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SUMMARY RECORD OF THE 50th MEETING

Chairman: Mr. KNIPPING-VICTORIA (Dominican Republic)

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

AGENDA ITEM 131: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS THIRTY-FIFTH SESSION (continued) (A/38/10, A/38/148)

1. Mr. DROUSHIOTIS (Cyprus), speaking on behalf of Ambassador Jacovides, who was required to be at his post in Washington because of the serious developments which had taken place in Cyprus, expressed satisfaction at the International Law Commission's continued constructive co-operation with other learned bodies, notably the Inter-American Juridical Committee, the African-Asian Legal Consultative Committee, the European Committee on Legal Co-operation and the Arab Commission for International Law. Such contacts were mutually beneficial as a means of exchanging information on regional perspectives, thus acquainting the Commission with the priorities and matters of particular legal concern in different regions.

2. The International Law Seminar was an institution of particular value, especially for nationals of developing countries, while the Gilberto Amado Memorial Lecture had provided another opportunity for the Commission both to enrich its experience and to honour the memory of one of its illustrious members.

3. The visit and address to the Commission by the Secretary-General had been a welcome and significant innovation. His remarks should serve as a standard for rethinking and rededication to the rule of law and the effectiveness of the United Nations by the international legal community as a whole. For Cyprus, which had had a bitter and continuing experience because of the flagrant violation of the most basic rules of international law by Turkey the Secretary-General's observation that there was no viable and long-term alternative to a policy of development and peaceful coexistence except within a framework of international law acquired special significance in its ongoing struggle to restore justice to the situation which if confronted on the basis of the United Nations Charter and the resolutions on the question of Cyprus.

4. A useful debate had taken place in the Committee at the last two sessions on the appropriateness of injecting fresh thinking and new perspectives into the Commission's role, objectives and methods of work, in the light of technological and scientific developments and dramatic changes in the composition of the community of nations. Priorities had changed and new topics had come to the surface which called for new, revised rules of international law. Constructive criticism should be examined objectively and with an open mind. His delegation had cited the setting of realistic but imaginative targets, the careful programming of work to be achieved in each five-year cycle, the re-examining of working methods and, possibly, new improved techniques as ways in which the Commission could prove to be more responsive to the needs of the contemporary international community. It continued to believe that the right attitude would be to have the courage to change things that could be changed, the serenity to accept things that could not be changed and the wisdom to know the difference between the two.

5. He was pleased to note that the Commission had endeavoured to be responsive to those concerns. A concrete manifestation of that attitude had been the constructive debate which had advanced the topic of the Draft Code of Offences

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against the Peace and Security of Mankind. While all constructive suggestions from interested and concerned individuals and learned bodies were welcome, no one was better qualified to decide on those matters than the Commission itself. He agreed that efforts should continue to minimize the Commission's existing shortcomings and maximize the chances for the adoption of improvements. The least the Commission could expect from the General Assembly was to be provided with the necessary means, in terms of staff, documentation and summary records, to discharge its important responsibilities to the international community.

6. The Committee's debate on the Commission's report provided the opportunity for the representatives of States to study, reflect and comment on the various aspects of the Commission's work, so that that work would be in keeping with political realities and the notions of contemporary international law. The harmonious interaction of the Sixth Committee, the International Law Commission and the International Court of Justice, was of the utmost importance in achieving that objective.

7. Chapter II of the report dealt with the Commission's work on the draft Code of Offences against the Peace and Security of Mankind, a subject to which the international community attached great importance. The realities of power relations and the vagaries of politics too often took the upper hand and resulted in double standards in the application of the rules of international law relating to peace and security, a prime example of which was the situation in his own country. It was therefore imperative to elaborate such a code at the earliest possible time as a contribution to strengthening the endangered international peace and security and as a deterrent to present and would-be aggressors. In doing so, due account should be taken of the results achieved in the progressive development of international law since that item had first been considered. A wealth of international legal material had been produced in that context, in terms of international conventions and United Nations resolutions declaratory of existing law. He referred specifically to the important element of the recognition in article 19 of the draft on State responsibility that crimes and delicts could be attributed to States.

8. He agreed that the draft Code should cover the most serious international offences, to be determined by reference to general criteria and to the relevant conventions and declarations pertaining to the subject, including the elements which had emerged in the context of decolonization, the need to protect human rights and the development of jus cogens. Not all international crimes, as envisaged by article 19 of the draft on State responsibility, could be covered by the Code; crimes against the peace and security of mankind were the most serious of international crimes and should be dealt with in the Code, whether or not they were politically motivated.

