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SUMMARY RECORD OF THE 36th MEETING

Chairman: Mr. GOERNER (German Democratic Republic)

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

AGENDA ITEM 130: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS THIRTY-SIXTH SESSION (continued) (A/39/10, A/39/412, A/39/306)

1. Mr. ALHAJ (Libyan Arab Jamahiriya) commended the report of the International Law Commission on the work of its thirty-sixth session (A/39/10) and thanked the Chairman of the Commission for his brilliant introduction of the report and also the other officers of the Commission for their statements.

2. With regard to the draft Code of Offences against the Peace and Security of Mankind, Libya agreed with the Special Rapporteur for that topic that the present draft should cover the same offences as those covered in the portion of the draft Code prepared by the Commission in 1954. It also agreed with the Commission's view regarding the necessity of limiting responsibility at the current stage to individuals, to the exclusion of States, because, in the current international situation, it would be difficult to define and determine the criminal responsibility of States. Nevertheless, his delegation believed that a State which committed such offences was not, in so doing, acting in its capacity as a legal person. However, the persons who represented such States, whatever their capacities, were the ones who committed such offences, and it was therefore necessary to establish a judicial organ to try such criminals. Otherwise, the whole topic would remain a matter of wishful thinking. His delegation agreed with those who called for the constitution of an international criminal court having all the necessary powers to try the perpetrators of offences against the peace and security of mankind, with the explicit provision that the sentences handed down in their regard would be carried out by all possible means. It should be specified also that the statute of limitations did not apply to such offences, however much time had elapsed since their commission. There were judicial precedents, in particular, in the Nürnberg and Tokyo Tribunals. His delegation hoped that the General Assembly would clarify the precise mandate of the Commission in respect of that topic.

3. With regard to the draft Code, he urged the necessity of laying down precise norms for the definition of offences against the peace and security of mankind, so that the Code would not be open to ambiguity and misinterpretation. Such offences should also include colonialism and neo-colonialism, with a view to the crystallization of the legal aspect of those concepts. Of course, the imposition of domination or hegemony by force and the ideas of peoples regarding their self-determination come within that legal framework. The perpetrators of such offences must be punished, because the latter constituted breaches of the peace and security of mankind, whether at the military level or at the level of the violation of the rights of people fighting for self-determination.

4. His delegation agreed that it was necessary to regard the use of the atomic weapon as an offence against the peace and security of mankind. It was amazed at the divergence of views which had emerged on that point. In his delegation's view, that was absolutely the gravest offence of that kind, unless that was the crime of

(Mr. Alhaj, Libyan Arab Jamahiriya)

first strike, using such a weapon of mass destruction. His delegation also believed that the problem of the environment, the question of mercenaries, the taking of hostages and economic aggression all constituted offences against the peace and security of mankind. That should be clearly stated in the draft Code.

5. With regard to chapter III, his delegation agreed in general with the draft articles prepared by the Commission. However, it noted that the drafting of the Arabic text of many of the draft articles was weak. With regard to substance, there was no justification for the provision, in draft article 31, that the maximum size or weight of the diplomatic bag allowed should be determined by agreement between the sending State and the receiving State, because the content of the bag was contingent upon the activity, the official reports and the correspondence of the sending State. He did not agree with the view that such a measure might be an indirect guarantee against abuse of the bag. His delegation believed in the principle of the absolute inviolability of the diplomatic bag, and no provision to the contrary should be contained in the body of the Code, because it might lead, as a result of political circumstances, to the breach of that inviolability.

6. Libya attached great importance to the draft articles on the law of the non-navigational uses of international watercourses and found the draft articles completed so far and the commentary thereon satisfactory. It believed that ground water entirely independent of any surface watercourse should be excluded, because such ground water consisted of aquifers formed in ancient times and was not fed by any other source, such as rainwater or seepage from watercourses.

7. He referred, in that context, to the great project just embarked upon Libya, namely, the creation of a man-made river to irrigate vast areas of desert. Libya stretched out its hands to its neighbours in order to achieve co-operation on that mighty project. Unquestionably, the draft legislation currently being prepared would be of effective value to his country in organizing and exploiting those water resources which Libya hoped would extend to the territory of its neighbours also; that should lead to the strengthening of the principle of good-neighbourliness and overall Arab unity which Libya sought constantly to put into practice.

8. Libya had a number of technical comments to make on the draft legislation prepared by the Commission, particularly with regard to the drafting of the Arabic text of that draft legislation, because there were some terms which were not accurately rendered. His delegation requested the Arab members to take note of that, and it would be able to furnish the Commission with some of its observations in writing at a later date.

