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New York

SUMMARY RECORD OF THE 30th MEETING

Chairman: Mr. AL-QAYSI (Iraq)

later: Mr. HERRERA CACERES (Honduras)

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The meeting was called to order at 10.50 a.m.

AGENDA ITEM 138: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS THIRTY-SEVENTH SESSION (continued) (A/40/10 and 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/17784)

1. Mr. ENKHASAIKHAN (Mongolia) said that, in the course of its 37 years of existence, the Commission had prepared a great number of important legal instruments, which had become rules of contemporary international law. Currently, it had before it about ten questions, the legal settlement of which would contribute to the strengthening of international security and the development of co-operation among States. His statement would focus on the question of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, which was dealt with in chapter IV of the report of the Commission (A/40/10); he wished to refer to paragraphs 175 to 203 of that report, on the examination by the Commission of the draft articles dealt with in the sixth report prepared by the Special Rapporteur. The completion of the work on the draft articles and their adoption by States would help to clarify the existing legal norms and partly to fill the gaps that persisted in the area of consular and diplomatic law. However, the report indicated that there was still disagreement on some articles, particularly on the provisions on the immunity of the diplomatic courier and the inviolability of the diplomatic bag, which were issues that were of primary importance on which his delegation wished to state its position.

2. Article 23 (new article 18), paragraph 1, provided that the courier should not be subject to the jurisdiction of the receiving or transit State in respect of all acts performed in the exercise of his functions. That provision was extremely important, and his delegation believed that the immunity in question should be unconditional, which was fully in keeping with the spirit of the Vienna Conventions, under which jurisdictional immunity was granted not for the benefit of the courier himself but in order to ensure the exercise of governmental functions.

3. Some delegations regarded article 23, paragraph 1, as a compromise text; in other words, it contained a limitation in respect of all acts performed by a courier in the exercise of his functions. His delegation was still of the view that the courier should enjoy total immunity from criminal jurisdiction, in view of the importance of his functions in maintaining normal relations between States. In its view, the assumption that the courier might take advantage of his position and that it was therefore desirable to limit the immunities he enjoyed was an argument that had no legal basis. Article 5, paragraphs 1 and 2, laid down the duties of the sending State in that connection, which consisted in seeing to it that the privileges and immunities granted were not used in a manner that was incompatible with the purpose of the articles, as well as the courier's obligation to comply with the laws and regulations of the receiving or transit State. In international practice, in cases where the courier was guilty of abuses, it was the sending State itself that had a duty to revoke the status of the diplomatic courier and to make him accountable for his acts.

(Mr. Enkhasaikhan, Mongolia)

4. The inviolability of the diplomatic bag also remained controversial. A variety of opinions had been expressed on draft article 36. His delegation endorsed the conclusion reached by the Special Rapporteur that it would be desirable to retain the already-established principle of absolute inviolability, while at the same time making provision for a certain amount of flexibility in the application of that principle. It believed, as many other delegations did, that the deletion from the original version of the draft article of the words "in the territory of the receiving or the transit State", after the words "wherever it may be", was appropriate. That step thus excluded the interpretation that the diplomatic courier did not enjoy the same degree of inviolability, for example, on the high seas or in the airspace above the high seas.

5. It was absolutely essential that draft article 41, which dealt with cases where States did not maintain diplomatic or consular relations, should be included in the future instrument. Many States still did not maintain diplomatic or consular relations with all other States, but diplomatic couriers continued to maintain communications between the States concerned and their various representatives and missions abroad. His delegation also believed that the question of the recognition of a State was duly reflected in the draft. Lastly, Mongolia hoped that, at its following session, the Commission would be able to complete its first reading of the 43 draft articles on the topic.

6. Mr. GOERNER (German Democratic Republic) said that his remarks would concern chapters IV and V of the report of the Commission (A/40/10). With regard to chapter IV, entitled "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier", his delegation wished to emphasize once again the importance it attached to the speedy drafting of an instrument that should help to fill certain gaps in the existing conventions on the topic and to establish a unified régime applicable to the diplomatic courier and diplomatic bags.

7. He wished to refer to various draft articles considered by the Commission at its thirty-seventh session; articles 37, 39 and 40 and the relevant amendments did not give rise to any major problems at the current stage, but he wished to reserve the right to comment on them once again at a later stage. On the other hand, his delegation had strong reservations in respect of the new version of article 23 (new article 18) on immunity from jurisdiction, paragraph 4 of which made it mandatory for the diplomatic courier to give evidence. Such a rule would create an unacceptable precedent that was likely to undermine the well-established standards laid down in the Vienna Convention on Diplomatic Relations, under which diplomatic couriers had no such obligation. A number of other issues remained pending, including the question of who was to determine which acts performed by the courier were of an official nature. If the determination of that matter was left to the discretion of the competent organs of the receiving State or the transit State, the likely result would be considerable restrictions on the exercise by the sending State of its sovereign rights. His delegation therefore believed that it would be desirable to retain the original wording of that paragraph.

(Mr. Goerner, German Democratic Republic)

8. With regard to article 36 on the inviolability of the diplomatic bag, it did not seem to be necessary to include in paragraph 1 the phrase "unless otherwise agreed by the States concerned", which was a departure from the principle of inviolability. That would be tantamount to calling into question a tried and tested precept of customary diplomatic law and would have serious implications for the régime governing the diplomatic courier and the diplomatic bag, as established under the Vienna Convention on Diplomatic Relations. Paragraph 2 of that same article seemed to negate one of the principles governing the freedom of diplomatic communications and to turn a proviso used in consular practice into a general principle; that approach was extremely likely to result in the total paralysation of communications between the State and its diplomatic and other missions abroad. His delegation was therefore in favour of deleting that paragraph; States that did not intend to apply the rules laid down in the Vienna Convention on Diplomatic Relations to all couriers could make declarations to that effect, in accordance with new draft article 43. Moreover, his delegation considered it regrettable that the reference to the duty of the receiving State and the transit State to protect the diplomatic courier and the diplomatic bag, which had been included in the original text of article 36, paragraph 2, had been deleted, and was in favour of including that principle in the draft articles once again.

