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SUMMARY RECORD OF THE 32nd MEETING

Chairman: Mr. HERRERA CACERES (Honduras)

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7.

The meeting was called to order at 3.20 p.m.

AGENDA ITEM 138: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS THIRTY-SEVENTH SESSION (continued) (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 (continued) (A/40/451 and Add.1-3, A/40/331-S/17209, A/40/786-S/17584)

1. Mrs. DIAGO ULACIA (Cuba) said that the draft Code of Offences against the Peace and Security of Mankind should contain provisions relating to the use and threat of force, the crime of apartheid, colonialism, terrorism, nuclear war, and mercenarism. The fact that some of those offences were under consideration in other subsidiary organs of the General Assembly should not prevent the International Law Commission from taking into account the opinions and suggestions expressed by States with regard to such offences. In view of the grave international threat they posed, they should be dealt with in the future Code.

2. In the view of her delegation, the topic was a fundamental one and the Commission's work in that area would strengthen the international legal order and assist States in eradicating acts which posed a grave threat to their independence and security. She therefore agreed with those speakers who had pointed to the need to consider in sufficient depth the legal consequences of the various offences. She hoped that the Commission would be able to fulfil its mandate on the topic in good time and that the topic would continue to be considered as a separate item on the agenda of the Sixth Committee.

3. Mr. OGISO (Japan) said that his delegation valued the important contribution made by the Commission to the development of legal order in the international community. Several of the most important conventions forming contemporary international law, such as the Vienna Convention on Diplomatic Relations, had been concluded on the basis of draft articles prepared by the Commission.

4. Japan believed that relations between States should be regulated through the progressive development and codification of international law, and to that end had made a consistent and substantial contribution to the work of the Commission.

5. It was essential for the members of the Commission to overcome conflicting national interests and accommodate differences in scholarly opinion on the basis of international realities, if it was to discharge its task of establishing a legal order which would serve world peace and prosperity. It was through such efforts to achieve consensus that the Commission had made such an important contribution. With regard to the programme of work, it would be useful if the Commission focused its attention on topics in respect of which early codification was highly desirable, in particular State responsibility and jurisdictional immunities of States and their property.

(Mr. Ogiso, Japan)

6. On the question of the draft Code of Offences against the Peace and Security of Mankind, his delegation believed that if the international community was to punish an offender who committed an act of aggression or another offence, it was essential for an international mechanism, such as an international criminal court, to be established, failing which an international code containing rules of criminal law would be incomplete and difficult to implement. The topic had first been considered soon after the Second World War, but no further action had been taken for many years. The tremendous changes in the international situation in the meantime should be fully taken into consideration. At its thirty-seventh session, the Commission had considered questions such as the scope of the draft articles and the definition of an offence against the peace and security of mankind. The Commission should proceed with the preparation of the introduction, containing general principles, in parallel with the establishment of the list of offences, and should exercise caution in considering each type of act to be covered by the draft Code.

7. With respect to State responsibility, part two of the draft articles and their commentaries represented a concrete achievement in the progressive development and codification of the relevant international law. Nevertheless, further consideration should be given to issues such as the handling of international crime and jus cogens, the identification of injured States as a result of a breach of obligations under multilateral conventions, the nature and scope of countermeasures, and the relationship between countermeasures and procedures for the settlement of disputes. The Commission should examine questions involving the concept of international crime with special care, and should, if necessary, review the definition of the concept laid down in part one of the draft. Part three of the draft articles, relating to the procedure for the settlement of disputes, would determine whether the Commission's entire work on State responsibility would be successful. It was therefore essential for the Commission to prepare an effective procedure which could be widely accepted by the international community.

8. With regard to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, the Commission had examined the revised versions of the articles relating to immunity from jurisdiction and the inviolability of the diplomatic bag. The basic agreement reached on the draft article dealing with immunity from jurisdiction, in the form of the new article 18, represented a positive step towards the completion of the draft articles. In that connection, his delegation wished to stress the understanding, as recorded in paragraph (3) of the commentary to article 18, regarding the phrase "in respect of all acts performed in the exercise of his functions" in paragraph 1 of the article.

9. In the areas to be covered by the draft articles there already existed four international conventions: the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character. The Commission should take care not to complicate the interpretation and implementation of those Conventions, and should refrain from preparing a draft convention with provisions which covered the areas already regulated by them.

(Mr. Ogiso, Japan)

10. With respect to jurisdictional immunities of States and their property, two schools of thought had emerged regarding the status of State-owned or State-operated ships which were engaged in commercial service. Some States, including Japan, had taken the position of not recognizing immunity from jurisdiction for such ships, whereas others had taken the view that immunity should be recognized when State-owned or State-operated ships were engaged in commercial governmental activities. Draft article 19 attempted to reflect both positions, but was ambiguous because of the term "[non-governmental]" inserted in paragraphs 1 and 4. The term should be deleted in order to avoid confusion. The question of jurisdictional immunities of States and their property was one of the topics on which the early adoption of unified rules of international law was desirable.

