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SUMMARY RECORD OF THE 36th MEETING

Chairman: Mr. FRANCIS (Jamaica)

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The meeting was called to order at 3 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. RIANOM (Indonesia), referring to the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, said that the protection of the bag was intended primarily to ensure the legitimate interests of the sending State and the confidentiality of the bag's contents. His delegation therefore welcomed draft article 28 as a sound basis on which to build an acceptable text. The prohibition of electronic or other technical devices to examine the diplomatic bag was important. The use of such devices impaired confidentiality and placed the developing countries at a disadvantage because they lacked such technical capabilities. None the less, he was aware of possible abuse of the diplomatic bag and the consequent need for precautionary measures, and therefore endorsed the provision that in the event of serious suspicions as to its contents, the diplomatic bag might be opened in the presence of the competent authorities of the receiving State by an authorized representative of the sending State. The role of the transit State should be one of strict neutrality. Should it have misgivings concerning the contents of the bag, it might inform both the sending and the receiving State, which would be responsible for further action.

2. His delegation agreed basically with draft article 5 concerning the courier's duty to respect the laws and regulations of the receiving State and the transit State. That article should be formulated in such a way as to strike a harmonious balance between the "functional immunities" of the courier and the interests of the States concerned.

3. Turning to the topic of jurisdictional immunities of States and their property, he expressed regret that the draft articles still reflected the untenable academic distinction between acta jure imperii and acta jure gestionis. In many countries, commercial activities were performed by Governments, not entirely by the private sector. Therefore strict differentiation between manifestations of State power and manifestations of a private or commercial nature could not be sustained, especially with regard to the developing countries. The future legal instrument should reflect that reality. With respect to article 6, there were differences of opinion concerning the inclusion of the expression "relevant rules of international law". The provision should be further clarified in the light of comments received from Member States.

4. As a riparian State, Indonesia recognized that the topic of the law of the non-navigational uses of international watercourses not only was complex and sensitive, but touched on the vital interests of many States. The Commission should therefore make every effort to reach acceptable solutions, taking into account the urgency of the problems involved. His delegation was pleased to note

(Mr. Rianom, Indonesia)

the general agreement with the Special Rapporteur's proposals concerning the manner in which the Commission might proceed with its work on the topic, and specifically endorsed the "framework agreement" approach.

5. The international law seminars should continue to be held. There was a dearth of qualified international lawyers in the developing countries, and the participation of legal experts from those States in the seminars would contribute to furthering their expertise and experience.

6. His delegation agreed with the Commission's decision to give priority at its 1987 session to those issues that offered the greatest chances of achieving consensus. Despite the financial crisis, it was essential to ensure the normal functioning of the Commission at its future sessions.

7. Mr. RAZAFINDRALAMBO (Madagascar) said that his delegation welcomed the progress achieved by the Commission in elaborating the draft Code of Offences against the Peace and Security of Mankind. He noted that the Special Rapporteur had added a fourth category to the list of offences, "Other offences". The French title might perhaps be amended to read: "Autres crimes" or "Autres actes constituant des crimes contre la paix et la sécurité de l'humanité".

8. To speak of complot, complicity and attempt as distinct offences was in line with the modern trend in criminal law to abandon the concept of accessory responsibility and to consider such acts as principal offences in so far as there was criminal intent. That had been the position adopted by the Commission in 1954. But while placing the notion of complot under a special heading entitled "Other offences" was fully justified, that was not the case for complicity or attempt. Those two notions needed to be precisely defined along with all their constituent elements, and the relevant penalties should be laid down. In his delegation's view, such a definition should come under the general principles of international criminal law. Specific definitions were essential in order to establish that international law had priority over internal law.

9. The Special Rapporteur's proposed general definition of offences in article 1 was too concise and almost a truism. The first alternative, or even the second alternative, of the definition proposed in his third report was preferable, since it implied the existence of a moral element (the commission of an act), a material element (the violation of an international obligation) and a causal element (the fact of endangering international peace and security or the right of peoples to self-determination).

10. Article 2, "Characterization", which established the priority of international law over internal law, unfortunately failed to resolve the difficulties involving the principle of non bis in idem in instances where there were competing jurisdictions.

11. Part II was devoted to general principles of international criminal law. Draft article 3 on responsibility and penalty was taken from article 1 of the 1954 Code, and his delegation could support it. Draft article 4 established the

(Mr. Razafindralambo, Madagascar)

principle that an offence against the peace and security of mankind was a universal offence. It posed a fundamental problem which could not be resolved at the current stage. Until Governments had responded adequately to the crucial problem of the scope of the draft ratione personae, and, more specifically, the problem of the criminal responsibility of States, it would not be possible to decide on the competent jurisdiction. Article 4, paragraph 2, left open the question of the existence of an international jurisdiction. His delegation considered that the question of competence should be dealt with in a section relating to jurisdiction. Governments should reply as rapidly as possible to the questions put to them by the Commission concerning the criminal responsibility of States.

12. The principle of non-applicability of statutory limitations was a rule of positive law binding on the international community as a whole. His delegation subscribed to the principle of jurisdictional guarantees (art. 6) and of non-retroactivity (art. 7).