9. Since the Nürnburg and Tokyo judgements, the international criminal responsibility of individuals had been commonly accepted. In view of the element of progressive development in article 19 on State responsibility, the criminal responsibility of the State must also be recognized and set forth in the draft

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Code. Failure to so would allow serious offences, such as aggression, apartheid and annexation, to go unpunished, since such offences were committed by States. Moreover, to limit the scope to criminal responsibility of individuals would be to diminish the value of the Code as an instrument of prevention and deterrence and to disregard the progressive development of the law on that subject over the past 30 years. The argument that the responsibility of States for acts classified as international crimes should be considered only in the context of the draft on State responsibility also raised the inevitable question of delimiting the respective scope of the two items, namely, that of the Code of Offences, which covered primarily offences against peace and security, and that of State responsibility, which included responsibility for international crimes under article 9 but was much broader in that it covered international crimes in general.

10. In view of the problem that had arisen over the question of the inclusion of the criminal responsibility of States in the draft Code, and in the interest of progress and consensus, the possibility should be considered of holding the decision on that issue in abeyance until it could be seen how much progress could be made under the State responsibility item in attributing criminal responsibility to States. If that could be a basis for compromise, it might even serve as a spur for expediting progress generally on that item, which regrettably was proceeding at too slow a pace. Such a compromise should not serve as an excuse for indefinite delay on the draft Code, but only as a temporary practical expedient to get over the hurdle created by the position taken by some members of the Commission and of the Sixth Committee. If a decision on that issue were to be called for immediately, his delegation would have no hesitation in voting for including the criminal responsibility of States for offences against the peace and security of mankind under the proposed Code. With regard to the implementation of the Code, his delegation had come to the conclusion that the Commission's mandate extended to the preparation of the statute of a competent international jurisdiction which should apply to individuals and, subject to his earlier remarks, also to States.

11. With respect to chapter IV of the report, on State responsibility, while there was room for not setting excessively ambitious targets and also for caution and avoidance of duplication, there should be no compromise on questions of principle. The concept of an international crime, having been established after a great deal of debate in part one of the draft articles, should not be allowed to be deprived of real meaning, downgraded or bypassed in part two, which was currently under consideration. The Commission should continue to work in the perspective of drafting articles which would ultimately be embodied in a general convention on State responsibility, covering every aspect of the topic and, in particular, dealing with the legal consequences of aggression, of other international crimes as well as of simple breaches of bilateral obligations. The effects of the United Nations Charter, of jus cogens and of international crime should not be ignored or compromised. Public policy, dictated by the higher common interests of the international community, was a concept which had an important place in contemporary international law and should be given weight in that subject also. His delegation had noted the four draft articles provisionally adopted by the Commission and favoured the retention of the elements on the effects of jus cogens and on the

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effects upon third States of an internationally wrongful act of a State which constituted an international crime. The fact that, in the current state of development of the international community, that concept might not be easy to apply neither detracted from its validity nor constituted a reason for abandoning it. To do so would be a retrograde step. He urged the Commission to continue its work expeditiously with the aim of arriving at a text of a draft convention which, even without its early ratification by a large number of States, would still influence the conduct of States and constitute a reference text for international courts and tribunals.

12. He noted the progress achieved during the last session of the Commission on the subject of jurisdictional immunities of States and their property, a topic of practical and everyday importance which had a great deal of background in terms of State pratice, international conventions and customary international law. As a party to the 1972 European Convention on State Immunity, Cyprus was very interested to see the law developed on the basis of the pragmatic compromise of the two conceptual approaches through a spirit of realistic adjustment to contemporary requirements.

13. Considerable advance had been made by the Commission on the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. The subject was broad enough to include communications of international organizations and recognzied national liberation movements. Even though many of the specific issues were already covered by the four existing multilateral conventions in the field of diplomatic law elaborated under the auspices of the United Nations, the effort currently under way was timely and necessary in supplementing and harmonizing the existing international legal instruments.

14. Substantial progress had also been made on the law of the non-navigational uses of international watercourses, a subject which, though perhaps not of direct relevance to island States such as Cyprus, was topical and important for many countries.

15. His delegation was pleased that the Commission had found it possible at its last session to deal, even though briefly, with the pending second part of the topic of relations between States and international organizations. He looked forward to further progress in that practical and interesting area of international law.

