UNITED NATIONS

General Assembly

FORTY-FOURTH SESSION

Official Records

SIXTH COMMITTEE
24th meeting
held on
Wednesday, 25 October 1989
at 10 a.m.
New York

SUMMARY RECORD OF THE 24th MEETING

Chairman: Mr. TUERK (Austria)

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Distr. GENERAL
A/C.6/44/SR.24
13 November 1989
ENGLISH
ORIGINAL: SPANISH

89-56612 1854S (E)

The meeting was called to order at 10.10 a.m.

AGENDA ITEM 145: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FIRST SESSION (A/44/10, A/44/409 and Corr.1 and 2)

AGENDA ITEM 142: DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (A/44/465, A/44/73-S/20381, A/44/75-S/20388, A/44/77-S/20389, A/44/123-S/20460)

1. Mr. GRAEFRATH (Chairman of the International Law Commission) said he took great honour in introducing the report of the International Law COmmission on the work of its forty-first session (A/44/10). In organizing the work of that session, the Commission had taken as a point of departure paragraph 3 of General Assembly resolution 43/169 and had been able to consider all of the seven topics in its current programme of work. The Commission and particularly its Drafting Committee, had devoted considerable attention to the topic entitled "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier". The Commission had completed its second reading of the draft articles on that topic and had adopted them, as well as two draft optional protocols thereto, devoted, respectively, to the couriers and bags of special missions and to the couriers and bags of universal international organizations. He recalled that two basic concerns had guided the work on the topic since the very beginning. The first concern had been to establish a coherent and, as much as possible, uniform régime governing the status of all kinds of couriers and bags, based on the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the 1969 Convention on Special Missions and the 1975 Convention on the Representation of States in their Relations with International Organizations of a Universal Character. To that end, the Commission had endeavoured on the one hand to consolidate, harmonize and unify existing rules and, on the other hand, to develop specific and more precise rules for the situations not fully covered by those conventions. The second concern had been to determine the legal protection to be accorded to the courier by reference to the criterion of functional necessity and to strike a proper balance between the rights and duties of the sending State, the receiving State and the transit State.

2. Explaining the scope of the three draft instruments adopted by the Commission at its forty-first session, he recalled that article 1, as adopted on first reading, had provided that the draft would apply to the diplomatic courier and the diplomatic bag employed for the official communications of a State with its missions, consular posts and delegations and for the official communications of those missions, consular posts and delegations with the sending State or with each other. The scope of the draft had been clarified by article 3 on use of terms which, as approved on first reading, included within the scope of the draft the diplomatic courier and the diplomatic bag within the meaning of the 1961 Convention; the consular courier and the consular bag within the meaning of the 1963 Convention; the courier and the bag of a special mission within the meaning of the 1969 Convention and the courier and the bag of a permanent mission, a permanent observer mission, a delegation or an observer delegation within the meaning of the 1975 Convention. The scope of the draft had, however, been far from general

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because article 33 allowed for optional declarations whereby any State could, when expressing its consent to be bound by the future instrument, indicate, by way of a declaration, that it would not apply the said instrument to a given category of couriers and bags. The Commission had noted that article 33 defeated one of the main purposes of the draft, namely the establishment of a uniform régime for all couriers and bags, and had given rise to substantial reservations and objections. It had therefore decided to delete it.

3. At the same time, it had reduced the scope of the draft by excluding therefrom the courier and bag of special missions within the meaning of the 1969 Convention, on the understanding that States wishing to apply the provisions of the future instrument to such couriers and bags could do so by becoming parties to an optional protocol. In that connection he drew attention to draft Optional Protocol One. By way of consequence, the references to the 1969 Convention and to the courier and bag of a special mission had been eliminated from article 3.

4. Furthermore, the Commission had observed that the 1946 and 1947 Conventions on the Privileges and Immunities of the United Nations and of Specialized Agencies did not define the concepts of permanent mission, delegation or courier and were therefore technically difficult to fit into the framework of article 3. It had therefore decided to omit any reference to those conventions in article 3.

5. Lastly, in relation to the scope aspect, he pointed out that the draft articles encompassed both the official communications between the sending State and its mission's consular posts or delegations and the official communications between those missions, consular posts or delegations inter se.

