117</sup> clearly established that international criminal responsibility applied to the authors of acts of *apartheid* within the meaning of the Convention "irrespective of the motive involved".

155. Other members of the Commission did not entirely share the foregoing views. One member held that a crime against humanity had the following distinguishing features: cruelty in regard to human life, debasement of human dignity and destruction of human culture. In addition, the motive of the crime was an important element. In his view, the notion of "humanity" would not

<sup>116</sup> *Yearbook ... 1988*, vol. II (Part Two), pp. 71-72.

<sup>117</sup> United Nations, *Treaty Series*, vol. 1015, p. 243.

be enough in itself to distinguish a crime against humanity from a war crime; hence motive was a useful and necessary element in the definition of a crime against humanity.

156. As to the distinction between "intention" and "motive", the Special Rapporteur, in reply to the comments made, said that the terminology used for those concepts in different legal systems was not without importance. In the system he knew best, the distinction was easy to make. The term "intention" meant the conscious will to commit an act, desiring and seeking the consequences. He fully recognized that intention was an essential constituent element of every crime, whether a crime against humanity or a common crime. The difference between intention and motive was that motive could be based on the most diverse feelings. There were sordid motives inspired solely by greed for gain, for instance the motives of banditry and procuring. There were also motives inspired by passion, such as jealousy, etc. In the case of crimes against humanity, the motive was all the more unacceptable in that it attacked values involving human dignity and a deep-rooted feeling of humanity. Thus what distinguished the different categories of crime from each other was not intention—the element common to them all—but motive. In the particular case of crimes against humanity, the motive struck at sacred values, in that it was inspired by racism, religious intolerance or ideological or political intolerance.

157. Some members suggested that crimes against humanity, such as genocide and *apartheid*, should be defined on the basis of acts rather than policies or practices, although the acts might result from a policy or be part of a practice, which would make them even more serious.

158. With regard to drafting, one member suggested that draft article 14 should be recast as follows. The article would be divided into eight separate articles in a sub-chapter entitled "Crimes against humanity". The first article would read:

"The present Code applies to genocide. For the purposes of the present Code, 'genocide' means any act committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such."

The second article would read:

"The present Code applies to the institution of any system of government based on racial, ethnic or religious discrimination."

The third article would read:

"The present Code applies to slavery and all other institutions and practices similar to slavery."

The expression "practices similar to slavery" might have to be re-examined, but in any case the term "forced labour" was inappropriate. The three crimes referred to in paragraph 4 of article 14 would then follow, divided into three separate articles, each introduced by the words: "The present Code applies to . . .". The following article, the seventh, would read:

"The present Code applies to all other inhuman acts against any population or against individuals on social, political, racial, religious or cultural grounds."

The eighth and last article would read:

"The present Code applies to any serious and intentional harm to the human environment."

### (b) Genocide

159. Referring to the crime of genocide, the Special Rapporteur observed that the enumeration of acts of genocide which he proposed in paragraph 1 of draft article 14<sup>118</sup> was not exhaustive like that in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,<sup>119</sup> because the acts which could constitute genocide were not confined to the five enumerated in that Convention. In a departure from the 1954 draft code, he had decided to distinguish genocide from other inhuman acts and devote a separate provision to it, because genocide might be regarded as the prototype of a crime against humanity.

160. The draft provision on genocide submitted by the Special Rapporteur was favourably received by members of the Commission. They agreed with his approach, first because it placed genocide first among the crimes against humanity; secondly, because it abided by the definition given in the 1948 Convention; and thirdly because, unlike that in the 1948 Convention, the enumeration of acts constituting the crime of genocide proposed by the Special Rapporteur was not exhaustive.

161. One member emphasized the links between the crime of genocide and the crimes of expulsion or forcible transfer of populations from their territory, which the Special Rapporteur had listed as separate crimes in paragraph 4 of draft article 14. In the opinion of that member, such acts often constituted either the means or the object of genocide.

### (c) Apartheid

162. In submitting paragraph 2 of draft article 14, on *apartheid*,<sup>120</sup> the Special Rapporteur said that there was no need to reopen the controversies provoked by that concept. During the discussions at previous sessions of

<sup>118</sup> Paragraph 1 of draft article 14 submitted by the Special Rapporteur in his seventh report read:

*"Article 14. Crimes against humanity"*

"The following constitute crimes against humanity:

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

- "(i) killing members of the group;
- "(ii) causing serious bodily or mental harm to members of the group;
- "(iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- "(iv) imposing measures intended to prevent births within the group;
- "(v) forcibly transferring children from one group to another group."

<sup>119</sup> United Nations, *Treaty Series*, vol. 78, p. 277.

<sup>120</sup> The two alternatives of paragraph 2 of draft article 14 submitted by the Special Rapporteur in his seventh report read:

*"Article 14. Crimes against humanity"*

"The following constitute crimes against humanity:

"..."

(Continued on next page.)

the Commission, some members had taken the view that *apartheid* should not be specifically mentioned and that the Commission should confine itself to the more general term "racial discrimination". But a very large group held a contrary view, by reason of the specific features of *apartheid* which made it a separate crime. The Special Rapporteur proposed two alternatives for paragraph 2: one referring to the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid*, and the other reproducing the entire text of article II of that Convention.

163. The inclusion of *apartheid* as a crime against humanity was generally accepted by the Commission. The great majority of members spoke in favour of the second alternative, which reproduced, in the definition of the crime, the text of article II of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*. Several of these members suggested that it would nevertheless be preferable not to cite the source of the provision *expressis verbis* in the text of the article, since many States were not yet parties to that

(Footnote 120 continued.)

**"2. FIRST ALTERNATIVE**

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

**"2. SECOND ALTERNATIVE**

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

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

- "(i) by murder of members of a racial group or groups;
- "(ii) by the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;
- "(iii) by arbitrary arrest and illegal imprisonment of the members of a racial group or groups;

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

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

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

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

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

Convention. They referred in that connection to the precedent of article 12 (Aggression), provisionally adopted by the Commission at its previous session.<sup>121</sup>

164. The great majority of members were also in favour of deleting the words in square brackets in the opening paragraph of the second alternative, namely "as practised in southern Africa". It was pointed out that, even though it might be thought that the régime of *apartheid* in South Africa was approaching its inevitable end—an event which some members considered to be still far distant—the Commission should legislate for the future, in order to avoid the establishment of similar systems in other countries of the world. In that context one member pointed out that there was also tribal or customary *apartheid*, which differed from institutionalized *apartheid* and consisted in one ethnic group considering itself traditionally superior to another and thus arrogating to itself rights over that other group. The victim group was sometimes prevented from participating in political life, or subjected to a *numerus clausus* for entry into schools and universities or to certain conditions governing its economic activities; sometimes it was even subjected to measures aimed purely and simply at its physical elimination or the destruction of its ecological and cultural environment. In the opinion of that member, draft article 14 should also cover such cases of *apartheid*.

165. While not totally opposed to the deletion of the words in square brackets, one member nevertheless said that he would prefer them to be retained. While it was true that the acts referred to in paragraph 2 were also committed in other parts of the world, it was only in southern Africa that *apartheid* had been made an official policy; in the other countries where the problem existed, efforts were being made to deal with it. Moreover, in the opinion of that member, widening the definition might make it more difficult for some States to accept.

166. Another member observed that the term "policies" used in the second alternative required clarification. The Commission could try to define the acts enumerated in the second alternative, retaining the drafting and perhaps expressly mentioning acts committed within the framework of *apartheid*.

167. One member drew attention to the following definition contained in the first alternative proposed by the Special Rapporteur: "The institution of any system of government based on racial, ethnic or religious discrimination." Another member thought that that formula could be used as an introduction to lead into the detailed enumeration of the policies and practices constituting *apartheid*.

168. The Special Rapporteur said that he had placed the words "as practised in southern Africa" in square brackets in order to draw the Commission's attention to the question whether it was advisable to retain those words or not. As to the expressions "tribal *apartheid*" and "customary *apartheid*", he did not wish the term *apartheid* to be generalized. He recognized that there might be various forms of racial discrimination which

<sup>121</sup> See footnote 116 above.

could be referred to by a formula such as “*apartheid* and other forms of racial discrimination”. The expression “customary *apartheid*” seemed to him unacceptable and could only cause confusion in so far as custom was a source of international law. The Commission should therefore avoid that expression in the code and find other wording. Since the International Convention on the Suppression and Punishment of the Crime of *Apartheid* had not yet been universally accepted, it was important to use terms that would not be an obstacle to accession by other States. In his view, however, *apartheid* must be considered as a violation of *jus cogens*.

(d) *Slavery, other forms of bondage and forced labour*

169. Referring to paragraph 3 of draft article 14, on slavery,<sup>122</sup> the Special Rapporteur pointed out that article 1, paragraph 1, of the 1926 Slavery Convention<sup>123</sup> defined slavery as being “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”. The same article (para. 2) defined the slave trade as including “all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves”. That Convention already made the slave trade a crime, since the States parties undertook to bring about its abolition (art. 2). Later, the Universal Declaration of Human Rights<sup>124</sup> (art. 4) and the International Covenant on Civil and Political Rights of 1966<sup>125</sup> (art. 8) condemned the practice of slavery in the strongest terms. The Special Rapporteur added that the International Covenant on Civil and Political Rights (art. 8, paras. 2 and 3) referred to servitude and forced labour. That Covenant also followed the provisions of the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery,<sup>126</sup> which stated in its preamble that “no one shall be held in slavery or servitude”. The Special Rapporteur pointed out that the 1954 draft code had already classified enslavement as an inhuman act. But some members of the Commission had thought it preferable to devote a separate provision to the subject and he had taken account of that view in drafting paragraph 3 of article 14.

170. There was general agreement in the Commission on the need to include slavery as a crime against humanity

<sup>122</sup> Paragraph 3 of draft article 14 submitted by the Special Rapporteur in his seventh report read:

“Article 14. Crimes against humanity

“The following constitute crimes against humanity:

“...”

“3. Slavery and all other forms of bondage, including forced labour.”

<sup>123</sup> League of Nations, *Treaty Series*, vol. LX, p. 253.

<sup>124</sup> General Assembly resolution 217 A (III) of 10 December 1948.

<sup>125</sup> United Nations, *Treaty Series*, vol. 999, p. 171.

<sup>126</sup> *Ibid.*, vol. 266, p. 3.

in the draft code. It was pointed out that the Commission had the choice between the traditional concept of slavery as it appeared in the 1926 Slavery Convention and the wider definition given in the Supplementary Convention, which referred to “slavery ... and institutions and practices similar to slavery”. The competent organs of the United Nations, in particular the Sub-Commission on Prevention of Discrimination and Protection of Minorities, had studied problems connected with slavery and it might be useful to refer to their reports when drafting the article, since the concept of slavery, whose scope had been widened in recent years, now covered debt bondage and a whole range of other forms of exploitation. It would also be necessary to define the different forms that slavery could take other than those already condemned by the law of many countries. According to one member of the Commission, the difficulty in condemning slavery was that under the law of most countries it was a common crime; it constituted a crime against humanity only when practised by a State. The Commission must therefore decide whether the code should apply simply to common crimes or also to those in the perpetration of which a State had taken part in one way or another.

171. As for the expression “other forms of bondage”, the general opinion in the Commission was that it lacked precision and that its content should be clarified.

172. With regard to “forced labour”, several members observed that additional clarifications were necessary. One member pointed out that article 5 of the 1926 Slavery Convention specified only the obligation of States parties “to take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery”. Thus that Convention dealt not so much with forced labour as with the risk of it turning into slavery. It even tolerated—albeit in 1926—the exaction of forced labour “for public purposes” (art. 5 (1)). Later, two institutions, debt bondage and serfdom, were outlawed. Forced labour was abolished by ILO Convention No. 105 of 1957.<sup>127</sup> Those texts could provide a basis for the Commission’s work, but on condition that it amended them in such a way that the acts sanctioned by the code were clearly defined.

173. Other members pointed out that the interpretation of the expression “forced labour” in ILO was extremely broad for the purposes of the draft code. It was suggested that the code could refer to “slavery or forced labour analogous to slavery”.

174. The Special Rapporteur said that that question needed further study, as did also the question whether forced labour, in order to be a crime against humanity, must necessarily be motivated by racial, ethnic or religious considerations or whether all forced labour of whatever kind must be considered a crime against humanity. It would, indeed, be necessary to distinguish that situation from the situations brought about in certain countries by the needs of economic development, which took the form of institutions called “civic service” or known by some other name.

<sup>127</sup> Convention (No. 105) concerning the Abolition of Forced Labour (*ibid.*, vol. 320, p. 291).

(e) *Expulsion of populations, their forcible transfer and related crimes*

175. The Special Rapporteur said that he had included paragraph 4 of draft article 14<sup>128</sup> in response to suggestions which had been made by members of the Commission at the previous session<sup>129</sup> and which had been supported by representatives in the Sixth Committee at the forty-third session of the General Assembly.<sup>130</sup>

176. Several members of the Commission welcomed the inclusion of paragraph 4. In the view of these members, the world was still witnessing the consequences and sufferings caused—in some cases for centuries—by the expulsion of populations, the implantation of settlers in occupied territories and the changing of the demographic composition of a given territory.

177. Some members gave as a typical example of the expulsion of populations the forcible transfer of national populations of the countries occupied by the Allied Powers at the end of the Second World War. Other members expressed the view that transfers of populations under treaties concluded in extremely grave and exceptional circumstances in the interest of preserving peace could not be considered forcible transfers.

178. The Special Rapporteur said that a distinction should be drawn between transfers carried out for humanitarian reasons and the type of transfer referred to in the draft code. In the first case, the transfer was in the nature of a relief operation carried out when a population in a country other than its own was threatened with torture or extermination. The second case involved the forcible transfer of a population from its country of origin to another country: such transfers were clearly inhuman acts and, as such, should fall within the scope of the draft code.

179. With respect to specific proposals on various aspects of paragraph 4, some members said that subparagraph (a) showed a certain lack of rigour and was somewhat vague. The purpose of the expulsion or transfer should be a highly important factor in qualifying the breach, but no mention was made of it in the draft provision. It was noted in that regard that, under article 6 of the Charter of the Nürnberg Tribunal,<sup>131</sup> the purpose of deportation was considered an important constituent element of the crime. For example, a transfer of civilian populations to ensure their safety during hostilities could not be considered a war crime. The crime described in the Charter of the Nürnberg Tribunal involved deportation for slave labour or other similar purposes.

<sup>128</sup> Paragraph 4 of draft article 14 submitted by the Special Rapporteur in his seventh report read:

“Article 14. Crimes against humanity

“The following constitute crimes against humanity:

“...

“4. (a) Expulsion or forcible transfer of populations from their territory;

“(b) Establishment of settlers in an occupied territory;

“(c) Changes to the demographic composition of a foreign territory.”

<sup>129</sup> See *Yearbook ... 1988*, vol. II (Part Two), p. 65, para. 275.

<sup>130</sup> See “Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the forty-third session of the General Assembly” (A/CN.4/L.431), paras. 309–310.

<sup>131</sup> See footnote 90 above.

180. Some members suggested that subparagraph (a) should refer to “an occupied territory”.

181. One member expressed doubts regarding subparagraph (c). In his view, the changing of the demographic composition of a foreign territory did not in itself constitute a crime, but was rather the consequence of another crime, namely the expulsion or forcible transfer of the population or the implantation of settlers, or of a combination of those acts. Another member proposed amending subparagraph (c) to read either “Changes to the demographic composition of a foreign territory or a territory situated within the borders of the State” or “Changes to the demographic composition of the territory of a population group”, in order to show clearly that the crime could also be committed within the borders of a State.

182. Some members proposed combining either subparagraphs (b) and (c) or subparagraphs (a), (b) and (c).

183. Certain texts were mentioned as sources which the Commission might draw on in dealing with the questions covered by paragraph 4, namely article 85, paragraph 4 (a), of Additional Protocol I<sup>132</sup> to the 1949 Geneva Conventions and article 147, on grave breaches, of the Fourth Geneva Convention.<sup>133</sup>

184. Finally, some members said that the crimes referred to in paragraph 4 could be confused either with the crime of genocide or with the crime of *apartheid*.

(f) *Other inhuman acts, including destruction of property*

185. Paragraph 5 of draft article 14<sup>134</sup> dealt with inhuman acts other than those covered by the preceding paragraphs. In his seventh report and in his oral introduction of the draft provision, the Special Rapporteur said that such other inhuman acts could include not only attacks on persons, but also attacks on property.

186. The Special Rapporteur noted that attacks on persons were not solely a matter of physical ill-treatment; they could also consist of humiliating or degrading acts not necessarily accompanied by physical ill-treatment. There were acts of cruelty which struck at a person’s innermost being, i.e. his convictions, beliefs or dignity.<sup>135</sup> Accordingly, humiliating or degrading acts which could

<sup>132</sup> See footnote 94 above.

<sup>133</sup> See footnote 96 above.

<sup>134</sup> Paragraph 5 of draft article 14 submitted by the Special Rapporteur in his seventh report read:

“Article 14. Crimes against humanity

“The following constitute crimes against humanity:

“...

“5. All other inhuman acts committed against any population or against individuals on social, political, racial, religious or cultural grounds, including murder, deportation, extermination, persecution and the mass destruction of their property.”

185. The Special Rapporteur mentioned in that regard the decisions of the Supreme Court of the British Zone, which stated, in one of its first rulings:

“... all sorts of attacks which cause injury to persons may constitute or cause crimes against humanity: any type of interference in a person’s existence, growth and development or sphere of action, any alteration in his relation with his environment, any attack on his property or his values by which he is indirectly affected ...”.

Cited in Meyrowitz, *op. cit.* (footnote 114 above), p. 274. See generally *History of the United Nations War Crimes Commission ... (ibid.)*, pp. 175–176 and 179.

not be considered physical atrocities, such as inflicting flagrant public humiliation or forcing individuals to act against their conscience, and in general ridiculing them or forcing them to perform degrading acts, could constitute crimes against humanity. For that reason, paragraph 5 was also concerned with humiliating or degrading treatment meted out to populations or groups of persons on political grounds or because of their race, religion, etc.

187. The Special Rapporteur recalled that the 1954 draft code had not included attacks on property within the definition of crimes against humanity. They were, however, included in the list of war crimes provided in Principle VI (b) of the Nürnberg Principles,<sup>136</sup> as well as in the Charters of the International Military Tribunals, which mentioned the “plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity”.<sup>137</sup> He wondered whether attacks on property could constitute crimes against humanity. Existing instruments relating to crimes against humanity did not specifically mention attacks on property. It might be asked whether they were of a sufficiently serious nature to be treated as crimes against humanity.

188. The Special Rapporteur stated that judicial opinion had tended to favour the treatment of mass attacks on property as criminal. The matter of the collective fine of 1 billion marks imposed on German Jews by the decree of 12 November 1938, following the assassination of a German diplomat in Paris by a Jew of Polish origin, was illustrative. A United States military tribunal had seen in that fine “a typical example of the persecution to which German Jews were subject”, persecution “on political, racial or religious grounds”. According to the judgment, the confiscation and “liquidation for the benefit of the Reich of property belonging to German Jews were part of a persecution campaign against the Jews in Germany and ‘represented a violation of international law and international treaties, thus constituting crimes within the meaning of count five of the indictment’”.<sup>138</sup> Under count five, the German authorities’ appropriation and liquidation of the possessions of concentration-camp prisoners, among other things, had been considered crimes against humanity. Another case in point was the decision of 4 July 1946 by the Court of Appeal of Freiburg im Breisgau, which stated that “the illegal confiscation of Jewish property in 1940 by governing bodies of the State constitutes a crime against humanity”.<sup>139</sup>

189. In the Special Rapporteur’s view, it followed from such judicial precedents that attacks on property could constitute crimes against humanity if they displayed the dual characteristics of being inspired by political, racial or religious motives, and being mass actions.<sup>140</sup> Those precedents remained fully valid, not only because prejudices were still deeply rooted, but especially because, in addition to national property, a new category of property had appeared which was increasingly considered

to be the heritage of mankind. Many monuments throughout the world had a historical, architectural or artistic significance which placed them in that category. Furthermore, UNESCO had classified certain sites and monuments as the common heritage of mankind. The Special Rapporteur noted that attacks on property of cultural value were already prohibited by conventions in force. The 1935 Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments<sup>141</sup> (reinforcing the Roerich Pact) had already been a step in that direction. It was notable that the Treaty was concerned with both wartime and peacetime. Later, there had been the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict.<sup>142</sup> Despite its title, that Convention also covered the protection of cultural property in peacetime, since article 3 stipulated that such protection was incumbent on the parties while they were at peace. Article 1 of the Convention gave the following very broad definition of cultural property:

... (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;

(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in subparagraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in subparagraph (a);

...

190. The Special Rapporteur also referred to article 85, paragraph 4 (d), of Additional Protocol I<sup>143</sup> to the 1949 Geneva Conventions, which classified as a grave breach:

(d) Making the clearly recognized historical monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof ...

He added that it was true that, in such cases, the destruction of property could not constitute a war crime if the property so destroyed was located in immediate proximity to military targets. When it was a question of crimes against humanity, that restriction did not apply, for such crimes were incited by different motives and could be committed regardless of any state of war.

191. The reasons outlined above had therefore led the Special Rapporteur to include attacks on property in paragraph 5 of draft article 14. Serious harm to property constituting a vital human asset, such as the environment, was covered in a separate provision, namely paragraph 6.

192. Paragraph 5 was received favourably by members of the Commission, who made a number of comments and suggestions regarding it.

<sup>136</sup> See footnotes 75 and 77 above.

<sup>137</sup> Art. 6 (b) of the Nürnberg Charter (see footnote 90 above).

<sup>138</sup> Meyrowitz, *op. cit.* (footnote 114 above), p. 267.

<sup>139</sup> *Ibid.*, pp. 267-268.

<sup>140</sup> *Ibid.*, p. 269.

<sup>141</sup> League of Nations, *Treaty Series*, vol. CLXVII, p. 289.

<sup>142</sup> United Nations, *Treaty Series*, vol. 249, p. 215.

<sup>143</sup> See footnote 94 above.

193. It was noted that the word "other" before the words "inhuman acts" was highly important in making it clear that, apart from genocide, the other crimes referred to in the preceding paragraphs were also inhuman acts.

194. One member expressed the view that paragraph 5 should refer to social, political, racial, religious or cultural "purposes" or "ends" rather than "grounds". Another member noted that the draft provision raised the question as to who could commit the "inhuman acts" in question. While article 2, paragraph (11), of the 1954 draft code provided that such acts could be committed "by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities", that element was missing from the draft under consideration, which could be interpreted as extending to any individual act. As that was probably not the intention of the Special Rapporteur, it should be made clear in the text. The same member expressed the view that the mass element should be incorporated in the provision, or, failing that, the principle whereby, to constitute a crime against humanity, the individual act must be one link in a chain, part of a system or plan.

195. One member suggested including "the destruction of dwellings" in the list of acts in paragraph 5. Another member said that clarification was needed with regard to the cases of persecution referred to in the paragraph, since persecution could take a number of forms.

196. Several members expressly supported the inclusion of attacks on property among inhuman acts. Attacks on property could have a quantitative, as well as a qualitative, character. While the draft provision as it stood covered the first aspect, namely the mass destruction of the property of a population, the paragraph should be expanded to cover expressly protection of the cultural heritage of mankind and to make attacks on monuments of historical, architectural, artistic or archaeological significance—in some cases, entire towns or villages—punishable acts. The work of UNESCO in that area was mentioned, as well as the possibility of referring to the criteria established by that organization in defining the specific property registered and recognized as the common heritage of mankind, the destruction of which should be a crime under the draft code.

197. One member expressed the view that consideration should be given to attacks on property *per se*. For example, in a given area all the housing and vital services such as water and power-distribution systems could be destroyed.

198. The Special Rapporteur welcomed the various suggestions made in the course of the debate. He believed, however, that a distinction should be drawn between attacks on property as war crimes, which were already specifically covered by article 85 of Additional Protocol I to the Geneva Conventions, and attacks on property as crimes against humanity, which constituted a separate issue. The prohibition of attacks on property in wartime was relative in that it entailed exceptions, for example destruction of property for reasons of military necessity or in cases in which the property was adjacent to military targets. No such limitations applied to attacks on property which did not occur in wartime and which were regarded as crimes against humanity: in such instances, the prohibition was absolute.

(g) *Attacks on property and assets of vital importance for mankind, such as the human environment*

199. Paragraph 6 of draft article 14<sup>144</sup> categorized any serious and intentional harm to a vital human asset, such as the human environment, as a crime against humanity.

200. The inclusion of serious harm to the human environment among crimes against humanity was received favourably by the Commission. Several members noted, however, that the provision should be aligned more closely with paragraph 3 (d) of article 19 of part I of the draft articles on State responsibility,<sup>145</sup> under which "a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas", was considered an international crime.

201. Other members expressed the view that account should also be taken of article 55 of Additional Protocol I to the 1949 Geneva Conventions, which was intended to protect the natural environment against widespread, long-term and severe damage likely to prejudice the health or survival of populations. One member suggested that some correlation should be established between paragraph 6 of draft article 14 and the draft on international liability for injurious consequences arising out of acts not prohibited by international law. Another member said that the concept of international security included ecological security and that the inclusion of such a provision in the code would unquestionably help to ensure that ecological security. He suggested that the notion of an ecological crime should be included in the code as a specific category of crimes against humanity.

202. Some members referred to the intentional nature of crimes against the environment and expressed support for paragraph 6 as it introduced the decisive notion of intent, thus enabling serious harm to the environment resulting from an accident to be distinguished from deliberate harm. Other members, however, expressed reservations with regard to the inclusion of the element of intent in the qualification of crimes against humanity; in their view, the seriousness of the harm which could be caused to the environment and the grave consequences which could result for the human population required that serious damage to the environment should be considered a crime regardless of whether there was any intent at the time when it was committed.

203. Several members expressed the view that the notion of "vital assets" was somewhat vague and should be more clearly defined. Determining what was "a vital human asset" was not a judicial function, and it was for the Commission to identify the vital human assets damage to which would constitute a crime. One member suggested the inclusion of the destruction of the property

<sup>144</sup> Paragraph 6 of draft article 14 submitted by the Special Rapporteur in his seventh report read:

"Article 14. Crimes against humanity

"The following constitute crimes against humanity:

"..."

"6. Any serious and intentional harm to a vital human asset, such as the human environment."

<sup>145</sup> Yearbook ... 1980, vol. II (Part Two), pp. 30 *et seq.*

of an ethnic group in addition to serious harm to the environment. Other members, however, took the view that serious damage to cultural property would be better dealt with in paragraph 5, or in a separate article.

204. With regard to the suggestion to use the wording of article 19 of part 1 of the draft articles on State responsibility, the Special Rapporteur recalled that he had proposed that approach in his fourth report,<sup>146</sup> but that it, too, had proved controversial. As to intent as a constituent element of a crime against the environment, the Special Rapporteur noted that he had specifically included the element of intent in the definition, but that flagrant errors and omissions should be treated as culpable intent. There were areas in which it was difficult for courts, even if well informed, to establish intent. In such cases, the circumstances must be examined in order to establish criminal intent. Acts damaging to the environment in wartime were already covered by article 35, paragraph 3, of Additional Protocol I to the Geneva Conventions and, in any event, fell within the scope of the provisions of draft article 13. Damage to the environment in peacetime, on the other hand, should be dealt with in a separate provision. With regard to the concept of “a vital human asset”, the Special Rapporteur explained that, in his view, a vital asset was an asset essential to life and that the human environment was one such asset.

#### (h) International traffic in narcotic drugs

205. Several members of the Commission expressed the view that the draft code should contain a provision qualifying international trafficking in narcotic drugs as a crime. That practice should be considered a crime against peace in that it had a destabilizing effect on some countries, particularly small countries, and thus was detrimental to the proper conduct of international relations. Moreover, international drug trafficking currently went hand in hand with international terrorism, and was thus a new type of crime known as “narcoterrorism” in some countries. Drug traffickers handled fabulous sums of money and were a threat to Governments by virtue of the resources derived from their trafficking, which were in some cases larger than the budgets of the States in which they operated. The laundering of drug money also created problems in other countries.

206. Some members said that international drug trafficking could also constitute a crime against humanity. Even where traffickers were in business for profit or were lured by the prospect of financial gain, their crimes were still detrimental to the health and well-being of mankind as a whole. Whereas narcotics exported by drug dealers had previously been intended for drug addicts who bought them voluntarily, things had changed in that the potential buyers were no longer only voluntary users. The new strategy was to establish a society which could be forced into drug addiction, which explained the efforts of traffickers to encourage children and young people to take drugs, so that they would later be assured of a steady supply of adult customers.

<sup>146</sup> See *Yearbook ... 1986*, vol. II (Part One), p. 61, document A/CN.4/398, para. 66, and p. 86, para. 4 of draft article 12.

207. The Commission was reminded of the signing in Vienna on 20 December 1988 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,<sup>147</sup> the basic thrust of which was to establish universal jurisdiction, with States having the obligation to extradite or to prosecute. That Convention, which had already been signed by 64 States and was expected to enter into force in 1990, did not deal with offences committed by an individual as the representative of a State. It did, however, contain a definition of the “seriousness” of the acts in question, stating that an offence was deemed “particularly serious” when “the offender holds a public office and ... the offence is connected with the office in question” (art. 3, para. 5(e)). While it had long been thought that, in the case of illicit drug trafficking by sea, there was justification for universal jurisdiction, including the right of search on the high seas over vessels flying a flag other than that of the State conducting the search, or even no flag at all, at the 1988 Vienna Conference it had been decided that States would not have universal jurisdiction for pursuit on the high seas, so that they would have to rely on bilateral conventions.

208. One member of the Commission referred to article 36 of the 1961 Single Convention on Narcotic Drugs<sup>148</sup> as a text from which the Commission might draw inspiration.

209. The Special Rapporteur said that the question of illicit drug trafficking had been raised during the consideration of one of his earlier reports. At that time, he had not been much in favour of making such trafficking a crime because he had had the impression that it was an ordinary offence, the basic motive for which was to make money. However, developments since then suggested that, although the traffickers’ purpose was to make money, there could also be political consequences. In the circumstances, he would have no objection to dealing with the question in two provisions, one under the heading of crimes against peace and the other under the heading of crimes against humanity. The question could be referred to the Drafting Committee.

210. The Commission decided to request the Special Rapporteur to prepare a draft provision on international drug trafficking for its following session.

### 3. IMPLEMENTATION OF THE CODE

211. Some members of the Commission made comments or proposals regarding the implementation of the code.

212. One member who was in favour of an international criminal tribunal said that an impartial and objective judicial organ was essential in the interest of consistency of decisions. It was also important to avoid the possibility of over-politicization of the code’s application in national courts. An international tribunal would pronounce with complete objectivity and, when applied by such a tribunal, the code would be less open to questionable interpretations.

<sup>147</sup> For the text, see E/CONF.82/15 and Corr.2.

<sup>148</sup> Single Convention on Narcotic Drugs, 1961, as amended by the Protocol of 25 March 1972 (United Nations, *Treaty Series*, vol. 976, p. 105).

213. Another member said that, if an international tribunal was unlikely to be established for some time, use should be made of national courts, which should, however, have a multinational membership consisting of one judge from the State bringing the charge, one judge from the State of the accused and at least one or two judges from other national jurisdictions.

214. In the view of another member, national courts and an international criminal court should not be regarded as mutually exclusive. It would be advisable to combine the advantages of national courts as courts of first instance with those of an international criminal court acting as an appeal court competent to review the decisions of national courts. Under that procedure, an appeal to an international court could be brought either by a State whose national had been tried by a court of another country, or by a State on whose territory or against which an offence had been committed, in the case where the accused had been tried by a foreign court. National courts hearing a case falling within the scope of the code could also be authorized to ask the international court for a binding opinion on a point of international criminal law. That procedure would, in the view of the member of the Commission in question, encourage States to accept the establishment of an international criminal court and avoid unnecessary extraditions, and would not require a public prosecutor or prosecution chamber or the establishment of an international prison and the training of international prison staff. At the same time, an international criminal jurisdiction in the form of an appeal court would enhance objectivity and impartiality in the administration of justice, harmonize the case-law of national courts and provide States with effective protection against the risks and possible shortcomings of national courts.

215. With regard to the above proposal, another member suggested that, if the international criminal court were to be a review body, an individual tried by a court of the State of which he was a national who had exhausted internal remedies should also be able to bring his case before the international criminal court.

216. The Special Rapporteur emphasized that he had by no means presumed that an international criminal court system should be precluded and would consider the possibility of submitting appropriate provisions at a later session of the Commission.

### C. Draft articles on the draft Code of Crimes against the Peace and Security of Mankind

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

217. The texts of draft articles 1 to 8 and 10 to 15 provisionally adopted so far by the Commission are reproduced below.

#### CHAPTER I INTRODUCTION

##### PART I. DEFINITION AND CHARACTERIZATION

###### *Article 1. Definition*

The crimes [under international law] defined in this Code constitute crimes against the peace and security of mankind.

###### *Article 2. Characterization*

The characterization of an act or omission as a crime against the peace and security of mankind is independent of internal law. The fact that an act or omission is or is not punishable under internal law does not affect this characterization.

#### PART II. GENERAL PRINCIPLES

###### *Article 3. Responsibility and punishment*

1. Any individual who commits a crime against the peace and security of mankind is responsible for such crime, irrespective of any motives invoked by the accused that are not covered by the definition of the offence, and is liable to punishment therefor.

2. Prosecution of an individual for a crime against the peace and security of mankind does not relieve a State of any responsibility under international law for an act or omission attributable to it.

###### *Article 4. Obligation to try or extradite*

1. Any State in whose territory an individual alleged to have committed a crime against the peace and security of mankind is present shall either try or extradite him.

2. If extradition is requested by several States, special consideration shall be given to the request of the State in whose territory the crime was committed.

3. The provisions of paragraphs 1 and 2 of this article do not prejudge the establishment and the jurisdiction of an international criminal court.\*

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

No statutory limitation shall apply to crimes against the peace and security of mankind.

###### *Article 6. Judicial guarantees*

Any individual charged with a crime against the peace and security of mankind shall be entitled without discrimination to the minimum guarantees due to all human beings with regard to the law and the facts. In particular:

1. He shall have the right to be presumed innocent until proved guilty.

2. He shall have the right:

(a) In the determination of any charge against him, to have a fair and public hearing by a competent, independent and impartial tribunal duly established by law or by treaty;

(b) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(c) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(d) To be tried without undue delay;

(e) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him and without payment by him in any such case if he does not have sufficient means to pay for it;

(f) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(g) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(h) Not to be compelled to testify against himself or to confess guilt.

###### *Article 7. Non bis in idem*

[1. No one shall be liable to be tried or punished for a crime under this Code for which he has already been finally convicted or acquitted by an international criminal court.]

\* This paragraph will be deleted if an international criminal court is established.

2. Subject to paragraphs 3, 4 and 5 of this article, no one shall be liable to be tried or punished for a crime under this Code in respect of an act for which he has already been finally convicted or acquitted by a national court, provided that, if a punishment was imposed, it has been enforced or is in the process of being enforced.

3. Notwithstanding the provisions of paragraph 2, an individual may be tried and punished [by an international criminal court or] by a national court for a crime under this Code if the act which was the subject of a trial and judgment as an ordinary crime corresponds to one of the crimes characterized in this Code.

4. Notwithstanding the provisions of paragraph 2, an individual may be tried and punished by a national court of another State for a crime under this Code:

(a) if the act which was the subject of the previous judgment took place in the territory of that State;

(b) if that State has been the main victim of the crime.

5. In the case of a subsequent conviction under this Code, the court, in passing sentence, shall deduct any penalty already imposed and implemented as a result of a previous conviction for the same act.

#### *Article 8. Non-retroactivity*

1. No one shall be convicted under this Code for acts committed before its entry into force.

2. Nothing in this article shall preclude the trial and punishment of anyone for any act which, at the time when it was committed, was criminal in accordance with international law or domestic law applicable in conformity with international law.

...

#### *Article 10. Responsibility of the superior*

The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had information enabling them to conclude, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all feasible measures within their power to prevent or repress the crime.

#### *Article 11. Official position and criminal responsibility*

The official position of an individual who commits a crime against the peace and security of mankind, and particularly the fact that he acts as head of State or Government, does not relieve him of criminal responsibility.

### CHAPTER II

#### ACTS CONSTITUTING CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

##### PART I. CRIMES AGAINST PEACE

###### *Article 12. Aggression*

1. Any individual to whom responsibility for acts constituting aggression is attributed under this Code shall be liable to be tried and punished for a crime against peace.

2. 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.

3. 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 cir-

cumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.

4. [In particular] any of the following acts, regardless of a declaration of war, constitutes an act of aggression, due regard being paid to paragraphs 2 and 3 of this article:

(a) 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;

(b) 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;

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

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

(e) 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;

(f) 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;

(g) 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;

(h) any other acts determined by the Security Council as constituting acts of aggression under the provisions of the Charter.

[5. Any determination by the Security Council as to the existence of an act of aggression is binding on national courts.]

6. Nothing in this article shall be interpreted as in any way enlarging or diminishing the scope of the Charter of the United Nations, including its provisions concerning cases in which the use of force is lawful.

7. Nothing in this article 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.

###### *Article 13. Threat of aggression*

Threat of aggression consisting of declarations, communications, demonstrations of force or any other measures which would give good reason to the Government of a State to believe that aggression is being seriously contemplated against that State.

###### *Article 14. Intervention*

1. Intervention in the internal or external affairs of a State by fomenting [armed] subversive or terrorist activities or by organizing, assisting or financing such activities, or supplying arms for the purpose of such activities, thereby [seriously] undermining the free exercise by that State of its sovereign rights.

2. Nothing in this article shall in any way prejudice the right of peoples to self-determination as enshrined in the Charter of the United Nations.

###### *Article 15. Colonial domination and other forms of alien domination*

Establishment or maintenance by force of colonial domination or any

other form of alien domination contrary to the right of peoples to self-determination as enshrined in the Charter of the United Nations.<sup>149</sup>

## 2. TEXTS OF DRAFT ARTICLES 13, 14 AND 15, WITH COMMENTARIES THERETO, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS FORTY-FIRST SESSION<sup>150</sup>

### CHAPTER II

#### ACTS CONSTITUTING CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

##### PART I. CRIMES AGAINST PEACE

...

###### *Article 13. Threat of aggression*

**Threat of aggression consisting of declarations, communications, demonstrations of force or any other measures which would give good reason to the Government of a State to believe that aggression is being seriously contemplated against that State.**

###### *Commentary*

(1) To determine whether an act constitutes a threat of aggression, two courses were open to the Commission: one was to formulate a general definition and the other was to determine, in the article itself, the constituent elements of a threat, so that the judge would be guided by precise criteria in determining whether a threat of aggression existed or not. The Commission preferred the second course.

(2) In formulating the constituent elements of a threat of aggression in article 13, the Commission was guided by several international texts, in particular Article 2, paragraph 4, of the Charter of the United Nations, the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among

<sup>149</sup> When introducing the report of the Drafting Committee on the present topic, the Chairman of the Drafting Committee informed the Commission that the Committee had held a long discussion on a draft article 16 concerning the serious breach of an obligation of essential importance for the maintenance of international peace and security. The text for this particular question was submitted by the Special Rapporteur in his sixth report at the Commission's fortieth session as paragraphs 4 and 5 of the revised draft article 11 (Acts constituting crimes against peace) (see *Yearbook ... 1988*, vol. II (Part Two), p. 62, footnote 289). Those paragraphs read:

"4. A breach of the obligations of a State under a treaty designed to ensure international peace and security, in particular by means of:

- "(i) prohibition of armaments, disarmament, or restriction or limitation of armaments;
- "(ii) restrictions on military training or on strategic structures or any other restrictions of the same character.

"5. A breach of the obligations of a State under a treaty prohibiting the emplacement or testing of weapons in certain territories or in outer space."

For the statement by the Chairman of the Drafting Committee at the present session on draft article 16, see the summary record of the 2136th meeting (see *Yearbook ... 1989*, vol. I), paras. 43 *et seq.*

<sup>150</sup> Unlike what was done in paragraph 1 of article 12 (Aggression), articles 13, 14 and 15 are, at this stage, confined to the definition of the acts constituting the crimes set forth in the articles. The question of the attribution of those crimes to individuals will be dealt with later in the framework of a general provision.

States in accordance with the Charter of the United Nations,<sup>151</sup> the 1987 Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations<sup>152</sup> and the judgment of the ICJ in the *Nicaragua* case.<sup>153</sup>

(3) As to the meaning of the word "threat", it must be pointed out that generally speaking the term may refer equally well to situations or disputes as to isolated acts. Thus it may be said of a situation that it constitutes a threat to international peace and security. That is so when situations or isolated acts in one region of the world contain germs of conflict liable to have repercussions on peace in that region and even in the rest of the world. Thus Article 34 of the Charter refers to "any situation" the continuance of which "is likely to endanger the maintenance of international peace and security". It is not, however, in this sense that the word "threat" is used in article 13 of the draft. Here, the word "threat" denotes acts undertaken with a view to making a State believe that force will be used against it if certain demands are not met by that State. Under the terms of the article, the threat may consist in *declarations*, that is to say expressions made public in writing or orally; *communications*, that is to say messages sent by the authorities of one Government to the authorities of another Government, by no matter what means of transmission; and, finally, *demonstrations of force* such as concentrations of troops near the frontier. This enumeration is indicative, as shown by the words "or any other measures".

(4) The existence of the threat does not depend on a subjective appraisal by the State which feels threatened, but on objective elements capable of verification by an impartial third party. In the first place, article 13 provides that the measures in question, including the declarations, communications and demonstrations of force, must be such as "would give good reason to the Government of a State to believe ...". "Good" reason means sufficient reason. On this point, it was said in the Commission that the measures referred to in the article were such as would give any responsible Government of a State reason to believe that aggression was imminent. Another objective element is provided by the adverb "seriously", which strengthens the idea that one must not regard as a threat of aggression mere passing verbal excesses, but concrete elements appraised in all objectivity. With regard to strengthening such objectivity, some members of the Commission considered that an international criminal court would provide adequate guarantees.

(5) It was also emphasized in the Commission that, unlike aggression, the threat of aggression did not justify the threatened State in resorting to force in the exercise of the right of self-defence as provided for in Article 51 of the Charter of the United Nations. There would, however, be nothing to prevent a State threatened with aggression from taking any preventive measure not involving the use of force, including recourse to the Security Council and possibly an appeal to regional solidarity arrangements.

<sup>151</sup> General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

<sup>152</sup> General Assembly resolution 42/22 of 18 November 1987, annex.

<sup>153</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits*. Judgment of 27 June 1986, *I.C.J. Reports* 1986, p. 14.

(6) In the opinion of some members of the Commission, the question of the relationship between the competence of a court or tribunal called upon to adjudicate and that of the Security Council in regard to the threat of aggression raised problems similar to those raised by the crime of aggression, which had been reflected in the commentary to article 12, provisionally adopted by the Commission at its previous session.<sup>154</sup> In particular, these members doubted whether a tribunal could be free to consider allegations of the crimes of aggression or threat of aggression in the absence of any consideration or finding by the Security Council.

(7) Some members of the Commission expressed reservations concerning article 13. Some of them thought that the constituent elements of the threat should be strengthened in the text: the notions of "seriousness", "imminence" and "planning" were mentioned. Other members thought that the intentional element of the threat was not made clear in the article. Others expressed doubts whether objective decisions on the fact of a threat could be made under the circumstances in which the alleged threat had taken place, but the act of aggression had not taken place. Others, again, believed that the Security Council should play a part in determining whether the acts invoked constituted a threat of aggression.

#### **Article 14. Intervention**

**1. Intervention in the internal or external affairs of a State by fomenting [armed] subversive or terrorist activities or by organizing, assisting or financing such activities, or supplying arms for the purpose of such activities, thereby [seriously] undermining the free exercise by that State of its sovereign rights.**

**2. Nothing in this article shall in any way prejudice the right of peoples to self-determination as enshrined in the Charter of the United Nations.**

#### *Commentary*

(1) The definition of intervention as a crime against peace set out in article 14 comprises two elements, which are clearly presented in *paragraph 1*. The first relates to the effects or consequences of intervention. It is expressed in the part of the paragraph referring to "intervention in the internal or external affairs of a State ... thereby [seriously] undermining the free exercise by that State of its sovereign rights". The second element of the definition is an enumeration of activities constituting intervention: fomenting [armed] subversive or terrorist activities, or organizing, assisting or financing such activities, or supplying arms for the purpose of such activities.

