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SUMMARY RECORD OF THE 29th MEETING

Chairman: Mr. AL-QAYSI (Iraq)

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The meeting was called to order at 3.30 p.m.

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

AGENDA ITEM 133: DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND: REPORT OF THE SECRETARY-GENERAL (A/40/451 and Add.1 to 3; A/40/331-S/17209, A/40/786-S/17584) (continued)

1. Mr. AENA (Iraq) endorsed the International Law Commission's decision to restrict its work on the draft Code of Offences against the Peace and Security of Mankind for the time being to the criminal responsibility of individuals and to consider at a later stage the criminal responsibility of States. Since it was concurrently considering Part Two of the draft articles on State responsibility, it was appropriate to wait until its work on the two topics had progressed sufficiently before deciding where to deal with the question of the criminal responsibility of States. His delegation supported the view expressed in paragraphs 57 and 59 of the ILC report and accordingly favoured the first alternative of draft article 2 of the draft Code. As to the definition of the offence, his delegation shared the view of the Special Rapporteur described in paragraph 69. The definition should take as its starting-point the same approach, but not necessarily the same formulation, as was reflected in article 19 of Part One of the articles on State responsibility. He endorsed the first alternative of article 3 and hoped that the Drafting Committee would be able to provide a clear definition along the lines of the approach adopted in that provision.

2. With respect to acts constituting an offence against international peace and security, he agreed with the distinction outlined in paragraph 76 between the notions of "international peace and security" and "peace and security of mankind". His delegation approved the inclusion of such acts as aggression, the threat of aggression, intervention, the international content of terrorism, forcible establishment or maintenance of colonial domination and mercenarism. With regard to aggression, a detailed approach based on General Assembly resolution 3314 (XXIX), which contained the definition of aggression, was preferable. However, a number of the provisions in that resolution would not be appropriate within the framework of the Code. Nonetheless, those provisions were an integral part of the package-deal definition and, accordingly, of the consensus, which had led to the approval of the definition. Consequently, particular care should be taken to reflect in the Code the required substance of the definition without destroying the underlying consenus.

3. On the question of State responsibility, his delegation was gratified to learn from paragraph 117 that the structure of Part Two had been generally acceptable to the Commission, and agreed with those members who felt that the special consequences of international crime should be further elaborated. He also welcomed the emerging consensus in the Commission that, in view of the conflicting political interests in questions of State responsibility, legal and judicial safeguards should be elaborated to guard against abuse. That would result in the strengthening of the law of State responsibility and, in turn, of the international legal order.

(Mr. Aena, Iraq)

4. He wished to highlight the important achievement of the Commission in adopting article 5 on the definition of "injured State". That key article linked Part One, which defined the author State, and Part Two, which set out the legal consequences of the internationally wrongful act. The criticism voiced regarding the reference in the text to the sources of the obligation breached by the internationally wrongful act was amply answered by paragraph (4) of the commentary. Furthermore, the addition of subparagraph (c) in article 5, paragraph 2, filled a gap. The words in square brackets in paragraph 3, when read in the light of paragraphs (26) to (28) of the commentary, indicated the Commission's conviction that the legal consequences of international crime might require further elaboration. Consequently, there was no doubt that restricting the work of the Commission in Part Two to the traditional fields of State responsibility would create an unacceptable inconsistency with Part One.

5. His delegation welcomed the progress achieved on the subject of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. The need to conclude the work on that topic promptly was fully borne out by recent events. He was gratified to note that the Commission had maintained a reasonable balance between the requirements of consolidation and amplification and the interests of States in security and free communication.

6. In the light of paragraphs (4) and (5) of the commentary to article 18, he did not believe that article 18, paragraph 1, represented a compromise between two clearly cut bodies of opinion, as was claimed in paragraph (2) of the commentary. Consequently, the point had yet to be resolved. Moreover, if the solution envisaged in the paragraph as it now stood could be said to represent a third body of opinion in the Commission, which he felt it did, the commentary must explain clearly the relationship between the provision and article 16, under which the courier enjoyed personal inviolability and would not be liable to any form of arrest or detention.