9. Mr. OESTERHELT (Federal Republic of Germany) said that international liability was one of the most difficult questions of international law. The principles of international co-operation, friendly relations and good-neighbourliness provided useful elements for work on the topic. In addition, the notion that States were under an obligation primarily to prevent damage and only in the second instance to limit it or provide compensation was enshrined in various branches of law. The Special Rapporteur's analysis of State practice in that respect seemed to point to

(Mr. Oesterhelt, Federal Republic of Germany)

the notion of sic utere tuo ut alienum non laedas, which was also laid down in the Declaration of the United Nations Conference on the Human Environment. The survey of State practice published by the Secretariat (ST/LEG/15) was also valuable.

10. The limitation of the scope of the draft articles submitted by the Special Rapporteur to physical consequences affecting the use or enjoyment of areas within the territory or control of another State was a decisive step forward. That limitation was a logical one in view of the nature of the topic, and rightly ignored consequences arising out of activities lying within the exclusive domestic jurisdiction of a State. Moreover, the structure of draft article 1 was clear cut.

11. Draft article 2 prevented the scope of the provisions from becoming too extensive. It was reasonable that activities legally carried out by private entities in the territory of a State should be included in the scope of the provisions only to the extent that they, by their very nature, carried a substantial risk of causing harm. In the case of such private activities, States should be encouraged, but not obligated, to develop conventional régimes to prevent and provide compensation for transboundary harm. The new Special Rapporteur should continue along the path embarked upon by Professor Quentin-Baxter.

12. The topic of State responsibility involved virtually the entire range of key questions in the system of international law: who was responsible for what, in what way and to whom, and how the latter might react in specific instances. It was becoming increasingly apparent that those individual questions were to a large extent interrelated. His delegation's final position was subject to the outcome of further consideration of the topic by the Commission.

13. Since the definition of an "injured State" was fairly straightforward in purely bilateral relationships and, in the case of multilateral treaties, where the obligation breached was stipulated in favour of a certain State or necessarily affected the exercise of the rights or the performance of the obligations of all other States parties, he believed that paragraphs (a) to (d) (ii) of draft article 5 were convincing. The three remaining categories of "injured State", however, included States that had not been specifically and directly affected by the wrongful act. He wondered whether the safeguards provided in draft articles 2, 4, and 8 to 16 would prove sufficiently watertight in reality. The over-generous conferment of the status of "injured State" might legitimize rather anarchical countermeasures, thus eroding the delicate system of safeguards. Much depended on whether the Commission succeeded in creating obligatory third-party dispute-settlement machinery in part three, for it could hardly be left to the States concerned to decide whether an obligation was stipulated for the protection of collective interests.

14. Since, under draft article 2, the provisions did not apply where specific subsystems existed, there was the problem of determining the existence of an exclusive subsystem. He wondered whether it already existed if there was provision for certain procedures without a binding result, as was the case with the International Covenant on Civil and Political Rights, or if such procedures were

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actually in effect between the conflicting parties, or only if there were bilateral mechanisms that were actually in effect and had a legally binding result, as was the case with the European Convention on Human Rights. His delegation tended to support the latter view. He also wondered whether, assuming that there existed a closely defined catalogue of fundamental human rights which were also embodied in customary international law, those obligations not imposed by a treaty should not also be covered in parallel to draft article 5 (d) (iv).

15. The relationship between paragraphs (d) (iii) and (iv) of article 5 and article 6 also posed a problem. An injured State could undoubtedly demand that the author State should discontinue a wrongful act. The Commission would have to discuss the nature of the guarantees referred to in article 6, paragraph 1 (d). However, it did not appear feasible that every injured State, pursuant to article 5 (d) (iii) and (iv), could demand a sum of money if restitutio in integrum was no longer possible.

16. As far as draft article 5 (e) was concerned, a great deal depended on the definition of an international crime: the current definition still gave rise to reservations on the part of his delegation. The Commission would have to consider the matter again, particularly in the light of the discussions on parts two and three. The key question was, however, how to deal with the legal consequences of an international crime. It was not clear whether article 14, paragraph 3, indicated that the draft, subject to other international rules, was intended only to grant the international community as a whole, in the shape of the United Nations, the right to react to an international crime or whether it referred only to additional rights arising under article 14, paragraph 1, which would mean that the directly injured States and third States were to be treated on a par as far as rights under draft articles 6 to 9 were concerned. A directly injured State should not have fewer rights of its own in the case of an international crime than it had in the case of a "normal" internationally wrongful act. The exercise of additional rights could well rest, in principle, with the international community.