(2) In drafting the enumeration of concrete activities constituting intervention, the Commission was guided by the relevant paragraph of the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States.<sup>155</sup> In the enumeration, there are two main differences between article 14 and the 1970 Declaration. First, the article

omits the word "tolerate", because the Commission considered that it pertained rather to the theory of complicity. Secondly, it was thought necessary for the article to focus on the provision of arms to foment subversive or terrorist activities in another State.

(3) In formulating the first element of the definition of intervention, the Commission was guided by the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States and the judgment of the ICJ in the *Nicaragua* case.<sup>156</sup> The Commission wished to avoid too broad a definition, which would treat as intervention any type or form of action by which a State could exercise some influence on the policy of another State. Intervention in the sense contemplated in article 14 must include an element of coercion, which derogates from the sovereignty of the State subjected to it and is unacceptable to that State. For example, in the *Nicaragua* case, the ICJ said that a prohibited "intervention" must be

one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State. . . . [The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States] equates assistance of this kind with the use of force by the assisting State when the acts committed in another State "involve a threat or use of force". . . .<sup>157</sup>

It is clear that, according to the Court, coercion is the decisive criterion for wrongful intervention.

(4) The first element of the definition of intervention in article 14 refers to the "internal or external affairs of a State". "External affairs" should be understood to mean the right of each State freely to determine its foreign policy or, as stated in the judgment of the ICJ cited above, "the formulation of foreign policy". Examples of intervention in the external affairs of a State would be forcing it to enter into or withdraw from a system of alliances, or forcing it to denounce treaties to which it is a party or to break such treaties.

(5) Divergent views led the Commission to place the word "seriously" in square brackets. Some members considered that word necessary in order to make it clear that the text related only to the most serious forms of intervention. Others thought that the activities listed in the article, namely fomenting subversive or terrorist activities, or organizing, assisting or financing such activities, or supplying arms for the purpose of such activities, were already serious in themselves and needed no further qualification.

(6) A discussion arose in the Commission on the question whether the "subversive or terrorist activities" condemned in article 14 must always be "armed" activities. Some members of the Commission considered that only coercion involving the use of armed force should be regarded as intervention within the meaning of the draft code, which should cover only the most serious

<sup>154</sup> *Yearbook . . . 1988*, vol. II (Part Two), pp. 72-73.

<sup>155</sup> See footnote 151 above.

<sup>156</sup> See footnote 153 above.

<sup>157</sup> *I.C.J. Reports 1986*, p. 108, para. 205.

forms of intervention. Other members thought that the intervention to which the draft code applied need not necessarily involve the use of armed force, since intervention often took other forms that were just as serious as the use of armed force, in particular that of economic measures: according to them, that form of intervention was the one most frequently used because it was less visible and less spectacular, though often more effective, especially in relations between States of unequal power. These different views led the Commission to place the word "armed" in square brackets.

(7) *Paragraph 2 of article 14 is a shorter form of similar safeguard clauses contained in other international texts, in particular paragraph 7 of article 12 (Aggression), provisionally adopted by the Commission at its previous session,<sup>158</sup> which in turn is based, as regards that clause, on article 7 of the Definition of Aggression adopted by the General Assembly in 1974.<sup>159</sup> The inclusion of this clause in article 14 may be temporary, in so far as a more general clause of the same kind may be adopted by the Commission at a later stage in its work, to cover all crimes against peace. With regard to the expression "as enshrined in the Charter of the United Nations", see paragraph (4) of the commentary to article 15.*

#### **Article 15. Colonial domination and other forms of alien domination**

**Establishment or maintenance by force of colonial domination or any other form of alien domination contrary to the right of peoples to self-determination as enshrined in the Charter of the United Nations.**

#### *Commentary*

(1) For article 15, the Commission drew inspiration from General Assembly resolutions 1514 (XV) of 14 December 1960 containing the Declaration on the Granting of Independence to Colonial Countries and Peoples, in particular paragraph 1 of that Declaration; 1541 (XV) of 15 December 1960 on the principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 (e) of the Charter; and 2625 (XXV) of 24 October 1970, annexed to which is the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance

with the Charter of the United Nations. The Commission also took into account its work on State responsibility, and in particular article 19, paragraph 3 (b), of part 1 of the draft articles on that topic.<sup>160</sup>

(2) The first part of article 15, reading "Establishment or maintenance by force of colonial domination", refers to traditional and historic colonial domination and its drafting directly follows article 19 of part 1 of the draft articles on State responsibility, adopted by the Commission on first reading. The Commission took the view that the unanimous and universal condemnation of colonialism and the need to eliminate all vestiges of it and any possibility of its revival fully justified the inclusion of this crime in the draft code.

(3) The second part of the article, reading "any other form of alien domination", is directly inspired by paragraph 1 of General Assembly resolution 1514 (XV) containing the Declaration on the Granting of Independence to Colonial Countries and Peoples. It refers to any foreign occupation or annexation and any deprival of the right of peoples to choose freely their political, economic or social system, in violation of the right of peoples to self-determination as enshrined in the Charter of the United Nations. Although based on paragraph 1 of General Assembly resolution 1514 (XV), which refers to "the subjection of peoples to alien subjugation, domination and exploitation", article 15 uses a shorter form of words which does not reduce its scope. Moreover, this formulation has the advantage of referring to all kinds of alien domination. Certain members of the Commission felt that alien domination included "neo-colonialism", and the exploitation of the natural resources and wealth of peoples in violation of General Assembly resolution 1803 (XVII) of 14 December 1962 on permanent sovereignty over natural resources.

(4) It was emphasized that the expression "as enshrined in the Charter of the United Nations" should not be interpreted to mean that the right of peoples to self-determination had not existed prior to the Charter. Several members stressed that this right had existed before the adoption of the Charter, which had simply recognized and confirmed it. The view was expressed that the phrase "contrary to the right of peoples to self-determination" should be replaced by the words "thus infringing the right of peoples to self-determination", in order to avoid giving the impression that there might be forms of alien domination which were not an infringement of that right.

<sup>158</sup> See footnote 116 above.

<sup>159</sup> General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

<sup>160</sup> See footnote 145 above.

## Chapter IV

### STATE RESPONSIBILITY

#### A. Introduction

218. The general plan adopted by the Commission at its twenty-seventh session, in 1975, for the draft articles on the topic "State responsibility" envisaged the structure of the draft as follows: part 1 would concern the origin of international responsibility; part 2 would concern the content, forms and degrees of international responsibility; and a possible part 3, which the Commission might decide to include, could concern the question of the settlement of disputes and the "implementation" (*mise en œuvre*) of international responsibility.<sup>161</sup>

219. At its thirty-second session, in 1980, the Commission provisionally adopted on first reading *part 1* of the draft articles, on the "Origin of international responsibility".<sup>162</sup>

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

221. From its thirty-second session to its thirty-eighth session (1986), the Commission considered seven reports submitted by the Special Rapporteur, Mr. Willem Riphagen, relating to *part 2* of the draft and *part 3* of the draft ("Implementation" (*mise en œuvre*) of international responsibility and the settlement of disputes).<sup>163</sup> The seventh report contained a section (which was neither introduced nor discussed at the thirty-eighth session) on the preparation of the second reading of *part 1* of the draft articles and dealing with the written comments of Governments on the articles of *part 1*.

222. By the end of its thirty-eighth session, in 1986, the Commission had reached the following stage in its work on *parts 2* and *3* of the draft articles. It had: (a) pro-

<sup>161</sup> *Yearbook . . . 1975*, vol. II, pp. 55-59, document A/10010/Rev.1, paras. 38-51.

<sup>162</sup> *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

<sup>163</sup> The seven reports of the Special Rapporteur are reproduced as follows:

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

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

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

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

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

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

Seventh report: *Yearbook . . . 1986*, vol. II (Part One), p. 1, document A/CN.4/397 and Add.1.

visionally adopted articles 1 to 5 of *part 2* on first reading;<sup>164</sup> (b) referred draft articles 6 to 16 of *part 2*<sup>165</sup> to the Drafting Committee; (c) referred draft articles 1 to 5 and the annex of *part 3*<sup>166</sup> to the Drafting Committee.<sup>167</sup>

223. At its thirty-ninth session, in 1987, the Commission appointed Mr. Gaetano Arangio-Ruiz Special Rapporteur for the topic "State responsibility".

224. At its fortieth session, in 1988, the Commission had before it the Special Rapporteur's preliminary report on the topic (A/CN.4/416 and Add.1).<sup>168</sup> The Commission also had before it comments and observations received from one Government on the articles of *part 1* of the draft.<sup>169</sup> In his preliminary report, the Special Rapporteur presented his approach to the remaining parts 2 and 3 of the draft articles and proposed a new article 6 on cessation (see para. 229 below) and a new article 7 on restitution in kind (see para. 230 below) for *part 2*. The Special Rapporteur introduced his report but, due to lack of time, the Commission was unable to consider the topic at the fortieth session.<sup>170</sup>

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

225. At the present session, the Commission considered the preliminary report of the Special Rapporteur (A/CN.4/416 and Add.1) at its 2102nd to 2105th, 2122nd and 2127th meetings, from 16 to 19 May and on 21 and 28 June 1989. Due to lack of time, the Commission was unable to consider the Special Rapporteur's second report (A/CN.4/425 and Add.1)<sup>171</sup> and deferred its consideration to the next session.

226. At the conclusion of its debate, the Commission decided at its 2127th meeting to refer draft articles 6 and 7 as submitted by the Special Rapporteur in his preliminary report to the Drafting Committee.

<sup>164</sup> For the texts, see section C of the present chapter.

<sup>165</sup> For the texts, see *Yearbook . . . 1985*, vol. II (Part Two), pp. 20-21, footnote 66.

<sup>166</sup> For the texts, see *Yearbook . . . 1986*, vol. II (Part Two), pp. 35-36, footnote 86.

<sup>167</sup> For a complete historical review of the Commission's work on the topic up to 1986, see *Yearbook . . . 1985*, vol. II (Part Two), pp. 19 *et seq.*, paras. 102-163; and *Yearbook . . . 1986*, vol. II (Part Two), pp. 35 *et seq.*, paras. 40-65.

<sup>168</sup> *Yearbook . . . 1988*, vol. II (Part One), p. 6.

<sup>169</sup> *Ibid.*, p. 1, document A/CN.4/414.

<sup>170</sup> For a summary of the Special Rapporteur's introduction of his preliminary report at the fortieth session, see *Yearbook . . . 1988*, vol. II (Part Two), pp. 104 *et seq.*, paras. 530-546.

<sup>171</sup> Reproduced in *Yearbook . . . 1989*, vol. II (Part One), p. 1.

227. As already stated (see para. 224 above), the Special Rapporteur had introduced his preliminary report at the fortieth session, in 1988. For the convenience of the General Assembly, a summary of the Special Rapporteur's introduction is presented in paragraphs 228 to 230 below.

228. With regard to his approach to the remaining parts 2 and 3 of the draft, the Special Rapporteur suggested maintaining the general outline followed by the previous Special Rapporteur and the Commission. However, he recommended some changes. First, he proposed to deal separately with the legal consequences of international delicts and of international crimes. Secondly, the chapters of part 2 dealing with delicts and crimes would each treat both substantive consequences, such as cessation and different forms of reparation, and procedural consequences, such as the right of the injured State to take measures designed to secure cessation or reparation, or to apply any form or forms of individual or collective measures or sanctions. Thirdly, with regard to part 3 of the draft as conceived by his predecessor, the Special Rapporteur believed that a distinction should be made between (a) provisions on the peaceful settlement of disputes and (b) provisions on any obligations the injured State or States should fulfil prior to resorting to measures. While the former would rightly be placed in part 3, the latter should be placed in part 2 together with the provisions on measures, a condition of whose lawfulness would be fulfilment of the said obligations. Accordingly, the Special Rapporteur proposed the following tentative outline for parts 2 and 3 of the draft articles:

**Part 2. Content, forms and degrees of State responsibility**

Chapter I. General principles (arts. 1-5 as adopted on first reading)

Chapter II. Legal consequences deriving from an international delict

Section 1. Substantive rights of the injured State and corresponding obligations of the "author" State

(a) Cessation

(b) Reparation in its various forms

(i) Restitution in kind

(ii) Reparation by equivalent

(iii) Satisfaction (and "punitive damages")

(c) Guarantees against repetition

Section 2. Measures to which resort may be had in order to secure cessation, reparation and guarantees against repetition

Chapter III. Legal consequences deriving from an international crime

Section 1. Rights and corresponding obligations deriving from an international crime

Section 2. Applicable measures

Chapter IV. Final provisions

Part 3. Peaceful settlement of disputes arising from an alleged internationally wrongful act

229. With regard to the new draft article 6 of part 2, on cessation of the wrongful act, the Special Rapporteur stated that, in a system in which the making, modification and abrogation of rules rested on the will of States, the violation of an existing rule threatened not only the effectiveness of that rule, but also its very existence. That was particularly true in respect of unlawful acts extending in time. Therefore a rule on cessation was necessary to protect not only the interests of the injured State, but also the interest of the international community in preservation of and reliance on the rule of law. Any rule on cessation should bind the wrongdoing State to desist, without prejudice to the responsibility it had already incurred, from its unlawful conduct. Even though in a

broad sense it was also a consequence of the wrongful act, in that it presupposed at least the initiation of the wrongful conduct, cessation differed from reparation. Consequently, cessation should be dealt with in a separate article. The Special Rapporteur submitted the following text for draft article 6:

**Article 6. Cessation of an internationally wrongful act of a continuing character**

A State whose action or omission constitutes an internationally wrongful act [having] [off] a continuing character remains, without prejudice to the responsibility it has already incurred, under the obligation to cease such action or omission.

230. Referring to the new draft article 7 of part 2, on restitution in kind, the Special Rapporteur stated that this form of reparation was intended to make good, either by itself or in combination with other forms of reparation, the injuries caused as a result of a wrongful act. He pointed out that doctrine and practice indicated an almost even division of opinion on the concept of restitution. According to one view, restitution consisted in re-establishing the situation which had existed prior to the wrongful act, namely the *status quo ante*. According to the other view, restitution consisted in re-establishing the situation that would have existed if the wrongful act had not been committed. Despite this division concerning its purpose, doctrine and practice were almost unanimous in regarding restitution in kind as the most natural, and in that sense the primary and preferable form of reparation. However, restitution could rarely function as a self-sufficient, totally autonomous form of reparation. In most cases, it had to be totally or partly substituted or supplemented by pecuniary compensation. Indeed, restitution in kind met obstacles which often justified such a total or partial substitution. The more common exception to the obligation of restitution was physical impossibility. Legal impossibility applied only when restitution would be incompatible with a superior international legal rule such as the Charter of the United Nations or a peremptory norm. Municipal law or domestic jurisdiction could not be invoked to refuse restitution. Such internal legal obstacles should, of course, be taken into account. If they would impose excessive onerousness on the wrongdoing State, they might justify failure to provide restitution. The Special Rapporteur expressed doubts about what constituted an appropriate definition of excessive onerousness, one that would not leave too many loopholes in the wrongdoing State's obligation to provide specific reparation. Noting the doctrine and practice, he believed that the choice between restitution and pecuniary compensation should not lie with the wrongdoing State. At the same time, the injured State's right of choice in that regard would be limited by the incompatibility of the choice with a peremptory norm of international law and also by the fact that the choice would result in an unjust advantage for the claimant to the detriment of the wrongdoing State. In the light of the above explanations, the Special Rapporteur submitted the following text for draft article 7:

**Article 7. Restitution in kind**

1. The injured State has the right to claim from the State which has committed an internationally wrongful act restitution in kind for any injuries it suffered therefrom, provided and to the extent that such restitution:

- (a) is not materially impossible;
- (b) would not involve a breach of an obligation arising from a peremptory norm of general international law;
- (c) would not be excessively onerous for the State which has committed the internationally wrongful act.

2. Restitution in kind shall not be deemed to be excessively onerous unless it would:

- (a) represent a burden out of proportion with the injury caused by the wrongful act;
- (b) seriously jeopardize the political, economic or social system of the State which committed the internationally wrongful act.

3. Without prejudice to paragraph 1 (c) of the present article, no obstacle deriving from the internal law of the State which committed the internationally wrongful act may preclude by itself the injured State's right to restitution in kind.

4. The injured State may, in a timely manner, claim [reparation by equivalent] [pecuniary compensation] to substitute totally or in part for restitution in kind, provided that such a choice would not result in an unjust advantage to the detriment of the State which committed the internationally wrongful act, or involve a breach of an obligation arising from a peremptory norm of general international law.

## 1. COMMENTS ON THE PROPOSED STRUCTURE OF PARTS 2 AND 3 OF THE DRAFT

### (a) Separate treatment of the legal consequences of international delicts and of international crimes

231. Many members of the Commission agreed with the Special Rapporteur's proposal to deal in two separate chapters with the legal consequences of international delicts and of international crimes. Such a structure made the distinction between delicts and crimes sharper. In the opinion of some members, a more carefully elaborated chapter on the legal consequences of international crimes was needed. However, such separate treatment should not lead to identification of the consequences of crimes with criminal responsibility. The Commission had deliberately avoided the latter expression from the outset, and it would be advisable to adhere to that approach. To that end, it was suggested by a few members that it would be better not to regard the object of measures as the infliction of punishment and not to accept punitive damages as a form of reparation.

232. A few members supported the proposed approach since they found it closer to the original approach adopted by the Commission, as expressed in the commentary to article 19 of part 1 of the draft articles,<sup>172</sup> which indicated the separate legal consequences which might flow from different wrongful acts. Besides, in their view, the structural change was only a matter of method of work and did not necessarily imply a change in theoretical approach in respect of delicts and crimes. The Commission could therefore proceed on the basis of the new outline and, at a later stage, it would be in a better position to determine whether the legal consequences of international delicts differed so much from those of international crimes that they should be dealt with separately. Such an approach, some members felt, would make it possible to determine the rights and obligations of the parties with regard to the various forms of reparation and, if possible, with regard to the cessation of the internationally wrongful act, as well as the means by which the original violation was to be remedied.

233. To some members, a sharp distinction between the consequences of delicts and of crimes, which seemed to be implied in the proposed outline, was artificial since delicts themselves were defined, in article 19 of part 1, by reference to crimes. The consequences of crimes were those of delicts plus something more. Thus no distinction should be drawn between delicts and crimes, both of which were infringements of the norms of international law differing only according to scale or gravity. To confine the discussion to delicts without dealing with problems common to all wrongful acts would, in the opinion of these members, be difficult and might also prolong the Commission's work. In the view of a member who questioned the wisdom of separate treatment of the consequences of delicts and of crimes, the following consequences were common to both: (a) discontinuance of the wrongful act, if the act was of a continuing character; (b) the obligation to provide reparation, in its various forms. The consequences peculiar to crimes were: (a) effects *erga omnes*: the obligation to withhold legal recognition from the situation created by the crime (occupation, annexation, etc.); (b) the obligation not to lend assistance to the author State; (c) the corresponding obligation to assist the injured State.

234. A few members contested the distinction between international delicts and international crimes as adopted by the Commission in part 1 of the draft articles. In their view, the category of crimes envisaged in article 19 of part 1 had no real *raison d'être* and its presence in the draft articles on State responsibility would unjustifiably complicate an already difficult topic. The concept of international crimes of States was an innovation and could not be supported by existing international law. These members felt that it would be inappropriate to attribute any notion of criminal responsibility to a State. Wrongful acts committed by States ranged from a lower scale of gravity to a higher scale of gravity. Legal consequences should be looked at in that context rather than trying to draw a fine line so as to identify certain wrongful acts as crimes.

235. One member wondered whether every internationally wrongful act could be characterized as either a delict or a crime. He did not believe that situations such as territorial or border disputes, which entailed international responsibility, could necessarily be identified as either delicts or crimes. Perhaps the Special Rapporteur should expand his analysis to include situations in that grey area with a view to identifying the legal consequences that might derive from them.

236. It was pointed out that a strict categorization of the rules of international law as "primary" or "secondary" rules was disconcerting. A less theoretical approach to the subject would make it easier to understand the basic principles involved. In addition, the approach should take account of the difficulties involved in determining whether a wrongful act had been committed.

237. One member observed that the Commission's approach to part 1 of the draft articles denied injury as a pre-condition for a State incurring responsibility. That decision, in his view, had sparked off considerable controversy, which had since abated but had not wholly died down. He felt that part 2 of the draft was being prepared on the assumption that injury had occurred. It

<sup>172</sup> Yearbook ... 1976, vol. II (Part Two), pp. 95 et seq.

would be appropriate for part 2 to deal first with the nature, characteristics or limits of injury before recommending various forms of reparation. In a similar context, another member wondered how part 2 would deal with remedies in the case of violation of the obligation of consultation or co-operation.

238. It was also suggested that, in formulating rules on the consequences of wrongful acts, one should be mindful of the fact that States were not abstract entities, but communities of human beings. Therefore the consequences of wrongful acts should not be defined in such terms as to negate a people's right to existence.

239. One member pointed out that, while he accepted the proposed structural changes in parts 2 and 3 of the draft, he wished to emphasize that part 1 should not be ignored. In his view, the principles in part 1 did not by any means exhaust the wealth of customary international law which derived from State practice and judicial decisions. Therefore even the much-valued part 1 warranted thorough review by the Commission on second reading.

240. A few members felt that the proposed outline might have been expanded in more detail. That would have put the Commission in a better position to see the path the Special Rapporteur intended to follow. A few other members felt that it was difficult to make definite comments on draft articles 6 and 7 without having been able to see all the articles on reparation, since they were in fact interconnected.

241. One member felt that, in dealing with the consequences of crimes, the Commission could benefit, by analogy, from the treatment of crimes in domestic law. In domestic penal codes, the constitutive elements of the offence were indicated and then, depending on the degree of gravity, the penalty was provided.

242. In summing up the debate, the Special Rapporteur said that the changes he had proposed to the outline of parts 2 and 3 of the draft should be neither exaggerated nor misunderstood. They were intended as matters of method, any changes in substance being subject first of all to further research and, in any case, to ultimate choices that the Commission would make.

243. With regard to the separate treatment of delicts and crimes which he had suggested for analytical purposes, he did not exclude *a priori* that the peculiarities of the consequences of crimes could eventually be set forth in the draft articles as "additional" to the consequences of delicts. That drafting solution might well prove to be the best one. Nevertheless, he was not in a position to commit himself before having explored both areas more adequately and in depth. He was in particular not ready to say in what measure or by what means punitive or otherwise afflictive measures could be justified for crimes and for the most serious kinds of delicts. All he was able to say for the time being, notably in view of the study he had carried out on the diplomatic and jurisprudential practice of satisfaction in a technical sense, was that instances of afflictive measures *vis-à-vis* offending States were not rare. That was particularly so with regard to wrongful acts characterized by serious negligence or wilful intent.

244. While conscious of the great difficulties involved in determining the specific consequences to be attached to crimes as a matter of progressive development and

codification of the law of State responsibility,<sup>173</sup> the Special Rapporteur said that he was unable to respond to the view expressed by a few members of the Commission that the very distinction between delicts and crimes should be abandoned and that the notion of international crimes of States unjustifiably complicated the topic. He obviously could not, as Special Rapporteur and at the current stage of elaboration of the draft, call in question the very survival of article 19 of part 1 as adopted by the Commission on first reading. It was, of course, possible and desirable that, on second reading of part 1 of the draft articles, improvements be introduced by the Commission in article 19. He was ready eventually to contribute to that end. He could not, however, proceed in the elaboration of part 2 of the draft on the assumption, advocated by a few members, that the category of crimes had disappeared from part 1.

245. The Special Rapporteur felt that it would be equally impossible for him to accept the view that the consequences of internationally wrongful acts qualified as crimes could be dealt with, by analogy with national criminal legislations, in terms of lists of crimes and of the penalties attached thereto. That would be to contradict not only the notion that international responsibility was neither purely civil nor purely penal and incorporated certain features of both, but also the notion that, although there were cases in which penal responsibility of a State did and should exist,<sup>174</sup> the responsibility of States presented mostly the features of the civil tort of national law. Furthermore, the adoption of a method consisting, as suggested, in an indication of specific penalties for specific acts would imply the abandonment by the Commission of the fundamental notion according to which the codification of State responsibility was to be concerned with the so-called "secondary" rules and not with the totality of "primary" rules of international law. While ready to recognize the relativity of the distinction, the Special Rapporteur believed that the adoption of a municipal criminal-law analogy would lead the Commission too far from the understanding of its task which had so far prevailed.

246. The very comparison between the opposing views expressed in the Commission's debate justified, in the Special Rapporteur's view:

(a) that the consequences of delicts and of crimes be studied separately;

(b) that he start with the better known area of the consequences of international delicts, before moving on to the less known (at least to him) area of the consequences of international crimes.

(b) *Substantive and procedural legal consequences*

247. Most members of the Commission agreed with a separate treatment of such substantive consequences of an internationally wrongful act as cessation and the various forms of reparation, on the one hand, and

<sup>173</sup> The Special Rapporteur said that many interesting thoughts on this problem emerged from J. H. H. Weiler, A. Cassese and M. Spinedi, eds., *International Crimes of State* (Berlin-New York, de Gruyter, 1989).

<sup>174</sup> See H. Lauterpacht, "Règles générales du droit de la paix", *Recueil des cours de l'Académie de droit international, 1937-IV* (Paris, Recueil Sirey, 1938), vol. 62, p. 350.

instrumental or procedural consequences, such as the measures to which resort may be had in order to secure cessation and reparation, on the other. One member, however, suggested that that distinction should not, in combination with the distinction between delicts and crimes, justify the adoption, among the rules concerning the procedural consequences of crimes, of provisions that would "criminalize" the offending State.

248. A number of members also agreed with the Special Rapporteur's proposal to move the procedural rules from part 3 of the draft to part 2 and to limit part 3 to the rules on the settlement of disputes. In their view, two points should be taken into account: first, the conditions to be fulfilled before an injured State could take legal action against the author State; and secondly, the procedures for the settlement of disputes proper. It would in fact be better to deal with those questions separately, since the conditions to be fulfilled prior to the taking of measures came within part 2 of the draft, as the Special Rapporteur had suggested, while dispute-settlement procedures came within part 3. It was also mentioned that one of the advantages of treating procedural consequences separately was that some of those consequences could have a bearing on substantive issues: an example was the rule of exhaustion of local remedies.

249. Some members agreed with the Special Rapporteur that the distinction between substantive and procedural legal consequences was not absolute. It would be unacceptable, for example, to argue that reparation was a substantive consequence and that the right to take reprisals was merely procedural because it served to secure cessation, reparation, etc. Thus reparation was not the only legal consequence of a wrongful act, nor was it the sole content of the relationship called State responsibility. The injured State also had a right, though not an unlimited right, to take countermeasures, which were also a legal consequence of a wrongful act and whose application depended mostly, if not entirely, on the non-fulfilment of the claim for reparation. Countermeasures, in the view of these members, could also be used to enforce the cessation of a wrongful act, to avert irreparable damage, to induce the other party to accept an agreed dispute-settlement procedure, and so on.

250. A view was also expressed that, in terms of procedural rules, there had to be specific provisions to define the conditions which had to be met in order to take countermeasures. The previous Special Rapporteur had, according to one member, laid down a procedural condition for invoking reparation in a provision to the effect that a State claiming reparation must notify the State alleged to have committed the internationally wrongful act of its claim, and that the notification must indicate the measures required to be taken and the reasons for them.<sup>175</sup> Such procedural rules could, however, be combined with the rules relating to the settlement of disputes in part 3 of the draft, since any dispute presupposed a claim, and there might be a need to exhaust dispute-settlement procedures at all points in the process under which State responsibility was invoked. Accordingly, to make clear the process whereby effect was given to the legal consequences of an internationally wrongful act, it might be advisable to define the legal

consequences in part 2, and the procedure for applying them and for resolving any disputes that might arise at any point during that process in part 3. It was pointed out by this member that such an approach was adopted in sections 3 and 4 of Part V of the 1969 Vienna Convention on the Law of Treaties.<sup>176</sup> A different method had, however, been used in other treaties. There was, in the view of this member, a substantive and procedural aspect to the reparation claim and the right to apply measures that differed from the rules on dispute settlement. He was therefore not entirely happy with the distinction introduced by the Special Rapporteur between substantive and procedural legal consequences and with the intention to confine part 3 simply to rules on dispute settlement. He would have preferred to concentrate in part 2 on determining the rights and duties that emerged as a legal consequence of an internationally wrongful act and to combine in part 3 rules for giving effect to those consequences and rules on the settlement of disputes that might arise during the process.

251. Replying to the comments made, the Special Rapporteur said that the choice to deal separately with the substantive and the instrumental consequences of internationally wrongful acts was dictated not by scholastic motivations, but by the very different nature of those two sets of consequences. Indeed, he believed that the rules on the duty of the offending State to desist from wrongful conduct and to provide reparation were different from the rules concerning the measures to which injured States might resort in order to secure cessation and reparation and possibly to inflict sanction. More specifically, the consequences of the former were immediate, substantive and inevitable, whereas the consequences of the latter were less immediate, instrumental and, as such, avoidable for the wrongdoing State by offering prompt and effective reparation (including, if applicable, cessation). To accumulate both sets of consequences indiscriminately one over the other would be misleading, in that it might be understood, as he would later explain, to mean that the right to resort to any measures would accrue to the injured State or States as an immediate consequence of an allegedly wrongful act regardless of the position taken by the offending State with respect to reparation.

252. The Special Rapporteur felt that the distinction, imposed by the very nature of things, was manifest in the operative content of his preliminary report (A/CN.4/416 and Add.1), which covered cessation and restitution in kind (arts. 6 and 7); in the envisaged content of his second report (A/CN.4/425 and Add.1), which covered, in draft articles 8 to 10, the other substantive consequences of an internationally wrongful act (compensation, interest, satisfaction and guarantees of non-repetition); and in the prospective content of his third report, which would be devoted to measures.

253. He noted that a fear had been expressed that the distinction between substance and procedure might, if combined with the distinction between crimes and delicts, lead to the adoption, for the consequences of crimes, of provisions intended to subject States to a kind of "criminal" sanction. Referring to what he had already

<sup>175</sup> Draft article 1 of part 3 (see footnote 166 above).

<sup>176</sup> United Nations, *Treaty Series*, vol. 1155, p. 331.

said on the subject of punitive or afflictive consequences of internationally wrongful acts, the Special Rapporteur did not see the adoption of any such form of "criminal" punishment as an inevitable consequence of either distinction or of their combination.

254. Reverting finally to the third of his departures from the outline followed so far, the Special Rapporteur addressed himself to the less problematic distinction between matters pertaining to part 2 of the draft and matters to be dealt with in part 3. As agreed upon by a large number of members, the removal from part 3 of any provisions concerning the actions which the injured State or States must take prior to resorting to measures intended to obtain cessation and reparation was suggested by the consideration that provisions concerning such actions as *sommation*, notice, etc. belonged more to the articles on measures, namely to part 2, than to the articles on dispute-settlement procedures to be placed in part 3.

255. The provisions in question, he believed, belonged indeed to part 2 because, as conditions of the lawfulness of resort to measures, they should be formulated in any case within the context of the part of the draft concerning any form of admissible reprisals. Their place was among the final, "general" clauses of part 2. They belonged less directly to dispute settlement—notwithstanding obvious interactions—because the existence of any obligation or *onera* compliance with which by an injured State was a condition of the lawfulness of resort to measures should not be subject to the more problematic dispute-settlement régime. Indeed, the rules on dispute settlement to be placed in part 3 were not all likely to be of a binding character; nor were they likely to be really exhaustive. The rules concerning actions which the injured State or States should normally take prior to resorting to measures would instead have to be conceived, in the Special Rapporteur's opinion—whatever the exceptions also to be envisaged—as binding rules. Indeed, to relegate such rules under a title such as "Implementation" and in a part different from that covering measures would be dangerously reductive of the importance he attached to such rules. He stated that he was not inclined to accept without substantial reservations and qualification the well-known dictum of the arbitral tribunal in the *Air Service Agreement* case, according to which:

... If a situation arises which, in one State's view, results in the violation of an international obligation by another State, the first State is entitled, within the limits set by the general rules of international law pertaining to the use of armed force, to affirm its rights through "countermeasures".<sup>177</sup>

## 2. COMMENTS ON DRAFT ARTICLES 6 AND 7 OF PART 2

### ARTICLE 6 (Cessation of an internationally wrongful act of a continuing character)<sup>178</sup>

256. The necessity of a provision on cessation was not disputed, but the exact meaning of cessation and its relationship to reparation were the subject of some discussion.

<sup>177</sup> Case concerning the *Air Service Agreement* of 27 March 1946 between the United States of America and France, decision of 9 December 1978 (United Nations, *Reports of International Arbitral Awards*, vol. XVIII (Sales No. E/F.80.V.7), p. 417, at p. 443, para. 81).

<sup>178</sup> For the text, see para. 229 above.

257. In terms of legal theory, a few members of the Commission disagreed with the Special Rapporteur's view that cessation basically derived from primary rules, as opposed to remedies which derived from secondary rules, and that cessation was thus independent of remedies. In their view, once a primary rule was violated, the secondary rules came into effect and thus both cessation and remedies belonged to secondary rules. Considering cessation as compliance with the primary obligation would blur the distinction, which had first been used by the Commission in the present topic, between primary and secondary rules, and would base the consequences of the violation on two different grounds. It would also be wrong because, even if cessation were intended to restore the situation prevailing before the breach of the obligation, it required from the author State a conduct different from that imposed by the original obligation. Even if that conduct were the same, it would have a completely different meaning. Cessation was, then, a legal consequence of the breach of the primary obligation, and as such it seemed to be one of the components of reparation.

258. It was pointed out that, in decisions of the ICJ and resolutions of the Security Council, a distinction had been made between a claim for respect for certain rights and a claim for the termination of specific conduct. Thus a claim for cessation was more than just an affirmation of continuance of the original obligation, since it involved new elements depending on the way in which the right had been violated. Besides, cessation in certain cases, it was noted, could be enforced by sanctions.

259. Most members, while not denying the relationship between cessation and reparation, agreed with the Special Rapporteur that cessation had inherent properties of its own which distinguished it from reparation. The basic consideration was that the primary obligation—the breach of which constituted the wrongful act—continued to exist and that cessation of the wrongful act was a consequence of that primary obligation.

260. It was also pointed out by one member that the concept of State responsibility was based on the policy of strengthening international law and eliminating the consequences of a wrongful act. Such a policy implied the fullest compliance with the primary obligation. A breach of the law did not lead to the extinction of the law itself. That was the basis for the requirement of reverting to the primary obligation in order to eliminate the breach. The link between cessation and restitution and other remedies would, it was said, become clearer if a distinction were drawn between the actual cessation of the wrongful act and what might be called juridical cessation, which occurred only after a full settlement of the issue, which might include remedies as well. While the distinction between cessation of a wrongful act and other remedies was relative, cessation had its own special and positive character which consisted mainly in the discontinuance of injurious conduct. It was stated that a wrongful act was also a threat to the very existence of the rule infringed by the unlawful conduct. That was why the significance of cessation went beyond the bilateral relationship of the two States involved and why it was of interest to all States.

261. Some other members found it unnecessary to try to make such clear theoretical distinctions as to whether cessation belonged to primary or to secondary rules. They

felt that, in practice, the injured State was more concerned about invoking a combination of remedies than about separate, distinguished remedies. Courts also seemed more concerned with determining remedies than with distinguishing the bases for them. Certain actions could, in some cases, have the character both of cessation and of restitution in kind, such as the release of hostages, evacuation of occupied territories, etc. These members agreed with the Special Rapporteur that a rule on cessation could be seen as situated in a kind of grey area between the primary and the secondary rules. From either standpoint, a specific rule on cessation was essential in the draft and should be independent of the provisions on reparation.

262. Comparing the right to cessation and the claim for interim measures of protection, a few members found it advantageous to draw a distinction between the two, as the Special Rapporteur had suggested. The claim for interim measures of protection might, for example, be ignored by the relevant tribunals if granting such orders was not envisaged in their jurisdiction. But an independent rule on cessation would surpass the jurisdictional obstacle.

263. It was suggested that draft article 6 should not simply emphasize the author State's obligation, but also include the injured State's right to demand cessation of the wrongful act. That shift of emphasis would not prevent the injured State or States from claiming reparation for specific injuries they had suffered. In relation to a breach of an obligation *erga omnes*, for example under a multilateral treaty, all other States could demand cessation. Reparation, however, would be confined to those States which had suffered specific harm, in addition to the legal breach *per se*.

264. With regard to the Special Rapporteur's idea of providing a mechanism for warning a State at an initial phase of the commission of an act which was likely to lead to a wrongful act, a few members pointed out that the problem was one of prevention. While they understood the Special Rapporteur's concern, they felt that the "initial phase" concept was likely to give rise to more problems than it would solve, since it was difficult to identify the potentially injured State.

265. As for the meaning of the expression "wrongful act of a continuing character", it was recalled that, in the commentary to article 18 of part 1 of the draft articles, the Commission had used the expression "act which extends over a period of time" to refer to three different types of acts: acts of a continuing character; acts composed of a series of actions; and complex acts.<sup>179</sup> To cover those three categories of acts, the expression "act of the State extending in time" was used in the title of article 25 of part 1. Thus the scope of the claim for cessation should not be confined to the category of continuing acts, since that would make draft article 6 too narrow. It was noted that, in State practice, claims for cessation had also been recognized in the case of a series of actions and of complex acts.

266. As regards the place of article 6 in the draft, some members felt that cessation was independent of remedies, had its own distinct place and should therefore be dealt

with in chapter I of part 2 under "General principles". Some others, however, believed that cessation was sufficiently linked to reparation not to be too far removed from the articles on reparation and that the provision should therefore stay in chapter II as a separate article.

267. One member felt that the articles should also contain a provision to the effect that restoration of the obligation that had been violated presupposed not only the factual discontinuance of the wrongful conduct, but also abrogation of the illegal acts, both international and national, committed by the offending State. National laws, administrative regulations and court decisions which infringed the rules of international law were subject to abrogation, annulment or amendment. They should be regarded as having no legal validity *ab initio*. Such an approach was based on recognition of the primacy of international law over internal law and on the premise that the international obligations of States took precedence.

268. One member pointed out that, in defining acts of a continuing character and subject to cessation, the Special Rapporteur's analysis seemed to imply that a wrongful act whose effect was continuing should be regarded as a continuing act subject to cessation. This member disagreed with that position. He gave an example in which a State adopted legislation nationalizing foreign property. According to the Special Rapporteur's definition, the nationalization act would be of a continuing character and hence subject to cessation—meaning, here, denationalization. Since the Special Rapporteur recognized no exception to cessation, the demand for cessation might in such cases constitute a threat to or jeopardize the social and economic system of a State.

269. A comment was made that there was, in the concept of cessation, a notion of urgency, of a need for immediate cessation. Article 6 should therefore be drafted so as to convey that understanding.

270. With regard to the nature of cessation and its relationship to other remedies, the Special Rapporteur, in summing up the debate, confirmed his definition of cessation as a remedy distinct from reparation. Like reparation, cessation of course presupposed a wrongful act, in the sense that for any cessation to be conceivable a wrongful act must at least have been initiated. On the other hand, to cease the wrongful conduct at any given time was different from providing reparation. The doubts expressed by a few members were due, in the Special Rapporteur's opinion, to the fact that in most cases cessation was absorbed, so to speak, by restitution in kind, thus becoming not perceptible itself. That was just one of the consequences of the obvious fact, also noted in his preliminary report, that in practice injured States requested cessation *together with* reparation in kind and possibly other forms of reparation, and that international tribunals decided accordingly. There were cases in which cessation was the object of a distinct, specific and urgent claim and decision. That might be particularly so in the case of very serious delicts and of crimes. In addition to the case concerning *United States Diplomatic and Consular Staff in Tehran*,<sup>180</sup> other examples could easily

<sup>179</sup> See *Yearbook ... 1976*, vol. II (Part Two), p. 88, para. (5) of the commentary.

<sup>180</sup> Judgment of 24 May 1980, *I.C.J. Reports 1980*, p. 3.

be cited, such as a gradually extending occupation of territory, a continuous series of "systematic" violations of international obligations in the area of human rights, or a creeping series of violations of obligations concerning the treatment of alien nationals.

271. Whatever the measure in which a telescoping of remedies might frequently occur in practice, there were sufficient reasons, in the Special Rapporteur's opinion, for cessation to be the subject of an express provision in the draft articles, and that was the only practical purpose of a discussion on the nature of cessation.

272. Careful thought should, however, be given, according to the Special Rapporteur, to the considerations put forward by one member with regard to the applicability of his concept of cessation in the case of an unlawful expropriation qualified as a continuing wrongful act. The Special Rapporteur felt that it was not excluded that one might reconsider the inclusion of the wrongful taking of property in the category of continuing wrongful acts.

273. The Special Rapporteur was unable to accept the view that cessation would only be a duplication of "provisional measures". First, any deliberation of provisional measures of protection was conceivable, in his view, only within the framework of a third-party settlement procedure or of an institutionalized procedure before an international political body. But the availability of any such procedure was exceptional, if not rare, in inter-State relations. In most cases, the offending State and the injured State faced each other directly, at diplomatic level, in the absence of any judicial or political third party. Secondly, the power of an international body to indicate provisional measures of protection was only exceptionally provided for in the relevant international instruments. Thirdly, provisional measures eventually decided upon were normally—as in the case of Article 41 of the Statute of the ICJ—deprived of binding force.

274. On the question of the place of the provision on cessation in the draft, the Special Rapporteur said that he was open to the suggestions made by a number of members. The main point was, in his view, that all speakers had agreed with him, in principle, that cessation should be dealt with "somewhere" among the initial articles of part 2, in other words before the provisions on the various forms of reparation. Cessation should therefore be covered by a provision to be placed either in a general introductory chapter of part 2 or in the first of the articles dealing with reparation. He thus saw no need to go on arguing whether cessation derived from primary or from secondary rules or whether it belonged, as suggested in his preliminary report, to a kind of grey area between the two sets of rules, the distinction between which should not be overestimated.

275. With regard finally to drafting, the Special Rapporteur was thankful to those members who had made a number of useful suggestions. While sharing the view, in particular—with regard to continuous wrongful conduct qualifying as a crime or as a very serious delict—that the language of draft article 6 should be stronger, he felt that one should avoid ineffective, purely rhetorical emphasis. With regard to the suggestion that the word "remains" be replaced by "is", he said that it

seemed to him that the term "remains" was less tautological and more apt to convey the essential purpose of the article, which was to assert the persistent vitality of the infringed international rule, judgment or decision and of the right deriving therefrom. As for reformulating the article in terms of a *right* of the injured State or States to *claim* cessation, he believed that his formulation might be preferable. One reason was that to make cessation dependent on a claim might weaken the obligation of the offending State to desist from its unlawful conduct whenever the injured State or States were for any reason not in a position to demand cessation. The second reason was that the requirement that a claim be put forward might unduly tamper with the delicate problem of acquiescence in international law. Forfeiture of a right to reparation was one thing; forfeiture of a "primary" right was another. The formulation of the article should in any case be carefully reconsidered.

276. The Special Rapporteur had no difficulty in accepting the useful suggestion that the language of the part of draft article 6 defining the kinds of wrongful acts to which cessation would apply should be adapted to that of the relevant provisions of part 1 of the draft articles. The suggested expression "extending in time" would probably be the most appropriate.

#### ARTICLE 7 (Restitution in kind)<sup>181</sup>

277. Many members of the Commission agreed with the Special Rapporteur that restitution in kind came foremost before any other form of reparation, since it enabled the injury suffered to be remedied in a natural, direct and integral manner. For that reason, they also agreed with the Special Rapporteur that restitution was a mode of reparation that should be applied as widely and as universally as possible and that there was no need to provide a special régime for breaches of rules on the treatment of aliens. That question might ultimately depend on the extent to which the Commission was willing to allow the content of the primary rules to determine the categorization of the secondary rules. The primacy of restitution, it was noted, was also recognized in the domestic law of many States.

278. It was pointed out by a few other members that the idea that restitution had primacy over other forms of reparation was not so easily proved from practice. Besides, restitution was, in effect, possible only when it was physically or politically feasible. Otherwise, restitution was normally considered as merely a preliminary to the assessment of monetary compensation. One member expressed the view that restitution in kind and cessation should be carefully separated. The notion of cessation being absorbed by, or telescoped into, restitution in kind should be expressly rejected, even in the extreme case where they happened at the same time. Accordingly an act might cease without restitution in kind occurring, and where it did occur both concepts were separable and should be separated. Another member noted the distinction between restitution in domestic common law and restitution in international law. In common law, a claim for restitution was not, strictly

<sup>181</sup> For the text, see para. 230 above.

speaking, a claim for damages; its purpose was not only to compensate for a loss, but also to deprive the wrongdoing party of a benefit. In international law, the prime consideration of restitution was the restoration of the *status quo ante*.

