United Nations
GENERAL ASSEMBLY
FORTIETH SESSION
Official Records*

SIXTH COMMITTEE
23rd meeting
held on
Monday, 28 October 1985
at 3 p.m.
New York

SUMMARY RECORD OF THE 23rd MEETING

Chairman: Mr. AL-QAYSI (Iraq)

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85-57036 4604S (E)

Distr. GENERAL
A/C.6/40/SR.23
31 October 1985
ENGLISH
ORIGINAL: FRENCH

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The meeting was called to order at 3.15 p.m.

AGENDA ITEM 138: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS THIRTY-SEVENTH SESSION (A/40/10; A/40/447)

AGENDA ITEM 133: DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND: REPORT OF THE SECRETARY-GENERAL (A/40/451 and Add.1 and 2; A/40/331-S/17209 and A/40/786-S/17784)

1. The CHAIRMAN recalled that the Commission had decided at a previous meeting that agenda item 133, "Draft code of offences against the peace and security of mankind" would be taken together with agenda item 138, "Report of the International Law Commission", on the understanding that delegations which so wished could make separate statements on agenda item 133.

2. Mr. JAGOTA (Chairman of the International Law Commission), introducing the Commission's report on the work of its thirty-seventh session, said that organizational, procedural and other questions were discussed in chapters I and VIII of the ILC report. From a procedural point of view, the Commission's work had proceeded normally although adjustments had had to be made in the number of meetings allocated to certain substantive questions. From the organizational point of view, the ILC had had to decide two questions in 1985. In the first place, it had had to fill four posts which had become vacant owing to the death of two of its members in 1984, namely, Mr. Quentin-Baxter and Mr. Stavropoulos, and the resignation of two others, who were elected to the International Court of Justice, namely, Mr. Evensen and Mr. Zhengu Ni. On 8 May 1985, the ILC accordingly elected Mr. Jiahua Huang (China), Mr. Arangio-Ruiz (Italy), Mr. Roukounas (Greece) and Mr. Tomuschat (Federal Republic of Germany), who had had a chance to become familiar with the Commission's work and make a useful contribution. Secondly, the ILC had had to appoint two special rapporteurs to replace Mr. Evensen (for the question of the law of the non-navigational uses of international watercourses) and Mr. Quentin-Baxter (for the question of international liability for injurious consequences arising out of acts not prohibited by international law). On 25 June 1985, the Commission had accordingly appointed Mr. McCaffrey to replace Mr. Evensen and Mr. Barboza to replace Mr. Quentin-Baxter.

3. The Commission had also endorsed the recommendations of the Planning Group established for the Enlarged Bureau's session on the organization of the work of the ILC sessions, the Drafting Committee, documentation and other questions. As would be seen from paragraphs 297 to 304 of chapter VIII of its report, the Commission hoped, as a matter of priority, to complete the first reading of draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and jurisdictional immunities of States and their property; it emphasized the importance of the Drafting Committee being convened as early as possible in the course of a session, of having pre-session documentation distributed to the members as far in advance of the commencement of a session as possible, of reducing delays in the publication of the Yearbook of the International Law Commission, particularly volume II (Part One) of the Yearbook, of having the United Nations publication "The Work of the International Law Commission" which was now in its third (1980) edition, up-dated and re-issued.

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4. The Commission had received the representatives of regional bodies, namely, the Arab Commission for International Law, the Asian-African Legal Consultative Committee, the European Committee on Legal Co-operation and the Inter-American Juridical Committee, had heard with interest their statements on the work and activities of the bodies they represented and had given them assurances regarding the strengthening of mutual co-operation. Moreover, the Commission had sent representatives to the regional meetings of those bodies.

5. Thanks to a generous contribution from the Government of Brazil, the seventh Gilberto Amado Memorial Lecture had taken place during the thirty-seventh session of the Commission and had been delivered by Professor Georges Abi-Saab of the Graduate Institute of International Studies, Geneva, on the topic "Reflections on the contemporary processes of developing international law". The twenty-first International Law Seminar, which was intended to familiarize the participants with the work of the ILC and other international organizations with headquarters in Geneva, had been held in Geneva in June 1985. The participants, mostly from developing countries, were advanced students of international law, junior professors or government officials. The Director of the Seminar had told the Commission he was worried that this programme for the dissemination of international law, which was of special importance for the developing countries, might not be able to continue for lack of funding. The 1985 Seminar had had to be organized using the balance remaining of the programme allocation and it was now almost exhausted; adequate contributions, including contributions from the developing countries themselves, were required if the programme was to continue in 1986 at the present level, that is, with 24 to 27 participants, 17 of whom were fellowship holders. Moreover, the Asian States had not designated candidates to participate in the Seminar and they should be encouraged to give more attention to the programme. The members of the Commission had expressed their concern, as reflected in paragraphs 333 and 334 of the report, and he therefore requested the members of the Sixth Committee to draw the matter to the attention of their Governments.

6. With regard to the draft code of offences against the peace and security of mankind, he noted that previous debate on the item was summarized in paragraphs 11 to 42 of chapter II of the Commission's report. The Commission had before it the third report of the Special Rapporteur, (A/CN.4/387 and Corr.1 and 2) prepared in accordance with the wish expressed by the General Assembly in its resolution 39/80 of 13 December 1984. The Special Rapporteur had drafted an introduction and a list of offences. He had indicated that the draft code would consist of two parts: the first part would deal with (a) the scope of the draft articles; (b) the definition of an offence against the peace and security of mankind; and (c) the general principles governing the subject. The second part would deal with the acts constituting an offence against the peace and security of mankind and would therefore contain a list of offences. The Special Rapporteur had proposed four draft articles relating to those offences: "Scope of the present articles" (article 1); "Persons covered by the present articles" (article 2), for which he was suggesting two alternatives; "Definition of an offence against the peace and security of mankind" (article 3), for which he was also suggesting two alternatives; and "Acts constituting an offence against the peace and security of mankind" (article 4).

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7. With regard to the general principles, opinion had been divided in the Commission as to when those principles should be spelled out and discussed; the debate on that point was summarized in paragraphs 45 to 51 of chapter II of the report. The Commission was to consider the matter in greater detail in 1986.

8. On the question of the delimitation of scope ratione personae, the Commission had decided that, as things stood, the draft code should be limited to offences committed by individuals without prejudice to the possibility of later considering applying it to the criminal responsibility of States in the light of the comments by Governments and the decision of the General Assembly. In discussing the question of identifying the individuals to whom the draft code should apply, the main point raised was whether the purpose of the code was to prevent the abuse of power by the agents of a State and therefore whether the code would apply only to the agents of a State or to individuals exercising a power of command, or whether individuals could also be liable for punishable offences such as crimes of genocide, of apartheid, etc. The Special Rapporteur had suggested two alternatives for draft article 2, the first relating to all individuals including private persons and the second restricted to individuals acting as "the authorities of a State". The Commission had opted for the first alternative, which had been referred to the Drafting Committee.

9. After discussing whether a definition of an offence was really necessary, the Commission had taken the view that a definition would establish the scope of the draft code, underscore the unity of the concept of the "peace and security of mankind" - thus precluding two distinct categories of offences - and would specify the applicable criteria. On that last point, as would be seen from paragraphs 65 to 74 of the report, the problem was to choose between a definition based on an enumeration of the specific interests of the international community to which a serious threat would constitute an offence and the content of draft article 19 of the first part of the draft articles on State responsibility as against a more general definition emphasizing that fundamental aspect of the question without enumerating the interests threatened by the act which justify calling it an offence. The two alternatives were included in article 3 proposed by the Special Rapporteur and they had both been referred to the Drafting Committee for consideration.

10. With regard to the acts constituting an offence against the peace and security of mankind, draft article 4 proposed by the Special Rapporteur covered only crimes against peace and threats to peace, based on article 2, paragraphs 1 to 9 of the 1954 draft Code as well as on other instruments elaborated since then. In his next report, to be submitted in 1986, the Special Rapporteur would deal with war crimes and crimes against humanity. Accordingly, at its thirty-seventh session, the Commission had considered only crimes against peace and threats to peace, on the understanding that it could review that issue in 1986 in the light of the comments made in the Sixth Committee and the General Assembly and in the light of the further report by the Special Rapporteur.