17. Certain limitations on the "normal" rights of injured third States under articles 6 to 9 would appear to be warranted. Since, in the event of an international crime under article 5 (e), all other States were injured, the question arose whether they could all individually exercise the rights under articles 6 to 9 in view of the internationally wrongful act inherent in that crime. An assumption to that effect could be made if article 14, paragraph 3, was not also intended to subject, mutatis mutandis, the rights of third States already established by article 5 (e) in conjunction with articles 6 to 9 to the procedures embodied in the Charter. Article 14 did not deprive third States of their status of "injured States". In his view, article 14, paragraph 3, in conjunction with paragraph 1, was intended to cover virtually the entire range of possible law enforcement measures available to States that were not directly affected. The question of whether and, if so, within what limits third States could take countermeasures on their own authority needed to be expressed more clearly.

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18. In view of draft article 16, which excluded from the scope of the draft any questions relating to the suspension of the operation of treaties, he wondered what area of treaty arrangements remained to be covered by article 8. If article 16 (a) was merely intended to cover certain breaches, for example, "material breaches", within the meaning of article 60 of the Vienna Convention on the Law of Treaties, while article 8 was intended to regulate the remaining and less serious breaches, that should be expressed more clearly in the text.

19. On the whole, however, the draft articles represented, for the first time, a consistent, detailed and complex system for regulating the consequences of an internationally wrongful act and were a major step forward in the work on the topic.

20. Turning to the draft Code of Offences against the Peace and Security of Mankind, he said that, while the international criminal responsibility of States might be conceivable in theory, the corollary of such responsibility was difficult, if not impossible, to put into practice. Since the international community was not yet ready for an international criminal system with an international criminal court for all States, the Commission's approach of focusing on a list of offences perpetrated solely by individuals might be a feasible one provided that the notion of perpetration by individuals was systematically adhered to. Such a list must not be a compilation of all conceivable offences, but should be limited to those which were widely considered on an international scale to be particularly serious and which were likely to jeopardize the peace and security of mankind. The second report of the Special Rapporteur provided a suitable basis for further discussion.

21. He noted with satisfaction the progress achieved on the topic entitled "Jurisdictional immunities of States and their property". Draft article 16 was correct and consistent, since judicial practice showed that States which competed with private entities in the commercial field in order to obtain profits did not enjoy any immunity in that respect. A State either requested another State to protect its trade marks through legislation or sought judicial protection of such rights, which logically implied the exercise of jurisdiction by the State of the forum. He was also pleased with the progress made in connection with ships employed in commercial service, and felt that draft article 19 took account of a trend towards restricted immunity that had existed for almost 60 years. It would, however, be more precise if the words "governmental service" in paragraph 2 (a) were replaced by the words "government non-commercial service", which corresponded to the wording of codification conventions prepared by the United Nations.

22. He generally agreed with the approach taken on draft articles 17 and 18. The proviso in article 17 might only be of marginal importance once the principle of restricted immunity in the field of commercial activities of States was accepted. As for draft article 18, he was convinced by the argument for not admitting State immunity where foreign States and private subjects of the territorial States engaged in corporate activities on an equal footing. The statement in paragraph (12) of the commentary to article 13 to the effect that employees might still have recourse in the State of the forum for compensation or damages for "wrongful dismissal" clarified a point earlier raised by his delegation.

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23. In dealing with the status of the diplomatic courier, it was advisable not to go beyond the privileges and immunities set forth in the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations. The Commission should focus on questions relating to the diplomatic bag not accompanied by diplomatic courier which had not been expressly settled to date. Since most States favoured that method of conveyance, there was a clear need to regulate the matter under international law.

24. He welcomed the abandonment of the "system" concept in the draft articles on the law of the non-navigational uses of international watercourses, since the definition of an international watercourse should be as neutral as possible. The further reduction of the definitions in draft article 1 to language that was purely descriptive without being less clear was an improvement. Noting the reference to "relevant" components or parts in draft article 3, he wondered whether there could possibly exist components or parts of the waters of an international watercourse which were of an international character as defined in draft article 1 but not relevant to the definition of a watercourse State. While welcoming the new approach adopted in draft article 4, he felt that the wording of that article might lead to the conclusion that only certain agreements meeting the conditions set out in paragraph 1 would be affected by the articles. Such a conclusion might cast doubt on the validity of existing agreements and on the scope of draft article 39 and thus lead to disputes. He shared the concern about the practicality of the words "affected to an appreciable extent" in draft articles 4 and 5. The drafting of a rather general instrument required the use of fairly general wording, and it was therefore very important to have rules on the compulsory settlement of disputes concerning questions such as the scope of that expression. His delegation preferred the new wording of article 6, paragraph 1, and felt that a better balance had been struck in the article as a whole.