7. After summarizing the discussion in the Commission concerning the application of the rule of absolute inviolability and exceptions thereto, he said that he still had doubts regarding the Special Rapporteur's conclusion that article 36 should call for inviolability at all times, as was the case for a diplomatic bag stricto sensu, and should contain a provision concerning the consular bag and a reference to the declaration of optional exceptions provided for in article 43. If that conclusion implied acceptance of the proposal made under article 36, he wondered what rule would be applicable in the case of a State which made a declaration under article 43 that it would apply the draft articles to diplomatic bags stricto sensu and another State which made a declaration under article 6 that it would apply the régime of the consular bag to diplomatic bags. Conversely, if the conclusion reached by the Special Rapporteur was that the proposal for the option was not accepted in article 36 and that optional exceptions should be confined to article 43, then States that were parties only to the Vienna Convention on Diplomatic Relations would be able to restrict the application of the draft articles to the diplomatic bag and courier stricto sensu. States that were parties to that Convention and to the Vienna Convention on Consular Relations would not be

(Mr. Aena, Iraq)

in a position to solve the problem of abuse of the diplomatic bag under the provision of inviolability, as they could not make an optional exception under article 43 limited to that point only. That might hinder wide acceptance of the draft articles. His delegation hoped that that fundamental difficulty would be resolved.

8. Turning to the question of the jurisdictional immunities of States and their property, he said that, because there was still controversy in the Commission, his delegation would comment at a later stage, after the Commission had completed its work on the topic.

9. With regard to the question of relations between States and international organizations (second part of the topic), he failed to understand why the second report of the Special Rapporteur on the subject and the Commission's discussion thereon had not been summarized in the ILC report. He looked forward to receiving further information in the future.

10. He agreed with the proposals of the new Special Rapporteur concerning the manner in which the Commission should proceed with its future work on the law of the non-navigational uses of international watercourses. However, he was puzzled to hear doubts expressed regarding the viability of the topic and its vital importance to States, given the absence of such views in the Commission. To stretch the requirement of consent to absolute limits was an invitation to tension and chaos and ran counter to the duty of States to co-operate and to the principle of good-neighbourliness. In view of the increasing scarcity of fresh water, the only rational solution was optimum management through fair allocation and co-operation to satisfy needs in a reasonable manner. The Commission had drawn up a framework convention as a guideline for States, and that work should be applauded rather than hindered by arguments which appeared to have natural characterstics as their sole basis.

11. His delegation looked forward to a timely resumption of consideration of the question of international liability for injurious consequences arising out of acts not prohibited by international law.

12. In conclusion, his delegation welcomed the decisions of the Commission regarding its programme and methods of work highlighted in chapter VIII of the report.

13. Mr. MIKULKA (Czechoslovakia) said, with regard to State responsibility, that Part Two, like Part One, should cover the general characteristics of the content, forms and degrees of State responsibility. It would be a mistake to deal with the content of State responsibility in specific cases, as that might give the impression that the articles covered the question exhaustively, which definitely was not the case. Specific points relating to the content of State responsibility would be covered in bilateral and multilateral agreements along with the primary obligations to which they referred.

(Mr. Mikulka, Czechoslovakia)

14. Accordingly, his delegation objected to the fact that certain provisions in Part Two - in particular article 5, paragraph 2 (e) (iii), article 6, paragraph 1 (a), and article 7 - dealt with specific issues and threatened to undermine the coherence of that Part. Moreover, responsibility arising out of the violation of human rights and fundamental freedoms or obligations pertaining to the treatment of aliens was inadequately covered in those provisions. Similarly, the consequences of the behaviour of a State in violation of a multilateral treaty dealt with in articles 11 and 13 would be governed largely by the multilateral treaty itself or, if it were not, by the relevant norm of the law of treaties. Accordingly, the question did not belong in Part Two.