11. The Special Rapporteur had proposed two alternatives for the definition of aggression and had provided two versions of draft article 4 A; the first contained

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an enumeration of crimes and referred in detail to the contents of General Assembly resolution 3314 (XXIX) of 14 December 1974, while the second referred to an act of aggression as defined in that resolution without enumeration. The reasons for and against each alternative - the text of which could be found in footnote 35 to paragraph 82, chapter II of the report - were summarized in paragraphs 81 to 85; the main point against the enumerative approach was the question whether provisions relating to the Security Council's role concerning evidence of aggression - as, for example, in relation to the first use of armed force, or concerning the scope of acts constituting aggression, both of which were specifically mentioned in resolution 3314 (XXIX) - were relevant to the juridical concept of the crime of aggression. In view of the difference of views, both alternatives had been referred to the Drafting Committee so that the Special Rapporteur might review the question in the report he was to submit in 1986, in the light of the Committee's observations.

12. On the question of the threat of aggression, many members of the Commission had felt that it should be considered a crime although some had disagreed on the grounds that it was difficult to ascertain whether a threat existed or how serious it was.

13. On the question of preparation of aggression, views had been divided. The Special Rapporteur himself had not proposed any draft article, even though it had been included in article 2, paragraph 3, of the 1954 draft Code. The main argument against its inclusion had been that if preparation led to aggression, it would be covered by that offence, and if it did not, no wrong would seem to occur. As indicated in paragraph 87 of its report, the Commission would give due attention to the discussion in the Sixth Committee and the General Assembly on that point.

14. On intervention in the internal or external affairs of another State, the Special Rapporteur had presented a draft article 4 C which consolidated the contents of article 2, paragraphs 5 and 9 of the 1954 draft Code and included a series of provisions concerning fomenting civil strife in another State and exerting pressure of various kinds on another State.

15. On terrorism, which was covered in article 2, paragraph 6 of the 1954 draft Code and in article 4 D submitted in the third report of the Special Rapporteur, the Commission had concentrated on the international content, that was to say, "terrorism which affects the security and stability of another State, as well as the security of its inhabitants and their property" and included seizure or hijacking of aircraft and violence against diplomats and other internationally protected persons.

16. The offences covered in draft article 4 E and 4 F dealt with the violation of treaties designed to ensure international peace and security and forcible establishment or maintenance of colonial domination. Other possible offences might relate to mercenarism and economic aggression. On mercenarism a separate provision might be included although the incursion of armed bands into the territory of a State was already covered by the definition of aggression. On economic aggression, the Commission had been unable to decide whether a separate provision was necessary

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or whether it would be covered by the definition of aggression or other relevant offences. At the end of the discussion, draft articles 1, 2 (first alternative) and 3, and draft article 4 A had been referred to the Drafting Committee for its consideration but due to lack of time that Committee had been unable to consider them in 1985.

17. At its thirty-seventh session the Commission had had before it the sixth report of the Special Rapporteur concerning state responsibility. The report contained the commentaries to draft articles 1 to 16 which comprised Part Two of the topic, the first four draft articles having been provisionally adopted in 1983 and the text of articles 5 to 16 having been submitted by the Special Rapporteur in his fifth report, in 1984. The sixth report also dealt with Part Three of the topic, namely, the implementation of international responsibility and the settlement of disputes, and offered an outline of the possible contents thereof. Draft articles 7 to 16 of Part Two had been referred to the Drafting Committee in 1985 and, upon its recommendation the Commission had provisionally adopted draft article 5 dealing with the definition of an injured State.

18. After recalling the content of articles 5 to 16 of Part Two, which were contained in footnote 54 to paragraph 107 of the Commission's report and which had already appeared in the Commission's report on the work of its thirty-sixth session, he said that the Commission's work on that topic in 1985 had dealt with draft article 5, international crimes (draft articles 14 and 15) and Part Three.

19. On the definition of the term "injured State" which was crucial for determining the legal consequences of an internationally wrongful act, draft article 5 as it had been adopted by the Commission in 1985 and as the commentary thereto indicated adopted a comprehensive approach. It defined the term in general terms and also enumerated the sources of the right infringed, such as a bilateral treaty, a judgement of decision of an international court or tribunal, a binding decision of an international organ other than an international court or tribunal, a multilateral treaty or a rule of customary international law. It also covered the case where the internationally wrongful act constituted an international crime. It was with reference to those provisions that an injured State was defined or identified. Paragraph 1 of draft article 5 provided that an injured State meant any State whose right had been infringed by the internationally wrongful act of another State; that was a new provision which gave a general definition with a linkage with Part One of the draft.

20. Paragraph 2 defined an injured State in particular circumstances. For example, if the right infringed by the act of a State arose from a bilateral treaty, the injured State was the other State party to the treaty. In the case of a multilateral treaty, the injured State would be any other State party if the infringement of the right necessarily affected the rights of other State parties or related to the protection of human rights and fundamental freedoms or affected the collective interests of the State parties. The same applied, mutatis mutandis to infringements of a right arising from a rule of customary international law. Paragraph 3 defined an injured State in the case of an international crime, to mean

all other States. That would be in the context of the rights and obligations of States under draft articles 14 and 15, which had yet to be reviewed, hence those words had been placed in brackets.

21. On the legal consequences of international crimes in the context of State responsibility, which were covered in draft articles 14 and 15, the main question before the Commission had been whether they could be made more specific or whether the general reference to "such rights and obligations as are determined by the applicable rules accepted by the international community as a whole" would be adequate. That aspect also had a bearing on draft article 19 of Part One of the draft, dealing with international crimes, and with the question of the scope ratione personae of the draft code of offenses. Another aspect in relation to paragraph 2 of draft article 14 was whether the obligation for every other State should be to come to the aid of the injured State, apart from not recognizing as legal the situation created by such crime and not acting or assisting the author State. As to draft article 15 dealing with aggression, the question had been discussed as to whether a separate article on the subject was necessary and, if so, with what specificity. It had been suggested that a reference should be made to the right of self defense of the injured State.

22. With respect to Part Three of the draft, ILC had on the whole found acceptable the Special Rapporteur's suggestions concerning compulsory conciliation as a method of settlement of disputes relating to internationally wrongful acts allegedly committed by an author State and the consequential rights of the injured State, on the analogy of the 1969 Vienna Convention on the Law of Treaties and the 1982 United Nations Convention on the Law of the Sea as well as the need for reference to the International Court of Justice for its decision on a dispute concerning the interpretation of the application of article 19 of Part One and article 14 of Part Two of the draft articles on State responsibility. The Commission must also study whether such a provision should include a reference to article 15 and the extent to which it should take into account the consequences of an eventual establishment of an international criminal court in connection with the draft Code on Offences against the Peace and Security of Mankind (para. 161 of the report).

23. Thus, ILC might be in a position to make concrete progress in 1986 concerning the elaboration of Parts Two and Three of the draft on State responsibility and move towards completing a first reading of all the draft articles in the near future.

24. Chapter IV of the ILC report dealt with the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. The Commission had been seized of the matter since 1977 and, in 1985, it had studied the sixth report of the Special Rapporteur, Mr. Yankov, on the question (A/CN.4/390 and Corr.1). Chapter IV of the report covered in detail the background of the topic and the progress achieved so far in preparing draft articles for an appropriate legal instrument. The Commission had provisionally adopted 27 draft articles, including draft article 18 (formerly article 23) and draft articles 21 to 27 (based on former articles 28 to 35), which had been adopted in 1985 on the recommendations of the Drafting Committee. The text of those 27 articles appeared on pages 83 to 92 of

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the report. Articles 36 to 43, which would be renumbered upon adoption, had been referred to the Drafting Committee for consideration. The Commission expected to complete the first reading of those draft articles in 1986.

25. The essence of the topic related basically to facilitating official communications between a State and its missions abroad, whence the need for a legal framework of specific provisions for the diplomatic courier, regular or ad hoc, and the diplomatic bag not accompanied by diplomatic courier. Four international conventions already dealt with that question, namely, the Vienna Convention on Diplomatic Relations (1961), the Vienna Convention on Consular Relations (1963), the Vienna Convention on Special Missions (1969) and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (1975). Two of those conventions were in force. They differed on some points dealing with the treatment of a diplomatic bag and a consular bag and the question of immunity from jurisdiction.