16. His delegation welcomed the most recent report of the Special Rapporteur on the "delineation" of the topic of international liability for injurious consequences arising out of acts not prohibited by international law. It also noted the areas in which the underlying principle of the topic was illustrated by reference to the work on international watercourses. It was clearly not an easy subject to define with clarity or precision, and there was therefore uncertainty as to the dividing-line between that topic and the topic of international responsibility for wrongful acts. While noting the existing divergencies of views,

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his delegation's position was that there was sufficient room, on the basis of existing State practice, to elaborate upon the basic principle sic utere tuo ut alienum non laedas. He looked forward to the reports promised by the Special Rapporteur on fact-finding procedures and the other matters referred to in his earlier schematic outline, as a further contribution to the fuller understanding and consolidation of the elements encompassed in that thought-provoking exploration of the underlying principle.

17. His delegation conceived the primary purpose of the debate to be for the Sixth Committee to assist the Commission by proposing guidelines and the general direction which each topic should take. There was every reason to be optimistic that the Commission would continue to perform creditably its central role in the international law-making process. There was more reason for concern on the much wider question of the role of international law in the real contemporary world. The sad reality was that the role of international law in international diplomacy was often limited. Yet, in most cases it was not insignificant. In certain cases where law coincided with power, it could be determining in the outcome of a conflict. In other cases, it at least served as a restraining factor to the full application of the law of the jungle by providing arguments for the weak side of a conflict and international standards for third parties. It might be true that, under the conditions prevailing in the world, might was right and possession was nine tenths of the law. But for the weak, right was might and justice would in the end prevail. International law provided the standard whereby what was not currently possible might become possible in the future. The only alternative to international anarchy and violence was international law, and it was well always to remember that in the Sixth Committee, and indeed everywhere.

18. He would not go into any details of the grave situation which had been created for his country by the grossly illegal action taken on 15 November by the Turkish Cypriot leadership, evidently with the full support of the Ankara Government. It was being dealt with elsewhere in the United Nations and the capitals of the world, where the Turkish action had drawn widespread condemnation. He trusted that effective measures for its condemnation and reversal would soon be taken. But it was relevant, to draw the Committee's attention to that situation as yet another grave instance of the gross violation of the rules of international law, the Charter principles and United Nations resolutions.

19. Mr. STEPANOV (Ukrainian Soviet Socialist Republic) said that, in evaluating the work of the International Law Commission, his delegation could not but express some dissatisfaction at the slow progress on a number of topics. The codification and progressive development of international law was indeed a laborious and time-consuming process, but the problems posed by contemporary international life made it necessary to increase the effectiveness of the Commission's activities. The question must be analysed carefully and comprehensively; generally recognized international legal norms which might be codified should be identified, State practice and doctrine relating to international law should be studied and the general way in which they were developing should be determined, taking into account the main principles of contemporary international law. The past experience of the

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Commission showed that it could not successfully fulfil its functions without such an analysis, and the need for it had been further demonstrated by its recent session, during which some members had unfortunately adopted a tendentious approach towards the consideration of certain topics and the evaluation of existing State practice and the ways in which it was developing. The harmful effects of that attitude must be overcome, especially as the Commission had before it a number of issues of crucial importance for strengthening and enhancing the effectiveness of international law as an important means of preserving world peace, reducing international tension and strengthening good-neighbourly relations and co-operation among States.

20. Many delegations had rightly stressed the urgent need to consolidate the international legal system, establish solid legal guarantees for international legality and security, and observe strictly the legally binding rules of conduct which States had developed together. That need was becoming steadily greater as the system of international law became broader and more complicated and the number of problems which could be settled only by expanding existing rules or clearly formulating new ones in accordance with the demands of modern international life increased. The Commission, as a body engaged in codification, had a direct role to play in that regard. The Sixth Committee must ensure that its debate on the report of the Commission provided the latter with information on the opinions of a wide range of States and produced agreed recommendations which could guide its work on particular topics, especially the most important ones. In considering the Commission's reports all delegations should therefore co-operate in a constructive and business-like fashion in order to find the best solutions, taking into account the positions of different groups of countries and the interests of the international community as a whole. In the modern world, with the growing threat of nuclear catastrophe, the strengthening of the international legal order and the improvement and increased effectiveness of the principles and norms of international law concerning the most urgent issues were becoming exceptionally important. In the final analysis, the effectiveness of the Commission's codification efforts depended on the extent to which the articles it drafted were generally acceptable and responsive to the needs of the international community as a whole.