15. With regard to the definition of the injured State contained in article 5, his delegation endorsed the central idea whereby the injured State was a State whose right had been infringed by the internationally wrongful act of another State. However, neither article 5 as presently worded nor the remainder of the draft articles indicated what difference existed between the right of "directly" injured States and the right of "indirectly" injured States in dealing with the responsibility of the State which had committed a wrongful act. Instead, article 5, paragraph 2, went into excessive detail regarding the sources of the infringed right, and paragraphs 2 and 3 lumped together the situation of States that were directly and indirectly injured. That gave the impression that the measures in article 6 would be available to any State that had been directly or indirectly injured. The Commission should take up article 5 again and clarify those questions so that other problems could be resolved on the basis of incontestable premises.

16. With regard to the difference of views in the Commission concerning the first part of article 6, paragraph 1, his delegation could accept the language proposed by the Special Rapporteur since it adequately stated the course of action open to the injured State without compelling it to select that option. The concept of reparations in article 6, paragraph 2, should not be limited to monetary payment: as borne out in international practice, in some cases reparations could be made through the provision of material assets. Lastly, consideration should also be given to whether the list in article 6 was truly complete and whether it should include other measures such as satisfaction.

17. Because article 7 was too specific, it should be deleted. Since articles 8 and 9 both dealt with the same category of countermeasures, namely reprisals, they could be merged in a single article. The principle of proportionality stated in article 9, paragraph 2, was entirely justified and would therefore apply to all the countermeasures envisaged. An unresolved question remained with respect to articles 8 and 9, namely how to determine the exact moment at which the injured State was entitled to apply countermeasures. The answer did not emerge clearly from article 10 either. Moreover, article 10 was based on the misguided idea that international responsibility could be implemented only within the framework of institutionalized procedures for the peaceful settlement of disputes. The falsity of that idea was borne out by international practice.

(Mr. Mikulka, Czechoslovakia)

18. With regard to article 12 (a), there was no question that the suspension of obligations under a convention could not result in reprisals if that was expressly ruled out by an international treaty. Accordingly, the principle should be formulated in more general terms so that it was not restricted to cases of diplomatic and consular immunities. Moreover, he had doubts as to whether the prohibition of reprisals applied equally to article 8 and article 9. The question arose whether the injured State was obliged to honour the prohibition even where the violation of international law pertained to the immunities of its diplomatic or consular mission. If the injured State could not secure the cessation of the wrongful behaviour, it might be able to resort by way of reciprocity, to reprisals in the same area as that affected by the other State's continuing wrongful acts. International practice in that regard should be examined more thoroughly.

19. The rule set out in article 12 (b) did not give rise to any doubt. The rule was clear and well-founded in international law, and any exceptions were strictly limited in nature, as in the case of self-defence in the face of armed aggression.

20. Article 14 did not clearly define the international legal consequences of an international crime. Paragraph 2 (a) and (b) in particular was open to interpretation a contrario, whereby situations created by internationally wrongful acts might be recognized as legal. Paragraphs 2 (c), 3 and 4 were also unclear. Article 14 must therefore be redrafted with a view to clarifying the distinction between the consequences of a wrongful act and those of an international crime. However, his delegation's views regarding the criminal responsibility of States remained unchanged and had already been expressed in its earlier statement on the draft Code of Offences against Peace and Security of Mankind.

21. The separate provision on the crime of aggression was fully justified and article 15 should therefore be included in Part Two of the draft.

22. Expressing optimism about prospects for the completion of work on the question of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, he said that despite current differences of opinion among the members of the Commission, article 18 should incorporate the concept of the full immunity of the diplomatic courier from criminal jurisdiction, as provided for under the 1961 Vienna Convention on Diplomatic Relations.

23. Turning to article 36, he said that his delegation attached primary importance to the strict inviolability of the diplomatic bag and to the exclusion of all forms of inspection likely to prejudice the strictly confidential nature of its contents. Article 36 should therefore generally prohibit all forms of inspection, including electronic. Indeed, its wording offered an acceptable measure of flexibility which would enable States to conclude agreements on mutual inspection procedures and deal with specific cases.

