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SIXTH COMMITTEE
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held on
Tuesday, 5 November 1985
at 10 a.m.
New York

SUMMARY RECORD OF THE 28th MEETING

Chairman: Mr. AL-QAYSI (Iraq)

later: Mr. MÜTZELBURG (Federal Republic of Germany)

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The meeting was called to order at 10.40 a.m.

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

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

1. Mr. MWANDEMBWA (United Republic of Tanzania) said that in view of the current international situation, the draft Code of Offences against the Peace and Security of Mankind was of particular importance, for such an instrument not only would bring hope of peace and security to mankind, but also would deter those who were out to disturb peace and create war from carrying out acts which would be prohibited as offences or crimes by the Code. Preparation of such an instrument would also have a positive effect on the codification and progressive development of international law. His delegation believed that the 1954 draft Code constituted an acceptable basis for the continuation of work on the topic.

2. However, international law had made tremendous progress since 1954 and those changes should be reflected in the draft Code. The current trend was not so much towards direct military aggression as towards indirect aggression and interference in the internal affairs of States. Such interference was manifested primarily in the form of economic aggression and internal subversion. In that connection, the Commission would certainly not fail to take into consideration the various international legal instruments dealing with crimes against the peace and security of mankind which had been adopted by various international bodies since 1954 and reflected the changes that had occurred since then.

3. The nature of offences against the peace and security of mankind had also changed. The new forms of international offences were directed primarily against peoples who were still oppressed and deprived of their natural right to self-determination, as well as peoples under the colonial yoke or the apartheid régime.

4. Economic aggression involving the plunder of the resources of young nations was a new form of international crime and had been mentioned in the 1954 draft Code in a note to the effect that the consequences of economic aggression imposed to destabilize the social order of a State or Government were on the same footing as the results of armed aggression. Economic aggression, which continued to manifest itself in various forms, undermined the principle of permanent sovereignty over natural resources. The same was true of direct military intervention in defence of "vital interests", and coercive measures against Governments which, for example, carried out nationalizations in exercise of their sovereignty.

5. The policy of apartheid of the racist South African régime constituted one of the biggest threats to international peace and security. That régime, which maintained itself by force and repression, was not only undermining the foundations

(Mr. Mwandembwa, United Republic of Tanzania)

of the international community; it was also accelerating its aggressive behaviour against neighbouring countries. Accordingly, the crime of apartheid should be given particular importance in the draft Code.

6. As to the scope of the draft Code, his delegation believed that responsibility for international offences should not be limited to individuals, but should be extended to States; otherwise States would be able to continue committing offences against peace and security with full impunity. It did not seem logical to limit criminal responsibility to individuals, who in fact exercised powers given to them by the State. It was not satisfactory to leave the matter to the topic of State responsibility. The Commission should face its responsibility and extend the Code to States.

7. With regard to the definition of an offence against the peace and security of mankind, his delegation supported the first alternative of article 3, which was more definite and precise than the general definition given under the second alternative. In that connection, it believed that in addition to aggression itself, the threat and preparation of aggression should be regarded as offences against the peace and security of mankind. The fear and worry which they caused had a paralysing effect on the State and its population, and threats and preparations usually resulted in actual aggression.

8. His delegation considered that terrorism and mercenarism should both be included in the list of offences under the Code, although they were the subjects of separate instruments being elaborated in other United Nations forums. In view of the widespread dimensions of those two phenomena in the modern world, the list of offences in the Code would be incomplete without them.

9. Mr. GILLET (Chile) said that his country was ready to co-operate actively in all the Commission's work on topics of greatest relevance to the codification and progressive development of international law.

10. On the question of jurisdictional immunities of States and their property, it was important above all to stress the principle of sovereign equality of States, which could not be subject to the jurisdiction of other States or to enforcement or attachment measures against their property without their express consent. In addition, the principle of reciprocity was an important element of the principle of equality of States and should therefore be reflected in the text of draft article 22. In that connection, diplomatic negotiations were the best means of producing a solution before recourse was had to enforcement measures and even before the judgement became final. With respect to articles 19 and 20 of part III, concerning exceptions to State immunity, his delegation endorsed the opinion reflected in the report (A/40/10, p. 159) that such exceptions did not constitute a waiver of immunity from the jurisdiction of a court which would otherwise be competent to decide the dispute or difference. However, consent to commercial arbitration implied acceptance of all the natural and logical consequences of the envisaged arbitration. It could thus be said that a State's consent to arbitration

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implied consent to the exercise of supervisory jurisdiction by a court of another State which was competent to supervise the implementation of the arbitration agreement.