25. Turning to the methods of work of the Commission, he said that it should devote each session to one or, at most, two priority topics which had previously been agreed upon, so that it could deal with them in a more concentrated and intensive fashion and conclude its work more swiftly than was currently the case. The debate in the Sixth Committee should also focus on those priority topics. The long-term goal must be to relieve the Commission's agenda so that it could proceed more quickly by concentrating on a few topics. When assigning new topics to the Commission, States should exercise the utmost restraint until work on the current topics had been concluded.

26. Mr. ROSENSTOCK (United States of America), referring specifically to the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, said that he agreed with the comments made by the representative of Jamaica (A/C.6/39/SR.35) concerning the need for simplification of the structure of the report on that topic. His delegation had always doubted that those draft articles were necessary in view of the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations. Moreover, the relatively few problems that had arisen over the years

(Mr. Rosenstock, United States)

had generally concerned abuses, whereas the draft articles not only failed to deal with abuses but provided extra protection for abusers.

27. Despite the Drafting Committee's efforts to simplify the draft articles, they remained excessively detailed. For example, draft article 8 added nothing to draft article 3, and he wondered whether draft article 20 was necessary at all.

28. Diplomatic couriers were not diplomats or members of the technical and administrative staff or members of special missions. In that connection, it would be better not to rely on the 1969 Convention on Special Missions, which, after 15 years, was still not in force, a fact which should serve as a warning against the granting of excessive privileges and immunities.

29. The reference to a diplomatic courier as an officer of the State (A/39/10, para. 155) could be applied to almost any civil servant and did not justify the granting of privileges and immunities. He disagreed with the view expressed by the Special Rapporteur in paragraph 162 to the effect that there was no justification for depriving the courier of the immunity from criminal jurisdiction enjoyed by staff in that grade. Quite the contrary, privileges and immunities were not rights but were extraordinary legal exemptions which required explicit justification. Accordingly, he suggested that the Commission should reconsider the task of the diplomatic courier and should limit the privileges accorded to him to those which were necessary for the performance of that task. In any case, primary importance should be placed on protection of the bag.

30. In that connection, draft article 13, paragraph 1, seemed to be unnecessary, and paragraph 2 seemed to be excessive. Moreoever, draft article 17 was excessive, but made no mention of the need for the bag to be in temporary accommodation.

31. The material contained in square brackets in draft article 23 should be deleted, and the text of and commentary to draft article 16 should be reconsidered in the light of the number of statements which had pointed out, inter alia, that a courier was not a diplomat or an administrative or technical employee.

32. He expressed the hope that, in future, the work on that topic would focus on ways of dealing with abuses and that the goal of unifying all the relevant provisions would not be used to grant maximum status to diplomatic couriers. Moreover, all bags should not be treated in the same way as diplomatic bags. The Commission should also consider very carefully the important question of the use and contents of diplomatic bags.

33. In conclusion, he reiterated his delegation's doubts about the work accomplished thus far both in terms of the substance and in terms of the time being diverted from other, more important topics, such as State responsibility.

34. Mr. BOSCO (Italy) said that all the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier provided a sound basis for continued work on that topic. However, such crucial

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issues as the diplomatic courier's immunity from jurisdiction and the inviolability of the diplomatic bag still required careful consideration.

35. His delegation suggested that inserting the word "exclusively" in draft article 10 so as to make it clear that the diplomatic courier should never be entrusted with functions other than taking custody, transporting and delivering of the diplomatic bag.

36. In draft article 12, the transit State, which was requested elsewhere to accord the diplomatic courier the same privileges and immunities as those accorded by the receiving State, should also be granted the right to declare a diplomatic courier persona non grata.

37. Since draft article 16 adequately expressed the legal obligation to protect the diplomatic courier, his delegation supported the deletion of paragraph 2 of draft article 20. In that connection, he drew attention to the last sentence of paragraph (5) of the commentary to draft article 16 (A/39/10, p. 122).

38. His delegation would also prefer a more balanced formulation of draft article 17, which dealt exclusively, and perhaps too extensively, with prohibiting agents of the receiving State from entering the temporary accommodation, but failed to consider the obligation of the receiving State to protect those premises from intrusion. He welcomed the fact that that obligation was dealt with in paragraph (8) of the commentary, and suggested that an explicit paragraph to that effect should be inserted in the draft article.