9. With regard to draft article 41, his delegation was in favour of the current text, which reflected the practice of a great number of States and was in keeping with the main objective of the overall draft, namely, to safeguard the sovereign right of any State to communicate with all its official foreign missions, even in exceptional circumstances. Where article 42 was concerned, his delegation shared the view of the majority of the members of the Commission, who had called for the reintroduction of paragraph 1 of the original text. His delegation had always believed that the future instrument on the matter in question ought to complement the four existing conventions on diplomatic and consular law. Moreover, the German Democratic Republic accepted the inclusion of new article 43, provided that it was made absolutely clear that optional exceptions were at variance with the content and the objective of the draft as a whole and must neither erode the régime established under the Convention on Diplomatic Relations nor strengthen the régime established under the Convention on Consular Relations.

10. Concerning chapter V on "Jurisdictional immunities of States and their property", he noted with regret once again that the Special Rapporteur had failed to take into account the suggestions made by the representatives of the group of socialist States and by those of various developing countries. The concept of "restrictive" immunity was not acceptable to a large number of States. The discussions in the Sixth Committee had clearly shown that the majority of States were interested in having the norms on jurisdictional immunities of States and their property based on the principle of sovereign equality of States. Yet, the legislation of a few capitalist States had been chosen as the basis of part IV of the draft. His delegation could not agree that such legislation should become the guideline for the whole international community. States should conduct their mutual relations in conformity with the principle of sovereign equality, and consequently a State could not be subjected to the jurisdiction of another State

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without its express consent. That important principle had not been sufficiently taken into account in part IV. The draft articles should embody the principle that the property of a State must not be subjected to legal enforcement measures unless the State concerned expressly accepted them. It was regrettable that the draft articles seemed more likely to dilute the internationally recognized principle of State immunity than to codify it in a manner acceptable to all groups of States.

11. His delegation also wished to comment on the articles discussed at the thirty-seventh session of the Commission, as well as on other drafts contained in the Special Rapporteur's seventh report. It shared the Commission's view regarding paragraph 1 of article 19. In the German Democratic Republic, ships were nationally owned. They were assigned to shipping companies which operated them on their own responsibility. Such national enterprises were legal entities which, under domestic legislation, were required to meet their liabilities from the funds available to them and on their own behalf. In its current form, article 19 allowed for proceedings to be instituted also against States which owned but did not operate ships; the commentary to that article noted that it was a question of the choice of parties against which to bring an action - the State or the operator of the ship. That position was not acceptable to the German Democratic Republic.

12. The wording of article 20 also gave rise to some questions, since the relationship between immunity and jurisdiction had been turned upside down. Consent to arbitration implied that the jurisdiction of a permanent court of a State would not be applicable. His delegation could not follow the proposition of the Special Rapporteur contained in paragraph 255 of his sixth report (A/CN.4/376/Add.2) that where a State consented to arbitration, it would be an irresistible implication, if not an almost irrebuttable presumption, that such a State had waived its immunity in respect of all questions arising from the arbitration, including legal proceedings. It would welcome an affirmation of the principle of immunity in article 20 as a basic premise. A waiver of immunity from the jurisdiction of a court of another State must then be made dependent upon a statement to that effect by the State concerned.

13. Part IV of the draft articles was entitled "State immunity in respect of property from enforcement measures". A rule existed in international law which provided that State property enjoyed immunity from any enforcement measure by any jurisdictional or administrative authority of another State. The articles proposed by the Special Rapporteur did not appear to codify such norms of customary law but to set up new rules to change customary law and, above all, to abolish the principle of absolute immunity in that area. Such an objective was unacceptable to his delegation.

14. It also seemed that the term "control" in article 21 was not clear enough and could therefore give rise to legal uncertainties. It would be advisable to refer only to State property or to property in the possession of the State. That observation also applied to other articles such as articles 22 and 23. Furthermore, the words "without its consent" in article 22 should be deleted, since the existence of immunity was not dependent on the consent of the State concerned.

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The rights ensuing from the owner's title comprised, pursuant to the national laws of most States, rights of possession, usufructuary rights and rights of disposal. The formulation "measures of constraint upon the use of property" in article 22 should therefore be examined to ensure that it was not too restrictive. The same observation also applied to article 24, paragraph 1. With regard to article 22, it was not conclusively explainable why legal proceedings should become necessary in respect of property which had already been specifically earmarked for the settlement of a claim. The wording of article 23, which the Special Rapporteur had submitted to the Drafting Committee, still appeared too complicated; its title should also be reworded to conform with article 8.

15. During the discussions in the Commission on draft article 24, which also relied on the national legislation of a few capitalist countries, it had been pointed out that the provision was intended to protect developing countries from pressures which might be exerted against them to force them to waive their immunity. However, an inverse conclusion might also be drawn, namely, that any type of State property not mentioned in that article should, a priori, be subject to enforcement measures. Regrettably, draft article 24 seemed to assume the non-immunity of State property as a starting-point. His delegation would prefer that article to begin with its current paragraph 2 and to list in subparagraphs (a) to (e) the categories that should in no case be considered as property used for commercial and non-governmental purposes. With respect to article 24, the reference to article 20, paragraph 3, of the Civil Code of the German Democratic Republic, which was contained in footnote 140 to the Special Rapporteur's seventh report was not correct. Article 20 of the Civil Code contained provisions on the protection of people's property and did not cover the assets of diplomatic missions.

