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SIXTH COMMITTEE
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held on
Tuesday, 4 November 1986
at 3 p.m.
New York

SUMMARY RECORD OF THE 33rd MEETING

Chairman: Mr. CASTROVIEJO (Spain)

later: Mr. FRANCIS (Jamaica)

Mr. JESUS (Cape Verde)

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The meeting was called to order at 3.10 p.m.

AGENDA ITEM 130: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS THIRTY-EIGHTH SESSION (continued) (A/41/10, 406, 498)

AGENDA ITEM 125: DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND: REPORT OF THE SECRETARY-GENERAL (continued) (A/41/537 and Add.1 and 2)

1. Mr. SZEKELY (Mexico) recalled that in previous discussions of the draft Code of Offences against the Peace and Security of Mankind, his delegation had spoken of the need for the Code to be limited to the most serious international offences and to be sufficiently flexible to allow for the codification and definition of new offences, the need to provide for the criminal responsibility of physical and juridical persons as well as States, and the need for the Code to provide for the establishment of an obligatory international criminal jurisdiction applicable to both physical and juridical persons. For the current session, his delegation had sought to go beyond those general considerations and submit specific proposals. Its task had been facilitated by the excellent fourth report submitted by the Special Rapporteur (A/CN.4/398 and Corr.1-3), which had gone a long way towards overcoming the problems that had become traditional in the 32-year-old debate on the item.

2. In his delegation's opinion, there was a gap in the enumeration of the principles relating to the application of the criminal law in its different areas. The Special Rapporteur's report evaded the question of the application of the criminal law in both the personal and material spheres, and dealt only with the application of the criminal law in time and space.

3. Failure to address the question of application in the personal sphere would lead to inconsistent and unacceptable results. First, there would be tacit recognition of the inability of the purely private individual to carry out acts, in a strictly private capacity, that were materially the same as those classified by international law as offences against the peace and security of mankind. Second, there would be a contradiction in characterizing such acts as criminal at the international level while leaving a possible loophole with respect to their criminal nature at the internal level. It would also be inconsistent not to recognize universality of jurisdiction at the substantive and material level. The official position of the perpetrator of an international crime should not constitute a protective shield; nor should lack of official capacity constitute a protective shield for the individual.

4. Although articles 1, 2 and 3 of the previous draft had been reworded to avoid the need to define offences against the peace and security of mankind and to list the persons to whom the draft Code applied, it might be necessary to deal with both questions in the new draft. The definitions of each specific offence contained in chapter II seemed to be limited to the authorities of a State as physical persons and to individuals acting in an official capacity. There remained the question of the criminal responsibility of the State per se. Moreover, such a limitation gave

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the impression that the individual acting exclusively on his own account was not to be included among the possible perpetrators of the offences in question. He pointed out that in Mexican legislation there was no distinction between the official and purely private capacity of perpetrators of offences against mankind and international law.

5. The question of the application of the criminal law in the material sphere was covered briefly and indirectly in paragraphs 206 and 207 to 212 of the report (A/CN.4/398), but only in connection with exceptions to criminal responsibility. In paragraph 206 it was stated that the act in question might be in conformity with or might violate the internal law of the person performing the act; in either case, the problem was one of "internal legality", which was not the concern of the report. According to paragraph 207, in the case of a conflict between the internal order and the international order, the latter would prevail. That explained why article 2 stated that the characterization of an act as an offence under international law was independent of the internal order, and why the fact that an action or omission was or was not prosecuted under internal law did not affect that characterization.

6. With such an approach, the international community appeared to be tolerating an inconsistency between international law and internal law, whereas the topic should be considered independently of the geographic location of its various components.

7. To accommodate those concerns, which no doubt other delegations shared, his delegation would like to propose a concrete solution based on the provisions of article 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. A second paragraph should be added to draft article 2, to read:

> "All States parties shall ensure that all acts which under this draft Code constitute offences against the peace and security of mankind are characterized in their criminal legislation equally and in the same terms as those provided here for offences by any person. The same shall apply to any attempt to commit such offences and to any act by any person which constitutes complicity or participation in such offences, in conformity with the provisions of Part IV of this draft Code."

Such a formulation would provide an additional legal basis for prosecuting such offences by fully embodying the concept of universal jurisdiction.

8. Turning to the question of broader dissemination of international law, he said that his delegation wished to congratulate the Commission on the seminars and conferences it had sponsored. His delegation had already stressed the need to publish the judgments and advisory opinions of the International Court of Justice in official United Nations languages other than the official Court languages of English and French. Such a step would contribute to the universal effectiveness and broader dissemination of international law, and would be extremely useful to

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the Commission, the Court itself, States, their officials, including diplomats, and to experts, professors and students of international law throughout the world. It was therefore with the greatest satisfaction that his Government had received the report of the Joint Inspection Unit entitled "Publications of the International Court of Justice" (A/41/591). Mexico gave the report its full and enthusiastic support and planned to submit a concrete proposal in that connection to the General Assembly at its next session.