26. In that regard, while elaborating a self-contained régime, ILC had had to consider questions linked to the field of application of the draft articles in relation to the four above-mentioned Conventions, the definition of a diplomatic courier and a diplomatic bag and the plurality of régimes arising from the variations between the existing Conventions. At its 1985 session, ILC had considered draft article 23 (currently article 18) concerning immunity from jurisdiction of a diplomatic courier, draft article 36, concerning inviolability of a diplomatic bag as regards, inter alia, electronic and other inspection, draft article 42, relating to relations between the draft articles and other international conventions and agreements and draft article 43, relating to the declaration of optional exceptions concerning the applicability of the draft articles.

27. The Commission had resolved the controversy pending since 1984 concerning draft article 23 (currently draft article 18) by restricting the immunity of the diplomatic courier from the criminal jurisdiction of the receiving State or the transit State to "all acts performed in the exercise of his functions" - in other words, by adopting a functional approach. To do that, the brackets in paragraph 1 of draft article 18 had been removed. Similarly, paragraph 4 of that draft article provided that the diplomatic courier was not obliged to give evidence as a witness in cases involving the exercise of his functions, but might be required to give evidence in other cases, provided that that would not cause unreasonable delays or impediments to the delivery of the diplomatic bag (draft article 18 and commentary thereon appeared on pages 94-101 of the report). The other draft articles provisionally adopted by ILC in 1985 on the recommendations of the Drafting Committee had been based on draft articles 28 to 32 and 34 and 35 of the original draft and had now been renumbered as 21 to 27.

28. Draft articles 21 and 22 dealt with the privileges and immunities of the diplomatic courier. Draft article 21 dealt with the duration of those privileges and immunities and ILC had decided to delete the brackets from draft article 12, paragraph 2. Draft article 22 dealt with the waiver of immunities, while draft

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article 23 concerned the status of the captain of a ship or aircraft entrusted with the diplomatic bag, without his being considered a diplomatic courier.

29. Draft articles 24 to 27 dealt with the diplomatic bag (identification of the diplomatic bag, content of the diplomatic bag, transmission of the diplomatic bag by postal service or any mode of transport, facilities for the safe and rapid transmission of the diplomatic bag). Draft article 33 (original numbering) had been deleted on the recommendation of the Drafting Committee, since its subject matter (status of the diplomatic bag entrusted to the captain of an aircraft or ship) had been covered by the new draft articles 24 and 25 (see para. 203 of the report).

30. The discussion in ILC on draft articles 36 to 43 had been summarized in paragraphs 179 to 201 of the report. The Drafting Committee was currently seized of those draft articles and ILC would review its position in 1986 in light of the recommendations of the Drafting Committee and the discussion in the Sixth Committee. Those draft articles dealt with the inviolability of the diplomatic bag (draft article 36), exemptions from customs inspection, customs duties and all dues and taxes (draft article 37, which replaced the earlier draft articles 37 and 38), protection measures in circumstances preventing the delivery of the diplomatic bag, such as termination of the functions of the diplomatic courier (draft article 39), obligations of the transit State as a consequence of force majeure or fortuitous event (draft article 40), non-recognition of States or Governments or absence of diplomatic or consular relations, particularly in the case of host States of international organizations or conferences (draft article 41), relations between the draft articles and other conventions and international agreements (draft article 42), and the declaration of optional exceptions to the articles on certain types of courier and bag (draft article 43).

31. It might be useful to deal in particular with draft articles 36, 42 and 43 which, in addition to draft article 23 (currently draft article 18), had a crucial bearing on the draft articles as a whole. Article 36 dealt with the inviolability of the diplomatic bag. As indicated in draft article 3, the term "diplomatic bag" comprised the packages containing the official correspondence, documents or articles intended exclusively for official use, with reference to the four Conventions mentioned earlier. The scope of draft article 36 was thus comprehensive. Accordingly, ILC should determine whether to apply a uniform régime of inviolability for all bags, diplomatic, consular or other. The debate had concentrated particularly on the question of examination or inspection by electronic or other devices if the receiving or transit State had serious reasons to believe that the bag contained something other than official correspondence, documents or articles intended exclusively for official use. In that connection, a distinction was made between a diplomatic bag, under the 1961 Convention, and a consular bag, under the 1963 Convention. The 1961 Vienna Convention on Diplomatic Relations provided in article 27, paragraph 3, that a diplomatic bag should not be opened or detained, while the 1963 Vienna Convention on Consular Relations in article 35, paragraph 3, authorized the receiving State, in case of serious doubt concerning the contents of the consular bag, to request that the bag be opened in

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the presence of the competent authorities by an authorized representative of the sending State. It also provided that, if that request was refused by the authorities of the sending State, the bag should be returned to its place of origin.

32. Two suggestions had been submitted to ILC in 1985: the Special Rapporteur had proposed, while emphasizing the inviolability of the diplomatic bag, that draft article 36 should provide for its return to its place of origin in case of serious doubt about its contents. He had also proposed an optional exception for applicability of those articles under draft article 43. Under draft article 43, the inspiration for which had come from article 298 of the 1982 United Nations Convention on the Law of the Sea, a State might, when signing, ratifying or acceding to those articles, by a written declaration designate those types of courier or bag to which it wished the provisions to apply. Such a declaration could be withdrawn at any time and would be subject to the principle of reciprocity. Accordingly, a plurality of régimes could emerge depending on whether or not that provision was applied.

33. Another suggestion had been made by a member of the Commission and had been supported by several other members. It introduced an optional dual régime, one for a consular bag to which article 35, paragraph 3, of the Convention on Consular Relations would apply, and the other for the other bags, to which the consular bag régime might also be applied by a written declaration made by one of the parties. The dual régime would be provided for in draft article 36 itself. The text of that proposal was contained in paragraph 182 of the report.

34. Finally, draft article 42 referred to relations between the draft articles and other conventions and international agreements. The discussion in the Commission had concentrated on determining how to reconcile the applicable law among States parties to several conventions, including the draft articles, dealing with the same subject matter. The solution appeared to be veering towards the 1984 proposal of the Special Rapporteur, instead of the draft article 42 proposed by him in his sixth report in 1985: it had been considered desirable to emphasize the complementary nature of the draft articles vis-à-vis the existing codification conventions. The parties might also adopt other agreements among themselves confirming, supplementing, extending, amplifying or even modifying the provisions of the draft articles. In its discussion on that question, the Commission had emphasized the possibility of modification (see para. 197 of the report).

35. In view of the stage reached in the work of ILC on the topic at its thirty-seventh session, it appeared that by 1986 the Commission would be able to adopt in first reading and to present a whole set of draft articles.

36. Chapter V of the Commission's report was devoted to jurisdictional immunities of States and their property. The Commission, which had had the question before it since 1978, had considered the seventh report of the Special Rapporteur, Mr. Sucharitkul, and had made considerable progress on the topic, in the light of increasing economic development and growing interdependence among States, varying State practice among industrialized States, socialist States and developing States,

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relevant conventions and other international legal instruments, and thanks to the comments of Governments and their representatives in the Sixth Committee, the assistance rendered by the Secretariat, which had prepared materials on jurisdictional immunity of States and their property, and the enlightened guidance of the Special Rapporteur. The substance of the topic had been dealt with from two different points of view, namely State immunity from jurisdiction of a foreign court and immunity of State property from attachment or execution.

37. At the current stage, the Commission had provisionally adopted 16 draft articles forming the first three parts. Part I contained introductory provisions concerning the scope of the draft articles, use of terms and interpretative provisions (draft articles 1 to 5). Draft articles 4 and 5 of part I were still pending. Part II, entitled "General principles", which contained articles 6 to 10, dealt with State immunity, modalities for giving effect to it, express consent to exercise of jurisdiction, participation in a proceeding before a court and counter-claims. Article 6 of part II, provisionally adopted in 1980, had been referred to the Drafting Committee for review. Part III, provisionally entitled "Exceptions to State immunity", which contained articles 11 to 20, dealt with commercial contracts, contracts of employment, personal injuries and damage to property, ownership, possession and use of property, patents, trade marks and other intellectual or industrial property, fiscal matters, participation in companies or other bodies, State-owned or State-operated ships engaged in commercial service (draft article 19), and effect of an arbitration agreement (draft article 20). Article 11 of part III was still pending.

38. The work of the Commission at its thirty-seventh session had included the consideration of draft article 19 (State-owned or State-operated ships engaged in commercial service) and draft article 20 (Effect of an arbitration agreement), which were left over from 1984. On the recommendation of the Drafting Committee, those draft articles had been adopted by the Commission on 22 July 1985, at its 1932nd meeting.