11. On the question of relations between States and international organizations, his delegation supported the draft article presented by the Special Rapporteur, in particular paragraph 2, which provided that "the capacity of an international organization to conclude treaties is governed by the relevant rules of that organization" (ibid., note 213). While the principle of sovereign equality of States identified them as the primary subjects of international law, that did not apply to international organizations, which were "the result of an act of will on the part of States, an act which stamps their juridical features" (A/37/10, para. 41). In view of the difference in nature between States and international organizations, it appeared normal to limit the capacity of the organizations. The draft article presented by the Special Rapporteur came within the framework of the law of treaties. It was essential not to lose sight of the principle on which the draft article was based when the topic was being considered.

12. His delegation would like to make a few comments which, although not directly related to the Commission's report, were prompted by concerns which the Commission might wish to take into account in the future. For example, the Commission might consider establishing a mechanism to enable representatives of States Members of the United Nations to participate, perhaps as observers, in public meetings held during its annual sessions. As a way of ensuring that the number of interventions did not impede the Commission's work, the arrangement could be that observers would have the right to speak only if the Commission so decided and only under strict conditions. That would still enable representatives of Member States to fulfil their role as representatives of sovereign States more effectively than if they attended such meetings as mere spectators. The participation of States in the Commission's public meetings on that basis could be equated, for example, with the participation of representatives of the various regional legal committees whose observers were invited to take the floor when the Commission considered it necessary.

13. His delegation also wished to refer to the co-operation between the Commission and such legal bodies as the Arab Commission for International Law, the Asian-African Legal Consultative Committee, the European Committee on Legal Co-operation and the Inter-American Juridical Committee. Such co-operation was extremely useful in view of the Commission's role in the progressive development and codification of international law and in view of the harmonization of national legislations, which was one of the constant concerns of those committees.

14. In that connection, his delegation attached great importance to co-operation between the International Law Commission and the Inter-American Juridical Committee. In 1985, Mr. Manuel Vieira, a member of that Committee, had attended and participated in the meetings of the Commission and had given it an account of the work of the Inter-American Juridical Committee in the codification of private international law which had led to the adoption, within the past 10 years, of

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18 treaties. He had also mentioned the studies undertaken by the Inter-American Juridical Committee at the request of the General Assembly and other organs of the Organization of American States, including a study of possible amendment of the OAS Charter, the Pact of Bogotá, and the Inter-American Treaty of Reciprocal Assistance, as well as a study of procedures for the peaceful settlement of disputes (see A/40/10, para. 319). His delegation welcomed that fruitful co-operation and expressed the hope that, in future, the co-operation of the Inter-American Juridical Committee with the International Law Commission would become as close as that of other regional juridical bodies.

15. Mr. BOSCO (Italy) said that the International Law Commission was making progress in its work on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, as could be seen from a reading of the draft articles provisionally adopted and of those that had been referred to the Drafting Committee.

16. His delegation confirmed its observations of the previous session concerning article 12, on the diplomatic courier declared persona non grata or not acceptable. It still believed that, since the transit State was required to accord the diplomatic courier the same privileges and immunities as the receiving State, it seemed fair that it should also enjoy the right to make such a declaration, thus avoiding having to admit to its territory persons regarded as undesirable. It hoped that that point would be taken into consideration during the second reading of the draft article.

17. With regard to draft article 18 (former draft art. 23), his delegation noted with satisfaction that ILC had restricted the immunity of a diplomatic courier from criminal jurisdiction to "all acts performed in the exercise of his functions", thus adopting the functional approach advocated by the Italian delegation at the previous session.

18. Draft article 25, which followed the wording of the relevant articles of the Vienna Conventions of 1961 and 1963, dealt with the delicate problem of the content of the diplomatic bag. His delegation approved the formulation of paragraph 1 of that draft article, particularly the restrictive adverbs emphasizing the official character of the content of the diplomatic bag. It hoped that, during the second reading of the draft article, the word "exclusively" would be retained.

19. Turning to the articles which had been discussed but not yet approved by ILC, his delegation wished to make a few suggestions that might be useful to the Commission when it reconsidered draft articles 36 to 43 in the light of the debate in the Sixth Committee.

20. Draft article 36 dealt with the inviolability of the diplomatic bag. That was a crucial issue which involved opposing interests, but it seemed to his delegation that paragraph 1 of the draft article did not strike the desired balance, in so far as it completely excluded the possibility of electronic scanning of the bag. It was hard to see how such a control could jeopardize diplomat communications if the

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scanning was designed solely to detect metallic objects in the bag. The matter should be the subject of further thorough examination.