279. It was mentioned that, in drafting an article on restitution, the practical exigencies should be taken into account and a flexible approach should be adopted. One member felt that draft article 7 seemed to deal exclusively with situations in which material damage had occurred. Even though the Special Rapporteur had said he intended to deal with legal injury in the context of "satisfaction", this member preferred that the matter be referred to in article 7 to prevent confusion.

280. As regards the meaning of restitution in kind, it was pointed out that there seemed to be no uniformity in doctrine or State practice. Some defined restitution as a mere re-establishment of the *status quo ante*, i.e. the situation which had existed prior to the wrongful act, and others defined it as the re-establishment of the situation that would have existed if the wrongful act had not been committed. Article 7, as drafted, did not indicate which of those meanings was attributed to restitution. Most members preferred the broader meaning of restitution, while some others preferred the narrower meaning (*status quo ante*).

281. Some members stated that, inasmuch as the purpose of a claim for reparation was to wipe out the consequences of the wrongful act, the term "restitution" should perhaps not be interpreted so broadly. For practical reasons, and following the example of article 8, paragraph 2 (a) and (d), of the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities,<sup>182</sup> the claim for restitution should be limited to restoration of the *status quo ante*, which could be clearly determined without prejudice to any compensation for *lucrum cessans*.

282. Some other members preferred the broader meaning of restitution, even if it involved some speculation. That approach, in their view, was compatible with the "integrated" concept of restitution supported by the Special Rapporteur and within which the restitutive and compensatory elements were fused.

283. It was also stated that it should be borne in mind that restitution was not related only to international delicts, but also to international crimes, namely serious violations of international law. In such cases, restitution would be broad in scope and content and it was not enough to take account only of its material aspects. Even though the Special Rapporteur intended to provide for other modes of reparation in subsequent articles, analysis should be carried further in the context of restitution, so as to take account of non-material damage.

284. With regard to *material impossibility* as an exception to the obligation of restitution, it was generally agreed that an exception on such a ground was self-evident.

285. As regards *legal impossibility*, views differed. It was pointed out that there were two types of legal impossibility: domestic and international. The Special

Rapporteur had found relevant only international legal impossibility, namely when the obligation of restitution would involve a breach of an obligation arising out of a rule of *jus cogens*. Many members agreed with that approach. One member, while agreeing with the *jus cogens* exception, found it difficult to see how restitution could be contrary to a peremptory norm unless the primary obligation from which it derived was also contrary to that norm, in which event it would be devoid of legal consequences and the question would not arise. Another member disagreed with the *jus cogens* exception. In his view, the determination of peremptory norms of general international law was controversial and such a provision would render the operation of restitution problematic and indeterminate.

286. One member was not convinced that the domestic-law exception should be disregarded altogether. He admitted that domestic law could not preclude international responsibility; but he felt that the obligation of restitution did not extend to certain acts, such as the judgments of national courts. If such domestic-law impossibilities were overlooked, then national courts' judgments which embodied a violation of international law would have to be set aside or rescinded. The European Convention on Human Rights,<sup>183</sup> however, provided a different solution. Under article 50 of that Convention, if internal law did not permit restitution, just satisfaction was to be afforded to the injured party. The problem, therefore, was not whether a State could avoid its international responsibility by invoking domestic law, but whether restitution applied to every internationally wrongful act.

287. It was also pointed out that, while domestic law as such could not be invoked to preclude restitution, some limitations were needed to ensure that a claim for restitution could not be used by aliens to restrict the right of peoples to self-determination, in particular the right to nationalization.

288. One member felt that nationalization *per se* was not a wrongful act and should therefore not be considered as covered by the topic of State responsibility. Another member felt that, at the present stage in its work, the Commission should be careful as to how to approach the question of the treatment of aliens. In the view of this member, there was, of course, a need to improve the social environment within which aliens had to live. That was more a question of human rights.

289. It was pointed out that the problem of whether restitution should be allowed in the event of a nationalization effected in breach of a rule of international law was a very real one which could not be evaded. The Special Rapporteur had faced that problem by proposing the exception of *excessive onerousness* of the burden imposed. That criterion would, in the opinion of some members, make it possible to safeguard the freedom of States to carry out any economic and social reforms they considered necessary. In the view of one member, however, in such cases it was not so much excessive onerousness that was at stake as respect for the political,

<sup>182</sup> International Legal Materials (Washington, D.C.), vol. XXVII (1988), p. 868.

<sup>183</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950) (United Nations, Treaty Series, vol. 213, p. 221).

economic and social options of States. He therefore found it somewhat artificial to try to establish a link between an exception to restitution and excessive onerousness and preferred to base that exception on respect for the political, economic and social systems of States.

290. One member also said that he could not agree to mitigating circumstances, such as those relating to domestic jurisdiction or internal law or, in the name of the principle of the equality of States before the law, those relating to the political, economic or social system of the author State, although it might be possible to take account of the level of economic development of the offending State. The fact was that a State which had committed an internationally wrongful act had an obligation of reparation, of which restitution in kind was one form, and it was pointless to affirm the primacy of the obligation of restitution in kind if exceptions to that principle were immediately to be provided for. What was necessary was to determine the conditions under which restitution in kind was to be made and the forms it should take.

291. It was pointed out by a few members that it might sometimes be difficult to separate material impossibility from legal impossibility, for example in cases of conflicting obligations of one State towards two or more States. In such cases, account could perhaps be taken of the nature and purpose of the obligations, in order to determine which of them should prevail.

292. One member found the expression "excessively onerous" infelicitous and felt that it should be replaced by "a disproportionate burden" or some other more easily understandable expression.

293. One member wondered whether the criterion of excessive onerousness was sufficiently clear to serve as a useful exception. He felt that, if the dominant factor in assessing excessive onerousness was the gravity of the violation or the injury, that might very often result in an impasse. On the other hand, if obstacles such as conflicting obligations or domestic-law impossibility were to override the concept of gravity, they would in effect achieve the status of impossibility. Another member expressing concern about the exception of excessive onerousness stated that, since restitution in kind was, in a way, the belated performance of an obligation, the arguments in support of this exception were unconvincing. If restitution seemed to be excessively onerous, that simply meant that the performance of the primary obligation would also have been onerous and that pecuniary compensation would be too.

294. While some members agreed with the Special Rapporteur that the distinction between direct and indirect injury was artificial, a few others found it useful to the extent that it was compatible with the principle of the exhaustion of local remedies. In their view, a State could not put forward a claim on behalf of its citizens against another State unless the local remedies of the alleged wrongdoing State had been exhausted.

295. It was pointed out by a few members that, in dealing with impossibility of compliance with the obligation of restitution, it should be borne in mind that the Commission had adopted on first reading article 33 of

part 1 of the draft articles,<sup>184</sup> under paragraph 1 (a) of which the author State could invoke a state of necessity when the wrongful act was "the only means of safeguarding an essential interest . . . against a grave and imminent peril". A State which found itself in the situation referred to in paragraph 2 (a) of draft article 7, namely where restitution would be a burden out of proportion with the injury caused by the wrongful act, might conceivably be justified in invoking the terms of article 33 of part 1. That would have the effect of precluding the wrongfulness of the act, without prejudice to any question involving compensation for damage.

296. As regards the right of the injured State to choose between restitution in kind and pecuniary compensation, some members agreed with the Special Rapporteur's proposal in paragraph 4 of draft article 7. They felt, however, that once an article on pecuniary compensation was proposed, the whole matter could be re-evaluated.

297. One member observed that paragraph 4 limited the freedom of choice of the injured State if the choice involved a breach of an obligation arising from a peremptory norm. In his view, violation of an obligation *erga omnes* arising from a multilateral treaty should be added to that exception. Another member felt that, in setting out the basis of the choice between restitution and pecuniary compensation, the interests of the international community should also be taken into account. For example, if the author State polluted an international river to the level of appreciable harm or to whatever level was considered wrongful and if the injured State or States accepted compensation in place of restitution, then it would be the environment and the international community which would have lost and which would remain injured.

298. In summing up the discussion, the Special Rapporteur admitted that he had not indicated in draft article 7 any express choice between the narrow concept of restitution in kind and the broad concept which most members had said they preferred. That choice, however, would emerge explicitly from the provisions covering forms of reparation other than restitution in kind, notably from the draft article on reparation by equivalent (pecuniary compensation). In the first paragraph of that draft article, it would indeed be provided that pecuniary compensation should cover any injury not covered by *naturalis restitutio* in the measure necessary—precisely—to re-establish the situation that would have existed if the wrongful act had not been committed.

299. The Special Rapporteur agreed with the point that the most delicate aspect of restitution in kind was to strike the right balance between the opposing interests in the definition of the circumstances in which the obligation of *naturalis restitutio* was or should be *caduque*. No question obviously arose with regard to such an insurmountable obstacle as physical impossibility, but there still remained the issues covered by paragraphs 1 (b) to 3 of draft article 7. Those paragraphs, however, should be read together whenever necessary. It should also be kept in mind that the provisions setting limits to the obligation to make *naturalis restitutio* did not limit the obligation to make

<sup>184</sup> See footnote 162 above.

reparation. An exception to the obligation to provide restitution in kind did not release the offending State from its obligation to "make good" by pecuniary compensation or other forms of reparation. Although he admitted that all the exceptions in question should be carefully reconsidered in order to make sure that the correct balance was achieved—a point he had already made in introducing his preliminary report—the Special Rapporteur said it was possible that some of the objections raised in the course of the debate might not have taken full account of the above consideration.

300. With regard to legal obstacles deriving from international law, the Special Rapporteur said that he would find it difficult to admit the validity of any such obstacles not deriving from a "superior" international rule. He would therefore maintain paragraph 1 (b) of draft article 7 as proposed. He was unable to see, in particular, how one could devise—in the case of a State A bound by conflicting obligations towards States B and C—any objective *legal* criterion (other than the co-presence, on one or the other side, of a "superior" general rule) on the basis of which State B's interest (in obtaining restitution in kind) could be made to prevail over State C's incompatible interest, or vice versa. The issue was bound to be settled by State A by some political solution.

301. As for excessive onerousness, the Special Rapporteur admitted that there was certainly much to be explored in greater depth. That demonstrated precisely the desirability of dealing with all the consequences of internationally wrongful acts less hastily and in all the detail necessary to avoid disregarding important issues. Subject to the results of further study and the consideration of the matter in the Drafting Committee, he suggested that the "exoneration" clause in question be assessed and defined taking all due account of the following facts:

(a) "exemption" from *naturalis restitutio* did not mean exemption from the duty of reparation in any other form;

(b) excessive onerousness included, in addition to such a reasonable condition as that of proportionality, precisely those legal obstacles of municipal law which (excluded as legal obstacles *per se*) could amount to a serious threat to the legal system, and in that sense to the political and social system of the offending State.

If the "excessive onerousness" exception was perhaps too generous towards the offending State in the opinion of some members of the Commission, it was indispensable in order to reduce the difficulties that other (or the same) members found with the exclusion of any validity of municipal legal obstacles. The words "by itself" (*à lui seul*) in paragraph 3 of draft article 7 had been proposed precisely with a view to admitting that pecuniary compensation could be substituted for modification or annulment of a final judgment, where such modification or annulment would necessarily be in contravention of constitutional principles (which *per se* were not valid legal impediments from the point of view of international law). Such substitution would be permissible only where the violation of the constitutional principles would very seriously prejudice the political and legal system of the offending State.

### C. Draft articles on State responsibility

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

##### TEXTS OF THE DRAFT ARTICLES PROVISIONALLY ADOPTED SO FAR BY THE COMMISSION<sup>185</sup>

302. The texts of articles 1 to 5 of part 2 of the draft provisionally adopted so far by the Commission are reproduced below.

##### *Article 1*<sup>186</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.

##### *Article 2*<sup>187</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.

##### *Article 3*<sup>188</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.

##### *Article 4*<sup>189</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.

##### *Article 5*<sup>190</sup>

1. For the purposes of the present articles, "injured State" means any State a right of which is infringed by the act of another State, if that act constitutes, in accordance with part 1 of the present articles, an internationally wrongful act of that State.

2. In particular, "injured State" means:

(a) if the right infringed by the act of a State arises from a bilateral treaty, the other State party to the treaty;

(b) if the right infringed by the act of a State arises from a judgment or other binding dispute-settlement decision of an international court or

<sup>185</sup> As a result of the provisional adoption of article 5 at its thirty-seventh session, the Commission decided to modify articles 2, 3 and 5 provisionally adopted at the thirty-fifth session (see *Yearbook ... 1985*, vol. II (Part Two), p. 20, para. 106) as follows: in articles 2 and 3, the reference to "articles [4] and 5" was replaced by a reference to "articles 4 and [12]"; and article "5" was renumbered article "4".

<sup>186</sup> Provisionally adopted by the Commission at its thirty-fifth session; for the commentary, see *Yearbook ... 1983*, vol. II (Part Two), p. 42.

<sup>187</sup> Provisionally adopted by the Commission at its thirty-fifth session; for the commentary, *ibid.*, pp. 42-43.

<sup>188</sup> Provisionally adopted by the Commission at its thirty-fifth session; for the commentary, *ibid.*, p. 43.

<sup>189</sup> Provisionally adopted by the Commission at its thirty-fifth session (then article 5); for the commentary, *ibid.*

<sup>190</sup> Provisionally adopted by the Commission at its thirty-seventh session; for the commentary, see *Yearbook ... 1985*, vol. II (Part Two), pp. 25 *et seq.*

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

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

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

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

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

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

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

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

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

## Chapter V

### INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

#### A. Introduction

303. At its thirtieth session, in 1978, the Commission included the topic "International liability for injurious consequences arising out of acts not prohibited by international law" in its programme of work and appointed Robert Q. Quentin-Baxter Special Rapporteur for the topic.

304. From its thirty-second session (1980) to its thirty-sixth session (1984), the Commission considered the five reports submitted by the Special Rapporteur.<sup>191</sup> The reports sought to develop a conceptual basis for the topic and included a schematic outline and five draft articles. The schematic outline was contained in the Special Rapporteur's third report, submitted to the Commission at its thirty-fourth session, in 1982.<sup>192</sup> The five draft articles were contained in the Special Rapporteur's fifth report, submitted to the Commission at its thirty-sixth session, in 1984,<sup>193</sup> and were considered by the Commission, but no decision was taken to refer them to the Drafting Committee.

305. At its thirty-sixth session, in 1984, the Commission also had before it the replies to a questionnaire addressed in 1983 by the Legal Counsel of the United Nations to 16 selected international organizations to ascertain, among other matters, whether obligations which States owed to each other and discharged as members of international organizations could, to that extent, fulfil or replace some of the

procedures referred to in the schematic outline;<sup>194</sup> and 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>195</sup>

306. At its thirty-seventh session, in 1985, the Commission appointed Mr. Julio Barboza Special Rapporteur for the topic, following the death of Robert Q. Quentin-Baxter. From its thirty-seventh session to its fortieth session (1988), the Commission received four reports from the Special Rapporteur.<sup>196</sup> At its fortieth session, in 1988, the Commission referred to the Drafting Committee draft articles 1 to 10 of chapter I (General provisions) and chapter II (Principles) of the draft, as submitted by the Special Rapporteur in his fourth report.<sup>197</sup>

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

307. At the present session, the Commission had before it the fifth report of the Special Rapporteur (A/CN.4/423). The Commission considered the topic at its 2108th to 2114th and 2121st meetings, from 30 May to 7 June and on 20 June 1989.

308. In his fifth report, the Special Rapporteur submitted revised draft articles 1 to 9 (see para. 311 below) to replace the 10 articles of chapters I and II referred to the Drafting Committee at the previous session, and new draft articles 10 to 17 (see para. 322 below) for chapter III of the draft (Notification, information and warning by the affected State).

309. At its 2121st meeting, the Commission referred the revised draft articles 1 to 9 to the Drafting Committee.

<sup>191</sup> The five reports of the previous Special Rapporteur are reproduced as follows:

Preliminary report: *Yearbook ... 1980*, vol. II (Part One), p. 247, document A/CN.4/334 and Add.1 and 2;

Second report: *Yearbook ... 1981*, vol. II (Part One), p. 103, document A/CN.4/346 and Add.1 and 2;

Third report: *Yearbook ... 1982*, vol. II (Part One), p. 51, document A/CN.4/360;

Fourth report: *Yearbook ... 1983*, vol. II (Part One), p. 201, document A/CN.4/373;

Fifth report: *Yearbook ... 1984*, vol. II (Part One), p. 155, document A/CN.4/383 and Add.1.

<sup>192</sup> The text of the schematic outline is reproduced in the Commission's report on its thirty-fourth session: *Yearbook ... 1982*, vol. II (Part Two), pp. 83-85, para. 109. The changes made to the outline by the previous Special Rapporteur are indicated in the Commission's report on its thirty-fifth session: *Yearbook ... 1983*, vol. II (Part Two), pp. 84-85, para. 294.

<sup>193</sup> The texts of draft articles 1 to 5 as submitted by the previous Special Rapporteur are reproduced in the Commission's report on its thirty-sixth session: *Yearbook ... 1984*, vol. II (Part Two), p. 77, para. 237.

<sup>194</sup> The replies to the questionnaire, prepared by the previous Special Rapporteur with the assistance of the Secretariat, appear in *Yearbook ... 1984*, vol. II (Part One), p. 129, document A/CN.4/378.

<sup>195</sup> *Yearbook ... 1985*, vol. II (Part One)/Add.1, p. 1, document A/CN.4/384.

<sup>196</sup> These four reports of the Special Rapporteur are reproduced as follows:

Preliminary report: *Yearbook ... 1985*, vol. II (Part One), p. 97, document A/CN.4/394;

Second report: *Yearbook ... 1986*, vol. II (Part One), p. 145, document A/CN.4/402;

Third report: *Yearbook ... 1987*, vol. II (Part One), p. 47, document A/CN.4/405;

Fourth report: *Yearbook ... 1988*, vol. II (Part One), p. 253, document A/CN.4/413.

<sup>197</sup> For the texts of draft articles 1 to 10 referred to the Drafting Committee at the fortieth session, see *Yearbook ... 1988*, vol. II (Part Two), p. 9, para. 22. For a summary of the Commission's debate, *ibid.*, pp. 9 *et seq.*, paras. 23-101.

## 1. INTRODUCTION OF THE FIFTH REPORT BY THE SPECIAL RAPPORTEUR

310. The Special Rapporteur said that there were two preliminary issues which he wished to raise before introducing his fifth report. They had not been dealt with in his report because they required further elaboration and he was mentioning them in order to elicit the reactions of the Commission as guidance for his future work. The first was the question of liability in respect of activities involving extended harm to many States, or the risk thereof. The second was the question of liability in respect of activities causing harm to the "global commons", in areas beyond the national jurisdiction of any State. Both issues raised complicated questions of procedure regarding notification and negotiation where there were many presumed affected States and sometimes several States of origin and where the intervention of international organizations might be required. The second issue presented additional difficulties such as the fact that, in some cases, the harm done to the "global commons" would not directly affect the interests of any State in particular, but rather those of the international community as a whole. The Special Rapporteur felt that both issues, in principle, fell within the scope of the present topic, since some of the most important and injurious consequences of the activities envisaged in draft article 1 were felt precisely in those areas, and the corresponding liability questions would logically arise. He hoped that members of the Commission would address those two issues during the consideration of his fifth report.

311. In view of the opinions expressed in the Commission at its previous session and in the Sixth Committee during the forty-third session of the General Assembly, the Special Rapporteur had revised the 10 articles of chapters I and II already referred to the Drafting Committee and reduced them to nine. He recalled that strong support had been expressed for the inclusion of the concepts of "harm" and "risk" in the scope of the topic. The revised draft articles 1 to 9 read as follows:

## CHAPTER I. GENERAL PROVISIONS

### *Article 1. Scope of the present articles*

The present articles shall apply with respect to activities carried on in the territory of a State or in other places under its jurisdiction as recognized by international law or, in the absence of such jurisdiction, under its control, when the physical consequences of such activities cause, or create an appreciable risk of causing, transboundary harm throughout the process.

### *Article 2. Use of terms*

For the purposes of the present articles:

(a) (i) "Risk" means the risk occasioned by the use of things whose physical properties, considered either intrinsically or in relation to the place, environment or way in which they are used, make them likely to cause transboundary harm throughout the process, notwithstanding any precautions which might be taken in their regard;

(ii) "Appreciable risk" means the risk which may be identified through a simple examination of the activity and the things involved, in relation to the place, environment or way in which they are used, and includes both the low probability of very considerable [disastrous] transboundary harm and the high probability of minor appreciable harm;

(b) "Activities involving risk" means the activities referred to in subparagraph (a), in which harm is contingent, and "activities with

harmful effects" means those causing appreciable transboundary harm throughout the process;

(c) "Transboundary harm" means the effect which arises as a physical consequence of the activities referred to in article 1 and which, in the territory or in places under the jurisdiction or control of another State, is appreciably detrimental to persons or objects, to the use or enjoyment of areas or to the environment, whether or not the States concerned have a common border. Under the régime of the present articles, "transboundary harm" always refers to "appreciable harm";

(d) "State of origin" means the State in whose territory or in places under whose jurisdiction or control the activities referred to in article 1 take place;

(e) "Affected State" means the State in whose territory or under whose jurisdiction persons or objects, the use or enjoyment of areas, or the environment are or may be appreciably harmed.

### *Article 3. Assignment of obligations*

1. The State of origin shall have the obligations established by the present articles provided that it knew or had means of knowing that an activity referred to in article 1 was being, or was about to be, carried on in its territory or in other places under its jurisdiction or control.

2. Unless there is evidence to the contrary, it shall be presumed that the State of origin has the knowledge or the means of knowing referred to in paragraph 1.

### *Article 4. Relationship between the present articles and other international agreements*

Where States Parties to the present articles are also parties to another international agreement concerning activities referred to in article 1, in relations between such States the present articles shall apply subject to that other international agreement.

### *Article 5. Absence of effect upon other rules of international law*

#### ALTERNATIVE A

The fact that the present articles do not specify circumstances in which the occurrence of transboundary harm arises from a wrongful act or omission of the State of origin shall be without prejudice to the operation of any other rule of international law.

#### ALTERNATIVE B

The present articles are without prejudice to the operation of any other rule of international law establishing liability for transboundary harm resulting from a wrongful act.

## CHAPTER II. PRINCIPLES

### *Article 6. Freedom of action and the limits thereto*

The sovereign freedom of States to carry on or permit human activities in their territory or in other places under their jurisdiction or control must be compatible with the protection of the rights emanating from the sovereignty of other States.

### *Article 7. Co-operation*

States shall co-operate in good faith among themselves, and request the assistance of any international organizations that might be able to help them, in trying to prevent any activities referred to in article 1 carried on in their territory or in other places under their jurisdiction or control from causing transboundary harm. If such harm occurs, the State of origin shall co-operate with the affected State in minimizing its effects. In the event of harm caused by an accident, the affected State shall, if possible, also co-operate with the State of origin with regard to any harmful effects which may have arisen in the territory of the State of origin or in other places under its jurisdiction or control.

### *Article 8. Prevention*

States of origin shall take appropriate measures to prevent or, where necessary, minimize the risk of transboundary harm. To that end they shall, in so far as they are able, use the best practicable, available means with regard to activities referred to in article 1.

#### **Article 9. Reparation**

To the extent compatible with the present articles, the State of origin shall make reparation for appreciable harm caused by an activity referred to in article 1. Such reparation shall be decided by negotiation between the State of origin and the affected State or States and shall be guided, in principle, by the criteria set forth in the present articles, bearing in mind in particular that reparation should seek to restore the balance of interests affected by the harm.

312. In the revised *article 1*, the concepts of "harm" and "risk" played an equally important role. Under the new formulation, the articles applied to activities either causing transboundary harm or creating a risk of causing such harm. Both harm and risk had been limited to those that were "appreciable". The Special Rapporteur said that a threshold for tolerance of risk higher than "appreciable" might be undesirable and unfair to the presumed affected States. Besides, the adjective "appreciable" had also been used by the Commission to qualify "harm" in the draft articles on the law of the non-navigational uses of international watercourses. Because of the similarities between the two topics, it seemed convenient that the terms used in both be harmonized and that was why he had borrowed the term "appreciable" from that other topic.

313. In view of the fact that the scope of the articles was no longer limited to activities involving risk, it was important to introduce another element which would limit the scope, otherwise it would appear that the articles were based on the concept of absolute liability. Already in his second report,<sup>198</sup> he had expressed a preference for the use of the term "activities" rather than "acts", and it seemed to him that the Commission agreed with that preference. An activity, as he understood it, was shaped by the acts of many persons, oriented towards broad common ends. Within a lawful activity there were lawful acts which might give rise to harm and certain consequences, and there might also be wrongful acts which gave rise to a breach of obligations. Therefore, by changing the focus of the topic to liability for the consequences of certain activities (not acts), its scope would be limited at the same time, since the articles would apply only in respect of harm which originated in activities described in article 1.

314. Strictly speaking, no liability could be ascribed to an activity, but only to acts, since the causal chain leading to any particular harm originated only in a specific act. Thus, in order for the articles to apply to acts, those acts must be inseparably linked to an activity which involved risk of transboundary harm or caused transboundary harm.

315. The revised definition of "risk" in *article 2* included also activities with a low probability of causing disastrous harm. There were obvious difficulties in dealing with activities such as those causing harm by pollution, which had cumulative effects, so that their appreciable harm appeared only after a certain period of time. Nevertheless, it was prudent to include them within the scope of the topic. The Special Rapporteur said that he had replaced the term "spheres" by "places" in subparagraph (c) in order to indicate that transboundary harm could affect not only a State's territory, but also other areas where the

State exercised jurisdiction or control. He had extensively explained the terms "jurisdiction" and "control" at the previous session and it was unnecessary to do so again. As for the expression "affected State", it now included an express reference to the environment. Accordingly, harm was caused not only to persons or objects and to the use or enjoyment of areas, but also to the environment, within the limitations set forth in article 1. The reference to harm being caused "throughout the process" of an activity was intended to cover harm caused at a single point in time, as well as harm which might be of a continuing character and might be cumulated as a particular activity went on.

316. The title of *article 3* had been changed from "Attribution" to "Assignment of obligations" in order to avoid confusion between the terms used in the present topic and those used in the topic of State responsibility. In part 1 of the draft articles on State responsibility,<sup>199</sup> the term "attribution" was used in reference to imputation of an act to a State, and that was governed by certain rules not appropriate in the present context. The present topic was not concerned with acts attributable to a State (within the meaning of the articles on State responsibility), but was built upon a causal relationship between an act—in the context of a specific activity carried on under the jurisdiction or control of a State—and specific harm. Paragraph 2 of article 3 laid down the presumption that a State had knowledge or means of knowing that an activity referred to in article 1 was being carried on in its territory or in places under its jurisdiction or control. The burden of proof to the contrary rested with that State.

317. *Article 4* was intended to make explicit that the present articles were not intended to override any specific agreements that States might wish to conclude regarding the activities covered by the topic.

318. The relationship between the present topic and that of State responsibility was dealt with in *article 5*. It was perfectly conceivable that a régime of responsibility for wrongfulness might coexist with one of causal liability within one and the same system. The decision of the arbitral tribunal in the *Trail Smelter* case<sup>200</sup> had provided for a twofold régime of responsibility for wrongfulness and strict liability. It had established certain preventive measures which the smelter was obligated to take and which the tribunal presumed would be sufficient to prevent further injury caused by fumes in the State of Washington. Nevertheless, the tribunal had determined that, should appreciable harm occur even though Canada took such measures, Canada would have to provide compensation.

319. *Article 7* now dealt more specifically with the obligations stemming from the principle of co-operation. Co-operation could be directed towards preventing or towards minimizing transboundary harm. In the first case, co-operation was aimed at minimizing the risk of activities involving risk; in the second case, it was aimed at keeping the harmful effects below the threshold of appreciable harm. The obligation of co-operation was based on good faith. Thus the affected State was expected to co-operate with the State of origin in order to prevent

<sup>198</sup> *Yearbook ... 1986*, vol. II (Part One), p. 151, document A/CN.4/402, para. 29.

<sup>199</sup> United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), p. 1905.

or minimize the harm. It would, however, be unfair to place such an obligation on the affected State if the State of origin had known in advance that the activity it was about to undertake would cause transboundary harm but had nevertheless gone ahead with it.

320. Under *article 8*, States were required to take appropriate measures to prevent or, where necessary, minimize the risk of transboundary harm. That duty was not absolute, since the article modified it by requiring States to use, in so far as they were able, the best practicable, available means. Thus, if an activity was carried on by a State or one of its agencies or enterprises, it was the State or its enterprise that would have to take the corresponding preventive measures. If the activity was carried on by private individuals or corporations, they would have to institute the actual means of prevention and the State would have to impose and enforce the corresponding obligation under its domestic law. In that regard, account had to be taken of the special situation of developing countries, which so far had suffered most from, and contributed least to, the global pollution of the planet. It was for that reason that, in referring to the means of prevention, article 8 provided that States had to use them “in so far as they are able” and that such means must be “available” to States. Since the topic was based on the logic of strict liability—mitigated by negotiation and the “costs-allocation” principle—the obligation of prevention stipulated in article 8 could remain, if the Commission so decided, as a form of co-operation, and its breach would not give rise to any right of action on the part of the affected State.

321. The revised *article 9* made no reference to the fact that harm “must not affect the innocent victim alone”, as the previous text<sup>201</sup> had done. That phrase had been criticized as inappropriate because it gave the impression that the innocent victim must bear the major burden of the harm. Under the new formulation, reparation would still have to be determined through negotiation, in which a number of factors would be examined. That would be the subject-matter of additional articles to be proposed in the future. Harm under the present articles should be viewed as an element which upset the balance of interests in the relationship between the State of origin and the affected State, and reparation should be aimed at restoring the balance of interests between the parties.

322. The latter part of the Special Rapporteur’s fifth report dealt with procedures for preventing transboundary harm. Those procedures focused on assessment, notification and warning in respect of activities referred to in article 1. They were the subject of the new draft articles 10 to 17 of chapter III, which read as follows:

### CHAPTER III. NOTIFICATION, INFORMATION AND WARNING BY THE AFFECTED STATE

#### *Article 10. Assessment, notification and information*

If a State has reason to believe that an activity referred to in article 1 is being, or is about to be, carried on in its territory or in other places under its jurisdiction or control, it shall:

- (a) review that activity to assess its potential transboundary effects and,

<sup>201</sup> Former draft article 10 (see footnote 197 above).

if it finds that the activity may cause, or create the risk of causing, transboundary harm, determine the nature of the harm or risk to which it gives rise;

(b) give the affected State or States timely notification of the conclusions of the aforesaid review;

(c) accompany such notification by available technical data and information in order to enable the notified States to assess the potential effects of the activity in question;

(d) inform them of the measures which it is attempting to take to comply with article 8 and, if it deems it appropriate, those which might serve as a basis for a legal régime between the parties governing such activity.

#### *Article 11. Procedure for protecting national security or industrial secrets*

If the State of origin invokes reasons of national security or the protection of industrial secrets in order not to reveal some information which it would otherwise have had to transmit to the affected State:

(a) it shall inform the affected State that it is withholding some information and shall indicate which of the two reasons mentioned above it is invoking for that purpose;

(b) if possible, it shall transmit to the affected State any information which does not affect the areas of reservation invoked, especially information on the type of risk or harm it considers foreseeable and the measures it proposes for establishing a régime to govern the activity in question.

#### *Article 12. Warning by the presumed affected State*

If a State has serious reason to believe that it is, or may be, affected by an activity referred to in article 1 and that that activity is being carried on in the territory or in other places under the jurisdiction or control of another State, it may request that State to apply the provisions of article 10. The request shall be accompanied by a documented technical explanation setting forth the reasons for such belief.

#### *Article 13. Period for reply to notification. Obligation of the State of origin*

Unless otherwise agreed, the notifying State shall allow the notified State or States a period of six months within which to study and evaluate the potential effects of the activity and to communicate their findings to it. During such period, the notifying State shall co-operate with the notified State or States by providing them, on request, with any additional data and information that is available and necessary for a better evaluation of the effects of the activity.

#### *Article 14. Reply to notification*

The State which has been notified shall communicate its findings to the notifying State as early as possible, informing the notifying State whether it accepts the measures proposed by that State and transmitting to that State any measures which it might itself propose in order to supplement or replace such proposed measures, together with a documented technical explanation setting forth the reasons for such findings.

#### *Article 15. Absence of reply to notification*

1. If, within the period referred to in article 13, the notifying State receives no communication under article 14, it may consider that the preventive measures and, where appropriate, the legal régime which it proposed at the time of the notification are acceptable for the activity in question.

2. If the notifying State did not propose any measure for the establishment of a legal régime, the régime laid down in the present articles shall apply.

#### *Article 16. Obligation to negotiate*

1. If the notifying State and the notified State or States disagree on:

- (a) the nature of the activity or its effects; or
- (b) the legal régime for such activity,

#### ALTERNATIVE A

they shall hold consultations without delay with a view to establishing the

facts with certainty in the case of (a) above, and with a view to reaching agreement on the matter in question in the case of (b) above.

#### ALTERNATIVE B

they shall, unless otherwise agreed, establish fact-finding machinery, in accordance with the provisions laid down in the annex to the present articles, to determine the likely transboundary effects of the activity. The report of the fact-finding machinery shall be of an advisory nature and shall not be binding on the States concerned. Once the report has been completed, the States concerned shall hold consultations with a view to negotiating a suitable legal régime for the activity.

2. Such consultations and negotiations shall be conducted on the basis of the principle of good faith and the principle that each State must show reasonable regard for the rights and legitimate interests of the other State or States.

#### *Article 17. Absence of reply to the notification under article 12*

If the State notified under the provisions of article 12 does not give any reply within six months of receiving the warning, the presumed affected State may consider that the activity referred to in the notification has the characteristics attributed to it therein, in which case the activity shall be subject to the régime laid down in the present articles.

323. The Special Rapporteur said that one of the bases for obligating States to take certain procedural steps to prevent transboundary harm was the principle of co-operation already laid down in draft article 7. From the duty to co-operate followed a duty for States to ascertain whether the activities about to take place in their territory involved a risk of transboundary harm. If there was such a risk, the potentially affected State should be notified. In some cases, joint action by both States might be necessary if prevention was to be effective. Some measures taken from the territory of the affected State could perhaps prevent the harmful effects arising in the State of origin from being transmitted to the territory of the former. Thus the new draft articles 10 to 17 of chapter III embodied specific features of the principle of co-operation.

324. In terms of the general structure of chapter III, draft articles 10 to 12 dealt with the first stage of procedures for the prevention of transboundary harm and the formulation of a régime governing the activities referred to in article 1. Draft articles 13 to 17 dealt with the steps following notification by the State of origin of the existence of an activity which might cause transboundary harm. These articles were drawn, *mutatis mutandis*, from part III of the draft articles on the law of the non-navigational uses of international watercourses, provisionally adopted by the Commission at its previous session.<sup>202</sup>

325. The three functions of assessment, notification and information laid down in article 10 were interrelated. For example, a notification could not be made unless the State of origin had first made an assessment of the possible effects of activities in its territory. The obligations set out in this article derived not only from the obligation to co-operate, but also from every State's duty to refrain from knowingly permitting its territory to be used for acts contrary to the rights of other States. Under the article, the State of origin had, first, to assess the potential effects of the activity; secondly, to notify the affected State if the assessment indicated possible transboundary harm; and,

thirdly, to transmit the available technical information so that the affected State could arrive at its own conclusions as to the potential effects of the activity. Thus the State of origin was required to inform the affected State of any unilateral measures of prevention it intended to take.

326. Article 11 dealt with the procedure for protecting national security interests or industrial secrets. There were situations in which the disclosure of information would be detrimental to the State of origin. It would be unfair to compel a State to divulge to its competitors industrial processes of great value. Occasionally, because of national security, certain types of information about an activity might have to be withheld. In such cases, however, where harm was presumably attributable to such an activity, the affected State should be allowed to draw on circumstantial evidence to establish that the harm was caused by that activity. The Special Rapporteur said that an article to that effect could be drafted.

327. Article 12 complemented article 10 by giving the presumed affected State the right to ask the State of origin to comply with its obligations under article 10 when the former had serious reason to believe that the latter was carrying on, or about to carry on, activities involving potential transboundary harm.

328. With regard to the procedural obligations set forth in draft articles 13 to 17, two questions should be addressed: first, whether the State of origin had to postpone an activity pending a satisfactory agreement with the presumed affected State; and, secondly, whether ongoing activities such as the disposal of wastes, the use of certain fertilizers, etc. were to be tolerated and, if so, to what extent. In dealing with those issues, the Special Rapporteur had drawn from the draft articles on the law of the non-navigational uses of international watercourses where appropriate.

329. As regards the first question, namely whether an activity should be postponed pending an agreement, the Special Rapporteur opted for non-postponement. The draft articles provided for an interim régime under which the State of origin could begin or continue the activity without waiting for the consent of the affected State. In such a case, however, the State of origin would immediately assume liability for any harm it might cause if the activity proved to be one referred to in article 1.

330. As for the second question, namely the status of ongoing activities causing transboundary harm, the draft articles offered a transitional solution. Most such activities were generally tolerated by all States. Many States were both States of origin and affected States with respect to such activities. Yet most such activities were regularly reviewed and were the subject of international negotiations to mitigate and ultimately remove their harmful effects. The draft articles were aimed only at requiring States to negotiate a régime for such activities and, in the absence of such a régime, to negotiate reparation for the harm that such activities might cause. If the Commission felt that the matter should be treated differently, the procedural rules could be amended later.

331. Article 13 was based, *mutatis mutandis*, on articles 13 and 14 of part III of the draft articles on the law of the non-navigational uses of international watercourses.<sup>203</sup>

<sup>202</sup> For the texts and the commentaries thereto, see *Yearbook ... 1988*, vol. II (Part Two), pp. 45 *et seq.*

<sup>203</sup> *Ibid.*, pp. 49-50.

Under this article, the notifying State must, unless otherwise agreed, allow a period of six months for the notified State to evaluate the potential harm of the activity in question and send its reply. The notifying State was under an obligation to co-operate with the notified State or States by providing them, on request, with any additional data and information that was available and necessary to evaluate the effects of the activity. The parties could, of course, agree on a shorter or longer time-limit than the six months stipulated in the article.

332. *Article 14* dealt with the reply of the notified State, which was under an obligation to communicate its acceptance or rejection of the preventive measures or legal régime proposed by the State of origin. Under *article 15*, silence on the part of any of the presumed affected States on those points implied acceptance.

333. *Article 16* contemplated the case in which the parties disagreed on the potential harm of a particular activity. In such a case, the parties were under an obligation to negotiate. That obligation was well established in international law as a first and preferred step for resolving conflicts. Of course, the obligation to negotiate was not unlimited. Good faith and reasonableness set the limits. The disagreement between the parties might be about (a) the nature of an activity (its risk or the extent of harm); or (b) the effectiveness of the proposed preventive measures or legal régime to govern the relationship between the parties in respect of the activity. Article 16 provided alternatives. Since the first type of disagreement was on factual issues, the parties could either negotiate with each other to resolve the problem or establish fact-finding machinery of a solely advisory nature. The establishment of fact-finding machinery had been proposed by the previous Special Rapporteur in the schematic outline<sup>204</sup> (sect. 2 (6)). However, when it came to resolving a disagreement about compensation for harm caused by an activity, there was no alternative to negotiation.

334. *Article 17* complemented article 12 and dealt with the situation in which a State of origin, having been requested by the presumed affected State to supply information, failed to reply within six months. Under article 17, such failure to reply implied acceptance by the State of origin (the notified State) of the conclusions about an activity reached by the presumed affected State (the notifying State). The activity in question would accordingly become subject to the régime laid down in the draft articles.

## 2. CONSIDERATION OF DRAFT ARTICLES 1 TO 9 BY THE COMMISSION

### (a) General comments

335. A number of observations of a general nature were made. These observations touched upon the approach to the topic and its scope, including the question whether the articles should apply to activities causing harm or creating a risk of causing harm to the so-called "global commons".

### (i) Approach to the topic

336. It was observed by some members that, as the Commission's work on the topic progressed, the complexities and special character of the topic became more evident. The submission of many draft articles by the Special Rapporteur enabled the Commission to understand better and bring into proper perspective the principles upon which the topic could more securely rest. Admittedly, the topic required the use of many new concepts, some borrowed from the law of tort, which was more familiar to some legal systems than to others. Another trait of the topic was the need to develop international law within the parameters established by the terms of reference of the topic itself, which did not refer to "licit" or "illicit" acts but to acts "not prohibited by international law". These problems, however, were not insurmountable. The Commission should not hesitate to borrow from other branches of law, such as the law of the non-navigational uses of international watercourses, State responsibility and the draft Code of Crimes against the Peace and Security of Mankind, when appropriate. Also, the Commission had to be flexible in seeking precedents for its work. The topic could benefit from both treaty practice and arbitral and judicial decisions. In the view of many members, there was considerable State practice, both conventional and in the area of judicial decisions, which ascribed liability to certain lawful activities causing transboundary harm. The conventions, of course, focused on specific and clearly identifiable activities, but that did not diminish their usefulness, for two reasons. First, the proliferation of those various conventions suggested that a more general régime was legally feasible. Secondly, the conventions themselves, as evidence of State practice, might provide a basis for generating an international régime.

337. The above point of view was not shared by all members of the Commission. One member observed that, when the Commission had started its work on the topic, it had done so without any firm assumption that international liability existed for transboundary harm arising out of acts not prohibited by international law. This member felt that there was no generally applicable principle whereby the State of origin incurred liability for transboundary harm. The matter, he believed, fell in a grey area. Under such circumstances, two approaches could be taken to the topic. The first was to engage in progressive development of the topic and impose strict liability for all activities causing transboundary harm. The second was to concentrate on prevention and impose liability for failure to take preventive measures. Thus the notion of State responsibility could be extended to the grey area in question, despite the fact that that had not originally been envisaged by the Commission. This member preferred the second approach and felt that the first one would prove to be problematic.

338. A few members felt that the foundation of rules governing strict liability in international law was an innovation and did not derive from considerable State practice. In the view of one member, invocation of principles selectively taken from individual decisions of domestic courts was not always justified, since the decisions of domestic courts and domestic law were not sources of international law. In his view, the Commission's aim at the present time should be to find a

<sup>204</sup> See footnote 192 above.

realistic and balanced approach to the topic that would take account of the interests of all States and of mankind as a whole. The approach should therefore be in terms of laying down legal foundations and identifying guiding principles for concluding agreements between States in respect of certain activities causing transboundary harm in which a State was not at fault.

339. It was pointed out that, in conceptualizing the topic, it had to be remembered that the régime established must eventually be reconciled with those contained in bilateral and multilateral treaties. It was stated that the reconciliation of the articles on the present topic with bilateral treaties would not pose major difficulties, since the parties could choose the régime they wished to apply to the activity in question. In respect of multilateral treaties, the problem could be resolved by clarifying the purpose of the topic. The purpose of the topic could be to regulate activities causing transboundary harm in the most general terms possible. In other words, the articles might be drafted in a way that was appropriate for a residual convention: the substantive rules would be couched in very general terms, it being left to special conventions to go further and be more specific. If the topic was to be approached in such general terms, in the view of another member, the Charter of Economic Rights and Duties of States<sup>205</sup> could be helpful, particularly in terms of elaborating the general provisions. Yet another member wondered whether, in view of the rapid expansion of environmental law in the form of specific conventions, there was still a need for a kind of "umbrella" convention. A list indicating activities covered by the present articles was still considered preferable by some members. State practice showed that a "list approach" was not so impracticable as had been argued during the Commission's debate at its previous session. Many other international instruments had adopted that approach. Such a list of activities would more clearly define and limit the scope of the topic and would make the articles acceptable to more States.

340. According to one member, the Special Rapporteur had not always drawn the line between the topic of State responsibility for wrongful acts and the present topic. In describing risk, the Special Rapporteur had built on the concept of "original fault" of the person undertaking an activity which caused an accident leading to transboundary harm. Even though the legal writings in some cases distinguished between "risk" and "fault", this member believed that both concepts stemmed from the same basic texts. The Commission had decided to deal with these two types of responsibility separately, but was it necessary to seek fundamental differences between the two? He believed all the rules on cessation and reparation in the context of State responsibility were equally applicable here. In the view of another member, however, drawing such a parallel between the present topic and that of State responsibility was misleading. State responsibility was related to secondary rules, whereas, under the present topic, it was a question of drawing up primary rules centred on protecting the environment. Yet, according to another member, while the Commission should draft a convention on the protection of the environment, such a convention was different from one on activities not prohibited by international law.

