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SUMMARY RECORD OF THE 38th MEETING

Chairman: Mr. GOERNER (German Democratic Republic)

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The meeting was called to order at 10.50 a.m

AGENDA ITEM 130: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS THIRTY-SIXTH SESSION (continued) (A/39/10, A/39/412, A/39/406)

1. Mr. KIRSCH (Canada) said he first wished to comment on chapter IV of the Commission's report concerning jurisdictional immunities of States and their property. While it was true, as some delegations had noted at the last session, that the task of the Commission was not to lay down rules governing the taking of jurisdiction by States, nevertheless, articles that set out the circumstances under which a plea of sovereign immunity could be raised could not but have an impact upon the rules according to which jurisdiction was taken in the first place.

2. In particular, article 12 contemplated jurisdiction being asserted on the basis of the "applicable rules of private international law". The problem was whose standards would be applied in determining those rules and whether there was agreement on all aspects of the rules relating to the taking of jurisdiction. The area of the extra-territorial application of laws provided a specific example. His delegation therefore believed that the Commission should give some further thought to the implications of the wording adopted in article 12.

3. The second point related to the ultimate objective of the Commission's work in that area. The choice of that objective - a treaty or some other kind of "normative statement" - might depend upon a variety of factors, including the particular needs of the international community, the degree of agreement among States and the current condition of State practice. The question that must be asked in each case was whether State practice should be left to itself to continue its process of development, or whether that process should be accelerated by the drawing up of a convention. What were the advantages and disadvantages of leaving State practice to develop in its own way? The Special Rapporteur had provided a compilation of the law that represented current State practice in the area as well as itself contributing to the development of that practice. The time was approaching when the Committee must look ahead to the future direction to be taken by the Special Rapporteur's remarkable contribution.

4. The topic of the diplomatic courier and the unaccompanied diplomatic bag could not be isolated from the general context of diplomatic and related immunities. At the moment, flagrant abuses of such immunities had gained world-wide attention and had brought into question the basis for such immunities and for their application in specific instances. His delegation had some concerns about the draft articles on that topic. The original intention was to bring together in a single instrument the rules that could be found in a variety of instruments. In other words, it was a consolidation rather than a codification or progressive development of the law.

5. However, his delegation now observed that the Special Rapporteur had gone beyond that original, somewhat modest conception. He had produced a far more comprehensive codification than had been anticipated. Under certain conditions, such a codification might serve a useful function. But his delegation was uncertain whether at the present time it was prudent for nations to be working out a draft convention that at the very least gave the impression of enhancing the scope of immunities or of consolidating and expanding them.

(Mr. Kirsch, Canada)

6. Both the Commission and the Committee should keep those considerations in mind when the draft articles were examined. His delegation would also echo the views of certain members of the Commission and of the Committee who had pointed out that the needs of the diplomatic courier were functional needs only. Immunities that related to him must only be those necessary to allow him to carry out his purpose. That should be the fundamental guideline against which the draft articles were measured.

7. In so far as those provisions went beyond the functional needs of the courier or the protections already provided in the Vienna Conventions on Diplomatic and Consular Relations, his delegation had difficulty with draft article 17 (1) and article 23 (1) and it associated itself with other delegations that had expressed similar reservations.

8. The Commission should give serious consideration as to whether the articles as now formulated would receive the general acceptance necessary for a successful codification. In the past, various codification exercises that could have represented useful contributions to international law had become dead letters because of the failure by States to realize at a sufficiently early stage that certain elements simply would not, in the long term, be generally acceptable to the international community and would therefore be void of any practical effect.

9. Turning to the question of State responsibility, his delegation regretted that the Commission had been unable to devote more time to that important area. The international community needed a clearer articulation of the consequences that attached to the violation of international standards. The Special Rapporteur had paved the way for a more detailed consideration of that topic; the onus was on the Commission to make the time available for a full discussion of the Special Rapporteur's work.

10. His delegation did not propose to make substantive comments on international liability for injurious consequences arising out of acts not prohibited by international law, although that topic was of particular interest to Canada. His delegation was encouraged by the development of its focus towards the area of liability for transboundary harm and urged the Commission to appoint a new Special Rapporteur so that the process of codification begun by Mr. Quentin-Baxter could be continued.

11. With regard to the law on non-navigable uses of international watercourses, the Special Rapporteur had been able to obtain considerable support because his approach was grounded in the concept of equitable sharing. But the draft articles as worded had the effect of subordinating the duty to share equitably to the duty to refrain from appreciable harm (arts. 9 and 13). As the Canadian delegation had noted the previous year that imbalance, which was inconsistent with the overall approach, should be redressed. The law relating to the non-navigational uses of international watercourses was of critical importance and he urged the Commission to make an early appointment of a new Special Rapporteur to deal with that topic.

(Mr. Kirsch, Canada)

12. Turning to the topic of the draft code of offences against the peace and security of mankind, his delegation found the Special Rapporteur's report a useful starting point for future discussions. Naturally, in the long term the acceptability of any codification in that area would depend upon the ability of the Special Rapporteur and the Commission to identify those offences which the international community as a whole accepted as being contrary to the peace and security of mankind.