11. Mr. McKENZIE (Trinidad and Tobago) said, with reference to the draft articles relating to State responsibility, that draft article 5 was a useful provision in that it provided for the determination of which State or States should be legally considered as being "injured". Such determination was connected with the origin and content of the obligation breached by the internationally wrongful act in question. Where the obligation breached was one imposed on a State by a bilateral treaty (article 5, para. (2) (a)), the right infringed was that of the other State party to the treaty, so that the presumption was that the other State was an "injured State". With respect to "multilateral" situations, where more than two States were bound by a primary rule, his delegation agreed with the provisions of subparagraph 2 (e) (i), which provided that the breach of the obligations inherent in the primary right injured only the State whose rights were thereby infringed.

12. Paragraph 2 (e) (iii) related to the obligation of States to respect human rights and fundamental freedoms. Since the interests protected by such rules were not identifiable with a particular State, it would be necessary to consider every other State party to a multilateral convention or bound by the relevant rule of customary law as an injured State. The subparagraph did not, however, prejudge the question of the extent to which primary rules of international law imposed obligations on States for the protection of human rights and fundamental freedoms.

13. Under paragraph 2 (f) States parties to a multilateral treaty might agree to consider a breach of an obligation imposed by the treaty as infringing the collective interest of all States. His delegation had serious reservations about a provision allowing the States concerned to decide whether an obligation had been stipulated for the protection of collective interests.

14. The value of article 5, paragraph 3, lay in the fact that it implied that all States, individually, were entitled to respond to an international crime as though their individual rights had been infringed. Thus obligations under that paragraph would become the responsibility of the international community.

15. Although the overall structure of the draft articles for Part Two was generally acceptable, the Commission should consider embarking on the elaboration of the special legal consequences of international crimes. In that connection, conflicts with rules otherwise considered as peremptory norms, such as those protecting the existence of States, should be resolved.

(Mr. McKenzie, Trinidad and Tobago)

16. With regard to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, his delegation considered that article 36 should state that the diplomatic bag was inviolable at all times and wherever situated; that it should not be opened or detained; and that it should be exempt from customs and other duties and from examination through electronic or other devices which might be prejudicial to its confidential character. The principle of absolute inviolability of the diplomatic bag conformed to the norms of customary law and to established practice as set forth in the relevant conventions. On the issue of the plurality of régimes concerning the bag established under the 1961 and 1963 Vienna Conventions on diplomatic and consular relations, his delegation considered that draft article 36 could contain a provision concerning the consular bag and the application of the rule embodied in article 35, paragraph 3, of the 1963 Vienna Convention.

17. His delegation supported the proposal to combine draft articles 39 and 40 by making one paragraph deal with the situations covered by present draft article 39, and another paragraph with the obligations of an "unforeseen" transit State in case of force majeure. Draft articles 12, 18, and 21 to 27 were generally acceptable to his delegation.

18. Article 18, paragraph 1, reflected a compromise solution to an important issue that his delegation could support when considered in conjunction with draft article 16. With respect to the duration of privileges and immunities of diplomatic couriers, draft article 21 was acceptable to his delegation as a basis for further consideration.

19. With regard to the jurisdictional immunities of States and their property, more thorough consideration of draft article 19 was required. The distinction between ships employed in commercial service and those in governmental service did not always provide a realistic criterion, since many developing States acted as maritime carriers to save shipping costs and not to make profits. With respect to draft article 20, the provision should cover the arbitration of differences relating to a "commercial contract". His delegation favoured the retention of the corresponding expression in square brackets as the preferred scope of the exception to State immunity relating to express provisions in an arbitration agreement. Under the draft article, submission by a State to commercial arbitration was regarded as constituting an expression of consent to all the consequences of acceptance of the obligation to settle differences by arbitration, including renunciation of jurisdictional immunity on all questions relating to the arbitration.

20. With regard to Part IV of the draft articles on the jurisdictional immunities of States and their property, his delegation considered that the purpose of the activity concerned should be given more prominence in the formulation of the provisions. The commercial activities of Governments of developing countries, for example, could not be equated with those of private entities. The principle of State sovereignty, whereby a State could not be made subject to another State's

(Mr. McKenzie, Trinidad and Tobago)

public authority without its consent, would also have to be considered. It was a well-established rule of customary international law that the property of a foreign Government was immune from attachment and seizure, a fact that Part IV appeared not to have stressed sufficiently.