24. Article 37 should focus exclusively on tax exemption, and exemption from customs inspection should be provided for under article 36.

(Mr. Mikulka, Czechoslovakia)

25. Article 39 should be redrafted so as to cover not only the termination of the functions of the diplomatic courier but also other cases in which he might be temporarily unable to exercise his functions.

26. Despite the current controversy the basic idea underlying article 40 was not being called into question. A diplomatic courier or bag entering the territory of a State unexpectedly should generally enjoy the same treatment and inviolability as a diplomatic courier or bag whose arrival had been duly notified, irrespective of how the State in question was informed of its unexpected entry.

27. The inclusion of article 41 in the draft was justified. Indeed, it constituted a parallel to article 82 of the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character.

28. Article 42, paragraph 1, did not clearly establish the relationship between the instrument being drafted and the large number of accepted international agreements which already covered the same questions. In that respect, the Special Rapporteur's initial proposal was preferable to the existing draft. However, in view of the importance of that question for the application of the future instrument, the Commission should give the matter further consideration after finally deciding on the contents of the instrument.

29. Article 43, which was likely to exacerbate rather than solve the problems posed by the existence of various other instruments governing the status of diplomatic couriers and bags, and thereby defeat the aim of unifying international practice and developing general norms of international law.

30. Turning to the question of the jurisdictional immunities of States and their property, he reiterated his country's concern about the general trend of codification in that area. The draft articles submitted by the Special Rapporteur, as well as most of those already adopted, were based on the questionable theory of "functional State immunity" whereby the so-called acta jure gestionis of the State - as opposed to acta jure imperii - were placed on an equal footing with the activities of natural and legal persons. The same observations applied to article 19. His delegation was unable to subscribe to that rule. Most of the 20 articles already drafted reflected only the views and legislation of one group of States. The views and practice of the Socialist and most of the developing countries had not been duly taken into account. In order to avoid failure and preserve confidence in ILC as an impartial body, the Commission should seriously reconsider the advisability of continuing codification in that area in a manner which a large number of States did not support.

31. Mr. ROSENSTOCK (United States of America) said that, despite the crucial importance of the report of the International Law Commission, the manner in which the Committee was dealing with that item was unfortunately not constructive. A succession of learned statements was being delivered but few of those present were actually listening, and even the statements by the most outstanding members of the legal profession were often lost. He wished to urge the Committee to consider better ways of dealing with the item on the report of the Commission.

(Mr. Rosenstock, United States)

32. It was still doubtful whether the Commission should be asked to work on the Draft Code of Offences against the Peace and Security of Mankind. That task was more political than legal, exceedingly difficult and of questionable value. Moreover, it had been undertaken too hastily and without a real set of criteria for identifying the offences, which was essential if concrete results were to be achieved. Despite the need for a more detailed analysis of the issues raised by the draft articles, the Special Rapporteur had been pressed for time, and matters had been referred too hastily to the Drafting Committee. For example, there were shortcomings in both versions of article 3. The first was an imprudent departure from the 1954 approach and consisted of an enumeration of vague generalities making no provision for the fact that the act should be recognized as a crime by the international community as a whole. The second version was simply too vague. Draft article 4 derived from General Assembly resolution 3314 (XXIX), yet attempts to use that resolution as a basis for legal action reflected a lack of understanding, not only of the nature, object and purpose of the resolution itself but also of the process of elaborating legal norms. The approach adopted, including attempts to incorporate such vague notions as the threat of aggression, was more likely to lead to chaos and exacerbate controversy.

33. Convinced that the Commission was right to focus on individual responsibility, his delegation was in favour of rejecting once and for all the notion of the criminal responsibility of States because its implications, especially in terms of the punishment of a State, were difficult to grasp.