21. Paragraph 2 of article 36 was of the utmost importance, given the widespread concern to prevent improper use of the bag and the number of States which were anxious about threats to their own security arising from such abuse. It was of course important to preserve the security of communications: again, a reasonable balance must be found. In that context, his delegation considered the new formulation of paragraph 2 to be a step forward and welcomed the reintroduction into the text of the draft article of that provision, which had already existed in customary law before the Vienna Convention on Diplomatic Relations. It had some doubts, however, about the optional exception to the applicability of article 36 as it resulted from draft article 43. Under the latter article, a State could designate by written declaration those types of couriers and bags to which it wished the relevant provisions to apply. A plurality of régimes might emerge, which would be very confusing and would mean additional work for the administrative authorities. His delegation therefore renewed the proposal that it had put forward at the thirty-ninth session of the General Assembly, which several members of the Commission had supported. The suggestion would introduce an optional dual régime: one for the consular bag, to which article 35, paragraph 3, of the Vienna Convention on Consular Relations would apply, and another for the other bags, to which the consular bag régime could apply by a declaration made by one of the parties. For that reason, his delegation was very much in favour of the reformulation of draft article 36 that appeared in paragraph 182 of the report (A/40/10). It noted, however, that the proposed solution had raised some difficulties for the Special Rapporteur, who had written in paragraph 184 of the report that "the application of the régime established in article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations to the diplomatic bag ... would clearly derogate from the régime established in the 1961 Vienna Convention on Diplomatic Relations". In that connection, his delegation pointed out that the new version of paragraph 2 of draft article 36 also constituted a derogation and that, if a derogation was inevitable, the one with the advantage of leading to a clearer situation should be selected.

22. The text of the new draft article 37 was an amalgamation of former draft articles 37 and 38, so that there was currently only one article on exemptions from customs inspection, customs duties and all dues and taxes. His delegation hoped that draft articles 39 and 40 could also be combined, to meet the concern about length, since they described similar situations.

23. Lastly, regarding article 42 on the relation between the draft articles and other conventions and international agreements, his delegation wondered whether the "provisions of the present articles" were really "without prejudice to the relevant provisions in other conventions or those in international agreements". To give only one example, if draft article 36 was to be approved in either of the versions presented in the report, a substantial modification of article 27 of the 1961 Vienna Convention would follow. His delegation therefore shared the perplexity of some members of the International Law Commission about the words "without prejudice

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to" and thought it might even be desirable, as had been suggested, to delete the paragraph altogether.

24. Mr. Mützelburg (Federal Republic of Germany) took the Chair.

25. Mr. HAYES (Ireland) said that the work of the International Law Commission had been virtually a total success, both through the excellence of its membership and through its modus operandi. By that he meant not only the internal working methods of the Commission but the external consultative procedures which had ensured the essential involvement of States. Through the reports submitted to the Sixth Committee, the debates on those reports and the written comments from Governments, the Commission's work had never become over-academic at the expense of the recognition of political realities, which was why the content of the conventions finally adopted by States on the basis of the drafts proposed by the International Law Commission retained a very large proportion of those drafts. In that connection, it should also be emphasized that even if, as the representative of Mexico had demonstrated, the number of ratifications was still disappointing, many States which had not ratified the conventions nevertheless applied them.

26. Regarding the report under consideration (A/40/10), he wished to stress the importance and difficulty of the subjects considered by the Commission and the fact that several of them overlapped or at least had the potential to do so. Those actual or potential overlaps added to the substantive problems and it was fortunate that consideration of the subjects was concurrent, thus reducing the danger of inconsistencies in the various drafts.

27. On the topic of State responsibility, his delegation was convinced that the approach adopted for the draft articles (a first phase relating to the origin of responsibility, a second phase relating to its content and the possibility of a third phase relating to implementation) was helpful to the proper organization of the work and, even more important, would facilitate the emergence of a draft that would be both comprehensive and easily understood. It had noted with interest the outline proposed in the sixth report of the Special Rapporteur (A/CN.4/389 and Corr.1 and 2) of the possible content of a Part Three. It had also noted that it was generally considered in the Commission that provisions for the settlement of disputes were necessary and that those in the outline were acceptable. His delegation shared that view, while recognizing that work was only just beginning on Part Three and that its future development would be influenced, in particular, by the content of Part Two. In the meantime, however, the proposal contained in the outline (procedure of compulsory conciliation or reference to the International Court of Justice, as appropriate) seemed to be a move in the right direction. The sixth report of the Special Rapporteur enabled the Committee for the first time to see the full scope of the instrument that was being prepared, which represented a significant advance in that it was thus easier to assess the remaining work and to form an opinion on the different parts of the draft.

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28. Regarding the draft articles of Part Two, his delegation shared the misgivings expressed by several delegations about the combined effect of article 5, devoted to the definition of the injured party, and articles 6 to 9, which stated the measures that party was authorized to take in response to an internationally wrongful act. Because of the breadth of that definition, a wide range of States would be authorized to take such measures, some of which were quite far-reaching, and to his delegation that seemed excessive. Nevertheless the scope of the definition contained in article 5 should be restricted. Instead, countermeasures needed to be graded and the injured State authorized to take the more extreme measures only when the State itself had suffered a specific injury. For instance, the measures envisaged in paragraph 2 of article 6 or in article 7 would not appear appropriate to an indirectly injured State. Similarly, the principle of proportionality contained in paragraph 2 of article 9 should also relate to the seriousness of the injury sustained.