21. With respect to the exceptions to the immunity of State property from attachment, contained in article 22, his delegation favoured a formulation that would extend the requirement of consent to attachment of property in commercial non-governmental service. With regard to the revised text of draft article 24, the deletion of the opening clause from the earlier text improved the formulation with respect to the types of State property generally immune from enforcement measures.

22. On the question of relations between States and international organizations, his delegation looked forward to the Special Rapporteur's suggestions on the possible scope of the draft articles to be submitted to the Commission at its thirty-eighth session. Finally, with regard to the law of the non-navigational uses of international watercourses, his delegation agreed with the Special Rapporteur's proposals concerning the manner in which the Commission might proceed with its work.

23. Sir John FREELAND (United Kingdom), referring to methods of work on the draft Code of Offences against the Peace and Security of Mankind, said that his delegation preferred the approach of elaborating general criteria in parallel with, if not in advance of, the identification of particular offences. He hoped that the Commission, with a minimum of further delay, would deal more specifically with the question of general principles. The great need for precision in the definition of those acts of individuals which were to be considered criminal would then become all the more apparent. But a precise definition could not be achieved if political slogans were included in any list of offences. He added that the Commission's efforts should be devoted exclusively to the international criminal responsibility of individuals.

24. With regard to the categories of offences suggested by the Special Rapporteur, the inclusion of terrorist acts seemed to be amply justified in contemporary circumstances and was susceptible to the necessary precision of definition. His delegation would not, however, accept that the category should be restricted to State-sponsored terrorism. All forms of terrorism, by whomsoever committed, called for condemnation as an offence against the peace and security of mankind. He was not convinced by the arguments advanced for the inclusion of a category revolving around "colonial domination". That was undefined and probably impossible to define with enough precision. If there were to be such a category, a more useful approach would be to criminalize every form of subjection of peoples against their will to alien subjugation or domination, in violation of the right to self-determination.

25. He was pleased that the Commission had referred to the Drafting Committee the first rather than the second alternative for draft article 2. It was important to maintain the clear dividing line between issues of State responsibility, which were the proper concern of the draft articles on that topic, and issues relating to the criminal responsibility of the individual, whether acting as such or in the

(Sir John Freeland, United Kingdom)

capacity of an agent of the State, which properly came under the draft Code; the second alternative had been unsatisfactory in that respect.

26. With regard to the topic of State responsibility, it was disappointing that the Commission had provisionally adopted only draft article 5. The wording in square brackets in paragraph 3 of that draft article seemed to be a desirable clarification. His delegation had doubts about the inclusion of paragraph 2 of draft article 11, which seemed to go too far in fettering the right of an injured State to have recourse to countermeasures in response to an internationally wrongful act, and about draft article 12 (b). He was not satisfied that the concept of jus cogens had a role to play in the law of State responsibility and saw no need, as a matter of law, for the inclusion of a reference to it in Part Two of the draft articles, which would only add confusion to an already difficult text. He would prefer subparagraph 12 (b) to be deleted, if not draft article 12 as a whole.

27. He welcomed the proposed outline of Part Three submitted by the Special Rapporteur and was convinced of the need for suitable mechanisms and procedures to ensure the effective application of the substantive provisions of Parts One and Two.

28. Turning to the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, he said that his delegation's central concern remained the need to control abuse of the diplomatic bag. There were no clear and easy solutions to that problem. The United Kingdom favoured a cautious approach to radical changes in the rules and had found that the rules of the Vienna Convention on Diplomatic Relations, supplemented by more general rules of customary international law relating in particular to self-defence and the duty to protect human life, offered greater flexibility of response than had perhaps been thought at first. Any changes to those familiar rules should not endanger the necessary fundamental balance between security of communications and restraints on possible abuse; neither should they inhibit international practices which acted as a safeguard, in particular the practice whereby diplomatic agents and couriers entitled to personal inviolability voluntarily subjected themselves to screening or search in the interest of air transport safety. He was concerned that the prohibitions on personal examination of the diplomatic courier in article 19 and the requirement that waiver from any immunities must be communicated in writing could cast doubt on such existing practices.

29. His delegation welcomed the moves made to reduce the level of new privileges and immunities for diplomatic couriers and to eliminate provisions which would be impractical to administer or would have no real effect. The inviolability of the courier's temporary accommodation would impose an unrealistic burden on the receiving State. His delegation opposed the granting of any immunity from jurisdiction: United Kingdom couriers who travelled without such immunity had never experienced difficulties in that regard. In view of the increasing number of incidents in which diplomats had relied on immunity to avoid their civil obligations, there should be no extension of the categories of persons who might be tempted to abuse immunity.