9. The great achievement of the report was its identification of specific formulas for the translation and publication of the Court's judgments and advisory opinions in the other official United Nations languages without incurring additional costs. The Inspectors responsible for the report should be commended for their skill in finding viable alternatives. It would be inexcusable not to take advantage of the possibility being offered of achieving important objectives at no additional cost. His delegation therefore hoped that both the Commission and the General Assembly would urge the Joint Inspection Unit to produce the final version of its study, spelling out the implications of its recommendations in specific economic terms, to serve as a basis for the draft resolution which his delegation wished to submit to the General Assembly at its next session. The draft resolution would be based on the following recommendations, which would lead to savings of at least 50 per cent of the Court's actual publication costs: the Court should consider limiting the number of copies of its judgments published in French/English. It should also consider publishing separate copies in each of those languages, according to need; it should consider publishing a compilation of all its judgments in paperback edition and in each of the official languages of the United Nations; efforts should be made to lower the Court's printing costs through competitive bidding procedures and by the use of new technology in the printing process; the Court should utilize the savings generated by the implementation of certain recommendations to defray the costs of others; as the principal judicial organ of the world, the Court should also study how to reach the largest possible audience for its work; the Secretary-General should provide necessary measures to facilitate the translation and printing of the Court's judgments and advisory opinions in the other official languages, if so desired by the Court.

10. The Inspectors had provided convincing evidence that the recommendations could be implemented within current budgetary resources. The proposals were therefore perfectly compatible with the Organization's efforts towards rationalization. His delegation was pleased at the similarity between the ideas expressed in the report and various Mexican proposals, and would work enthusiastically to have the recommendations adopted in the interest of the Organization, all its Members, and a more promising future for international law and the administration of justice.

11. Mr. Francis (Jamaica) took the Chair.

12. Mr. MOTOO OGISO (Japan), commenting on the work of the International Law Commission in general, said that his delegation valued the crucial role the Commission played in the international community. Japan had consistently relied on the treaty-making process within the United Nations, especially that of the Commission, and would maintain its fundamental position of relying on legal mechanisms in the conduct of its foreign relations.

(Mr. Motoo Ogiso, Japan)

13. Although the Commission had completed its first reading of the draft articles on State immunity and on the status of the diplomatic courier and the diplomatic bag at its thirty-eighth session, lack of time had hampered progress on the remaining topics. His delegation considered that the Commission should concentrate its efforts on a few topics at each session.

14. With regard to the future programme of work, after comments had been received from Governments, the Commission should first proceed to the second reading of the above-mentioned draft articles. Secondly, it should expedite its deliberations on State responsibility and complete the first reading of the draft articles with a view to re-examining part one as soon as possible. Thirdly, the Commission should maintain its traditional 12-week session in order to make progress in its work. In that connection, he suggested that it should seriously consider new methods to expedite the work of its Drafting Committee.

15. The topic of jurisdictional immunities of States and their property was an important area of international law, and one in which States were confronted with difficult problems. Unified models should be adopted as soon as possible in a situation in which the existence of two schools of thought (absolute immunity versus limited immunity) resulted in different State practices.

16. The expanding commercial activities of States had made it necessary to introduce rational guidelines regarding the scope of the jurisdictional immunity of States, in terms of ratione personae and ratione materiae. The task of the Commission was to make a clear distinction between acta jure imperii and acta jure gestionis. The draft articles presented by the Commission had followed that line of thought, with which his delegation concurred.

17. Article 6 on State immunity was a key article and deserved serious consideration by the Commission. The principles of State immunity should be clearly laid down in the draft articles, which must as far as possible reflect developments in international law in that area as evidenced in State practice and judicial proceedings.

18. His delegation concurred basically with draft articles 21 to 23, in part IV, in which it was stipulated that a State enjoyed immunity from measures of constraint. That was essentially a different matter from State immunity from jurisdiction, dealt with in article 8. He had three specific comments to make on part IV. Firstly, there was a reference in square brackets to "property in which it has a legally protected interest". The concept of "interest" was still not clearly defined and should be carefully examined in second reading. Secondly, draft article 21 (a) contained an element of ambiguity due to the word "non-governmental" in square brackets. His delegation was of the view that that word should be deleted in second reading. Thirdly, article 21 made no distinction among the measures of constraint according to the stage of proceedings. As stated in paragraph (3) of the commentary (A/41/10, p. 39), the measures of constraint mentioned in the article were not confined to execution but covered also attachment and arrest. The rule formulated in part IV was stated in article 21 as a general

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rule of immunity from all measures of constraint at any stage of the proceedings. His delegation did not object to that comprehensive approach, but felt that it was necessary to consider a situation in which an interim measure was so vital that without it the entire proceedings could become meaningless. For example, if a ship of a coastal State was damaged within its territorial waters by a ship owned by another State and used for commercial purposes, and a claim was filed, the domestic court would have to decide whether to initiate proceedings without taking some interim measure of constraint vis-à-vis the ship which had caused the damage. He hoped that due account would be taken of possible situations of that kind in second reading.