39. The seventh report of the Special Rapporteur (A/CN.4/388 and Corr.1 and 2) dealt with part IV (State immunity in respect of property from attachment and execution) and part V, entitled "Miscellaneous provisions", and contained draft articles 21 to 24 in part IV and draft articles 25 to 28 in part V. The Commission had discussed part IV of the topic in 1985 and, in the light of its discussions, the Special Rapporteur had prepared revised texts of draft articles 21 to 24, which had been referred to the Drafting Committee but which it had not been able to consider for lack of time. The Commission would consider part V, containing draft articles 25 to 28, in 1986. It should also be in a position to review some left-over articles, such as the provisions in the introductory part, draft article 6 concerning the principle of State immunity, and draft article 11 concerning the scope of part III (Exceptions to State immunity), including the question of extraterritorial effects of measures of nationalization. Thus, by 1986, the Commission expected to complete the first reading of the entire set of draft articles on the topic.

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40. In 1985, the Commission had considered the text of draft articles 19 and 20 of part III, which were contained, along with the commentary, on pages 150 to 160 of the report. The discussion on draft articles 21 and 24 of part IV were summarized in paragraphs 217 to 247 of the report.

41. Draft article 19 of part III (Exceptions to State immunity) dealt with ships engaged in commercial service. It had taken the Commission some time to complete its discussion on that draft article, after two proposals had been made by the Special Rapporteur in 1984. The text of those proposals was contained in footnotes 183 and 185 of the Commission's 1984 report (A/39/10). At its 1985 session, the Commission had provisionally adopted draft article 19, the text of which was contained on pages 150 to 151 of its report (A/40/10).

42. The new text was general in nature, in order to ensure its wider application and acceptability. It did not rely on any particular system of maritime law. Such terms as action in rem, action in personam or admiralty proceedings, which were identified with the common law system, had been omitted, although not from the scope of the draft article, as explained in paragraphs (11) and (15) of the commentary on draft article 19. Under draft article 19, the exception from immunity applied to State-owned or State-operated ships engaged in commercial service. Non-immunity applied to proceedings relating to the operation of that ship (see para. 1 and para. 3 of the draft article) and to the carriage of cargo on board such ships (see para. 4). However, immunity continued to apply to warships, naval auxiliaries and other State-owned and State-operated ships used or intended for use in government non-commercial service (see para. 2), as well as to cargo carried on board such ships (see para. 5). If a question arose about the government and non-commercial character of a ship or cargo, a certificate signed by the diplomatic representative or other competent authority of the State concerned and communicated to the court should serve as evidence of the character of that ship or cargo (para. 7). Paragraph 6 of draft article 19 recognized that the State might plead all measures of defence, prescription and limitation of liability which were available to private ships and cargoes and their owners.

43. It would be noted that, although the words "government non-commercial service" were given in paragraph 2 without brackets, the words "non-governmental" in paragraphs 1 and 4 were placed within brackets. The reasons were explained in paragraphs (5) to (9) of the commentary, the main question being whether the double criterion of "commercial non-governmental" would be useful or whether it would lead to difficulty and controversy concerning the scope of non-immunity. It had been clarified that a "State-operated ship" included a charter for a time or voyage, bare-boat or otherwise (para. (10) of the commentary).

44. Draft article 20 of Part III dealt with the effect of an arbitration agreement concerning differences relating to a "commercial contract" or to a "civil or commercial matter". Those words had been placed within square brackets in view of the need for further clarification of the scope of non-immunity under that article (see para. (2) of the commentary). The article did not apply to arbitration agreements between States or between a State and an international organization; nor

did it apply to an autonomous régime of settlement of disputes established between States and nationals of other States, such as under the 1965 Convention on the Settlement of Investment Disputes (see para (7) of the commentary). Draft article 20 was also qualified by the phrase "unless the arbitration agreement otherwise provides". Thus, the exception to jurisdictional immunity of a State under draft article 20 did not alter the existing supervisory jurisdiction of a court of another State concerning the arbitration agreement to which the former State was a party, particularly concerning the validity or interpretation of the arbitration agreement, the arbitration procedure and the setting aside of the award.

45. In Part Four, draft articles 21 to 24 dealt with State immunity from attachment, arrest and execution by order of a court of another State. Draft article 21 dealt with the scope of Part Four. Draft article 22 was the substantive clause on State immunity from enforcement measures. Draft article 23 dealt with the effect of consent to enforcement measures, and draft article 24 specified property categories generally immune from arrest and execution. The course of discussion on those draft articles by the Commission could be better appreciated by comparing the articles originally proposed by the Special Rapporteur (text in footnotes 158, 159, 160 and 161) and those proposed by him at the end of the discussion (text in footnote 173).

46. There was agreement in the Commission that State immunity from jurisdiction and immunity of State property from attachment and execution had the same legal foundation, namely the independence and sovereign equality of States. Since constraint on State property could affect the operations of that State, it had been provided that a separate consent would be necessary for waiver of immunity from attachment or execution. The questions which required clarification had related to the meaning and scope of State property, and of property in its possession and control or in which it had an interest, and the meaning and scope of attachment, arrest and execution. The concept of property had been somewhat clarified in the discussion: for example property in which a State had an interest or a "controlling interest" did not refer to a majority share of a State in a foreign corporation. That aspect was covered by draft article 18. However, the property to which those draft articles applied would not be restricted to property owned by a State (see paras. 231 and 232 of the report).

47. As for the meaning of arrest, attachment and execution, the redraft of those articles, based on discussion in the Commission, had preferred a wider phrase, namely "judicial measures of constraint upon the use of property, including attachment, arrest and execution", thereby covering certain types of interlocutory injunctions not amounting to attachment, arrest or execution as such (see para. 230 of the report).

48. The main controversy in the Commission had concerned the contents of draft article 22, the heading of which had become "State immunity from enforcement measures", namely what place should be given to the principle of State immunity which could be waived only by consent, and in what cases consent would be implied. The original drafts of article 22 (1) (b) and 23 (1), appeared to be contradictory

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inasmuch as the former made an exception to immunity in the case of "the property in use or intended for use by the State in commercial and non-governmental service", whereas the latter required consent by waiving immunity from attachment. A solution had been suggested by the Special Rapporteur in his new draft article 22 by specifying the exception to consent in the following terms: "unless the property in question is specifically in use or intended for use by the State for commercial and non-governmental purposes and, being located in the State of the forum, has been allocated to a specific payment or has been specifically earmarked for payment of judgement or any other debts". Different views concerning the use of the words "commercial and non-governmental" could be found in paragraph 237 of the report.

49. Draft article 23 in the redraft had been simplified and only dealt with the modalities and effect of express consent to enforcement measures. Draft article 24 specified the types of property generally immune from enforcement measures and included diplomatic and consular property, property of a central bank and State monetary authority with some exceptions, and public property forming part of national archives of a State or of its distinctive national cultural heritage. Paragraph 1 of article 24 had been qualified by the phrase "unless otherwise expressly and specifically agreed by the States concerned", in response to some suggestions in the Commission.

50. Draft articles 21 to 24 were before the Drafting Committee and the Commission would review them in the light of the recommendations of the Drafting Committee and the discussion in the Sixth Committee. The Commission would also deal with Part Five, concerning draft articles 25 to 28. The Commission expected, during 1986, to complete the first reading of the entire set of articles on that topic.

51. Chapter VI of the report was devoted to the second part of the topic of relations between States and international organizations. The Special Rapporteur, Mr. Diaz-González, had submitted his second report on the topic to the Commission (A/CN.4/391 and Add 1). The first part of the topic concerning the status, privileges and immunities of the representatives of States to international organizations had been completed in 1971, and had led to the adoption in 1975 of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character. The second part dealt with the status, privileges and immunities of international organizations, their officials and experts and other persons engaged in their activities who were not representatives of States. Consideration of that second part had been delayed because of the priority given to other topics, pursuant to the wishes of the General Assembly.

52. In 1985, the Commission had resumed its consideration of that topic and had devoted five meetings to it. The Special Rapporteur had proposed a text which could constitute two paragraphs of one draft article or two separate articles, one dealing with the legal personality and legal capacity of an international organization and the relevant implications, and the other with the treaty-making capacity of an international organization. The text was given in footnote 213 to paragraph 265 of the report.