21. He noted with satisfaction that the Commission had begun work on the draft Code of Offences against the Peace and Security of Mankind and that it appeared fully aware of the importance of the question and the need to codify the most serious international offences. In order to complete work on the draft, the appropriate provisions had to be refined and crystallized on the basis of the principles that had already been accepted, taking into account the current level of development of international law and the interest of the international community as a whole.

22. The draft articles on State responsibility were also of exceptional importance. However, three years after the General Assembly had given the Commission the clear mandate of preparing part two of the draft dealing with the content, forms and degrees of international responsibility of States for

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internationally wrongful acts, not only had it made little substantial progress in its work, but there was a clear movement in the wrong direction. The Special Rapporteur's attempts to reduce that cardinally important part of the draft to provisions of minor significance and to revise the basic approach to the topic was a matter of great concern. His fourth report had on a number of occasions been rightly criticized, especially for its proposal that a part three dealing with the implementation of responsibility should be formulated immediately. The argument that the prospects with regard to the implementation of State responsibility influenced the way in which part two would be elaborated was unconvincing.

23. He regretted that the Commission had not agreed on the order in which the work on part two should proceed, since that created difficulties for the codification of the concept of international responsibility. The importance of the topic was obvious, and international developments, including the recent aggression against a small independent developing country in the Caribbean in gross violation of the principles and purposes of the United Nations and the generally recognized norms in international law, showed how urgent the matter was and how necessary it was for the Commission to step up its efforts to complete its work on the topic.

24. His delegation did not share the doubts of the Special Rapporteur on the advisability of dealing in part two with the legal consequences of aggression. While there was no doubt that that aspect was closely connected with the draft Code of Offences against the Peace and Security of Mankind, it was very important to determine the substance and form of that connection. For example, the existence of article 19 of the draft on State responsibility, the correct interpretation of which was of vital importance for the draft Code, indicated that the Commission must be consistent in recognizing that the Code concerned the responsibility of individuals, while the topic entitled "State responsibility" covered internationally wrongful acts committed by States as such.

25. The Commission would not succeed in codifying the concept of State responsibility if it limited or changed its substance. State responsibility should be considered primarily in relation to international crimes and other gross violations of the United Nations Charter and contemporary international law, with particular attention to such aspects as State responsibility for aggression, the maintenance of colonial domination by force, genocide, apartheid and other serious crimes.

26. The Commission had made no significant progress on the topic of international liability for injurious consequences arising out of acts not prohibited by international law, and many questions touched on in the report were stated in a very general way, thus making specific discussion difficult. His delegation did not, however, believe that there was any general rule of international law obliging States to repair damage caused by acts not prohibited by international law. Such an obligation could derive only from appropriate international agreements concerning specific activities. Consequently, it would be fundamentally wrong and contrary to existing practice to establish "strict liability" for such harmful consequences.

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27. The topic of 'jurisdictional immunities of States and their property included many questions of interest to all States, as well as the principle of sovereign equality, a fundamental concept of contemporary international law. His delegation had serious objections to the insistence of the Special Rapporteur and some members of the Commission that there was a general trend towards the concept of "restrictive" or "functional" immunity of States. There was no basis for such a concept in either the practice or the theory of contemporary international law. Many countries, including the socialist countries, strictly upheld the full and absolute immunity of States and considered that such immunity could be denied and particular matters subjected to the jurisdiction of a foreign court only when the State had voluntarily given its consent. It was also fundamentally wrong to consider that a State could act in two different capacities, depending on the functions it performed - as a holder of State (public) power or as a party to a private-law transaction in connection with so-called commercial activities, enjoying immunity in the first case while not being entitled to it in the second. In its foreign relations, a State always acted as the holder of public power, regardless of which body acted on its behalf and with its authorization to perform economic activities. Foreign economic activities were major function of States, and the State sector had a major role to play in the economies of many countries, including the developing countries. His delegation was convinced that the codification of the subject should be based on the generally recognized principle of State immunity from foreign jurisdiction, which derived from State sovereignty and the sovereign equality of States. The only possible lawful exceptions to that principle must, by their very nature, be those that would not undermine the essence of the principle itself. It was very important for all the articles to be based on jurisdictional immunity of States as a fundamental rule, with non-immunity being the exception requiring the consent of the State.

28. Stressing the importance of the topic entitled "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier" and the need to speed up the codification of it, he said that his delegation considered draft articles 1 to 8 and 15 to 23 entirely satisfactory. The General Assembly would be justified in recommending that, the Commission should conclude its first reading of the draft articles at its thirty-sixth session.