29. Draft article 12 should be retained, including its paragraph (b) on jus cogens. The commentary of the Special Rapporteur on that question was fully convincing.

30. With regard to draft article 14 his delegation, while supporting the general approach adopted in paragraph 1, hoped that it would be possible to find a more appropriate formula than "accepted by the international community as a whole". He doubted that the obligations of States currently extended or should be extended to that under paragraph (c), since such an obligation might be excessively burdensome.

31. His delegation looked forward to the next report of the Special Rapporteur and urged the Commission to give adequate attention to that subject at every session until it was completed. In that respect, it noted with satisfaction in paragraph 299 of the report that the Commission would make every effort to complete a first reading of Part Two and Part Three of the draft articles at its thirty-eighth session.

32. It was pleased to note that progress had been made on the topic of jurisdictional immunities of States and their property and that the Commission expected to complete its first reading of the entire set of draft articles at its thirty-eighth session. Regarding the very controversial question of whether immunity should be absolute or limited, his delegation was of the view that absolute immunity was no longer appropriate to an age in which the activities of States extended far beyond the traditional exercise of functions of government. The distinction between acta jure imperii, to which immunity attached, and acta jure gestionis, to which it did not, was therefore an essential element in the modern doctrine of immunity of States, which was now widely recognized in the practice of States. The application of that distinction in detailed provisions was not a simple matter and a careful selection of terminology was required. In that regard, the Commission should be more concerned to ensure that the basic distinction was applied than that traditional terms should be preserved.

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33. His delegation welcomed the Commission's efforts to keep its programme and methods of work under review and section B of chapter VIII of the report reinforced its confidence in that process. In order to enable States which were not members of the Commission to follow its work more easily, it was essential that production of the Commission's Yearbook be expedited. It was also time to prepare a new and updated edition of the publication entitled "The work of the International Law Commission".

34. Mr. TUERK (Austria) welcomed the progress made at the thirty-seventh session of the Commission with respect to the draft Code of Offences against the Peace and Security of Mankind. He wished, however, to draw attention to the difference between the English and French versions: the first used the term "offence" and the other the term "crime", whereas the word "délit" corresponded to the English "offence". The Commission should therefore take a decision as to whether it wished to use the term "crime" in both versions or to retain the word "offence" in the English version, in which case the word "délit" should be used in the French version.

35. It was realistic to limit the scope of the draft Code to the criminal responsibility of individuals. As regards the persons to be covered by the future Code, his delegation shared the preference of the Commission for the first alternative of draft article 2 to the second alternative which referred to "State authorities". That second alternative, apart from being more restrictive, might lead to the erroneous conception that the provision dealt with criminal offences committed by juridical persons.

36. His delegation had no objection to a unified concept of "offences against the peace and security of mankind", although the arguments put forward by Sir David Maxwell Fyfe and Professor Jean Graven, for whom that notion was not an indivisible whole, also had their merits. Concerning the definition of an offence against the peace and security of mankind, it had a clear preference for the first alternative of draft article 3, which was closely linked to article 19 of the draft on State responsibility. It would comment on the second alternative when dealing with the topic of State responsibility.

37. Concerning acts constituting an offence against the peace and security of mankind, his delegation favoured the first alternative of draft article 4, section A, which reproduced the Definition of Aggression adopted by the General Assembly in resolution 3314 (XXIX). Since such a definition was indispensable in the context of the draft Code, a mere reference to that resolution - suggested by the second alternative - would not suffice. However the question was whether the political Definition of Aggression contained in the resolution should not be looked at from a juridical angle with a view to modifying it for the purposes of the future Code. With regard to the threat of aggression and the preparation of aggression, the first was such a serious matter that it could not be left out of the Code; the second, on the other hand, even if regarded as an offence from a purely legal standpoint, was so vague a notion that it should not be dealt with by

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the Code, lest the Code itself should become an enumeration of unrealistic provisions.

38. In draft article 4, section C, paragraph (b), the Special Rapporteur proposed that "exerting pressure, taking or threatening to take coercive measures of an economic or a political nature against another State in order to obtain advantages of any kind" should be made an offence against the peace and security of mankind. While the idea underlying that suggestion was commendable, in the formulation of such a provision great care should be taken not to outlaw diplomatic negotiations altogether. Obviously, in such negotiations one party could indicate that failure would lead to a deterioration in relations with the other party, which might be perceived as exerting pressure in order to obtain advantages.