34. Concerning the question of State responsibility, his delegation was gratified by prospects for the completion of Part Two of the Commission's work, and expressed the belief that a number of questions would be clarified by work on Part Three. The reference in draft article 5, paragraph 3, to "an international crime" was not soundly based. Were such a notion to be included, the phrase inside square brackets would make it explicit that "all other States" did not have the right to free recourse to all of the remedies provided for in draft articles 6 to 9. It was premature to comment on the other draft articles. Draft article 10, in particular, needed careful examination. The existence of a mechanism for the settlement of disputes did not rule out all countermeasures. As it stood, draft article 11 might give rise to the same problem to a certain extent. His delegation was pleased to note that the Commission would be able to make progress on Parts Two and Three in 1986, since it would then be in a position to embark on the simplification of Part One, which should include but not be restricted to the deletion of draft article 19.

35. His delegation doubted that there was a need for further codification in the area of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. Amalgamating separate rules designed for separate circumstances into one rule for all circumstances was not necessarily either desirable or describable as codification or progressive development of international law. His delegation was inclined to reserve its comments for the time being. It was to be hoped that the Commission would not devote to that topic time that could so much more usefully be devoted to such topics as State responsibility, jurisdictional immunities of States and their property and the law of the non-navigational uses of international watercourses.

(Mr. Rosenstock, United States)

36. His delegation was pleased to note that the Commission was continuing to make progress on the topic of jurisdictional immunities of States and their property. It was regrettable that further consideration of draft articles 21 to 24 had not been possible owing to lack of time. The notion of commercial service to which immunity would apply was both unreasonable and inconsistent with the entire thrust of the draft articles adopted so far in first reading. The nature of a given activity must govern the question of immunity; where the nature of the activity was commercial, the fact that it might be conducted by a State organ was not a basis for the assertion of immunity. Formulations such as "commercial and non-governmental service" were unhelpful. His delegation was pleased to note that the Commission expected to complete its first reading of the draft articles on jurisdictional immunities of States and their property at its 1986 session.

37. The Commission should not spend time on the topic of relations between States and international organizations, to the detriment of consideration of other more pressing issues, particularly since the nature of the topic was such that it was likely to give rise to all sorts of doctrinal difficulties. However, on balance, his delegation was not troubled by the general thrust of the work submitted by the Special Rapporteur on that question.

38. It was regrettable that, for reasons beyond its control, the Commission had made no progress on the topics of 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. Where the former topic was concerned, his delegation trusted that an appropriate balance would be struck between, on the one hand, building on the work carried out so far and, on the other hand, avoiding the temptation to abandon key perceptions already accepted by the Commission. Likewise, his delegation trusted that the Commission would build on the work already carried out on the topic of international liability for injurious consequences arising out of acts not prohibited by international law, including the recommendation that it had endorsed at its 1984 session that the scope of the topic should be limited to physical activities causing or threatening physical transboundary harm.

39. The 1985 session had positioned the Commission for an exceptionally productive conclusion of the current quinquennium in 1986.

40. Mr. ALI (Pakistan) said that his delegation was pleased to note that the Commission hoped to complete its first reading of the draft articles on the topics of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and jurisdictional immunities of States and their property before the conclusion of the current term of membership. It shared the concern expressed by the Commission at the delays in the publication of the Yearbook of the International Law Commission and believed that it should be given priority. Furthermore, the publication The Work of the International Law Commission should be updated, in accordance with the recommendation made by the Commission. His delegation also wished to appeal to the States that had made generous contributions in the past to raise their contributions so that the International Law Seminar could continue to be held without interruption.

(Mr. Ali, Pakistan)

41. The content of the draft Code of Offences against the Peace and Security of Mankind should be limited to the parameters set by the title. Any effort to make the draft Code all-encompassing, through the inclusion of concepts that were predominantly political, would make its adoption no more than a remote possibility. The view expressed in the report of the Commission (para. 62) that "an offence against the peace and security of mankind" could be defined only if it was regarded as a single and unified concept meant that a crime against a State was in fact also a crime against mankind. The Special Rapporteur was right to limit the offences in question to the serious circumstances indicated in paragraph 69 of the report. However, the inclusion of "preservation of the human environment" was a matter of concern to his delegation. The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques and other similar instruments might serve as a guide in that connection.