30. Referring to article 24, he said that the United Kingdom had recently revised its rules on the identification and handling of foreign diplomatic bags to reflect

(Sir John Freeland, United Kingdom)

its understanding of international law and practice and to enable the official origin and endorsement of all items purporting to be diplomatic bags to be checked. His delegation strongly agreed with the Commission's view in the commentary on article 24 that the rigorous application of the rules on the external marking of the bag operated in the interests of both sending and receiving States. He suggested, however, that the Commission might consider modifying the text of article 24 to include under "visible external marks" an indication of the destination and the consignee.

31. Concerning the content of the diplomatic bag, he found the Commission's commentary to article 25 to be helpful. His country's practice was not to allow items to be sent by the diplomatic bag if their import or export violated United Kingdom laws; that was the case with arms or explosives, regardless of any claim that weapons might be needed for official use. Draft articles 37, 39 and 40 were particularly helpful, but the key provision of the entire draft was article 36. Although electronic scanning should not be practised as a matter of routine, it should be allowed under specific circumstances when the grounds for suspicion were sufficiently strong. That view was in line with the conclusions reached by the United Kingdom Government in its recent review of the Vienna Convention on Diplomatic Relations.

32. His delegation had also followed with interest the discussion of the possibility of an optional régime under which States making a written declaration gree among themselves to treat diplomatic bags in the way in which consular re treated under the Vienna Convention on Consular Relations. That would like-minded States to agree that, when a State had serious reason to suspect bag contained prohibited items, it could demand that it be opened or d to its place of origin. The idea had undoubted attractions, but he had ngs, particularly in reading article 36 together with draft articles 42 and 43, as to whether the separate régimes might not in practice become too complex. A uniform régime for bags would be of great benefit to all States maintaining diplomatic relations and could be guaranteed only if the rules on treatment were standardized and could be easily applied by customs officers. He hoped that the Commission would not lose sight of the ideal of a uniform régime.

33. On the topic of the jurisdictional immunities of States and their property, he said that it continued to be his delegation's view, with regard to draft article 19 as provisionally adopted by the Commission, that State-owned ships employed in commercial service should not enjoy immunity. He therefore did not favour the inclusion of the double criterion of "commercial non-governmental service", which would pose difficulties of interpretation and narrow the exception unacceptably. The expression "non-governmental" should therefore be omitted wherever it appeared in square brackets in the draft article. The word "exclusively" in paragraphs 1 and 4 should also preferably be deleted. He was not in favour of retaining the formulation in the second set of square brackets in draft article 20, since the scope of the provision should not be restricted to differences relating to a "civil or commercial matter". There were difficulties inherent in any suggestion that might require those States which had recently passed legislation accommodating the distinction between acts jure imperii and acts jure gestionis now to move in a

(Sir John Freeland, United Kingdom)

reverse direction towards some extent of immunity. With regard to the second part of the topic of relations between States and international organizations, his delegation continued to have doubts about the scope for useful work by the Commission. On the topics of the law of the non-navigational uses of international watercourses and of international liability for injurious consequences arising out of acts not prohibited by international law, his delegation hoped that progress would be achieved along the lines envisaged by the Special Rapporteur. It supported the conclusions concerning the future work of the Commission, recorded in paragraphs 298 and 299 of the report.

34. Mr. GÖRÖG (Hungary), referring to the draft Code of Offences against the Peace and Security of Mankind, fully supported the Commission's decision to limit the scope of the draft to the criminal responsibility of individuals. It would be inconsistent with the generally accepted rules of international law and counter to the principle of State sovereignty for the draft to encompass the criminal responsibility of States, which should not be allowed to hide behind their sovereignty if they committed acts against the peace and security of mankind.

35. There was no reason why individuals should be divided into two categories - private individuals and agents of the State. He supported the much broader approach reflected in the first alternative of article 2, which made no such distinction.

36. His delegation found the distinction between two types of offences mentioned in paragraph 62 of the report to be somewhat artificial and concurred with the Commission's conclusion that an offence against the peace and security of mankind could be defined only if it were regarded as a single and unified concept. With regard to the definition of such an offence in article 3 of the draft Code, his delegation had no clear answers to the problems raised in paragraphs 71 to 73 of the report. It appeared at first glance that the first alternative of article 3 could never attain the required completeness; but the wording of the second alternative seemed too sweeping and the phrase "the international community as a whole" very vague. The answer might be the suggestion contained in paragraph 146 of the report to use the wording "applicable rules of international law".

37. With regard to the two alternatives for article 4, section A, his delegation welcomed the general agreement arrived at in the Commission that the offence of aggression should be included in the future Code. It was not easy to decide how it should be reflected, but it might be possible to incorporate the text of the definition contained in resolution 3314 (XXIX).

38. His delegation agreed with the inclusion of "threat of aggression against another State" in article 4, section B, and of "colonial domination" in article 4, section F. Those phenomena were still very much alive and several examples could be given.