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53. The Commission had decided to continue its consideration of the draft articles in 1986, and had suggested that, in the meantime, the Special Rapporteur might consider the scope of the draft articles and present a schematic outline of the subject-matter in his next report. The Commission had also available to it the Secretariat study on the status, privileges and immunities of international organizations (A/CN.4/L.383 and Add.1 to 3), based on the replies to the questionnaire sent to them by the Legal Counsel in 1978. The study was a supplement to the one prepared in 1967. The Secretariat had also been requested to distribute to the members of the Commission in 1986 copies of replies received from regional organizations to a similar questionnaire. The Commission had started its substantive consideration of the topic in 1985, and should be able to make further progress in 1986.

54. Chapter VII of the Commission's report dealt with the law of the non-navigational uses of international watercourses. The Commission and the Sixth Committee were fully aware of the importance and sensitivity of the topic but, owing to developments beyond their control, consideration of the topic had not yet been completed. Considerable progress had been made between 1979 and 1984. In 1983 and 1984, the Commission had had before it the framework of a draft convention on the topic consisting of 39 to 41 draft articles, and the Sixth Committee had been kept fully informed about the course of its discussion and progress.

55. Since Mr. Evensen had been elected to the International Court of Justice in 1984, the Commission had appointed Mr. Stephen McCaffrey as Special Rapporteur in 1985 and had requested him to prepare a preliminary report indicating the status of the topic to date and the lines of future action. The preliminary report of the Special Rapporteur (A/C.4/393) had been before the Commission at its 1985 session and had been discussed at its 1928th meeting. Paragraphs 279-290 of the report indicated that in 1986 the Commission proposed to continue with the outline prepared in 1983 and 1984 and to build as far as possible on the progress already achieved. Draft article 1 to 9 on the topic dealing with the introduction and general principles had been referred to the Drafting Committee in 1984. In his next report in 1986, the Special Rapporteur might provide a concise statement of his views on the major issues raised by draft articles 1 to 9, which might give rise to further discussion. The Special Rapporteur would then deal with the draft articles in chapter III concerning co-operation and management in regard to international watercourses, and develop his own views thereon. The Commission should, therefore, be in a position to make progress on the topic in 1986.

56. Paragraph 291 of chapter VIII of the report dealt with international liability for injurious consequences arising out of acts not prohibited by international law. After the death of Mr. Quentin-Baxter, the Commission had appointed Mr. Barboza as Special Rapporteur on that topic and had requested him to prepare a preliminary report on the status of the work done so far on the topic, and the lines for further action. The new Special Rapporteur had submitted his preliminary report (A/CN.4/394), which the Commission had noted with appreciation but had not been able to discuss at its thirty-seventh session. It would consider the report together with the Special Rapporteur's new report in 1986.

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57. The Commission had made considerable progress on the topics of the draft code of offences against the peace and security of mankind, State responsibility, the diplomatic courier and the diplomatic bag, and jurisdictional immunities of States and their property. In 1986, it should be in a position to complete its first reading of draft articles on the two last-mentioned topics. He assured the members of the Committee that the Commission would take fully into account their comments and observations on the Commission's report at its next session.

58. Mr. KOROMA (Sierra Leone) said that the fortieth anniversary of the founding of the United Nations provided an opportunity to acknowledge the key role played by the International Law Commission in maintaining international peace and security and strengthening the international legal order. After some 40 years of relative peace, it was tempting to take the international legal order for granted, but it had been patiently built up following the breakdown of the previous legal order caused by two world wars. For 37 years, the Commission had continued to uphold the principles of the Charter and promote human rights and the right of peoples to self-determination. As the Secretary-General had recalled in his latest report on the work of the Organization, more international law affecting virtually all areas of human activity had been codified in the past 40 years than in all the previous years of recorded history.

59. To judge from the topics covered in its latest report, the Commission continued to play its part. The Commission also maintained its co-operation with other legal bodies, such as the Arab Commission for International Law, the Asian-African Legal Consultative Committee, the European Committee on Legal Co-operation and the Inter-American Juridical Committee. That co-operation was fruitful for all concerned: it not only helped to promote the primacy of the law and to further understanding of international law, but also enabled the Commission to perform a specific task of real use to the international community. That co-operation could be increased and extended to other areas of co-operation.

60. It was gratifying that the Commission had once more had an opportunity to pay a tribute to the memory of Gilberto Amado, the illustrious Brazilian jurist and former member of the Commission. His delegation expressed its thanks to the Brazilian Government, whose generous contribution had made possible a commemorative lecture entitled "Reflections on contemporary processes of developing international law". It was to be hoped that the printed version of the lecture would soon be available.

61. His delegation noted with satisfaction that the Commission had been able to organize another International Law Seminar. The Seminar was an important occasion for jurists from different parts of the world and representing different legal systems to meet together. Sierra Leone had noted the financial difficulties involved in holding the Seminar, and appealed to all States in a position to do so to contribute generously to the programme.

62. The draft code of offences against the peace and security of mankind dealt with complex questions involving international, domestic and criminal law and

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problems of jurisdiction and competence. Those issues were still highly relevant and, if it was properly formulated, the code could help to strengthen international peace and security and deter aggression.

63. In its resolution 39/80 of 13 December 1984, the General Assembly had requested the Commission to continue its work on the code by drawing up an introduction and a list of the offences. On the subject of the code's scope, it had been considered by some that, at the present stage, the draft code should be limited to the criminal responsibility of individuals, without prejudice to subsequent consideration of the possible application to States of the notion of criminal responsibility. That was, perhaps, a pragmatic position, but it should be acknowledged that, if the code was to be effective and comprehensive, the Commission should seriously consider the possibility that a State might be held responsible for some of its most serious actions, such as crimes of aggression or genocide.

64. It was true that the liability of an individual was established on a different basis from that of a State and that the elements of proof in the two categories of offence were different. In the case of the State, only international law was applicable, whereas individual liability might be subject to both international law and domestic criminal law. However, in view of those differences it should be easier to make the necessary distinction between the criminal liability of an individual and that of a State in breach of its obligations. In addition, in the interest of progressive development of the law, States as well as individuals should be held responsible for certain particularly heinous offences. In answer to the question put to Governments by the Commission, Sierra Leone considered that the notion of criminal responsibility should apply to States as well if the most serious offences were not to go unpunished.

65. As to the question of who should be covered by the draft code, the matter was a complicated one since an act could be committed by an individual, by an individual acting officially on behalf of the State or by a State itself but which might find it convenient to take refuge behind an individual or group of individuals.

66. Given the fact that criminal liability and its consequences were different for a State than for an individual, it was difficult to determine who should be covered by the code while at the same time ensuring that it was comprehensive enough to include all perpetrators of the acts against which it legislated. Accordingly, article 2 on persons to be covered by the draft code should be examined in greater detail so that the code did not find itself with a serious lacuna. His delegation believed that the article should be drafted in such a way as to include a State on occasions when the State itself, through its authorities, had committed an offence against the peace and security of mankind. The article should also cover situations where private individuals or groups of individuals had engaged in criminal acts leading to genocide, war crimes and crimes against humanity. The intention would be twofold: first, to ensure that when an individual or group of individuals, or a State acting through its authorities, committed an offence

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against the peace and security of mankind, they would not escape responsibility because the code was not sufficiently comprehensive; secondly, that a comprehensive code would act as a deterrent against those who might be disposed to commit offences which the international community had classified as contrary to the peace and security of mankind.

67. As far as the definition of the concept of an offence against the peace and security of mankind was concerned, Sierra Leone was of the view that the element of "seriousness" was an objective criterion and should guide the determination of which acts fell under that heading. After all, it was because of their serious nature that such offences were regarded as militating against the fundamental interests of mankind and against its security.

68. In the hierarchy of acts constituting an offence against international peace and security, aggression should rank as the most serious. Unfortunately, in spite of the definition of aggression adopted by the General Assembly in resolution 3314 (XXIX) and in spite of Article 2, paragraph 4, of the Charter, the Security Council had been most reluctant to draw the right conclusions when force had been used by States, and to take appropriate action. It was that serious omission by the Council which had engendered a crisis of confidence in the United Nations itself. Sierre Leone considered that the code should simply make reference to the resolution in question without reproducing its text in full: the definition contained elements which were of an evidential nature and had no proper place in the type of code envisaged.

69. The threat of aggression, like the threat of the use of force which was prohibited by Article 2, paragraph 4, of the Charter, was a means of exerting pressure that might endanger international peace and security and should therefore be included in the draft code.