341. Some members felt that it might be useful to consult experts and the competent international organizations, as well as to seek the views of States themselves. That would help, in their view, to conceptualize the topic in the light of actual situations and specific activities which were generally agreed to pertain to the topic. It was preferable to take a problem-solving approach, since these members believed the ultimate question was whether the Commission was ready to meet an existing international problem and to initiate guidance as to how to deal with increasing transboundary harm, a by-product of the present civilization based on science and technology. They believed the Commission must look ahead and envisage the situations in which States might harm each other by certain types of activities, or harm the environment. Thus it should examine ways in which it could prevent or resolve future upheavals, aiming at improving the quality of life and building upon international solidarity and interdependence.

#### (ii) *Scope of the topic*

342. Some members of the Commission commented on the Special Rapporteur's introductory remarks about the situations in which harm might occur, as a result of activities covered by the present topic, to the "global commons", i.e. areas beyond the national jurisdiction of any State and in particular those constituting the common heritage of mankind. In their view, the Commission could not ignore the perceived need to deal with harm to the human environment and to reflect the growing awareness of new conceptual approaches to the "global commons". It was generally acknowledged, it was said, that a State had sovereignty over its atmosphere up to the point at which outer space began. Nevertheless, there was a growing tendency to see the atmosphere as belonging to the "global commons", in other words to the shared resources of mankind, and it was necessary to consider how such a concept could be reconciled with the principle of sovereignty. Obviously the problem was not simple, nor was it any longer an academic one. Given current controversies surrounding the impact of chlorofluorocarbons on the ozone layer, the question as to how liability was to be determined in such a case could not simply be shelved. In the view of one member, it was possible that other forms of legal régime might be designed in the future to deal with certain activities having a harmful effect on the environment. In those régimes, legal grounds other than no-fault liability might be invoked. But, in the mean time, the Commission should continue its work on the topic on the assumption that it included activities harmful to the environment and should adopt the no-fault approach to liability. A few other members, however, were not entirely certain about the wisdom of including this problem in the topic, since it might make the topic unmanageable. One member felt that the Commission should postpone a decision on the matter until further progress had been made on the topic. The Commission could then decide whether or not to include activities affecting the "global commons".

343. Many members welcomed the shift of emphasis in the scope of the topic. The scope as defined at the previous session had linked the application of the articles to activities involving a risk of causing transboundary harm. In response to much demand in the Commission

<sup>205</sup> General Assembly resolution 3281 (XXIX) of 12 December 1974.

and in the Sixth Committee of the General Assembly, the Special Rapporteur had—in their view, rightly—revised the scope. Under the revised formulation, the articles applied both to activities involving a risk of causing transboundary harm and to those causing transboundary harm. The concepts of risk and harm thus played an equally important role in the topic. For these members, the criteria of risk and harm had been brought into proper perspective and laid the foundations for building the two important components of the topic, namely prevention and reparation.

344. Concern was expressed about the inclusion of appreciable harm within the scope of the articles as the basis of liability by itself. One member felt that that was tantamount to establishing absolute liability for any appreciable harm and that it would make the dividing line between the present topic and that of State responsibility less clear. He believed that making harm the only basis for liability gave the topic a new conceptual basis which undermined its former grounds. Harm—without risk—as the sole basis of liability would deprive measures for the prevention of harm of all legal foundation. For how would States co-operate to prevent harm in the absence of any postulation of risk? This member added that he would like to have an indication of precisely the type of lawful activities—activities in which the element of risk could not be identified—intended to be covered by the new scope. In short, he had serious reservations about the new basis of the scope of the topic. Another member believed that the new formulation would make the articles less acceptable to States in the absence of a list of activities to which the articles applied, as States might not be prepared to assume obligations which were not precisely defined. He felt that the Commission should not abandon the idea of establishing a list of activities covered by the topic.

345. In elaborating on the concept of risk, a few members cautioned the Special Rapporteur that he should not equate risk with conditional or contingent “fault”. That was a legal fiction unhelpful for serving as a basis for liability for activities involving risk. State practice did not support risk ever being considered as hidden fault. In the view of one member, the concept of unjust enrichment might serve as a legal basis for no-fault liability, since it was based on a compensatory régime and on notions of cost-allocation.

346. One member pointed out that, in the Special Rapporteur’s fifth report (A/CN.4/423) and in the Commission’s debate, the expressions “strict liability” and “absolute liability” seemed so far to have been used interchangeably. His own understanding was that strict liability was based on harm, not on fault. As he saw it, there was either an existing or an evolving norm of strict liability for environmental injury. Absolute liability, he said, meant liability without limitation of any kind. That type of liability was imposed in a number of multilateral treaties in respect of such matters as damage caused by nuclear installations. There were, of course, some differences between various treaties with regard to such matters as exemptions, but they clearly set forth the rule of liability without fault, not responsibility founded on risk. However, he felt that risk—and particularly exceptional risk—was relevant to the topic.

347. In summing up the debate, the Special Rapporteur said, with respect to the general comments made by members, that he had been bound, as Special Rapporteur, to take into account the very strong views expressed in the Commission and in the Sixth Committee of the General Assembly the previous year. He believed those views had urged him to give an equally important role to the concepts of harm and risk and he had therefore revised the scope of the topic. He hoped that, as the work on the topic progressed and its peculiarities and special character became more evident, the Commission would be in a better position to limit the scope, if it found it appropriate. For now, in the light of the views expressed in the current debate, he believed he should continue on the assumption that the concepts of harm and risk were both present in the scope of the topic.

348. As regards the issue of liability for harm to the “global commons”, he appreciated the views of those members who had addressed the question. He agreed with many members that, in principle, activities leading to harm to the “global commons” were a part of the present topic. He would, however, like to study the matter further and report to the Commission at the next session.

349. The Special Rapporteur pointed out that some of the draft articles and proposals he had submitted so far and would be submitting were experimental, since the topic took the Commission into new areas. He would revise them on the basis of the guidance and comments he received from the Commission and the Sixth Committee. Obviously, some of the proposals would lead to lengthy discussions in the Commission, since many members held strong views on the direction in which the topic should move. He considered those discussions useful. He only wished to stress that the Commission had been given a mandate by the General Assembly and should fulfil that mandate.

350. Regarding some of the views expressed on the role played by strict liability in the topic, the Special Rapporteur considered that account should be taken of the fact that such liability was already considerably mitigated in the schematic outline,<sup>206</sup> from which he saw no reason to deviate in that respect. There seemed to be a widely shared view in the Commission in favour of no liability before transboundary harm occurred; and even when such harm occurred, there had, up to now, been no obligation other than to negotiate the compensation due. With regard to the suggestion that he should not equate risk with “contingent” or “conditional” fault, the Special Rapporteur said that he had no such intention and that, in his fifth report (*ibid.*, paras. 5-7), he had not tried to introduce a legal theory of conditional fault for activities involving risk: he had only attempted to explain the psychological mechanisms operating in the field of responsibility in general when it came to looking for the person responsible. As to the question of a list of activities which would constitute the scope of the topic, he continued to believe, without prejudice to the possibility of re-examining the matter once more, that such a list would better be the subject of a protocol or of a regional convention entered into within the framework of the present articles.

<sup>206</sup> See footnote 192 above.

(b) *Comments on specific articles*

351. Many members of the Commission welcomed the revision of the articles of chapters I and II of the draft. The revised articles 1 to 9 were much improved and had taken into account the opinions of many members of the Commission and of representatives in the Sixth Committee of the General Assembly. Even though the original articles of chapters I and II were already before the Drafting Committee, some members felt it necessary to comment on the revised texts. Some comments were of a drafting nature, while others related to the substance of the articles.

(i) *Chapter I. General provisions*

**ARTICLE 1 (Scope of the present articles)**

352. In addition to the general comments made about the scope of the topic (see paras. 342-346 above), more specific comments were made with respect to draft article 1.

353. With regard to the question whether the articles should apply to "activities" or to "acts", many members preferred the term "activities". "Activities", they felt, properly formed the subject-matter of the present articles and, in particular, more clearly expressed the conduct which gave rise to harm through cumulative effect. Thus it was suggested that it was better for the Commission to concentrate on "activities" that could give rise to harm of a physical nature, either because of an accident or due to continuing pollution.

354. A few members, however, expressed a different view. They agreed that the main purpose of the articles should be to regulate activities through procedures to prevent transboundary harm, i.e. to create a legal régime. But harm could result from acts or from situations, whether or not they were associated with activities. There were many acts or man-made situations which could produce transboundary harm even if they were not related to activities. Besides, the distinction between activities and acts was not entirely clear. For example, if a nuclear power plant was dismantled and the operation caused transboundary harm, would the dismantling be considered an act or an activity? Thus the distinction between acts and activities could prove to be superficial. Even if there was a real and identifiable distinction between acts and activities, limiting the articles to activities would ignore the principle that an innocent victim should not be left alone to bear the loss.

355. The view was also expressed that the concept of "activities" seemed to exclude transboundary harm caused by a "situation". Sometimes transboundary harm occurred not as a result of activities or acts, but as a result of the existence of a state of affairs. The concept of a "situation" was thus essential and should be included in article 1.

356. In the view of some of those members who supported the inclusion of both harm and risk in the definition of scope in article 1, some structural changes in the draft articles might be required. It might be better, they felt, to treat separately the provisions on risk and

those on harm. The view was expressed that the evaluation of harm and the evaluation of risk were closely linked and interdependent and that one could in no circumstances be placed in opposition to the other, as seemed to have been done in article 1.

357. A number of comments were made regarding the terms "territory", "jurisdiction" and "control". Some members found the use of the three terms together preferable, since they covered all the cases of transboundary harm. Some others found the term "territory" unnecessary. A few members preferred the expression "effective control" to "control". They believed the adjective "effective" could take account of the special situation of developing countries which might not have *effective* control over the activities of multi-national corporations in their territory. One member doubted, however, that that formula could effectively protect developing countries. Since the concepts of "jurisdiction" and "control" in the draft articles were now limited to "places", they would no longer cover the jurisdiction and control exercised by the home State of a multinational corporation whose harmful activities took place in a foreign State. A different formula would have to be found to cover those cases. Another member felt that "jurisdiction" took three forms: territorial, functional or *de facto* (control). Thus "control" was not always an alternative to "jurisdiction". In his view, they could be cumulative.

358. Some members found the use of certain expressions in article 1 vague and thought they could be improved. The expressions "throughout the process" and "places", for example, were unusual and should be replaced. A few members found it unnecessary to discuss these matters of detailed drafting and believed they should be left to the Drafting Committee.

**ARTICLE 2 (Use of terms)**

359. Many members felt that the definitions in draft article 2 were provisional and that the Commission would have to come back to them when more progress had been made on the topic. Some members, however, made specific comments about the use of certain terms in the article.

360. Some members found the expression "appreciable risk" satisfactory. They agreed with the Special Rapporteur that any other criterion raising the threshold of risk would be unfair to the presumed affected State. Many other members, however, felt that "appreciable risk" fell below the accepted international threshold embodied in treaties. They felt that, even though the adjective "appreciable" had been used by the Commission in the context of the draft articles on the law of the non-navigational uses of international watercourses, it was inappropriate for the present topic, which dealt with many diverse forms of activities. In more recent State practice, expressions such as "significant risk", "significant impact" and "significant effects" had been used, but never the expression "appreciable risk", which signified a much lower threshold. Similarly, it was suggested that the expression "appreciable harm" should be replaced by "significant harm". According to these members, the Commission should follow State practice. If

it was intended to limit the freedom of States to conduct activities not prohibited by international law, those activities should involve more than an "appreciable" risk of causing transboundary harm.

361. It was also felt that the adjective "appreciable" qualifying "risk" meant detectable or foreseeable, by comparison with hidden or imperceptible risk. Hence a better word might be "detectable". But when the term "appreciable" applied to harm, it implied a point on a scale, and it might be preferable to replace it by "significant".

#### ARTICLE 3 (Assignment of obligations)

362. Some members agreed with the change of the title of draft article 3 from "Attribution" to "Assignment of obligations". The word "attribution" could have created confusion between the present topic and that of State responsibility, particularly in view of the fact that in the latter there were specific rules applied in imputing an act to a State which had no bearing on the present topic. Some members were not entirely certain that the term "assignment" was the best choice, but agreed that "attribution" was inappropriate.

363. As to the content of the article, some members found the revised text an improvement on the previous wording, particularly since the new formulation placed the burden of proof of lack of knowledge or means of knowing on the State of origin. In that regard, some members said that attention should be paid to the special needs of the developing countries. With the imposition by the industrialized countries of strict environmental rules on the manufacture of chemical and toxic materials, many manufacturers were moving their operations into developing countries where there were no such rules. Faced with enormous burdens of poverty and external debt, many developing countries were not in a position to resist something which in the short term seemed like an attractive economic opportunity. In most cases, these multinational corporations, while assuming the nationality of the developing country in question, remained under the control of the parent corporation. Article 3 ignored this particular difficulty facing developing countries and thus alternative formulations must be found. On this issue, one member expressed a different opinion. He said that he was sympathetic to the view that the interests of the developing countries had to be safeguarded, but he was not certain that the best way to do so was to make liability conditional on knowledge or means of knowing on the part of the State of origin. That, in his opinion, was a deviation from basic principles of law. Besides, this requirement was so generally formulated that it could apply to all States, including developed countries, at the expense of developing countries.

#### ARTICLE 4 (Relationship between the present articles and other international agreements) and

#### ARTICLE 5 (Absence of effect upon other rules of international law)

364. Very few members commented on these two articles. With regard to draft article 4, some members felt

that more careful consideration should be given to reconciliation of the articles on the present topic and other international agreements. One member observed that there were many legal instruments already setting standards which were much more detailed and stringent than the rules proposed by the Special Rapporteur. Yet those instruments did not form a coherent whole. The Commission, by contrast, was attempting to devise a coherent and comprehensive legal framework, one which could, however, perform only a subsidiary function, since specific rules must always take precedence. In that connection, he felt that article 4 failed to take sufficient account of the importance that should be accorded to such international agreements.

365. A comment was also made that the obligations and the standards of absolute liability which could be found in other international agreements on similar subject-matter could coexist with the less rigorous obligations enunciated in the present articles. Because article 4 waived the rule of *lex specialis*, the obligations contained in such agreements could be diluted if the States parties were also parties to the present articles. If that were to happen at a time of increasing awareness of the importance of environmental problems, the Commission's reluctance to admit a standard of absolute liability would be a step backward.

366. Another member said that the ultimate form the present articles took would better determine their relationship to other international agreements. If the final instrument were to be a multilateral convention, then paragraph 3 of article 30 of the 1969 Vienna Convention on the Law of Treaties<sup>207</sup> would be applicable, since the situation would be one of successive treaties. If, on the other hand, the present exercise was a restatement of the law, then he did not see the need for draft article 4.

367. As regards draft article 5, one member preferred alternative B. Another member saw no need for the article and preferred to leave the matter to the general rules of international law and to the law of treaties.

#### (ii) Chapter II. Principles

#### ARTICLE 6 (Freedom of action and the limits thereto)

368. A few members commented on draft article 6. It was pointed out that the provision represented a compromise between the sovereign right of a State to act freely within its territory and the inviolability of other States' territory from adverse effects caused by activities undertaken in the territory of the former. One member wondered whether States were ready to accept such a compromise in respect of lawful activities. Another member, while agreeing that gaining such acceptance would not be an easy task, saw no other solution if the planet was to be preserved. This compromise could be explained in terms of the general principle of good-neighbourliness, as set out in Article 74 of the Charter of the United Nations.

#### ARTICLE 7 (Co-operation)

369. Some members welcomed the new formulation of draft article 7, which implied that the State of origin and

<sup>207</sup> United Nations, *Treaty Series*, vol. 1155, p. 331.

the affected State should join efforts in combating transboundary pollution or the risk thereof. They also approved the fact that the article dealt with co-operation for prevention and reparation separately. As regards the obligation of co-operation with international organizations, some members felt that such an obligation should not be absolute, for in some cases it might not be wholly desirable. Others, however, found the reference to international organizations timely and useful.

370. A few members found the precise legal content of the principle of co-operation as drafted in article 7 unclear. The article should state the fundamental principles of international law on which co-operation between States, in this respect, rested. Since the principle of co-operation was central to the topic, it must be given a prominent place in article 7, and in that regard the article must be drafted more positively and the modalities of co-operation set out perhaps in the language of similar provisions in the 1982 United Nations Convention on the Law of the Sea.<sup>208</sup> Article 7 should also spell out the need for co-operation by the affected State in the case of activities involving a risk of harm as well as in that of activities which had already caused harm. It was also suggested that the article should differentiate more clearly between the rules applicable to activities involving risk and those applicable to activities causing harm.

371. The view was expressed by one member that the entire system of international co-operation in respect of prevention of and compensation for harm, both in the territory of the State of origin and in that of the affected State, was based on an approach in which risk was an essential element. The Special Rapporteur had retained that foundation for the special régime provided for in the draft, even though the existence of risk was no longer acknowledged as an essential element of liability. It was, however, impossible, in the view of this member, to perform a balancing act between two different approaches. He believed that that balance fell apart on dealing with the principle of co-operation. The revised text of article 7 was based on the philosophy of "alienation" or opposition between the "victim" and the party that was considered, implicitly if not explicitly, to be guilty. The former text of article 7<sup>209</sup> more properly required co-operation between both States of origin and affected States and was preferable.

#### ARTICLE 8 (Prevention)

372. Many members approved, in principle, of draft article 8, which placed the duty of prevention on the State of origin, regardless of the duty of co-operation set out in article 7. It was noted that article 8 limited the duty of prevention to the utilization of the best practicable, available means, but that it was not clear whether that limitation referred to the scientific and technological means existing in the world or to the means available to the State of origin, which might be of a lower standard. It was further suggested that the obligation of prevention should include that of minimizing actual harm.

<sup>208</sup> Official Records of the Third United Nations Conference on the Law of the Sea, vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 151, document A/CONF.62/122.

<sup>209</sup> See footnote 197 above.

373. Many members stressed that it should be clear that failure by the State of origin to take preventive measures, in the absence of any harm, should not be considered a wrongful act and should not entail any responsibility for that State. It was also stated that the view expressed by the Special Rapporteur in his fifth report to the effect that the obligation of prevention applied not only to States, but also to private individuals or corporations (A/CN.4/423, para. 66), seemed somewhat unusual. International conventions did not normally impose obligations directly upon individuals, but only on States, which had a responsibility to enact laws to enforce such obligations at the domestic level.

#### ARTICLE 9 (Reparation)

374. Many members agreed with the underlying principle of draft article 9, namely restoration of the balance of interests between the State of origin and the affected State. They approved of the approach of the article, which did not concern itself solely with cessation of restitution and was flexible enough to allow for different forms of reparation in accordance with the diverse nature of the activities covered by the present topic. They also approved of the provision in the article that reparation would have to be the subject of negotiation in good faith between States. It was pointed out, however, that either the meaning of the expression "balance of interests" should be clearly defined or the criteria by which such a balance could be achieved should at least be identified. A few members felt that the Special Rapporteur's view that reparation did not mean reparation for all the harm suffered was unclear. In their view, some additional guidance would be required with regard to the measures that must be taken to satisfy that obligation.

375. It was pointed out by a few members that, in the revised text, the concept of reparation had been dissociated from the concepts of the innocent victim and equity. It was true that the cause of harm was sometimes in the use of advanced technology which invariably harmed the State of origin too. But the fact was that the affected State had no role in causing the harm and the protection of its interests should have priority. One member, however, found it counter-productive to set a régime of reparation in which the fact was totally ignored that the State of origin was also harmed while carrying on pioneering activities and suffered even more than the innocent victim.

376. Some members suggested changing the title of the article, bearing in mind the specific meaning attached to reparation in the context of the topic of State responsibility. In the view of one member, article 9 seemed to deal more with the criteria governing negotiations than with those governing reparation.

#### 3. CONSIDERATION OF DRAFT ARTICLES 10 TO 17 BY THE COMMISSION

##### (a) General comments

377. Many members pointed out that, in formulating rules on the present topic and particularly in laying down procedural rules, it should be kept in mind that the Commission was not dealing with wrongful acts. Chapter

III of the draft, in their view, did not seem in its present form fully to reflect that fact. The chapter seemed to borrow heavily from part III of the draft articles on the law of the non-navigational uses of international watercourses.<sup>210</sup> However, the procedural provisions of the draft articles on international watercourses stemmed from extensive and continuing international practice and were embodied in a large number of instruments. While there were similarities between the two topics, there were also substantial differences. The procedures envisaged for the present topic must be capable of being applied to many different types of activities and situations. The proposed procedures were drafted on the assumption that it was possible to identify in advance the potentially affected State or States and also the State of origin. But in many cases of transboundary pollution that was not localized, such as long-range air pollution, the States likely to be affected were not necessarily known in advance and, since pollution could come from various sources, it was not possible to determine which was the State of origin; indeed, there could be several such States.

378. The procedural obligations as drafted were found by some members not to be applicable in the case of harm to the "global commons". If the "global commons" were to be included in the scope of the topic, procedures should be applicable to situations in which the whole of the international community was considered to be affected and harmed.

379. Some members suggested providing, instead of negotiations, for a procedure for notification, or for the submission of periodic reports to an expert committee, as had been done in the case of human rights and of the law of the sea. These expert committees could be appointed by States and operate under the auspices of international organizations.

380. It was also pointed out by some members that the obligation of negotiation should not be confused with that of consultation. The former obligation represented almost the conclusive stage in a series of procedural steps which had to be performed by all the parties with respect to the activities covered by the topic. The latter obligation, however, did not necessarily imply an agreement at the end of consultations. Consultations took place between official representatives of States for the purpose of clarifying points of view and, if necessary, of finding a solution. The approach in chapter III of the draft, however, seemed to lead towards an obligation for the States concerned to agree on a régime. But there was, in the view of these members, no general rule of international law which obligated a State to negotiate a régime for lawful activities involving potential transboundary harm. Even the more recent work being done in the area of environmental pollution required consultations and not negotiations. The procedural obligations should not amount to a right of veto for the potentially affected State over the activities of the State of origin.

381. The procedures set out in draft articles 10 to 17 were viewed by some members as complex and burdensome for States. The purpose of such rules was also somewhat unclear. For example, the six-month period stipulated in draft article 13 for reply to

notification was meaningless if the State of origin did not have to postpone the activity pending the reply. Besides, different procedures applied to activities involving a risk of transboundary harm and to those which caused such harm. The two situations were different, and it was difficult to imagine that the same procedures could usefully be applied in both cases.

382. With regard to procedural steps for prevention, the Special Rapporteur, in his summing-up, stated that there were really only three possible solutions. The first was to formulate detailed procedures for compliance. The second was to formulate general procedural articles with much flexibility in their application. The third was not to contemplate any procedural rules. It was clear to him that the Commission did not approve of the first solution, namely designing detailed procedural rules as he had already done in draft articles 10 to 17. The third solution was not attractive simply because, in the absence of any procedures, the participation of the presumed affected State was not assured, and consequently there would be neither any guide for measures of prevention nor any criteria by which the affected State or States could determine whether any preventive measures had been taken. The role of prevention in the draft articles would then be seriously diminished. He therefore preferred the second solution, which would provide general and flexible procedures for the implementation of preventive measures, and he would submit draft articles to that end at the next session.

383. As regards having separate procedural articles for activities involving a risk of harm and for those causing harm, the Special Rapporteur agreed that it was a matter he should definitely explore. As a preliminary observation, however, he wished to point out that there could not be a complete separation between procedural articles for activities involving a risk of harm and those for activities causing harm. Some procedures were common to the two types of activities and should apply to both. For example, the obligations of assessment of the consequences of an activity, exchange of information and notification were equally applicable to both types of activities. A partial separation of procedural rules might be more appropriate, and he would examine that possibility in his next report. Such a separation, he felt, was more unlikely when it came to the principles embodied in draft articles 6 to 9.

384. The Special Rapporteur pointed out that he himself had mentioned, when introducing his fifth report, that the articles of chapter III did not contemplate cases of extended harm or of risk thereof, such as long-range pollution or harm to the "global commons". As he had stated, he was aware of the problem and would explore the matter further in his next report.

#### (b) *Comments on specific articles*

##### *Chapter III. Notification, information and warning by the affected State*

##### **ARTICLE 10 (Assessment, notification and information)**

385. Some members, while agreeing in general with the substance of draft article 10, wondered whether the Commission should establish procedures as detailed as

<sup>210</sup> See footnote 202 above.

those proposed, since such procedures might not be appropriate for every type of activity. Obviously, the extent to which a State had fulfilled its obligation of prevention could constitute an important element in the assessment of liability, but the articles themselves did not need to enter into those details. A general article, whose application was left to specific agreements between States on a bilateral or regional level, was preferable. In that context, it was mentioned that it would be useful to explore the co-operative machinery established under regional agreements.

386. The requirement in subparagraph (b), namely timely notification of the affected State, was not applicable, in the view of some members, to situations in which the State of origin could not identify in advance the potentially affected State. The subparagraph should therefore be less categorical. One member felt that, since no decision had yet been taken by the Commission to include ongoing activities within the scope of the topic, the reference to activities "being . . . carried on" should either be deleted from the introductory clause or be placed in square brackets. In the view of another member, article 10 should encourage States to provide information without treating notifications as tantamount to an admission of guilt. Thus the article as drafted was appropriate for certain cases, such as the siting of potentially dangerous installations close to an international border, but in other cases it should be for the affected States to lodge objections.

#### **ARTICLE 11 (Procedure for protecting national security or industrial secrets)**

387. A few members commented on draft article 11. It was considered to be a traditional provision of the kind adopted by the Commission in the draft articles on the law of the non-navigational uses of international water-courses<sup>211</sup> and also to be found in the 1982 United Nations Convention on the Law of the Sea.<sup>212</sup> It would be preferable to follow the wording of those provisions for article 11 and delete the word "procedure" from the title. Instead of granting the State of origin the right to invoke reasons of national security, the article could simply stress that nothing in the present articles would prejudice the right of that State to protect sensitive information.

388. The fact that the Special Rapporteur had introduced an obligation of impact assessment and fact-finding in article 11 was welcomed. Some members pointed out that the Special Rapporteur had followed the considerable international practice in that regard. In particular, the draft Framework Agreement on Environmental Impact Assessment in a Transboundary Context being prepared by the Economic Commission for Europe<sup>213</sup> was especially useful, since it used and defined many of the terms—or their equivalents—used by the Special Rapporteur in the present articles.

<sup>211</sup> See article 20 (Data and information vital to national defence or security), provisionally adopted by the Commission at its previous session (*Yearbook . . . 1988*, vol. II (Part Two), p. 54).

<sup>212</sup> See footnote 208 above.

<sup>213</sup> See document ENVWA/AC.3/4, annex.

#### **ARTICLE 12 (Warning by the presumed affected State)**

389. Draft article 12 was not the subject of many comments. The purpose of the article, it was stated, was to afford the presumed affected State the possibility of approaching the State of origin to draw its attention to an activity being carried on, or about to be carried on, in the territory of the latter which might have possible harmful consequences in the territory of the former. One member found the reference to a "warning" by the presumed affected State in the title of the article and in the title of chapter III of the draft unusual, since it was normally the State of origin which would be issuing the warning. Another member suggested that the word "serious" in the first sentence of article 12 was unnecessary, since article 10—which contemplated a similar situation for the State of origin—spoke of "reason to believe" and not "serious reason to believe". The wording of the two articles should be harmonized.

#### **ARTICLE 13 (Period for reply to notification. Obligation of the State of origin) and**

#### **ARTICLE 14 (Reply to notification)**

390. A few members commented on draft articles 13 and 14. One member said that the reference to the "potential effects" of an activity (art. 13) indicated that the articles were directed at planned activities and not at ongoing activities. On the question whether or not the initiation of an activity should be postponed pending an agreement between the affected State and the State of origin, one member was in favour of postponement. In his view, certain types of physical harm were irreversible. To pay pecuniary compensation for past errors might satisfy the affected State, but could do little to alleviate harm to the environment. In his view, there were precedents for imposing interim measures of protection to avoid serious harm. The postponement of such activities was also supported by a principle of Islamic law, codified in article 30 of the Ottoman Civil Code, which provided that the avoidance of harm had priority over the acquisition of benefits.

#### **ARTICLE 15 (Absence of reply to notification)**

391. It was suggested that draft article 15 established an unusual legal system in that the primary obligation was still unspecified. By ignoring the fact that the object of the exercise was to draw up a residual régime, the Commission was proceeding towards a presumption in favour of the legal régime proposed by the affected State without, however, knowing what that régime would consist of.

392. One member found the solution proposed in article 15 reasonable, but felt that the rights of the presumed affected State should perhaps not be unlimited. There was therefore a need to formulate some form of estoppel to enable a State of origin which received no reply to continue its activity without fear. Article 15 seemed to be based on a bilateral approach and it was not entirely certain that it could function in the event of an accident causing widespread harm or in the event of creeping pollution, the effects of which were difficult to localize.

**ARTICLE 16 (Obligation to negotiate)**

393. It was pointed out that it was difficult to express the obligation to negotiate in an acceptable form. In the case of multi-State transboundary situations particularly, the Commission should, in the view of some members, introduce an obligation to pursue a settlement under the auspices of an international organization, where there would be a much greater likelihood of a successful outcome to negotiations. Thus draft article 16 might provide that each party could suggest that consultations take place through the good offices of an international organization.

394. A few members observed that the obligation to negotiate was unrealistic because it did not reflect the existing state of international law and presupposed that the international community had achieved a sufficiently advanced degree of integration. Within certain regional organizations, such as the European Economic Community, in which a higher degree of integration existed, it might be possible for States to negotiate legal régimes governing many of their own national activities within the community. But that would not be possible under the terms of an instrument as broad in scope as the present articles. Such negotiations could realistically be expected only among neighbouring States.

395. One member felt that the obligation to negotiate should not be drafted in such a way that it would settle by itself the question of liability. In other words, a State's refusal to negotiate should not in itself be sufficient to attribute liability to that State. In the view of another member, consultations and the establishment of fact-finding machinery were not necessarily alternatives: they might, in fact, be complementary.

**ARTICLE 17 (Absence of reply to the notification under article 12)**

396. Very few members commented on draft article 17. One member observed that the article added new elements of presumption and automaticity, similar to those in draft article 15. He did not think that such presumptions were acceptable, since they did not take account of all possibilities. He said that article 17 assumed that there would be no reply by the State of origin to the request of the presumed affected State; but what would happen if the State of origin did reply? Another member felt that the article should be developed further.

397. In summing up the debate, the Special Rapporteur said that, on the basis of the comments made, he understood that the Commission did not wish to have detailed procedural rules for prevention. The preference was for articles of a more general nature whose violation would not in itself give rise to any right of action. With regard to the obligation to negotiate under draft article 16, he would not go so far as to say that it implied an obligation to agree on a régime. It was simply an obligation to sit at the negotiating table with a view to reaching an agreement by acting reasonably and in good faith. As such, the obligation to negotiate was in his opinion well established in international law. However, mere consultations as a first step might be a better solution. He noted that only one member had spoken on the question of postponement of an activity covered by the present topic pending an agreement with the presumed affected State; he was therefore inclined to interpret the silence of many members as consent to his proposal for non-postponement. In the light of the debate, he did not ask that draft articles 10 to 17 be referred to the Drafting Committee. He agreed that they needed further work.

## Chapter VI

### JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

#### A. Introduction

398. The topic "Jurisdictional immunities of States and their property" was included in the Commission's current programme of work by decision of the Commission at its thirtieth session, in 1978, on the recommendation of the Working Group which it had established to commence work on the topic<sup>214</sup> and in response to General Assembly resolution 32/151 of 19 December 1977 (para. 7).

399. At its thirty-first session, in 1979, the Commission had before it the preliminary report<sup>215</sup> of the Special Rapporteur, Mr. Sompong Sucharitkul. The Commission decided at the same session that a questionnaire should be circulated to States Members of the United Nations to obtain further information and the views of Governments. The materials received in response to the questionnaire were submitted to the Commission at its thirty-third session, in 1981.<sup>216</sup>

400. From its thirty-second session to its thirty-eighth session (1986), the Commission received seven further reports of the Special Rapporteur,<sup>217</sup> which contained draft articles arranged in five parts, as follows: part I (Introduction); part II (General principles); part III (Exceptions to State immunity); part IV (State immunity in respect of property from attachment and execution); and part V (Miscellaneous provisions).

401. After long deliberations over eight years, the Commission, at its thirty-eighth session in 1986, completed the first reading of the draft articles on the topic, having provisionally adopted a complete set of

<sup>214</sup> See *Yearbook ... 1978*, vol. II (Part Two), pp. 152-153, paras. 179-190.

<sup>215</sup> *Yearbook ... 1979*, vol. II (Part One), p. 227, document A/CN.4/323.

<sup>216</sup> Those materials, together with certain further materials prepared by the Secretariat, were later published in the volume of the United Nations Legislative Series entitled *Materials on Jurisdictional Immunities of States and their Property* (Sales No. E/F.81.V.10).

<sup>217</sup> These seven further reports of the Special Rapporteur are reproduced as follows:

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

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

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

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

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

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

Eighth report: *Yearbook ... 1986*, vol. II (Part One), p. 21, document A/CN.4/396.

28 articles<sup>218</sup> and commentaries thereto.<sup>219</sup> At the same session, the Commission decided<sup>220</sup> that, in accordance with articles 16 and 21 of its statute, the draft articles provisionally adopted on first reading should be transmitted through the Secretary-General to the Governments of Member States for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 1988.<sup>221</sup>

402. At its thirty-ninth session, in 1987, the Commission appointed Mr. Motoo Ogiso Special Rapporteur for the topic. At its fortieth session, in 1988, the Commission had before it the Special Rapporteur's preliminary report on the topic (A/CN.4/415).<sup>222</sup> In the report, the Special Rapporteur analysed the written comments and observations on the draft articles received from 23 Member States and Switzerland, which, together with those received subsequently from five other Member States, were reproduced in document A/CN.4/410 and Add.1-5.<sup>223</sup> For each article he summarized the comments and observations received and, on the basis thereof, proposed either to revise the text of the article concerned, to merge it with another article or to retain the article as adopted on first reading. The Special Rapporteur introduced his preliminary report, but, due to lack of time, the Commission was unable to consider the topic at the fortieth session.<sup>224</sup>

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

403. At the present session, the Commission had before it the second report of the Special Rapporteur (A/CN.4/422 and Add.1), which it considered together with the preliminary report (A/CN.4/415) for the purpose of conducting the second reading of the draft articles.

404. In his second report, the Special Rapporteur gave further consideration to some of the draft articles on the basis of the written comments and observations of Governments and his analysis of relevant codification

<sup>218</sup> For the texts, see *Yearbook ... 1986*, vol. II (Part Two), p. 8, chap. II, sect. D.1.

<sup>219</sup> *Ibid.*, pp. 8 *et seq.*, footnotes 7 to 35.

<sup>220</sup> *Ibid.*, p. 8, para. 21.

<sup>221</sup> For a complete historical review of the Commission's work on the topic up to 1986, see *Yearbook ... 1985*, vol. II (Part Two), pp. 51 *et seq.*, paras. 205-247; and *Yearbook ... 1986*, vol. II (Part Two), pp. 7-8, paras. 15-22.

<sup>222</sup> *Yearbook ... 1988*, vol. II (Part One), p. 96.

<sup>223</sup> *Ibid.*, p. 45.

<sup>224</sup> For a summary of the Special Rapporteur's introduction of his preliminary report at the fortieth session, see *Yearbook ... 1988*, vol. II (Part Two), pp. 98 *et seq.*, paras. 501-520.

and State practice and proposed certain revisions, additions or deletions complementary to those suggested in his preliminary report. In response to requests from some members of the Commission, the Special Rapporteur also included a brief review of the recent development of general State practice concerning State immunity.

405. The Commission considered the Special Rapporteur's preliminary and second reports at its 2114th to 2122nd meetings, from 7 to 21 June 1989. After hearing the introduction by the Special Rapporteur of the second report, the Commission discussed the proposals made by him in the two reports for the second reading of the draft articles. At its 2122nd meeting, the Commission decided to refer articles 1 to 11 to the Drafting Committee for their second reading, together with the new articles 6 *bis* (see para. 457 below) and 11 *bis* (see para. 498 below) proposed by the Special Rapporteur, as well as with the proposals made by the Special Rapporteur and those formulated by some members in plenary during the discussion, on the understanding that the Special Rapporteur could make new proposals to the Drafting Committee, if he deemed it appropriate, on the basis of the comments and observations made in the Commission. As for the remaining articles 12 to 28, the Commission decided to consider them further at the next session.

406. In undertaking the second reading of the draft articles, the Commission agreed with the Special Rapporteur that it should avoid entering yet again into a doctrinal debate on the general principles of State immunity, which had been extensively debated in the Commission and on which the views of members remained divided. Instead, the Commission should concentrate its discussion on individual articles, so as to arrive at a consensus as to what kind of activities of the State should enjoy immunity and what kind of activities should not enjoy immunity from the jurisdiction of another State. This, in the view of the Commission, was the only pragmatic way to prepare a convention which would command wide support by the international community.

407. There was also general support in the Commission for the view that, in undertaking the second reading, the Commission should not rush to complete its work, since, according to some members, there were still unresolved issues of a substantive nature. It was noted that the law of jurisdictional immunity of States was in a state of flux, as some States were in the process of amending their basic laws or had done so recently. It was therefore essential that the draft articles be given the opportunity to reflect such Government practice and, moreover, that room be left for further development of the law of jurisdictional immunity of States.

408. In that connection, the Commission noted with interest the information presented by one member concerning a series of legislative and economic reforms which were being implemented in the USSR under the process of *perestroika* and were aimed at the decentralization of the national economic system, granting, *inter alia*, State enterprises the right to administer, use and dispose of a segregated part of nationally owned property and to maintain their own

balance sheet. Those State enterprises had independent legal status: the State was not responsible for the obligations of State enterprises, and vice versa. Similar information on legislative reforms was provided by another member regarding the status of State enterprises in Poland. Another member informed the Commission of recent amendments to the *Foreign Sovereign Immunities Act of 1976*<sup>225</sup> of the United States of America concerning State-owned vessels and the enforcement of arbitration agreements and awards.

409. Commenting generally on the draft articles as a whole, some members expressed concern that the texts adopted on first reading favoured the practice of a limited number of States subscribing to the restrictive theory of State immunity, and as such could hardly be said to reflect general international law or the practice of the large majority of States. The object of the future convention, in the view of these members, should be to reaffirm and strengthen the application of jurisdictional immunities of States while laying down clear exceptions. Replacement of the basic rules of State immunity by those of restricted immunity would lead to legal uncertainty, exposing States to excessive foreign jurisdiction, which could hamper the economic development of States and create international frictions. To be widely acceptable to the international community, the draft articles should be improved so as to accommodate the diverse practice of States in different political, socio-economic and legal systems and stages of development.

410. In that regard, these members disagreed with the Special Rapporteur's conclusion in his second report (A/CN.4/422 and Add.1, para. 10), on the basis of his analysis of the practice of certain States from the nineteenth century to the present period, that it could no longer be maintained that the absolute theory of State immunity was a universally binding norm of customary international law. They maintained that the principle of State immunity was upheld in a large majority of States, pointing out that the case-law cited in the Special Rapporteur's analysis was limited mostly to industrialized countries and, moreover, that decisions of these countries' national courts were not as uniform as suggested by the Special Rapporteur. Some members suggested that the review of judicial practice and national legislation should include not only the decisions of domestic courts, but also pleadings before foreign courts by defendant States. It was stressed that the rules of State immunity could not be judicially substantiated by reference to State practice in a limited number of countries in certain regions.

411. Some other members, without wishing to enter the debate concerning the current status of the law relating to jurisdictional immunity of States, supported the Special Rapporteur's conclusion. It was said that the practice of States adhering to the theory of functional or restricted State immunity had been constant and uniform for some time and thus it could not be asserted that there was universal recognition or observance of a monolithic rule of jurisdictional immunity of States. One member suggested that, since the draft articles related to a

<sup>225</sup> *United States Code, 1982 Edition*, vol. 12, title 28, chap. 97, p. 278; see also United Nations, *Materials on Jurisdictional Immunities* . . . (see footnote 216 above), pp. 55 *et seq.*

fast-developing area, they could provide for periodic meetings of contracting parties with a view to taking account of the evolution of State practice and introducing, if appropriate, adjustments in the provisions of the articles.

412. The Special Rapporteur stated that his conclusion after reviewing the evolution of the law of State immunity was that no consensus existed at present as to whether the absolute theory or the restrictive theory was the rule of international law and that the Commission's work on the second reading of the draft articles should therefore be focused in particular on reaching agreement on the areas in which State activities should be excluded from the application of immunity from foreign jurisdiction. He pointed out that the inherent problem in any jurisprudential analysis of State immunity was the difficulty in obtaining pertinent judicial or legislative material from States in different regions and that the written comments and observations received from Governments in certain regions were extremely limited.

413. The following paragraphs reflect the comments and proposals on the draft articles made by the Special Rapporteur on the basis of the written comments and observations of Governments as well as the reaction of members of the Commission to those comments and observations and to the suggestions made by the Special Rapporteur. Since the Commission was unable to complete its consideration of articles 12 to 28, the present report does not reflect the opinions of all the members of the Commission on those articles.

## 1. DRAFT ARTICLES PROVISIONALLY ADOPTED ON FIRST READING

### (a) PART I. INTRODUCTION

#### ARTICLE 1 (Scope of the present articles)

414. Article 1, as provisionally adopted by the Commission on first reading, reads as follows:

##### *Article 1. Scope of the present articles*

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

415. In his preliminary report, the Special Rapporteur noted that the only comment received on article 1 had been from one Government which had suggested setting forth the general principle of immunity from jurisdiction of sovereign States at the outset of the envisaged convention (A/CN.4/415, paras. 17-18). On this question, the Special Rapporteur's view was that article 1 should deal only with the definition of the scope of the draft articles and that the enunciation of the general principle of State immunity (art. 6) should remain in part II of the draft.

416. There was general support in the Commission for the view of the Special Rapporteur. One member stated, however, that the provision of article 6 could be incorporated in article 1. Another member suggested that the provision of article 6 might be placed immediately after article 1. A further drafting proposal was made by one member that the expression "one State" should be

replaced by "a foreign State" and the expression "another State" by "a forum State".

417. The Special Rapporteur also pointed out that article 6 should not be too far removed from articles 11 to 19, to which it was closely connected.

#### ARTICLE 2 (Use of terms) and ARTICLE 3 (Interpretative provisions)

418. Articles 2 and 3 deal with the definition and interpretation of certain terms used in the draft articles. The texts provisionally adopted by the Commission on first reading read as follows:

##### *Article 2. Use of terms*

###### 1. For the purposes of the present articles:

- (a) "court" means any organ of a State, however named, entitled to exercise judicial functions;
- (b) "commercial contract" means:
  - (i) any commercial contract or transaction for the sale or purchase of goods or the supply of services;
  - (ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee in respect of any such loan or of indemnity in respect of any such transaction;
  - (iii) any other contract or transaction, whether of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

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

##### *Article 3. Interpretative provisions*

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

- (a) the State and its various organs of government;
- (b) political subdivisions of the State which are entitled to perform acts in the exercise of the sovereign authority of the State;
- (c) agencies or instrumentalities of the State, to the extent that they are entitled to perform acts in the exercise of the sovereign authority of the State;
- (d) representatives of the State acting in that capacity.

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

419. In his preliminary report, the Special Rapporteur pointed out with regard to the definition of the term "court", in paragraph 1 (a) of article 2, that two Governments had commented that the concept of "judicial functions" should be clarified in order to avoid inconsistent interpretations in different legal systems (A/CN.4/415, para. 23). The Special Rapporteur felt that the present formulation was sufficiently clear, but suggested that the matter could be discussed in the Drafting Committee.