19. Article 28 on non-discrimination was a compromise reached after prolonged debate. His delegation could go along with that formulation. In future deliberations, however, consideration should be given to such questions as how to evaluate restrictive applications of the provision by the other State concerned.

20. With regard to the draft articles on the status of the diplomatic courier, his delegation recognized the need to find a fair and balanced formulation of article 28 which would be acceptable to all States concerned. Japan intended to co-operate further towards that end.

21. The Japanese proposal that a bag believed to contain something other than correspondence, documents or articles referred to in article 25 should be subjected to examination through electronic or other technical devices had been included in article 28, paragraph 2. His Government supported such a procedure, because if the only recourse was to return the bag to its place of origin, the routine utilization of the bag would be hindered.

22. With regard to article 33, he noted that the number of States which had acceded to conventions containing provisions regarding the diplomatic courier and diplomatic bag varied widely. Reference to the diplomatic bag was different in each convention. The aim of the draft articles under consideration was to establish clear rules governing the diplomatic courier and diplomatic bag. They were not intended to replace existing provisions, but to complement them. Although his delegation understood why the inclusion of an article on optional declarations had become necessary, it believed that the Commission should not complicate the implementation of the treaty. It hoped that that fundamental requirement would again be duly taken into account in second reading.

23. Mr. Jesus (Cape Verde) took the Chair.

24. Mr. BEESLEY (Canada) said that contemporary lawmaking was a dynamic process which sought to harmonize the interests of a diverse community of States. It was essential to give due consideration to the various claims made, so as to arrive at principles and rules corresponding to the legitimate expectations of States. The field of international law was characterized by flux and change. The Commission faced the challenge of bringing about the progressive development of international law while reconciling the pressures for change with the fundamental values of stability, certainty, predictability and equity.

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25. The issue of jurisdictional immunities of States and their property was of interest to all States, those whose agencies were engaged in commercial activities, as well as those in which suit was brought against foreign trading entities. Moreover, the prevalence of mixed economies in the wo ld meant that most States could fit into either category. In seeking to determine the circumstances in which the general rule of the immunity of the State would not be applicable, the Special Rapporteur had relied in part upon the developing practice by States of restrictive immunity, as reflected in Canadian law. Future practice would continue to favour that basically fair approach in dealings between Governments and private individuals or commercial entities. Where such a practice was emerging, the draft articles should aim to facilitate the process. Canada believed that that consideration should guide the Commission in its further deliberations on the draft articles.

26. With regard to immunity from execution, Canada believed that some clarification of the draft articles was necessary. His delegation took it that the consent to execution referred to in draft article 22 related merely to the matters for which consent was required under draft article 21. In other words, under no circumstances would consent be required for measures of execution in respect of property in use or intended for use by a State for commercial purposes, which, as provided in article 21 (a), had a connection with the object of the claim. Clarification of that matter was important, because the availability of execution would determine the reality of any rights against a foreign State. However, it would be useful to know whether the requirement that property subject to execution must not only be used or intended for commercial purposes, but must also have some connection with the object of the claim, was really consistent with the general approach of the draft articles. The proposition that a State had no immunity in respect of its commercial activities rested on the principle that by engaging in such activities, the State was acting as if it were a private individual with commercial interests and objectives similar to those of other private individuals. That characterization could equally be applied to a State's property. A State might engage in commercial activities or in non-commercial activities; it might have property intended for commercial activities and propert not intended for such use. If a State had no immunity with regard to any of its commercial activities, none of its property used or intended for commercial activities should be immune from execution.

27. The underlying assumption of the doctrine of restrictive immunity was that foreign States should be treated in the same way as other entities in the market-place. The right to execute should not be limited to property related to the particular transaction in dispute; it should apply to all property in use or intended to be used for commercial activities.

28. With regard to article 23, paragraph 1 (c), he noted that the Special Rapporteur had excluded from the category of property "specifically in use or intended for use by the State for commercial purposes", property of the central bank or other monetary authority of the State which was in the territory of another State. It would be interesting to learn why, if such property in the hands of a

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bank or other monetary authority was in fact used or intended for use in commercial activities, it should be immune from execution. In that regard, subparagraph (c) stood in contrast with the other subparagraphs of paragraph 1, which based the immunity of property from execution on the nature or use of the property, and not on the nature of the institution possessing the property. The underlying rationale for the absence of immunity from adjudication with regard to commercial activities and of immunity from execution in the case of property used or intended for use in commercial activities, was that participation in commercial activities negated any justification for special privilege or immunity. Clarification was needed on why it was necessary to make an exemption merely because the property was in the hands of a central bank or monetary authority.