13. Draft article 8 dealt with exceptions to the principle of responsibility. The two categories of exceptions would have been clearer if they had been grouped separately, since non-responsibility related to the author of an act, whereas the justifying facts were of an in rem nature. Thus coercion and error were causes of non-responsibility, whereas a state of necessity, force majeure and the order of a Government were justifying facts. To complete the list, insanity should be added to the first group. His delegation could accept article 8 (e) and article 9, which set out well-known principles of general law.

14. It was questionable whether the list of general principles referred to in the Special Rapporteur's fourth report was comprehensive. For example, it did not deal with extenuating or aggravating circumstances, or, in particular, exculpatory excuses. However, those might be concepts to be used in the context of penalties.

15. He noted that as far as the various categories of offences were concerned, the Special Rapporteur had only attempted a definition with respect to war crimes. As for the list of offences, the Special Rapporteur had chosen the enumerative method, which was acceptable as long as no definition applicable to all the crimes in each category existed. But that method had the disadvantage of leaving room for omissions.

16. His delegation fully agreed with the contents of draft article 11 relating to crimes against peace. In addition to aggression, the article should include State terrorism, the violation of disarmament treaties, the isolation of the prohibition of nuclear tests, the maintenance of colonial domination, and mercenarism. He particularly appreciated the fact that article 11, paragraph 3, covered economic aggression.

17. With respect to part II of the draft, he said that genocide was the quintessential crime against humanity. The second alternative of article 12, paragraph 2, on apartheid, and the second alternative of article 13 on war crimes were preferable to the other alternatives. Madagascar fully supported paragraph (b) (ii) of the latter alternative concerning the first use of nuclear weapons. The use of atomic weapons in self-defence could not be considered lawful.

(Mr. Razafindralambo, Madagascar)

18. His delegation supported the idea expressed in the second alternative of article 14. It believed that the proposed definition of complicity contained all the necessary elements of that offence. However, the concept of attempt did not appear to have received much attention. The draft should clearly indicate the conditions and precise stages of the iter criminis that characterized criminal attempt in international criminal law, in order to avoid recourse to the provisions of internal law.

19. His delegation hoped that the Special Rapporteur would draft a special section devoted to implementation, procedure and competent jurisdiction, without which the text as a whole would suffer the same fate as its 1954 predecessor.

20. Mr. LACLETA (Spain) said that his delegation was gratified at the progress made by the Commission at its most recent session, despite the reduction in the length of the session.

21. Referring to the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, he said it was regrettable that the Commission had been unable to reach a consensus on draft article 28, whose text contained many square brackets. The square brackets reflected the conflict between the concept of absolute inviolability of the bag - and the absolute right for the bag to enter the transit and receiving States - and the view that a certain amount of control was required in order to safeguard the receiving State's security interests. Although his delegation regarded the inviolability of the diplomatic bag as a fundamental principle, it continued to reaffirm that the interests of the receiving State must be safeguarded. It therefore had no difficulty in accepting the suggestion that, in the event of serious doubts as to the content of the bag, the receiving State should request that the bag should be opened - in the presence and with the consent of a representative of the sending State - for the sole purpose of ascertaining what type of articles it contained. If the doubts in question were not dissipated as a result of the opening of the bag, or if the sending State did not authorize the opening of the bag, the bag should be returned to its place of origin. It was simply a question of general acceptance of the rules laid down in the Vienna Convention on Consular Relations.

22. However, another difficulty arose in that context - in draft article 25. It was necessary to determine the reasons justifying the suspicion that a bag contained articles whose entry was unlawful. In the case of the conventional bag, which obviously contained only documents or a small object - normally objects for encoding or decoding messages - it was obvious that the bag's weight, shape and size could give rise to suspicion. However, the problem was that the bag might be constituted by all sorts of packages, and legitimately so. Since draft article 25 referred to "articles intended exclusively for official use", all the items covered by article 36 of the Vienna Convention on Diplomatic Relations could be sent in the bag - including, for example, weapons for a mission's security service. That meant

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that suspicions could not be based on the size, weight or shape of the bag and that it would be legitimate to claim that even an entire vehicle constituted a diplomatic bag. In other words, the bag was no longer solely a special means of communication, but had become a means of transport. The question was whether the principles applied to the conventional bag could also be applied to such means of transport. In view of the enormous potential for abuse, it would not appear to be possible to maintain the concept of the bag's inviolability in such circumstances. Consideration should be given to whether the problem could be solved by means of a third approach, namely, that of limiting the contents of the bag so that the bag once again became solely a means of communication; the transport of all articles other than official documents could take place in a new type of diplomatic consignment that would be subject to a minimum amount of control but that would indeed be controlled.

23. The draft articles still associated the diplomatic courier too closely with the staff of a diplomatic mission, as though his functions were carried out uninterruptedly in one and the same receiving State - which disregarded the courier's highly peripatetic nature. Moreover, the provisions governing the appointment of the diplomatic courier were particularly to be criticized, since they treated the courier as though he would be a resident of the receiving State (draft art. 9, paras. 2 and 3). In actual fact, the receiving State often had no prior knowledge of the appointment of the diplomatic courier. Information on the appointment of the courier and his arrival in a given State was not transmitted to the State in question as it was in the case of mission staff. It was normally only in exceptional circumstances and in cases where a visa was required that the courier could be declared not acceptable prior to his arrival.