6. Articles 4 to 16 had either remained unchanged or had undergone only minor, mostly drafting changes.

7. Article 17, on inviolability of temporary accommodation, had been abundantly commented on in the Commission and in the observations of Governments, basically in relation to two points: first, whether the temporary accommodation of the courier should be said to be inviolable and if so, to what extent; and, second, under what conditions that inviolability could be put aside. On the first point, the Commission had taken the view that the inviolability of the temporary accommodation was directly linked to the better protection of the inviolability of the bag and that that inviolability might be affected if the receiving State or the transit State were accorded a general right of access to the temporary accommodation, with the possibility of conducting inspections. On the second point, the Commission had taken the view that a reasonable balance should be struck between respect for the inviolability of temporary accomodations and the need for the receiving State or the transit State to take protective action if they were faced with emergency situations or if there were reasonable grounds to believe that prohibited articles were present in the courier's temporary accommodation and that search and inspection would be justified.

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8. Paragraphs 1 and 3 of article 17 as adopted on first reading dealt with the principle of inviolability, the exceptions to it and the conditions attaching to those exceptions. The Commission had thought that it would be more logical to reorganise the ideas expressed in those two paragraphs in the following way: (i) to state the principle of inviolability; (ii) to state the exceptions to that principle; and (iii) to state the conditions attaching to the exceptions. The new paragraph 1 enunciated the general rule that the temporary accommodation of the diplomatic courier was inviolable. In order to emphasize that the inviolability of the temporary accommodation related principally to the bag which the courier was carrying, the Commission had inserted in the opening sentence, after the words "diplomatic courier", the words "carrying a diplomatic bag" and in order to make it clear that the principle of inviolability of temporary accommodation admitted of certain exceptions, it had inserted after the word "shall" the phrase "in principle", which immediately introduced an element of flexibility, suggesting the exceptions appearing in subparagraphs (a) and (b). Subparagraph (a) was basically the final part of paragraph 1 of the text adopted on first reading. It provided that inviolability might be set aside when fire or other disaster required prompt protective action by the receiving State or the transit State. Subparagraph (b) was basically the first part of paragraph 3 of the original text. It allowed inspection and search by the authorities of the receiving State or the transit State when there were serious grounds for believing that, in the temporary accommodation of the courier, there were articles whose possession, import or export was prohibited by the laws of the receiving State or the transit State or controlled by their quarantine regulations.

9. Paragraphs 2 and 3 set forth the conditions under which the exceptions stated in paragraph 1 (a) and (b) were allowed. Paragraph 2 was taken from paragraph 1 of the original text and paragraph 3 was taken from the original paragraph 3. The second sentence of that paragraph was new. Since the situation referred to in paragraph 1 (b) was not one of emergency and did not normally require the same prompt protective action as was required in emergencies, the diplomatic courier should be given an opportunity to contact his mission in order to invite a member of the mission to be present during inspection or search. He referred in that connection to paragraph (8) of the commentary.

10. Paragraph 4 reproduced without change paragraph 2 of the text adopted on first reading.

11. In dealing with article 18 on immunity from jurisdiction, the Commission had borne in mind that the text adopted on first reading represented a compromise based on a functional approach leading to qualified immunity from jurisdiction. In order to avoid upsetting the delicate balance achieved in the text, it had kept changes to a minimum. The only substantive modification consisted in adding at the end of paragraph 2 a new sentence, proposed by the Special Rapporteur on the basis of the written coments of a Government and reading: "Pursuant to the laws and regulations of the receiving State or transit State, the courier shall, when driving a motor vehicle, be required to have insurance coverage against third-party risks." The other changes made were of a purely drafting nature.

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12. The positions of articles 19 and 20 had been switched since the first reading and a paragraph of the original article 19 had been transferred to the original paragraph 20. The provisions adopted on first reading had thus been re-arranged for reasons of logic, but their wording remained largely unchanged.