29. Work on the topic of the law of the non-navigational uses of international watercourses would be meaningful only if it was aimed at producing general rules riparian States which might include in agreements concerning particular international rivers. Every international river and the legal régime governing its non-navigational uses necessarily had their own peculiarities. Consequently, the formulation of a universal régime, which the Special Rapporteur was aiming at in the complete draft he had submitted, was a hopeless task.

30. He noted with satisfaction the resumption of work on the topic of relations between States and international organizations. That topic should cover the status, privileges and immunities of international organizations, their officials, experts and other persons engaged in their activities who were, not being representatives of States.

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31. In conclusion, his delegation felt that the report of the International Law Commission on the work of its thirty-fifth session should be approved.

32. Mr. HAYASHI (Japan) noted the major role of the International Law Commission in the progressive development and codification of international law and its significant contribution to the establishment of legal order in the international community. One of the primary reasons for the Commission's success was that its members had demonstrated a high level of scholarly competence as well as a deep understanding of the realities of the international community, without being bound by the positions of their home Governments. Clearly, if its members clung to their own theoretical arguments or pursued only the national interests of their home countries, the Commission could never maintain such a high standard of performance. He hoped that each member would respect that valuable tradition and work to further the Commission's objectives, maintaining the delicate balance between high professional standards and a keen perception of modern realities.

33. Since the Commission could not give full consideration to all the topics within its mandate at a given session, it had to focus on certain priority topics. His delegation would consider it useful if, at its thirty-sixth session, it devoted more time to State responsibility and to jurisdictional immunities of States and their property. Efforts should be made to keep the draft articles on those topics to a reasonable number, reflecting actual need.

34. His delegation had strong reservations regarding the topic of the draft Code of Offences against the Peace and Security of Mankind. The international community could not directly punish offenders without a mechanism such as an international criminal court capable of implementing the relevant law at the international level. Under current circumstances, it was quite unlikely that such a mechanism would be established in the foreseeable future. Until it was, codification attempts might well result in providing a spurious basis for the victors to impose "justice" unilaterally upon the vanquished. Furthermore, the Commission had taken no action on the draft Code for many years, during which the international situation had changed dramatically. His Government saw no urgency in pursuing the topic again. Therefore, and bearing in mind the close connection to the question of State responsibility, the topic should be considered with all the care it required, after the work on State responsibility was completed.

35. Although Japan had followed the doctrine of absolute immunity of States, that did not necessarily mean that it was determined to do so in the future. With the expansion of areas of State activity, certain cases were beginning to emerge where immunity should be denied to the State involved. His delegation supported the early adoption of uniform rules on State immunity and therefore hoped that the Commission would avoid abstract arguments on principles and theories. It should take a pragmatic approach, weighing the positive and negative results of denial of State immunity and then deciding whether or not exceptions should be provided for in given cases. The draft articles submitted at the thirty-fifth session generally deserved to be commended from the standpoint of the progressive development of international law. He hoped that the Commission would make a further detailed study of each of those draft articles.

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36. Although some parts of the fourth report on the topic State responsibility, such as the concept of "objective régime", might cause confusion, the report was in general a positive attempt towards the progressive development of international law. At its thirty-fifth session, the Commission had held a useful exchange of views on such questions as the inadmissibility of acts of reprisal involving the use of force and the legal consequences of aggression or other international crimes. Since it was expected that the Special Rapporteur would prepare draft articles on those questions in his next report, he hoped that the Commission would examine them again in detail at its thirty-sixth session. In preparing part two and a possible part three of the draft articles, the Commission should ensure the coherence and consistency of the draft as a whole.

37. Since the existing legal framework covering the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier was not inadequate, there appeared to be no urgent need to draft a separate convention regulating the legal status of the diplomatic courier and unaccompanied bags. What was required was further efforts on the part of all Governments to ensure that the existing rules were observed. Rather than formulating such detailed provisions as those contained in the draft articles on the topic and conferring upon the diplomatic courier and unaccompanied bags more privileges and immunities than were recognized under the existing legal régime, the Commission should examine the régime established by the Vienna Convention on Diplomatic Relations and how it was being implemented in order to find out whether there were any problems, especially regarding the need to guarantee freedom of communication. Only when any such problem was identified should the Commission proceed to rectify it by preparing new provisions, and then only within the particular area concerned.