24. It should be made clear that the courier's functions began, in respect of each receiving State, each time he entered the State in question, and they ended each time he departed from that State, without any type of notification. However, when considered in the light of draft article 7, the text of article 11 reflected, rather, the idea that the courier's functions began at the time of his appointment and ended with the notifications provided for in draft article 11, which actually applied to absolutely exceptional situations.

25. A certain amount of difficulty arose from the distinction between the professional diplomatic courier and the courier ad hoc. In his delegation's view, the professional courier did not have to belong to a specific department of a State's civil service. He simply travelled routinely in order to transport bags, whereas the courier ad hoc only did so occasionally. It might be said that the professional courier travelled in order to transport the bag, whereas the courier ad hoc transported the bag when he was travelling.

26. His delegation had already referred on earlier occasions to draft article 23 on the status of the captain of a ship or aircraft entrusted with the diplomatic bag, indicating that it would be more appropriate to extend the scope of the provision to any member of the crew of an aircraft in commercial service, as had actually been done at an earlier stage of the Commission's work. The text of draft

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article 30 clearly showed that the earlier wording of draft article 23 was preferable, all the more so since the only resulting specific international obligation on the part of the receiving State was the obligation to permit a member of the relevant diplomatic mission to have unimpeded access to the aircraft.

27. Draft article 33, which permitted a whole range of different régimes, represented a step backwards. If that was the price to be paid in order to achieve universal acceptance of the draft articles, the text in question would have to be accepted. However, it would be preferable to make another effort to find a satisfactory solution to the problem that arose in the case of draft article 28, so that a single régime could be applied to all bags.

28. His delegation endorsed the Commission's approach to the topic of jurisdictional immunities, which was to state the principle of immunity and to define and delimit it by means of the establishment of certain exceptions. It was necessary to identify certain cases in which a State should not have immunity. Many States had set up machinery designed to prevent the State as such from carrying out acta jure gestionis. That situation was likely to be conducive to a solution to the problem of immunity along the lines of the approach taken by the Commission in the draft articles adopted in first reading.

29. Draft article 18 should take account of the principles laid down not only in the 1926 Brussels Convention, but also in the United Nations Convention on the Law of the Sea and the 1958 Convention on the High Seas, in which immunity was recognized only in the case of a ship intended for official commercial service. His delegation believed that the words inside square brackets should be deleted. Furthermore, in draft article 19, his delegation continued to be in favour of retention of the term "civil or commercial matter".

30. On the whole, his delegation endorsed the content of part IV of the text adopted by the Commission, and in principle considered the text of part V acceptable.

31. Where draft article 6 was concerned, his delegation shared the view that immunity and non-immunity were two aspects of the same issue, and that international law was in constant evolution - an evolution in which the Commission should participate. Once the rules laid down in the draft acquired the status of codified rules, they would be applicable in their own right and would therefore not require any supplementary reference to other relevant rules of general international law, which would of course continue to apply to issues not covered by the draft articles. His delegation believed that the words inside square brackets in draft article 6 should therefore be deleted.

32. The Commission did not appear to have considered the question of how a State was to invoke its immunity before the courts of another State or what authority would settle any dispute that arose over whether there was immunity in a specific case, or whether any of the exceptions to the principle of immunity applied. The modern practice followed by some States indicated that such decisions were within

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the purview of the judges of the State whose jurisdiction was being challenged, and that any appeal should be dealt with in accordance with the legislation of that State which meant that it would always be the courts of that State that would be called upon to settle such matters. In his delegation's view, such disputes would be international disputes and should be dealt with as such. The Commission should consider that matter in the course of its second reading of the draft articles.

33. Mr. GOERNER (German Democratic Republic) said that the Commission should devote special attention to the topic of State responsibility with a view to finalizing a set of draft articles on the subject, whose complexity called for a thorough, step-by-step approach. The hastened referral of parts two and three of the draft articles to the Drafting Committee was counter-productive, since substantive discussion - which reflected State practice - was thus moved from the plenary Commission to the Drafting Committee. The Commission should be guided by the main trends in the debate in the Sixth Committee, and should take an all-embracing, carefully balanced codification approach to the topic. Although such a draft always involved elements of progressive development, the progressive development of international law could not be reduced to the notions and conceptions of just a few scholars, since it depended on the consent and actions of States. The result of a rushed approach was discernible in the text of draft article 5 of part two, which was hardly acceptable, just as it was evident in the Drafting Committee's inability to formulate draft articles 6 to 16 of part two.

34. The current wording of draft article 5 of part two was inadequate. According to the definition given in the draft article, the "injured State" was a State whose rights had been infringed by an internationally wrongful act. Since there were essentially three categories of breach or infringement - the bilateral situation, the multilateral situation and an erga omnes situation in the case of international crimes - only those categories should be listed in draft article 5. Any other references to sources, details and primary rules, as still set forth in paragraph 2, would give rise to problems. Draft article 5 was not a primary rule, and the impression that it created an independent basis for reactions to a wrongful act must be avoided. If subparagraph (a) of paragraph 2 were formulated in broader terms, subparagraphs (b), (c), (d), (e) (iii) and (f) could be deleted. As indicated in paragraph 3, in the case of an international crime, the term "injured State" included all other States that consequently were entitled to respond to the act collectively or individually. However, that presupposed a distinction between States directly affected and States indirectly affected by an internationally wrongful act constituting an international crime.