420. With regard to the definition of the term "State" in article 3, paragraph 1, and of the expression "commercial contract" in article 2, paragraph 1 (b), and in article 3, paragraph 2, the Special Rapporteur drew attention to certain substantive points raised by some Governments. These suggestions concerned: the inclusion of the constituent parts of a federal State in the definition of a

"State" in article 3; the clarification of the conditions under which political subdivisions of a State, or agencies or instrumentalities of a State, would enjoy jurisdictional immunity under paragraph 1 (a) to (c) of article 3; the status of State enterprises with "segregated State property"; and the need to find an appropriate formulation of the criteria for determining whether a specific contract was a commercial contract or not.<sup>226</sup>

421. Responding to the criticism made by a number of Governments that the criteria in paragraph 2 of article 3 for determining the commercial character of a contract were subjective and could result in legal uncertainty, the Special Rapporteur proposed the following reformulation (para. 3 of the new draft article 2) (see para. 423 below):

"In determining whether a contract for the sale or purchase of goods or the supply of services is commercial, reference should be made primarily to the nature of the contract, but if an international agreement between the States concerned or a written contract between the parties stipulates that the contract is for the public governmental purpose, that purpose should be taken into account in determining the non-commercial character of the contract."

422. Commenting further on this provision in his second report (A/CN.4/422 and Add.1, para. 19), the Special Rapporteur acknowledged that the relevance of the "purpose" test in determining the precise character of certain contracts could not be denied. Nevertheless, the present formulation of paragraph 2 of article 3, according to which reference should be made primarily to the nature of the contract, but also to its purpose in the light of the relevant practice of the State party to the contract, would in his view lead to uncertainties in application, since the practice of that State would not necessarily be clear, and the double criterion would ultimately favour the doctrine of absolute immunity. He considered that a more objective criterion might be found in the proposed reformulation, which would limit the application of the "purpose" test to cases in which the public and non-commercial character of a contract was stipulated in an international agreement or in the written contract itself.

423. The Special Rapporteur said that he accepted the proposal made by many Governments to consolidate the provisions of articles 2 and 3 in a single article containing definitions of the essential terms used in the draft articles. The new combined text for article 2 (A/CN.4/415, para. 29) would read as follows:

#### *"Article 2. Use of terms*

"1. For the purposes of the present articles:

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

"(b) 'State' means:

"(i) the State and its various organs of government;

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

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

"(iv) representatives of the State acting in that capacity;

"(c) 'commercial contract' means:

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

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

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

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

"3. In determining whether a contract for the sale or purchase of goods or the supply of services is commercial, reference should be made primarily to the nature of the contract, but if an international agreement between the States concerned or a written contract between the parties stipulates that the contract is for the public governmental purpose, that purpose should be taken into account in determining the non-commercial character of the contract."

424. During the Commission's discussion, there was general support for the Special Rapporteur's recommendation to combine articles 2 and 3 under the title "Use of terms".

425. With regard to the definition of the term "court" in paragraph 1 (a) of the new draft article 2, some members considered that clarification of the concept of "judicial functions" was necessary. On this point, one member specifically mentioned that section 3 of Australia's *Foreign States Immunities Act 1985*<sup>227</sup> could usefully serve as a guide. Another member suggested further clarification to the effect that the "judicial functions" referred to were limited to civil matters.

426. The definition of the term "State" in paragraph 1 (b) of the new article 2 was considered by many members to be a provision requiring a thorough review. As for the treatment of federal States, several members supported the suggestion made by one Government to include a specific provision on constituent parts of a federation. One member noted that the component states of a federal State were not entitled to perform acts in the exercise of

<sup>226</sup> See *Yearbook ... 1988*, vol. I, pp. 261–262, 2081st meeting, paras. 11–15; and *Yearbook ... 1988*, vol. II (Part Two), pp. 99–100, paras. 507–510.

<sup>227</sup> Australia, *Acts of the Parliament of the Commonwealth of Australia passed during the year 1985* (Canberra, 1986), vol. 2, p. 2696.

the sovereign authority of the federal State, and were therefore excluded from the application of subparagraph (b) (ii). He therefore preferred subparagraph (b) (ii) to read “political subdivisions of the State vested with sovereign or governmental power”.

427. Some members suggested that more precise definitions of the expressions “organs”, “subdivisions” and “agencies or instrumentalities” were necessary to accommodate various State entities in different political systems. In that regard, one member said that, rather than attempting to prepare a list of all relevant entities—a list which could not be exhaustive—it would suffice to define the legal character of the State *per se*, stating simply that the State was the body entitled to exercise sovereign authority.

428. Some other members remarked that clarification would be needed in subparagraph (b) (iii) to ensure that private corporations, whoever might be their owner, did not enjoy immunity. Another member, subscribing to a similar view, indicated his support for the following text proposed by one Government for the definition of the term “State” (see A/CN.4/415, para. 35):

“The expression ‘State’ means the State and its various organs and representatives which are entitled to perform acts in the exercise of the sovereign authority of the State.”

429. As for subparagraph (b) (iv), concerning representatives of the State acting in that capacity, some members suggested that it might be deleted, since its application would raise the question of the rules of diplomatic immunity and those of State immunity.

430. Some other members suggested that the definition of the term “State” did not make the status of State enterprises sufficiently clear; they supported the view of one Government that State-owned, self-supporting legal entities which had been established exclusively for the purpose of performing commercial transactions and which acted on their own behalf did not represent the State and therefore were not entitled to immunity under international law in respect of themselves and their property. These members suggested that the following text proposed by that Government on this question be included in the definition of the term “State”:

“The expression ‘State’ as used in the present articles does not comprehend instrumentalities established by the State to perform commercial transactions as defined in [the present article], if they act on their own behalf and are liable with their own assets.”<sup>228</sup>

431. Turning to the conditions under which State entities enjoy jurisdictional immunity, several members pointed out that the expression “sovereign authority”, in paragraph 1 (b) (ii) and (iii) of the new draft article 2, did not adequately cover all cases in which State entities enjoyed immunity, as compared to the corresponding expression used in the French text, *prérogatives de la puissance publique*. The discrepancy in the two language versions was considered to be a substantive one, since the French expression included State entities not exercising sovereign authority. In that regard, the attention of the Commission was drawn to the use of the expressions

“sovereign authority” and “governmental authority”, respectively, in articles 7 and 12, for which the expression “puissance publique” was used in both articles in French. One member pointed out that the expression “government” or “governmental” authority was used in part 1 of the draft articles on State responsibility<sup>229</sup> and that the Commission had taken the view there that it was the correct translation of the expression *prérogatives de la puissance publique* in the French text. He therefore suggested that the word “sovereign” be replaced by “governmental”, at least in paragraph 1 (b) (iii) of the new article 2.

432. With regard to the definition of the expression “commercial contract” in paragraph 1 (c) of the new article 2, some members suggested that the use of the term “commercial” was tautological and should be avoided. One member considered that that term could be deleted at least in subparagraph (c) (iii). Another member further proposed the deletion of subparagraph (c) (ii), which he considered to be superfluous since post-Second World War State practice indicated that financial transactions such as loans and the issue of bonds between a Government and a foreign private financial institution almost invariably provided for a waiver of sovereign immunity on the part of the Government party. As for the use of the word “contract”, some members stated that they would prefer a broader term such as “activity” or “transaction”.

433. With regard to paragraph 2 of the new article 2, one member continued to be of the view that such a provision was not necessary. He felt that it would be useful, however, to specify that the use in the draft articles of terms employed in other international instruments or in internal laws did not necessarily mean that the Commission accepted those terms with the meaning attached to them in the earlier contexts.

434. Several members supported the text proposed by the Special Rapporteur for paragraph 3 of the new article 2, which dealt with the criteria for determining the commercial character of a contract. Some members, however, opposed the proposed reformulation. In their view, its requirements were too rigid and did not adequately provide for unforeseen situations which could not be stipulated in advance in an international agreement or a written contract. On those grounds, they stated their preference to revert to the original provision, namely paragraph 2 of article 3 as provisionally adopted by the Commission on first reading, it being understood that the “purpose” test was to be treated as supplementary to the “nature” test, or to have the text proposed by the Special Rapporteur substantially reformulated. Some other members felt that both the “nature” and “purpose” tests should be given equal importance.

435. Other members insisted on the primacy of the “nature” test (or criterion), which was an objective one. In the opinion of some of these members, the “purpose” test could only have a subsidiary character, coming into play only if the application of the “nature” test did not lead to a clear interpretation of the contract. In the view of other members, the “purpose” test was unworkable and had no place in the draft articles.

<sup>228</sup> Yearbook . . . 1988, vol. II (Part One), p. 68, document A/CN.4/410 and Add.1-5.

<sup>229</sup> Yearbook . . . 1980, vol. II (Part Two), pp. 30 *et seq.*

436. One member observed that the expression "commercial contract" should be used in paragraph 3 instead of "contract for the sale or purchase of goods or the supply of services" to make it clear that the paragraph was to apply to all types of commercial contracts referred to in paragraph 1 (c).

437. In the light of the comments made, the Special Rapporteur made several observations. Referring to the proposal to define the expression "judicial functions", he indicated that that might be a difficult task, since its meaning varied according to different legal systems, and that the point could be covered in the commentary. He suggested that the matter be referred to the Drafting Committee.

438. Commenting on the proposal by one member to replace the expression "sovereign authority" by "governmental authority", the Special Rapporteur referred to the commentaries to articles 3 and 7 and stated that, since the use of the expression "sovereign authority" was intended to exclude generally "subdivisions of the State at the administrative level of local or municipal authorities [which] do not normally perform acts in the exercise of the sovereign authority of the State, and as such do not enjoy State immunity",<sup>230</sup> the proposed amendment in paragraph 1 (b) (ii) and (iii) of the new draft article 2 might involve a change of substance. He suggested that the pertinent part of the commentary be kept in mind in the Drafting Committee.

439. Regarding the proposal to delete paragraph 1 (b) (iv), the Special Rapporteur was of the view that the provision could be retained, on the understanding that the relationship between the present draft articles and the 1961 Vienna Convention on Diplomatic Relations<sup>231</sup> was made sufficiently clear in article 4.

440. As for the suggestion to use the term "activity" or "transaction" instead of the term "contract", the Special Rapporteur considered that the question should be referred to the Drafting Committee. He pointed out that the original proposal by the previous Special Rapporteur had indeed been to use either the term "transactions" or the term "activities" and that the Drafting Committee had subsequently given preference to the term "contract" for reasons which were not clear to him. The Special Rapporteur said that he would not object to amending the term as suggested but he could do so only with clear guidance from the Commission.

441. On the question of the appropriate criteria for determining the commercial character of a contract, the Special Rapporteur indicated that, in the light of some critical comments on the reformulation he had proposed in paragraph 3 of the new article 2, he would attempt to draft an alternative text. As a preliminary proposal, he suggested adding the following phrase at the end of the paragraph:

" . . . it being understood that a court of the forum State may, in the case of unforeseen situations, decide that the contract has a 'public purpose'."

He further suggested that the question be referred to the Drafting Committee.

<sup>230</sup> Yearbook . . . 1986, vol. II (Part Two), p. 14, para. (3) of the commentary to article 3.

<sup>231</sup> United Nations, Treaty Series, vol. 500, p. 95.

442. With regard to the suggestion made by one member to clarify that the reference to a "contract" in paragraph 3 covers all types of commercial contracts defined in paragraph 1 (c) of the same article, the Special Rapporteur suggested that the opening phrase of paragraph 3 might be amended to read: "In determining whether a contract under paragraph 1 (c) is commercial . . .". Again, the matter should be referred to the Drafting Committee.

#### ARTICLE 4 (Privileges and immunities not affected by the present articles)

443. Article 4, as provisionally adopted by the Commission on first reading, reads as follows:

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

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

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

(b) persons connected with them.

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

444. In his preliminary report, the Special Rapporteur recalled that one Government, in its written comments and observations, had proposed the insertion of the words "under international law" after the word "State" in the introductory clause of paragraph 1, so as to clarify that the privileges and immunities referred to in that paragraph were those conferred by international law. The proposal was also aimed at bringing the paragraph into line with paragraph 2. The Special Rapporteur supported that proposal and, accordingly, suggested (A/CN.4/415, para. 50) that the introductory clause of paragraph 1 be amended to read:

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

445. With regard to paragraph 1 (a), the Special Rapporteur, commenting on the suggestion made by one Government to include a reference to the 1961 Vienna Convention on Diplomatic Relations<sup>232</sup> and the 1963 Vienna Convention on Consular Relations,<sup>233</sup> pointed out that the subparagraph also referred to "special missions" and "missions to international organizations". He therefore suggested that the subparagraph remain unchanged (*ibid.*, para. 48).

446. Turning to paragraph 2, the Special Rapporteur pointed out that one Government had suggested including not only the privileges and immunities accorded under international law to heads of State, but also those recognized for heads of Government, ministers for foreign affairs and persons of high rank. In the Special Rapporteur's view, however, the privileges and immunities enjoyed by these persons as well as by

<sup>232</sup> *Ibid.*

<sup>233</sup> *Ibid.*, vol. 596, p. 261.

members of the families of heads of State were granted on the basis of international comity rather than in accordance with established rules of international law (*ibid.*, para. 49). He therefore felt that it might not be necessary to amend paragraph 2. Another Government had suggested the inclusion of an additional paragraph providing that the present articles were without prejudice to the privileges and immunities enjoyed by the armed forces of one State while present in another State with the latter's consent. The Special Rapporteur's view was that such privileges and immunities were determined by agreement between the States concerned rather than by customary international law, and that the proposed addition might therefore not be appropriate.

447. There was general support in the Commission for the amendment to paragraph 1 suggested by the Special Rapporteur. Some members expressed concern that the provision might accord greater protection to a diplomat than to the State he represented, since the exceptions to the jurisdictional immunities of States provided for in the draft articles would not apply to diplomatic agents. They considered therefore that it was important to clarify the relationship between State immunity under the present articles and diplomatic immunity under the 1961 Vienna Convention on Diplomatic Relations. Some other members, however, were of the view that the result might not be as anomalous as it would appear, since it seemed understandable, and indeed necessary, that a diplomat be given greater protection than the sending State itself to carry out his functions in the receiving State. Since there were differences in nature and purpose between jurisdictional immunity and diplomatic immunity, the latter was limited in time and was aimed at facilitating the exercise of the functions of the diplomat.

448. With regard to paragraph 2, several members suggested that the scope of the provision be extended to heads of State in their private capacity, as well as to heads of Government, ministers for foreign affairs and other persons of high rank.

449. The Special Rapporteur felt that, while the concern expressed by some members regarding the relationship between diplomatic immunity and State immunity in the context of the present articles might be understandable, diplomatic immunity, as a well-established special legal régime, could and should be separated in the application of the present articles. He observed in that connection that such a view was supported by some members.

450. As for the suggestion to expand the scope of application of paragraph 2, the Special Rapporteur considered that the immunities of heads of Government, ministers for foreign affairs and other high-ranking officials acting as State organs were covered by paragraph 1. Furthermore, as regards the privileges and immunities of members of the families of heads of State, the Special Rapporteur still doubted, despite the comments of some members, that they were accorded on the basis of established rules of international law. He would not, however, object to adding a reference to these persons in paragraph 2, as suggested by some members.

#### **ARTICLE 5 (Non-retroactivity of the present articles)**

451. Article 5, as provisionally adopted by the Commission on first reading, reads as follows:

#### **Article 5. Non-retroactivity of the present articles**

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

452. The Special Rapporteur noted in his preliminary report that two Governments had made specific observations in their written comments. One had suggested including an additional "optional clause" allowing the present articles to operate with regard to any cause of action arising within a certain limited period preceding the date of entry into force of the convention between the States concerned. The other had suggested providing for the retroactive application of certain articles setting forth current principles of international law. The Special Rapporteur, however, was of the view that no change should be made in article 5 pending completion of the second reading of the draft articles (A/CN.4/415, para. 56). Some members of the Commission expressly supported the views of Governments referred to above.

#### **(b) PART II. GENERAL PRINCIPLES**

##### **ARTICLE 6 (State immunity)**

453. Article 6 sets forth the principle of State immunity. The text, as provisionally adopted by the Commission on first reading, reads as follows:

#### **Article 6. State immunity**

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

454. In his preliminary report, the Special Rapporteur pointed out with regard to article 6, which sets forth the basic concept of the draft articles, that the comments and observations received from Governments had revealed a clear and even division between those supporting the retention of the bracketed phrase "and the relevant rules of general international law" and those favouring its deletion. The former group of Governments considered that the retention of the phrase was essential in order to maintain sufficient flexibility and to accommodate any further development in State practice, as well as the corresponding adaptation of general international law. The latter group of Governments insisted on the deletion of the phrase, which in their view would only encourage unilateral interpretation of the present articles and uncertainties in application (A/CN.4/415, paras. 59-63).

455. The Special Rapporteur was of the view that, while the retention of the bracketed phrase might be consistent with recent developments in State practice, which appeared to be inclined towards restricted immunity, the reference could result in the rules of the jurisdictional immunities of States being subjected to unilateral interpretation by the courts of the forum State and ultimately in the undue restriction of acts *jure imperii*.

456. On those grounds, the Special Rapporteur proposed the deletion of the bracketed phrase (*ibid.*, para. 67). He also indicated that the deletion might be made more acceptable if the following paragraph were included in the preamble to the future convention, as suggested by one Government (*ibid.*, para. 65):

*"Affirming that the rules of general international law continue to govern questions not expressly regulated in this Convention".*

457. Further to his proposal to delete the bracketed phrase, the Special Rapporteur suggested in his second report (A/CN.4/422 and Add.1, para. 17) the inclusion in the draft of a new article 6 *bis*, providing for an optional declaration regarding exceptions to State immunity. The new article, which was proposed as an alternative to the above suggestion by one Government, was intended to restore a proper balance in regard to the position of those Governments which favoured the restrictive doctrine of State immunity. The new article 6 *bis* would read as follows:

#### *"Article 6 bis*

*"Notwithstanding the provision of article 6, any State Party may, when signing this Convention or depositing its ratification, acceptance or accession, or at any later date, make a declaration of any exception to State immunity, in addition to the cases falling under articles 11 to 19, according to which the court of that State shall be able to entertain proceedings against another State Party, unless the latter State raises objection within thirty days after the declaration was made. The court of the State which has made the declaration cannot entertain proceedings under the exception to State immunity contained in the declaration against the State which has objected to the declaration. Either the State which has made the declaration or the State which has raised objection can withdraw its declaration or objection at any time."*

458. The Special Rapporteur's view was that the optional declaration would serve to clarify that the present articles did not prejudice the extent of jurisdictional immunities under the articles in cases falling outside the exceptions or limitations established in articles 11 to 19, and at the same time might be conducive to the formation of precise rules of general international law on State immunity by encouraging uniform State practice. The Special Rapporteur further stated that, if the proposed new article 6 *bis* were adopted and if the bracketed phrase "and the relevant rules of general international law" in article 6 were deleted, article 28 (Non-discrimination) could be deleted (*ibid.*, para. 18).

459. The views of members were divided on the question whether the bracketed phrase should be deleted or retained. Many members favoured its deletion, since, in their view, it might impose arbitrary restrictions on the codified rules, defeating the very purpose of the Commission's work. If the phrase was intended to provide for the progressive development of international law, the best approach would be for States parties to the future convention to supplement the rules of the convention as necessary by adopting additional protocols. One member

also pointed out that it would be questionable to interpret the phrase as referring only to the restrictive doctrine, inasmuch as the rules of general international law still prevailed in the majority of States and they rather reflected the absolute doctrine of State immunity.

460. Some members expressly supported retention of the phrase, which, in the view of one member, was necessary to leave room for the continuation of the current trend towards restricted immunity and, according to another member, would prove important as a basis for reaching consensus on the future convention if the limitations and exceptions in articles 11 to 19 were too restrictive both in scope and application. One member felt that a solution might be found in using more neutral wording for the phrase "subject to the provisions of the present articles", which might be amended to read "under the provisions of the present articles".

461. With regard to the proposed new article 6 *bis*, many members, while commending the Special Rapporteur's efforts, considered that it could not solve the problem, for, according to the proposed text, a State could make a declaration of exceptions in addition to those under articles 11 to 19, and a long list of exceptions would defeat the purpose of the draft articles. One member pointed out that the legal effect of a reservation was to restrict the obligations a State would otherwise undertake under a treaty, whereas, under draft article 6 *bis*, a State party would acquire rights *vis-à-vis* other States parties by virtue of a unilateral declaration. That, in his view, would not constitute a sound precedent in international law. It was therefore suggested that some substantial redrafting was necessary to meet that concern.

462. Some members spoke in favour of a preambular paragraph along the lines suggested by one Government (see para. 456 above). The Special Rapporteur, in the light of these comments, suggested that the Drafting Committee be allowed to work on the basis of the original text, since the views of the Commission and the written comments and observations of Governments were divided and since the deletion of the bracketed phrase would mean a substantial concession on the part of those countries upholding restricted immunity on the basis of their national legislation.

463. The bracketed phrase could eventually be deleted by consensus once the Drafting Committee found a suitable formula, such as an additional protocol, which would close the gap between the traditional doctrine of State immunity and recent codifications supporting restricted immunity.

#### ARTICLE 7 (Modalities for giving effect to State immunity)

464. Article 7, as provisionally adopted by the Commission on first reading, reads as follows:

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

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

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

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

465. In his preliminary report, the Special Rapporteur, on the basis of the written comments and observations of some Governments, stated that there was a need to examine in the Drafting Committee the use of such terms as "interests" in paragraph 2 and "control" in paragraph 3, since those terms were not clearly understood in certain legal systems. He accepted the suggestion by a number of Governments that paragraph 3 could be simplified by avoiding the lengthy definition of the term "State", which was already dealt with in paragraph 1 of article 3, as well as the suggestion by one Government to replace the expressions "a State" and "another State" by "a forum State" and "a foreign State", respectively, so as to clarify the article's proper context. The Special Rapporteur also referred to the comment received from one Government suggesting clarification to the effect that no default judgment could be rendered against States where a judge had the possibility of recognizing that the prerequisites for immunity had been fulfilled. The Special Rapporteur's view was that paragraph 4 of the proposed new text of article 9 (see para. 479 below) adequately dealt with that particular concern (A/CN.4/415, paras. 76-78).

466. In the light of the above-mentioned comments and observations, the Special Rapporteur proposed the following new text of article 7 (*ibid.*, para. 79):

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

"1. A forum State shall give effect to State immunity under article 6 by refraining from exercising jurisdiction in a forum State against a foreign State.

"2. A proceeding in a forum State shall be considered to have been instituted against a foreign State, whether or not the foreign State is named as party to that proceeding, so long as the proceeding in effect seeks to compel the foreign 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 the foreign State.

"3. In particular, a proceeding in a forum State shall be considered to have been instituted against a foreign State when the proceeding is instituted against any organ of a State referred to in subparagraphs (a) to (d) of article 3, paragraph 1, or when the proceeding is designed to deprive that foreign State of its property or of the use of property in its possession or control."

467. The proposed new text was generally accepted as a substantial improvement of the article. Some members of the Commission made specific comments on drafting points. These proposals were: to amend the title of the article to read: "Modes of giving effect to State immunity"; to clarify the meaning of the phrase "so long as the proceeding . . .", in paragraph 2; to consider the deletion of paragraph 2 in the light of the new draft article 2 (see para. 423 above), or, if it was retained, to define

more precisely the terms "agencies" and "instrumentalities" in article 2; and to simplify the language of paragraphs 2 and 3, as well as to delete such terms as "interests" and "control" or replace them with more commonly accepted legal terms. With regard to paragraph 3, it was suggested that it would be useful to provide that courts were required *ex officio* to examine whether immunity of a particular agency or instrumentality was involved or not. It was also suggested that paragraph 3, if retained, should make provision for component states of a federal State.

**ARTICLE 8 (Express consent to the exercise of jurisdiction)**

468. Article 8 concerns the effect of express consent by States to the exercise of jurisdiction by foreign courts. The text, as provisionally adopted by the Commission on first reading, reads as follows:

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

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

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

469. With regard to subparagraph (b), the Special Rapporteur noted in his preliminary report that one Government had disagreed with the view expressed by some Member States in the Sixth Committee of the General Assembly that an amendment might be made to allow a State to withdraw its consent to foreign jurisdiction where a fundamental change had occurred in the circumstances prevailing at the time when the contract in question was signed, and that another Government had supported such an amendment (A/CN.4/415, paras. 83-84). The Special Rapporteur stated that he was not in favour of introducing the concept of a "fundamental change", since it might lead to abuse (*ibid.*, para. 89).

470. With regard to subparagraph (c), the Special Rapporteur supported the suggestion made in the comments and observations received from some Governments that the provision be made more flexible as regards the way in which a State might submit to the jurisdiction of a foreign court. He indicated that one option would be to amend the subparagraph to read: "by a written declaration submitted to the court after a dispute between the parties has arisen" (*ibid.*, paras. 90 and 93).

471. The Special Rapporteur pointed out that one Government had proposed adding a proviso at the end of article 8 to the effect that an agreement to apply the law of one State should not be interpreted as submission to the jurisdiction of that State. Another Government had expressed the view that the phrase "in a proceeding before a court" in article 8, as well as in articles 9 and 10, might be elaborated by way of an additional definition in article 2, paragraph 1, clarifying that the term "proceeding" included appellate courts. The Special Rapporteur considered that these points could be dealt with in the commentary (*ibid.*, para. 91).

472. The Special Rapporteur also observed that one Government had proposed specifying that a waiver of State immunity must be made by the highest authority. In his view, however, that was primarily a question of internal procedure, and in fact the relevant treaty practice as evidenced in article 46 of the 1969 Vienna Convention on the Law of Treaties<sup>234</sup> did not support such a position (*ibid.*, para. 92).

473. Some members of the Commission suggested that subparagraph (b) should allow exceptions in cases where a fundamental change had occurred in the circumstances existing at the time when a contract was concluded (*rebus sic stantibus*), since the concept had been recognized in treaty law and was not an uncommon practice in contracts. Some other members were of the view that it would be undesirable to introduce such a qualification, which could result in abuse and instability in international relations.

474. As for the reformulation of subparagraph (c) proposed by the Special Rapporteur (see para. 470 above), several members supported it as a useful clarification. A suggestion was made, however, that the subparagraph might read simply “by a written declaration submitted to the court”, thus leaving it to the parties to decide how that was to be effected. Another suggestion was to reformulate the subparagraph in a less restrictive manner, so as to admit express consent through diplomatic channels.

475. A further suggestion of a drafting nature was to replace the word “matter”, in the introductory clause, by “dispute”.

#### **ARTICLE 9 (Effect of participation in a proceeding before a court)**

476. Article 9 deals with the effect of participation by a State in a proceeding before a foreign court. The text, as provisionally adopted by the Commission on first reading, reads as follows:

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

**1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State if it has:**

**(a) itself instituted that proceeding; or**

**(b) intervened in that proceeding or taken any other step relating to the merits thereof.**

**2. Paragraph 1 (b) above does not apply to any intervention or step taken for the sole purpose of:**

**(a) invoking immunity; or**

**(b) asserting a right or interest in property at issue in the proceeding.**

**3. Failure on the part of a State to enter an appearance in a proceeding before a court of another State shall not be considered as consent of that State to the exercise of jurisdiction by that court.**

477. The Special Rapporteur noted in his preliminary report that two specific proposals had been made in the comments and observations received from Governments. One proposal made by two Governments was to include in paragraph 1 (b) a qualification providing for immunity in the case where the State in question took a step relating

to the merits of a proceeding before it had knowledge of facts on which a claim to immunity might be based, or more generally in the case where the State was not properly impleaded. The Special Rapporteur considered that an additional provision to that effect might be appropriate (A/CN.4/415, paras. 96 and 98).

478. The Special Rapporteur also pointed out that one Government had proposed clarifying, in connection with the exceptions provided for in paragraph 2, that the mere appearance of a State or its representatives before a foreign tribunal to perform the duty of protecting its nationals or with a view to reporting crimes or giving evidence in a case should not be deemed to constitute consent to the exercise by the court of jurisdiction over that State. The Special Rapporteur, while maintaining that the formulation “appearance . . . in performance of the duty of affording protection” would unduly widen the scope of State immunity, considered that a new paragraph providing for immunity in cases where a State appeared before a foreign court as a witness might usefully be added to cover this concern (*ibid.*, paras. 97 and 99).

479. In the light of the above-mentioned comments and observations, the Special Rapporteur proposed the following new text of article 9 (*ibid.*, para. 100):

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

**“1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State if it has:**

**“(a) itself instituted that proceeding; or**

**“(b) intervened in that proceeding or taken any other step relating to the merits thereof. However, if the State satisfies the court that it could not have acquired knowledge of facts on which a claim to immunity can be based until after it took such a step, it can claim immunity based on these facts provided it does so at the earliest possible moment.**

**“2. Paragraph 1 (b) above does not apply to any intervention or step taken for the sole purpose of:**

**“(a) invoking immunity; or**

**“(b) asserting a right or interest in property at issue in the proceeding.**

**“3. The appearance of a representatives of a State before a court of another State as a witness does not affect the immunity of that State in the proceeding before that court.**

**“4. Failure on the part of a State to enter an appearance in a proceeding before a court of another State shall not be considered as consent of that State to the exercise of jurisdiction by that court.”**

480. Many members of the Commission supported the additional sentence in paragraph 1 (b) proposed by the Special Rapporteur. As for the proposed new paragraph 3, it was favourably received by several members but considered unnecessary by others. One member suggested

<sup>234</sup> *Ibid.*, vol. 1155, p. 331.

that the phrase “in the proceeding before that court”, in that paragraph, be amended to read “from the jurisdiction of that court”. The opinion was furthermore expressed that the new paragraph 3 should also cover the case of fulfilment of consular relations.

#### ARTICLE 10 (Counter-claims)

481. Article 10, as provisionally adopted by the Commission on first reading, reads as follows:

##### *Article 10. Counter-claims*

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

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

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

482. In his preliminary report, the Special Rapporteur observed that one Government had proposed adding a proviso similar to the one found in the United States *Foreign Sovereign Immunities Act of 1976*<sup>235</sup> (sect. 1607 (c)), to the effect that a foreign State could not invoke immunity from jurisdiction only to the extent that the claim or counter-claim against it did not seek relief exceeding in amount or differing in kind from that sought by the foreign State itself. The Special Rapporteur was in favour of introducing such a provision in article 10 and therefore proposed the following new paragraph 4 (A/CN.4/415, paras. 105 and 107):

“4. A State cannot invoke immunity from jurisdiction only to the extent that the claim or counter-claim against it does not seek relief exceeding in amount or differing in kind from that sought by that State itself.”

483. Another Government had proposed combining the provisions of paragraphs 1 and 2 into a single paragraph which would read:

“Neither a foreign State which institutes a proceeding nor a foreign State which intervenes to present a claim in a proceeding before a court of the forum State can invoke immunity from jurisdiction in respect of any counter-claim against the foreign State arising out of the same legal relationship or facts as the principal claim.”

484. The Special Rapporteur suggested that the latter proposal be referred to the Drafting Committee for consideration (*ibid.*, para. 106).

485. Some members of the Commission indicated that they could accept the new paragraph 4 proposed by the Special Rapporteur. Several other members, however, doubted its validity and requested the Special Rapporteur to elaborate on the intended effect of the paragraph.

486. The Special Rapporteur explained that the purpose of the new paragraph 4 was to prevent an excessive claim or counter-claim against a State in situations provided for

in paragraphs 1 and 2, where the State was not entitled to immunity. He had particularly in mind the situation in which a claimant or counter-claimant, utilizing the circumstances in which the State could not claim immunity, collected or purchased debts attributable to the State and would present a claim or counter-claim far exceeding the original claim. He thought that the new provision could prevent such a situation. However, he recognized that the appraisal of the claim and the counter-claim presented a difficult problem in a litigation and said that he would therefore not insist on the retention of the new provision, if the view of the Commission was that it was not appropriate.

#### (c) PART III. [LIMITATIONS ON] [EXCEPTIONS TO] STATE IMMUNITY

487. In his preliminary report, the Special Rapporteur noted that the issue of the title of part III had been a source of controversy in the Commission and that the comments and observations received from Governments also reflected conflicting views. Some States favoured the term “limitations”, subscribing to the view that present international law did not recognize jurisdictional immunity of States in the areas dealt with in part III; others favoured the term “exceptions”, considering that it correctly conveyed the notion that jurisdictional immunity of States was the rule in international law and that exceptions to that rule were made subject to the express consent of the State. The Special Rapporteur’s view, however, was that undue weight had been given to the problem of the title during the first reading. He stated that a choice could be made either way, without prejudice to the various doctrinal positions, once the main issues involved were settled (A/CN.4/415, para. 110).

488. Members of the Commission again expressed support for one or the other bracketed expression. There was general support, however, for the Special Rapporteur’s suggestion that a decision on the title of part III should be made after the completion of the second reading of the substantive part of the draft articles. One member suggested that a more descriptive title, for example “Cases in which State immunity may not be invoked before a court of another State”, might facilitate reaching a consensus.

#### ARTICLE 11 (Commercial contracts)

489. Article 11 deals with jurisdictional immunity of States in proceedings before foreign courts relating to commercial contracts. The text, as provisionally adopted by the Commission on first reading, reads as follows:

##### *Article 11. Commercial contracts*

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

2. Paragraph 1 does not apply:

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

<sup>235</sup> See footnote 225 above.

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

490. In his preliminary report, the Special Rapporteur noted that a number of Governments, in their comments and observations, had favoured the inclusion of a rule pertaining to the jurisdictional link between a dispute arising out of a commercial contract and the forum State, whereas in the view of one Government the reference in paragraph 1 to "the applicable rules of private international law" was both effective and sufficient. The Special Rapporteur stated that he was inclined to agree with the latter view. In his opinion, unification of rules of private international law was outside the scope of the draft articles and would in any event be no easy task, since the solutions adopted in various national and international legal instruments differed (A/CN.4/415, paras. 113 and 116). The Special Rapporteur therefore suggested that the present formulation be retained (*ibid.*, para. 119).

491. With regard to the phrase in paragraph 1 reading "the State is considered to have consented . . . that proceeding", the Special Rapporteur agreed with the view of some Governments that it erroneously applied a fiction of implied *ad hoc* consent in the situations where current international law did not recognize jurisdictional immunity as a rule. He therefore suggested (*ibid.*, para. 121) that paragraph 1 be amended to read:

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

492. During the Commission's discussion, many members supported the reformulation of paragraph 1 proposed by the Special Rapporteur. Some members, while supporting the Special Rapporteur's proposal, considered it important to include in that paragraph a rule establishing a territorial link between the commercial contract and the forum State, rather than relying generally on "the applicable rules of private international law".

493. One member suggested further that a clarification might usefully be added to article 11 to the effect that a provision in any commercial contract that it was to be governed by the law of another State was not to be deemed as submission to the jurisdiction of that State.

494. Another member suggested that paragraph 1 should begin with the phrase "Unless otherwise agreed between the States concerned", which appeared in articles 12 to 18, and that the formulation "If a State enters into a commercial contract . . ." should be replaced by more precise language pointing to the obligation arising for a State out of a commercial contract. Noting the importance of providing a rule concerning the jurisdictional link between a given dispute and the forum State, that member therefore suggested amending paragraph 1 along the following lines:

"1. Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State if a proceeding is based

on an obligation of the State arising out of a commercial contract between the State and a foreign natural or juridical person and the commercial activity is partly or wholly conducted in the State of the forum."

495. Regarding the question of the applicable rules, the Special Rapporteur reiterated the view he had already expressed (see para. 490 above) and indicated that, for the purpose of article 11, it sufficed to note that a local court normally had its own rules for determining a jurisdictional link between a particular commercial contract and the forum State.

496. The Special Rapporteur took note of the proposed clarification concerning the effect of any agreement between the parties to a commercial contract regarding the law governing the contract and suggested that the matter be considered by the Drafting Committee, either in the context of article 11 or, as suggested by one Government, in that of article 8.

497. As for the proposed addition of the phrase "Unless otherwise agreed between the States concerned", the Special Rapporteur was opposed to the suggestion. He considered that article 11 was the basic rule of non-immunity of States from foreign jurisdiction and that it would not be appropriate to encourage deviation either by way of bilateral or regional agreements or in written contracts.

498. In his preliminary report (A/CN.4/415, para. 122), the Special Rapporteur, taking into account the views expressed by the Governments of some socialist States in their written comments and observations, proposed a new article 11 bis dealing with the question of State enterprises with segregated State property. The new article would read as follows:

#### *"Article 11 bis. Segregated State property"*

"If a State enterprise enters into a commercial contract on behalf of a State with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial contract fall within the jurisdiction of a court of another State, the former State cannot invoke immunity from jurisdiction in a proceeding arising out of that commercial contract unless the State enterprise, being a party to the contract on behalf of the State, with a right to possess and dispose of segregated State property, is subject to the same rules of liability relating to a commercial contract as a natural or juridical person."

499. Several members of the Commission, while supporting the need to include in the draft articles a provision relating to State enterprises with segregated State property along the lines suggested by the Special Rapporteur, held the view that the concept required substantial clarification. Certain specific points were raised in that context. First, it was suggested that the notion of a commercial contract entered into by a State enterprise "on behalf of a State" was difficult to comprehend, because State enterprises entered into commercial contracts on their own behalf with foreign persons. Secondly, it was pointed out that the problem of representation still arose, which involved the question of

the relationship between the rules of internal law defining the status of State entities separate from the State itself and the rules of international law concerning representation. Thirdly, the separation of State enterprises with segregated property from the State might leave private persons without a sufficient remedy. The view of these members was therefore that the question of State enterprises with segregated State property should be considered in greater depth by the Commission. One member suggested that State enterprises, not being subject to State immunity, should be dealt with under a separate heading.

500. In the view of some members, the purpose of the new article 11 bis should be to prevent abuse of the judicial process against foreign States, and to that end the article should not only clarify the concept of a State enterprise with segregated State property, but also exempt States from appearance before a foreign court in a proceeding concerning differences relating to a commercial contract between a State enterprise with segregated State property and a foreign person. Some other members felt that such an exemption was also important to developing countries. In that connection, it was said that there had been many instances in which judicial process had been instituted against a State with respect to commercial contracts of a State enterprise having separate and distinct juridical status under national law for the execution of its functions. Such proceedings should, in the view of those members, be confined to such enterprises not only on the basis of legal principles, but also taking into account the limited economic resources of developing countries and the very high cost of litigation in certain other countries.

501. With a view to clarifying further the legal concept of a State enterprise with segregated State property, one member proposed, on a preliminary basis, the following revised text for article 11 bis for consideration by the Commission:

*“Article 11 bis*

“1. If a State enterprise enters into a commercial contract with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial contract fall within the jurisdiction of a court of another State, the State cannot invoke immunity from jurisdiction in a proceeding arising out of that commercial contract unless the State enterprise is a legal entity separate from the State with rights of possessing, using and disposing of a definite segregated part of State property, subject to the same rules of liability relating to commercial contracts as a natural or juridical person, and for whose obligations the State is in no way liable under its domestic law.

“2. In a proceeding arising out of a commercial contract indicated in the preceding paragraph, a certificate signed by the diplomatic representative or other competent authorities of the State to whose nationality the State enterprise belongs and directly communicated to the foreign ministry for transmission to the court shall serve as definite evidence of the character of the State enterprise.”

502. Another member proposed the following formulation for article 11 bis:

*“Article 11 bis*

“1. If a State enterprise enters into a commercial contract with a foreign juridical or natural person and, by virtue of the applicable rules of private international law, differences relating to the commercial contract fall within the jurisdiction of a court of the other State, the State enterprise (State juridical person) shall not enjoy immunity from jurisdiction in a proceeding arising out of that commercial contract.

“2. Paragraph 1 shall not apply when the action is brought not against the State juridical person which has entered into a commercial contract with a foreign natural or juridical person, but against some other enterprise of the same State or against that State itself. Furthermore, the provisions of this article shall not apply when the action is brought in connection with extra-contractual relations.

“3. Paragraph 1 shall not be applied by the State of the forum if, in corresponding cases, jurisdictional immunity is granted in that State to State juridical persons.”

503. Many members considered these two proposals useful and suggested that the Commission examine them thoroughly at its next session. In that connection, some members stated that they were not clear as to the extent to which the practice of socialist States could be applied to other States. Specifically, it was said that the legal implications of draft article 11 bis for developing countries would have to be carefully studied.

504. Recognizing that draft article 11 bis raised a complex problem, some members preferred the proposal by one Government to include in the definition of the term “State” the following new paragraph (see para. 430 above):

“The expression ‘State’ as used in the present articles does not comprehend instrumentalities established by the State to perform commercial transactions as defined in [the present article], if they act on their own behalf and are liable with their own assets.”

505. In the light of the comments made, the Special Rapporteur said that he would submit a revised text of draft article 11 bis or of paragraph 1 (b) of the new draft article 2 (see para. 423 above) to the Drafting Committee, on the basis of the useful information provided during the session and any other material, including the USSR’s 1988 law on State enterprises, which might be made available to him.

## ARTICLE 12 (Contracts of employment)

506. Article 12 deals with non-immunity of States in proceedings before foreign courts relating to contracts of employment. The text, as provisionally adopted by the Commission on first reading, reads as follows:

*Article 12. Contracts of employment*

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

employment between the State and an individual for services performed or to be performed, in whole or in part, in the territory of that other State, if the employee has been recruited in that other State and is covered by the social security provisions which may be in force in that other State.

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

- (a) the employee has been recruited to perform services associated with the exercise of governmental authority;
- (b) the proceeding relates to the recruitment, renewal of employment or reinstatement of an individual;
- (c) the employee was neither a national nor a habitual resident of the State of the forum at the time when the contract of employment was concluded;
- (d) the employee is a national of the employer State at the time the proceeding is instituted;
- (e) the employee and the employer State have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject-matter of the proceeding.

507. In his preliminary report, the Special Rapporteur indicated that Governments, in their written comments and observations, had, with one exception, supported the inclusion of article 12. He noted, however, that a number of Governments had suggested the deletion of the additional criterion of social security coverage in paragraph 1: it was considered that such a requirement might discriminate between countries that had social security systems and those that did not. It had also been suggested that there were no justifiable grounds for adding the criterion of social security coverage as a cumulative condition for non-immunity of a foreign State. In the light of these comments, the Special Rapporteur proposed the deletion of the phrase "and is covered by the social security provisions which may be in force in that other State" (A/CN.4/415, para. 131).

508. The Special Rapporteur also agreed with the view expressed by some Governments that paragraph 2 (a) and (b) as presently worded could give rise to unduly wide interpretations and substantially diminish the scope of the exception to State immunity provided in the article. He noted that the 1972 European Convention on State Immunity<sup>236</sup> did not contain such provisions. The Special Rapporteur therefore suggested that those two subparagraphs be deleted (*ibid.*, para. 132).

509. Some members of the Commission suggested that article 12 be deleted altogether. In their view, labour-law disputes as envisaged in the article were normally settled by mutual agreement or by insurance coverage. The scarcity of judicial decisions or evidence of State practice did not justify the inclusion of the provision.

510. Some other members considered article 12 important, since a local forum was the only convenient forum to provide effective remedies to employees. They pointed out that the application of local labour law to disputes of this nature and the settlement of such disputes by courts of the forum State were not uncommon. In their view, recourse to diplomatic protection would not normally offer a satisfactory solution because of the uncertainties involved in a claim being espoused by the State concerned and because of the requirement of the exhaustion of local remedies.

<sup>236</sup> Council of Europe, *European Convention on State Immunity and Additional Protocol*, European Treaty Series, No. 74 (Strasbourg, 1972).

511. The Special Rapporteur's proposal to delete the condition of social security coverage in paragraph 1 was supported by several members, although some members considered the condition appropriate.

512. Some members were in favour of the Special Rapporteur's proposal to delete subparagraphs (a) and (b) of paragraph 2. One member, referring to the use of the expression "governmental authority" in paragraph 2 (a) of article 12 and of the expression "sovereign authority" in paragraph 1 (b) and (c) of article 3, suggested that one and the same expression be used in both cases. Another member suggested that the requirement in paragraph 2 (d) that the employee be a national of the employer State at the time the proceeding in question is instituted was too restrictive and should be amended to refer to the time of the conclusion of the particular contract. Some other members were opposed to the deletion of subparagraphs (a) and (b): such a step, they believed, would be contrary to the clearly established rules. One member was particularly concerned about the deletion of subparagraph (b), for that could lead to a situation in which a foreign State might be compelled by the forum State, for example, to employ a particular individual.

513. With regard to the latter observation, the Special Rapporteur felt that little would remain in substance of the exception provided in article 12 if subparagraphs (a) and (b) of paragraph 2 were retained. In particular, he was concerned that subparagraph (b) had the effect of substantially narrowing the scope of application of local labour regulations to protect the position of employees. In that connection, the Special Rapporteur cited a case in which a Japanese employee had brought suit against her employer, the Commission of the European Communities, for annulment of her dismissal.