13. His delegation hoped that the Commission, as its Chairman had stated, could make progress with the draft articles on the diplomatic courier, jurisdictional immunities and State responsibility. However, it also hoped that the Commission would keep in mind the necessity of working on all topics in its mandate in a balanced manner and that priorities would be set in the light of a variety of factors, including the views expressed in the Committee, and not in the light of fortuitous events such as the hiatus in the appointment of Special Rapporteurs.

14. Mr. GUILLAUME (France) recalled that, at the previous meeting, his delegation had expressed the opinion that ILC should spend more time on the topics that had been dealt with most, in order to carry them forward or even complete them. It had been thinking particularly of State responsibility, the jurisdictional immunities of States and their property, and the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. He was gratified that ILC had apparently chosen that course, at least for the last two topics. He also endorsed the ILC's intention to plan its work so as to consider in depth, in 1985 and 1986, the topics on which progress could realistically be achieved (A/39/10, para. 385).

15. Referring to the draft Code of Offences against the Peace and Security of Mankind, he noted that ILC had decided, at least for the time being, to limit its study to the criminal responsibility of individuals and he hoped that it would maintain that position definitively because, in his delegation's opinion, the criminal responsibility of States did not exist at the present stage of international law.

16. His delegation was well aware of the reasons why the Commission had proceeded by stages, starting with the "living tissue" in order to define the offences to be covered in the future code. Taking that approach, the Commission intended to explore what serious breaches of international law could be considered "international crimes", and then to determine which of those crimes were to be considered "offences against the peace and security of mankind". While, in principle, such a method seemed acceptable, it was to be feared that its implementation would be difficult. It involved an evaluation which, except in clear-cut cases, was largely subjective regarding what constituted a serious breach of international law. For that purpose the Special Rapporteur had provided the Commission with a list of instruments - convention or resolutions, which might be considered relevant to "international crimes", but the legislative merit of those instruments and their degree of acceptability were far from uniform. For there to be a breach of international law, and a fortiori for that breach to constitute a

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crime, there had to be a rule of law which had been accepted by States. That was certainly not true of all the instruments enumerated. ILC should therefore proceed, before taking any decision on that issue, to a meticulous analysis of the documentation compiled.

17. The Commission had raised, among other problems, that of the use of the nuclear weapon. In his opinion, it should not, at the risk of jeopardizing its credibility and authority as a legal organ, take up that topic. The questions of disarmament, including those concerning nuclear disarmament, were dealt with in the First Committee. That Committee's work revealed the complexity of those questions and the extent of existing divergencies. The positions expressed there were such that it would be unrealistic to think that a consensus could emerge on the matter of qualifying, as an offence against the peace and security of mankind, the use of nuclear weapons, at the risk of jeopardizing deterrence and, consequently, peace itself. Moreover, there could be no question, in the course of that study, of reformulating the principle of the non-use of force and its indispensable corollary, the right of self-defence. France's position on that issue was not subject to change, it intended neither to weaken, nor supplement nor revise the provisions of the Charter.

18. While the Commission was endeavouring to specify what would constitute an offence against the peace and security of mankind, there was no way of knowing what the régime applicable to such an offence would be, whether an international court could be competent in the matter, whether the offences would be ones for which the competence of States would be extended, and what the rules governing extradition would ultimately be. So far those questions had not had to be considered by the Commission, but they were certainly closely connected with the definition to be established, because the law enforcement régime to be adopted could be all the more rigorous the more the list of offences was limited to "offences distinguished by their especially horrible, cruel, savage and barbarous nature" (A/39/10, para. 63). On that subject, his delegation was sure that ILC and the Special Rapporteur would find a solution that would be widely supported.

19. As for the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, he recalled that his delegation, for reasons which it had given in 1983, believed that the text under consideration should deal only with the diplomatic courier in the strict sense and the diplomatic bag not accompanied by diplomatic courier to the exclusion of any other category of bag, including the consular bag.

20. The Special Rapporteur had submitted an extremely detailed text but, since a real legal instrument rather than a code of conduct was involved, his delegation wondered whether it might not gain by being made less complex. It shared the opinion of the members of the Commission (paras. 113 and 115) that the protection accorded to the diplomatic courier was intended to facilitate free communication of diplomatic missions. The criterion to be taken into account was a functional criterion, having regard, in particular, to the temporary nature of the courier's function. The rules laid down on that matter by the 1961 Vienna Convention should

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not be amended. The sole aim should be, without touching the instruments in force, to find solutions to the practical problems that remained unsolved under the existing provisions.

21. He wondered whether articles 8 and 9 were indispensable or whether they should at the very least be simplified by indicating that, unless the receiving State so agreed, the diplomatic courier should neither be a national of that State nor, unless he was a national of the sending State, a permanent resident of the receiving State.

22. The Commission should review article 22 (concerning the diplomatic courier declared a persona non grata) in the context of articles 14 and 39. His delegation held that, prior to the start of the journey, the problem posed by couriers who were personally undesirable would most often be settled by the refusal of a visa. Moreover, in the course of a journey, there was the matter of knowing whether a courier declared not acceptable by the receiving State or the transit State while in its territory would immediately have to surrender the diplomatic bag of which the State concerned could then take possession. His delegation agreed with the observation in paragraph 147 of the report that the courier should be able to perform the functions entrusted to him, namely, to deliver the bag to the representatives of the sending State.