39. The definition of "terrorist acts" in article 4, section D, paragraph (a), was too narrow. Such acts could be directed not only against States, but also against international organizations. Furthermore, if the intention was not to consider any damaging of public property as constituting a terrorist act, it was necessary to state that in order to be considered as such, the acts set forth in paragraph (b) (ii) must be "calculated to create a state of terror in the minds of public figures, or a group of persons or the general public" (see para. (a)). Finally, paragraph (b) (iii) should be amended so as to include in the definition of terrorist acts not only the seizure of aircraft, but also the seizure of ships. Instead of listing different forms of transport, the Special Rapporteur could perhaps refer to all means of public transport.

40. If the Commission wished to retain a provision along the lines of that of draft article 4, section E, it should attempt to arrive at a precise definition of the categories of treaties covered by that provision. As to situations provided for in section F (colonial domination), it seemed that they were already covered by the obligation to safeguard the right of peoples to self-determination. With regard to economic aggression, his delegation reiterated the doubts previously voiced on the subject, that phenomenon being already adequately dealt with by other provisions of the draft.

41. Rapid progress had been made with respect to the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. The revised texts submitted by the Special Rapporteur seemed to be more widely acceptable than those of the previous drafts. The essence of the topic related to facilitating official communications between a State and its missions abroad. The Commission should attempt to consolidate in a single instrument the existing rules of international law concerning the diplomatic courier and the diplomatic bag by making those rules more precise and by supplementing them where necessary. Austria was therefore somewhat dismayed at the prospect of having to face a plurality of régimes regarding important provisions of those draft articles. While being fully aware of the need for some flexibility, his delegation did not really see the need for a new international instrument that would add to the plurality of régimes which already resulted from existing conventions.

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42. Draft article 36, on the inviolability of the diplomatic bag, was one of the core provisions (A/CN.4/390, p. 23). It was gratifying that the Special Rapporteur, in his revised text of that draft article, had provided for the possibility of a return of the diplomatic bag to its place of origin, as Austria had suggested. However, the text did not specify what would happen if the sending State failed to comply with the request made by the receiving or transit State. It should also be made clear that the sending State always had the possibility of consenting to the opening of the bag in order to avoid its return to the place of origin. Austria accepted the possibility of submitting the bag to electronic screening in the interest of the safety of civil aviation. Of course, the confidentiality of the content of the bag could be affected, but no one could impose on airlines the risk of transporting diplomatic bags without previous electronic examination. The situation would be different if an airline expressly agreed to transport the diplomatic bag without such examination, but the sending State must then assume responsibility for the consequences which might arise therefrom.

43. The Commission had resolved the controversy that had arisen with respect to draft article 23 by providing, in the new article 18, that the diplomatic courier did not enjoy immunity from the criminal jurisdiction of the receiving or transit State except for acts performed in the exercise of his functions. His delegation was not convinced of the need for such a provision. Indeed, if the diplomatic courier enjoyed personal inviolability and was not liable to any form of arrest or detention, to which should be added any other form of restriction on his personal freedom, the exercise by the receiving or transit State of criminal jurisdiction over him could not impede the exercise of his functions.

44. His delegation welcomed the fact that the commentary to article 18, paragraph 2, specified that purchases and services of a general commercial nature rendered to the diplomatic courier were not exempt from local laws and regulations, even if they were directly linked to the exercise of his official functions. As to who was entitled to determine whether an act of a diplomatic courier was or was not "an act performed in the exercise of his functions", the determination should as far as possible be made jointly by the receiving or transit State and the sending State. If an amicable solution could not be reached through the diplomatic channel, then the determination should be left to the receiving or transit State.

45. His delegation remained unconvinced of the need to provide for the inviolability of the temporary accommodation of the courier (art. 17). Article 19 on exemption from personal examination, customs duties and inspection was an improvement on the previous two draft articles that it had replaced. Draft article 39 on protective measures in circumstances preventing the delivery of the diplomatic bag (A/CN.4/390, p. 26) and draft article 40 on the obligations of the transit State in case of force majeure or fortuitous event (ibid., p. 27) should be combined into a single article. The obligation to advise the sending State immediately of any circumstance preventing the delivery of the diplomatic bag, which article 39 imposed on the receiving or transit State, seemed excessive. The Commission should therefore carefully reconsider that point.

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46. With respect to draft article 43 (ibid., p. 31) on the declaration of optional exceptions to applicability in regard to designated types of couriers and bags, he wished to refer to his comments on the question of a plurality of régimes. His delegation questioned the wisdom of permitting such declarations and did not consider the reference to article 298 of the United Nations Convention on the Law of the Sea convincing. In fact, the optional exceptions provided for in that Convention wholly applied to procedures for the settlement of disputes and did not concern the substantive obligations of States.