#### ARTICLE 13 (Personal injuries and damage to property)

514. Article 13 deals with non-immunity of States in proceedings before foreign courts relating to personal injuries and damage to property. The text, as provisionally adopted by the Commission on first reading, reads as follows:

##### *Article 13. Personal injuries and damage to property*

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

515. In his preliminary report, the Special Rapporteur noted that article 13 had drawn criticism from several Governments. In the view of these Governments, personal injuries and damage to property would occur as a result of an act or omission by an individual or a legal entity, and the regulation of the legal relations arising in connection with compensation for damage was outside the scope of the draft articles. If the act or omission was attributable to a State, then the question of State responsibility would arise, which was a matter of inter-

national law and could not be decided upon by national courts. The application of article 13 would, in the view of these Governments, create further complications, since its effect would be that a foreign State would, in respect of one and the same act, enjoy less immunity than its diplomats, who were protected from tort liability under article 31 of the 1961 Vienna Convention on Diplomatic Relations.<sup>237</sup> It was pointed out that only a small number of disputes arose in this area, as such matters would normally be settled by insurance or through diplomatic channels. Accordingly, these Governments suggested that article 13 be deleted (see A/CN.4/415, para. 136).

516. Other Governments, on the other hand, were in favour of including article 13. Some of them further suggested that the article's scope of application should be extended to cover transboundary damage, and proposed that the concluding phrase, "and if the author of the act or omission was present in that territory at the time of the act or omission", be deleted. One Government also suggested that a clarification might be introduced in the article to the effect that the provision would not affect the rules of international law regulating the extent of liability or compensation or establishing specific methods of dispute settlement (*ibid.*, paras. 137-138).

517. With regard to the question of State responsibility, the Special Rapporteur was of the view that the illegality of the act or omission under article 13 was determined by the law of the State of the forum (*lex loci delicti commissi*), as stated in the commentary to the article,<sup>238</sup> and not in accordance with the rules of international law (*ibid.*, para. 140). As for the second territorial criterion, the Special Rapporteur agreed that the presence of the author of the act or omission in the territory of the State of the forum at the time of the act or omission could not legitimately be viewed as a necessary criterion for the exclusion of State immunity in the light of the relevant provisions of recent codifications, and he therefore proposed that it be deleted (*ibid.*, para. 141). However, in his second report (A/CN.4/422 and Add.1, para. 20), the Special Rapporteur observed that the tort exception under article 13 would not be applicable to torts committed abroad or to other transfrontier injurious acts, because of the first requirement of territorial connection.

518. The Special Rapporteur supported the suggestion by one Government to add a new paragraph 2 to article 13 and proposed that it read as follows (A/CN.4/415, paras. 142-143):

"2. Paragraph 1 does not affect any rules concerning State responsibility under international law."

519. In his second report (A/CN.4/422 and Add.1, para. 22), the Special Rapporteur indicated that the present scope of article 13, which, *inter alia*, covered all types of physical injury to the person and damage to tangible property, might be too broad to command general support. In that connection, he noted that the commentary to the article suggested that the intent of the Commission had been to limit the application of the

article mainly to traffic accidents occurring routinely within the territory of the forum State. The Special Rapporteur therefore suggested that the Commission might, for the sake of compromise, consider narrowing the scope of the article to cover only traffic accidents.

520. During the Commission's discussion, a number of members expressed serious doubts about article 13. It was pointed out that the article encompassed wider areas than those involving domestic-law violations. Difficulties arose, according to some members, because the article could be prejudicial to questions of international responsibility which were outside the scope of the draft articles; because it would create inconsistency between the jurisdictional immunities enjoyed by a State under the future convention and those enjoyed by diplomatic agents representing the State under the relevant international agreements in force; and because it made no distinction between sovereign acts and private-law acts.

521. Some members proposed the deletion of article 13. It was held that the article had no legal basis other than in the recent legislation of a few States and that, whenever States accepted a waiver of immunity in cases involving personal injuries or damage to property before foreign courts, they did so by concluding international agreements. In the view of these members, such cases could be settled most effectively through diplomatic channels.

522. Other members supported the retention of article 13. They pointed out that disputes of this nature were not uncommon and considered that the provision was a necessary safeguard for the protection of individual victims. In their view, diplomatic protection was not a viable alternative as a practical matter.

523. Some other members, while not entirely opposed to the inclusion of a provision on the matter, stressed that article 13 required substantial redrafting in order to clarify the rules to determine those cases to be covered by the article and those to be resolved by reference to the international law of State responsibility.

524. With regard to the specific proposals made by the Special Rapporteur, the views expressed by members generally indicated a preference to retain the text of the article as adopted on first reading. The deletion of the second territorial criterion, as proposed by the Special Rapporteur, was not considered appropriate, since transboundary damage normally gave rise to international disputes which had to be settled by recourse to international law and not to the law applicable in a forum State.

525. As for the proposed new paragraph 2 (see para. 518 above), it was generally considered to be superfluous. One member suggested, however, that the paragraph be expanded to include reference to provisions of treaty law concerning international civil liability for transboundary damage. Finally, on the question of limiting the scope of article 13 to traffic accidents, the views of members were divided. Some members suggested that the general practice of settlement through insurance would diminish the practical need for such a provision in the draft articles.

<sup>237</sup> See footnote 231 above.

<sup>238</sup> *Yearbook ... 1984*, vol. II (Part Two), p. 66, para. (3) of the commentary to article 14 (subsequently article 13).

526. In the light of the comments made, the Special Rapporteur indicated that he would not insist on the deletion of the second territorial criterion. At any rate, further examination of article 13 was required, particularly with respect to the important question of its legal relationship with the law of State responsibility.

#### ARTICLE 14 (Ownership, possession and use of property)

527. Article 14 deals with non-immunity of States in proceedings before foreign courts relating to the ownership, possession and use of property. The text, as provisionally adopted by the Commission on first reading, reads as follows:

##### *Article 14. Ownership, possession and use of property*

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

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

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

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

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

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

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

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

(b) in which the State claims a right or interest,

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

528. In his preliminary report, the Special Rapporteur observed that some Governments, in their comments and observations, had suggested that the scope of article 14 in its present form was too broad. With regard to paragraph 1, the Special Rapporteur himself expressed doubts as to whether subparagraphs (c) to (e) reflected universal practice. If the intention of the Commission was to let the practice of common-law countries prevail, he would propose amending subparagraphs (c), (d) and (e) to better reflect actual practice. However, if the Commission thought that subparagraphs (b) to (e) could open the door to foreign jurisdiction even in the absence of any link between the property in question and the forum State, he would propose the deletion of those four subparagraphs (see A/CN.4/415, paras. 146-147 and 152-154).

529. On the basis of these considerations, the Special Rapporteur proposed (*ibid.*, para. 156) that paragraph 1 of article 14 be amended to read:

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

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

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

"(c) the administration of a trust, the winding up of companies, bankruptcy proceedings or any other form of administration of property situated in the State of the forum, notwithstanding that a foreign State might have or assert an interest in part of the property.]"

530. The Special Rapporteur's recommendation to reconsider subparagraphs (c) to (e) of paragraph 1 was supported by several members of the Commission. It was generally said that those provisions were based on the legal practice of common-law countries and were not appropriate for a universal convention. The term "interest", which was not a clearly understood legal concept outside the common-law system, continued to present a difficult problem for many members. Some members doubted whether there was any jurisdictional link between the property referred to in subparagraphs (b) to (e) and the forum State and suggested the deletion of those four subparagraphs.

531. Some members pointed out a possible duplication between paragraph 2 of article 14 and paragraph 3 of article 7, and suggested that paragraph 2 be deleted.

532. The Special Rapporteur suggested that these points could be referred to the Drafting Committee for consideration. As for the question of the jurisdictional link between a given property and the forum State, the Special Rapporteur suggested that, as far as subparagraph (b) was concerned, it would not be too difficult to discern that link.

#### ARTICLE 15 (Patents, trade marks and intellectual or industrial property)

533. Article 15 deals with non-immunity of States in proceedings before foreign courts relating to patents, trade marks and intellectual or industrial property. The text, as provisionally adopted by the Commission on first reading, reads as follows:

##### *Article 15. Patents, trade marks and intellectual or industrial property*

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

(a) the determination of any right of the State in a patent, industrial design, trade name or business name, trade mark, copyright or any other similar form of intellectual or industrial property, which enjoys a measure of legal protection, even if provisional, in the State of the forum; or

(b) an alleged infringement by the State in the territory of the State of the forum of a right mentioned in subparagraph (a) above which belongs to a third person and is protected in the State of the forum.

534. In his preliminary report, the Special Rapporteur observed that, in its written comments and observations, one Government had made specific proposals with regard to subparagraph (a): (i) to include a reference to "plant breeders' rights"; (ii) to delete the word "similar" from the phrase "any other similar form of intellectual or

industrial property”, which might create the need to determine whether various kinds of new rights without a clearly defined legal status, such as rights in computer-generated works, were covered; (iii) to amend the words “the determination of”, which unjustifiably narrowed the scope of application of the provision (A/CN.4/415, para. 159).

535. The Special Rapporteur, responding to the first two proposals referred to above, stated that the points raised could be clarified in the commentary. He therefore suggested that the text of the article adopted on first reading remain unchanged.

536. No specific comments were made in the Commission on article 15, except to support the Special Rapporteur’s suggestion that the substantive scope of the article be elaborated on in the commentary and that the text remain unchanged.

#### ARTICLE 16 (Fiscal matters)

537. Article 16 deals with non-immunity of States in proceedings before foreign courts relating to fiscal matters. The text, as provisionally adopted by the Commission on first reading, reads as follows:

##### *Article 16. Fiscal matters*

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

538. In his preliminary report, the Special Rapporteur indicated that the comments and observations on article 16 received from Governments included three specific proposals. One proposal was that the article be replaced by a new provision stipulating that jurisdictional immunity did not apply to proceedings concerning customs duties, taxes or penalties, as provided in article 29 (c) of the 1972 European Convention on State Immunity.<sup>239</sup> Another proposal was to add after the words “for which it may be liable under the law of the State of the forum” the phrase “or under the international agreements in force between the two States”. The third proposal was to insert the phrase “and without prejudice to the established rules of international diplomatic law” after the phrase “Unless otherwise agreed between the States concerned” (see A/CN.4/415, paras. 165-167).

539. With regard to the first proposal, the Special Rapporteur was of the view that article 16 should be kept unchanged. As for the second proposal, the Special Rapporteur said that the point was covered in the opening phrase “Unless otherwise agreed between the States concerned”. Regarding the third proposal, it was the Special Rapporteur’s understanding that article 4 already made it clear that the privileges and immunities of diplomatic and consular property under international law were not to be prejudiced (*ibid.*, paras. 169-170). If that understanding were included in the commentary, no change in article 16 would be necessary.

540. During the Commission’s discussion, some members supported the retention of article 16. Some

other members doubted its necessity. In the opinion of one member in particular, the article should be deleted altogether as it was derogatory to sovereignty and the sovereign equality of States.

#### ARTICLE 17 (Participation in companies or other collective bodies)

541. Article 17 deals with non-immunity of States in proceedings before foreign courts relating to their participation in companies or other collective bodies. The text, as provisionally adopted by the Commission on first reading, reads as follows:

##### *Article 17. Participation in companies or other collective bodies*

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

(a) has participants other than States or international organizations; and

(b) is incorporated or constituted under the law of the State of the forum or is controlled from or has its principal place of business in that State.

2. Paragraph 1 does not apply if provision to the contrary has been made by an agreement in writing between the parties to the dispute or by the constitution or other instrument establishing or regulating the body in question.

542. In his preliminary report, the Special Rapporteur noted that one Government had suggested that the requirement in paragraph 1 (b) that the collective body have its “principal place of business” in the forum State should be given precedence over the other two criteria establishing the exception to the rule of jurisdictional immunity of States. Another Government had proposed replacing the words “participation” and “participants” by “membership” and “members”, respectively (see A/CN.4/415, paras. 173-174).

543. The Special Rapporteur proposed retaining article 17 in its present formulation, on the grounds that, as far as the first proposal was concerned, no precedent was found in relevant international or national legal instruments and that, regarding the second proposal, the present wording of paragraphs 1 and 2 did not suggest the need to amend the words “participation” and “participants”.

544. During the Commission’s discussion, no specific comments were made on article 17, except that one member suggested reformulating paragraph 1 (b) in more general terms.

#### ARTICLE 18 (State-owned or State-operated ships engaged in commercial service)

545. Article 18 deals with non-immunity of States in proceedings before foreign courts relating to State-owned or State-operated ships engaged in commercial service. The text, as provisionally adopted by the Commission on first reading, reads as follows:

##### *Article 18. State-owned or State-operated ships engaged in commercial service*

1. Unless otherwise agreed between the States concerned, a State which owns or operates a ship engaged in commercial [non-governmental]

<sup>239</sup> See footnote 236 above.

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

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

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

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

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

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

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

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

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

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

546. In his preliminary report, the Special Rapporteur noted that a number of Governments, in their written comments and observations, had suggested the deletion of the term "non-governmental" in paragraphs 1 and 4. Only one Government had expressed the view that the term should be retained without square brackets, while another Government had pointed out that the possibility of a ship being used for commercial but also governmental purposes must be taken into account (see A/CN.4/415, paras. 180 and 182).

547. The Special Rapporteur felt that the inclusion of the term "non-governmental" rendered the meaning of paragraph 1 ambiguous and could be an unnecessary source of controversy. He therefore proposed that the term be deleted from paragraphs 1 and 4 (*ibid.*, para. 191). In his second report, the Special Rapporteur pointed out that the deletion of the term would be consistent with treaty practice, for such a reference could not be found in the relevant international conventions, including the 1926 Brussels Convention,<sup>240</sup> the 1958 Convention on the Territorial Sea and the Contiguous Zone<sup>241</sup> and the 1982 United Nations Convention on the Law of the Sea.<sup>242</sup>

<sup>240</sup> International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels (Brussels, 1926) and Additional Protocol (Brussels, 1934) (League of Nations, *Treaty Series*, vol. CLXXVI, pp. 199 and 215; reproduced in United Nations, *Materials on Jurisdictional Immunities* ... (see footnote 216 above), pp. 173 *et seq.*).

<sup>241</sup> United Nations, *Treaty Series*, vol. 516, p. 205.

<sup>242</sup> *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 151, document A/CONF.62/122.

Under those conventions, the immunity of State-owned or State-operated seagoing vessels was limited to warships and ships on government non-commercial service. The Special Rapporteur further expressed the view that providing for immunity of ships owned or operated by a State other than those used or intended for use in government non-commercial service might not ultimately be in the interests of developing countries. In his view, if States were not answerable for claims in respect of the operation of ships and cargoes on board those ships, private parties in the developed as well as developing countries would hesitate to use the services of such ships (A/CN.4/422 and Add.1, paras. 24-25).

548. Also in his second report, the Special Rapporteur observed that two Governments had suggested introducing into the draft articles the concept of segregated State property, which in their view could considerably facilitate the solution of problems relating to State-owned or State-operated ships engaged in commercial service. In the light of those comments, the Special Rapporteur proposed adding to article 18 the following new paragraph 1 *bis* (*ibid.*, para. 26), corresponding in substance to the new draft article 11 *bis* (see para. 498 above):

"1 *bis*. If a State enterprise, whether agency or separate instrumentality of the State, operates a ship owned by the State and engaged in commercial service on behalf of the State and, by virtue of the applicable rules of private international law, differences relating to the operation of that ship fall within the jurisdiction of a court of another State, the former State is considered to have consented to the exercise of that jurisdiction in a proceeding relating to the operation of that ship, unless the State enterprise with a right of possessing and disposing of a segregated State property is capable of suing or being sued in that proceeding."

549. The Special Rapporteur also referred to the suggestion by one Government that the Commission consider in the context of article 18 the question of State-owned or State-operated aircraft engaged in commercial service. He indicated that the question was governed by treaties on international civil aviation and their protocols, including the Convention relating to the Regulation of Aerial Navigation (Paris, 1919);<sup>243</sup> the Convention for the Unification of Certain Rules relating to International Carriage by Air (Warsaw, 1929);<sup>244</sup> the Convention for the Unification of Certain Rules relating to the Precautionary Attachment of Aircraft (Rome, 1933);<sup>245</sup> the Convention on International Civil Aviation (Chicago, 1944);<sup>246</sup> and the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (Rome, 1952).<sup>247</sup> Having analysed the relevant provisions of those treaties, he was inclined to the view that, apart from those treaties, there was not a uniform rule of customary international law concerning the immunity of State-owned or State-operated aircraft. Moreover, the relevant legal cases which might constitute

<sup>243</sup> League of Nations, *Treaty Series*, vol. XI, p. 173.

<sup>244</sup> *Ibid.*, vol. CXXXVII, p. 11.

<sup>245</sup> *Ibid.*, vol. CXCII, p. 289.

<sup>246</sup> United Nations, *Treaty Series*, vol. 15, p. 295.

<sup>247</sup> *Ibid.*, vol. 310, p. 181.

State practice were scanty. In the light of those considerations, the Special Rapporteur suggested that the question of aircraft could more suitably be dealt with in the commentary than in an additional provision in article 18 (A/CN.4/422 and Add.1, paras. 28-31).

550. With regard to paragraph 6, the Special Rapporteur suggested that the Commission consider redrafting it as it could be misinterpreted to mean that States were allowed to plead all measures of defence, prescription and limitation of liability only in proceedings relating to the operation of the relevant ships and cargoes (*ibid.*, para. 25).

551. During the Commission's discussion, many of the members who addressed the issue supported the Special Rapporteur's proposal to delete the term "non-governmental" in paragraphs 1 and 4, but some others held a contrary view. One member stated that the position of developing countries, which tended to support the inclusion of the term "non-governmental", was not to seek immunity of all State-owned or State-operated ships engaged in commercial service. Their concern, as had been evident in the discussion on the criteria for determining the commercial character of a contract under paragraph 3 of the new draft article 2 (see para. 423 above), was that, where public interests were involved in a given commercial activity engaged in by a ship owned or operated by a State, that State could invoke the immunity of the ship. In the view of one member, the fact that the existing treaties referred consistently to the criterion of "government non-commercial service" could be taken to mean that there existed a criterion of "government commercial service". Several members stated that they could not agree with that member's view. The retention of the term "non-governmental", it was said, would seriously increase the problem of application. Another member stressed that article 18 raised questions similar to those addressed in connection with the definition of the term "State" in the new draft article 2 and of "segregated State property" in draft article 11 bis. The question was not to ensure an advantage for States which had a large sector of State property, but to protect them against discrimination.

552. Members of the Commission who spoke on the issue were also in general agreement with the Special Rapporteur that there was no specific need to include a new provision concerning the jurisdictional immunity of State-owned or State-operated aircraft and that the question should be dealt with in the commentary.

553. As for paragraph 6, some members requested further clarification of the objective of the Special Rapporteur's suggestion to delete it.

#### ARTICLE 19 (Effect of an arbitration agreement)

554. Article 19 deals with non-immunity of States in proceedings before foreign courts relating to an arbitration agreement. The text, as provisionally adopted by the Commission on the first reading, reads as follows:

##### **Article 19. Effect of an arbitration agreement**

If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a

[commercial contract] [civil or commercial matter], that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:

- (a) the validity or interpretation of the arbitration agreement;
- (b) the arbitration procedure;
- (c) the setting aside of the award,

unless the arbitration agreement otherwise provides.

555. With regard to the two bracketed alternatives in the introductory clause, the Special Rapporteur noted in his preliminary report that a number of Governments, in their written comments and observations, had expressed a preference for the expression "civil or commercial matter", although two Governments had supported the expression "commercial contract" (A/CN.4/415, paras. 194-195).

556. The Special Rapporteur agreed that the expression "civil or commercial matter" was preferable, in view of the increasing number of arbitration cases involving disputes arising from commercial and civil matters between States and natural or juridical persons. He further maintained that, if implied consent was the basis of article 19, there was no reason for limiting the forum State's supervisory jurisdiction to commercial contracts (*ibid.*, para. 200). In his second report (A/CN.4/422 and Add.1, para. 32), the Special Rapporteur observed that, from a practical point of view, the reference to a "civil matter" would be appropriate so as not to exclude cases such as arbitration of claims arising out of the salvage of a ship, which might not be included within the purview of a "commercial contract".

557. As for the reference to a "court", the Special Rapporteur pointed out that article 19 contained the phrase "before a court of another State which is otherwise competent", whereas the original proposal by the previous Special Rapporteur had been "a court of another State on the territory or according to the law of which the arbitration has taken or will take place". The Special Rapporteur preferred the latter formulation (*ibid.*, para. 33).

558. With regard to the provision of subparagraph (c) concerning the setting aside of the arbitral award, the Special Rapporteur noted that some domestic laws concerning civil procedure provided that the setting aside of the award could take place for reasons of public policy. He pointed out in that connection that the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>248</sup> stipulated that the setting aside of an award might be ordered only by a court of the State in which the arbitration had taken place (*ibid.*, para. 34).

559. On the question of the extent of proceedings involving the exercise of supervisory jurisdiction by a court of another State, the Special Rapporteur indicated that one Government had proposed adding in subparagraph (c) a reference to proceedings relating to the "recognition and enforcement" of the arbitral award (*ibid.*, para. 35). With regard to the "enforcement" of an arbitral award, the Special Rapporteur stated that recent codifications, with the exception of Australia's *Foreign States Immunities Act 1985*,<sup>249</sup> did not regard the

<sup>248</sup> *Ibid.*, vol. 330, p. 3.

<sup>249</sup> See footnote 227 above.

submission by a State to arbitration as a waiver of immunity from enforcement jurisdiction. He pointed out, however, that decisions of national courts and the opinions of writers were far from uniform on the issue. The Special Rapporteur therefore suggested that the question of the enforcement of arbitral awards be kept outside the scope of article 19, despite the comment by one Government suggesting that it should be dealt with explicitly in the article (*ibid.*, paras. 36-37).

560. As for the “recognition” of an arbitral award, the Special Rapporteur referred to the practice of French courts, which strictly distinguished recognition of an arbitral award from actual execution of the award. While it might be a method peculiar to one State, the Special Rapporteur considered that the Commission might be guided by that method in formulating its position on the question. He therefore suggested that the Commission consider adding to article 19 the following new subparagraph (d):

“(d) the recognition of the award,”

on the understanding that it should not be interpreted as implying waiver of immunity from execution (*ibid.*, paras. 38-40).

561. During the Commission’s discussion, several members supported the Special Rapporteur’s suggestion to delete the expression “commercial contract” in favour of “civil or commercial matter”. Several other members were opposed to the suggestion, on the grounds that it would broaden the scope of the exception to State immunity under article 19.

562. With regard to the Special Rapporteur’s proposal for a new subparagraph (d), several members considered it a useful addition, although one member suggested caution so as not to compound the problem of ambiguity which persisted in article 19 by such an addition. Another member considered it important to provide expressly for recognition and enforcement of arbitral awards somewhere in the draft articles and wondered whether that should be done in part III, which dealt only with immunity or lack of it, or in part IV, dealing with enforcement. In his view, the provision could be included either in article 19 or in article 21.

563. On the latter question, the Special Rapporteur said that, as far as the recognition of arbitral awards was concerned, the provision could be included in article 19 if it was stated clearly in connection with the proposed subparagraph (d) that it should not be interpreted as implying waiver of immunity from execution.

#### **ARTICLE 20 (Cases of nationalization)**

564. Article 20 deals with extraterritorial effects of measures of nationalization. The text, as provisionally adopted by the Commission on first reading, reads as follows:

##### ***Article 20. Cases of nationalization***

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

565. In his preliminary report, the Special Rapporteur noted that article 20 had not elicited comments and observations from many Governments. Some Governments considered that the meaning and precise scope of the provision were not clear. Some stated that measures of nationalization, as sovereign acts, were not subject to the jurisdiction of another State and that article 20, which allowed the conclusion that nationalization measures were an exception to the principle of immunity, should be deleted. Some other Governments suggested that the article be placed in part I of the draft (see A/CN.4/415, paras. 205-207).

566. The Special Rapporteur pointed out that the extraterritorial effects of measures of nationalization were not a subject on which the Commission had been specifically requested to express its opinion. He recalled that, during the first reading, some discussion had taken place on the problem, but the Commission had agreed to retain a general reservation clause such as article 20. He therefore considered that the article could be retained without change (*ibid.*, para. 208). In his second report (A/CN.4/422 and Add.1, para. 41), the Special Rapporteur referred to some specific situations in which a general saving clause on nationalization measures might be relevant.

567. During the Commission’s discussion, many members were in favour of deleting article 20. The present location of the article was considered particularly problematical as it gave the impression that measures of nationalization were a part of the cases involving non-immunity of States provided for in articles 11 to 19. Some members suggested that the article be placed elsewhere, for example in part I.

568. In the light of those comments, the Special Rapporteur indicated that he could agree to the deletion of article 20 if that was the wish of the Commission, but he would be opposed to placing it in part I, since it did not relate to the main subject of the draft articles.

#### **(d) PART IV. STATE IMMUNITY IN RESPECT OF PROPERTY FROM MEASURES OF CONSTRAINT**

##### **ARTICLE 21 (State immunity from measures of constraint)**

569. Article 21 deals with the principle of State immunity from measures of constraint. The text, as provisionally adopted by the Commission on first reading, reads as follows:

##### ***Article 21. State immunity from measures of constraint***

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

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

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

570. In his preliminary report, the Special Rapporteur noted that, according to the comments and observations on article 21 received from Governments, a number of

them considered that the meaning and legal effect of the phrase “or property in which it has a legally protected interest” in square brackets in the introductory clause were not clear and that the phrase should therefore be deleted, since it might permit a broadening of the present scope of State immunity from execution. Retention of the phrase was supported by two Governments. Many Governments also considered that the requirement in subparagraph (a) that, for a State to be brought before a foreign court in a proceeding relating to measures of constraint, the property in question must specifically be in use or intended for use by the State for commercial purposes and have a connection with the object of the proceeding placed an excessive restriction on the cases in which property might legitimately be subject to measures of constraint (see A/CN.4/415, paras. 211 and 213).

571. Some Governments had expressly stated their preference for the term “non-governmental” in square brackets in subparagraph (a) to be deleted (*ibid.*, para. 212).

572. One Government had suggested the deletion of subparagraphs (a) and (b) (*ibid.*, para. 216).

573. In the light of those comments and observations, the Special Rapporteur proposed the deletion of (i) the bracketed phrase in the introductory clause, “or property in which it has a legally protected interest”; (ii) the phrase “and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed” in subparagraph (a); (iii) the term “non-governmental” in square brackets in subparagraph (a). The Special Rapporteur did not, however, agree to the deletion of subparagraphs (a) and (b) suggested by one Government, because the restrictions on State immunity formulated therein were, in his view, necessary to prevent a broadening of the scope of immunity related to measures of constraint, and a number of Governments had in fact supported those exceptions to State immunity from measures of constraint in their written comments and observations (*ibid.*, paras. 217-220).

574. Further to the above proposals, the Special Rapporteur stated in his second report (A/CN.4/422 and Add.1, paras. 43 *in fine* and 46) that a possible alternative to his suggestion to delete the phrase “and has a connection . . . directed” in subparagraph (a) might be to retain that phrase and to add the phrase “Unless otherwise agreed between the States concerned” at the beginning of the article.

575. Some of the members of the Commission who spoke on article 21 were in favour of deleting the bracketed phrase in the introductory clause, “or property in which it has a legally protected interest”, as suggested by the Special Rapporteur. One member pointed out, however, that the legal concept of an “interest” was broader than that of a “right”: the phrase should be retained, in order not to restrict the scope of the exceptions to the immunity of States from foreign enforcement jurisdiction. Some members proposed replacing the notion of a “legally protected interest” by that of a “real right”, which was equivalent, thereby following the judgment in the *Barcelona Traction* case.<sup>250</sup>

<sup>250</sup> *Barcelona Traction, Light and Power Company, Limited, Second Phase*, Judgment of 5 February 1970, I.C.J. Reports 1970, p. 3.

576. The Special Rapporteur’s proposal to delete the term “non-governmental” in square brackets in subparagraph (a) was supported by some members, but some other members were opposed to the deletion, which would, in their view, limit the application of the rule of State immunity from execution. One member suggested that a satisfactory resolution of the problems relating to the definition of a “commercial contract” in the new draft article 2 (see para. 423 above) and the treatment of State-owned or State-operated ships in article 18 could facilitate a compromise on that particular point.

577. As for the Special Rapporteur’s suggestion to delete the phrase “and has a connection . . . directed” in subparagraph (a), some members found it unacceptable. Some other members supported the addition of the phrase “Unless otherwise agreed between the States concerned” at the beginning of the article, which the Special Rapporteur had proposed as an alternative.

578. One member was of the view that article 21 should explicitly spell out the principle of State immunity in respect of property from measures of constraint, along the lines of article 23 of the 1972 European Convention on State Immunity,<sup>251</sup> incorporating some of the elements of article 22 of the present draft. Accordingly, he proposed the following reformulation:

#### “Article 21

“1. No measures of constraint, including measures of attachment, arrest and execution, against the property of a State may be taken in the territory of another State except where and to the extent that the State has expressly consented thereto, as indicated:

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

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

579. Another member also suggested that article 21 be formulated as a general provision on the principle of the prohibition of execution against the property of foreign States, rather than as one concerning exceptions, and that a provision might be added requiring States to abide by final court decisions rendered against them on the basis of the present articles.

#### ARTICLE 22 (Consent to measures of constraint)

580. Article 22, as provisionally adopted by the Commission on first reading, reads as follows:

##### *Article 22. Consent to measures of constraint*

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

<sup>251</sup> See footnote 236 above.

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

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

581. Having considered the written comments and observations of Governments, the Special Rapporteur made only one proposal on article 22 in his preliminary report, namely to delete the phrase in square brackets in paragraph 1, "or property in which it has a legally protected interest" (A/CN.4/415, para. 226).

582. The above proposal by the Special Rapporteur was supported by some of the members of the Commission who spoke on article 22. One member suggested replacing the words "legally protected interest" by "effective right", as had been proposed with regard to article 21. Another member proposed the following reformulation of article 22 as a consequence of his proposal for reformulating article 21:

### *"Article 22*

"The property of a State against which measures of constraint may be taken under article 21 shall be the property that:

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

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

## ARTICLE 23 (Specific categories of property)

583. Article 23, as provisionally adopted by the Commission on first reading, reads as follows:

### *Article 23. Specific categories of property*

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

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

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

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

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

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

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

584. In his preliminary report, the Special Rapporteur noted that three Governments, in their comments and observations, had referred to the term "non-governmental" in square brackets in paragraph 1, two being in favour of its deletion and one its retention. In the Special Rapporteur's view, the term "non-governmental" should be deleted, as in articles 18 and 21 (A/CN.4/415, para. 238).

585. With regard to paragraph 1 (c), the Special Rapporteur suggested in his second report (A/CN.4/422 and Add.1, para. 46) that the words "and serves monetary purposes" could usefully be added at the end of the subparagraph, as proposed by one Government, so as not to permit immunity for the entire central bank property.

586. As for paragraph 2, the Special Rapporteur indicated that, after further consideration, he withdrew his earlier proposal for its reformulation.

587. During the Commission's discussion, some members who spoke on article 23 supported the Special Rapporteur's proposal to delete the term "non-governmental" in paragraph 1. Some other members favoured its retention.

588. As for the Special Rapporteur's proposal to add the words "and serves monetary purposes" at the end of paragraph 1 (c), some members doubted the merit of the proposed addition on the grounds that any bank account, including a central bank's account, was established for monetary purposes and that the proposed addition could give rise to confusion.

589. With regard to paragraph 2, some members supported its retention without amendment. A few members favoured its deletion.

590. On the question of a central bank's account, the Special Rapporteur stated his understanding that such an account was generally presumed to be established for monetary purposes and enjoyed immunity from execution, unless it was allocated or being used for commercial purposes.

### *(e) PART V. MISCELLANEOUS PROVISIONS*

## ARTICLE 24 (Service of process)

591. Article 24, as provisionally adopted by the Commission on first reading, reads as follows:

### *Article 24. Service of process*

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

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

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

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

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

- (i) by transmission by registered mail addressed to the head of the Ministry of Foreign Affairs of the State concerned requiring a signed receipt; or
- (ii) by any other means.

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

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

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

592. The Special Rapporteur noted in his preliminary report that several Governments, in their written comments and observations, had suggested that the provision in paragraph 1 (a) could not be implemented in many legal systems. Another Government had expressed the view that service of process or other document should be effected, as a matter of principle, by transmission through diplomatic channels (see A/CN.4/415, paras. 243 and 245).

593. In the light of those comments and observations, the Special Rapporteur felt that it would be more appropriate to refer to an international agreement between the States concerned and, failing that, to transmission through diplomatic channels, rather than to a special "arrangement" as provided for in paragraph 1 (a). The Special Rapporteur therefore proposed (*ibid.*, para. 248) that paragraphs 1 and 2 be amended to read:

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

"(a) in accordance with any applicable international convention binding on the State of the forum and the State concerned; or

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

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

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

"(ii) by any other means.

"2. Service of process referred to in paragraph 1 (b) is deemed to have been effected by receipt of the documents by the Ministry of Foreign Affairs.

"..."

594. Some of the members of the Commission who spoke on article 24 considered that proposal acceptable. They also suggested that the words "if necessary" in paragraph 3 be deleted.

#### ARTICLE 25 (Default judgment)

595. Article 25, as provisionally adopted by the Commission on first reading, reads as follows:

##### *Article 25. Default judgment*

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

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

596. In his preliminary report, the Special Rapporteur noted that two Governments, in their comments and observations, had expressed concern that article 25 could suggest that a default judgment might be rendered merely by virtue of due service of process in accordance with article 24. In that regard, one Government had suggested adding the words "[and] if the court has jurisdiction" at the end of paragraph 1 of article 25 (see A/CN.4/415, paras. 251-252).

597. The Special Rapporteur pointed out that the concern of these Governments would be adequately covered if article 24 were revised as recommended (see para. 593 above) and service of process were thereby effected either in accordance with an international agreement or through diplomatic channels (A/CN.4/415, para. 254).

598. During the Commission's discussion, one member proposed amending paragraph 1 of article 25 to ensure that, under the provision, no default judgment could be entered by a court unless the complainant had established the jurisdiction of the court and his claim or right to relief by evidence satisfactory to the court. Another member pointed out that receipt of documents should not be presumed merely by virtue of service of process in accordance with article 24.

599. Some members proposed that the words "if necessary" be deleted from paragraph 2, a change which they had also proposed in respect of paragraph 3 of article 24.

#### ARTICLE 26 (Immunity from measures of coercion)

600. Article 26, as provisionally adopted by the Commission on first reading, reads as follows:

##### *Article 26. Immunity from measures of coercion*

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

601. The Special Rapporteur noted in his preliminary report that one Government had suggested reformulating article 26 in order to clarify that the immunity which it conferred upon a foreign State meant that a domestic court should not make orders against that State (A/CN.4/415, para. 258).

602. In the Special Rapporteur's view, it was clear that, where a State enjoyed immunity in a proceeding before a court of another State, the court had an obligation to respect that immunity and accordingly not to issue an order of monetary coercion. In article 26, the phrase "State enjoys immunity . . . from any measure of coercion" was interpreted to include the obligation not to issue such an order, as well as the obligation not to take the actual measure of coercion (*ibid.*, para. 259).

## ARTICLE 27 (Procedural immunities)

603. Article 27, as provisionally adopted by the Commission on first reading, reads as follows:

### *Article 27. Procedural immunities*

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

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

604. In his preliminary report, the Special Rapporteur indicated that two Governments, in their written comments and observations, had suggested that paragraph 2 be amended to provide that non-requirement of security applied only in cases where the State was acting as defendant (A/CN.4/415, para. 262).

605. The Special Rapporteur agreed to that suggestion and proposed (*ibid.*, para. 266) that paragraph 2 be amended to read:

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

606. Some of the members of the Commission who spoke on article 27 expressed doubts about the proposed reformulation of paragraph 2. It was said that limiting the application of paragraph 2 to defendant States would discourage States from instituting proceedings as claimants in foreign courts. One member supported the Special Rapporteur’s proposal as a reasonable qualification.

## ARTICLE 28 (Non-discrimination)

607. Article 28, as provisionally adopted by the Commission on first reading, reads as follows:

### *Article 28. Non-discrimination*

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

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

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

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

608. The Special Rapporteur indicated in his preliminary report that Governments, in their comments and observations, had suggested that article 28 required further study, since it raised substantial problems of interpretation. Having noted that article 28 was closely related to article 6 (A/CN.4/415, para. 67), the Special Rapporteur suggested that article 28 be retained as adopted on first reading, in order to maintain flexibility and strike a balance between the two opposing positions

on article 6 (*ibid.*, para. 273). One Government had pointed out that article 28 was really concerned with reciprocity, rather than with non-discrimination, and doubted the appropriateness of the provision in the draft articles (*ibid.*, para. 270).

609. During the Commission’s discussion, some members considered that article 28 should be deleted, whereas others supported its retention. The members who supported its deletion said that, in their view, restrictive application of the present articles based on reciprocity would derogate from the purpose of the future convention, for any party could deviate from the prescribed rules simply by claiming that the other party applied the convention restrictively. One member suggested that the provisions of paragraph 2 were problematical, since they would require national courts to defer to the injunctions of the executive in order to abide by the principle of reciprocity. Another member pointed out that, since almost all the provisions of the draft on exceptions to State immunity began with the words “Unless otherwise agreed . . .”, article 28 was not needed for the purpose of agreed or reciprocal extensions of, or limitations on, immunity.

610. Some other members supported the retention of article 28 as a useful counterweight to the proposed deletion of the bracketed phrase “and the relevant rules of general international law” in article 6.

## 2. PROVISIONS CONCERNING THE SETTLEMENT OF DISPUTES

611. In his eighth report, the previous Special Rapporteur submitted proposals for a part VI of the draft and an annex, on the settlement of disputes.<sup>252</sup> Draft articles 29 to 33 of part VI and the annex read as follows:

### PART VI

#### SETTLEMENT OF DISPUTES

##### *Article 29. Consultation and negotiation*

If a dispute regarding the interpretation or application of the present articles arises between two or more Parties to the present articles, they shall, upon the request of any of them, seek to resolve it by a process of consultation and negotiation.

##### *Article 30. Conciliation*

If the dispute is not resolved within six months of the date on which the request referred to in article 29 has been made, any party to the dispute may submit it to the conciliation procedure specified in the annex to the present articles by submitting a request to that effect to the Secretary-General of the United Nations and informing the other party or parties to the dispute of the request.

##### *Article 31. Judicial settlement and arbitration*

Any State at the time of signature or ratification of the present articles or accession thereto or at any time thereafter may, by notification to the depositary, declare that, where a dispute has not been resolved by the application of the procedures referred to in articles 29 and 30, that dispute may be submitted for a decision to the International Court of Justice by a written application of any party to the dispute, or in the alternative to arbitration, provided that the other party to the dispute has made a like declaration.

<sup>252</sup> Yearbook . . . 1986, vol. II (Part One), pp. 32 *et seq.*, document A/CN.4/396, paras. 43-48.

***Article 32. Settlement by common consent***

Notwithstanding articles 29, 30 and 31, if a dispute regarding the interpretation or application of the present articles arises between two or more Parties to the present articles, they may by common consent agree to submit it to the International Court of Justice, or to arbitration, or to any other appropriate procedure for the settlement of disputes.

***Article 33. Other provisions in force for the settlement of disputes***

Nothing in articles 29 to 32 shall affect the rights or obligations of the Parties to the present articles under any provisions in force binding them with regard to the settlement of disputes.

**ANNEX**

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

2. When a request has been made to the Secretary-General under article 30, the Secretary-General shall bring the dispute before a conciliation commission constituted as follows:

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

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

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

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way.

The four conciliators chosen by the parties shall be appointed within sixty days following the date on which the Secretary-General receives the request.

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

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the

International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

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

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

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

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

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

7. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

612. In his preliminary report (A/CN.4/415, para. 274), the Special Rapporteur noted that these proposals had not been considered by the Commission due to lack of time and were therefore not included in the draft articles adopted on first reading. He indicated that he would be willing to present his views on the subject, should the Commission so desire.

613. During the Commission's discussion, one member expressed the view that it might not be appropriate to include in the draft articles a set of rules on the settlement of disputes concerning the interpretation and application of the articles. He suggested that, should the draft articles finally take the form of an international convention, the legal mechanism on dispute settlement should be incorporated in a separate optional protocol, rather than in the body of the convention. In any event, he pointed out, it was a matter to be decided by a diplomatic conference. Some other members also favoured leaving the matter to a diplomatic conference. Before the matter is considered further, an indication of the preference of the General Assembly would be useful to the Commission.

## Chapter VII

### THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

#### A. Introduction<sup>253</sup>

614. The Commission included the topic "Non-navigational uses of international watercourses" in its programme of work at its twenty-third session, in 1971, in response to the recommendation of the General Assembly in resolution 2669 (XXV) of 8 December 1970.

615. At its twenty-sixth session, in 1974, the Commission adopted the report of a Sub-Committee set up on the topic at that session and appointed Mr. Richard D. Kearney Special Rapporteur for the topic.<sup>254</sup>

616. At its twenty-eighth session, in 1976, the Commission had before it replies from the Governments of 21 Member States<sup>255</sup> to a questionnaire<sup>256</sup> which had been formulated by the Sub-Committee, as well as a report submitted by the Special Rapporteur.<sup>257</sup> 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.<sup>258</sup>

617. At its twenty-ninth session, in 1977, the Commission appointed Mr. Stephen M. Schwebel Special Rapporteur for the topic.

618. Mr. Schwebel submitted his first and second reports at the Commission's thirty-first and thirty-second sessions, in 1979 and 1980, respectively.<sup>259</sup> At the thirty-second session, the Commission provisionally

<sup>253</sup> For a fuller account of the Commission's work on the topic, see *Yearbook ... 1985*, vol. II (Part Two), pp. 68 *et seq.*, paras. 268-290.

<sup>254</sup> At the same session, the Commission had before it a supplementary report by the Secretary-General on legal problems relating to the non-navigational uses of international watercourses (*Yearbook ... 1974*, vol. II (Part Two), p. 265, document A/CN.4/274).

<sup>255</sup> *Yearbook ... 1976*, vol. II (Part One), p. 147, document A/CN.4/294 and Add. I. 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. I; and *Yearbook ... 1982*, vol. II (Part One), p. 192, document A/CN.4/352 and Add. I.

<sup>256</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. I, para. 6; see also *Yearbook ... 1984*, vol. II (Part Two), pp. 82-83, para. 262.

<sup>257</sup> *Yearbook ... 1976*, vol. II (Part One), p. 184, document A/CN.4/295.

<sup>258</sup> *Yearbook ... 1976*, vol. II (Part Two), p. 162, para. 164.

<sup>259</sup> *Yearbook ... 1979*, vol. II (Part One), p. 143, document A/CN.4/320; and *Yearbook ... 1980*, vol. II (Part One), p. 159, document A/CN.4/332 and Add. I.

adopted six draft articles (arts. 1 to 5 and X).<sup>260</sup> Also at the thirty-second session, the Commission accepted a provisional working hypothesis as to what was meant by the expression "international watercourse system".<sup>261</sup>

619. At its thirty-fourth session, in 1982, the Commission appointed Mr. Jens Evensen Special Rapporteur for the topic.<sup>262</sup> Mr. Evensen submitted his first and second reports at the Commission's thirty-fifth and thirty-sixth sessions, in 1983 and 1984, respectively.<sup>263</sup> The first report contained an outline for a draft convention, the purpose of which was to serve as a basis for discussion, and the second report a revised text of that draft convention, comprising 41 articles arranged in six chapters.

620. At the thirty-sixth session, the Commission focused its discussion on draft articles 1 to 9<sup>264</sup> and decided to refer them to the Drafting Committee for consideration in the light of the debate.<sup>265</sup> Due to lack of time, however, the Drafting Committee was unable to consider those articles at the 1984, 1985 and 1986 sessions.

621. At its thirty-seventh session, in 1985, the Commission appointed Mr. Stephen C. McCaffrey Special Rapporteur for the topic. The Special Rapporteur submitted to the Commission at that session a preliminary report<sup>266</sup> reviewing the Commission's work on the topic to date and setting out his preliminary views as to the general lines along which the Commission's work on the topic could proceed. There was general agreement with the Special Rapporteur's proposal that he follow generally the outline proposed by the previous Special Rapporteur in elaborating further draft articles on the topic.

<sup>260</sup> The texts of these articles and the commentaries thereto appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 110 *et seq.*

<sup>261</sup> The note containing the hypothesis is reproduced in footnote 292 below.