16. With regard to the Commission's work programme, his delegation would appreciate speedy progress on the codification projects, particularly on such important topics as those covered in chapters II, IV, and V of the report. The Commission should be able to finalize, even in its current term of membership, the first reading of the draft articles on the status of the diplomatic courier. Concerning the topic of jurisdictional immunities of States and their property, his delegation continued to believe that the interests of all groups of States must be given due consideration. Any premature decision which did not rely on a broad consensus would make that important codification project unacceptable to a number of States.

17. Mr. GOROG (Hungary) said that the Commission had achieved substantial progress on a number of topics, such as the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. However, his delegation was not satisfied with the slow progress made on other topics. It intended to speak on the draft Code of Offences against the Peace and Security of Mankind when agenda item 133 was being considered.

18. The topic of State responsibility was one of the most important on the Commission's agenda, and his delegation attached great importance to the establishment of generally accepted norms on that subject. For the time being, it wished to make some observations on draft articles 5 and 15.

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19. The definition of "injured State" was one of the most delicate problems, since it determined whether a State could avail itself of the rights and other means appertaining to an injured State. The text of article 5 needed further refining. The enumeration, in paragraph 2, of acts which constituted an infringement of rights was rather arbitrary. Since it could not be exhaustive, it would be simpler to include wrongful acts in two categories: those which constituted an infringement of a right arising from a bilateral treaty and those relating to a multilateral treaty. His delegation was convinced that subparagraph (e) (iii) of article 5, which arbitrarily included special rules among the hitherto general rules, would be totally unacceptable to a number of countries. Consideration should therefore be given to the omission of that part of the text.

20. In its current form, draft article 15 was incomplete, particularly since it covered one of the gravest international crimes. That draft article should also specify the rights of States which were victims of aggression, including the right of self-defence.

21. Part three concerned one of the most disputed fields of current international law, namely, that of the settlement of disputes by a third party. His delegation did not question the analogy between, on the one hand, the situation envisaged in the Vienna Convention on the Law of Treaties dealing with the question of the invalidity, termination and suspension of the operation of treaties and, on the other hand, the situation resulting from an internationally wrongful act committed by a State. It was obvious that if, under the provisions of part two, an injured State exercised its new rights, under certain circumstances a dangerous escalation could be set in motion, which would really threaten relations between the States involved in the situation.

22. The Special Rapporteur intended to avoid that danger by introducing a compulsory conciliation procedure along the lines of the Vienna Convention on the Law of Treaties and the United Nations Convention on the Law of the Sea. His delegation agreed that it was necessary to have means for dispute settlement, but the most appropriate means could be devised only if one took into account the theoretical concepts and practical procedures of a broad range of States, including the socialist countries. The Vienna Convention on the Law of Treaties provided a good illustration of the need for caution, because the reason why so few States had acceded to that Convention lay in the fact that its provisions on the settlement of disputes, particularly the possibility for one of the parties to resort unilaterally to the International Court of Justice, were unacceptable to a great number of States. His country was one of those which preferred a negotiated settlement of disputes and normally refused to accept procedures by which one of the parties might, by a unilateral decision, submit the dispute to a third party for judgement. His delegation hoped that the Commission would expedite its work on the elaboration of a broadly acceptable international legal instrument on State responsibility.

23. Turning to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, he noted with satisfaction the progress made on

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that topic, which should receive priority in the Commission's programme of work. Although several delegations were of the opinion that it was not absolutely necessary to draft new provisions in that regard, in view of the instruments already in existence, his delegation was convinced that if the rules were elaborated and adopted in the form of an appropriate legal instrument, they would enhance the effectiveness of the rules governing inter-State relations and co-operation. In other words, the draft currently in preparation would achieve its purpose only by consolidating the existing rules and concentrating on questions that were not covered by the four basic conventions.

24. His delegation was in full agreement with the proposed wording of article 36, declaring the inviolability of the diplomatic bag, and also considered that the bag should be inviolable at all times and wherever situated, that it should not be opened or detained, and that apart from routine identification checks of visible marks, seals and other external features, it should be exempt from customs inspection or similar examination through electronic or mechanical means, which might be prejudicial to its inviolability and confidential character.

25. Paragraph 2 of article 36 ensured sufficient flexibility of application, in so far as it allowed the receiving State to request return of the bag if there were serious grounds to assume that it contained something other than documents or articles for official use. His delegation approved of the idea of combining former draft articles 37 and 38 into a new article 37. It also agreed to the combination of draft articles 39 and 40 into a single article.

26. Draft article 41, on contact with special missions even in case of non-recognition of a State or the absence of diplomatic relations between the sending State and the receiving State, met an important practical need. His delegation believed that the topic deserved increased attention because work on it was about to conclude.

27. Turning to the question of jurisdictional immunities of States and their property, he said his delegation was of the opinion that progress on that topic had been merely apparent, and that no substantive step had been taken to move closer to the goal of elaborating a broadly acceptable legal instrument. The difficulties could be explained by the lack of clarity of the concept of State immunity, or its different interpretations. His delegation had said time and again that it saw no chance of success unless clear answers were found to the fundamental questions involved.

28. The immunity of one State from the jurisdiction of another State had always been one of the fundamental principles of international law. His delegation was well aware that the extent of immunity, which was the crux of the matter, had been determined by States on the basis of historical, economic and social conditions, and had ranged from absolute to relative or functional immunity. Immunity was viewed in different ways by States whose economy (including foreign trade) was managed wholly or in part by the State itself, and by those States where the economy was basically operated by the private sector.

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29. Jurisdictional immunity followed from the principle of sovereign equality of States. Just as there were concepts of absolute and limited sovereignty, the current concepts and practices of States concerning immunity covered the full spectrum of ideas between the two extremes. Hungary, as a socialist country, recognized the jurisdictional immunity of States as a basic principle of law and applied it consistently. A Hungarian court or other authority could not have jurisdiction in any matter involving a foreign State or its property, unless immunity had been expressly waived by that State.