39. His delegation supported the deletion from draft article 19 of the words relating to exemption from examination carried out by electronic means, which would run counter to the security measures adopted by almost all States. Draft article 20 had also been improved to specify that the diplomatic courier would enjoy exemption from dues and taxes in the performance of his functions.

40. Referring to the provisions which had not yet been adopted by the Commission, he observed that the courier should be afforded the protection necessary for the performance of his offical duties but that the interests of the receiving or transit State should not be unduly affected.

41. In connection with draft article 23 (A/39/10, p. 40), his delegation agreed that immunity from criminal jurisdiction should be confined to acts performed in the exercise of official functions, and saw no reason why the courier should not be called upon to give evidence as a witness, so long as that did not interfere with the performance of those functions. His delegation also felt that a provision concerning the duration of such immunity should be included in the draft, and therefore welcomed the formulation of draft article 28 (p. 44).

42. Italy favoured the inclusion, in draft article 31 of a provision on the maximum size or weight of the diplomatic bag, which would indirectly help to prevent abuses, and, for the same reason, supported draft article 32, paragraph 2,

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which established the specific obligations of the sending State in that regard. Any attempt to define in greater detail the contents of the diplomatic bag, which were dealt with in draft article 32, paragraph 1, might create more problems than it solved, and the suggestions made on that subject seemed too restrictive. Nor would it be useful to divide bags into two separate classes: he therefore suggested that draft article 32, paragraph 1, should remain unchanged.

43. The main difficulty in dealing with the crucial issue of the inviolability of the diplomatic bag lay in balancing the need to protect diplomatic communications and the need to prevent abuse. In that connection, he reminded members of the lengthy discussions held in the Commission during the preparation of the 1961 Vienna Convention. Accordingly, his delegation could not support draft article 36 (p. 52), which did not give adequate consideration to the integrity and security of the receiving or transit States, but would prefer a more balanced solution similar to that embodied in the 1963 Vienna Convention. His delegation agreed that States parties to a convention on the diplomatic courier and diplomatic bag should have the right to make a declaration to the effect that they would apply to all bags the provisions contained in article 35, paragraph 3, of the 1963 Vienna Convention.

44. Mr. KOLOSOV (Union of Soviet Socialist Republics), referring to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, said that diplomatic couriers were one of the most important means of communication for States in carrying out their foreign policy. The constant maintenance of unimpeded communications between States and their representatives abroad was an inalienable element of international relations. Maintenance of normal inter-State relations presupposed that favourable conditions were ensured for the delivery of diplomatic bags.

45. The importance of the question, together with infringements of the inviolability of diplomatic bags, called for urgent codification and development of the principles governing the status of the diplomatic courier and diplomatic bag, which were only partially consolidated in the 1961 Vienna Convention on Diplomatic Relations and other multilateral treaties. The Soviet Union advocated the speediest possible preparation of an international legal instrument on the status of the diplomatic courier and diplomatic bag. It therefore agreed with the International Law Commission that the desirability of completing the first reading of draft articles on the subject should be taken into consideration when time was allocated for the work of its thirty-seventh and thirty-eighth sessions.

46. Draft article 23 dealt with the question of the immunities of the diplomatic courier, the juridical nature of which followed directly from the principles of respect for the sovereignty of States and the sovereign equality of States laid down in the Charter of the United Nations. Observance of the principle of the complete independence of States in carrying out their domestic and foreign policies was of the utmost importance for normal relations among States. It was the foundation for the granting of the immunities under consideration. The necessity of granting diplomatic couriers immunity sprang from the need to ensure both the

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confidentiality, effectiveness and security of diplomatic communications and normal conditions for the operation of a State's missions abroad. In view of that, the status of the diplomatic courier as an official servant of the State must be in accordance with his functions, taking into consideration the direct connection between the status of the diplomatic bag and of those to whom it was entrusted. There was no doubt that the diplomatic courier had to be given complete immunity from criminal jurisdiction. As for paragraph 4 of draft article 23, differences of opinion could perhaps be overcome by adding the words "except in the cases envisaged in paragraph 2".

47. Draft article 36, dealing with the question of the inviolability of the diplomatic bag, raised no doubts in principle. But the question had arisen of the legality of using electronic or other technological means to examine the bag. His delegation was convinced that such actions should be prohibited. Given the current state of electronic technology, its use would clearly make it possible to extract confidential information from the diplomatic bag, thus undermining the very foundation of the principle of observing its inviolability. The provision that the diplomatic bag should be exempt from any examination was completely in line with the basic aims of the draft.