23. While draft article 10 (defining the functions of the diplomatic courier) seemed to him quite satisfactory, he wondered whether article 11 (concerning the possibility of terminating those functions through notification) was useful. Such notification, provided for in article 43 of the 1961 Vienna Convention, was necessary for diplomatic agents because of the permanency of their functions, but that was not true of couriers whose functions were essentially temporary and for whom it was important to determine the duration of their privileges and immunities, a matter governed by article 27, paragraphs 5 and 6, of the 1961 Convention and echoed in draft article 28 of the Rapporteur.

24. Article 16 on personal protection and inviolability of the diplomatic courier recapitulated the relevant provisions of the Vienna Convention on Diplomatic Relations and seemed very satisfactory; that inviolability seemed to offer sufficient guarantees, and there was no need to provide for inviolability in respect of the courier's temporary accommodation, as was mentioned in draft article 17.

25. Article 19 raised two sensitive problems: that of personal examination of the diplomatic courier and that of customs immunities. The former, which arose mainly in airports, was not expressly covered in the 1961 Convention. His delegation considered that personal inviolability was such that those enjoying it should not be obliged to undergo personal examination. On the other hand, it agreed with the Commission that monitoring of the diplomatic courier (but not of the bag) by electronic procedures was possible. Article 19, paragraph 1, therefore seemed acceptable, provided that it was made clear that the courier could claim such immunity only in the performance of his functions.

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26. On the other hand, the customs exemptions and the exemption from inspection of personal baggage specified in article 19, paragraphs 2 and 3, went beyond the 1961 Convention and his delegation did not support them, any more than it supported article 20, on exemption from dues and taxes. As some members of the International Law Commission had observed, the latter article was pointless because the shortness of the courier's stay in the receiving State or in the transit State precluded his exercising any taxable activity there.

27. Referring to some articles which had not yet been considered by the Drafting Committee of the Commission, he noted that draft article 23 granted the diplomatic courier immunity from jurisdiction, whereas articles 27 and 40 of the 1961 Convention provided no such immunity. The inviolability enjoyed by diplomatic couriers under those provisions was therefore sufficient to ensure their protection, and hence to enable them to perform their tasks properly. His delegation therefore did not support article 23.

28. Article 30 sought to clarify the status of the captain of a commercial aircraft carrying a diplomatic bag. The text, which was essentially the same as article 27, paragraph 7, of the Vienna Convention, had no obvious purpose, but if it was retained, primary emphasis should be placed on the facilities which the diplomatic mission should enjoy when the diplomatic bag was delivered by the captain of the aircraft.

29. The consideration of part III of the draft articles (arts. 33 to 39), in view of the diversity of opinions expressed within the International Law Commission, seemed to be at a very preliminary stage. The discussion had focused mainly on whether it was legally and practically possible to adopt measures to prevent improper use of the diplomatic bag. The consideration of that question reflected the concerns of France and its partners in the European Communities. His delegation had noted with interest the various suggestions put forward in that connection, but rejected at first sight any solution which would modify the juridical status of the diplomatic bag by its inviolability. It therefore also rejected an attempt to model the status of the diplomatic bag on that of the consular bag, or any other proposal which would authorize the opening or detaining of the bag in violation of article 27, paragraph 3, of the Vienna Convention. At the practical level, the bag must not be subjected to electronic or mechanical inspection.

30. Lastly, article 31, paragraph 1, and article 32, paragraph 1, should simply reproduce without change the terms of article 27, paragraph 4, of the 1961 Vienna Convention. Article 32, paragraph 2, the last two paragraphs of article 34, and article 37 could easily be deleted.

31. As for the jurisdictional immunities of States and their property, the articles adopted by the Commission at its thirty-sixth session, which dealt with exceptions to the immunity of States, called for some general comments.

32. The general tenor of article 13, concerning contracts of employment was on the face of it acceptable but the subjection of an employee to local social-security provisions was not the most relevant criterion for establishing absence of immunity

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in that field. It would be more appropriate to allude to the absence, in the contract, of clauses excluding the applications of local ordinary law. In addition, there could be some question as to the meaning of subparagraph 2 (b) of that article, as the Commission's commentary seemed to indicate (p. 153), under which proceedings relating to the renewal of a contract or to reinstatement would not fall within the competence of local courts, whereas proceedings to obtain corresponding compensation might. The wording used did not precisely reflect that intention, however.

33. Article 14, on personal injuries and damage to property, was too categorical and should differentiate between various possibilities, particularly regarding the nature and purpose of the act which caused the injury or damage. The same was true of article 18.

34. With respect to article 19, concerning ships employed in commercial service, he drew the attention of the International Law Commission to the Brussels Convention of 10 April 1926, supplemented by the Additional Protocol of 24 May 1934, for the unification of certain rules relating to the immunity of State-owned vessels. The rules stipulated in that Convention, to which States from every part of the world were parties, were satisfactory and subparagraph 2 (a) of article 19 should be revised so as to provide immunity of jurisdiction not only to ships of war but, to use the terms of article 3 of the above-mentioned Convention, ships "used at the time or cause of action arises exclusively on Governmental and non-commercial service".

35. Lastly, he expressed the general view that the draft under consideration should not affect the immunities enjoyed by foreign States under such specific rules of international law as those concerning embassies and consulates; nor could part III of the draft regulate immunities from measures of execution, and the reservation expressed in paragraph (4) of the commentary on article 17 should therefore be extended to all of that part of the draft.