<sup>262</sup> At the same session, the third report of the previous Special Rapporteur, Mr. Schwebel, was circulated (see *Yearbook ... 1982*, vol. II (Part One) (and corrigendum), p. 65, document A/CN.4/348).

<sup>263</sup> *Yearbook ... 1983*, vol. II (Part One), p. 155, document A/CN.4/367; and *Yearbook ... 1984*, vol. II (Part One), p. 101, document A/CN.4/381.

<sup>264</sup> For the texts, see *Yearbook ... 1984*, vol. II (Part Two), pp. 89 *et seq.*, footnotes 288, 290, 291, 292, 295, 296, 300, 301 and 304.

<sup>265</sup> 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 footnote 292 below), the texts of articles 1 to 5 and X provisionally adopted by the Commission at the same session (see footnote 260 above) and the texts of draft articles 1 to 9 submitted by the Special Rapporteur in his first report (see *Yearbook ... 1983*, vol. II (Part Two), pp. 68 *et seq.*, footnotes 245 to 250).

<sup>266</sup> *Yearbook ... 1985*, vol. II (Part One), p. 87, document A/CN.4/393.

622. At its thirty-eighth session, in 1986, the Commission had before it the second report of the Special Rapporteur on the topic.<sup>267</sup> In the report, the Special Rapporteur, after reviewing the status of the Commission's work on the topic, set out his views on draft articles 1 to 9 as submitted by the previous Special Rapporteur<sup>268</sup> and discussed the legal authority supporting those views. The report also contained a set of five draft articles concerning procedural rules applicable in cases involving proposed new uses of watercourses.<sup>269</sup>

623. At its thirty-ninth session, in 1987, the Commission had before it the third report of the Special Rapporteur on the topic.<sup>270</sup>

624. In the third report, the Special Rapporteur briefly reviewed the status of the work on the topic (chap. I); set forth general considerations on procedural rules relating to the utilization of international watercourses (chap. II); submitted six draft articles (arts. 10-15) concerning general principles of co-operation and notification<sup>271</sup> (chap. III); and introduced the subtopic of the general exchange of data and information (chap. IV).

625. After discussion in the Commission, draft articles 10 to 15 as submitted by the Special Rapporteur were referred to the Drafting Committee.<sup>272</sup>

626. Also at the thirty-ninth session, the Commission, after having considered the report of the Drafting Committee on the draft articles already referred to it on the present topic, approved the method followed by the Committee with regard to article 1 and the question of the use of the term "system", and provisionally adopted articles 2 to 7.<sup>273</sup> The articles adopted at the thirty-ninth session were based on draft articles 2 to 8 referred to the Drafting Committee by the Commission at its thirty-sixth session, in 1984,<sup>274</sup> as well as on articles 1 to 5 provisionally adopted by the Commission at its thirty-second session, in 1980.<sup>275</sup> Due to lack of time, the Drafting Committee was unable to complete its consideration of draft article 9 (Prohibition of activities with regard to an

<sup>267</sup> *Yearbook ... 1986*, vol. II (Part One), p. 87, document A/CN.4/399 and Add.1 and 2.

<sup>268</sup> See footnote 264 above.

<sup>269</sup> Those five draft articles were the following: art. 10 (Notification concerning proposed uses); art. 11 (Period for reply to notification); art. 12 (Reply to notification; consultation and negotiation concerning proposed uses); art. 13 (Effect of failure to comply with articles 10 to 12); art. 14 (Proposed uses of utmost urgency).

<sup>270</sup> *Yearbook ... 1987*, vol. II (Part One), p. 15, document A/CN.4/406 and Add.1 and 2.

<sup>271</sup> Those six draft articles were the following: art. 10 (General obligation to co-operate); art. 11 (Notification concerning proposed uses); art. 12 (Period for reply to notification); art. 13 (Reply to notification; consultation and negotiation concerning proposed uses); art. 14 (Effect of failure to comply with articles 11 to 13); art. 15 (Proposed uses of utmost urgency). For the texts, see *Yearbook ... 1987*, vol. II (Part Two), pp. 21-23, footnotes 76 and 77.

<sup>272</sup> For a brief account of the major trends of the discussion on draft articles 10 to 15 at the thirty-ninth session, including the conclusions drawn by the Special Rapporteur following the debate, *ibid.*, pp. 21 *et seq.*, paras. 93-116.

<sup>273</sup> For the texts of these articles and the commentaries thereto, *ibid.*, pp. 25 *et seq.* See also section C below.

<sup>274</sup> See footnote 264 above.

<sup>275</sup> See footnote 260 above.

international watercourse causing appreciable harm to other watercourse States), submitted by the previous Special Rapporteur and referred to the Committee in 1984, nor was it able to take up draft articles 10 to 15 referred to it at the thirty-ninth session.

627. At its fortieth session, in 1988, the Commission had before it the fourth report of the Special Rapporteur on the topic.<sup>276</sup>

628. The fourth report was divided into three chapters, entitled "Status of work on the topic and plan for future work" (chap. I); "Exchange of data and information" (chap. II); and "Environmental protection, pollution and related matters" (chap. III). In chapter I, the Special Rapporteur provided a tentative outline for the treatment of the topic as a whole. He also proposed a schedule for submission of remaining material, which met with general approval in the Commission.

629. In his fourth report, the Special Rapporteur submitted four draft articles, namely articles 15 [16] (Regular exchange of data and information), 16 [17] (Pollution of international watercourse[s] [systems]), 17 [18] (Protection of the environment of international watercourse[s] [systems]) and 18 [19] (Pollution or environmental emergencies).<sup>277</sup> The report also contained an extensive survey of material on environmental protection, pollution and related matters.

630. With the exception of article 18 [19], the above-mentioned draft articles were referred to the Drafting Committee at the fortieth session after discussion in the Commission.<sup>278</sup> As for article 18 [19], the Special Rapporteur indicated that he would make an effort in his next report to cast it in more general terms to deal with all kinds of water-related emergencies. That suggestion met with general approval.

631. Also at the fortieth session, the Commission, on the recommendation of the Drafting Committee, provisionally adopted articles 8 to 21.<sup>279</sup>

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

632. At the present session, the Commission had before it the fifth report of the Special Rapporteur on the topic (A/CN.4/421 and Add.1 and 2).

633. Chapter I of the fifth report dealt with part VI of the draft and contained draft articles 22 (Water-related hazards, harmful conditions and other adverse effects) and 23 (Water-related dangers and emergency situations) as submitted by the Special Rapporteur (see paras. 637 and 641 below). The chapter also contained an analytical survey of the extensive material relating to that subtopic. Chapters II and III of the report dealt with the

<sup>276</sup> *Yearbook ... 1988*, vol. II (Part One), p. 205, document A/CN.4/412 and Add.1 and 2.

<sup>277</sup> For the texts, see *Yearbook ... 1988*, vol. II (Part Two), pp. 25 *et seq.*, footnotes 67, 73, 91 and 94. The numbering of these articles was, of course, provisional. The numbers in square brackets refer to the numbering originally proposed by the Special Rapporteur. Since the Commission has already provisionally adopted 21 articles, these numbers will eventually have to be changed.

<sup>278</sup> For a summary of the debate, *ibid.*, pp. 24 *et seq.*, paras. 124-187.

<sup>279</sup> For the texts of these articles and the commentaries thereto, *ibid.*, pp. 35 *et seq.* See also section C below.

relationship between non-navigational and navigational uses and with the regulation of international watercourses and contained two draft articles (arts. 24 and 25) on those subtopics for parts VII and VIII of the draft, respectively (see para. 677 below).

634. In the report, the Special Rapporteur reaffirmed the schedule for submission of remaining material which he had proposed in his fourth report<sup>280</sup> and which was intended to place the Commission in a position to complete the first reading of the whole set of draft articles by the end of its current term of office in 1991.

635. The Commission considered chapter I of the Special Rapporteur's fifth report at its 2123rd to 2126th meetings, from 22 to 28 June 1989. At its 2126th meeting, on the recommendation of the Special Rapporteur, the Commission referred draft articles 22 and 23 to the Drafting Committee for consideration in the light of the debate. Chapters II and III of the report were introduced by the Special Rapporteur at the 2126th meeting and at the 2133rd meeting, on 7 July 1989, but were not considered by the Commission at the present session due to lack of time.

#### 1. WATER-RELATED HAZARDS, DANGERS AND EMERGENCY SITUATIONS (PART VI OF THE DRAFT ARTICLES)

636. After setting out the texts of draft articles 22 and 23 submitted by the Special Rapporteur, together with a summary of his comments thereon in his fifth report, the following paragraphs indicate the main trends of the debate on the topic at the present session, including the Special Rapporteur's oral introduction and summing-up.<sup>281</sup>

**ARTICLE 22 (Water-related hazards, harmful conditions and other adverse effects) and**

**ARTICLE 23 (Water-related dangers and emergency situations)**

637. The Special Rapporteur proposed that draft articles 22 and 23 be contained in a separate part of the draft, provisionally designated part VI and entitled "Water-related hazards, dangers and emergency situations". Draft article 22 submitted by the Special Rapporteur in his fifth report read:

##### PART VI

##### WATER-RELATED HAZARDS, DANGERS AND EMERGENCY SITUATIONS

###### **Article 22. Water-related hazards, harmful conditions and other adverse effects**

**1. Watercourse States shall co-operate on an equitable basis in order to prevent or, as the case may be, mitigate water-related hazards, harmful conditions and other adverse effects such as floods, ice conditions, drainage**

<sup>280</sup> Yearbook ... 1988, vol. II (Part One), p. 208, document A/CN.4/412 and Add.I and 2, paras. 8-9.

<sup>281</sup> The views expressed and the comments made during the debate are reflected extensively in the summary records of the 2123rd to 2126th meetings (see Yearbook ... 1989, vol. I).

problems, flow obstructions, siltation, erosion, salt-water intrusion, drought and desertification.

**2. Steps to be taken by watercourse States in fulfilment of their obligations under paragraph 1 of this article include:**

**(a) the regular and timely exchange of any data and information that would assist in the prevention or mitigation of the problems referred to in paragraph 1;**

**(b) consultations concerning the planning and implementation of joint measures, both structural and non-structural, where such measures might be more effective than measures undertaken by watercourse States individually; and**

**(c) preparation of, and consultations concerning, studies of the efficacy of measures that have been taken.**

**3. Watercourse States shall take all measures necessary to ensure that activities under their jurisdiction or control that affect an international watercourse are so conducted as not to cause water-related hazards, harmful conditions and other adverse effects that result in appreciable harm to other watercourse States.**

638. In his comments on draft article 22 in his report, the Special Rapporteur pointed out that *paragraph 1* laid down a general obligation of co-operation with regard to water-related hazards, harmful conditions and other adverse effects. In his view, co-operation between watercourse States was essential to the prevention of the kinds of problems to which the article was addressed. The Special Rapporteur explained that co-operation "on an equitable basis" encompassed the duty of an actually or potentially injured watercourse State to contribute to or provide appropriate compensation for protective measures taken, at least in part, for its benefit by another watercourse State—an obligation for which there was precedent in the treaty practice of States. The notion of equity was also relevant to the nature of the co-operation called for, which, in the Special Rapporteur's view, would vary according to the circumstances of the particular international watercourse system involved. Both article 8 (Obligation not to cause appreciable harm) as provisionally adopted at the fortieth session<sup>282</sup> and draft article 22 would apply to the harmful effects of water on activities not directly related to the watercourse.<sup>283</sup> Examples of such effects were flood damage and water-related diseases.<sup>284</sup>

639. In his comments, the Special Rapporteur stated that the use of the word "include" in *paragraph 2* was intended to indicate that the list of steps specified was not an exhaustive one: additional measures or forms of col-

<sup>282</sup> Yearbook ... 1988, vol. II (Part Two), p. 35.

<sup>283</sup> Article I of the articles on "The relationship between water, other natural resources and the environment" adopted by the International Law Association at its Fifty-ninth Conference, held at Belgrade in 1980 (ILA, *Report of the Fifty-ninth Conference, Belgrade, 1980* (London, 1982), pp. 374-375), is to the same general effect. It provides:

###### "Article 1

"Consistent with article IV of the Helsinki Rules, States shall ensure that:

"(a) The development and use of water resources within their jurisdiction do not cause substantial injury to the environment of other States or of areas beyond the limits of national jurisdiction; . . . . ."

(For the Helsinki Rules on the Uses of the Waters of International Rivers, adopted by ILA at its Fifty-second Conference, held at Helsinki in 1966, see ILA, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), pp. 484 *et seq.*; reproduced in part in Yearbook ... 1974, vol. II (Part Two), pp. 357 *et seq.*, document A/CN.4/274, para. 405.)

<sup>284</sup> Examples of such diseases are schistosomiasis (bilharziasis), river blindness, malaria and leptospirosis.

laborative action might be necessary in some instances in order for watercourse States to fulfil their obligations under paragraph 1.

640. According to the Special Rapporteur, *paragraph 3* was a combination of the formulations found in article 194, paragraph 2, of the 1982 United Nations Convention on the Law of the Sea<sup>285</sup> and article 8 as provisionally adopted by the Commission at its fortieth session. He indicated that, while it might be sufficient for the purposes of the draft articles to refer to activities conducted in the “territory” of watercourse States, rather than to those under their “jurisdiction or control”, the meaning of the latter expression in the present context was in his view sufficiently clear that it was juridically preferable. The Special Rapporteur stated that paragraph 3 would apply, for example, to uses of land or water which led to such problems as flooding, siltation, erosion or flow obstructions in other watercourse States. It was his view that the obligation in question was nothing more than a concrete application of article 8 (Obligation not to cause appreciable harm).

641. Draft article 23 submitted by the Special Rapporteur in his fifth report read:

**Article 23. Water-related dangers and emergency situations**

1. A watercourse State shall, without delay and by the most expeditious means available, notify other, potentially affected States and relevant intergovernmental organizations of any water-related danger or emergency situation originating in its territory, or of which it has knowledge. The expression “water-related danger or emergency situation” includes those that are primarily natural, such as floods, and those that result from human activities, such as toxic chemical spills and other dangerous pollution incidents.

2. A watercourse State within whose territory a water-related danger or emergency situation originates shall immediately take all practical measures to prevent, neutralize or mitigate the danger or damage to other watercourse States resulting from the danger or emergency.

3. States in the area affected by a water-related danger or emergency situation, and the competent international organizations, shall co-operate in eliminating the causes and effects of the danger or situation and in preventing or minimizing harm therefrom, to the extent practicable under the circumstances.

4. In order to fulfil effectively their obligations under paragraph 3 of this article, watercourse States, together with other potentially affected States, shall jointly develop, promote and implement contingency plans for responding to water-related dangers or emergency situations.

642. In his comments on draft article 23 in his report, the Special Rapporteur pointed out that the article incorporated draft article 18 [19] (Pollution or environmental emergencies) as submitted in his fourth report at the previous session.<sup>286</sup> As paragraph 1 of the present article made clear, the provision was intended to apply both to natural situations and to those resulting from human activities. In either case, the situation or danger would normally take the form of a sudden incident or event. The Special Rapporteur suggested that the Commission might wish, at an appropriate time, to include a definition of “water-related dangers or emergency situations” in article 1 of the draft.

<sup>285</sup> Official Records of the Third United Nations Conference on the Law of the Sea, vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 151, document A/CONF.62/122.

<sup>286</sup> See footnote 277 above.

643. According to the Special Rapporteur, *paragraph 1* required that immediate notification be given of a danger or situation originating in the territory of a watercourse State or of which that State had knowledge. “Notification” in this context included the provision of both a warning and any information necessary to enable potentially affected States to deal with the situation. The Special Rapporteur noted that the States to be notified were not limited to watercourse States, but included any States that might be affected (such as coastal States that could be affected by a large oil spill into a watercourse).

644. The Special Rapporteur explained that *paragraph 2* applied principally to dangers and situations resulting from human activities. The chief obligation with respect to those of natural origin was that of prompt notification, provision of information and the like.

645. The Special Rapporteur stated that *paragraphs 3 and 4* were derived largely from article 199 of the 1982 United Nations Convention on the Law of the Sea. The obligations contained in those paragraphs had also received support both in the Commission and in the Sixth Committee of the General Assembly.<sup>287</sup> The expressions “States in the area affected” and “other potentially affected States” were intended to include non-watercourse States which might nevertheless be harmed by a danger or situation covered by the article.

646. The Special Rapporteur noted that a suggestion had been made in the Sixth Committee that States benefiting from protective or other measures should be required to compensate third States for the measures taken. The Special Rapporteur indicated that he perceived no difficulties, in principle, with such an obligation, so long as the benefited States were required to contribute only on an equitable basis. The point deserved consideration by the Commission.

647. Finally, the Special Rapporteur stated that the Commission might wish to consider whether article 23 should include a provision requiring a State affected by a disaster to accept proffered assistance and not to regard offers thereof as interference in its internal affairs. He recalled that several of the commentators whose works he had surveyed had highlighted that issue.

648. In his oral introduction of draft article 22, the Special Rapporteur drew attention to the chronic or continuing nature of the phenomena with which that article was largely concerned. He also recalled General Assembly resolution 42/169 of 11 December 1987, in which the 1990s had been designated as the International Decade for Natural Disaster Reduction, and which provided further evidence of the need for the kind of action called for in the article. Draft article 22 specifically required watercourse States to work together on the prevention and amelioration of the chronic problems as well as to take measures to prevent, or lessen the effects of, the catastrophic ones. Thus the thrust of the article was directed towards measures of an anticipatory and

<sup>287</sup> For the comments made in the Sixth Committee, see “Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the forty-third session of the General Assembly” (A/CN.4/L.431), paras. 144-146.

preventive nature, rather than measures of an emergency nature as provided for in draft article 23. Draft article 22 reflected the fundamental obligation, as revealed in virtually all of the international agreements surveyed, to co-operate with other watercourse States in order to prevent or mitigate water-related hazards and other adverse effects.

649. In introducing draft article 23, the Special Rapporteur noted that it provided, *inter alia*, for prompt warning regarding water-related dangers and emergency situations and would require a watercourse State in whose territory a water-related danger or emergency situation originated to take, without delay, all feasible measures to eliminate or mitigate it and to prevent damage to other watercourse States.

650. Most members of the Commission who addressed the issue expressed support for the general thrust of draft articles 22 and 23 and for the general approach to the subtopic, including the integrated treatment of all types of hazards and dangers together in the draft articles.

651. Some members were, however, of the view that the material submitted by the Special Rapporteur in his fifth report did not always appear relevant or lead to the conclusions and draft articles that were presented. With regard to the question raised by the Special Rapporteur as to whether the draft articles should contain secondary rules specifying the consequences of the breach of certain obligations of watercourse States, the prevailing view was not in favour of such an approach on the grounds that it would complicate the draft, introduce an imbalance into the draft and unduly prolong the Commission's work on the topic. The Special Rapporteur expressed his agreement with those points and indicated that he did not plan to pursue the matter further. The view was, however, expressed that secondary rules should eventually be included in the draft articles and that efforts in that regard should be harmonized with similar endeavours in connection with the topics of State responsibility and international liability for injurious consequences arising out of acts not prohibited by international law.

652. A comment was made that the experience of massive disaster situations clearly demonstrated the necessity of a global response which would marshal private resources as well as those of Governments and international organizations, in particular the manifold benefits of modern science and technology.

653. It was also pointed out that the bilateral agreements cited contained very diversified obligations and could not serve as the basis for customary norms in this area. Other members felt that the source material referred to by the Special Rapporteur indicated at least certain modern trends in international law which the Commission should take into account.

654. It was questioned whether the bilateral treaties and case material cited by the Special Rapporteur could be treated as proper precedents for the envisaged multilateral instrument. One member responded that the references to bilateral treaty practice seemed correct as the known river problems usually existed in a bilateral context. In his summing-up, the Special Rapporteur

agreed, but cited as an example of a multilateral instrument which addressed such problems the 1980 Convention creating the Niger Basin Authority.<sup>288</sup>

655. A number of speakers expressed the view that the necessity of taking the term "system" out of square brackets in the draft articles was demonstrated by draft articles 22 and 23, which clearly illustrated the interrelationship between water and land uses.

656. The view was also expressed that environmental protection warranted a higher standard of liability than that envisaged by the Special Rapporteur. According to one member, a certain degree of liability should be envisaged even in cases of natural disasters.

657. One member expressed the view that the draft articles should not impose on States obligations which it would be known in advance they could not discharge in view of the complexity of factors contributing to water-related hazards. The answer for meeting and remedying such situations lay in the field of education, assistance, prevention and transfer of experience and technology.

658. It was suggested by another member that draft articles 22 and 23 be restructured along the following lines: they should provide first for the obligation of notification, secondly for measures to be taken by individual watercourse States, and thirdly for joint, collective measures. The Special Rapporteur stated in response that the most fundamental obligation in relation to the problems addressed by draft article 22 was that of co-operation, as revealed by the international agreements surveyed; it therefore did not seem advisable to reverse the places of that obligation and of the means of its implementation, unless the Commission so desired.

659. *Draft article 22:* Most members of the Commission expressed support for the general thrust of draft article 22. A few members, however, questioned the usefulness of the article or of its paragraph 3 on the ground that the problem was adequately covered by article 8.<sup>289</sup> A broad range of questions were raised with regard to the terminology used in article 22, including its title. The term "hazard", including its translation into other languages, was referred to as problematical. Most of those who addressed the issue thought that the expression "other adverse effects" was too general. The Special Rapporteur, having indicated his agreement with the desirability of clarifying the terminology, pointed out the difficulties of finding general terms to cover all the phenomena addressed in article 22, especially in view of the fact that they were often physically interrelated.

660. *Paragraph 1:* The view was expressed that the list of problems referred to in paragraph 1 was undoubtedly not exhaustive: water-borne diseases were identified as an additional problem to be covered. The Special Rapporteur, while agreeing that the latter problem should be expressly mentioned in article 22, in view of its importance, cautioned that an attempt to draw up an exhaustive list would be inappropriate in a framework agreement because it would inevitably lead to the

<sup>288</sup> United Nations, *Treaties concerning the Utilization of International Watercourses for Other Purposes than Navigation: Africa*, Natural Resources/Water Series No. 13 (Sales No. E/F.84.II.A.7), p. 56.

<sup>289</sup> See footnote 282 above.

omission of some problems that were of a particularly serious nature in the case of some international watercourses.

661. A number of comments were made on the concept of co-operation "on an equitable basis". It was suggested that that expression be deleted or replaced by the words "in accordance with the provisions of the present Convention". It was also proposed to add a reference to other forms of co-operation, including mutual reimbursement. Other members, however, supported the use of the expression "on an equitable basis". The idea behind the use of that expression, as the Special Rapporteur had stressed, was that all relevant factors should be taken into account in determining the respective "contributions" of each watercourse State to the prevention or mitigation of water-related hazards and dangers. In response to the observation that the expression "on an equitable basis" did not appear in paragraph 3 of draft article 23, the Special Rapporteur said that he would have no objection to including it in that paragraph.

662. One member suggested that the phrase "as the circumstances of the particular international watercourse system warrant" be added to paragraph 1. The Special Rapporteur said that he would have no objection to such an addition as, in his opinion, it would ensure that the paragraph covered the many different types of watercourses as well as the needs of States at different stages of development.

663. With regard to *paragraph 2 (a)* of article 22, a question was raised as to the relationship between the subparagraph and article 10 (Regular exchange of data and information) provisionally adopted at the fortieth session.<sup>290</sup> It was suggested that subparagraph (a) should include a reference to article 10 and provide for a more frequent exchange of relevant data and information relating to the problems dealt with in draft articles 22 and 23.

664. An observation was made that another term should be found for the word "problems". The general comment was also made that it would be desirable to clarify the text of subparagraph (a).

665. With regard to *paragraph 2 (b)*, a number of members requested clarification as to the meaning of the expression "structural and non-structural". The Special Rapporteur stressed that that expression merely referred to physical structures such as dams, embankments, etc. He added that, in order to clarify the point, the subparagraph might, for example, refer instead to "joint measures, whether or not involving the construction of works . . .".

666. *Paragraph 2 (c)*, in the view of one member, should be made more concise. It was also suggested that the words "preparation of" be replaced by "pursuance of". However, that suggestion was opposed by another member of the Commission.

667. *Paragraph 3*: As already indicated, the view was expressed that paragraph 3 was unnecessary as the problem was adequately covered by article 8 (Obligation not to cause appreciable harm). Most comments on the paragraph concerned matters of detail. For example, it was suggested that the word "practicable" be inserted

before the word "measures". Preference was expressed by a number of members for use of the term "territory" rather than the expression "jurisdiction or control". It was also proposed that the word "may" be inserted before the word "result". A reference to "individual and collective measures" was also proposed. The view was expressed that the expression "appreciable harm" should be replaced by "substantial harm". It was also stated that the wording "are so conducted as not to cause . . ." seemed rather categorical. The Special Rapporteur indicated that these proposed changes deserved careful consideration and that he would raise them in the Drafting Committee.

668. *Draft article 23*: The general thrust of draft article 23 received broad support in the Commission. While some members supported the idea of defining "emergency situations", an opposing view was expressed to the effect that emergencies were always of an exceptional nature and therefore defied definition. It was also stated that emphasis should be placed on prevention, possibly by referring to it in paragraph 1 instead of in paragraph 3. The view was also expressed that it would be preferable for all provisions relating to the pollution of watercourses to be included in one sub-chapter of the draft articles.

669. *Paragraph 3*: While comments on paragraphs 1 and 2 were basically of a drafting nature, the discussion of paragraph 3 covered a broad range of issues. The expression "States in the area affected" was viewed as vague and thus as requiring clarification. At the same time, it was said that this approach to the problem was unnecessarily limited in that it did not take into account the cases in which voluntary assistance was provided by States not in the area affected.

670. It was pointed out that States and international organizations not parties to the present articles could not be bound by them. The suggestion was made—with which the Special Rapporteur agreed—that the problem could be solved by redrafting to make it clear that non-parties were not bound by these obligations.

671. It was suggested that States possessing certain types of technology, such as remote-sensing capabilities, should be encouraged to provide assistance to potentially affected States by sharing data relating, for example, to flood forecasting. Several drafting points were also made. For example, a question was raised in connection with the use of the term "minimizing"; and a proposal was made to replace the word "shall" by "should".

672. Regarding the question of acceptance of outside assistance, the overall view was that, although the draft should not contain such an obligation, States could be encouraged to accept such assistance.

673. A new article 23 bis, which would operate as a safeguard clause and encourage the acceptance of assistance by the affected watercourse States, was proposed by one member. The question of providing modalities through which assistance could be rendered was also raised. In his summing-up, the Special Rapporteur agreed with the suggestion by one member that the draft articles could provide for regular or *ad hoc* meetings of the contracting parties to deal with all common problems and referred to the precedent in the framework of the General Agreement on Tariffs and Trade.

<sup>290</sup> Yearbook . . . 1988, vol. II (Part Two), p. 43.

674. The improved climate of international co-operation was referred to in the context of mutual assistance in cases of disasters and emergencies. It was stated that this should be supported by long-term legal measures, in particular international agreements.

675. With regard to paragraph 4 of article 23, the preparation and implementation of contingency plans was highlighted as the most important aspect of the article.

676. As for the question of compensation for protective measures taken by another watercourse State, it was observed that, since the matter of compensation depended primarily on a particular situation, it was practically impossible to provide definite answers in advance. It was said that, if another State implemented measures principally for the benefit of the State concerned, the question of compensation was self-evident. The question was asked whether compensation should be provided before or after a disaster. It was also stated that the notion of compensation was not useful unless a standard of compensation (contribution) was introduced. It was further suggested that before protective measures were implemented the prospective beneficiaries should be consulted. It was proposed in the latter connection that the draft articles could themselves provide for or encourage agreement to accept assistance at least under certain circumstances. Such advance consent would make it unnecessary to deal further with the matter.

## 2. PARTS VII AND VIII OF THE DRAFT ARTICLES

677. Draft articles 24 and 25 submitted by the Special Rapporteur in his fifth report read:

### PART VII

#### RELATIONSHIP TO NAVIGATIONAL USES AND ABSENCE OF PRIORITY AMONG USES

##### *Article 24. Relationship between navigational and non-navigational uses; absence of priority among uses*

1. In the absence of agreement to the contrary, neither navigation nor any other use enjoys an inherent priority over other uses.

2. In the event that uses of an international watercourse [system] conflict, they shall be weighed along with other factors relevant to the particular watercourse in establishing equitable utilization thereof in accordance with articles 6 and 7 of these articles.

### PART VIII

#### REGULATION OF INTERNATIONAL WATERCOURSES

##### *Article 25. Regulation of international watercourses*

1. Watercourse States shall co-operate in identifying needs and opportunities for regulation of international watercourses.

2. In the absence of agreement to the contrary, watercourse States shall participate on an equitable basis in the construction and maintenance or, as the case may be, defrayment of costs of such regulation works as they may have agreed to undertake, individually or jointly.

678. In his oral introduction of draft articles 24 and 25,<sup>291</sup> the Special Rapporteur pointed out that article 24

provided primarily that, as a general rule, no one use of an international watercourse should be accorded automatic priority over other uses and that navigation was no different from other uses in that regard. Further to that, any conflict between uses had to be resolved through a balancing of all relevant considerations as required by articles 6 and 7.

679. The Special Rapporteur suggested that, in view of the increasing importance of maintaining a sufficient level of water quality for domestic and agricultural uses, for example, as well as for reasons of environmental protection, the Commission might wish to consider indicating that certain factors should be given greater weight in the balancing process.

680. Draft article 25 highlighted the importance of regulation of international watercourses and of co-operation between watercourse States in that regard. The Special Rapporteur stressed that the term "regulation" had a specific technical meaning in the context of watercourses and thus should not be construed broadly. He explained that the term referred to the control of the water in a watercourse, by works or other measures, in order to prevent harmful effects and maximize the benefits to be obtained from the watercourse.

681. The Special Rapporteur emphasized that the regulation of international watercourses represented one of the most important aspects of the management of international watercourse systems. It was a broader subject than that of water-related hazards and dangers, dealt with in chapter I of his fifth report, because it related not only to prevention of the harmful effects of water, but also to creation and enhancement of the benefits of water. The Special Rapporteur drew the Commission's attention in particular to the account given in his report of State practice in the matter (A/CN.4/421 and Add.1 and 2, paras. 132-138), which in his opinion amply demonstrated the importance that States and learned bodies attached to the subject of regulation of international watercourses.

682. The Special Rapporteur also indicated that the Commission might wish to consider the possibility of adding to paragraph 1 of article 25 a provision requiring watercourse States to consult with each other, at the request of any of them, with regard to needs and opportunities for watercourse regulation.

683. In conclusion, the Special Rapporteur expressed the hope that, at its next session, the Commission would allocate sufficient time for consideration of the topic, both in plenary and in the Drafting Committee, to allow it to attain its goal of completing the first reading of the draft articles by the end of its current term of office in 1991.

## C. Draft articles on the law of the non-navigational uses of international watercourses

### TEXTS OF THE DRAFT ARTICLES PROVISIONALLY ADOPTED SO FAR BY THE COMMISSION

684. The texts of draft articles 2 to 21 provisionally adopted so far by the Commission are reproduced below.

<sup>291</sup> See the summary records of the 2126th meeting (paras. 82 *et seq.*) and the 2133rd meeting (paras. 23 *et seq.*) (*Yearbook ... 1989*, vol. I).

**PART I**  
**INTRODUCTION**

**Article 1. [Use of terms]<sup>292, 293</sup>**

**Article 2. Scope of the present articles**

1. The present articles apply to uses of international watercourse[s] [systems] and of their waters for purposes other than navigation and to measures of conservation related to the uses of those watercourse[s] [systems] and their waters.

2. The use of international watercourse[s] [systems] for navigation is not within the scope of the present articles except in so far as other uses affect navigation or are affected by navigation.

**Article 3. Watercourse States**

For the purposes of the present articles, a watercourse State is a State in whose territory part of an international watercourse [system] is situated.

**Article 4. [Watercourse] [System] agreements**

1. Watercourse States may enter into one or more agreements which apply and adjust the provisions of the present articles to the characteristics and uses of a particular international watercourse [system] or part thereof. Such agreements shall, for the purposes of the present articles, be called [watercourse] [system] agreements.

2. Where a [watercourse] [system] agreement is concluded between two or more watercourse States, it shall define the waters to which it applies. Such an agreement may be entered into with respect to an entire international watercourse [system] or with respect to any part thereof or a particular project, programme or use, provided that the agreement does not adversely affect, to an appreciable extent, the use by one or more other watercourse States of the waters of the international watercourse [system].

3. Where a watercourse State considers that adjustment or application of the provisions of the present articles is required because of the characteristics and uses of a particular international watercourse [system], watercourse States shall consult with a view to negotiating in good faith for the purpose of concluding a [watercourse] [system] agreement or agreements.

**Article 5. Parties to [watercourse] [system] agreements**

1. Every watercourse State is entitled to participate in the negotiation of and to become a party to any [watercourse] [system] agreement that applies to the entire international watercourse [system], as well as to participate in any relevant consultations.

2. A watercourse State whose use of an international watercourse [system] may be affected to an appreciable extent by the implementation of a proposed [watercourse] [system] agreement that applies only to a part

<sup>292</sup> At its thirty-second session, in 1980, the Commission accepted a provisional working hypothesis as to what was meant by the expression "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."

(*Yearbook ... 1980*, vol. II (Part Two), p. 108, para. 90.)

<sup>293</sup> The Commission agreed at its thirty-ninth session, in 1987, to leave aside for the time being the question of article 1 (Use of terms) and that of the use of the term "system" and to continue its work on the basis of the provisional working hypothesis accepted by the Commission at its thirty-second session, in 1980 (*ibid.*). Thus the word "system" appears in square brackets throughout the draft articles.

of the watercourse [system] or to a particular project, programme or use is entitled to participate in consultations on, and in the negotiation of, such an agreement, to the extent that its use is thereby affected, and to become a party thereto.

**PART II**

**GENERAL PRINCIPLES**

**Article 6. Equitable and reasonable utilization and participation**

1. Watercourse States shall in their respective territories utilize an international watercourse [system] in an equitable and reasonable manner. In particular, an international watercourse [system] shall be used and developed by watercourse States with a view to attaining optimum utilization thereof and benefits therefrom consistent with adequate protection of the international watercourse [system].

2. Watercourse States shall participate in the use, development and protection of an international watercourse [system] in an equitable and reasonable manner. Such participation includes both the right to utilize the international watercourse [system] as provided in paragraph 1 of this article and the duty to co-operate in the protection and development thereof, as provided in article ...

**Article 7. Factors relevant to equitable and reasonable utilization**

1. Utilization of an international watercourse [system] in an equitable and reasonable manner within the meaning of article 6 requires taking into account all relevant factors and circumstances, including:

(a) geographic, hydrographic, hydrological, climatic and other factors of a natural character;

(b) the social and economic needs of the watercourse States concerned;

(c) the effects of the use or uses of an international watercourse [system] in one watercourse State on other watercourse States;

(d) existing and potential uses of the international watercourse [system];

(e) conservation, protection, development and economy of use of the water resources of the international watercourse [system] and the costs of measures taken to that effect;

(f) the availability of alternatives, of corresponding value, to a particular planned or existing use.

2. In the application of article 6 or paragraph 1 of the present article, watercourse States concerned shall, when the need arises, enter into consultations in a spirit of co-operation.

**Article 8. Obligation not to cause appreciable harm<sup>294</sup>**

Watercourse States shall utilize an international watercourse [system] in such a way as not to cause appreciable harm to other watercourse States.

**Article 9. General obligation to co-operate<sup>295</sup>**

Watercourse States shall co-operate on the basis of sovereign equality, territorial integrity and mutual benefit in order to attain optimum utilization and adequate protection of an international watercourse [system].

**Article 10. Regular exchange of data and information<sup>296</sup>**

1. Pursuant to article 9, watercourse States shall on a regular basis exchange reasonably available data and information on the condition of the watercourse [system], in particular that of hydrological, meteorological, hydrogeological and ecological nature, as well as related forecasts.

2. If a watercourse State is requested by another watercourse State to provide data or information that is not reasonably available, it shall employ its best efforts to comply with the request but may condition its compliance upon payment by the requesting State of the reasonable costs of collecting and, where appropriate, processing such data or information.

<sup>294</sup> Text based on draft article 9 as submitted by the previous Special Rapporteur in 1984.

<sup>295</sup> Text based on draft article 10 as submitted by the Special Rapporteur in 1987.

<sup>296</sup> Text based on draft article 15 [16] as submitted by the Special Rapporteur in 1988.

3. Watercourse States shall employ their best efforts to collect and, where appropriate, to process data and information in a manner which facilitates its utilization by the other watercourse States to which it is communicated.

### PART III

#### PLANNED MEASURES

##### *Article 11. Information concerning planned measures*

Watercourse States shall exchange information and consult each other on the possible effects of planned measures on the condition of the watercourse [system].

##### *Article 12. Notification concerning planned measures with possible adverse effects<sup>297</sup>*

Before a watercourse State implements or permits the implementation of planned measures which may have an appreciable adverse effect upon other watercourse States, it shall provide those States with timely notification thereof. Such notification shall be accompanied by available technical data and information in order to enable the notified States to evaluate the possible effects of the planned measures.

##### *Article 13. Period for reply to notification<sup>298</sup>*

Unless otherwise agreed, a watercourse State providing a notification under article 12 shall allow the notified States a period of six months within which to study and evaluate the possible effects of the planned measures and to communicate their findings to it.

##### *Article 14. Obligations of the notifying State during the period for reply<sup>299</sup>*

During the period referred to in article 13, the notifying State shall co-operate with the notified States by providing them, on request, with any additional data and information that is available and necessary for an accurate evaluation, and shall not implement, or permit the implementation of, the planned measures without the consent of the notified States.

##### *Article 15. Reply to notification<sup>300</sup>*

1. The notified States shall communicate their findings to the notifying State as early as possible.

2. If a notified State finds that implementation of the planned measures would be inconsistent with the provisions of articles 6 or 8, it shall provide the notifying State within the period referred to in article 13 with a documented explanation setting forth the reasons for such finding.

##### *Article 16. Absence of reply to notification<sup>301</sup>*

If, within the period referred to in article 13, the notifying State receives no communication under paragraph 2 of article 15, it may, subject to its obligations under articles 6 and 8, proceed with the implementation of the planned measures, in accordance with the notification and any other data and information provided to the notified States.

##### *Article 17. Consultations and negotiations concerning planned measures<sup>302</sup>*

1. If a communication is made under paragraph 2 of article 15, the notifying State and the State making the communication shall enter into

<sup>297</sup> Text based on draft article 11 as submitted by the Special Rapporteur in 1987.

<sup>298</sup> Text based on draft article 12 as submitted by the Special Rapporteur in 1987.

<sup>299</sup> Text based on draft article 12 as submitted by the Special Rapporteur in 1987.

<sup>300</sup> Text based on draft article 13 as submitted by the Special Rapporteur in 1987.

<sup>301</sup> Text based on draft article 14 as submitted by the Special Rapporteur in 1987.

<sup>302</sup> Text based on draft article 15 [16] as submitted by the Special Rapporteur in 1987.

consultations and negotiations with a view to arriving at an equitable resolution of the situation.

2. The consultations and negotiations provided for in paragraph 1 shall be conducted on the basis that each State must in good faith pay reasonable regard to the rights and legitimate interests of the other State.

3. During the course of the consultations and negotiations, the notifying State shall, if so requested by the notified States at the time of making the communication under paragraph 2 of article 15, refrain from implementing or permitting the implementation of the planned measures for a period not exceeding six months.

##### *Article 18. Procedures in the absence of notification<sup>303</sup>*

1. If a watercourse State has serious reason to believe that another watercourse State is planning measures that may have an appreciable adverse effect upon it, the former State may request the latter to apply the provisions of article 12. The request shall be accompanied by a documented explanation setting forth the reasons for such belief.

2. In the event that the State planning the measures nevertheless finds that it is not under an obligation to provide a notification under article 12, it shall so inform the other State, providing a documented explanation setting forth the reasons for such finding. If this finding does not satisfy the other State, the two States shall, at the request of that other State, promptly enter into consultations and negotiations in the manner indicated in paragraphs 1 and 2 of article 17.

3. During the course of the consultations and negotiations, the State planning the measures shall, if so requested by the other State at the time it requests the initiation of consultations and negotiations, refrain from implementing or permitting the implementation of those measures for a period not exceeding six months.

##### *Article 19. Urgent implementation of planned measures<sup>304</sup>*

1. In the event that the implementation of planned measures is of the utmost urgency in order to protect public health, public safety or other equally important interests, the State planning the measures may, subject to articles 6 and 8, immediately proceed to implementation, notwithstanding the provisions of article 14 and paragraph 3 of article 17.

2. In such cases, a formal declaration of the urgency of the measures shall be communicated to the other watercourse States referred to in article 12 together with the relevant data and information.

3. The State planning the measures shall, at the request of the other States, promptly enter into consultations and negotiations with them in the manner indicated in paragraphs 1 and 2 of article 17.

##### *Article 20. Data and information vital to national defence or security<sup>305</sup>*

Nothing contained in articles 10 to 19 shall oblige a watercourse State to provide data or information vital to its national defence or security. Nevertheless, that State shall co-operate in good faith with the other watercourse States with a view to providing as much information as possible under the circumstances.

##### *Article 21. Indirect procedures*

In cases where there are serious obstacles to direct contacts between watercourse States, the States concerned shall proceed to any exchange of data and information, notification, communication, consultations and negotiations provided for in articles 10 to 20 through any indirect procedure accepted by them.

#### D. Points on which comments are invited

685. The Commission would welcome the views of Governments, either in the Sixth Committee or in written form, in particular on draft articles 22 and 23 as submitted by the Special Rapporteur.

<sup>303</sup> Text based on draft article 14 as submitted by the Special Rapporteur in 1987.

<sup>304</sup> Text based on draft article 15 as submitted by the Special Rapporteur in 1987.

<sup>305</sup> Text based on draft article 15 [16] as submitted by the Special Rapporteur in 1988.

## Chapter VIII

### RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS (SECOND PART OF THE TOPIC)

#### A. Introduction

686. The topic entitled "Relations between States and international organizations" has been studied by the Commission in two parts. The first part, relating to the status, privileges and immunities of the representatives of States to international organizations, was completed by the Commission at its twenty-third session, in 1971, when it adopted a set of draft articles and submitted them to the General Assembly.<sup>306</sup>

687. That set of draft articles on the first part of the topic was subsequently referred by the General Assembly to a diplomatic conference which was convened in Vienna in 1975 and which adopted the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.<sup>307</sup>

688. At its twenty-eighth session, in 1976, the Commission commenced its consideration of the second part of the topic, dealing with the status, privileges and immunities of international organizations, their officials, and experts and other persons engaged in their activities not being representatives of States.<sup>308</sup>

689. At the Commission's twenty-ninth and thirtieth sessions, in 1977 and 1978, the previous Special Rapporteur, the late Abdullah El-Erian, submitted his preliminary and second reports on the topic,<sup>309</sup> which were duly considered by the Commission.<sup>310</sup>

690. At its thirty-first session, in 1979, the Commission appointed Mr. Leonardo Díaz González Special Rapporteur for the topic to succeed Mr. Abdullah El-Erian, who had resigned upon his election to the ICJ.<sup>311</sup>

691. Owing to the priority that the Commission had assigned, upon the recommendation of the General Assembly, to the conclusion of its studies on a number of topics in its programme of work with respect to which the process of preparing draft articles was already advanced, the Commission did not take up the topic at its thirty-second session, in 1980, or at its subsequent two

<sup>306</sup> *Yearbook ... 1971*, vol. II (Part One), pp. 284 *et seq.*, document A/8410/Rev.1, chap. II, sects. C and D.

<sup>307</sup> United Nations, *Juridical Yearbook 1975* (Sales No. E.77.V.3), p. 87.

<sup>308</sup> *Yearbook ... 1976*, vol. II (Part Two), p. 164, para. 173.

<sup>309</sup> *Yearbook ... 1977*, vol. II (Part One), p. 139, document A/CN.4/304; and *Yearbook ... 1978*, vol. II (Part One), p. 263, document A/CN.4/311 and Add.1.

<sup>310</sup> For a summary of the Commission's discussion of the two reports, the conclusions reached and the action taken by the Secretariat, see *Yearbook ... 1987*, vol. II (Part Two), pp. 50-51, paras. 199-203.

<sup>311</sup> *Yearbook ... 1979*, vol. II (Part Two), p. 189, para. 196.

sessions. It resumed its work on the topic only at its thirty-fifth session, in 1983.