39. Lastly, given its political and legal significance, the topic should again be considered as a separate item at the next session of the General Assembly.

40. Mr. KHALIK (Egypt), recalling the statements made by his delegation at previous sessions, drew attention to the importance of elaborating a code of offences against the peace and security of mankind, particularly in the light of the current international situation, and of including that item on the agenda of future sessions. The validity of the seven general principles formulated by the Commission at its second session must be reconsidered in the light of developments since 1950. To that end, the Commission should initially concentrate on identifying the criminal acts before formulating any general principles.

41. The aim of the draft Code would be defeated if it was limited to individual responsibility. State criminal responsibility must also be covered by the Code instead of being dealt with separately because the serious nature of State crimes deserved special punishment. In that connection, however, he recalled that his Government had agreed to the approach outlined in paragraph 65 of the report of the Commission on the work of its thirty-sixth session (A/39/10).

42. Concerning the article on individual responsibility, the first alternative proposed by the Special Rapporteur was preferable because it made no distinction between the authorities of a State and private individuals.

43. Expressing satisfaction about the work of the Commission in defining the scope of the concept of "an offence against the peace and security of mankind", he agreed that the criterion of "extreme seriousness" was the most appropriate characteristic of the offence. In that connection, the first version of article 3 as proposed by the Special Rapporteur provided a good working basis despite its direct link with article 19 of the draft articles on "State responsibility".

44. The Code should cover "the threat of aggression", despite the difficulty of ascertaining its existence. Regarding the preparation of aggression, his delegation supported paragraph 87 of the Commission's report, provided that aggression and the threat of aggression should be so defined as to include all borderline cases such as the stationing of troops along national frontiers without any further manifestation of aggression.

45. "Intervention in the internal or external affairs of another State" should also be among the offences covered by the Code, despite the difficulty of clearly distinguishing between internal and external affairs. A detailed discussion on that question would not only clarify that distinction but would also make it possible to work out a much more specific wording than the one contained in article 4 as set out in footnote 37. Indeed, that text should be made into a general provision and supplemented by the largest possible number of paragraphs, specifying the various acts to be covered by the general provision. They would not be limited to civil war and coercive measures of an economic and political nature, as envisaged 35 years earlier.

46. He went on to express satisfaction with the Commission's work on the question of terrorism and the hope that it would comment on the proposed draft article at its next session. Recalling his delegation's statement on item 137, he added that mercenarism should also be covered by the Code. Regretting the inconclusiveness of

(Mr. Khalik, Egypt)

the discussions on the notion of "economic aggression", he urged the Commission to take into consideration the seriousness of that offence from the point of view of the principle of permanent sovereignty over natural resources.

47. Mr. TREVES (Italy), expressing satisfaction with the Commission's progress on the topic of jurisdictional immunities of States and their property, said that the new formulation of article 19 was generally acceptable because it was simpler than the earlier version, in which the distinction between actions in rem and actions in personam would have made the provision very difficult to apply under legal systems such as the Italian one. However, referring to the formulation "commercial [non-governmental] "in paragraphs 1 and 4, he inquired whether it was the words between brackets or the brackets themselves that were to be deleted, or whether a more satisfactory solution could be envisaged. The difficulties reflected by the use of brackets stemmed from the negative formulation "unless otherwise agreed ... cannot invoke immunity", on account of which paragraph 2 might be unnecessary. However, since there had been no objection to the formulation "government non-commercial service" in paragraph 2, the problem apparently consisted in finding a formulation for paragraphs 1 and 4 that would encompass all State ships not covered by the formulation in paragraph 2. The formulation in paragraphs 1 and 4 should be "commercial or non-governmental", or simply "commercial", in view of the relatively minor importance of uses that were non-governmental and non-commercial.

48. Paragraph 7 of article 19 went too far in stipulating that "a certificate ... shall serve as evidence of the character of that ship or cargo." Indeed, it should be left to the judge to decide whether material submitted by the parties should constitute evidence. Any departure from that principle would be very difficult to accept. Moreover, the preceding provisions of article 19 might be made invalid if States could, at will, protect their ships against the jurisdiction of foreign courts.

49. Reaffirming his delegation's support for article 20, he pointed out that submission to a national court under article 20 presented no danger for the weaker party in the arbitral proceedings. Courts offered a guarantee in case of biased arbitration panels.

50. Turning to the question of immunity from enforcement measures in respect of property, he said that although the articles submitted to the Drafting Committee constituted a step in the right direction, they were too restrictive and called for refinement. Under Italian law, enforcement measures against the property of a foreign State were subject to the principle of reciprocity. That system, however, was being reformed because of its shortcomings. Ideally, the system should not only take into account the sovereign needs of States, but also ensure that private parties obtained the enforcement of such rights as had been granted to them by the court against the foreign State. A link must be maintained between exceptions to immunity from jurisdiction and exceptions to immunity from enforcement measures.