13. Article 21 dealt with the beginning and the end of privileges and immunities. In order to bring out those two aspects more clearly, the Commission had decided to deal with them in separate paragraphs and to modify the title. Paragraph 1 corresponded to the first sentence of paragraph 1 of the original text. Paragraph 2, on the end of the courier's privileges and immunities, opened with what had been the second sentence of the original paragraph 1, supplemented by a clause reading "or the expiry of a reasonable period in which to do so", which called for a word of explanation. The original text had provided that the privileges and immunities of a courier "normally" ceased when he left the territory of the receiving State. An exception to the rule, set out in paragraph 2, was that when the courier was declared persona non grata or not acceptable, his privileges and immunities ceased when he left the territory or on the expiry of a reasonable period in which to do so. At the stage of second reading, the Commission had taken the view that the same principle should be applied to all couriers; there being no reason for any courier to continue to enjoy his privileges and immunities if he remained in the territory of the receiving or transit State for a long period after the completion of his functions. In such a case, the receiving or transit State should be entitled to give the courier a reasonable period in which to depart, and to cease to accord him privileges and immunities on the expiry of that period. As a result of the addition, at the end of the first sentence of paragraph 2, of the clause "or on the expiry of a reasonable period to do so", paragraph 2 of the original article had become pointless and had therefore been deleted. The second sentence of paragraph 2 in the new text corresponded to the last sentence of paragraph 1 in the original text and provided a second exception to the rule that privileges and immunities ceased at the moment of the courier's departure from the territory of the receiving State. The text adopted on first reading provided that the privileges and immunities of a courier ad hoc ceased at the time of delivery of the bag to its consignee; the intention was not to discriminate against the courier ad hoc but to cover the case of a courier, who, being a resident of the receiving State, should not continue to enjoy privileges and immunities after he had delivered the bag. In order to make that point clear, the text currently referred to the courier ad hoc "who is a resident of the receiving State".

14. In article 22 on waiver of immunities, three substantive changes had been made. The first consisted in the elimination in paragraph 2 of the words "except as provided in paragraph 3 of this article", the rationale for the deletion being that the situation envisaged in paragraph 3 was not a situation of waiver stricto sensu. Since, however, the rule enunciated in paragraph 2 resulted in the receiving or the transit State exercising its jurisdiction without a formal waiver, a second change had been made: it consisted in the insertion, at the beginning of paragraph 3, of the word "However". The third substantive change concerned paragraph 4: the Commission had taken the view that the requirement of a separate waiver for execution should apply not only in respect of civil or administrative

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proceedings but also in respect of criminal proceedings; to make the text comprehensive in that respect, it had replaced the words "civil or administrative proceedings" by "judicial proceedings".

15. No substantive changes had been made in articles 23 to 27.

16. Turning to the most difficult article of the entire draft, namely article 28 which, as adopted on first reading, contained several parts in square brackets, he recalled that, in order to facilitate a solution, the Special Rapporteur in his eighth report had offered three alternatives, based on the written comments by Governments.

17. For paragraph 1, all three alternatives suggested the same solution - retaining in the text the idea that the diplomatic bag must be inviolable, wherever it might be, and the idea that the bag must be exempt from examination directly or through electronic or other technical devices. On both scores, the opinions of Governments had concorded with the view expressed by the majority of the Commission's members during the discussion of the article on first reading: the bag should be declared inviolable and should not be subject to examination, either directly or through electronic or other technical devices. Hence, paragraph 1 of the article currently reproduced the text adopted on first reading but without the square brackets.

18. In the case of paragraph 2, the choice had been more difficult. The 1963 Vienna Convention on Consular Relations contained a provision - article 35, paragraph 3 - under which the receiving State might, if it had serious doubts as to the contents of the bag, request that it be opened. If the request was turned down, the bag must be returned to the State of origin. Such a provision did not exist in other Conventions. The three alternatives suggested by the Special Rapporteur for paragraph 2 all had their pros and cons: the first alternative was to eliminate the paragraph - a solution which had the advantage of establishing a uniform régime covering all bags, but entailed a departure - with regard to the consular bag - from the 1963 Vienna Convention. The second option was to maintain the paragraph but limit its application to the consular bag - an approach consistent with the 1963 Vienna Convention, but at variance with one of the main purposes of the draft, namely, the establishment of a uniform régime for all bags. The third alternative was to extend to all bags the treatment applicable to the consular bag under the 1963 Convention - an approach consistent with the concern for a uniform régime but involving a departure from existing conventions, particularly the 1961 Vienna Convention on Diplomatic Relations. The Commission had come to the conclusion that the second alternative was the only one that could command general acceptance and had therefore reproduced in paragraph 2 of article 28 the text of article 35, paragraph 3, of the Vienna Convention on Consular Relations. In reaching that conclusion, the Commission had in no way ignored the legitimate concerns of the receiving and transit States. It was fully aware, as indicated in paragraph (8) of the commentary to article 28, of the abuses to which the inviolability of the bag might give rise, especially with regard to the illicit import and export of narcotic drugs. The Commission realized that that