70. Regarding the article on intervention in the internal or external affairs of another State, such as fomenting civil strife in another State or exerting pressure of various kinds on another State, there was evidence of such acts every day, particularly against the newly independent States. For example, South Africa, when it was not sending its armed forces to invade the territories of neighbouring States, was fomenting civil strife there and attempting to destabilize them in the hope that opposition to its policy of racial discrimination would fade away. It was obvious that South Africa's policy of deliberately fomenting strife by means of military and other material support posed a serious threat to international peace and security and should be included in the code. On the other hand, opposition to the policy of apartheid was intended to protect and uphold the common fundamental interests of mankind, including those of the people of South Africa which the South African régime assaulted on a daily basis. From its inception, the General Assembly had determined that the South African régime's policy of apartheid involved such a massive violation of human rights that its discussion could not be regarded as interference in South Africa's domestic affairs.

71. It was also appropriate for mercenarism to be included in the draft code. Acts of mercenarism endangered the stability of young and weak States and, in some

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cases, mercenaries were so contemptuous of their victims as to engage in the most reprehensible criminal acts against them. Thus, not only were they endangering international peace and security when they destabilized States but, when they engaged in such conduct as massive killings, they were also committing offences against the peace and security of mankind.

72. In his delegation's view, the forcible establishment or maintenance of colonial domination should be covered by the code. The aim should not be to look back but to legislate against situations that persisted even when the international community, as constituted by the United Nations, had ruled against them. Namibia was one such situation. The General Assembly had terminated South Africa's mandate over the Territory and the International Court of Justice had ruled that South Africa's occupation of the Territory was illegal, but the South African régime persisted in its occupation, with all the consequences that that entailed for international peace and security and for the fundamental interests of the Namibian people. On that issue, there was a school of thought that the forcible establishment or maintenance of colonial domination was tantamount to permanent aggression, which must be resisted. Furthermore, such forcible establishment or maintenance was contrary to the right of peoples to self-determination enshrined in the Charter and other international instruments. Consequently, there was no shortage of reasons for including colonial domination in the code and a properly drafted provision on the subject should find a place therein.

73. Lastly, the subject of economic aggression was particularly relevant to the code. It was true that the topic had always been contentious. It had even been discussed in the context of Article 2, paragraph 4, of the Charter when the Charter was being drafted. Now, however, the topic had become even more relevant as some States threatened openly to use their economic might to asphyxiate others. For instance, the South African régime threatened repeatedly to cut off the economic life-line of some neighbouring States because of their opposition to apartheid. If the Pretoria régime implemented its threats, the integrity of the States concerned would be seriously impaired and international peace and security would be endangered. The interests of the international community would be threatened if one of its members unilaterally and illegally used its economic might or geographical circumstances to inflict injury on a weaker State, especially if such injury might affect the latter's territorial integrity or viability. Sierra Leone therefore considered that such acts should be proscribed by the draft code.

74. Sierra Leone had an open mind as to when it would be appropriate to formulate the general principles regarding the code. Its position was dictated by two reasons: first, the International Law Commission had not forgotten the general principles elaborated at Nürnberg and these had guided the Special Rapporteur in his work. Secondly, the non-enunciation of those principles at the present stage had not affected the elaboration of the code. Sierra Leone was therefore prepared to accept the Special Rapporteur's assurance that the general principles would be included, in the appropriate place, in a future draft. His delegation reserved the right to comment on the remaining parts of the International Law Commission's report at an appropriate stage.

75. Mr. CALERO RODRIGUES (Brazil) noted that the International Law Commission had made progress on most of the items entrusted to it and recalled that, as far as the law on the non-navigational uses of international watercourses was concerned, the Special Rapporteur's stated intention of building as much as possible on the progress already achieved and of aiming at further concrete progress in the form of the provisional adoption of draft articles, had already been approved by members of the International Law Commission who had expressed their confidence in that approach. His delegation shared their view entirely. The topic was a difficult one and, if work on it was to be completed successfully, the search for compromise formulations that would make it possible to accommodate the different points of view must be continued.

76. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, although paragraph 10 of the report in document A/40/10 indicated that the item had not been considered at the Commission's thirty-seventh session, according to paragraph 292 the Commission had noted with appreciation the preliminary report submitted by the new Special Rapporteur (A/CN.4/394), who might present a new report at the next session. The ideas outlined in the preliminary report regarding the continuation of work on the topic seemed to be correct. Since consideration of the subject was far less advanced than for other topics, it seemed perfectly adequate for the new Special Rapporteur to have undertaken to review carefully all that had been done, in order to confirm the proposals of the former Special Rapporteur or propose the changes dictated by his own conception of the problems (A/CN.4/394). Moreover, his delegation noted with satisfaction that the Special Rapporteur did not intend to start the whole exercise anew or to call into question some of the basic concepts put forward in earlier reports, concepts that, by and large, had been accepted by the Commission.

77. With regard to its work on State responsibility, the Commission had achieved progress on three fronts: it had provisionally adopted article 5, it had examined the remaining articles proposed by the Special Rapporteur for Part Two, and it had considered suggestions regarding Part Three on the "implementation (mise en oeuvre)" of international responsibility and the settlement of disputes.

78. While the adoption of a single article might seem a meagre achievement, the article was of particular importance since it dealt with the definition of "injured State". It was essential for the application of the articles to identify the injured State, namely, the State which, having had a right infringed by the internationally wrongful act of another State, was entitled to take countermeasures and to seek redress. Furthermore, two approaches were possible: one could either simply state that the injured State was the State a right of which had been infringed, or one could try to give more precise indications, specifying which State was to be considered the injured State in a given situation, basing oneself on the source of the right (bilateral treaty, multilateral treaty, customary law, decision of an international body) or its nature (a right arising out of the breach of an obligation which constituted an international crime, or which was related to the protection of human rights, for instance). Since opinions had been divided as to which approach should be adopted. The Commission had decided to combine the

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two, giving a general indication of the meaning of "injured State" in paragraph 1 and specific indications in paragraph 2. The article had therefore been difficult to elaborate and was rather complex, but his delegation believed that it could be considered satisfactory.

79. The Special Rapporteur had presented, with commentaries, the 16 articles which, in his view, should constitute Part Two of the draft articles on State responsibility. His delegation agreed with the views expressed in the Commission that the proposed articles formed a good basis but required considerable elaboration. The consequences of international crimes in articles 14 and 15, for instance, seemed to be presented too concisely and did not include all the elements that should be indicated. In the view of his delegation, the classical consequences of internationally wrongful acts in articles 6 to 13 also needed adjustments, which it was confident would be worked out by the Commission.

80. The Special Rapporteur had suggested that a Part Three to the draft articles would be needed, to deal with the "implementation (mise en oeuvre)" of State responsibiity and the settlement of disputes. His delegation considered the elaboration of such a part to be a very delicate task, but agreed reluctantly that the part would be necessary in order to ensure the effectiveness of the proposed instrument. Like most members of the Sixth Committee, therefore, his delegation was prepared to authorize the Special Rapporteur to make concrete proposals for draft articles and would comment on the subject after their presentation.

81. The work on the status of the diplomatic courier and the diplomatic baq not accompanied by diplomatic courier continued to proceed satisfactorily and a complete set of articles on the subject, provisionally approved by the Commission, might be presented to the Committee in 1986.

82. Of the 42 articles submitted by the Special Rapporteur, the first 35 had already been considered by the Commission and, with a few deletions, now constituted articles 1 to 27, which had been provisionally adopted after examination by the Drafting Committee. At its latest session, the Commission had completed its work on articles 12 to 18 and had provisionally adopted a further seven, which were now numbered 21 to 27.

83. Article 18 (formerly art. 23) had given rise to a considerable difference of opinion in both the Commission and the Sixth Committee. The article dealt with immunity from jurisdiction and the question to be decided had been whether the courier should be entitled to civil and administrative immunity only, or to immunity from criminal jurisdiction as well. A compromise had been arrived at in the Commission: since there had been agreement that civil and administrative immunity should be recognized on a functional basis, i.e., in respect of acts performed in the exercise of the courier's functions, the Commission had decided to apply the same criterion to criminal immunity. Several members of the Commission, as well as several delegations in the Sixth Committee, had been of the view that the recognition of immunity from criminal jurisdiction was unnecessary since, according to article 16, the courier enjoyed personal inviolability and could not

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be liable to any form of arrest or detention. That provision would already limit considerably the extent to which a courier was subject to the criminal jurisdiction of the receiving or transit State. His delegation could accept the view that the protection accorded to the courier by article 16 would be sufficient but, in order to accommodate those who insisted on the need to grant the courier immunity from criminal jurisdiction, it was prepared to accept article 18 as now proposed by the Commission.