35. Draft article 6 covered the full spectrum of claims to reparation, and was sufficiently comprehensive. However, if it was found that the current wording lacked clarity, changes should be made. For example, measures of satisfaction could be expressly mentioned in paragraph 1 (d). On the other hand, the words "to release and return the persons and objects held through such act" should be deleted, together with the whole of paragraph 1 (b). The same applied to the whole of draft article 7.

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36. The two types of countermeasures - reciprocity and reprisals (draft arts. 8 and 9) - were unilateral reactions on the part of the injured State and were admissible legal responses. Except in the case of certain emergency situations, such countermeasures were designed to materialize a claim to reparation that had been asserted. Irrespective of whether reciprocity and reprisals were covered in one or two articles, in either case the decisive element would be proportionality. It was also imperative to disallow reprisals involving armed force. The circumstances in which armed force could be used fell under the heading "implementation of international responsibility", and should therefore be dealt with in part three.

37. Draft articles 10 and 11 could be deleted if draft article 5 were given a narrower formulation and if any issue relating to claims and enforcement were systematically addressed in part three. Such issues included the cases of special urgency, implicitly envisaged in draft article 10, paragraph 2 (a), and special procedures under relevant treaties, covered under draft article 11, paragraph 2. The injured State's options where countermeasures were concerned should not be narrowed too much. On the other hand, the primacy of specific enforcement procedures laid down in primary rules must also be taken into account. Moreover, it was inadmissible to regard only procedures involving compulsory third-party decisions as effective procedures for the settlement of disputes. Such an approach was incompatible with State practice and the principle of peaceful settlement of disputes.

38. In the current draft, the legal consequences of international crimes were dealt with inadequately, and the need for a fundamental distinction between international crimes and international delicts had not been duly taken into account. The specific legal consequences of international crimes must be concretized and comprehensively codified. Aggression - the most serious international crime - should be dealt with separately.

39. The concept underlying the substantive portions of part three was unacceptable, since it gave the impression - particularly where international crimes were concerned - that no responsibility was involved and there was no right to apply countermeasures, except in cases where the International Court of Justice so determined. The system proposed by the Special Rapporteur for part three was tantamount to an attempt to introduce retroactively into all treaties and conventions a general procedure involving compulsory third-party decisions, which had not been agreed upon by the parties at the time of the establishment of the relevant primary rules.

40. International practice showed that international third-party dispute - settlement procedures and court proceedings were no panacea for manifestations of escalation and internationally wrongful acts. The decisive factor in the relevant situations was the readiness of the States concerned to co-operate, which would determine which dispute-settlement procedure was selected and whether a court judgement or any other form of dispute settlement would be accepted. Several members of the Commission had pointed out that dangers of an escalation of a

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conflict might also arise from inadequate possibilities for the injured State to respond to a wrongful act. Part three considerably narrowed such possibilities, as demonstrated by the mere fact that the procedure devised might span a period of two years. The system of compulsory dispute settlement laid down in the draft was only seemingly limited to certain situations. It could extend to all primary-rule areas and thus to the entire field of international law. As demonstrated by the general reluctance of States to accept the compulsory jurisdiction of the International Court of Justice, there was no real likelihood that a great number of States would accept such a system.

41. The example of the Vienna Convention on the Law of Treaties illustrated to what extent the system of dispute settlement could determine the fate of an entire convention. The Vienna Convention had entered into force only recently, and quite a number of States had entered reservations relating to the dispute-settlement procedure. Moreover, the Vienna Convention system was much more flexible and, at the same time, narrower in scope. As far as the issue of responsibility was concerned, usually infringements of individual obligations arising from treaties were involved. In that context, the continuance of the treaty in question was usually not threatened. The reference made by the Special Rapporteur to the enforcement system provided for in the United Nations Convention on the Law of the Sea was not convincing. That Convention provided for a specific system that was tailored to the settlement of a specific issue and could not be used retroactively as a blueprint for other legal issues pertaining to international law.

42. Part three should cover all issues dealing with enforcement and the settlement of disputes. Consequently, the enforcement issues under articles 10 and 11 of part two should be included under part three. That did not mean that the interrelationship between the individual parts would not be viewed in the overall context. Part three necessarily had to relate to part one. In order to reflect that view more clearly, the second sentence of article 1 of part three could read: "The notification shall indicate the [alleged] rules which were not complied with and the measures required to be taken and the reasons therefor."

43. With regard to article 2, paragraph 1, of part three, he proposed that the "cases of special urgency" should be dealt with and defined separately. They should be associated with article 10, paragraph 2 (a), of part two. The content of article 2 should be moved in its entirety to part three. His delegation held that a case was considered urgent if it involved measures of protection taken by the injured State within its jurisdiction in order to stop the internationally wrongful act, to prevent its continuing effects or to avert irreparable damage in cases where those aims could be achieved only through immediate action.