48. His delegation understood the concern expressed by some Governments about abuses of the inviolability of the diplomatic bag. But he doubted whether individual abuses should be the basis for a general rule, or if far-reaching conclusions and generalizations could be drawn from isolated incidents. To regard all diplomatic couriers as potential smugglers was to mistrust not only the couriers themselves, but also the States, which were responsible for the moral standards of their officials.

49. The title of the draft articles seemed somewhat narrower than their content and could more accurately be worded "Draft articles on the status of the diplomatic courier and diplomatic bag". In draft article 20 it should be possible to delete the words "and shall prosecute and punish persons responsible for such infringements", since the methods by which States performed such obligations could be various. It was also important to avoid possible violations of the immunity of the diplomatic courier. In place of the deleted words, it would be possible to add, for example: "and in the case of such infringements being committed, shall take all necessary measures to prevent their repetition". The same evidently applied to the text of articles 32 and 36 as presented by the Special Rapporteur.

50. His delegation thought that it was possible to delete paragraph 3 from draft article 21, although the basic idea of the article must be preserved. The same could be said of paragraph 2 of article 22.

51. Draft article 30, concerning the sending of diplomatic bags with the crews of commercial aircraft or merchant ships, was very important and should obviously indicate that it concerned aircraft and ships registered in the sending State, since cases of bags being sent with foreign crews could scarcely arise. If such a possibility was not completely excluded, it was obviously covered by the provisions

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of article 34, but it would be necessary to solve the question of access by a member of the mission of the sending State to a foreign aircraft or vessel. It was obviously necessary also to provide in article 34 for cases where a member of a mission required access to an aircraft or ship not only to take possession of but also to deliver a diplomatic bag.

52. In discussing the prospects for drafting a convention on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, some delegations had referred to similar instruments which had supposedly not received general recognition and not entered into force. But their argument disregarded the fact that the Vienna Convention on Consular Relations had entered into force even though not every State agreed with all its provisions. He was confident that the time was not far off when the international community would have an important new international agreement concerning the diplomatic courier and the diplomatic bag.

53. Mr. TEPAVICHAROV (Bulgaria) said that his delegation reserved the right to express its views on the draft Code of Offences against the Peace and Security of Mankind at a later stage. Instead, it wished to focus on the subject of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

54. The right to free communications between States and their missions abroad was a basic principle of international law without which missions could not possibly function normally. Work on the draft articles with a view to adopting an international legal instrument in that field was of major importance for implementing the principle. A clear distinction had to be made between the diplomatic courier and the diplomatic bag, but protection of the former was an essential requirement for protection of the latter. His delegation therefore supported the Special Rapporteur's approach aimed at establishing a uniform régime for all types of couriers and official bags; the intention was clearly to create a lasting régime, uninfluenced by occasional incidents or fluctuations in the international situation. However, while understanding the Special Rapporteur's apprehension about expanding the scope of the draft articles to cover the couriers and bags of international organizations and national liberation movements recognized by the United Nations and regional organizations, his delegation believed that the eventual convention should cover the status of all couriers and bags used for official purposes.

55. On the subject of balancing the rights and interests of receiving and sending States, his delegation believed that the immunity of the diplomatic courier was a basic principle, any deviation from which should be expressly provided for and restricted to cases where there were serious grounds for believing that the courier had abused the confidence of the receiving State. His delegation could agree with the text of paragraph 3 of the new article 17, on the understanding that the qualifications and restrictions it contained in no case permitted violation of the immunity of the courier and the bag, their detention or delay. Bulgaria was of the opinion that the privileges and immunities accorded to couriers should be similar

(Mr. Tepavicharov, Bulgaria)

in scope to those of the administrative and technical staff of missions, thus guaranteeing that they could perform their functions normally. It was not convinced that the new article 18 sufficiently guaranteed normal fulfilment of the courier's functions, and believed that its wording should not be changed to restrict the immunity of the diplomatic courier further. In particular, the right to personal inviolability was not a sufficient guarantee for the safety of the courier and the fulfilment of his duties, and his submission to criminal jurisdiction could impede his mission, which was in no way inferior to those performed by staff who enjoyed full immunity from criminal jurisdiction.

56. The fact that a diplomatic courier's functions were not of a representative kind should not be used to determine the scope and nature of the protection afforded him. The minimum guarantee of adequate protection would be unconditional immunity from criminal jurisdiction and functional immunity from the civil and administrative jurisdiction of receiving or transit States. The fact that the courier's mission was of very short duration underlined the need to guarantee its prompt performance.