30. Draft article 22 was a good illustration of what he had said earlier, because it could not be framed unless article 6 was elaborated or unless the fundamental question was answered. If the majority of members of the Commission adopted the concept of absolute immunity of States, then State property would be immune from judicial measures of constraint, even if that property was in commercial or non-governmental service. Should that concept not prevail, there might be endless debates over the meaning of commercial and non-governmental service.

31. His delegation was of the opinion that only a document which took fully into account not only the interests of the industrialized countries, but also the socio-economic interests of the developing countries and the socialist countries, as well as their legal systems, was likely to be broadly accepted. That implied a middle-of-the-road approach.

32. Turning to the question of the law of the non-navigational uses of international watercourses, he said that for geographical reasons, his country was particularly interested in the elaboration of legal norms on the topic. It agreed with the approach which the new Special Rapporteur intended to take. The basic concepts regarding future regulation had changed three times within a short period, which indicated the need for clarification of the major issues. The new Special Rapporteur had suggested that draft articles 1 to 9 should not be subjected to another general debate; however, in view of the fact that no consensus had been reached on those articles during the past year, the possibility of returning to that topic could not be excluded.

33. Mr. KEKOMAKI (Finland) said that the Commission had for some years not been in a position to submit a final set of articles on the topics before it to the General Assembly. That was not in itself a reason for concern. While it had not yet been possible to produce final results, the quality of the Commission's work was mainly due to the prudent and scholarly manner in which its deliberations had always been conducted. Expediting the work at the expense of the quality of results would certainly not promote the cause of the development and codification of international law.

34. Some of the topics before the Commission had, however, been on the agenda for a very long time. That applied particularly to State responsibility, and while recognizing the scope and complexity of the many problems involved, his delegation hoped that the work could be completed in the near future. The answer was not to put more pressure on the Commission, given the efficiency with which it tackled,

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every year, the various topics on its agenda. Over the next few years, however, it could perhaps devote much more time to the question of State responsibility. Without compromising the standard of its work or diverting attention from other equally important projects, it would be desirable for the Commission to have the time and the necessary facilities to speed up its consideration of the topic.

35. With regard to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, he said that the work of the Special Rapporteur had proceeded at a satisfactory pace. In order not to lose momentum, special attention should be given to the topic in the time available for the Commission's deliberations.

36. The Special Rapporteur had submitted a revised text of draft article 36 concerning the inviolability of the diplomatic bag. The rule of absolute inviolability formed the basis for the article: that rule was clear, well established in international practice, and free of possibly confusing technical considerations.

37. According to paragraph 2 of revised article 36, the authorities of the receiving State might, in case of serious suspicion of the contents of the bag, request that it be returned to its place of origin. That might well reflect the normal course of events under the exceptional circumstances envisaged. It would seem, however, from the wording of the paragraph, that there was a possibility that the sending State might be willing to allow the bag to be opened. If it was thereby proved not to contain anything improper, it would obviously not be necessary for the bag to be returned.

38. Note should nevertheless be taken of the distinction established by the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations between the diplomatic bag and the consular bag. His delegation would be prepared to consider a unified régime for both of them along the lines of the Convention on Consular Relations. It had nevertheless also noted with interest the other options put forward in the Commission, leaving, in varying degrees, the choice of the régime applicable to a particular bag to individual States. The comprehensive régime envisaged by revised draft article 43, as proposed by the Special Rapporteur, would provide a systematically more advanced solution. The plurality of régimes suggested therein might, however, prove somewhat complicated in practice. The suggestion appearing in paragraph 182 of the Commission's report, addressing specifically the question of the inviolability of the diplomatic bag in relation to the consular bag, might therefore provide an adequately flexible and clear solution.

39. Although some promising progress had been made on the topic of the law of the non-navigational uses of international watercourses, work was still far from completion. His delegation noted with satisfaction that, in the report presented by him, the current Special Rapporteur had demonstrated his intention of building as much as possible on the progress already achieved. That decision was important, since the second report submitted by Mr. Evensen, the then Special Rapporteur,

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deserved to be used as a basis for further discussions. Moreover, in the light of the need to complete the work on the topic as soon as possible and to reach generally acceptable solutions, State practice and well-established customary rules should not be overlooked. Similarly, it was worth recalling that, in adopting its resolution on the law of international watercourses in 1970, the General Assembly had noted that it had been agreed in the Sixth Committee that intergovernmental and non-governmental studies on the subject should be taken into account by the International Law Commission in its consideration of the topic.

40. The specific confines of the topic of international liability for injurious consequences arising out of acts not prohibited by international law had still to be defined. His delegation had already expressed some concern at the notably broad approach that had characterized treatment of the topic. It hoped that more time could be devoted to a closer determination both of the goals to be achieved and the means of reaching them.

41. The Commission had made encouraging progress on the draft Code of Offences against the Peace and Security of Mankind. His delegation was in general agreement with the approach chosen by the Special Rapporteur, particularly with regard to the outline of the future Code put forward by him. As regards the delimitation of the scope of the topic, his delegation had already expressed its agreement with the Commission's decision that, at least for the moment, its efforts should be focused on the criminal responsibility of individuals. As for the possible exclusion of private individuals, as distinct from agents of a State, his delegation felt that it was neither necessary nor desirable to draw such a distinction. The decisive factor in identifying an offender under the Code should obviously be the nature of his criminal activity. It might be presumed that, in order to constitute an offence serious enough to affect the peace and security of mankind, a violation would usually be committed by State machinery as operated by its agents. It was not, however, unthinkable that private individuals or other private entities could commit acts constituting offences under the Code.