47. With regard to jurisdictional immunities of States and their property, his delegation had already indicated that it adhered to the principle of relative immunity. It was, however, aware of the different views on that matter and therefore felt that a pragmatic approach was necessary if the draft articles were to be acceptable to most States. The approach adopted by the Special Rapporteur seemed correct. Nevertheless, Austria could not accept the establishment of any system which would in any way have a discriminatory effect with respect to States with a particular economic system.

48. Austria was pleased that the Commission had provisionally adopted draft articles 19 and 20. The commentary to draft article 19 showed that the Commission had thoroughly examined the compatibility between the article and the 1926 Brussels Convention for Unification of Certain Rules Relating to the Immunity of State-owned Vessels. His delegation therefore had no objections to that draft article. Austria welcomed draft article 20, which corresponded to the idea of an implicit submission to the supervisory jurisdiction of a court of another State in the case of an arbitration agreement. As to whether the draft article should deal with arbitration of differences relating to a "commercial contract" or to a "civil or commercial matter", his delegation preferred the second alternative.

49. The title of part IV should be changed in the English version to "State immunity from enforcement measures in respect of property". Draft article 21 defining the scope of that part seemed superfluous, as its essential aspects were contained in draft article 22. Furthermore, the expression "property ... in which it has an interest", used in draft article 21 and in the following articles, should be replaced by a clearer formulation.

50. His delegation welcomed the provision in draft article 22 that, under certain conditions, the property of a foreign State could be subject to enforcement measures, even without its consent. That provision was an important step forward in the progressive development of international law in that field because, among other things, it went beyond the 1972 European Convention on State Immunity. His delegation therefore believed that the present version of draft article 22 should not be weakened, for instance by requiring reciprocity or preceding diplomatic negotiations. While it was true that linking the concepts of "commercial service" and "non-governmental service" would make it possible to extend immunity to purely commercial activities, it was unrealistic to request the elimination of the criterion "non-governmental".

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51. His delegation was satisfied that draft article 23 had been revised in line with the wording of draft article 8 on express consent to the exercise of jurisdiction. It particularly welcomed the provision that a State could give its consent by a declaration before the court in a specific case (para. 1 (c)). It was particularly useful that paragraph 2 specified that the consent to the exercise of judicial measures of constraint required a separate waiver.

52. The structure of the revised version of draft article 24 was acceptable to his delegation in principle. The present formulation of subparagraphs (c) and (d) of paragraph 1 was, however, too vague. In particular, it would be preferable to delete subparagraph (c). As for subparagraph (e), the term "public property" should be maintained because private property, even if it formed part of the national cultural heritage of a State, could not be exempted from enforcement measures.

53. With regard to part V of the draft, contained in the seventh report of the Special Rapporteur (A/CN.4/388), draft article 25 concerning immunities of personal sovereigns and other heads of State was generally acceptable. However, it should be made clear in paragraph 1 (a) that the proceedings relating to private immovable property situated in the territory of the State of the forum were "real actions", a term also used in article 31, paragraph 1, of the Vienna Convention on Diplomatic Relations.

54. With regard to draft article 26, his delegation had doubts as to the wisdom of the procedure laid down in paragraph 1, which seemed to imply the need to transmit the writ or other document instituting proceedings to the Minister for Foreign Affairs in person. It would be preferable to state that the competent authorities of the State of the forum should transmit the relevant documents through the diplomatic channel to the Ministry of Foreign Affairs of the defendant State, for onward transmission, where appropriate, to the competent authority. Service of those documents should be deemed to have been effected by their receipt by the Ministry of Foreign Affairs. In paragraph 3 of that draft article, an express minimum time-limit should be prescribed before a judgement in default of appearance could be rendered against a State.

55. Austria had no objection to draft article 27 concerning procedural privileges. It should be added in paragraph 3, however, that a State which was a claimant in the courts of another State should pay any judicial costs or expenses for which it might become liable. His delegation felt that the text of draft article 28 concerning restriction and extension of immunities and privileges was too vague to be acceptable.

56. Austria, as a host country of the United Nations and other important international intergovernmental organizations, took a keen interest in the question of relations between States and international organizations. It was pleased to note that the consideration of the second part of the topic was being pursued.

57. His delegation would communicate its comments on the other items on the Commission's agenda in another statement.

58. Mr. CORELL (Sweden) said that the fortieth anniversary of the United Nations offered an opportunity to reflect on the past and future of the Organization. He recalled the useful role played by the International Court of Justice, and he stressed the need to strengthen its position and its contribution to the reaffirmation and development of international law. It was regrettable that one of the permanent members of the Security Council had recently decided to terminate its acceptance of the Court's compulsory jurisdiction, and that another permanent member of the Security Council was one of those which had not accepted that compulsory jurisdiction. Those observations were especially important as the documents generated by the International Law Commission all dealt with how to resolve conflicts between States. The need to strengthen the Court's position was therefore obvious, and his delegation invited all Member States which had not yet done so to accept the compulsory jurisdiction of the Court.