44. It would be useful to know whether the formulation "against measures taken" in article 3, paragraph 1, referred to measures of protection in the cases of special urgency referred to. If not, the provision contained under article 3, paragraph 1, could replace article 10, paragraph 1, which did not belong in part two. Article 3, paragraph 2, should be complemented by a similarly formulated

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paragraph 3 referring to special procedures of implementation provided under relevant treaties. That would ensure the primacy of those special procedures over general legal provisions concerning State responsibility, which had already been included in part two, article 2, regarding entitlement to legal response. Consequently, the procedural provision contained in article 11, paragraph 2, of part two, which also referred to such special procedures, could be deleted.

45. His delegation believed that draft article 4 of part three was unacceptable as formulated. It was particularly opposed to the idea that the legal consequences of international crimes should be determined by a decision of the International Court of Justice, because that meant, for example, that apartheid would be deemed an international crime only if and when the Court so determined. An international crime would usually entail an emergency situation, involving the right to immediate unilateral response. In other cases, "United Nations law" was applicable, and the Security Council, other United Nations organs and, as the case might be, the International Court of Justice were competent to act in those matters. A reference to the procedure contained in the United Nations Charter should be incorporated in part three with regard to the enforcement of the legal consequences of an international crime. Such a reference was contained under article 14, paragraph 3, of part two.

46. Furthermore, his delegation could not endorse article 4, because there was no justification for drawing a parallel with the Vienna Convention on the Law of Treaties and the Convention on the Law of the Sea, or for over-emphasizing compulsory third-party decisions. It also disapproved of the general prohibition of reservations as proposed in article 5, which was in contradiction to the "residual character" of the draft articles in part three. That system and the proposed compulsory third-party settlement procedure could be excluded through the special procedures set forth in relevant treaties and through other arrangements agreed upon between States. It was unrealistic to propose the introduction of a general procedure for compulsory jurisdiction or for the settlement of disputes if the injured State was not prepared to condone the wrongful act. It was in sharp contrast to the fact that article 36, paragraphs 2 and 3 of the Statute of the International Court of Justice made the compulsory jurisdiction of the Court dependent upon a special declaration made by the parties to a dispute on the basis of reciprocity. Such declarations had been made by very few States, and were limited by far-reaching reservations. Experience showed that even that system appeared to be too rigorous. It would be interesting to know why an attempt should be made to enhance the functionality of a system by making it even more rigorous, when its very strictness prevented it from being very functional.

47. It might be useful it the General Assembly reaffirmed the priority character of the project on State responsibility, and if the Governments of the Member States were invited to submit written comments on that matter.

48. Mr. BARBOZA (Argentina) said that delays in the Drafting Committee were one of the most serious problems hindering the work of the Commission. Numerous matters in the area of the law of nations remained to be considered in order for the Commission to discharge its task of codification. Despite the need to cut costs, the General Assembly should carefully consider the duration of the Commission's session so that the Commission could make more time available to the Drafting Committee. His delegation was pleased to see that the Commission had continued its traditional co-operation with regional juridical bodies having missions similar to its own.

49. All members of the Sixth Committee, the International Law Commission, the other legal committees of the United Nations, and university professors and legal researchers the world over were working to establish the rule of law as the principle of civilized coexistence within the community of nations. Everything which helped to increase understanding of the law of nations and to facilitate its application was in their interest. Therefore, his delegation supported the general thrust of document A/41/591 and the recommendation that the Judgments and Advisory Opinions of the International Court of Justice should be printed in separate French and English versions, and that they should be published in paper-back in each of the official languages of the United Nations. Such a measure would be fair, because all the languages of the United Nations must be treated equally. It would be practical, because it would permit a wider distribution of international law and would give legal scholars better access to the Court's rulings.

50. Turning to the draft articles on jurisdictional immunities of States and their property provisionally adopted by ILC at its thirty-eighth session, he suggested that it would be preferable to incorporate draft article 3 of part I into article 2, because article 3 contained the definition of the expression "State" used in the other draft articles.

51. In draft article 6, the clause in brackets might create problems of logic. Its inclusion would mean that, in addition to the provisions in the articles, immunity was governed by the relevant rules of general international law. The Commission had tried to reflect the fact that there was a certain consensus with regard to State immunity and non-immunity, and that between the two lay a grey zone, awaiting future developments on the subject. The phrase in brackets would permit developments to continue unhindered in national courts and State practice, shaping new customs in the law of nations. If that was the Sixth Committee's intention the draft would have to be altered entirely, because the meaning was not obvious from the present formulation. The draft nowhere stipulated where State immunity should apply; on the other hand, it carefully detailed the circumstances in which there was no such immunity. Such reasoning could only be based on the notion that immunity was the general rule, and instances of non-immunity the exception which needed to be specified in detail. Immunity and non-immunity were not, therefore, of equal standing. The most logical interpretation of the draft article of the bracketed phrase was allowed to stand was that the general rule and the exceptions must be regarded as complementary in the implementation of customary law. That would raise doubts with regard to the exceptions, which must be restricted. The commentary, as the Jamaican representative had observed, should

(Mr. Barboza, Argentina)

not be used as a substitute for a poorly-drafted text. His delegation preferred to delete the phrase in brackets.