57. The provision for the immunity of a diplomatic courier from the civil and administrative jurisdiction of receiving or transit States in respect of acts performed in the exercise of his official functions received an important guarantee in draft article 23, paragraph 4, which provided that he was not obliged to give evidence as witness. His delegation believed strongly that State interests should be given priority and that the reference to the administrative jurisdiction of the receiving State in paragraph 5 of the same article should be deleted.

58. On the matter of the duration of privileges and immunities (draft article 28), it should be made clear that the official functions of diplomatic couriers could be terminated only by the sending State and that it was up to that State to determine which acts were performed in the exercise of the courier's official functions and which were not.

59. On the subject of the waiver of immunity, draft article 29 could be improved by making it clear that only the sending State could waive the diplomatic courier's immunity and that its express consent had to be given in writing. His delegation therefore had difficulties with the draft article's definition of who could authorize the waiver of immunity, which raised the question of who was competent to do so and what was necessary to ascertain that competence. A similar problem arose in draft article 30; his delegation believed that members of the crew of a commercial aircraft or merchant ship could be employed for the custody, transportation and delivery of the diplomatic bag only if they were expressly authorized by the captain of the aircraft or the master of the ship.

60. With regard to the status of the diplomatic bag not accompanied by diplomatic courier, the Special Rapporteur had been guided by the necessity of ensuring safe, free and prompt delivery of the bag, and free communications between the State and its missions abroad. His delegation welcomed that approach and considered the principle of absolute inviolability as the only appropriate basis for elaborating

(Mr. Tepavicharov, Bulgaria)

the status of the unaccompanied bag. That would be consistent with established practice among States and with such instruments as the Vienna Convention on Diplomatic Relations, the Convention on Special Missions and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character.

61. The possibility of opening the diplomatic bag was envisaged only in the Vienna Convention on Consular Relations and only under special circumstances and with special guarantees. That deviation from the general principle had inhibited wider acceptance of that Convention. He therefore felt that the régime under consideration should allow no deviations from the generally recognized principle of absolute inviolability of the diplomatic bag. Strict observance of that principle was the only guarantee of safe and free delivery. His delegation considered that even the opening of the bag by mutual consent should not be explicitly provided for in the draft articles. By mutual agreement, States could establish any régime they felt would provide maximum protection of their interests. But his delegation would resist the inclusion of provisions which could serve as a pretext to impose, under the guise of reciprocity, a régime which would favour those with better technological equipment. In the light of the provision contained in draft article 42, paragraph 3, the expression "unless otherwise agreed by the States concerned" in draft article 36, paragraph 1, should be deleted as superfluous. Moreover, the bag should be exempt from examination by electronic and other devices, because they could infringe the inviolability of the bag by revealing too much of its contents and because States that did not possess advanced technology would be discriminated against.

62. His delegation was fully aware of the necessity of establishing an acceptable balance between the interests of the sending and the receiving States, and it supported the provisions of draft article 32 regarding the limitation of the contents of the bag. That was an essential guarantee for protecting the interests of the receiving State and would be still further strengthened when reinforced by the obligation which the sending State was to assume under draft article 32, paragraph 2.

63. When the bag was entrusted to the captain of an aircraft or ship, what was apparently of particular importance was not the status of the captain but the régime of the bag, as well as the possibility of its being delivered or received directly and safely by a member of the staff of the mission.

64. Free communications between the State and its missions abroad would not be sufficiently guaranteed unless every facility for the delivery of the diplomatic bag was provided. He wished to underline the importance of the provisions of draft article 39, which provided for the protection of the bag in circumstances preventing its delivery; they might be of great practical significance, even though they might be rarely applied. The obligation of the receiving State and the transit State to take measures to ensure the inviolability and safety of the diplomatic bag in such cases was of major importance.

(Mr. Tepavicharov, Bulgaria)

65. The transit State should indeed assume obligations to ensure the inviolability of the diplomatic bag. He commended the efforts of the Special Rapporteur to reduce those obligations to a minimum, but it was evident that the obligation provided for in draft article 40 was necessary to ensure the receipt of the bag under extraordinary circumstances. In that connection, the provisions of draft article 41 were also necessary to guarantee a State freedom of communication with its missions abroad. Cases where those provisions would apply were not rare in practice, particularly in communications of States with their missions to international organizations. The absence of an appropriate régime for such cases could create serious obstacles to diplomatic communication and undesirable complications in relations among States.