36. With respect to chapter V of the report, he said that the discussions on the question of international liability for injurious consequences arising out of acts not prohibited by international law had strengthened his delegation's conviction that progress could not be made on that topic independently of the project concerning State responsibility for internationally wrongful acts. His delegation therefore had some doubts about the usefulness of embarking on the drafting before the problem had been more accurately pin-pointed.

37. With respect to the law of the non-navigational uses of international watercourses, his delegation was pleased that the Special Rapporteur had kept out of the new text the "watercourse system" concept, about which it had very explicit reservations, and also felt that it was wise not to refer to the concept of "shared natural resources". It would, nevertheless, like the International Law Commission to provide clarification and assurances regarding the full substantive implications of the changes thus introduced. In such cases, it would be best to reject not only the words but also their content.

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38. His delegation also felt that it would be unrealistic to try to prepare at the international level an overly detailed convention on the subject and agreed with many other delegations that it would be better for the Commission to draw up a framework agreement which the countries concerned could use and adapt to their particular needs. The Commission seemed to have adopted that point of view, but his delegation was not convinced that the draft under consideration quite fitted the definition of a framework agreement, which should be a more flexible and freer text.

39. Turning to the question of State responsibility, he said that, in view of the pace of work on that difficult topic, he did not feel able to submit detailed comments on the provisions envisaged. He was concerned, however, by certain provisions which had been discussed by the International Law Commission at its most recent session (arts. 5 to 11).

40. His delegation's reservations with respect to the application to States of the concept of international crime were well known. His delegation had at the previous session expressed its view that the question of reprisal should not be dealt with in the study being made. It still held that view and referred specifically to article 9 of the part of the draft under consideration; the application of that article could create serious uncertainty in international relations.

41. On a more technical level, his delegation shared the view of the Commission members who had felt, in connection with articles 6 and 7, that it was not advisable to specify the possible kinds of compensation for an internationally wrongful act. Lastly, it agreed with some members of the Commission that, in view of the great diversity of internationally wrongful acts, it would be preferable in article 5 to adopt a definition of injured State which was sufficiently flexible to cover all cases.

42. In conclusion, he noted with satisfaction that the work on some of the topics dealt with by the Commission seemed to be on the verge of producing results. It therefore was essential to enable the Commission to take into consideration the views of States, so that it might produce texts which would be acceptable to the international community.

43. Mr. ANDRIAMISEZA (Madagascar) said that the task of drafting a Code of Offences against the Peace and Security of Mankind presented the International Law Commission with numerous difficulties, in particular because it was tackling a new area in the absence of any real codification of international criminal law. It was therefore an open question how far that law would have the characteristics of domestic criminal law. In his opinion, the question was far from being settled.

44. He wondered wether the solution should be - as in several existing criminal codes - to define the offences clearly and precisely and to punish only the acts specified and not analogous acts, thus prohibiting reasoning by analogy; or whether the solution should be a flexible draft which left more scope for the discretionary power of judges - the current tendency of certain legislators. If a precise draft was to be achieved, a precise terminology had to be available for use. But the ground was still shifting in that area: what was "mercenarism to be condemned", for example, or what exactly were coercive measures of an economic nature? When

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seeking to define those expressions with precision, it should not be forgotten that considerations of a political nature might affect the meaning finally assigned to them.

45. It appeared from the report (A/39/10), that the International Law Commission had decided to keep the offences contained in the 1954 draft Code in the first place, and then to draw up a list of offences which had emerged since 1954, selecting only the most serious ones. He wondered whether the International Law Commission had finished drawing up that list. On reading the report, he was tempted to reply in the affirmative because, as early as paragraph 52 and on the subject of colonialism, there was a typological and terminological analysis of a kind which, according to paragraph 40, should be worked on only later, when all the material had been selected and determined. But other factors seemed to indicate that that was not the case: no mention was made of offences against the norms concerning the protection of persons from being subjected to torture and other cruel, inhuman or degrading treatment, contained in the Declaration annexed to General Assembly resolution 3452 (XXX); furthermore, should not harbouring individuals guilty of the crimes mentioned be made a separate crime, or was it thought preferable to treat it as a special case of complicity, with all the drawbacks that might entail?

46. If the list of offences was not complete, strict procedure would demand that analysis of terms should not begin. Moreover, with reference to the distinction drawn by the International Law Commission between maximum content and minimum content, it could be seen that the elements listed for possible inclusion in the maximum content did not follow from the international instruments enumerated by the Commission in paragraph 50. In fact, the concept of maximum content was pointless, as also was that of minimum content, which might result in an excessive reduction in the content of the Code.

47. As far as the content ratione personae was concerned, only individuals should be dealt with, leaving aside the notion of the criminal responsibility of States; admittedly, comparison with the concept of the criminal responsibility of legal persons under domestic law was tempting, but a deeper examination should be carried out before a decision was taken, because the context and the elements might be different. The question of civil responsibility resulting from a criminal sentence also deserved study. It could happen that the people sentenced as individuals were wholly or partially insolvent. If it was considered that in such cases the State could be sued, the victims would have the possibility of invoking the civil responsibility of the State of origin, and the latter could always institute proceedings against the criminals. However, it should not be forgotten in that connection that the concepts of State debts or régime debts might be involved in cases where those who committed the crimes were the rulers of the State.