(Mr. Treves, Italy)

51. His delegation welcomed the shorter version of article 23 and particularly the deletion of paragraph (a), which might have been misinterpreted. Article 23 should apply only to cases not covered by article 22, and that relationship between the two articles should be spelt out clearly. The relationship between articles 23 and 24 however, was far from clear. If anything, article 24 should specify cases in which State property could not be subject to enforcement measures, even with the State's consent. However, there was little reason for a list of kinds of property relating to which States could give their consent, when there was a general rule on State consent in article 23. Article 24 might therefore be deleted because it was badly drafted and added nothing to the other provisions.

52. Recalling his delegation's statements on the question of the draft Code of Offences against the Peace and Security of Mankind during the thirty-ninth session of the General Assembly, he said that Italy would address that topic in detail in 1986, together with the question of relations between States and international organizations.

53. Mr. BRANQUINHO (Portugal), referring to the draft Code of Offences against the Peace and Security of Mankind, expressed support for the first alternative of article 2 on individual responsibility, because it was not restricted to State authorities. Indeed, some of the offences that could be committed by individuals were punishable per se under Portuguese law. They included genocide, racial discrimination and terrorism, and there was no need to establish a connection with State authority.

54. He agreed with the criterion adopted by the Special Rapporteur in article 3. However, the formulation of a general provision covering all punishable acts, in addition to those already specifically provided for, was not acceptable. Both versions of the article were based on vague concepts and failed to offer the degree of certainty and security required by criminal law. A specific list of punishable acts would be preferable, and the first alternative might serve either as a basis for the elaboration of that list, or as a general provision to be supplemented by specific criteria for determining the seriousness of a breach and the essential importance of the obligation in question.

55. By and large, the wording of paragraphs (1) to (9) in article 2 of the 1954 text, was satisfactory. However, although a large number of the acts covered by those paragraphs were provided for in the Definition of Aggression contained in General Assembly resolution 3314 (XXIX), the Code of Offences should not reproduce that Definition in extenso. For that reason, but also for the sake of greater clarity and precision, the first alternative of article 4, section A, was preferable. However, the competence of the Security Council regarding evidence of the aggression as provided for in paragraph (b) of article 4, section A, was not acceptable because it was likely to prejudice the independence of the body responsible for trying the perpetrators of the act of aggression. The courts must remain independent from the decisions of other bodies, especially political bodies. In addition, his delegation did not agree with paragraph (c) (viii) of article 4, section A, especially since the Security Council had no such powers under the Charter.

(Mr. Branquinho, Portugal)

56. Drawing attention to the progress achieved on the drafting of article 4, sections C, D and E, he said that the reference in section C to intervention in the internal or external affairs of States was too vague. Moreover, the wording of section E was also imprecise, and distinctions should be drawn on the basis of the seriousness of the breach and the nature of the obligations in question. However, since it would be difficult to work out a general formulation that would satisfy all requirements, a solution might be derived from the conventions and treaties referred to in section E which could provide a basis for determining punishable acts, or the seriousness of some of those acts.

57. Turning to the question of State responsibility, he said that his delegation was in favour of elaborating a convention based on the draft articles, particularly since the issues involved were closely related to those covered by the draft Code of Offences, which must be taken into consideration in that respect. However, it was important that the draft articles should lay down the rights of victim States and third States, as well as means of securing those rights.

58. Noting the progress achieved on the question of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, he said that the Vienna Conventions on diplomatic and consular relations must be taken into account in work on that subject.

59. Mr. BOEL (Denmark) said that he wished first of all to comment on the draft Code of Offences against the Peace and Security of Mankind. Although his delegation did not oppose the limitation of the scope of the draft Code to offences committed by individuals, it wondered to what extent that represented a real limitation, since the notion "individuals" covered both individuals acting in a private capacity and individuals acting as representatives of a State. The latter group of individuals would not only be held responsible in their own capacity, but would also bring into play the responsibility of the State they represented. However, a distinction between individuals and States might be relevant in connection with the penal sanctions to be applied against the individual perpetrator.

60. His delegation welcomed the attempt made by the Special Rapporteur to define an offence against the peace and security of mankind on the basis of the criteria set forth in article 19 of part one of the draft on State responsibility.