66. His delegation felt that certain improvements needed to be introduced in draft article 42, paragraph 1. The draft articles should not be considered only as a complement to the provisions on the diplomatic courier and bag contained in existing conventions. They should further develop and clarify the status of the courier and bag in such a manner as to provide for complete and thorough regulations. The draft articles should therefore be considered as lex specialis in relation to the general conventional norms on the subject. Furthermore, experience gained from implementing existing conventional diplomatic law had revealed the necessity for precise and comprehensive recommendations regarding every aspect. Gaps or ambiguities had caused it to be variously interpreted and had thus created difficulties in inter-State relations. The work of the Commission should be to elaborate a detailed and comprehensive text, generally acceptable to all States, that left aside no problems relating to the status of the diplomatic courier and bag.

67. The topic should be considered by the Commission on a priority basis because of the importance and universal character of the problem and the urgent need for comprehensive and uniform regulations.

68. Mr. SÜSS (German Democratic Republic) said that although the Commission had made further progress on some projects, the current state of the work on jurisdictional immunities of States and their property and on State responsibility was not totally satisfactory.

69. He welcomed the further progress made by the Commission on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. His delegation considered the draft articles to be a solid, generally acceptable basis for further work. He hoped that the Commission would be able to conclude the debate on that topic during its current term of membership in order that a universal legal instrument might soon be adopted.

70. His delegation felt that the future legal instrument should apply to all categories of couriers and to the bags of official foreign missions. Limiting it to the diplomatic courier and the diplomatic bag in the strict sense, as had been urged by some delegations, would make for further debate at a later time on the other categories of courier and bag and would unnecessarily increase the work-load of the United Nations.

(Mr. Süss, German Democratic Republic)

71. His delegation wished to express certain reservations with regard to deletions and alterations affecting draft articles provisionally adopted by the Commission, in particular draft articles 20 and 21 (new draft articles 16 and 17), which he felt reduced the courier's status to a minimum. His delegation considered that restrictive interpretation of the principle of the functional necessity for the protection of the courier and bag was inappropriate.

72. The future legal instrument should contain clear-cut regulations on the obligation of States to prosecute and punish persons responsible for attacks on couriers. The original version of article 20 regarding the personal inviolability of the courier had fully met with that objective.

73. Unfortunately no agreement had been reached so far in the Commission with regards to the courier's immunity from jurisdiction. The future legal instrument should contain specific regulations on immunity from the jurisdiction of receiving States and transit States. His delegation supported the argument put forward in paragraph 191 of the report (A/39/10) that the courier was an official agent of the sending State, exercising official State functions in connection with the transport of the diplomatic bag. His delegation would therefore welcome the adoption of draft article 23 in the version submitted by the Special Rapporteur.

74. Draft article 36, dealing with the inviolability of the diplomatic bag was one of the most important provisions. His delegation believed that it was of the utmost importance for the Commission to succeed in producing an article on that subject which would safeguard the confidentiality and protection of official correspondence. His delegation would like to stress its support for the approach proposed by the Special Rapporteur concerning that draft article.

75. There must be a clear, legally binding instrument on the status of the diplomatic courier and bag. There must be no restriction of essential regulations regarding the status of the courier.

ORGANIZATION OF WORK

76. The CHAIRMAN drew the attention of the Sixth Committee to a matter that had been a source of concern for the past few years: the recommendation by other Main Committees to the General Assembly, without previous consultations with the Sixth Committee, that items which had generally been considered as falling within their respective areas of competence should be referred to the Sixth Committee. He believed that there was a widespread feeling in the Sixth Committee that such transfers of items could have beneficial effects only if the advantages to be derived therefrom were jointly assessed by the two Committees concerned. He had therefore, in consultation with the officers of the Sixth Committee and representatives of the regional groups, prepared a letter in which he suggested that, should any Main Committee envisage transferring any of the items currently on its agenda to the Sixth Committee, its Chairman should approach him so that he could bring the matter to the attention of the Sixth Committee. If there were no objections, he would address that letter to the Chairmen of the other Committees, through the President of the General Assembly.

77. It was so decided.

AGENDA ITEM 133: REPORT OF THE SPECIAL COMMITTEE ON THE CHARTER OF THE UNITED NATIONS AND ON THE STRENGTHENING OF THE ROLE OF THE ORGANIZATION (continued)

78. The CHAIRMAN announced that the Islamic Republic of Iran had become a sponsor of draft resolution A/C.6/39/L.4.

The meeting rose at 5.50 p.m.