59. The work of the Commission, which had been established in 1947, had made it possible to codify many areas of international law in the 1950s and 1960s. Since then, however, the world had become more complex, and the pace of the Commission's work had slowed down. The Commission should nevertheless resolutely pursue its task of codifying and progressively developing international law.

60. Since 1947, the Commission had always had as one of its members an expert from the Nordic countries. However, the seat vacated by the appointment of Mr. Evensen to the International Court of Justice had not been filled by a person from the Nordic countries, although they accounted for an important part of the legal systems of the world. In addition, the total population of those countries should merit at least one seat on the Commission. In the ordinary elections to the Commission during the forty-first session of the General Assembly, due consideration should be given to the common interest in having a Nordic member on the Commission.

61. Turning to the Commission's report (A/40/10), he said that the legal value and usefulness of the proposed Code of Offences against the Peace and Security of Mankind would be enhanced if the text were limited to criminal responsibility of individuals. As a development of the Nürnberg Principles, the future document would have more practical value if it defined concrete measures and options with regard to the prosecution and extradition of individuals. The question of criminal responsibility of States would only complicate the work on the Code. In any case, it would be better to consider that question within the framework of the Commission's draft articles on State responsibility.

62. As to which individuals should be covered by the Code, his delegation felt that, since the text should be limited to the most serious offences, it would also be desirable to limit its application to individuals who represented State authority. His delegation therefore preferred the second alternative of draft article 2, which linked an offence against the peace and security of mankind to the exercise of State power. The wording could be improved, however, so that the text would read: "Individuals who, in exercising State authority, commit an offence against the peace and security of mankind are liable to punishment."

(Mr. Corell, Sweden)

63. With respect to the acts constituting an offence against international peace and security, international aggression was obviously of paramount importance. His delegation felt that the Definition of Aggression set forth in General Assembly resolution 3314 (XXIX) should be incorporated in the Code where appropriate. A mere cross-reference to a General Assembly resolution was perhaps not advisable or sufficient in a legal instrument like the proposed Code. Moreover, it was not necessarily very constructive to consider the preparation of aggression as a specific offence. The precedent of Nürnberg showed that such an idea was not necessarily beneficial to the proper administration of justice. Similarly, his delegation was hesitant as to whether the principle of non-intervention should be included in the Code. The serious forms of intervention would be covered by the concept of aggression anyway, and the less serious forms probably did not belong in the Code. Moreover, the concept of colonial domination could be given a convincing legal meaning only if it was combined with the right of peoples to self-determination in accordance with General Assembly resolution 1514 (XV). There would be no offence against the peace and security of mankind unless it was established that there was a denial of the right of peoples to self-determination. Lastly, the concepts of mercenarism and economic aggression would probably not be characterized by the seriousness which should be the distinctive feature of the offences which the Code was intended to eliminate.

64. His delegation took note of the Special Rapporteur's intention to devote his following report to war crimes and crimes against humanity. With regard to war crimes, the Nürnberg Principles must be reaffirmed and special emphasis should be placed on prohibited means of warfare. The use of chemical weapons, which had been explicitly prohibited since 1925, was a particularly obvious example. The use of nuclear weapons in contravention of traditional principles of humanitarian law also merited special attention. With regard to crimes against humanity, the notion itself should be somewhat expanded in order to provide a basis for progressive development of the law in that field.

65. As to the question of State responsibility, his delegation supported the idea of making use of the International Court of Justice for settling disputes within the context of the future instrument. It believed that draft article 6 should not simply list the options open to the injured State but should, in addition, stress the obligations of the guilty State.

66. His delegation would not object to separate articles dealing with the notions of reciprocity and reprisals. The important thing was that the concept of reprisals should be set forth and clarified in the future instrument, which should reaffirm existing law, including the norm laid down in the Declaration of 1970 on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV)), which was itself derived from Article 2, paragraph 4, of the Charter of the United Nations. The principle that reprisals involving the threat of the use of force were prohibited must be reaffirmed.

(Mr. Corell, Sweden)

67. His delegation was of the firm opinion that draft article 12 should contain a reference to the concept of jus cogens in order to make it clear that obligations might not be suspended, if they had the status of peremptory norms. Lastly, draft article 14 should make a reference to the duty of States to co-operate in the prosecution and punishment of perpetrators of international crimes.