61. As to the delimitation of the scope of the topic ratione materiae, his delegation endorsed the view expressed by the Special Rapporteur that, in the formulation of the list of acts to be regarded as offences against the peace and security of mankind, it would be appropriate to take as a point of departure the list of offences drawn up by the Commission in 1954, which should be appropriately supplemented or updated. It was important to draw a distinction between, on the one hand, acts treated as offences in treaty law or customary international law and, on the other hand, offences that had so far been recognized only in non-binding instruments. The scope of the topic ratione materiae should be limited to the former category of offences. In any event, the draft Code could contain a clause calling for a review of the instrument every 5 or 10 years.

(Mr. Boel, Denmark)

62. It was becoming increasingly clear that the draft Code should be evaluated in the light of the draft on State responsibility. It was therefore to be hoped that the Commission would seek to move forward with the two topics simultaneously and in a co-ordinated manner.

63. His delegation noted that the Commission had made considerable progress on the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. It was important that the draft articles should make adequate provision for the prevention of misuse of the bag, and his delegation therefore wished to study in greater detail the various suggestions relating to the wording of draft article 36.

64. It was gratifying to note that the Commission had also made considerable progress on the topic of jurisdictional immunities of States and their property. His delegation endorsed the Commission's approach and supported the Special Rapporteur's endeavour to draw a distinction between acta jure imperii and acta jure gestionis. Denmark favoured a restrictive view of State sovereignty. When a State engaged in activities within the realm of private law and thus placed itself on an equal footing with private contracting parties, it must accept the law that was applicable to the latter. His delegation hoped that the Commission would be able to submit complete sets of draft articles on the topics of the diplomatic courier and jurisdictional immunities by the forty-first session of the General Assembly, in order to facilitate an overall evaluation of the extent to which the Commission had been able to strike a realistic balance between the conflicting considerations involved.

65. As in previous years, his Government would make scholarships available for representatives of the developing countries to attend the International Law Seminar. It hoped that funding would also be forthcoming from other quarters.

66. Mr. LACLETA (Spain), referring to a point raised at the previous meeting by the representatives of Venezuela and Panama, observed that according to a footnote relating to the title of the draft Code of Offences against the Peace and Security of Mankind (A/40/10, p. 6 of the Spanish version), the Spanish-speaking members of the Commission had expressed the view that, in Spanish, the title should refer to "crímenes" (crimes), not "delitos" (offences). It seemed that a similar problem arose in the English version. In Spanish, the word "crímenes" meant "delitos graves" (serious offences). There was considerable agreement among the members of the Commission that the draft Code should deal only with the most serious offences. Moreover, in connection with article 19 of part one of the draft on State responsibility, the Commission had already drawn a distinction between crimes and offences in general. His delegation therefore wished to suggest that, in the Spanish title of the draft Code, the word "delitos" should be replaced by the word "crímenes".

67. In other respects, his delegation endorsed the general approach taken by the Special Rapporteur and the Commission. However, it had serious misgivings about both of the alternative texts proposed for draft article 3. Since the draft Code

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must contain a description of the acts in question, a general definition would not be necessary. However, if a general definition was included, the second alternative put forward could be used, provided it was made clear that the serious offences recognized by the entire international community as crimes against the peace and security of mankind were solely the offences covered by the draft Code.

68. His delegation endorsed the views set forth in paragraph 81 and the following paragraphs of the Commission's report. It was obvious that account would have to be taken of the Definition of Aggression laid down in the annex to General Assembly resolution 3314 (XXIX). However, his delegation was fully aware of the difficulties involved in reproducing that text in the draft Code. Perhaps the problems in question could be solved by means of rules governing the implementation of the draft Code, which his delegation regarded as absolutely necessary. Spain was therefore in favour of the first alternative for section A of article 4. It shared the views expressed by other delegations on the concepts of the threat of aggression and the preparation of aggression, particularly the latter, which was extremely vague. Intervention in the internal or external affairs of a State could be regarded as an international crime, provided that the definition of the concept was precise enough and did not include the normal pressures exerted in negotiations between States. His delegation had no difficulty with the approach to the question of terrorism. In connectiion with that crime, it favoured the first alternative put forward for draft article 2. With regard to the forcible establishment or maintenance of colonial domination, his delegation could under no circumstances accept formulations that did not take account of General Assembly resolution 1514 (XV) and disregarded the principle of the territorial integrity of States. As to the question of mercenarism, the Commission should take account of the work of the Ad Hoc Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries. Lastly, his delegation was extremely doubtful about the concept of economic aggression.

69. The progress made by the Commission on the draft articles on State responsibility was to be welcomed. The current text of draft article 5 appeared to be an improvement. However, it was not entirely satisfactory where multilateral treaties and international crime were concerned. It was therefore to be hoped that the Commission would be able to draw a distinction, either in draft article 5 itself or in other draft articles, beween the directly injured State and the indirectly injured State. Although his delegation was somewhat doubtful about draft article 8, it could accept that text. The Commission should give close consideration to the limits set by draft articles 10 and 11. As it stood, draft article 10 was excessively restrictive, to the benefit of the author State. If that draft article was to be acceptable, provision must be made for effective machinery for the settlement of disputes. Naturally, his delegation believed that, in exercising the right to take reprisals, the injured State must act in accordance with the principle of proportionality and must fulfil its obligations under the Charter of the United Nations relating to the prohibition of the use of force.