29. In his latest report, the Special Rapporteur had included provisions for the settlement of disputes, as was common in multilateral treaties. Such provisions were desirable and indeed necessary, for example, in the case of the Convention on the Law of the Sea, where the specialized technical matters involved could not always be addressed appropriately through the existing mechanisms for the settlement of disputes. Moreover, that Convention had not only provided a set of rules to be applied by States; it had established a complete régime of interdependent rights and obligations. It was essential for that régime to have its own institutions for the settlement of disputes, reflecting the particular characteristics of that régime. However, the situation was different in areas within the traditional category of codification, where the objective was merely to clarify the rights and obligations of States rather than to create a new régime. In those circumstances, the interpretation of the rights and obligations established under the new draft articles could readily be left to the existing mechanisms for the settlement of international disputes. New mechanisms should be established when necessary. However, unessential additional and alternative bodies diminished the stature of the existing institutions involved in the settlement of disputes, such as the International Court of Justice. The Commission must carefully consider whether new procedures for the settlement of disputes should be created or whether it sufficed to remind States of the obligation to settle disputes peacefully, using existing mechanisms.

30. In the review of the draft articles on the diplomatic courier and the unaccompanied diplomatic bag, consideration must be given to the relationship of the draft articles to the existing conventions on diplomatic and consular immunities. Furthermore, it must be determined whether the articles provided greater immunity for the diplomatic courier than was necessary for him to discharge his functions properly, and to what extent the articles might impede the proper functioning of diplomatic relations. Canada noted with pleasure that the Special Rapporteur had not stipulated specific dimensions for the diplomatic bag, making it possible to respond to legitimate needs as and when they arose, and that he had maintained the fundamental principle of the inviolability of the diplomatic bag, including freedom from examination by electronic or other technical devices. His delegation was prepared to see the removal of the square brackets in article 28, paragraph 1. However, as the Special Rapporteur had recognized, two conflicting principles were at issue: on the one hand, the inviolability of the bag, based on

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the need to protect a fundamental value of diplomatic relations, namely, the security and sanctity of the transmittal of information between a foreign mission and its home State; on the other hand, the right of the receiving or transit State to protect itself from abuses and from harm which could result from the transmittal of improper materials in the diplomatic bag.

31. Canada supported the objective of protecting the receiving or transit State, and agreed with the Special Rapporteur that the implementation of the principle of the inviolability of the diplomatic bag should not provide an opportunity for abuse affecting the interests of the receiving State. However, measures taken to prevent abuses by the few should not interfere with the legitimate activities of the vast majority of States which used the diplomatic bag as intended. The proposal contained in article 28, paragraph 2, to extend to diplomatic bags the existing rule for consular bags, deserved particular attention.

32. Mr. Francis (Jamaica) resumed the Chair.

33. Mr. CORELL (Sweden) said that in preparing for the current debate on the report of the International Law Commission (A/41/10), his delegation had wondered whether the traditional method of dealing with the item was really efficient, especially in the light of the Organization's constrained budget situation. The item was an extremely time-consuming one, involving many lengthy statements to which Committee members could not always give adequate attention. It was often more convenient to study a transcript of a statement than to follow its delivery. At the same time, although the statements might cover many pages, they were not always detailed in substance and hardly ever comprehensive, so that the Commission did not always receive the detailed political and legal guidance it was entitled to expect.

34. His delegation strongly supported the proposals of the Asian-African Legal Consultative Committee contained in document A/41/437 and endorsed the Netherlands proposal to the effect that comments on the Commission's report might be supplied in writing directly to the Commission and distributed as General Assembly documents. The advantage of that propsal, which was applied by the Netherlands in document A/41/406, was that the comments would be prepared in the respective capitals especially for the benefit of the Commission, a procedure which would facilitate a more detailed review within the competent ministries, whose findings could then be set out in an informal, succinct and businesslike manner. His Government proposed to adopt that course with regard to the report of the Commission currently under consideration. In that connection, he also referred to the statement on the same topic made by Canada on behalf of several delegations, including his own, at the Committee's 18th meeting, on 17 October 1986.

35. A slight disadvantage of the method he was proposi g was that it would take some time to collect the comments of Governments and issue them as a United Nations document. However, his delegation saw no obstacle to deciding on a closing date for the submission of comments, for example, during the month of December. Individual Governments could also, should they so desire, circulate their comments on their own initiative.