48. In connection with the concept of criminal intent, his delegation wondered whether it was absolutely identical with the corresponding concept in domestic law. That was undoubtedly true in general, but in the particular case of an accident caused, for example, by an atomic bomb left in orbit around the earth, would the moral element then be so weakened that only civil proceedings could be envisaged?

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49. The draft Code raised many other questions, relating in particular to sanctions, jurisdiction, the effect of extenuating circumstances and juridical precedent, but the International Law Commission should be left to break the ground first.

50. With regard to the subject of the status of the diplomatic courier and the diplomatic bag, he welcomed the great advance that had been made despite difficulties due mainly to the fact that a balance had to be sought between the need to protect the diplomatic bag and the wish not to infringe the sovereignty and security of either the receiving or the transit State: hence the hesitation between absolute and relative immunity.

51. Although, in matters of domestic law, the State not only passed legislation but was also able to acquire the means to enforce it, in international law the domestic legislator could not intervene in matters regarding the means of enforcement. The wording of the text should therefore take into account domestic obstacles which might impede enforcement of the law: for example, in the case of developing countries, the lack of electronic customs checking methods, assuming that the principle of their use was accepted.

52. Particular attention should be paid to delivery of the bag and the Malagasy delegation therefore favoured deleting the expression "in the performance of his functions". It was not essential to repeat the corresponding provisions of earlier conventions (the Vienna Conventions of 1963, 1969 and 1975), because the cases envisaged in those Conventions mainly concerned persons resident in the receiving or transit State or remaining there for some time - at least long enough to initiate the necessary procedures there - whereas, in the case of the diplomatic courier, the visit was generally short.

53. In that connection, the brevity of the diplomatic courier's stay also gave rise to a suggestion with regard to article 23, paragraph 5. Although the Malagasy delegation favoured the substance of that provision, since its main aim was to protect possible victims and Madagascar had even introduced the concept of blameless responsibility in civil matters, it had difficulty with the provision's practical application. In Madagascar, for example, civil proceedings involved time-limits, which the parties were required to respect, and it was obvious that the courier could not await the expiry of those time-limits on the spot. When the courier had left the country, it would be impossible to summon him: the police were not in fact empowered to trace an individual summoned before a civil or administrative court and the victims might not know even the country of origin of the diplomatic courier, let alone his address. So that paragraph 5 should not remain a dead letter, a saving clause should be included, preferably in the official commentaries on the article, obliging States to help the victims in their inquiries. The same comment applied equally to the giving of evidence: the principle that the courier did not have to give evidence should be retained, but the commentaries should indicate that it would be desirable for a diplomatic courier who had witnessed a traffic accident - generally covered by criminal law - or acts of some seriousness, to leave a letter explaining the circumstances involved.

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54. Referring finally to paragraph 388 of the Commission's report, the Malagasy delegation thought it was undesirable for the Commission to hold two sessions a year in two different cities: in particular, such a practice would have the disadvantage of keeping members of the Commission away from their respective countries for longer periods of time and would increase the costs of the sessions. His delegation favoured the existing arrangement but would not object to the Commission holding extraordinary sessions, perhaps with an order of priority for the questions under consideration.

55. Mr. TREVES (Italy), in presenting his delegation's views on chapter IV of the Commission's report (A/39/10), said that the text of the draft articles on the jurisdictional immunities of States and their property was a sound step in the codification and progressive development of that difficult chapter of international law. In that field, practice occurred mostly within the framework of the domestic legal systems of States, namely, court decisions and statutes, which allowed for divergent trends in different States. It was true that, with notable exceptions, the legal obligation upon which States based their behaviour when they followed customary international law was less evident in the judiciary and the legislature than it was in the government organs, which were in direct contact with foreign States. The divergencies of approach in different States made it all the more important to clarify the existing law on State immunity and promote its standardization.

56. The evolution of the Commission's work, especially with regard to part III of the draft articles on exceptions to State immunity, had done much to dissipate the difficulties which his delegation had expressed on previous occasions. However, Italy maintained its general reservation on the approach implicitly adopted for article 6. The most recent evolution of practice might justify a different point of departure.

57. His delegation also wondered whether the purpose of the contract, mentioned in article 3 as a means of determining the non-commercial character of the contract, was a useful interpretative criterion or whether it introduced a subjective aspect, thus opening the way for a non-uniform application of the articles. It would clearly be easier to re-examine those two aspects when the Commission completed its study of the draft articles as a whole.

58. With regard to the articles provisionally adopted by the Commission at its thirty-sixth session, his delegation approved of the general structure and contents of article 13, but wished to raise two troublesome points. On the one hand, paragraph 1 provided that immunity could not be invoked in a proceeding which related to a contract of employment if the employee was covered by the social-security provisions of the forum State. That condition confirmed the fact that contracts of employment were an exception to State immunity, but it should nevertheless not be a specific requirement as the text appeared to indicate, because that would create some difficulties, especially since proceedings whose object was omission of coverage of an employee under the local social-security provisions were not being considered in that article.