38. The draft submitted by the Special Rapporteur for the topic entitled "The law of the non-navigational uses of international watercourses" was expected to provide the basic framework for the law regulating the subject-matter and was therefore likely to play a co-ordinating role with respect to the varied uses of different international watercourses. At its thirty-fifth session, the Commission had focused particular attention on such concepts employed by the Special Rapporteur as "international watercourse system", "shared natural resources" and "appreciable harm". His delegation hoped that those and other concepts and terms would be further clarified in the Special Rapporteur's second report, so that the discussion at the thirty-sixth session might be more substantive and constructive.

39. With regard to the topic of relations between States and international organizations, his delegation considered generally valid the conclusions of the Commission that it should, inter alia, commence the study of the second part of the topic, proceeding with great prudence and adopting a broad outlook.

40. Various circumstances had prevented the Commission from conducting a full debate on the fourth report of the Special Rapporteur for the topic of international liability for injurious consequences arising out of acts not prohibited by international law. He hoped that, at its thirty-sixth session, the Commission would be able to have a more substantive discussion and reach an

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agreement on the basic direction for its future work. Since the topic was an extremely progressive one and relevant State practice was very limited, it would not be surprising if the Commission again faced some difficulties in its work. It was therefore most important that the Commission should adopt a pragmatic approach towards each issue involved, taking into account the divergence of opinion among its members and the members of the Sixth Committee.

41. Mr. DE STOOP (Australia) said that the Commission seemed to have lost its orientation in part two of the draft articles on State responsibility and should be given some guidance on the future direction of those articles. It should continue to approach its work on the topic with the ultimate goal of drafting articles for inclusion in a convention. That would be consistent with the assumptions on which it had proceeded thus far and would offer the continuing prospect of careful drafting and rigorous thinking which the subject demanded. Only if major legal or political difficulties stood in the way of further progress should the Commission examine other alternatives, such as a set of guidelines for Governments to follow. The Special Rapporteur should proceed with part two of the draft articles before attempting to deal with the question of implementation. The whole subject of the consequences of an internationally wrongful act, including the question of reparation, was of pressing concern.

42. His delegation categorically rejected the view that the draft articles should deal with the specific legal consequences of aggression and the corresponding notions of individual and collective self-defence. Both notions were already covered in the United Nations Charter, and there were serious risks in attempting to duplicate them in a separate convention, which should be primarily concerned with the narrower technical issues of State responsibility. It would be desirable to place greater emphasis on the question of reparation and to consider including a general rule setting out the principle of the quantitative proportionality between the seriousness of a wrongful act and the measures which affected States were entitled to take against the author State.

43. Paragraph 111 of the report (A/38/10) referred to international crimes other than aggression and enumerated four "elements" of legal consequences which were common to all international crimes. His delegation doubted whether all those elements found a clear basis in customary international law, at least in the way in which they had been expressed. If the intention was to develop new principles of international law, the report should say so and provide reasons. His delegation also doubted whether it was true, as a matter of law, that there was a "duty of solidarity between all States other than the author State". It would be interesting to learn what the "duty of solidarity" meant in practical terms.

44. The more fundamental question was what was an "international crime" and what consequences flowed from it. Although "international crimes" were already dealt with in part one of the draft articles on State responsibility, his delegation continued to believe that that was an area where analogies with private law were inappropriate. A State was internationally responsible for the violation of an international obligation. He could not see what benefit was to be gained by

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categorizing international responsibility as "criminal" or "delictual" depending on the nature and gravity of the offence. Attempts to do so might well be counter-productive in practice. In relations between sovereign States, it was important to have some co-operation from the State which was responsible for a violation of international law, if reparation was to be obtained. The chances of obtaining such co-operation were not good if the defendant State was accused of an international crime, because any co-operation by that State could be perceived as a tacit acknowledgement of guilt. That was likely to be one of the real problems in characterizing certain violations of international law as international crimes.

45. His delegation agreed that draft article 1 should merely serve as a link between parts one and two of the text. The other draft articles provisionally adopted by the Commission seemed acceptable, but they might need to be re-examined when the subsequent articles dealing with substantive obligations were adopted. His delegation regretted that the commentary to the draft articles was not more detailed.

46. In its consideration of part two, the Commission should examine the less controversial issues before attempting to deal with the more difficult ones. It might be appropriate to start with the more typical situations involving State responsibility in international law, such as when a State failed to abide by its international obligations in relation to an injury suffered by an alien in its territory or when officials or property of another State suffered injury or damage.