42. The criteria used to define an offence against the peace and security of mankind should, in the view of his delegation, be of a general nature so as to provide a framework in which a more specific enumeration of the acts concerned could take place. It would therefore prefer the approach of the first alternative of articles 3, contained in footnote 34 to paragraph 71 of the Commission's report. A mere statement, as in the second alternative, to the effect that any internationally wrongful act recognized as such by the international community as a whole was an offence under the Code, would hardly facilitate the identification of the offences in question.

43. The link between the first alternative and article 19 of the draft on State responsibility was interesting. In principle, his delegation was not opposed to linking the two topics in that way, but it reserved its position as to the specific contents of the provision. Obviously, general agreement on each of the categories of wrongful acts would be necessary in order to make the identification of the offences concerned possible.

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44. With regard to acts constituting an offence against international peace and security, his delegation concurred with the observation in paragraph 78 of the report that the notion of the peace and security of mankind went beyond relations between States. The category of offences falling under the concept of crimes against humanity appeared to gain importance given that international law had increasingly come to concern itself with the rights and obligations of individuals.

45. With regard to acts seriously affecting the relations between States, it might be argued that a redrafting of the Definition of Aggression as adopted by the General Assembly in 1974 would not be necessary for the purposes of the Code; that a threat of aggression might constitute an offence against the peace and security of mankind, but also that a provision to that effect would be of little practical value if the threat envisaged was not defined in a precise manner; that the same observation would seem to apply to the preparation of aggression, which could readily be brought under the concept of a threat of aggression; and that reference to intervention short of aggression might only cause confusion. It was obvious that what might, from a subjective point of view, be described as interference in the internal affairs of another State would not always amount to an offence against the peace and security of mankind.

46. His delegation wished to stress its interest in the other topics on the Commission's agenda. It recognized the importance and complexity of the topics of the jurisdictional immunities of States and their property and of relations between States and international organizations.

47. As had been its practice for many years, the Government of Finland intended once more in 1986 to grant a fellowship in order to contribute to the participation of a national of a developing country in the annual International Law Commission seminar on international law.

48. Mr. Herrera Caceres (Honduras) took the Chair.

49. Mr. MAZILU (Romania), referring to chapter IV of the Commission's report, concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, said that article 18, formerly article 23, had given rise to considerable difference of opinion both in the Commission and in the Sixth Committee on whether the courier should be entitled to civil and administrative immunity only or to immunity from criminal jurisdiction as well. The safety of the diplomatic courier, an official of the sending State who performed official State functions associated with the protection and transport of the diplomatic bag, was necessary for the normal exercise of his functions. Granting the courier the status of the administrative and technical staff of missions would constitute only a minimum guarantee and only full immunity from criminal jurisdiction would provide the courier with the legal protection he required. Such a course of action would also be in conformity with the provisions of the multilateral conventions in the field of diplomatic law adopted under the auspices of the United Nations.

(Mr. Mazilu, Romania)

50. Another important question was the duration of the privileges and immunities of the courier. Article 21 stipulated that the privileges and immunities were extended to the courier from the moment he began to exercise his functions. His delegation considered it desirable that that moment should be better defined, in terms of whether it was the moment of his appointment or that in which he actually took custody of the bag. Neither the text of the article nor the commentary contained any clarification of that matter.

51. With regard to article 23, which had been improved, there was no question that the captain of a ship or aircraft entrusted with the diplomatic bag was responsible for it; however, there was nothing to prevent the captain, under internal administrative arrangements, entrusting physical custody of the bag placed under his responsibility to a member of the crew. Moreover, the use of the expression "ship or aircraft in commercial service which is scheduled to arrive at an authorized port of entry" gave the provision in question more precision and flexibility. Furthermore, article 23, paragraph 3, was of great practical value, expressing a widespread practice in legal terms.

52. The draft articles on the identification, contents and transmission of the unaccompanied bag gave expression to concepts already affirmed in existing international conventions on the subject.

53. The full inviolability of the diplomatic bag was a basic guarantee for the freedom of official communications between States and their missions, and that principle should therefore be set forth in the draft. The prohibition of any kind of examination or inspection, whether direct or indirect, was of particular importance in that connection. The use of electronic or mechanical devices might breach the confidential character of the contents of the bag, especially in view of the rapid technological advancements in that field. At the same time, there was no doubt that the use of such devices would place a number of countries which did not possess them at a disadvantage.

54. A measure of flexibility was necessary in applying the régime contemplated in the draft, in order that it might be accepted by the greatest possible number of States. In that connection, his delegation would prefer a régime based on the Vienna Convention on Diplomatic Relations, the 1969 Convention on Special Missions and the 1975 Convention on the Representation of States and their Relations with International Organizations of a Universal Character.

55. With regard to the draft Code of Offences against the Peace and Security of Mankind, the Commission should define the responsibility of States and individuals in that field and draw up a complete list of offences against the peace and security of mankind. The Code should include a general definition of the concept of an offence against the peace and security of mankind, which should incorporate such essential criteria for identification as the internationally wrongful nature of the act, the fact that it was detrimental to fundamental interests of the international community and the fact that it constituted an offence against the international community as a whole.

(Mr. Mazilu, Romania)

56. The list of offences against the peace and security of mankind should include such internationally wrongful acts as the planning, preparation, initiation or waging of a war of aggression, the forcible establishment or maintenance of colonial domination, genocide, apartheid and violations of the laws or customs of war. The Code should also indicate that acts constituting conspiracy, direct incitement or attempts to commit such offences or constituting complicity in the commission thereof, were themselves offences.