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59. That kind of proceeding had often been taken before Italian courts and had generally been concluded by agreement between the parties following correspondence between the relevant foreign State and the Italian Government. The current formulation of that provision could allow an interpretation that his delegation would be unable to accept, namely that the employer State would have the absolute discretion to choose whether its employees were to be placed under the local social-security system or under its own system, or even not to provide them with any kind of coverage. According to that interpretation, a foreign State could easily avoid being submitted to the jurisdiction of the forum State for any kind of contract of employment just by not having its employees covered by the local social-security system. It would seem wise that the particular category of proceedings relating to coverage under the local social-security system should be explicitly indicated as being subject to the jurisdiction of local courts. Another solution would be to omit that requirement altogether.

60. Paragraph 2 (e) of article 13 could also be omitted, since, the fact of determining whether there was immunity from jurisdiction presupposed that that jurisdiction would otherwise exist. The existence of an agreement denying jurisdiction to local courts and of public policy rules making such agreement inapplicable concerned the existence of jurisdiction in the first place: the situation would be the same between private subjects. That provision therefore was outside the scope of the law on State immunity or exceptions thereto.

61. Article 14, in providing for an exception to State immunity for proceedings regarding compensation for personal injuries or damage to property, seemed to contribute to the progressive development of the law in that sphere. As mentioned in paragraph (4) of the related commentary, article 14 was important because it precluded the possibility of the insurance company hiding behind the cloak of State immunity. His delegation also agreed that some limits had to be set, but it was not sure whether the criterion of territoriality was really the best in all cases. Some transboundary damage caused by a State's commercial activities could therefore not be covered by immunity.

62. With regard to article 19, his delegation considered, as did others, that the distinction between actions in rem and actions in personam contained in one of the Special Rapporteur's alternative proposals was not viable in articles meant for implementation in countries such as Italy, whose legal system made no such distinction. The revised version of draft article 19 proposed by the Special Rapporteur (A/39/10, footnote 185) was a right point of departure even if article 19, paragraph 2, under which paragraph 1 did not apply to warships or ships employed by a State in governmental service, might seem superfluous in the light of article 6.

63. The text of article 20 as proposed in the sixth report of the Special Rapporteur (A/CN.4/376/Add.2) seemed to be a good starting point. Indeed, as the Special Rapporteur put it, if a State decided to submit disputes concerning civil or commercial matters to arbitration, there was "irresistible implication" that that State had renounced its jurisdictional immunity on all questions relating to arbitration. If it were otherwise, that State's decision would be incompatible with the aim of arbitration, namely, to deal with matters expeditiously on the

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basis of equality between parties. As had emerged from the debates in UNCITRAL's Working Group on International Contract Practices, which had just completed a model law on international commercial arbitration, it was particularly important to establish a clear relationship between arbitral proceedings and the court competent for deciding questions relating to the proceedings. Any measure of uncertainty as to the consent of States in accepting the jurisdiction of that court could hamper the development of smooth commercial relations between States and private individuals and corporations.

64. This delegation endorsed some of the approaches that the Special Rapporteur intended to follow in his seventh report on the topic of State immunity from execution and attachment. Too many presumptions of consent to jurisdiction should be avoided but at the same time, the doctrine of State immunity should not be rendered meaningless by too wide exceptions to State immunity with regard to execution and attachment. Nevertheless, a decision of a court of law would be lacking in meaning if it could not be executed against the will of the losing party, and it was important to bear that consideration in mind.

65. There was no strict parallelism between immunity - and exceptions to immunity - with regard to jurisdiction in general, and State immunity relating to attachment and execution. In the first case, legal relationships, such as contracts, formed the subject of proceedings; the second case concerned assets. The right balance had to be found between the consideration of the nature of the assets and the need to respect the rules on State immunity, and especially on the exceptions thereto. His delegation was confident that the Special Rapporteur and the Commission would be able to strike the right balance without indulging in considerations of an a priori or political nature, which would merely hinder the development of the law.

66. Mr. de PAIVA (Brazil) said that his delegation had already stressed the need for caution in the admission of exceptions to the principle of State immunity. The five new draft articles on exceptions to State immunity submitted to the Commission at its thirty-sixth session by the drafting Committee had not garnered unanimous support. The difficulties raised by the question of the jurisdictional immunities of States and their property stemmed in part from the fact that the practice of States was rather limited and that only a few countries had enacted legislation on the matter. Most of the conclusions reached were based, therefore, on considerations of pure logic and followed the two basic cases formulated in draft articles 12 and 15, provisionally adopted at the two previous sessions of the Commission although with some reservations.

67. As formulated, the five new draft articles sought to avoid any possible abuse in the interpretation of the exceptions to State immunity. The Commission had tried to describe with as much precision as possible the situations to which the basic principle of State immunity should not apply, limiting the exceptions to cases in which the application of the principle would result in a jurisdictional vacuum and to activities carried out within the territory of the forum State, it being understood that the general rule of State immunity could prevail since the clause "unless otherwise agreed between the States concerned" was used in each of the articles in question.

(Mr. de Paiva, Brazil)

68. His delegation felt, however, that the new draft articles sometimes went beyond what it regarded as the generally acceptable limits for the identification of exceptions to State immunity, that their formulation was not always satisfactory, or that they exceeded the field of private international law. The fact that all five draft articles were of a purely residual nature, because of the use of the clause already mentioned, left the door open to States to choose alternative procedures which might be diametrically opposed to the rules established in the draft articles. His delegation understood the spirit behind the formulation of that clause, but felt that it left a considerable degree of uncertainty as to whether the exceptions currently envisaged would actually be incorporated into State practice.