47. The Commission had been considering the preliminary provisions of part two for three years. The time had come for it to move on to the elaboration of substantive provisions and to begin considering, at its thirty-sixth session, concrete provisions setting out the legal consequences of internationally wrongful acts. In expressing that view, his delegation did not mean to detract in any way from the Special Rapporteur's very useful work in clarifying the theoretical issues.

48. It was regrettable that the topic entitled "International liability for injurious consequences arising out of acts not prohibited by international law", which was of great importance to Australia and its neighbours, had not been considered in greater depth by the Commission at its thirty-fifth session. His delegation agreed that the scope of the topic should be confined to the duty to avoid, minimize and repair physical transboundary harm resulting from physical activities within the territory or control of a State (A/38/10, para. 287). The Special Rapporteur for the topic had carefully articulated some of the main issues and had performed useful and thought-provoking work. His delegation continued to believe that the main focus should be on prevention. It agreed with the revised schematic outline set out in paragraph 294 of the report. Since there was a measure of broad agreement on the scope and structure of the topic, the Commission should be in a position to proceed with the preparation of draft articles. It would be very useful for States to receive, at the earliest opportunity, the Secretariat's study on State practice pertaining to the topic.

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49. There had been encouraging progress in recent years on the question of jurisdictional immunities of States and their property. The Special Rapporteur had produced five carefully thought-out draft articles dealing with the complex and politically sensitive subject of exceptions to State immunity. His delegation was pleased that the Commission had provisionally adopted draft articles 10, 12 and 15. While it supported the general thrust of those draft articles, it would refrain from commenting on their substance until its Government and the Australian Law Reform Commission had examined more closely the matters involved.

50. His delegation was impressed by the Special Rapporteur's considerable effort to find compromise solutions in areas of particular sensitivity. For example, draft article 3 (2), sought to avoid a one-sided application of a single test by providing a supplementary standard for determining whether a particular contract or transaction for the sale or purchase of goods or the supply of services was "commercial" or "non-commercial". It might well be that a reference in the interpretative provisions to both the nature and the purpose of a contract would make draft article 12 generally more acceptable. It was essential for the future success of the project that the Special Rapporteur should continue, as far as possible, to devise language and criteria that were sufficiently broad to accommodate variations in national legislation and case law on sovereign immunity and, at the same time, would help to reduce the gap between those who admitted of no exception to the principle of State immunity, save with the express or implied consent of the State entitled to assert immunity, and those who espoused the doctrine of relative immunity.

51. In view of the importance of State immunity in international affairs and the progress achieved in the consideration of the topic, the Commission should give priority to the item with a view to the early conclusion of a full set of draft articles.

52. The question of the draft Code of Offences against the Peace and Security of Mankind had a close historical connection with the question of defining aggression and with proposals to establish an international criminal jurisdiction. The Special Rapporteur for the topic had submitted a clear and useful report and had identified the three major issues to be considered by the Commission: scope, methodology and implementation. His delegation believed that the Code should cover only the most serious international offences. The Commission should begin by reviewing international law with a view to identifying those offences. At some stage, it would have to develop criteria to identify acts which could properly be called "offences against the peace and security of mankind". It would be difficult to avoid a combination of the inductive and deductive methods in the preparation of the list of offences to be covered by the Code.

53. With regard to the material scope of the provisions, the main issue was whether the Code should cover violations of its provisions by States as well as individuals. It was generally accepted that individuals who committed crimes against humanity were criminally responsible in international law. However, the régime of the criminal responsibility of individuals for certain types of offences

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stood apart from the general régime of State responsibility for internationally wrongful acts. His delegation believed that the Code should be limited to crimes committed by individuals. There was no point in pretending that the international criminal responsibility of States was recognized in international law.

54. The assertion in paragraph 54 of the Commission's report that failure to recognize the State as a subject of criminal law would simply mean allowing offences such as aggression or annexation to go unpunished was factually and legally incorrect. International law already provided a variety of options to deal with the most serious transgressions by States of their international obligations. His delegation failed to see how calling such transgressions "criminal" would in any way enhance the effectiveness of such options. Any development of the notion of criminal responsibility of States could be counter-productive in an unintegrated international society where the principal actors were sovereign States and where the application of international law depended on consent and acquiescence.