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36. His proposal was that a more concentrated and strategic debate should be held on the various issues dealt with by the Commission and the Sixth Committee in order to give more guidance on the possibilities and prospects of the various items on the two bodies' respective agendas. The debate should be held at a time decided well in advance and concentrated in such a way as to allow members of the Commission, chief legal advisers and heads of the legal departments of the foreign ministries of Member States to participate in the entire debate. A procedure along those lines would certainly not mean cancelling the Sixth Committee's debate on the Commission's report. On the contrary, it would mean holding a different kind of debate - a real debate, devoted basically to providing the Commission with guidelines of a general nature for its future work. Such a debate would be much more interesting and useful and, at the same time, much shorter. It would also allow for a general consideration of the work done by the Sixth Committee and the Commission and the distribution of issues between them and various ad hoc committees, with a view to achieving maximum efficiency in the work being done in the legal field as a whole.

37. If the new procedure were introduced, the Commission itself would be able to make better use of the consultation procedures provided for in articles 16, 17 (2) (b) and 21 of its Statute. Member States would reply to questionnaires and drafts sent out by the Commission. That was particularly important when a Special Rapporteur had presented his final draft and had requested comments from Governments before a certain deadline. However, if the Commission believed that the most productive way of obtaining advice from Governments on a particular issue was a discussion in the Sixth Committee, it should, of course, have the right to suggest that such a discussion should be held. A debate of that kind, although it might be detailed and prolonged, would be limited to a specific issue of particular interest to the Commission and might therefore be expected to be of real use. Furthermore, concentration on one particular issue would enable delegations to prepare themselves more thoroughly for the debate and would help Governments to compose their delegations in such a way as to provide the most qualified expertise.

38. The Commission's work of promoting the progressive development of international law and its codification was bound to be slow; there was no advantage in proceeding too hastily and producing documents which offered but little guidance to the international community. Indeed, such an approach could well prove counter-productive. It was therefore necessary to pinpoint the issues with which the Commission could deal to good effect. The Commission and the Sixth Committee had a joint responsibility to avoid topics, or parts of topics, which were likely to cause the Commission to become completely bogged down. In that connection he remarked that in the past, his delegation had supported the work being done on State responsibility, but now, after many years of endeavour in the Commission, it had begun to wonder whether there was any chance of a convention on State responsibility being drafted, adopted and ratified and whether better use might not be made of the Commission's resources.

39. Similar arguments of efficiency should be applied to other items on the Committee's agenda. In fact, the work of the Committee and that of the Commission

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could not be considered separately. The Committee should avoid placing new items on the agenda unless there was a fair chance of its work on the subject leading to the clarification, development or strengthening of international law. Furthermore, related agenda items should not be discussed separately, at different times and in different groups, but should be brought together in clusters. That applied, for example, to such items as the peaceful settlement of disputes, the non-use of force and good-neighbourliness. Another example was the draft Code of Offences against the Peace and Security of Mankind, which clearly had to be considered together with the Commission's report.

40. In paragraph 250 of the report, the Commission stated that at its thirty-ninth session it would consider the question of the organization of its future work in the light of general objectives and priorities at that time. In the view of his delegation, the Commission at its next session should concentrate on the topic of the law of the non-navigational uses of international watercourses, that being the item on which progress appeared most likely in a short-term perspective.

41. Another item of great importance was the draft Code of Offences against the Peace and Security of Mankind. However, a reading of the draft articles reproduced in footnote 84 to the report suggested that some concentration of the Commission's work on the item was necessary in order to make progress. The scope of the draft articles was far too wide for agreement to be reached within a reasonable time. The Commission should prepare for a debate on the item in the Sixth Committee at the forty-second session of the General Assembly with the aim of identifying common ground which could serve as a starting-point for a draft code. As an example, he remarked that it would obviously be fruitless to embark on a discussion of whether environmental questions fell within the scope of offences against the peace and security of mankind before resolving the issues falling within the narrower framework of the Judgement of the Nüremberg Tribunal.

42. With regard to the two most advanced subjects on the Commission's agenda, namely, jurisdictional immunities of States and their property and status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, he congratulated the Commission, its Chairman and the Special Rapporteurs on the progress made and endorsed the Commission's decision to transmit the draft articles to Governments for comments and observations by 1 January 1988. In future, after completing the first reading of a draft, the Commission might perhaps prepare a comprehensive document containing the text as adopted. Such a document would greatly facilitate work at the national level, where the proposal might have to be sent to a considerable number of agencies and organizations for their opinion. At present, the necessary work of compilation had to be done in each Member State, which hardly seemed an efficient method.