57. In his delegation's opinion, the definition of terrorist acts contained in article 4, section D, was too vague. It might be better to omit the definition and to enumerate the acts which constituted terrorist acts, as was done in subparagraph (b), though in parts too vaguely. If mercenarism was not dealt with in a separate provision, the part of the Code dealing with mercenaries should be developed and strengthened. However, since that part was embodied in a very general manner in the 1974 Definition of Aggression, whose substance could not be changed, there was a good case for dealing with mercenarism in a separate provision.

58. With regard to economic aggression, the corresponding offences in the Code, such as pressure, etc., should be elaborated and strengthened so as to take special account of that type of aggression.

59. In order to ensure the inevitability of punishment for persons guilty of offences against the peace and security of mankind, the Code should qualify those offences as not subject to statuatory limitations and should provide for the prosecution or extradition of the offenders. The fact that an individual had participated in an international offence in accordance with the policy of an author State or in the execution of that policy should not be regarded by any State as grounds for granting political asylum to the imdividual in question. Moreover, the Code should include provisions concerning co-operation among States in conformity with the United Nations Charter for the prevention of offences against the peace and security of mankind and the punishment of persons who were guilty of their commission.

60. With regard to State responsibility, he stressed that the purpose of the draft was to define the nature of internationally wrongful acts, to determine liability for them and to define the legal consequences and the measures which the countries affected might take in response. In that regard, what was required were clear, understandable, convincing and, as far as possible, uncomplicated guidelines. The essential purpose was not to make it easier for legal experts or law courts to assess the legal aspects of a case a posteriori but to give the draft articles on State responsibility a preventive character, namely, to prevent the commission of internationally wrongful acts and to ensure that, should such acts be committed, the reaction of the injured State was kept within an appropriate legal framework.

61. Article 5 established a crucial legal link between the internationally wrongful act and the permissible reactions to it. With its central notion of the "injured State", the object of that provision was to determine in a legally

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relevant manner the State affected by the wrongful act, while, at the same time, the status of the "injured States" was to be the basis for justifying countermeasures. It was essential to identify the injured State, i.e., the State whose right had been violated by the internationally wrongful act of another State and which was therefore entitled to take countermeasures and to seek redress. Two approaches were possible: either to simply say that an injured State was the State a right of which had been infringed or to give more precise indications, specifying which State was to be considered the injured State in a given situation, taking as a basis either 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, etc.). Taking the differences of opinion into account, the Commission had combined the two approaches, giving a general definition of "injured State" in paragraph 1 of draft article 5 and specific indications in paragraph 2.

62. As an international crime was always by definition an internationally wrongful act, article 5, paragraph 3, might be understood as having the intention of enabling all States to exercise the rights arising under articles 6 to 9 in the event of an international crime. However, it was still unclear whether and to what extent those rights were to be restricted again by articles 14 and 15.

63. His delegation shared the view expressed in the Commission that the proposed articles formed a good working basis. However, some of them still required considerable elaboration. For example, the consequences of international crimes, which were the subject of articles 14 and 15, were presented too concisely and were not comprehensive enough. Similarly, the Commission should make several adjustments to article 6 to 13, which dealt with general classical consequences of internationally wrongful acts.

64. Article 14, paragraph 3, according to which the exercise of the rights arising under paragraph 1 of that article was "subject ... to the procedures embodied in the United Nations Charter with respect to the maintenance of international peace and security" appeared to answer the fundamental question whether the international community as a whole or every individual third State might react in the event of an international crime. In his delegation's view, the solution proposed by the Special Rapporteur should be reconsidered. Determination of the legal consequences of an internationally wrongful act could not be left to the provisions and procedures in the Charter. If, in the event of any threat to the peace, breach of the peace or act of aggression, the United Nations was required to take the necessary measures in accordance with Chapter VII of the Charter, that chapter did not cover all the aspects of the international responsibility of States. The Commission and the Special Rapporteur should therefore make new efforts to prepare a comprehensive definition of the legal consequences of an internationally wrongful act of a State. In that connection, it would be necessary to consider again the whole range of problems pertaining to the measures which were available to States, either collectively or individually, and to grade those measures according to the nature of the wrongful act and the extent to which States were affected.

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65. With regard to jurisdictional immunities of States and their property, his delegation considered that it was necessary to view the draft as a whole in order to have a clear idea as to how the principle of State immunity could be reconciled with exceptions meant to protect the interests of other States. The draft should define more precisely the immunity of States in respect of the activities and properties serving to accomplish diplomatic and consular functions. It was also necessary to take into account the fact that States were increasingly engaging in economic activites under intergovernmental agreements and must enjoy full jurisdictional immunity in that respect. Exceptions from State immunity did not justify legal action against a State or its property arising from contracts concluded or activities undertaken by a State enterprise which had legal personality and its own capital.

66. The work of the Commission on that topic gave rise to concern because of the place accorded to the concept of "limited immunity", which went against the principle of sovereign equality of States. The argument that a State which engaged in commercial activities was no longer entitled to immunity was specious. It should be emphasized that the economic function was no less important than the sovereign function. Ships being used for public State purposes must have immunity. The practice of a number of countries was not reflected in the draft articles submitted to the Commission, and the division of State property into commercial and non-commercial property appeared to be disputable.

67. The Commission had been unable to reach agreement, and that was reflected in the brackets which appeared in paragraphs 1 and 4 of the proposed article. Should one refer to a "ship engaged in commercial service" or to "ships engaged in commercial non-governmental service"? His delegation shared the view of developing countries that foreign courts should not exercise jurisdiction over such operations, on the grounds that their commercial character should not deprive them of the immunity attached to their governmental nature. A new formula should therefore be found in order to protect State property in all its forms.