55. It would be quite unrealistic to attempt to institute criminal proceedings against States. It would be equally unrealistic to believe that a State would agree to go before an international criminal tribunal when it was alleged to have committed an international offence. Very few States had accepted the compulsory jurisdiction of the International Court of Justice for the settlement of disputes involving classical breaches of international law, and it was unlikely that any State would be willing to surrender any of its officials for trial before an international criminal tribunal for something so emotionally charged as an international crime. His delegation was inclined to think that the exercise of an international jurisdiction over officials was possible only when the offending régime was replaced by another régime as a result of defeat in war or civil commotion.

56. Accordingly, from both a legal and a pragmatic standpoint, the draft Code of Offences should be limited to acts committed by individuals. The Commission should examine various models for the establishment of a criminal jurisdiction for international offences committed by individuals. On the question of penalties, it was clear that punishment for an offence committed by an individual could only be carried out at the domestic level. The proposed Code could do little more than give guidance on how serious offenders should be dealt with.

57. The Commission should pursue its work on the draft Code, provided it could confine itself to areas where broadly acceptable results were likely. In fact, those should be the criteria for pursuing any item in the Commission and the Sixth Committee, since time was at such a high premium. In that connection, inasmuch as delegations would continue to have the opportunity to comment on the draft Code during the discussion of the Commission's report, the time had come to drop the separate item on the subject from the General Assembly's overcrowded agenda.

58. His delegation wished to pay tribute to the Special Rapporteur on the law of the non-navigational uses of international watercourses for the valuable outline he had prepared. Tribute was also due to the Special Rapporteur on the status of the

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diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. The draft articles on that subject should not in any way contradict the Vienna Convention on Diplomatic Relations and should be limited to areas where there were clearly demonstrated gaps or defects in existing law. His delegation fully supported the Special Rapporteur's commitment to an empirical, functional and pragmatic approach, and close examination of State practice in the field of diplomatic communications (A/38/10, para. 144).

59. His delegation hoped that the various constructive suggestions on how the methods of work of the Commission could be improved would be fully examined at its thirty-sixth session. Although no radical changes in the existing methods were called for, some changes would facilitate its work and meet the concerns of Governments. The Commission should examine simplified ways of obtaining the reactions of Governments to items on its agenda. The question of expanding and intensifying the research work and studies undertaken by the Codification Division of the Office of Legal Affairs merited further consideration. Further consideration should also be given to the proposal to stagger from year to year the major consideration of topics on the current programme of work (A/38/10, para. 307). Priority should be given to topics which were of major importance and on which there had been considerable progress in recent years, with the aim of ensuring that the Commission could complete projects on its agenda at fairly regular intervals.

60. Mr. AKDAG (Turkey), speaking in exercise of the right of reply, said that the question of Cyprus was totally irrelevant to agenda item 131. It was the subject of agenda item 41 and had also been under consideration for years in the Security Council. It fell within the province of organs other than the Sixth Committee.

61. He had no wish to open a sterile debate. His only response to the unfounded allegations against Turkey would be a reiteration of his delegation's views as expressed in the Security Council and the plenary Assembly.

AGENDA ITEM 125: DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND (continued) (A/38/10, chap. II, A/38/325-S/15905, A/38/356, A/38/371-S/15944)

62. Mr. SINGH (India) said his delegation supported the International Law Commission's view that the draft Code of Offences should cover only the most serious international crimes, which would be determined by with reference to such instruments as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid. It also agreed with the Commission that the criminal responsibility of individuals and that of States required different treatment. The Commission should, in the first instance, deal only with the international criminal responsibility of individuals. In that respect, it could profit from the provisions of the two conventions he had mentioned. According to article IV of the 1948 Convention, "persons committing genocide (...) shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals"; according to article III of the 1973 Convention, "international criminal responsibility shall apply (...) to individuals, members of organizations and institutions and representatives of the State".

(Mr. Singh, India)

63. The proposed Code should not deal with the question of an international criminal jurisdiction, which had sensitive political implications. Sovereign States might not yet be ready to accept such a jurisdiction. In that respect also, it might be advisable to refer to the provisions of the 1948 and 1973 Conventions.

AGENDA ITEM 129: REPORT OF THE AD HOC COMMITTEE ON THE DRAFTING OF AN INTERNATIONAL CONVENTION AGAINST THE RECRUITMENT, USE, FINANCING AND TRAINING OF MERCENARIES (continued) (A/C.6/38/L.5)

64. Mr. BADR (Assistant Secretary of the Committee) announced that Cyprus and India had become sponsors of draft resolution A/C.6/38/L.5.

The meeting rose at 12.50 p.m.