43. His delegation saw little point in devoting a considerable amount of the Committee's time to discussing the two topics at the current session. The best way in which the Committee could help to improve the efficiency of the administrative and financial functioning of the United Nations was by following the procedure of submitting written comments and observations by a certain date. In fact, he would

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go so far as to suggest that a Committee debate on any topic on which the Commission had adopted a full set of draft articles in first reading should be banned pending the submission of written comments within the time-limit set by the Commission was by following the procedure of submitting written comments and observations by a certain date.

44. In conclusion, he stressed that all the proposals he had just made were in line with the recommendations of the Asian-African Legal Consultative Committee, especially recommendations 5 and 9, as well as with proposals and statements made by representatives of many delegations belonging to different groups. There was no lack of good ideas aimed at making the Committee's work more efficient. Perhaps the point at issue was merely a matter of co-ordinating what was already in the spirit of all delegations. At all events, in his delegation's view, the time had come to act in order to steer the work of the Committee and the Commission along a more efficient path.

45. Mr. KULOV (Bulgaria) said that by submitting two completed drafts to the General Assembly, the International Law Commission had fully complied with the recommendations contained in General Assembly resolution 40/75. The good results achieved were due largely to the very sound organization of the Commission's work and to its correct identification of priority issues and topics. It was to be hoped that in setting priority topics during its next mandate the Commission would be guided by the same criteria. A differentiated approach to the various topics, taking due account of the specific nature of the subject-matter, was fully justified and should be pursued in the further consideration of the draft articles submitted by the Commission. It would be reasonable, for example, if the time allowed for the submission of comments, observations and replies by Governments were determined in the light of the complexity of the subject-matter. In that connection, he wondered whether the time-limit set for comments on the topic of jurisdictional immunities was not rather short. The topic encompassed more than any other the relationship and interdependence between internal and international law. Its scope of application was extremely wide and its study implied a difficult procedure of internal co-ordination among numerous State organs and organizations. For those reasons, Governments should be allowed at least until 1 January 1989 in order to make an in-depth study of the draft articles. The same considerations did not apply to the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, where the procedure for internal co-ordination was less complicated because diplomatic courier service was, as a rule, a service of each country's ministry of foreign affairs. The draft articles had no bearing on basic principles and norms of international law or on basic attributes of the State and its sovereignty. Hence the deadline of 1 January 1988 appeared in that particular case to be a realistic and acceptable one.

46. With regard to the question of jurisdictional immunities of States and their property, he recalled that, as stated at a number of previous sessions, his delegation was unable to accept as correct the approach adopted in drafting the text. In its view, the draft articles should have been based on the generally recognized principle of absolute immunity of States and should have dealt only with

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a limited number of exceptions acceptable to a broad majority of States, leaving it to the discretion of States to decide on the question of waiving their immunity in each specific case. Instead, the draft articles contained so large a number of exceptions to the principle of State immunity from jurisdiction as to turn that principle into juridical fiction. Although some of the draft articles had been improved as a result of discussion in the Commission, the picture as a whole had not changed, and his delegation's misgivings were further confirmed by the fact that the draft appeared to be based largely on the legislations of a limited number of developed Western States.

47. Since his Government intended to submit its comments in writing after closer study of the draft, he would confine himself to making only a few preliminary remarks. His delegation failed to understand the logic of draft article 19 since it did not consider that an arbitration agreement between a Government and a natural or juridical person automatically implied waiving State immunity from jurisdiction even in the cases referred to in the text. On the contrary, an arbitration agreement meant that the State concerned did not consent to waive its immunity from jurisdiction in any disputes that might arise, but accepted arbitration as a way of settling them out of court. His delegation also had difficulty with draft articles 18, 21, and 23 in which the scope of the term "property intended for use by the State for commercial (non-governmental) purposes" was treated rather broadly. The possibility of defining the scope of that term while avoiding conflict with the State's discretionary authority to determine the purposes for which it chose to use its property appeared doubtful.

48. Turning to the question of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, he noted with satisfaction that compromise decisions had been reached on the limited number of issues which had given rise to difficulties. The few issues still outstanding, such as that relating to the inviolability of the bag (art. 28), would doubtless be resolved on the occasion of the final adoption of the text by government representatives. In his delegation's view, that adoption could take place within the framework of the Sixth Committee after the expiry of the deadline for the submission of written comments by Governments on 1 January 1988.

49. For the present he would confine himself to reiterating his delegation's view that the total inviolability of the bag implied and aimed above all at ensuring the full inviolability of the bag's contents. That was a fundamental and substantive guarantee of the State's freedom of communication with its missions abroad. Accordingly, it was necessary to provide that the bag should not be opened and should be exempt from examination through electronic or other technical devices, including inspection from a distance. His delegation would find it difficult to accept a régime concerning the diplomatic bag different from that envisaged in the Vienna Convention on Diplomatic Relations. The possibility of opening the bag in the presence of the representative of the sending State and returning it to the place of origin was provided for only in the Vienna Convention on Consular Relations and not in the other three universal conventions in the field of diplomatic law. Any deviation from the régime established by the Vienna Convention on Diplomatic Relations would be a backward step.