52. With regard to the heading of part III, "exceptions" was the appropriate term, but if the phrase in brackets was deleted from draft article 6 "limitations" would be equally acceptable.

53. Although the basic principles applicable to the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier were already laid down in other conventions, his delegation believed that the Commission's work in that field was worth undertaking, because it would give States a clear body of law on the matter.

54. The main principle to be codified was that of freedom of communication between States and their diplomatic and consular delegations abroad and among themselves. Freedom of communication included protection of the confidentiality of the contents of the diplomatic bag, which was also covered by the inviolability of archives est blished in the earlier Vienna conventions. In the recent past there had been cases of abuse, justifying the adoption in the draft of specific precautions in order to strike a balance between the interests of the sending State, i.e. its freedom of communication, and those of the receiving State, i.e. its security and respect for its laws. The wording of draft article 28, if some of the brackets were removed, seemed generally acceptable. That article should apply to bags of all kinds, whether diplomatic, consular or other.

55. With regard to examination by electronic devices under the second paragraph of draft article 28, his delegation would have no great difficulties but agreed that some developing countries might be at a disadvantage in the practical application of that provision because they lacked suitable technology. The wording of the paragraph seemed to reconcile the inspection provision with the conflicting rights of States because inviolability would be protected if the sending State paid to have the bag returned to its place of origin. The exceptional nature of that provision, which was apparent from the wording of the draft article, was an adequate safeguard against abuse of the freedom of communication.

56. With regard to the optional declaration under article 33, his delegation feared that the numerous different bilateral régimes to which it might give rise would run counter to the systematic application of basic principles.

57. Mr. HILLGENBERG (Federal Republic of Germany) said that the discussion on State responsibility at the Commission's most recent session had focused on the proposal to include a part three, covering the implementation of international responsibility and the settlement of disputes. The proposed procedure, including the notification of claims against a party alleged to have committed a wrongful act, the expiry of a certain period before further action, the notification of intended countermeasures and a reference to the duty of parties to seek a peaceful settlement under the Charter of the United Nations, was suitable for preventing the escalation of countermeasures. It was essential to regulate such a complex issue

(Mr. Hillgenberg, Federal Republic of Germany)

as precisely as possible, particularly in respect of the form and substance of objections and the period in which such objections could be raised. His delegation welcomed the provision in part three, article 4 of the draft, which would permit unilateral recourse to the International Court of Justice, but regretted that the Court was only to decide whether such countermeasures violated jus cogens or were inadmissible because they constituted an international crime, and that the conciliation procedure provided for in the Annex was only to cover additional questions on the admissibility of countermeasures. Part two, draft article 6, deserved particular attention because it was the initial reaction of the injured State which determined the degree of escalation.

58. Turning to the draft Code of Offences against the Peace and Security of Mankind (sect. V of the report), he said that his delegation welcomed the limitation of responsibility to acts by individuals. The present draft articles gave an overview of the proposed system of punishable offences. However, the principle of universality (draft art. 4) needed further clarification. A prosecution by a country completely unconnected with the offence concerned might give rise to considerable conflict. The issue was linked with the as yet unsettled question of whether to establish an international criminal court.

59. The draft Code was likely to be adopted only if it was confined to precisely defined offences which were unequivocally regarded as crimes against humanity or war crimes. The attempt to include not only aggression, but any form of coercion or pressure (draft art. 11, para. 3), seemed excessive and might lead to abuses. However, the inclusion of a precise definition of terrorist acts (draft art. 11, para. 4) was in keeping with the increase of international co-operation in the fight against terrorism.

60. Part IV of the draft, "Other offences", covering complicity, conspiracy and attempts to commit any of the offences defined in the Code, deserved particular attention because it might be extended to an indefinite number of persons. The draft Code must apply only to particularly despicable acts, and there could be no question of automatic responsibility of certain groups of persons. The aim must be to define acts committed by individuals which were so despicable that it was the common task of humanity, not only of national judiciaries, to punish them.

61. Turning to the question of the law of the non-navigational uses of international watercourses (sect. VII of the report), he said that his delegation supported the decision not to attempt a definition of an "international watercourse" and a "shared natural resource". The aim was to create a framework which interested States could adopt and build upon. In that light, draft article 6 as currently worded did not seem an adequate means of ensuring the effectiveness of the principle of a shared natural resource. In draft article 8, it did not seem necessary to list the individual factors determining the "reasonable and equitable use" of a watercourse. The Special Rapporteur had pointed out the conflict between the principle of "equitable utilization" of a watercourse by the riparian States and the obligation not to use an international watercourse in such a way that other

(Mr. Hillgenberg, Federal Republic of Germany)

riparian States might suffer tangible harm. In that context, "harm" must be interpreted as "legal injury" because the possibility of damage to another riparian State might preclude even "equitable utilization" of an international watercourse.

62. His delegation considered that draft article 4 should be worded in a more general manner so as not to restrict the validity of existing specific agreements or the scope of future ones. It reserved the right to make written comments on draft articles 10 to 14.