692. The Commission resumed its consideration of the topic at its thirty-fifth session on the basis of a preliminary report<sup>312</sup> submitted by the present Special Rapporteur.

693. In his preliminary report, the Special Rapporteur gave a concise historical account of the Commission's work on the topic, indicating the major questions that had been raised during the consideration of the previous reports<sup>313</sup> and outlining the major decisions taken by the Commission concerning its approach to the study of the topic.<sup>314</sup>

694. During the Commission's consideration of the Special Rapporteur's preliminary report,<sup>315</sup> nearly all the members who spoke emphasized that the Special Rapporteur should be allowed considerable latitude and should proceed with great caution, endeavouring to adopt a pragmatic approach to the topic in order to avoid protracted discussions of a doctrinaire, theoretical nature.

695. In accordance with the Special Rapporteur's summing-up at the end of the discussion, the Commission reached the following conclusions:

(a) The Commission should take up the study of the second part of the topic "Relations between States and international organizations";

(b) This work should proceed with great prudence;

(c) For the purposes of its initial work on the second part of the topic, the Commission should adopt a broad outlook, since the study should include regional organizations. The final decision on whether to include such organizations in a future codification could be taken only when the study was completed;

(d) The same broad outlook should be adopted in connection with the subject-matter, as regards determination of the order of work on the topic and the desirability of carrying out that work in different stages;

(e) The Secretariat should be requested to revise the study prepared in 1967 on "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities"<sup>316</sup> and to update that study in the light of replies to the further questionnaire sent out on 13 March 1978 by letter of the Legal Counsel of the United Nations addressed to the legal counsels of the specialized agencies and IAEA in connection with the status, privileges and immunities of those organizations, except in matters pertaining to representatives of States, and which complemented the questionnaire on the same topic sent out on 5 January 1965;

<sup>312</sup> *Yearbook ... 1983*, vol. II (Part One), p. 227, document A/CN.4/370.

<sup>313</sup> *Ibid.*, p. 228, para. 9.

<sup>314</sup> *Ibid.*, para. 11.

<sup>315</sup> See *Yearbook ... 1983*, vol. I, pp. 237 *et seq.*, 1796th to 1798th meetings and 1799th meeting, paras. 1-11.

<sup>316</sup> *Yearbook ... 1967*, vol. II, p. 154, document A/CN.4/L.118 and Add.1 and 2.

(f) The Legal Counsel of the United Nations should be requested to send the legal counsels of regional organizations a questionnaire similar to that circulated to the legal counsels of the specialized agencies and IAEA, with a view to gathering information of the same kind as that acquired through the two questionnaires sent to the United Nations specialized agencies and IAEA in 1965 and 1978.<sup>317</sup>

696. At its thirty-seventh session, in 1985, the Commission had before it the second report submitted by the Special Rapporteur.<sup>318</sup> In the report, the Special Rapporteur examined the question of the notion of an international organization and possible approaches to the scope of the future draft articles on the topic, as well as the question of the legal personality of international organizations and the legal powers deriving therefrom. Regarding the latter question, the Special Rapporteur proposed to the Commission a draft article with two alternatives in regard to its presentation.<sup>319</sup> The Commission also had before it a supplementary study prepared at the Commission's request (see para. 695 (e) above) by the Secretariat on the basis of replies received to the questionnaire sent by the Legal Counsel of the United Nations to the legal counsels of the specialized agencies and IAEA, on the practice of those organizations concerning their status, privileges and immunities.<sup>320</sup>

697. In considering the topic, the Commission focused its discussion on the matters dealt with by the Special Rapporteur in his second report.

698. At the end of the discussion, the Commission reached the following conclusions:

(a) The Commission held a very useful debate on the topic and expressed appreciation for the efforts made by the Special Rapporteur to enable the Commission to achieve substantial progress on the topic and for his flexibility in referring to the Commission the decisions on the next steps to be taken;

(b) The short time available for discussion of the topic at the present session did not enable the Commission to take a decision at that stage on the draft article submitted by the Special Rapporteur, and made it advisable to resume the discussion at the Commission's thirty-eighth session to enable more members to express their views on the matter;

(c) The Commission looks forward to the report which the Special Rapporteur has expressed the intention to present at its thirty-eighth session;

(d) In this connection, the Special Rapporteur may examine the possibility of submitting at the thirty-eighth session of the Commission his concrete suggestions, bearing in mind the views expressed by members of the Commission, on the possible scope of the draft articles to be prepared on the topic;

(e) The Special Rapporteur may also consider the possibility of presenting at the Commission's thirty-eighth session a schematic outline of the subject-matter to be covered by the various draft articles he intends to prepare on the topic;

(f) It would be useful if the Secretariat could submit to the members of the Commission, at its thirty-eighth session, copies of the replies to the questionnaire referred to in paragraph [695] (f) above.<sup>321</sup>

<sup>317</sup> Yearbook ... 1983, vol. II (Part Two), pp. 80-81, para. 277.

<sup>318</sup> Yearbook ... 1985, vol. II (Part One), p. 103, document A/CN.4/391 and Add.1.

<sup>319</sup> For the text of this draft article, see Yearbook ... 1985, vol. II (Part Two), p. 67, footnote 252.

<sup>320</sup> Yearbook ... 1985, vol. II (Part One)/Add.1, p. 145, document A/CN.4/L.383 and Add.1-3.

<sup>321</sup> Yearbook ... 1985, vol. II (Part Two), p. 67, para. 267.

699. At the thirty-eighth session, in 1986, the Special Rapporteur submitted his third report on the topic<sup>322</sup> to the Commission, which was unable to consider it due to lack of time.

700. At its thirty-ninth session, in 1987, the Commission had before it the Special Rapporteur's third report on the topic (see para. 699 above). The Commission also had before it a document prepared by the Secretariat (ST/LEG/17) setting out the replies received, on a question-by-question basis, from regional organizations to the questionnaire concerning their status, privileges and immunities sent to them by the Legal Counsel of the United Nations on 5 January 1984 (see para. 695 (f) above).

701. In his third report, the Special Rapporteur analysed the debates on the topic held in the Sixth Committee of the General Assembly at its fortieth session and in the Commission at its thirty-seventh session, and drew a number of conclusions from those debates. He also set out various considerations regarding the scope of the topic and submitted to the Commission, in compliance with its request, an outline of the subject-matter to be covered by the draft articles he intended to prepare on the topic.<sup>323</sup>

702. In considering the Special Rapporteur's third report, the Commission held an exchange of views on various aspects of the topic, such as the scope of the future draft, the relevance of the outline submitted by the Special Rapporteur and the methodology to be followed in the future.

<sup>322</sup> Yearbook ... 1986, vol. II (Part One), p. 163, document A/CN.4/401.

<sup>323</sup> The outline submitted by the Special Rapporteur in his third report read as follows:

- “I. Privileges and immunities of the organization
  - “A. Non-fiscal privileges and immunities:
    - “(a) immunity from legal process;
    - “(b) inviolability of premises and exercise of control by the organization over those premises;
    - “(c) immunity of property and assets from search and from any other form of interference;
    - “(d) inviolability of archives and documents;
    - “(e) privileges and immunities in respect of communication facilities (use of codes and dispatch of correspondence by courier or in diplomatic bags, etc.);
  - “B. Financial and fiscal privileges:
    - “(a) exemption from taxes;
    - “(b) exemption from customs duties;
    - “(c) exemption from currency controls;
    - “(d) bank deposits.
- “II. Privileges and immunities of officials
  - “A. Non-fiscal:
    - “(a) immunity in respect of official acts;
    - “(b) immunity from national service obligations;
    - “(c) immunity from immigration restrictions and registration of aliens;
    - “(d) diplomatic privileges and immunities of executives and other senior officials;
    - “(e) repatriation facilities in times of international crisis;
  - “B. Financial and fiscal:
    - “(a) exemption from taxation of salaries and emoluments;
    - “(b) exemption from customs duties.
- “III. Privileges and immunities of experts on mission for, and of persons having official business with, the organization.”

703. Further to the exchange of views, the Commission decided to request the Special Rapporteur to continue his study of the topic in accordance with the guidelines laid down in the outline contained in his third report and in the light of the views expressed on the topic at the thirty-ninth session, in the hope that it would be possible for him to produce a set of draft articles in due course. Regarding the methodology to be followed, the Special Rapporteur would be free to follow a combination of the approaches mentioned during the exchange of views, namely the codification or systematization of the existing rules and practice in the various areas indicated in the outline and the identification, where possible, in each of those areas, of the existing normative lacunae or specific problems that called for legal regulation, for the purposes of the progressive development of international law on those points.

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

704. At the present session, the Commission resumed its consideration of the topic and had before it the fourth report of the Special Rapporteur (A/CN.4/424).

705. In his fourth report, the Special Rapporteur referred to the views expressed on the topic in the Sixth Committee during the forty-second session of the General Assembly, in regard to the notion of an international organization, the legal capacity of international organizations and their privileges and immunities, with special reference to immunity from legal process, the status of property, funds and assets of international organizations and the inviolability of their property and premises. The Special Rapporteur submitted 11 draft articles in his report (arts. 1 to 11),<sup>324</sup> comprising parts I, II and III of the draft and dealing with general provisions, legal personality, and property, funds and assets.

706. Due to lack of time, however, the Commission was unable to discuss the topic at the present session. It nevertheless deemed it advisable for the Special Rapporteur to introduce his report, in order to facilitate work on the topic at its next session.

707. The Special Rapporteur introduced his fourth report at the Commission's 2133rd meeting, on 7 July 1989.

#### 1. GENERAL COMMENTS AND DEFINITION OF AN INTERNATIONAL ORGANIZATION<sup>325</sup>

708. The Special Rapporteur pointed out that the second half of the twentieth century had been char-

<sup>324</sup> For the texts, see footnotes 325, 332 and 335 below.

<sup>325</sup> Draft articles 1 to 4 submitted by the Special Rapporteur in his fourth report read:

##### "PART I. INTRODUCTION

###### "Article 1. Terms used

"1. For the purposes of the present articles:

"(a) 'international organization' means an intergovernmental organization of a universal character;

"(b) 'relevant rules of the organization' means, in particular, the constituent instruments of the organization, its decisions and

acterized by greater interdependence of the various human groups in the world. The extraordinary development of technology and the progress and increasing speed of means of communication and transport had, by drawing peoples closer together, given them a feeling of solidarity, no matter where their countries might be, and had made them aware of belonging to one single human race. That awareness had manifested itself in co-operation between States in their endeavours to solve or face up to a number of political, social, economic, ecological, cultural, humanitarian and technical problems, among others, whose magnitude placed them beyond the capabilities of any single member of the international community.

709. In order to regulate, direct and give practical effect to such co-operation, States had recourse to the only instrument available to them under international law: the treaty. The organic basis of co-operation was the treaty, by which various States defined, limited and gave effect to the co-operation they agreed on; in other words they established indispensable permanent functional organs, independent

resolutions adopted in accordance therewith and its established practice;

"(c) 'organization of a universal character' means the United Nations, the specialized agencies, the International Atomic Energy Agency and any similar organization whose membership and responsibilities are of a world-wide character;

"(d) 'organization' means the international organization in question;

"(e) 'host State' means the State in whose territory:

"(i) the organization has its seat or an office; or

"(ii) a meeting of one of its organs or a conference convened by it is held.

"2. The provisions of paragraph 1 of this 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 2. Scope of the present articles

"1. The present articles apply to international organizations of a universal character in their relations with States when the latter have accepted them.

"2. The fact that the present articles do not apply to other international organizations is without prejudice to the application of any of the rules set forth in the articles which would be applicable under international law independently of the present articles [Convention].

"3. Nothing in the present articles [Convention] shall preclude the conclusion of agreements between States or between international organizations making the articles [Convention] applicable in whole or in part to international organizations other than those referred to in paragraph 1 of this article."

###### "Article 3. Relationship between the present articles [Convention] and the relevant rules of international organizations

"The provisions of the present articles [Convention] are without prejudice to any relevant rules of the organization."

###### "Article 4. Relationship between the present articles [Convention] and other international agreements

"The provisions of the present articles [Convention]:

"(a) are without prejudice to other international agreements in force between States or between States and international organizations of a universal character; and

"(b) shall not preclude the conclusion of other international agreements regarding the privileges and immunities of international organizations of a universal character."

of themselves, to achieve the object in view. In legal doctrine that was called the "regulatory power" assigned to international organs, which could act faster and more effectively than traditional diplomatic conferences.

710. The Special Rapporteur pointed out that, since the Second World War, the proliferation of international organizations of a universal or regional character had helped to bring about a transformation in international relations. It was undeniable that the development of the new international law was based on the multilateral co-operation of States. The new international economic law, international criminal law, environmental law and diplomatic law itself were evolving and changing in the context of those new multilateral relations and of the concept of inter-State co-operation, which was a consequence of the growing interdependence of the different human groups inhabiting the earth. As a result of those changes, which had led to some international recognition of the individual and the establishment and increasing proliferation of international organizations, society and, ultimately, international relations were no longer matters for States alone.

711. With regard to the concept of an international organization, the Special Rapporteur noted that most legal writers had been in favour of a definition proposed in 1956 during the Commission's work on the codification of the law of treaties, according to which the expression "international organization" meant "a collectivity of States established by treaty, with a constitution and common organs, having a personality distinct from that of its member States".<sup>326</sup> That definition had, however, not been adopted either in the 1969 Vienna Convention on the Law of Treaties<sup>327</sup> or in subsequent codification conventions. Article 2, paragraph 1 (i), of the 1969 Vienna Convention, whose sole purpose was to determine the scope of the Convention, merely stated: "'international organization' means an intergovernmental organization". That definition was consistent with the terminology adopted by the United Nations, which described international organizations as intergovernmental organizations, in contradistinction to non-governmental organizations (see Art. 57 of the Charter of the United Nations). According to French legal writers, particularly Reuter and Combacau, an international organization was "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>328</sup>

712. The Special Rapporteur said it was interesting that the definitions proposed in the many legal and political publications on the question all referred to the same three important constituent elements of an international organization: (a) the basis, consisting of a treaty which, from the legal point of view, was the constituent instrument and reflected a political will to co-operate in certain areas; (b) the structure, or institutional element, which

<sup>326</sup> Draft article 3 (b) submitted by Sir Gerald Fitzmaurice in his first report on the law of treaties (*Yearbook ... 1956*, vol. II, p. 108, document A/CN.4/101).

<sup>327</sup> United Nations, *Treaty Series*, vol. 1155, p. 331.

<sup>328</sup> P. Reuter and J. Combacau, *Institutions et relations internationales*, 3rd ed. (Paris, Presses universitaires de France, 1985) (*collection "Thémis"*), p. 278.

guaranteed a measure of permanence and stability in the functioning of the organization; (c) the means, which consisted of the functions and powers of the organizations and reflected a degree of autonomy on its part *vis-à-vis* its members. In legal terms, such autonomy was reflected in the existence of decision-making machinery which in turn reflected the will of the organization itself, which was not necessarily to be identified with that of each of its members and thus attested to its separate legal existence or legal personality.

713. The Special Rapporteur also pointed out that the 1947 Convention on the Privileges and Immunities of the Specialized Agencies<sup>329</sup> did not speak of "international organizations". Section 1 of article 1 (Definitions and scope) used only the words "specialized agencies" and indicated that they meant the agencies which it listed or "any other agency in relationship with the United Nations in accordance with Articles 57 and 63 of the Charter".

714. The Commission had adopted a pragmatic position from the very beginning of its work leading to the adoption of the 1969 Vienna Convention on the Law of Treaties. The same position was reflected in the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character<sup>330</sup> and in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.<sup>331</sup> That pragmatic position had been adopted in the present study on the second part of the topic of relations between States and international organizations and the Special Rapporteur said that the reports he had submitted were also based on it.

## 2. LEGAL CAPACITY OF INTERNATIONAL ORGANIZATIONS<sup>332</sup>

715. The Special Rapporteur noted that every legal system naturally determined the entities in which were vested the rights and duties recognized under the rules it laid down. Prior to the establishment of international organizations, States had been the only subjects of inter-

<sup>329</sup> United Nations, *Treaty Series*, vol. 33, p. 261.

<sup>330</sup> See footnote 307 above.

<sup>331</sup> A/CONF.129/15.

<sup>332</sup> Draft articles 5 and 6 submitted by the Special Rapporteur in his fourth report read:

### "PART II. LEGAL PERSONALITY

#### "Article 5

"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 6

"The capacity of an international organization to conclude treaties is governed by the relevant rules of that organization and by international law."

national law recognized as having international personality. Now international organizations also enjoyed international personality, as the ICJ had held in its advisory opinion of 11 April 1949 on *Reparation for Injuries Suffered in the Service of the United Nations*, according to which such "personality" should be understood to mean "capable of possessing international rights and duties".<sup>333</sup>

716. Such personality had many practical consequences. For example, international organizations contributed to the development of international law by observing customary rules, drawing up international agreements and adopting international norms. They could incur international responsibility, but they could also bring international claims and exercise "functional protection", analogous to diplomatic protection, on behalf of their officials and agents who might have suffered injury in the exercise of their functions. They could also be parties to international arbitration. It could therefore be said that the regulatory provisions which denied them access to certain permanent bodies, such as the ICJ, were not consonant with the stage of development reached by the international community.

717. In the Special Rapporteur's opinion, it was obvious that the personality conferred on international organizations could not be as far-reaching as that enjoyed by States. In the words of the ICJ in the advisory opinion cited above: "The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights; and their nature depends upon the needs of the community."<sup>334</sup> The powers of international organizations were circumscribed by the provisions of their constituent instruments and by the general functions entrusted to them. The extent of those powers and the international personality of international organizations had opened up new chapters in international administrative law and had transformed the very concept of positive international law, which was no longer just a law of relations between States, but also a law of international organizations.

718. The Special Rapporteur pointed out that States were the original subjects of international law, whereas international organizations, created by the will of States, enjoyed personality at a secondary level and individuals did so indirectly through the machinery which international organizations set up and to which individuals had access. It was thus obvious that States were still at the heart of international life. It was, however, also clear that account had to be taken of the extent to which traditional attitudes had changed as a result of the establishment of international organizations, which had slowly—though progressively and steadily—come to have an influence on the international community. In the light of the changes in international society, international law could no longer be regarded as an exclusively inter-State law, even though States would maintain their prominent position in international life and the concept of sovereignty—that essential attribute of the State—would continue to have a decisive influence on international law as a whole.

<sup>333</sup> I.C.J. Reports 1949, p. 174, at p. 179.

<sup>334</sup> *Ibid.*, p. 178.

### 3. PRIVILEGES AND IMMUNITIES<sup>335</sup>

719. The Special Rapporteur noted that, in addition to the capacity to contract which intergovernmental international organizations possessed (capacity to contract, to acquire and dispose of movable and immovable property and to institute legal proceedings), the United Nations and its specialized agencies enjoyed certain privileges and immunities which were recognized in general treaties and headquarters agreements, as well as

<sup>335</sup> Draft articles 7 to 11 submitted by the Special Rapporteur in his fourth report read:

#### "PART III. PROPERTY, FUNDS AND ASSETS

##### "Article 7

"International organizations, their property, funds and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case they have expressly waived their immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution or coercion."

##### "Article 8

"1. The premises of international organizations used solely for the performance of their official functions shall be inviolable. The property, funds and assets of international organizations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference or coercion, whether by executive, administrative, judicial or legislative action.

"2. International organizations shall notify the host State of the location and description of the premises and the date on which occupation begins. They shall also notify the host State of the vacation of premises and the date of such vacation.

"3. The dates of the notification provided for in paragraph 2 of this article, except where otherwise agreed by the parties concerned, shall determine when the enjoyment of inviolability of the premises, as provided for in paragraph 1 of this article, begins and ends."

##### "Article 9

"Without prejudice to the provisions of the present articles [Convention], international organizations shall not allow their headquarters to serve as a refuge for persons trying to evade arrest under the legal provisions of the host country, or sought by the authorities of that country with a view to the execution of a judicial decision, or wanted on account of *flagrants crimen*, or against whom a court order or deportation order has been issued by the authorities of the host country."

##### "Article 10

"Without being restricted by controls, inspections, regulations or moratoria of any kind:

"(a) International organizations may hold funds, gold or currency of any kind and operate bank accounts in any currency;

"(b) International organizations may freely transfer their funds, gold or currency from one country to another or within any country and convert any currency held by them into any other currency;

"(c) International organizations shall, in exercising their rights under subparagraphs (a) and (b) of this article, pay due regard to any representations made by the Government of any member State party to the present articles [Convention] in so far as it is considered that effect can be given to such representations without detriment to their own interests."

##### "Article 11

"Notwithstanding the provisions of article 10, subparagraphs (a) and (b), the scope of the rights accorded may be limited, in the light of the functional requirements of the organization in question, by mutual agreement of the parties concerned."

in supplementary instruments. If the raison d'être of an international organization was the functions and purposes for which it had been set up, those functional requirements had to be one of the main criteria, if not the only one, used in determining the extent and range of the privileges and immunities that were to be accorded to a given organization. The independence of the organization would thus be safeguarded to the extent necessary for it to perform its functions and achieve its objectives.

720. Justification for the privileges and immunities granted to international organizations could also be found in the principle of equality among an organization's member States. As international organizations were the creation of States which were equal among themselves, those States must all be on an equal footing *vis-à-vis* the organization they had set up and belonged to. In particular, no State should derive unwarranted fiscal advantages from the funds placed at an organization's disposal.

721. The Special Rapporteur also noted that precedent had been a factor in defining the privileges and immunities of international organizations. For understandable practical reasons, the privileges granted in the past to a number of similar organizations had been a useful reference point in considering the question of what privileges and immunities to grant to a new organization. As soon as the first international bodies had been set up, it had become apparent that there was a need to afford them some protection against local State authorities, particularly judges and executive officials, capable of interfering with their operation. International organizations, lacking territory of their own, had to be based in the territory of a State.

722. The Special Rapporteur added that, originally, privileges and immunities had been granted to officials or representatives of such bodies, generally by assimilating them to diplomatic personnel. Very soon, given the rapid growth of international organizations, a new doctrine had prevailed. That well-founded doctrine had provided a justification for granting privileges and immunities to international organizations which was independent of and different from that established in relation to States. The privileges and immunities granted to international organizations and their officials and agents were based primarily on the principle *ne impediatur officia*, the intention being to enable them to perform the functions entrusted to them without let or hindrance. Thus, according to the Special Rapporteur, the basis for those privileges and immunities was the independence necessary for functions carried out in the interests of the international community.

723. The Special Rapporteur went on to say that, although the Covenant of the League of Nations had referred, in Article 7, paragraph 4, to "diplomatic privileges and immunities", almost all of the instruments relating to existing international organizations had discarded that formula in favour of the principle *ne impediatur officia* and required that the organizations should enjoy the privileges and immunities they needed for the performance of their functions. Article 105, paragraph 1, of the Charter of the United Nations provided: "The Organization shall enjoy in the territory

of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes." Paragraph 2, which used similar wording with regard to representatives of the Members of the United Nations and officials of the Organization, referred to privileges and immunities necessary "for the independent exercise of their functions". The Special Rapporteur explained that the *ne impediatur officia* principle enabled privileges and immunities to be granted when the interests of the function so required and that it set the limits beyond which there was no need to grant them. The criterion adopted was thus that of the independence of the functions of the international organization.

724. According to the Special Rapporteur, international organizations enjoyed privileges and immunities *motu proprio*, being granted them in conventions, headquarters agreements or possibly by custom, in their capacity as international legal persons, as subjects of international law. They were entitled to privileges and immunities and could require them of States. However, one basic difference in relation to States concerned reciprocity. The different nature of the parties precluded international organizations from offering equivalent benefits in exchange for the privileges and immunities accorded to them. In that connection, the Special Rapporteur agreed with Dominicé that:

... None of the conventions on the privileges and immunities of such organizations, the headquarters agreements especially, would make any sense if the organizations lacked international juridical personality. This is not to say, however, that immunities are a necessary attribute of such personality. They derive from the specific rules prescribing them...<sup>336</sup>

725. In conclusion, the Special Rapporteur said that, whatever the régime, the privileges and immunities of international organizations and those of their officials were now based on solid legal instruments and on texts which established a right unrelated to any consideration of comity. Being unable to enjoy the protection conferred by territorial sovereignty, as States could, international organizations had as their sole protection the immunities granted to them. The ample immunity afforded them was fully justified, in contrast to the increasingly restricted immunity of States, for the good reason that States were political entities pursuing their own interests, whereas international organizations were service agencies acting on behalf of all of their member States.

#### 4. PLANNED OUTLINE FOR CONSIDERATION OF THE TOPIC

726. In referring to the overall outline of the topic and the general structure of the draft articles he was preparing, the Special Rapporteur said that parts I (Introduction), II (Legal personality) and III (Property, funds and assets) consisted of the 11 articles he had submitted at the present session. Part III would be completed in a subsequent report by additional articles on the archives of international organizations. Part IV would include provisions on facilities in respect of communications. Part V would deal with the privileges and immunities of officials of international organizations.

<sup>336</sup> C. Dominicé, "L'immunité de juridiction et d'exécution des organisations internationales", *Collected Courses of the Hague Academy of International Law, 1984-IV* (Dordrecht, Martinus Nijhoff, 1985), vol. 187, p. 164.

## Chapter IX

### OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

#### A. Programme, procedures and working methods of the Commission, and its documentation

727. At its 2095th meeting, on 2 May 1989, the Commission noted that, in paragraph 5 of its resolution 43/169 of 9 December 1988, the General Assembly had requested the Commission:

(a) To keep under review the planning of its activities for the term of office of its members, bearing in mind the desirability of achieving as much progress as possible in the preparation of draft articles on specific topics;

(b) To consider further its methods of work in all their aspects, bearing in mind that the staggering of the consideration of some topics might contribute, *inter alia*, to a more effective consideration of its report in the Sixth Committee;

(c) To indicate in its annual report, for each topic, those specific issues on which expressions of views by Governments, either in the Sixth Committee or in written form, would be of particular interest for the continuation of its work;

728. The Commission decided that that request should be taken up under item 9 of its agenda, entitled "Programme, procedures and working methods of the Commission, and its documentation".

729. The Planning Group of the Enlarged Bureau was composed as indicated in chapter I (para. 4). Members of the Commission who were not members of the Group were invited to attend and a number of them participated in the meetings.

730. The Planning Group held nine meetings, between 4 May and 6 July 1989. It had before it the sections of the topical summary of the discussion held in the Sixth Committee during the forty-third session of the General Assembly entitled "Programme, procedures and working methods of the Commission" and "Efforts to improve the ways in which the report of the Commission is considered in the Sixth Committee, with a view to providing effective guidance for the Commission in its work" (A/CN.4/L.431, paras. 418–432 and 435–439). It also had before it a number of proposals submitted by members of the Commission.

731. The Enlarged Bureau considered the report of the Planning Group on 13 July 1989. At its 2142nd meeting, on 18 July 1989, the Commission adopted the following paragraphs on the basis of recommendations of the Enlarged Bureau resulting from the discussions in the Planning Group.

#### *Planning of activities: present and future programme of work*

732. The Commission is of the view that the programme of work which it set itself at its fortieth session, in 1988, for the remainder of the five-year term of office of its members remains valid provided it is implemented with

the necessary degree of flexibility. Under that programme of work, the Commission's intention was to complete, during the current term of office, the second reading of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier as well as the second reading of the draft articles on jurisdictional immunities of States and their property.

733. The first of those goals has now been attained. The Commission intends to make every effort to complete the second reading of the draft articles on jurisdictional immunities of States and their property at its forty-second session, in 1990. It furthermore intends to give priority during the remainder of the current term of office to the topics "Draft Code of Crimes against the Peace and Security of Mankind" and "The law of the non-navigational uses of international watercourses", with a view to completing the first reading of the draft articles on those two topics within that term. In keeping with the intentions it expressed at the outset of the current five-year term of office, the Commission will also endeavour to make substantial progress on the topic of international liability for injurious consequences arising out of acts not prohibited by international law and the topic of State responsibility, and will continue its consideration of the second part of the topic of relations between States and international organizations.

734. Pursuant to paragraph 557 of its report on its fortieth session,<sup>337</sup> the Commission, at its 2104th meeting, on 18 May 1989, established a Working Group to consider the Commission's long-term programme of work. The Working Group, which was composed of Mr. Al-Khasawneh, Mr. Diaz González, Mr. Mahiou, Mr. Pawlak and Mr. Tomuschat, was to elect its own chairman and submit a report in due course to the Planning Group.

735. The Working Group elected Mr. Leonardo Diaz González as its Chairman and discussed several questions related to the Commission's long-term programme of work.<sup>338</sup>

<sup>337</sup> *Yearbook ... 1988*, vol. II (Part Two), p. 110.

<sup>338</sup> The status of topics and subtopics in the Commission's long-term programme of work as regards action by the Commission thereon is as follows:

(a) *Topics in the 1949 long-term programme of work which the Commission is currently studying*: State responsibility; jurisdictional immunities of States and their property.

(b) *Topics or subtopics in the 1949 long-term programme of work on which the Commission has already produced final drafts*: régime of the high seas; régime of territorial waters; nationality, including statelessness; law of treaties; diplomatic intercourse and immunities; consular intercourse and immunities; arbitral procedure; succession of States in respect of treaties; succession of States in respect of matters other than treaties.

(Continued on next page.)

736. The Commission noted that the Working Group, while it had held a useful exchange of views over a number of meetings on the questions within its mandate, considered it still premature to make recommendations and suggested that, as contemplated in paragraph 557 of the Commission's report on its fortieth session, it should hold further meetings at the forty-second session to continue its consideration of those questions.

#### *Role of the Drafting Committee*

737. The Commission examined ways and means of achieving targets in accordance with the programme of work it endorsed at the beginning of the current five-year term of office. In that connection, ways and means of facilitating the work of the Drafting Committee were thoroughly discussed.

738. The Commission reiterates the need to maintain a certain balance between the consideration of topics in plenary and the examination of draft articles in the Drafting Committee. The Commission organized its work so as to enable the Drafting Committee to present its reports in plenary in a staggered manner. This enabled the Commission to conclude its consideration of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier at the present session.

739. After reviewing the current status of work and the progress needed to be achieved,<sup>339</sup> the Commission

(Footnote 338 continued.)

(c) *Topics or subtopics in the 1949 long-term programme of work which have not been the subject of a final draft or report and which are not currently under study by the Commission:* recognition of States and Governments; jurisdiction with regard to crimes committed outside national territory; treatment of aliens; right of asylum; succession of States in respect of membership of international organizations.

(d) *Topics currently being studied by the Commission which were referred to it by the General Assembly:* draft Code of Crimes against the Peace and Security of Mankind (formerly "draft Code of Offences against the Peace and Security of Mankind") (1981 resumption request); relations between States and international organizations (second part of the topic); the law of the non-navigational uses of international watercourses; international liability for injurious consequences arising out of acts not prohibited by international law; status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

(e) *Topics referred to the Commission by the General Assembly on which the Commission has produced drafts, reports or conclusions:* draft Declaration on Rights and Duties of States; formulation of the Nürnberg Principles; question of international criminal jurisdiction; reservations to multilateral conventions; draft Code of Offences against the Peace and Security of Mankind (1947 request); question of defining aggression (1954 draft Code of Offences against the Peace and Security of Mankind); relations between States and international organizations (first part of the topic); special missions; most-favoured-nation clause; question of treaties concluded between States and international organizations or between two or more international organizations; question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law; juridical régime of historic waters, including historic bays; question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations; review of the multilateral treaty-making process.

It is to be noted that the Commission has also considered the following topic on the basis of article 24 of its statute: ways and means for making the evidence of customary international law more readily available.

<sup>339</sup> At the end of the present session, the Drafting Committee had pending before it: draft articles 6 and 7 on State responsibility; draft articles 1 to 11 *bis* on jurisdictional immunities of States and their

considered various ways of allocating additional time to the Drafting Committee at the next two sessions. In the light of the factors mentioned above, the Commission intends to accord as much time as possible during the remainder of the current five-year term of office to the Drafting Committee, given the latter's special role in the formulation of draft articles.

#### *Relationship between the Commission and the General Assembly*

740. The Commission notes with satisfaction the continuation within the Sixth Committee of the General Assembly, in accordance with paragraph 6 of Assembly resolution 42/156 of 7 December 1987, of efforts to improve the ways in which the report of the Commission is considered in the Sixth Committee with a view to providing effective guidance for the Commission in its work. It also notes with appreciation the results of the work carried out by the *Ad Hoc* Working Group established by the Sixth Committee at the forty-third session of the General Assembly under paragraph 6 of the above-mentioned resolution.

741. With a view to facilitating the consideration of the Commission's report in the Sixth Committee, Rapporteurs of the Commission will make every effort to, *inter alia*: (a) make the report as concise as possible by reducing to a minimum the background information appearing at the beginning of most chapters; (b) harmonize the presentation of the debates on the various topics and focus it on issues on which the Commission needs the guidance of the General Assembly; (c) enlist the assistance of special rapporteurs in providing, for inclusion in the "General description of the work of the Commission" contained in chapter I of the report, a brief account of the results achieved on their respective topics.

742. The Commission recalls that, in paragraph 582 of its report on its fortieth session,<sup>340</sup> it drew attention to the possibility of enabling special rapporteurs to attend the Sixth Committee's debate on the report of the Commission so as to give them the opportunity to acquire a more comprehensive view of existing positions, to take note of observations made and to begin preparing their reports at an earlier stage. Several members of the Commission, referring to the opinion expressed on this subject within the framework of the Working Group established by the Sixth Committee under paragraph 6 of General Assembly resolution 42/156, were of the view that the Commission should reiterate its position on the desirability of affording special rapporteurs the opportunity to be present in the Sixth Committee when parts of the Commission's report of concern to them are being discussed. In that connection, it was noted that, in addition to the reasons already cited, the presence of special rapporteurs could facilitate useful informal contacts, exchanges of views and consultations between them and representatives of Governments.

property; draft articles 9, 11 (paras. 3 (a), 3 (b), 4, 5 and 7), 13 and 14 on the draft Code of Crimes against the Peace and Security of Mankind; and draft articles 16[17], 17[18], 22 and 23 on the law of the non-navigational uses of international watercourses.

<sup>340</sup> *Yearbook ... 1988*, vol. II (Part Two), pp. 112-113.

### *Duration of the session*

743. The Commission wishes to reiterate its view that the requirements of the work on the progressive development of international law and its codification and the magnitude and complexity of the subjects on its agenda make it desirable that the usual duration of its sessions be maintained. The Commission also wishes to emphasize that it made full use of the time and services made available to it during its current session.

### *Other matters*

744. In paragraph 570 of its report on its fortieth session,<sup>341</sup> the Commission requested the Codification Division of the Office of Legal Affairs, to the extent allowed by existing resources and United Nations directives on the control and limitation of documentation, to gather and circulate in a timely manner material relevant to the topics in the Commission's current programme of work originating in the United Nations, the specialized agencies and IAEA, and non-governmental organizations concerned with international law. The Commission noted that, for its forty-first session, a list of the material gathered in accordance with the above request had been prepared and sent to all members. It is of the view that these arrangements go towards meeting the Commission's needs and should be maintained and that the Secretariat should add to the list such documents as may be recommended by special rapporteurs and other members of the Commission.

745. The Commission considers it important that the work of the United Nations in the field of the progressive development and codification of international law, including that of the Commission itself, should be made known as widely as possible. It noted with interest the steps taken to that end by the secretariat of the Commission and the Information Service at the United Nations Office at Geneva.

746. The Commission, as indicated in paragraph 567 of its report on its fortieth session,<sup>342</sup> considers worthy of further examination the possibility of using computerized assistance in the performance of its task. In that connection, it was informed that the task force established in another framework to deal with this issue was still at the exploratory phase of its activities. The Commission intends to revert to this issue once it has sufficient information to assess the feasibility and potential advantages of the technologies in question.

## **B. Co-operation with other bodies**

747. The Commission was represented at the February 1989 session of the Asian-African Legal Consultative Committee in Nairobi by the outgoing Chairman of the Commission, Mr. Leonardo Díaz González, who attended as Observer for the Commission and addressed the Committee on behalf of the Commission. The Asian-African Legal Consultative Committee was represented at the present session of the Commission by the Secretary-General of the Committee, Mr. Frank X. Njenga. Mr. Njenga addressed the Commission at its 2128th meeting,

on 29 June 1989; his statement is recorded in the summary record of that meeting.

748. The Commission was represented at the November-December 1988 session of the European Committee on Legal Co-operation in Strasbourg by the outgoing Chairman of the Commission, Mr. Leonardo Díaz González, who attended as Observer for the Commission and addressed the Committee on behalf of the Commission. The European Committee on Legal Co-operation was represented at the present session of the Commission by Mr. Eric Harremoes. Mr. Harremoes addressed the Commission at its 2134th meeting, on 11 July 1989; his statement is recorded in the summary record of that meeting.

749. The Inter-American Juridical Committee was represented at the present session of the Commission by Mr. Galo Leoro Franco. Mr. Leoro Franco addressed the Commission at its 2134th meeting, on 11 July 1989; his statement is recorded in the summary record of that meeting.

### **C. Date and place of the forty-second session**

750. The Commission decided to hold its next session at the United Nations Office at Geneva from 1 May to 20 July 1990.

### **D. Representation at the forty-fourth session of the General Assembly**

751. The Commission decided that it should be represented at the forty-fourth session of the General Assembly by its Chairman, Mr. Bernhard Graefrath.

### **E. International Law Seminar**

752. Pursuant to General Assembly resolution 43/169 of 9 December 1988, the United Nations Office at Geneva organized the twenty-fifth session of the International Law Seminar during the present session of the Commission. The Seminar is intended for postgraduate students of international law and young professors or government officials dealing with questions of international law in the course of their work.

753. A selection committee under the chairmanship of Professor Philippe Cahier (Graduate Institute of International Studies, Geneva) met on 15 March 1989 and, after having considered more than 80 applications for participation in the Seminar, selected 24 candidates of different nationalities, most of them from developing countries. Twenty-two of the selected candidates, as well as three UNITAR fellowship holders, were able to participate in this session of the Seminar.<sup>343</sup>

<sup>343</sup> The participants in the twenty-fifth session of the International Law Seminar were: Mr. Ferry Adamhar (Indonesia); Mr. Grégoire Alaye (UNITAR fellowship holder) (Benin); Mr. Jaime Barberis (Ecuador); Mr. Nguyen Ba Son (Viet Nam); Mr. Abderrahmen Ben Mansour (Tunisia); Mr. Sayeman Bula Bula (Zaire); Mr. Adolfo Curbelo Castellanos (Cuba); Mr. Salifou Fomba (UNITAR fellowship holder) (Mali); Mr. Samuel Forson (Ghana); Ms. Roxana Garmendia (Peru); Mr. Aslan Gündüz (Turkey); Mr. Eckhard Hellbeck (Federal Republic of Germany); Mr. Umesh Kadam (India); Mr. Kohen Marcelo (Argentina); Mr. Abul Maniruzzaman (Bangladesh); Mr. Mkombozi Mhina (United Republic of Tanzania); Mr. José Antonio Montes-

(Continued on next page.)

<sup>341</sup> *Ibid.*, p. 111.

<sup>342</sup> *Ibid.*, pp. 110-111.

754. The session of the Seminar was held at the Palais des Nations from 12 to 30 June 1989 under the direction of Ms. Meike Noll-Wagenfeld, United Nations Office at Geneva. During the three weeks of the session, the participants in the Seminar attended the meetings of the Commission and lectures specifically organized for them. Several lectures were given by members of the Commission, as follows: Mr. Leonardo Díaz González: "Relations between States and international organizations (second part of the topic)"; Mr. Ahmed Mahiou: "The work of the International Law Commission"; Mr. Stephen C. McCaffrey: "The law of the non-navigational uses of international watercourses"; Mr. Pemmaraju Sreenivasa Rao: "Legal problems relating to terrorism, with special reference to extradition"; Mr. Edilbert Razafindralambo: "Jurisdictional immunity of international civil servants"; Mr. Emmanuel J. Roucounas: "Relations between subsidiary means for the determination of international law"; and Mr. Doudou Thiam: "Draft Code of Crimes against the Peace and Security of Mankind".

755. In addition, talks were given by staff of the United Nations Office at Geneva and of ICRC, as follows: Mr. Antoine Bouvier (Legal Division, ICRC): "Approach of international humanitarian law"; Mr. Jacques Cuttat (Senior Economic Affairs Officer, UNCTAD): "The new international economic order"; Mr. Wiek Schrage (Environment and Human Settlements Division, ECE): "Environmental aspects of the work of the Economic Commission for Europe".

756. As has become a tradition for the Seminar, the participants enjoyed the hospitality of the City of Geneva and were also officially received by the Republic and Canton of Geneva. On that occasion they were addressed by Mr. E. Bollinger, Chief of Information of the Canton, who gave a talk on the constitutional and political features of Switzerland in general and of the Canton of Geneva in particular.

757. At the end of the Seminar, Mr. Pemmaraju Sreenivasa Rao, First Vice-Chairman of the Commission, and Mr. Jan Martenson, Director-General of the United Nations Office at Geneva, addressed the participants. In the course of this brief ceremony, the participants were presented with certificates attesting to their participation in the twenty-fifth session of the Seminar.

758. The Seminar is funded by voluntary contributions from Member States and through national fellowships awarded by Governments to their own nationals. The Commission noted with particular appreciation that the Governments of Austria, Finland, the Federal Republic of Germany, Ireland, Mexico, Sweden and Switzerland had made fellowships available, in particular to participants from developing countries, through voluntary contributions to the appropriate United Nations assistance programme. With the award of those fellowships, it was possible to achieve adequate geographical distribution of participants and bring from

distant countries deserving candidates who would otherwise have been prevented from participating in the session. In 1989, full fellowships (travel and subsistence allowance) were awarded to 12 participants and partial fellowships (travel or subsistence allowance only) were awarded to four participants. Of the 558 candidates, representing 124 nationalities, selected to participate in the Seminar since its inception in 1965, fellowships have been awarded to 280.

759. The Commission wishes to stress the importance it attaches to the sessions of the Seminar, which enable young lawyers, and especially those from developing countries, to familiarize themselves with the work of the Commission and the activities of the many international organizations which have their headquarters in Geneva. The Commission noted with great satisfaction that, in 1989, fellowships could be awarded to all those who had applied for financial assistance and it recommends that the General Assembly should again appeal to States which are able to make the voluntary contributions that are needed for the holding of the Seminar in 1990 with as broad a participation as possible.

760. The Commission also noted with satisfaction that, in 1989, full interpretation services had been made available to the Seminar and it expresses the hope that every effort will be made to continue to provide the Seminar at future sessions with the same level of services and facilities, despite existing financial constraints.

#### F. Gilberto Amado Memorial Lecture

761. With a view to honouring the memory of Gilberto Amado, the illustrious Brazilian jurist and former member of the Commission, it was decided in 1971 that a memorial should take the form of a lecture to which the members of the Commission, the participants in the session of the International Law Seminar and other experts in international law would be invited.

762. The Gilberto Amado Memorial Lectures have been made possible through generous contributions from the Government of Brazil. Early in its present session, the Commission established an informal consultative committee, composed of Mr. Carlos Calero Rodrigues (Chairman), Mr. Andreas J. Jacovides, Mr. Abdul G. Koroma, Mr. Paul Reuter and Mr. Alexander Yankov, to advise on necessary arrangements for the holding of a Gilberto Amado Memorial Lecture in 1989. The tenth Gilberto Amado Memorial Lecture, followed by a Gilberto Amado Memorial dinner, took place on 14 June 1989. The lecture, which was delivered by Mr. Carl-August Fleischhauer, Under-Secretary-General and Legal Counsel of the United Nations, was entitled "Reflections on legal aspects of United Nations peace-keeping". The Commission hopes that, as previously, the text of the lecture will be printed in English and French and thus made available to the largest possible number of specialists in the field of international law.

763. The Commission expressed its gratitude to the Government of Brazil for its generous contribution, which enabled the Gilberto Amado Memorial Lecture to be held in 1989, and requested its Chairman to convey its gratitude to the Government of Brazil.

(Footnote 343 continued.)

Marroquin (UNITAR fellowship holder) (Guatemala); Mr. Rénovat Ndayirukiye (Burundi); Ms. Melissa Perry (Australia); Ms. Carolina Rosso (Bolivia); Mr. Pavel Sturma (Czechoslovakia); Mr. Sakari Vuorensoola (Finland); Mr. Stanislaw Wajda (Poland); Ms. Gabriela Wyss (Switzerland); Mr. Essam Zanati (Egypt).