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50. His delegation was not entirely satisfied with the text of draft article 32, which failed to express with sufficient clarity the idea that the articles should be viewed as complementing the existing norms of international law in the field of diplomatic and consular law in its capacity as special law. In that connection, he emphasized that the future instrument based on the draft articles should be adopted in the form of a convention finalizing the process of codification and progressive development of diplomatic and consular law and filling the existing gaps in the status of the diplomatic courier and diplomatic bag. Lastly, referring to draft article 33, he said that although his delegation would have preferred the establishment of a coherent, uniform and generally acknowledged régime for all categories of couriers and bags based on the Vienna Convention on Diplomatic Relations, the Convention on Special Missions and the Convention on the Representation of States in their Relations with International Organizations of a Universal Character, it was prepared to endorse the approach reflected in the article. However, the possibility of adopting a flexible approach should not be construed one-sidedly; States should have the option of using and applying the weaker régime in respect of all categories of couriers and bags or, vice versa, of applying the régime providing for a wider scope of privileges and immunities to all categories of couriers and bags, including consular ones. As was known, the legal régime normally applied to the diplomatic courier and diplomatic bag in the narrow sense was frequently adopted on a bilateral basis in the practice of consular relations among States.

51. Mr. AL-KHASAWNEH (Jordan), commenting on the work of the International Law Commission in general, recalled that the Commission had been unable to give adequate consideration to certain topics at its 1986 session, not only because the duration of the session had been reduced, but also because the Commission's agenda was overcrowded. His delegation therefore felt the Commission should not consider more than two or three topics per session. He agreed with the Commission's view that its documentation should not be cut back, but found it difficult to concur with the categorization of the summary records of the Commission's meetings as travaux préparatoires. The fact that the draft articles constituting the basic proposal were negotiated by individuals acting in their personal capacity limited the extent to which they could be relied upon to ascertain the intention of the legislators, who were government representatives at a plenipotentiary conference.

52. Turning to chapter II of the report, on jurisdictional immunities of States and their property, he wished to make preliminary comments on the draft articles adopted in first reading, on which his Government would later comment in detail. The task of the Special Rapporteur had not been easy. The difficulties inherent in attempting to translate varying and sometimes divergent State practice into a single uniform international instrument could not be overstated. One example, referred to in the commentary to part IV, was that measures of constraint known in the practice of States varied considerably and, as such, it would be difficult, if not impossible, to find a term which covered each and every possible method or measure of constraint in all legal systems. That difficulty was compounded by the fact that in the absence of decisions by international tribunals and given the scarcity of diplomatic practice, such varying practices had, of necessity, to

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provide the main part of the source material for the codification and progressive development of the law of State immunity. The Special Rapporteur's success in producing the draft articles adopted in first reading was therefore all the more impressive.

53. Another feature of the draft articles was the frequent resort to compromise as a means of reconciling not only conflicting State interests but also doctrinal differences. There were instances in the draft where compromise was justifiable and useful. Thus, for example, the more liberal régime for the enjoyment of State immunity from measures of constraint in part IV was justified by the reference, in paragraph (2) of the commentary to article 21, to the fact that the practice of States had evidenced several theories in support of immunity from execution as separate from and not interconnected with immunity from jurisdiction. The different treatment for part IV was also justifiable from another angle, namely the need to protect developing countries from the growing practice of private litigants seeking satisfaction through the attachment of property owned by those countries. From a third angle, the liberal régime in part IV was justifiable because part IV took care of the needs of a group of States and was therefore part of an overall balance, although there might be disagreement as to whether part IV could of itself redress the imbalance in other parts. But it was an example of a case in which compromise was permissible: it did not undermine the logical consistency of the draft.

54. By contrast, the Commission's attempt to treat the doctrine that immunity was a unitary rule carrying within it its own limitation as a compromise between the doctrine that immunity was an exception to the principle of territorial sovereignty and the doctrine that immunity was a general rule of international law was an example of compromise that could only lead to confusion without solving any problems. He felt uneasy about the notion of compromise on doctrine, which by its very nature did not lend itself to compromise. Attempts at doctrinal compromise were in reality nothing more than attempts to brush the problem aside in the hope that the resulting logical inconsistency would not manifest itself in specific provisions. But the draft articles presented two instances of persistent differences within the Commission attributable to doctrinal disagreement. The first was the title of part III, as evidenced by the phrases in square brackets, "limitations on" and "exceptions to". The second was the inclusion in square brackets of the words "and the relevant rules of general international law" in article 6. The problem of the words in square brackets had also been seen as the consequence of the "dichotomy" approach on the one hand and the "grey zone" approach on the other. As the representative of the Netherlands had argued, the problem arose from the difficulty of obtaining agreement between States on the dividing line between acta jure imperii, in which case immunity should be given, and acta jure gestionis, in which case it should be denied. The fact that it was unrealistic to expect such agreement left a grey zone which should be regulated by the inclusion of the phrase "and the relevant rules of international law". However, he was not totally convinced by that argument. An approach based on strict dichotomy was impossible in practice because even if agreement between States on the dividing line could be obtained, there would always be room for