63. Mr. LEHMANN (Denmark) welcomed the adoption by the International Law Commission of the draft articles on the jurisdictional immunities of States and their property, and on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. In respect of the former topic, it often proved difficult in practice to distinguish between the activities of States performed in the exercise of their sovereign authority (acta jure imperii), which were covered by immunity, and activities where States acted as if they were private companies (acta jure gestionis), when they should not enjoy immunity. Some attempts had been made at the regional level to resolve the issue, for instance in the 1972 European Convention on State Immunity, but it was to be hoped that the new draft articles would eventually lead to the adoption of universally acceptable rules.

64. The draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier reflected the important principles of freedom of official communications (art. 4) and the duty to respect the laws and regulations of the receiving State and the transit State (art. 5). The difficulty of striking a balance between the two had been clearly demonstrated by the lack of agreement within the Commission over article 28, on the protection of the diplomatic bag, where alternative wordings had been provided for certain key elements. In view of recent cases of abuse of diplomatic immunities in connection with acts of terrorism, it was essential to find ways to prevent abuse.

65. He noted that the Commission intended to limit the draft Code of Offences against the Peace and Security of Mankind to offences committed by individuals, without prejudice to any subsequent consideration of the application to States of the notion of international criminal responsibility. However, the notion of an "individual" would seem to cover both private individuals who committed crimes such as hijacking and hostage-taking, and individuals who acted as representatives of a State. Individuals in the latter category might be subjected to a combined sanction consisting of criminal prosecution of the individual and payment of exemplary damages by the State concerned. The question defining an offence against the peace and security of mankind had proved so controversial that it seemed necessary to give an explicit list of acts which constituted such offences. The point of departure should be the catalogue of offences contained in the 1954 draft Code, supplemented by offences which had been generally accepted as such since then. His delegation considered that the content of the draft ratione materiae should be limited to offences based on treaty law or customary international law;

(Mr. Lehmann, Denmark)

it should not cover offences which had been recognized only in non-legally-binding instruments such as resolutions and declarations. An extra clause could be added, stating that the Code should be reviewed every 5 or 10 years.

66. It was clear that work on the draft Code of offences must be co-ordinated with work on the draft articles on State responsibility. In particular, part one, article 19, which defined an international crime, part two, articles 14 and 15, concerning the legal consequences of such a crime, and part three, concerning settlement of disputes relating to an internationally wrongful act, might have a bearing on the establishment of an international criminal court under the draft Code of offences. With regard to the settlement of disputes, his delegation would like to see a strengthening of the compulsory elements in the draft articles on State responsibility. However, the model chosen by the Special Rapporteur might well prove to be the most suitable compromise.

67. There was an obvious link between State responsibility and the question of international liability for injurious consequences arising out of acts not prohibited by international law. The accident at the Chernobyl nuclear power plant had been the most recent demonstration of the need for legal norms to govern the relations between States in that field. Under the auspices of the International Atomic Energy Agency conventions on early notification and mutual assistance in case of nuclear accidents had quickly been adopted. The conventions did not cover all the aspects involved, but they showed the willingness of States to approach such problems in a constructive manner.

68. The draft articles on international liability must form a framework of basic principles, to be followed up by more specific agreements in relevant fields. His delegation could accept the limitations of scope proposed by the Special Rapporteur, which confined the topic mainly to the duties of the source State, but it was essential to consider the legal basis of any responsibility. The concept of sovereignty covered not only a State's right to act in its own territory, but the right not to suffer harm from activities outside.

69. A framework agreement stating main principles only also seemed the most realistic approach to the topic of the law of the non-navigational uses of international watercourses. His delegation supported the Special Rapporteur's suggestion that only a limited and indicative list of general criteria should be given for the determination of a reasonable and equitable use of an international watercourse.

70. As in previous years, his Government was to make scholarships available for representatives of developing countries to attend the International Law Seminar in Geneva. His delegation expressed its appreciation to the Secretariat for the uniformly high academic standard of the Seminar.

71. Mr. VOICU (Romania), referring to the topic of State responsibility, said that the essential purpose of the draft articles was to prevent the commission of internationally wrongful acts and, should such acts be committed, to provide an

(Mr. Voicu, Romania)

appropriate legal framework for measures taken by the injured State. In that connection, it was essential to identify the injured State, either by stating simply that an injured State was a State a right of which had been infringed, or by specifying the source or nature of the law by virtue of which a State was to be considered an injured State in a particular situation. Article 5 of part two of the draft combined those two approaches in its paragraphs 1 and 2. Referring to paragraph 3 of the same article, he remarked that since an international crime was always, by definition, an internationally wrongful act, it was entirely proper that in the event of an international crime, all States should be entitled to exercise the rights deriving from draft articles 6 and 9; whether and to what extent those rights should be subject to the limitations embodied in draft articles 14 and 15 was, however, a matter for further consideration.

72. While agreeing that the proposed articles provided a sound basis for future work, his delegation considered that some of them, including draft articles 6 to 13 but more especially draft articles 14 and 15, were still in need of considerable improvement. In particular, the solution proposed by the Special Rapporteur in paragraph 3 of article 14 was inadequate. The legal consequences of an internationally wrongful act should not be determined exclusively by reference to the provisions and procedures of the Charter. The Commission should not suspend efforts to produce an exhaustive, or at any rate more detailed, definition of the legal consequences of such an act.