42. If the threat of aggression became a crime, it would automatically give rise to the exercise of the right of self-defence. Its inclusion in the draft Code would therefore be counter-productive. It must be borne in mind that Article 51 of the Charter of the United Nations permitted a State to exercise that right before reporting to the Security Council. His delegation believed that the right of self-defence, which was subject to the limits of Article 51, would in fact become a right of self-preservation. The Israeli attack on an Iraqi nuclear reactor should serve as a warning in that connection.

43. The concept of "preparation of aggression" might not be legally justified. It would provide a strong State with a ready pretext for taking military action against a weak one. Furthermore, the Commission would have to take an objective approach to the question of intervention in the internal or external affairs of another State so as to ensure that that crime did not become an instrument to be used against small States. His delegation was sceptical about the inclusion of the concept of terrorism in the draft Code, since its boundaries were yet to be determined. It also had doubts about the inclusion of the principle of the violation of a treaty designed to ensure international peace and security. However, it had no objection to further consideration of that concept by the Commission. Since the vestiges of colonialism were disappearing, the value of a provision on colonial domination was diminishing. In the current circumstances, the establishment of colonialism would be tantamount to aggression and military occupation, which were separate and far more serious offences. The deprivation of the right to self-determination should be seen in the light of the relevant United Nations resolutions. Where the issue of mercenarism was concerned, the Commission would have to give consideration to the interrelationship between treatment of that question in the draft convention that was under preparation and its treatment in the draft Code. Lastly, it would be virtually impossible to establish an objective definition of the concept of economic aggression. It should be borne in mind that that concept would be used as a pretext for military aggression by strong States.

44. His delegation was pleased to note the progress made by the Commission on the topic of State responsibility. In draft article 5, the definition of an "injured State" was now so broad that even an unrelated State could regard itself as an

(Mr. Ali, Pakistan)

injured State, particularly where paragraph 2, subparagraph (e), was concerned. The provision in paragraph 3 would depend on the final text of the draft Code of Offences against the Peace and Security of Mankind. Since the scope of the draft Code was being broadened, the matter was becoming extremely complicated. His delegation therefore hoped that the Commission would give the text of paragraph 3 further consideration.

45. 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. The draft articles must be based on the following three fundamental principles: each State had the potential capacity of a sending State, a third State and a receiving State; the bag was to be used for official communications; the inviolability of the bag was intended to maintain the confidentiality of official communications.

46. In draft article 25, paragraph 1, the phrase "articles intended exclusively for official use" was not in conformity with the term "official communications", but his delegation was prepared to accept it. The beginning of that paragraph should read: "The diplomatic bag shall contain only official correspondence". The beginning of paragraph 2 of that same article should read: "The sending State shall take the necessary measures". Article 27 should read: "The receiving State or, as the case may be, the transit State shall, as permitted by local circumstances, provide the facilities necessary for the safe and rapid transmission or delivery of the diplomatic bag". Where draft articles 36 to 43 were concerned, an effort must be made to eliminate the possibility of misuse of the bag, while maintaining its inviolability. Furthermore, due account must be taken of the interests of the receiving State in respect of such matters as customs.

47. With regard to the jurisdictional immunities of States and their property, certain activities carried out by States should not be regarded as commercial activities. That was particularly applicable to developing States that had mixed economies or were establishing non-profit development corporations. His delegation noted with satisfaction that State property had been made immune from attachment and execution, as indicated in draft article 15, paragraph 3. However, since State immunity was greatly diminished in other draft articles, the protection provided in that paragraph would have little impact.

48. His delegation urged the Commission to give priority to the topic of the law of the non-navigational uses of international watercourses and was pleased to note the statement made in the second sentence of paragraph 287 of the report.

The meeting rose at 5.15 p.m.