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70. His delegation endorsed the paragraphs of the Commission's report concerning the proposals put forward by the Special Rapporteur relating to the possible content of part three of the draft articles, particularly paragraph 115. Spain had always stressed the need, particularly in connection with article 19 of part one of the draft, for effective procedures for settling disputes. The proposals put forward by the Special Rapporteur represented no more than a basic minimum.

71. His delegation noted that the Commission had made substantial progress on the topic of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. The solution proposed for draft article 18 was acceptable to his delegation. The significance of jurisdictional immunity lay in the fact that the diplomatic courier was not obliged to appear before a court in connection with questions relating to the execution of his duties.

72. The inviolability of the diplomatic bag was a fundamental principle, but the interests of the receiving State must also be safeguarded. The text of article 36, paragraph 2, seemed to solve the problems that arose. However, his delegation wished to draw attention to the increasing tendency to use the diplomatic bag as a means of transport for all kinds of objects, including objects of considerable weight and volume, provided that they were for official use. In view of the provisions laid down in article 36 of the Vienna Convention on Diplomatic Relations and in draft article 25, it would become increasingly difficult to prevent the diplomatic bag from becoming a means of transport. His delegation did not believe that the text of draft article 23, on the status of the captain of a ship or aircraft entrusted with a diplomatic bag, represented an improvement. The previous text, which had referred to the captain or a member of the crew, was preferable.

73. It was evident that there was a certain amount of confusion between the diplomatic courier proper and the "ad hoc" courier. A diplomatic courier was any person entrusted with making a trip or a number of trips for the purpose of transporting a diplomatic bag. Unlike the diplomatic courier, the ad hoc courier was not travelling simply in order to transport the diplomatic bag. The ad hoc courier had the status of a courier from the point where the diplomatic bag was entrusted to him to the point where he handed it over at its destination.

74. The Commission should make every possible effort to simplify the draft articles. His delegation believed that draft article 42 should be deleted and was, moreover, also dissatisfied with draft article 43.

75. His delegation welcomed the progress made by the Commission on the topic of jurisdictional immunities of States. It endorsed the Commission's approach to that topic and considered it absolutely essential that a distinction should be drawn between acta jure imperii and acta jure gestionis. However, the concerns of the developing countries could be met, if account was taken of the purpose of the activities in question. On the whole, the new draft articles adopted by the Commission were acceptable. However, the words in square brackets in draft article 19, paragraphs 1 and 4, should be deleted. That draft article should take account of the principles laid down not only in the 1926 Brussels Convention, but

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also in the 1958 United Nations Convention on the High Seas and the 1982 United Nations Convention on the Law of the Sea. His delegation was in favour of retention of the term "civil or commercial matter" in draft article 20. In general, it endorsed the draft articles that made up part IV of the text, but it did not regard draft article 21 as necessary and did not believe that a mere "interest" in property was sufficient. Moreover, the last sentence of draft article 22 should be revised.

76. The Commission did not appear to have considered the question of how a State was to invoke immunity before the courts of another State or the question of which authority was to settle any dispute as to whether in a given case one of the exceptions to the principle of immunity should apply. His delegation viewed such disputes as international disputes that should be treated as such. The Special Rapporteur and the Commission should consider that matter with due care.

77. With regard to the topic of relations between States and international organizations, his delegation endorsed the ideas embodied in the draft article relating to the international legal status of international organizations and their capacity to act as subjects of law in the context of the legal order of Member States.

78. It would be possible, on the basis of the work already carried out, to draw up general rules on international watercourses, as well as rules to facilitate co-operation among riparian States with a view to improving the management of such watercourses. The Commission should also continue its work on the topic of international liability for injurious consequences arising out of acts not prohibited by international law, bearing in mind that the aim was to avoid or repair physical transboundary harm caused by physical activities.

79. The efforts of the United Nations in the past 40 years relating to the codification of international law surpassed all previous endeavours. However, the progress made in drawing up substantive rules could not conceal the inadequacy of the rules governing implementation and of the machinery for the settlement of disputes. In that connection, he endorsed the views expressed in the Sixth Committee by the delegation of Mexico, as well as the appeal made by that delegation that the rulings of the International Court of Justice should be published in Spanish, too. Although Spain endorsed the methods of work of the Commission, it hoped that the Commission would make an effort to ensure that its report was circulated earlier.

The meeting rose at 6.15 p.m.