84. Lastly, his delegation could also accept new articles 21 to 27. Article 21 concerned the duration of the privileges and immunities of the courier and stated that the privileges and immunities of the diplomatic courier began when the courier entered the territory of the receiving or transit State or, if he was already in that territory, from the moment he began to exercise his functions. In his delegation's view, it would have been desirable to indicate in the latter case the actual moment at which the courier began to exercise his functions. Was it the moment of appointment, or was it the moment at which he actually took custody of the diplomatic bag? Neither the text of the provisions nor the commentary clarified the question.

85. As far as the cessation of privileges and immunities was concerned, his delegation found the article satisfactory, with the exception of the provision contained in the final sentence of paragraph 1. That sentence stated that the privileges and immunities of the diplomatic courier ad hoc would cease at the moment when the courier had delivered to the consignee the diplomatic bag in his charge. In so doing it simply restated what was contained in the four Vienna Conventions on diplomatic and consular law. The solution was entirely acceptable if the diplomatic courier was to stay in the territory of the receiving State. If a member of a diplomatic mission or a consular post had brought a diplomatic bag, it was normal that his privileges and immunities as a courier should cease once he had delivered the bag.

86. However, a diplomatic courier ad hoc might not be a member of a diplomatic mission or consular post in the receiving State: he might have come from the capital of the sending State or from one of its missions or consulates in a third country. His delegation saw no reason why such a courier should be deprived of his privileges and immunities upon delivery of the bag and not enjoy them while he was waiting to leave the receiving State, as was the case for an ordinary courier. It was conceivable that the drafters of the Vienna Conventions had not paid attention to that situation. However, now that it was realized that that would be the only provision that made a distinction between the ordinary and the ad hoc courier, the provision should be revised in order to accord to the ad hoc courier, in that particular situation, the same treatment as was given to the ordinary courier. If the ad hoc courier was not a resident of the territory of the receiving State and was supposed to leave that territory after delivering the bag, his privileges and immunities should be extended until the moment of his departure.

87. Article 23, dealing with the status of the captain of a ship or aircraft entrusted with the diplomatic bag, was quite satisfactory, paragraphs 1 and 2

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describing the situation of the captain in a simplified form without superfluous details. The captain authorized to transport and deliver a diplomatic bag was responsible for it: that did not prevent a member of the crew, under the responsibility of the captain being entrusted with custody of the bag. The use of the expression "ship or aircraft in commercial service which is scheduled to arrive at an authorized port of entry" was also welcome since it gave the provision the necessary precision and flexibility. Paragraph 3, establishing that a member of a mission, consular post or delegation should be permitted to have unimpeded access to the ship or aircraft to receive the bag, rightly expressed a useful and widespread practice as a legal norm.

88. Articles 24 to 26, on the identification of the diplomatic bag, its contents and the means used for the transmission of the unaccompanied bag, gave expression to concepts already affirmed in existing diplomatic conventions. The new wording had gained in clarity and precision.

89. With regard to chapter V, on the jurisdictional immunities of States and their property, he had doubts whether the Commission would be able to complete its first reading of all the draft articles on the subject at its next session, as it hoped. It was clear that examination of the articles presented by Mr. Sucharitkul, because of the very nature of their subject, would be more time-consuming than the examination of the articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, the first reading of which the Commission probably could complete at its next session. In the case of jurisdictional immunities, his delegation thought it desirable that the Commission should complete its first reading of the draft articles at its thirty-eighth session if possible; but it should not proceed in such a hurry that it sacrificed the quality of its work.

90. During the thirty-seventh session, as chapter V of the report showed, the Commission had provisionally adopted the last two articles (19 and 20) of part III on exceptions to State immunity. Those two articles did not raise the same problems for his delegation as some of the other articles in that part. Seeing the list of exceptions completed, it still retained some doubt as to whether all the provisions were justified and whether the listing of so many exceptions did not affect the very integrity of the principle of immunity. That was one more reason for his delegation to attach considerable importance to article 6, which was to define the principle of "State immunity" and which, although provisionally adopted, had been sent to the Drafting Committee for re-examination.

91. His delegation could endorse article 19, which embodied a generally accepted exception to the principle of immunity in the case of State-owned or State-operated ships engaged in commercial service.

92. One point on which the Commission had been unable to agree, as indicated by the square brackets in paragraphs 1 and 4 of the proposed article, was whether it should refer to a ship "engaged in commercial service" or to one "engaged in commercial non-governmental service". At first sight, one might think that if a

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ship was engaged in commercial service, that service would necessarily be non-governmental. When a State operated a ship for commercial purposes, that State was not, strictly speaking, engaged in a governmental operation which should be protected by the rule of State immunity. Most States which operated ships in commercial service were prepared to accept for such ships the same treatment as that given to privately operated ships. However, some developing countries were of the view that foreign courts should not be admitted to exercise jurisdiction over such operations, maintaining that their commercial character should not deprive them of the benefit of immunity attaching to their governmental nature. His delegation would not be opposed to a formula that could satisfy the countries concerned, if such a formula could be found.

93. With reference to article 20, on the effect of an arbitration agreement, his delegation could accept the recognition of the supervisory powers that courts might have over arbitral proceedings, within the terms proposed by the Commission. In the first place, that provision did not apply to intergovernmental arbitration agreements; in the second place, it did not apply if the parties had otherwise agreed; in the third place, the courts could exercise jurisdiction only on three specific problems - the validity or interpretation of the arbitration agreement, the arbitration procedure and the setting aside of the awards. It was thus clear that courts could not unduly interfere with the arbitration, nor could they try to substitute themselves for the arbitral tribunal.

94. The Special Rapporteur had proposed that the question of State immunity from enforcement measures in respect of property should be treated in a separate part IV of the draft articles, which would consist of articles 21 to 24. His delegation fully agreed that the power to decree measures of constraint affecting the property of a State was not included in the general jurisdictional powers of the courts. If a State consented to the jurisdiction of the court, a separate waiver must be expressed in respect of such measures. His delegation also agreed that that kind of immunity from enforcement measures was subject to limitations and did not apply to all types of property. However, it believed that those principles could very well be enunciated in part II of the draft articles, dealing with general principles. Strictly speaking, therefore, it believed that the proposed part IV would not be necessary. A first version of articles 21 to 24 had been presented by the Special Rapporteur in his seventh report (A/CN.4/388); subsequently, in the light of comments made in the Commission, the Special Rapporteur had submitted a revised version, which appeared in footnote 173 to the Commission's report. The new version was in many ways an improvement, but the Commission would have to study the articles carefully before deciding their final form.

95. Article 21 seemed by and large superfluous and, if it was maintained, its language should be carefully examined to make it cover exactly what was contained in the provisions that followed. Article 22 adequately expressed the principle of immunity from measures of constraint, and indicated which types of property were not covered by that immunity. Article 23 was now limited to indicating the modalities of State consent to measures of constraint. Article 24 listed some types of property which could not generally be subject to measures of constraint.

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In the original version of that provision, such types of property were protected "regardless of consent or waiver of immunity". That was designed to protect developing countries, but doubts had been raised whether it did not go too far and risked limiting the very sovereignty of those countries. The change suggested by the Special Rapporteur in his second version tried to cover the point. However, the Brazilian delegation thought that the provision, thus revised, had become meaningless or, at least, redundant. If indeed there was a general rule that State property could not be subject to measures of attachment, arrest or execution by a foreign court, and if article 22 indicated which types of property were not protected by that rule, it was quite unnecessary to indicate in article 24 which types were protected. Protection was given to all State property which did not fall within the exceptions listed in article 22 (commercial property or property allocated to a payment). Trying to spell out which types of property were covered by the rule of immunity might cast doubt on the general application of the rule itself. So article 24 in its current form should have no place in the draft articles.

96. Chapter VI, on relations between States and international organizations (second part of the topic), required very little comment. The Special Rapporteur was proceeding with the great prudence recommended to him by the Commission, and had submitted in his second report a single article in two alternative forms. By providing in the first article that international organizations should enjoy legal personality under international law, the Special Rapporteur was proposing to give expression to the basic principle which would be the foundation of the draft articles. The Brazilian delegation could not but agree with that proposal.