69. The new formulation of article 13 was an improvement over the text proposed at the previous session, as was that of article 14, although his delegation still had some reservations in regard to the latter, both as to substance and to form. It was still doubtful whether there was in fact an emerging trend in favour of granting relief to individuals for personal injury or property loss, which had been the basic justification for draft article 14. The Commission had left that point for future consideration without giving any convincing explanation.

70. Moreover, given the nature of the acts envisaged in draft article 14, it was not clear what was meant by an act or omission occurring only partly in the territory of the State of the forum. The commentary to the draft article did not clarify that point. Actually, there were a number of references to the lex loci delicti commissi and to the existence of a "substantial connection" between the territory where the act was committed and the forum. The problem was not simply one of drafting, especially since one of the Commission's main concerns had been to exclude cases of transboundary damages from the scope of article 14. In his delegation's opinion, simple reference to an act carried out partly in the State of the forum was not sufficient to make it clear that transboundary damages were not covered by the draft article. The whole text of the article should be reviewed.

71. His delegation had no difficulty with article 16 (a), because, in its view, it covered only a single case, namely that in which a State, having registered a patent or any other form of industrial or intellectual property in the State of the forum and consequently enjoying that State's legal protection, initiated proceedings for the determination of its rights in the patent registered. The exception to the principle of State immunity applied in that case mainly to counter-claims. In that sense, subparagraph (a) was unnecessary since the provisions of draft article 10 (1) already covered the matter in more general form.

72. Article 16 (b) covered the situation in reverse: if a State decided to enjoy certain specific legal rights in another State, it was logical for it to recognize that third persons in that State enjoyed similar rights. That was where the exception to the basic principle of State immunity applied. One could, however, imagine a situation in which a State preferred not to have any legal protection over patents in the State of the forum. In that circumstance, it would be valid to ask whether draft article 16 (b) was still appropriate. The nature of the link between subparagraphs (a) and (b) was not yet clearly established.

(Mr. de Paiva, Brazil)

73. He regretted that the Commission's report did not contain the usual summary of the discussion on draft articles 16, 17 and 18, although they had been examined for the first time in 1984 and information on the main trends of the debate would have been very interesting.

74. In conclusion, he made the procedural suggestion that the Commission should take a look at all the draft articles in part III as soon as it had examined all the exceptions to the principle of State immunity, even before the second reading of the draft as a whole, with a view to solving any disagreements among delegations. Although that was not the Commission's normal procedure, it might permit wide acceptance of the draft articles.

75. Turning to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, his delegation noted with satisfaction that, according to chapter VIII of the report, the Commission might be in a position to complete a first reading of the whole set of draft articles before the conclusion of the current term of membership. The Commission should continue to work in a balanced manner, trying to avoid over-detailed formulations wherever they were not really necessary.

76. The report also revealed some disagreement on priorities, in other words, whether the draft should concentrate more on the diplomatic bag and less on the courier, or the other way round. In his delegation's opinion, the question was secondary: both aspects of the subject were perfectly in order, as the title of the topic implied, and there was no reason at the moment to argue for a scale of priorities. Articles 31 et seq., dealing exclusively with the bag, deserved the same amount of attention and study as the previous ones and it was to be hoped that the Commission would be able to tackle them with thoroughness, doing its best to adopt a constructive approach.

77. Mr. TEPAVICHAROV (Bulgaria), presenting his delegation's comments on chapters IV and V of the Commission's report, said that during the discussion of the Commission's report on the work of its thirty-fourth session, attention had been drawn to the fact that the tendency towards increasing the number of exceptions to the principle of the jurisdictional immunity of States could actually lead to the emasculation of the principle itself. In that connection, his delegation, while congratulating the Special Rapporteur on his untiring and productive efforts, reiterated the serious reservations it had expressed at the thirty-eighth session of the General Assembly regarding the approach adopted by him and the point of departure on which his work on the subject had been based. Although it concurred that ideological and doctrinal differences should be taken into consideration in as much as they were reflected in State practice and in national legislation, his delegation could not agree that there was a generally accepted tendency to limit the scope and content of the jurisdictional immunities of States.

78. The draft articles submitted by the Special Rapporteur to the International Law Commission at its thirty-sixth session reflected his intention of proceeding with a gradual and systematic limitation of the scope and content of the principle of State immunity. The numerous exceptions and limitations which were proposed

(Mr. Tepavicharov, Bulgaria)

transformed the principle into an exception to a pretended general rule authorizing any State to exercise its jurisdiction over the economic activities and property of another State. Apparently, the Special Rapporteur had based his conclusion mainly on the legal practice of the United States and the United Kingdom. While those two States had extensive experience and practice in that field, theirs was not the only experience.

79. In that connection, his delegation considered that the efforts of the Special Rapporteur over the last three years to persuade members of the correctness of his position was an affront to the views expressed by many representatives during the discussion of the item in the Sixth Committee. Moreover, it had been pointed out that the absence of judicial practice in some States which recognized the absolute immunity of States should not be interpreted as practice substantiating that supposed trend, since, as a matter of fact, there were no judgements or decisions on matters relating to State immunity. That was a point which highlighted the conceptual differences which existed regarding the question of State immunity.