68. Draft article 20 laid down the principle that a State which had entered into an arbitration agreement with a foreign natural or juridical person could not invoke its jurisdictional immunity before a court of another State that was competent for the purposes of arbitration. That article as drafted did not apply to intergovernmental arbitration agreements; secondly, it did not apply if the parties had otherwise agreed; thirdly, the courts could exercise jurisdiction on three specific problems only: the validity or interpretation of the arbitration agreement, the arbitration procedure and the setting aside of an arbitral award. Thus, the courts could not interfere unduly in the arbitration procedure or try to substitute themselves for the arbitral tribunal.

69. His delegation considered that the power to decree measures of constraint - attachment, arrest or forced execution - affecting the property of a State was not included in the general jurisdictional powers of the courts. If a State had consented to the jurisdiction of a court, a separate waiver was necessary for the court to be able to take such measures. That principle could very well be enunciated in Part II of the draft articles, which dealt with general principles. Therefore, Part IV now proposed would not be necessary.

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70. With regard to the law of the non-navigational uses of international watercourses, he noted that, as indicated in paragraph 286 of the report under consideration, the members of the Commission had approved the intention expressed by the new Special Rapporteur in his preliminary report to take as much account as possible of the progress already made and to aim at further progress in the form of the provisional adoption of the draft articles. His delegation considered that that approach was the right one, because the subject was complex, and in order to ensure that the work was brought to a successful conclusion the Commission and the Sixth Committee should endeavour to find formulations that could protect the interests of all States.

71. Mr. HUANG Jiahua (China) said that the formulation of a draft Code of Offences against the Peace and Security of Mankind had been on the Commission's agenda since its creation. The debates on the subject had brought home the fact that acts which presented threats to peace and security, such as aggression, expansionism, armed occupation, interference in the internal affairs of States and apartheid, were mainly perpetrated by State entities. The draft Code should take that fact into account. Although the differences of opinion concerning the criminal responsibility of States - and perceived difficulties in implementation - had prompted the Commission to limit the scope of the project to the criminal responsibility of individuals, that choice should not rule out subsequent consideration of the applicability of the concept of the international criminal responsibility of States, with due regard to the views and observations of Governments. Nevertheless, the draft itself or its commentary should specify that the punishments envisaged applied mainly to individuals or to agents exercising State powers in the name of or on behalf of a State and not to individuals generally.

72. The elaboration of general principles should be based on those defined for the Nürnberg and Tokyo trials, which should, however, be supplemented in the light of the development of international relations and international law.

73. With regard to the offences to be included, all the acts mentioned in the third report of the Special Rapporteur (A/CN.4/387) should certainly be retained, but new categories of crimes should be added, taking account of post-war experience. The draft Code should be comprehensive and precise, as was desirable as in the case of any penal provisions.

74. With regard to jurisdictional immunities of States and their property and, more particularly, Part IV of the draft on State immunity in respect of property from execution, his delegation recalled that that immunity was directly related to jurisdictional immunity of States, which itself ruled out the possibility of any attachment and execution of the property of one State by the court of another State, however, waiver of the former did not automatically entail waiver of the latter. The international community considered the attachment and forced execution of the property of another State as a major action that might have serious consequences for inter-State relations. For that reason, the inviolability of the principle of immunity of State property from attachment and execution was of

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greater importance. His delegation believed, like the Special Rapporteur, that immunity from attachment and execution was more absolute than immunity from jurisdiction. The latter allowed of exceptions, whereas the attachment and execution of State property could be carried out only with the express consent of the State concerned, and such consent would be considered null and void if the property involved was non-attachable. That principle should be fully reflected in part IV of the draft articles.

75. Article 22 was the key provision and should therefore express the general principle of immunity from attachment and execution. However, the opening phrase of the initial text, "In accordance with the provisions of the present articles", in fact negated the independent existence of that priniciple. The Commission should consider in that connection the precedent of draft article 6, where the same wording had been a source of difficulty. His delegation considered also that certain exceptions to the immunity provided for in that article were inappropriate, especially that provided for in paragraph 1 (d). That provision was based on the theory of limited immunity, which was widely disputed among States and detrimental to normal relations between them, in particular to the maintenance and development of economic and trade relations. An extension of the resultant distinction between acta jure imperii and acta jure gestionis to the question of immunity from attachment and execution would be tantamount to authorizing the courts of a State to enforce at will attachment and execution of the property of another State, with the serious consequences that could be imagined. Such a provision would also render totally meaningless the principle that immunity from attachment and execution was more absolute than immunity from jurisdiction. Moreover, even the European Convention on State Immunity, which was the only multilateral convention based on limited immunity, contained a clear stipulation prohibiting execution of State property without the necessary consent.

76. Article 23 confirmed that no form of attachment or execution of State property could be carried out without the express consent of the State concerned. That provision was in keeping with the basic principle of sovereign equality of States and general international practice. It should, however, be spelt out that consent to the exercise of jurisdiction was not the same as consent to attachment and execution, which required separate expression. The revised version of draft article 23 proposed by the Special Rapporteur should serve as a basis for the continuation of the Commission's work.

77. His delegation agreed in principle with the general approach and basic content of draft article 24, although its specific provisions had yet to be studied further. In general, it believed that the draft articles as a whole must be in conformity with the principle of sovereign equality of States, be fully responsive to the international practice and interests of all States and be conducive to international co-operation and exchanges.