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different interpretation in good faith, in addition to the fact that it would be impossible to elaborate the areas to which that dichotomy would apply. However, what was at issue was whether the draft should openly provide for the development of other rules, which, given the divergent trends of national legislation, would mean in practice that the twilight zone would be enlarged, ultimately endangering the force of the draft, or whether the draft should be the central point and standard which would regulate the law of State immunity.

55. With regard to article 21, he would prefer the phrase in square brackets "or property in which it has a legally protected interest" to be used, for the reasons mentioned by the representative of Jamaica. There was perhaps a need to include in the draft an interpretative provision concerning the term "property".

56. On the subject of interpretative provisions, he wondered whether paragraph 1 of article 3 was not tautological. Paragraph 2 of that article raised a number of questions. It provided that the primary test for determining whether a contract was commercial was the nature of that contract. That reflected the philosophical starting-point that when a sovereign trades, he should submit to the rules of the market. On the other hand, the "purpose" test, which was given only a secondary role in determining whether a contract was commercial, was a reflection of the other, equally legitimate, starting-point that the protection and advancement of the welfare of the people was a manifestation of imperium. His delegation believed that a fairer balance between those opposing starting-points could be struck by giving equal weight to the two tests of "purpose" and "nature", although that would make the lives of judges asked to interpret the draft infinitely more difficult.

57. The second point he wished to make on article 3, paragraph 2, was that what was referred to as the "practice" of the State was a misnomer in the case of the socio-economic system under which the State concluded commercial contracts as part of its public functions. The Commission might therefore wish to re-examine the article in second reading. In any event, the confusion caused by the reference to "that State" should be clarified by referring to the practice of the State claiming immunity.

58. The topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier was, in contrast, limited and well-defined. The main purpose was to establish a coherent and uniform régime in that area. An optional declaration, as envisaged in article 33, would lead to a plurality of régimes and thus defeat the purpose of the codification exercise. There was also a risk that it might be used by a State Party to any of the four Conventions on diplomatic and consular relations to free itself from or amend its obligations under those Conventions.

59. Article 31 on non-recognition of States or Governments or absence of diplomatic or consular relations was unacceptable as currently drafted. It appeared to be a result of the Commission's inability to give adequate consideration to certain topics for lack of time. His delegation urged the Commission to re-examine the article in second reading in order to reflect the Commission's intention, which was the exact opposite of what was conveyed by the article as currently worded.

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60. The words in square brackets in article 28, paragraph 1, appeared to be unnecessary. The inviolability of the bag was already covered in a more specific way by the words "the diplomatic bag shall not be opened or detained" in that article and by article 30 on protective measures in case of force majeure or other circumstances.

61. Article 28, paragraph 2, raised a number of questions which should be clarified in second reading. Firstly, the protection envisaged should apply to all bags irrespective of whether they were consular or diplomatic. Secondly, a strong case could be made that the interests of the transit State were normally less likely to be affected by the bag in transit than those of the receiving State and that therefore the rights of the transit State should not be put on a par with those of the receiving State. Thirdly, although his delegation understood the motive for the provision of an extra measure of security by examining the bag through electronic and other technical devices, and realized that it was only an option, it was uneasy about the possibility of such scanning endangering the confidentiality of diplomatic correspondence. However, that possibility should not be over-dramatized and he felt it would not be too difficult to find a solution to the problem in second reading. There was merit in the idea expressed by the representative of the Philippines at the 32nd meeting that receiving States which proved to be mistaken concerning the contents of the bag, regardless of the means used to discover its contents, should perhaps make amends to the sending State.

62. There was some risk that because of the reference to the relevant rules of international law with respect to State immunities and to an optional declaration with respect to the status of the diplomatic courier and bag, the Commission's work on those two topics might lead completely away from the main objective of the process of the codification and progressive development of international law, which was to give coherence and uniformity to customary rules or to rules contained in different instruments. That objective should therefore be borne in mind by the Commission when it took up those drafts in second reading.

AGENDA ITEM 124: PEACEFUL SETTLEMENT OF DISPUTES BETWEEN STATES (continued) (A/C.6/41/L.2)

63. Mr. KALINKIN (Secretary of the Committee) announced that Ghana had joined the sponsors of draft resolution A/C.6/41/L.2.

The meeting rose at 5.40 p.m.