80. The jurisdictional immunity of foreign States was a basic principle of his country's national legislation. Consequently, it was difficult to find cases in which jurisdictional immunity had been recognized in his country's judicial practice. Bulgarian judicial institutions strictly respected the principle of the jurisdictional immunity of foreign States and, in the absence of the explicit consent of the foreign State, they dismissed cases in which a foreign State was named as defendant. It was understood in such cases that the court decided neither on its competence nor on the problem of immunity, since immunity was prescribed by law. Problems relating to the jurisdictional immunity of foreign States were disposed of in the same way in the legislation of many other countries. That went to substantiate the contention that conceptual differences could not be ignored, because they stemmed from the legislation and practice of States, neither of which, in the view of his delegation, had been thoroughly studied.

81. His delegation had reservations with regard to the way in which the discussions in the International Law Commission, particularly the objections made by some of its members - which had been duly reflected in the summary records of the Commission's meetings - had been summarized in the report. His delegation agreed with others that the proposed draft articles were designed not only to sanction the privileged position of some industrialized countries but also to favour the economic domination of transnational corporations. Furthermore, the draft articles, as a whole, were at variance with certain basic tenets of the strategy for the establishment of a new international economic order, which was aimed at restructuring international economic relations on a more just and more democratic basis.

82. A thorough study of the legislation and practice of States could lead to a generally acceptable text on the jurisdictional immunity of States and their property based on the principle of State immunity and containing a reasonable number of precisely defined and strictly limited exceptions relating to certain specific areas of States' activities.

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83. For example, it was likely that agreement could be reached on an exception to the jurisdictional immunity of States with respect to their enterprises in the territory of another State and cases of rights in rem in immovable property situated in the territory of another State, even though in the latter case a distinction should be made based on the use and the character of the immovable property. Such property could be subject to local legislation and courts in so far as it was subject to the civil jurisdiction of the State in which it was situated. That was one example of the application of the principle of State immunity and of the fact exceptions to the principle could exist, although only in very limited areas and in very clearly defined circumstances. His delegation would therefore find it difficult to work on the basis of a document which excluded such important areas of States' activities from the scope of the principle of jurisdictional immunity.

84. The sixth report of the Special Rapporteur showed that the latter continued to propose new exceptions which restricted the principle of the jurisdictional immunity of States to such an extent as to render it inoperative in practice. That was the only interpretation which could be given to the exceptions proposed in such areas as patents, trademarks, intellectual or industrial property and arbitration. With regard to the exceptions relating to liability to taxation and customs duties, and participation in companies or other collective bodies, his delegation considered that the fact that a State engaged in activities in those areas gave rise to the presumption that it consented to the jurisdiction of the courts of the other country, and it was therefore not necessary to take such cases into account in the draft articles.

85. His delegation was firmly convinced that the Commission should give further thought to whether it was appropriate to prepare a text on the jurisdictional immunities of States and their property on the basis of the idea of restricted sovereignty and whether such a text was likely to win general support. Otherwise, the document prepared by the Commission would be only an intellectual exercise and would not serve any useful purpose, since States which could accept it already had national legislation on the matter and would continue to abide by it, while States whose national legislation was based on the principle of the jurisdictional immunity of States would not accept it as a codification and progressive development of the norms of international law in that field. He therefore suggested the drawing up of a list of problems on which more State practice should be gathered; on the basis of such information reflecting the variety of existing practice and legislation, an assessment should be made of the feasibility and appropriateness of the International Law Commission continuing its work on the topic.

86. With regard to the Commission's work on the topic of international liability for injurious consequences arising out of acts not prohibited by international law, his delegation had indicated at the thirty-eighth session of the General Assembly that serious objective difficulties existed which stemmed from both the specific nature of the topic and the fact that the practice of States was not sufficiently developed in that sphere and the absence of generally accepted international norms.

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87. While the International Law Commission had already proceeded to discuss the five draft articles relating to the scope of the draft which had been submitted by the Special Rapporteur, neither the exact purpose nor the practical application of the future instrument had as yet been finally delineated. That difficulty therefore had not been overcome. His delegation's doubts with regard to the possibility of formulating a general principle of liability for acts not prohibited by international law had not been dissipated. Unless there was an explicit agreement between two or more States concerning specific areas of activity, there were no legal grounds for such liability. Furthermore, the development of international legal regulations on the preservation and protection of the environment would lead to establishing liability for acts regulated by international treaty rules. In such cases, there would be liability for acts that were contrary to international legal norms. However, if such acts were not defined as violations of the norms of international law, it would be difficult to raise the question of liability for injurious consequences arising out of such acts.

88. Clarifications were needed concerning certain basic concepts in the draft articles. For example, according to article 1, the draft articles would apply to activities and situations which were with the territory or control of a State and "which do or may give rise to a physical consequence" affecting the use or enjoyment of areas within the territory or control of another State. That definition required substantial improvement so as to clarify the meaning of the terms used, particularly the concept of "activities and situations", the immediate connection between that concept and the injurious consequences, and the expression "physical consequence". It was also necessary to clarify the so-called "transboundary element" and other basic concepts such as those expressed by the words "within the territory or control of a State".

89. For those reasons, his delegation considered that work on that topic was still at a very preliminary stage and could not be expected to yield practical results soon. In order to achieve tangible results, the International Law Commission should concentrate on those topics with respect to which completion of its first reading of draft articles was a possibility.

The meeting rose at 1 p.m.