68. With regard to the question of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, his delegation regarded the revised text of draft article 36 as a promising attempt to find a generally acceptable formula. Paragraph 1 could perhaps be formulated in a less categorical way. The main feature of the inviolability was accurately described on page 69 of the report by means of the formulation "the diplomatic bag shall not be opened or detained". In addition, the examination of the bag through electronic or other mechanical devices must be expressly prohibited. However, the formulation "exempt from any kind of examination" was too broad in the sense that it excluded all forms of external examination. His delegation believed, as some members of the Commission did, that it would be preferable to model draft article 36, paragraph 2, on article 35 of the 1963 Vienna Convention on Consular Relations. Article 37 should deal exclusively with exemption from dues and taxes, while article 6 should cover all matters relating to inspections.

69. His delegation was not entirely satisfied with the revised text of draft article 42 because it believed that the draft should consolidate and specify the law relating to the diplomatic courier, if necessary, by going beyond the content of the relevant codification conventions. It would therefore be desirable to stress that the draft articles were intended to complement the existing conventions; accordingly, the word "complement" contained in the original wording of article 42, paragraph 1, should be reinserted. An alternative would be simply to delete that paragraph.

70. Generally speaking, his delegation believed that the draft articles should do no more than provide the immunity and inviolability required in order to ensure the smooth functioning of diplomatic communications. The courier must be granted the protection necessary for the performance of his official duties, but at the same time a formula allowing for the protection of the security or public order of the receiving or transit State must be found.

71. With regard to jurisdictional immunities of States and their property, his delegation had already voiced its support for the concept of restrictive immunity in the case of government activities for commercial purposes. It was therefore in favour of retention of the distinction between acts jure imperii and acts jure gestionis in that context. Traditional international law held that the immunity of State property was not absolute but was, rather, dependent on the uses to which the property was to be put. His delegation recognized, however, that the distinction between commercial purpose and governmental service was not always possible in the case of developing countries and that the future instrument might have to reflect that fact.

(Mr. Corell, Sweden)

72. Draft article 22 indicated clearly that the consent of the State concerned was a prerequisite for non-immunity. Although his delegation did not object to that approach, it felt that subparagraph (b) restricted the concept of acts jure gestionis in a manner that was not consistent with State practice in some regions of the world. It was a tricky problem, and the new approach adopted by the Special Rapporteur should serve as a basis for a compromise. His delegation believed that the list set forth in draft article 24 should clarify matters. Lastly, it welcomed the fact that the Special Rapporteur wished to change the wording of the opening clause so as to remove any suggestion of a rule of jus cogens.

73. His delegation wished to express its appreciation of the work carried out by the Commission and to congratulate the four newly elected members of the Commission.

74. Mr. Al-Qaysi (Iraq) resumed the Chair.

75. Mr. RASSOL'KO (Byelorussian Soviet Socialist Republic) said that his delegation believed that the draft Code of offences against peace drawn up in 1954 provided a good foundation for the work of the Commission. However, account must be taken of the events that had taken place over the past 30 years and of the changes that international law had undergone in the intervening time. The goal was to draw up a universal instrument defining crimes against the peace and security of mankind and establishing the responsibility of States and the criminal responsibility of individuals guilty of the acts dealt with. The most serious crimes must be included; for example, aggression, the preparation of nuclear war and activities relating to the first use of nuclear weapons. Naturally, the Commission must base its work on the many relevant international instruments, conventions and General Assembly resolutions adopted since the Second World War. Accordingly, among the offences to be suppressed it should include State terrorism, colonialism, apartheid, racism, genocide and violations of humanitarian law.

76. The Code must, on the one hand, define the offences themselves and, on the other hand, establish the responsibility of States and, in particular, that of individuals. There was no criminal responsibility of States under international law, because there was no criminal procedure for dealing with States. However, States had a pecuniary liability and were subject to the sanctions laid down in the Charter of the United Nations. In contrast, individuals who were guilty of offences had a personal responsibility under both domestic and international law.

77. The attempts made by some delegations to provide for the criminal responsibility of States and the plan to establish a supranational jurisdiction were therefore altogether pointless. Such measures would be entirely contrary both to the Charter of the United Nations and the principle of national sovereignty, upon which the contemporary international order was based. In actual fact, States that committed offences were represented by individuals who had criminal responsibility. It was that type of responsibility that the Code must deal with. Individuals should not be able to evade personal responsibility by invoking government orders. Moreover, the draft Code should specify that States could include crimes against the peace and security of mankind in their domestic legislation and make them subject to the maximum penalties.

(Mr. Rassol'ko, Byelorussian SSR)

78. Although the general thrust of the work of the Commission appeared to have been established, the progress made in drawing up the actual text of the draft articles was still inadequate. At a time when there seemed to be a threat of wars breaking out, the importance of the draft Code would appear to be greater than ever, and the Committee must devote its full attention to the matter. Pending completion of the work of the Commission on the draft Code, the Committee must regard that question as one of the major items on its agenda.

The meeting rose at 12.50 p.m.