73. Referring specifically to the draft articles proposed by the Special Rapporteur in his seventh report, he questioned the wisdom of the procedure of submitting disputes to the International Court of Justice, as proposed in paragraphs (a) and (b) of draft article 4 of part three. It was common knowledge that not all States accepted the compulsory jurisdiction of the Court, and such a provision would discourage some States from becoming parties to the future convention. With regard to paragraph 1 of draft article 3, he noted that during the discussion in the Commission it had been suggested that recourse to Article 33 of the Charter should be available at all stages of a dispute. What was needed was a text making it absolutely clear that States should resort to the means indicated in Article 33 as soon as the first signs of a dispute became apparent. Noting that paragraph 1 of draft article 2 mentioned a period of three months and article 4 a period of 12 months, he remarked that no indication was given of the time-limits applicable in cases of special urgency. Generally speaking, his delegation had some doubts as to the appropriateness of instituting a settlement procedure which might take as long as two years.

74. Referring to chapter VIII of the Commission's report (A/41/10), he said that his delegation, while generally in favour of accelerating the codification of international law, saw no reason for changing the Commission's statute, working methods or organization of work. It supported the efforts to expedite publication of the Yearbook of the International Law Commission and welcomed the forthcoming issuance of the fourth edition of The Work of the International Law Commission. The inclusion of a subject index in the latter publication would be appreciated.

75. Mr. AHMED (Sudan) commended the valuable work done by the International Law Commission in spite of the reduced length of its session. The customary 12-week session was essential if the Commission was to discharge its duties adequately.

76. In the field of the jurisdictional immunities of States and their property (sect. II of the report), the practice varied from State to State. A distinction had been established between acta juris imperii, where States acted in the exercise of their sovereign authority, and acta juris gestionis, where States acted as if they were private companies. The subject was a contentious one, and the alternative wordings given in brackets in the draft articles showed that much more work would be needed in order to achieve a convention acceptable to the entire international community.

77. All States were involved in trade through their various organs and instrumentalities; his own country traded extensively with industrialized nations in order to obtain consumer goods, advanced technology and funds for development. However, for the purposes of the draft articles it was essential to define the concept of the "State" precisely. In its present form, draft article 3 had avoided that contentious question, but if no concise definition could be found, it might be useful to clarify further the term "organs of government".

78. As the representative of Jamaica had suggested, the purpose of a contract, as well as its nature, should be taken into account when determining whether a contract was commercial (draft art. 3, para. 2). The purchase of basic commodities such as food and medicines by third world countries was conducted for public purposes rather than for profit and deserved to be protected.

79. Central banks or State monetary authorities were exempted from the jurisdiction of foreign States because they were their Government's purses and any action against them would subject the Government to undue pressure. However, if Governments traded through publicly-owned or government-owned companies, their activities were not normally covered by immunity.

80. The draft articles should be precise and self-explanatory, although that was difficult to achieve in the case of articles in multilateral conventions, which were often the result of elaborate compromises. The heading of part III gave two alternatives; "'limitations on' or 'exceptions to' State immunity". His delegation preferred the second formulation, because it implied that there were basic rules governing State immunity, while the word "limitations" did not necessarily do so. In general, his delegation supported the draft articles, although much could still be done to reconcile the divergent interests of States.

81. His delegation considered that the draft articles on the status of the diplomatic courier and diplomatic bag not accompanied by diplomatic courier would provide a useful supplement to the four Vienna Conventions containing provisions on the different types of diplomatic bag. His delegation did not agree with the wording of article 12, which covered the possibility of a courier being declared persona non grata or not acceptable. A courier was not accredited to the receiving State or transit State and might not even be a national of the State which had sent

him, and could therefore not be declared persona non grata. The phrase should, therefore, be deleted.

82. In article 28 (1), his delegation supported the version of the paragraph without brackets, stating that the diplomatic bag should not be subject to examination by means of electronic or other technical devices. While it had no objection to the use of such devices, they were not readily available to third world countries and the provision would, therefore, put such States at a disadvantage. However, the provision was a useful one because the only other option was to return the diplomatic bag to the sending State.

83. The optional declaration provided for in article 33, by which a State might specify categories of diplomatic courier and diplomatic bag to which it would not apply the articles, was a welcome compromise.

84. Mr. ROMPANI (Uruguay) reviewed the historical background to the topic of the draft Code of Offences against the Peace and Security of Mankind and, in particular, to the definitions provided in chapter II, articles 11, 12 and 13, of the draft. With regard to the definition of genocide contained in article 12, paragraph 1, he questioned the repeated use of the word "group", which might prove inconsistent with the text of the Convention on the Prevention and Punishment of the Crime of Genocide, and suggested the use of the term "community". In reiterating Uruguay's strong support for the effort of codification of international law pertaining to offences against the peace and security of mankind, he stressed the importance of restricting the provisions of the draft Code exclusively to offences distinguished by their particularly horrifying and cruel nature, and directed against the fundamental values of civilization.

The meeting rose at 6.15 p.m.