78. Regarding State responsibility, his delegation believed that Part II must include adequate provisions concerning the legal consequences of international offences. It was particularly necessary to focus on the ergo omnes nature and the consequences of such offences, which differed from those of internationally

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wrongful acts, otherwise the distinction between international offences and internationally wrongful acts of a general nature would be without any practical significance. Draft articles 5 (e) and 14 had apparently taken that into account. Paragraph 2 of article 14 was certainly necessary, but should be accompanied by the formulation of more "positive" obligations such as the obligation of other States to give political and moral support to the injured State. That aspect would have to be explored further. In addition, the draft articles on the obligations of the author State and the rights of the injured State should try to facilitate the prevention of internationally wrongful acts and eliminate the consequences and compensate the losses caused by them, while avoiding improper restrictions on the lawful relief measures, including reciprocal and retaliatory measures, taken to help the injured State. Draft article 7 on the obligations of the author State should state clearly that "the author State has the obligation to take the following measures". Draft article 10 should also be reworded to prevent the author State from prolonging the internationally wrongful act on the pretext of a necessary exhaustion of dispute settlement procedures and from obstructing the exercise of legitimate rights by the injured State. There was also a need to prevent pressure from being exerted on other States, especially small and medium sized States, and the principle of proportionality introduced into paragraph 2 of draft article 9 was therefore reasonable and necessary.

79. Part III relating to dispute settlement procedures should be both realistic and flexible in order to ensure the effectiveness of the instrument and its widespread acceptability.

80. With regard to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, his delegation noted that the draft articles adopted provisionally by the Commission maintained the proper balance between the different needs and interests of sending, receiving and transit States. Draft articles 18 and 36 were core articles, discussion of which had revealed divergent viewpoints. Draft article 18 was acceptable in principle and his delegation believed that article 36 must confirm the principle of the inviolability of the diplomatic bag, thereby protecting it from arbitrary detention and inspection, before the necessary provisions to prevent abuse of the diplomatic bag could be drafted. It hoped that the Commission would be able to complete its first reading of the draft as a whole before its present mandate expired. It was pleased to note the Commission's decision to resume consideration of the topic entitled "Relations between States and international organizations" and to appoint new special rapporteurs on the topics "The law of the non-navigational uses of international watercourses" and "International liability for injurious consequences arising out of acts not prohibited by international law".

81. His delegation noted that some of the important international conventions elaborated by the Commission had won broad support and hoped that the Commission would continue to conform to the requirements of international reality, developing a body of international law which contributed to the building of a better world.

82. Mr. Al-Quaysi (Iraq) resumed the Chair.

83. Mr. BENNOUNA (Morocco) said that the experience gained by the Commission with regard to the draft Code of Offences against the Peace and Security of Mankind since that topic had been placed on its agenda when it was first set up should enable it to avoid the now familiar pitfalls.

84. His delegation agreed with the Special Rapporteur's proposal to limit the subject-matter of the draft Code at the current stage to offences committed by individuals, for it was preferable to wait until the Commission had completed its deliberations on article 19 of the draft articles on State responsibility and until a definition of international offences had been adopted before envisaging possible penalties. It also found the plan suggested by the Special Rapporteur to be coherent.

85. As for the scope of the draft Code, his delegation believed that the very subject of the Code and the circumstances under which States and societies now functioned no longer justified the distinction that the 1954 draft made between individuals acting as the authorities of a State and those acting as private individuals. Private individuals with considerable means often in fact acted on behalf of States without being vested with any authority. In view of the gravity of the offences which the draft was aimed to prevent and punish, all individuals should be covered, whatever their social or political function.

86. With regard to the definition of offences against the peace and security of mankind, the unity of the concept appeared to be well-established since it involved protecting the sacred values of mankind and not the interests of one or other State or group of States.

87. The second alternative of article 3 proposed by the Special Rapporteur sought to establish a link between the existence of an international offence and a breach of the rule of peremptory law defined in article 53 of the Vienna Convention on the Law of Treaties, 1969. Such an offence was not, as the Special Rapporteur proposed any internationally wrongful act recognized as such by the international community as a whole, since it was not the act that was recognized but the obligation. His delegation suggested therefore that the second alternative of article 3 should read as follows: "Any internationally wrongful act resulting from a breach of an international obligation of essential importance for the safeguarding of the fundamental interests of mankind and recognized as such by the international community is an offence against the peace and security of mankind". The first alternative could then be placed after that sentence to form a single provision which would enunciate a definition and follow it with illustrative examples.

88. Of the two alternatives proposed by the Special Rapporteur in connection with the question of aggression, his delegation preferred that which simply referred back to the text of General Assembly resolution 3314 (XXIX). All in all, for the definition of the offences covered it favoured a general formulation which would take into account the evolving nature of contemporary international law and leave the door open to any future adaptation and progressive development. In the case of aggression, the definition could be the following: "Acts qualified as aggression by the rules of current international law shall be regarded as offences against the peace and security of mankind".

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89. His delegation believed that to mention the threat and preparation of aggression would be to introduce into the future Code subjective elements which might detract from the objective pursued. The question of economic aggression, for its part, should be dealt with from the standpoint of foreign intervention and constraint to deprive peoples of the right to choose their own political, economic and social systems. At the same time, the concept of intervention should be analysed in greater depth in order to retain only specific acts such as terrorism and mercenarism. Universal condemnation of the terrorism which currently exposed entire regions to the risk of war argued in favour of an explicit reference to acts of that type in the future Code. The Commission's discussions and the international legal instruments in force might serve as reference for the Special Rapporteur in arriving at an appropriate definition.

90. His delegation had taken note of the intention announced by the Special Rapporteur in paragraph 85 of the Commission's report to devote an independent provision to mercenary activities. The draft Code could not in fact ignore such acts against the sovereignty, political independence and territorial integrity of States, nor the actions of those who financed them and used them as a subtle means of thwarting the right of peoples to self-determination. His delegation also considered it desirable to approach the question of the maintenance of colonial situations from the standpoint of the exercise of the right of peoples to self-determination and to qualify as an offence any act aimed at obstructing or denying the exercise of that right on whatever grounds.

91. It also considered it necessary to take account of developments in international law, for instance with regard to human rights in the general meaning of the word, in order to condemn acts of constraint aimed at depriving a people of its right to choose freely its political, economic and social system.

The meeting rose at 1.30 p.m.