97. Mr. BADR (Qatar) said that the Commission, as evidenced by its report (A/40/10), had once more proved to be the most important and productive organ of the United Nations in the field of the progressive development and codification of international law.

98. With regard to chapter II, on the draft Code of Offences against the Peace and Security of Mankind, his delegation agreed with the proposed outline of the future Code as contained in the Special Rapporteur's third report. The Commission having decided at its thirty-sixth session that the Code should be limited at the current stage to offences committed by individuals, the first alternative draft of article 2, which made no distinction as to the applicability of the Code as between private individuals and individuals who were agents or "authorities" of a State, had missed an important point. The Special Rapporteur had rightly raised the question of whether private individuals, although mentioned in the 1954 draft, could actually commit offences against the peace and security of mankind (para. 57 of the Commission's report). His delegation was of the view that they could not because, by reason of the particular nature and scale of such offences, only individuals abusing the powers of a State could commit them. It therefore hoped that the Commission would reconsider its decision to refer only the first alternative version of article 2 to the Drafting Committee. If that text was adopted, his delegation suggested that it should be accompanied by a commentary to the effect that the term "individuals" mentioned therein covered only those who were agents or authorities of a State.

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99. With regard to draft article 3, the first alternative was preferable to the concise wording of the second, which provided no real criteria for determining what constituted the offences in question. Likewise, the definition of aggression contained in the first alternative for draft article 4, section (a), was preferable to the second, which merely referred to the 1974 General Assembly resolution on the definition of aggression.

100. Draft article 4, section D, on terrorism, would create a problem if the broader definition of the term "individuals" in article 2 was adopted, against the advice of certain members of the Commission and the views of some delegations, including his own. In fact, when the acts described in subsection (b) were committed by individuals who were not agents of a State or who were not encouraged to commit them by the agents of a State, they were certainly punishable under domestic laws pertaining to terrorism; such acts might even constitute international crimes if a transnational element was involved. However, it remained to be seen whether they were truly offences against the peace and security of mankind. Such offences, which would fall within the purview of the Code, constituted a category in themselves and had characteristics not shared with other crimes, however heinous. In his delegation's view, expressed during the preceding session, the Code should deal only with the most serious offences having a widespread impact; extending the list of offences threatened to diminish the importance of the Code and keep it from fulfilling its main purpose.

101. Turning to chapter V, "Jurisdictional immunities of States and their property", he said that, before commenting on the last two parts of the draft articles which the Special Rapporteur had recently submitted, his delegation deemed it necessary to comment again on draft article 3, adopted by the Commission at its thirty-fifth session. In the course of the preceding year's debate in the Sixth Committee, his delegation had mentioned several reasons why the purpose of a transaction should not be taken into account in determining whether it was official and therefore immune, or commercial and not immune, in nature. To those reasons, which were still valid, was now added another: the text as currently worded recognized the practice of an individual defendant State as the criterion for determining whether the purpose of a transaction should be taken into account. Since State practices differed, that did not constitute a true objective criterion, but instead an unlimited number of previously unknown pseudo-criteria, which, owing to their diversity, undermined the predictability and certainty required in the field of legal transactions. Draft article 3 represented the opposite of the unification of the norms of international law which it was the Commission's task to pursue. If adopted as it stood, the article would allow States to invoke all manner of unfamiliar practices, and the Commission would simply have compounded the confusion in that area.

102. With regard to the revised text of draft article 22, on enforcement measures, his delegation would have preferred that the sole criterion for lack of immunity should be the use of property or funds for commercial purposes. That was what the Special Rapporteur had proposed in his original draft of article 22, subparagraph 1 (b), which had reflected the general trend in recent national

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legislation on the subject. Instead, article 22 in its revised form added a further requirement to the effect that the property or funds should be allocated to a specific payment or specifically earmarked for payment of judgement or any other debts. That additional requirement implied that the State had consented to having the property used to satisfy a judgement. The whole structure of the article then became questionable. The article began by stating that "A State is immune without its consent ... from judicial measures of constraint ... unless ...", and went on to enumerate the exceptions to that rule which necessarily implied consent, and therefore did not constitute true exceptions to the principles originally set out. His delegation believed that the Commission should reconsider draft article 22 at its next session; it would also welcome a return to the text of article 22 as originally proposed by the Special Rapporteur. The same applied to article 24, subparagraphs 1 (c) and (d), where the allocation of property for payments of judgement was mentioned as an additional requirement for lack of immunity of the property of central banks or monetary authorities. Since such an allocation denoted consent, the very mention of it eliminated those two subparagraphs as possible exceptions to immunity from enforcement not based on consent. Recent national legislation on the subject required only that the property should not be used by central banks or for monetary purposes, and did not add the further requirement that it should be specifically earmarked for the payment of a judgement. That was a more logical approach than the one reflected in draft article 24 as revised by the Commission, which should consider the article further.

103. Draft article 20, on arbitration, had also been provisionally adopted by the Commission at its thirty-seventh session; it omitted all mention of recognition and enforcement of an arbitral award from the list of matters with regard to which a State could not claim immunity before the courts. The commentary on page 159 of the report recognized, however, that the enforcement of an arbitral award might depend on judicial participation. His delegation therefore suggested that paragraph (c) of draft article 20 should be amended to read: "(c) the recognition and enforcement or the setting aside of the award". In truth, the setting aside of an award and its enforcement were two aspects of the same problem. It was impossible to provide for one and not the other.

104. His delegation noted with satisfaction the appointment of Mr. Julio Barboza as Special Rapporteur on the topic "International liability for injurious consequences arising out of acts not prohibited by international law". His delegation looked forward to the resumption of work on that topic, which had been interrupted by the untimely death of the previous Special Rapporteur, Mr. Quentin-Baxter, who should be given all credit for the progress made thus far in that novel area of international law.

105. With regard to chapter III, "State responsibility", his delegation approved the contents of draft article 5, on the definition of an "injured State", the only article the Commission had adopted provisionally at its thirty-seventh session. That article was comprehensive and fully adequate. His delegation hoped that the Commission would be able to give the other articles proposed by the Special Rapporteur all due consideration at its next session.

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106. The debate as to the distinction between reciprocity and reprisal in articles 8 and 9 was still going on within the Commission, as indicated in paragraph 128 of the report. However, draft article 8 clearly indicated that reciprocity concerned only obligations of the injured State which corresponded to or were directly connected with the obligation breached by the other State. In contrast, reprisal could relate only to other obligations of the injured State that were unconnected with the obligation breached. That analysis provided sufficient grounds for a clear distinction between the two concepts. Furthermore, there was no ground for depriving the injured State of its right to reciprocal treatment with regard to matters mentioned in draft article 12. Reciprocity was a pillar of international law and international relations, and was an expression of the equal sovereignty of States. The fact that one State's treatment of another State also constituted a wrongful act should be a further justification for reciprocal treatment rather than an obstacle to it; otherwise, the State which had committed a wrongful act would be placed in a more favourable position than the State which had not. Committing a wrongful act should not be rewarded by shielding from reciprocal treatment. His delegation therefore wished to reiterate the suggestion it had made the year before that the wording of draft article 12 should be reconsidered with a view to deleting the mention of article 8, on reciprocity, so that the exclusions mentioned in article 12 would apply only to reprisal as dealt with in article 9.

107. A study on the topic "Law of non-navigational uses of international watercourses" had suffered delays as a result of successive replacements of the Special Rapporteur. His delegation endorsed the proposal of the new Special Rapporteur, Mr. Stephen McCaffrey, as reflected in his preliminary report, concerning the manner in which the Commission should proceed on that topic.

108. With regard to the Commission's decisions concerning its programme and methods of work, his delegation agreed with the decision to give priority to those topics which were already in an advanced stage of preparation. Thus, the choice of topics - status of the diplomatic courier and diplomatic bag and jurisdictional immunities of States - that had been made was fully justified. His delegation hoped that the Commission would take into account, perhaps to a greater degree than in the past, the views of States contained in the topical summaries prepared by the Codification Division of the Office of Legal Affairs. Also, as the Commission was finding it necessary to postpone the consideration of draft articles from year to year, it should be sure to consult not only the topical summary of the preceding session of the Sixth Committee, but those of earlier sessions as well. Only then could it genuinely profit from the discussions of the Sixth Committee.

The meeting rose at 6.10 p.m.