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particular problem was one of major concern to the international community, both at the international level (as evidenced by the inclusion in the Assembly's agenda of a new item which had been allocated to the Sixth Committee) and at the regional level, as appeared from the work being carried out in the framework of the Inter-American Juridical Committee, whose most recent session he himself had had the privilege to attend as Chairman of the Commission. The solution adopted in paragraph 2 of article 28 in no way detracted from those concerns.

19. The only change of substance in article 29 concerned the deletion of the reference to "all national, regional or municipal dues and taxes".

20. In article 30, only paragraph 2 had undergone substantive changes. First, the new text envisaged, as did paragraph 1, "other exceptional circumstances" in addition to cases of force majeure. Second, the words "the diplomatic courier or the diplomatic bag" had been replaced by the words "the diplomatic courier or the unaccompanied diplomatic bag". Third, the Commission had decided to indicate expressly that the obligations provided for in the text would arise only if the State concerned was "aware of the situation". Fourth, it had given the content of those obligations greater precision by adding the words "provided for under the present articles" after the word "protection" and by replacing the words "shall extend to them the facilities necessary to allow them to leave the territory" by "and, in particular, extend facilities necessary for their prompt and safe departure from its territory".

21. Article 31 addressed situations of non-recognition or absence of diplomatic or consular relations between a State in whose territory an international organization had its seat or an office and a State maintaining a mission to such an organization. The Commission had reformulated the original text to make it clear that such situations did not relieve the former State of its obligation to act as a receiving State towards the latter State. That obligation, however, concerned only couriers and bags exchanged between the sending State and its missions or delegations.

22. Article 32 on the relationship between the future instrument and other conventions and agreements, had been re-drafted for more clarity. It currently dealt in three separate paragraphs with three different categories of agreements and conventions. Paragraph 1 dealt with the relationship between the future instrument and the codification conventions referred to in article 3. The word "supplement" indicated that the draft elaborated on the provisions of those conventions and did not purport to amend them, since only the States parties to the conventions in question could do so. That point was developed in paragraph (2) of the commentary. The text of paragraph 2, which concerned the relationship between the future instrument and existing bilateral and multilateral agreements other than the codification conventions, reproduced in principle the wording of article 73, paragraph 1, of the Vienna Convention on Consular Relations. Paragraph 3 concerned the relationship between the future instrument and future agreements. It was based on article 73 of the Convention on Consular Relations and article 41 of the Convention on the Law of Treaties.

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23. Turning to the two draft optional protocols, he said that draft Optional Protocol One, as indicated in its article I, enabled States to apply the provisions of the draft articles to the courier and bag employed for the official communications of a State with its special missions, within the meaning of the Convention on Special Missions, and for the communications of those missions with the sending State or with other missions, consular posts or delegations. Article II was a definitional article and article III was modelled on article 32 of the draft articles.

24. With regard to draft Optional Protocol Two, he recalled that at the time of adoption of the draft on first reading, the view had prevailed in the Commission that couriers and bags of international organizations should be left outside the scope of the draft. Taking into account the comments of Governments, however, the Special Rapporteur had proposed in 1988 to add to article 1 on the scope of the draft articles a second paragraph that would bring the couriers and bags of international organizations within the ambit of the draft. At its forty-first session, the Commission had taken the view that States should be afforded the possibility of applying the articles to couriers and bags of international organizations, particularly in the light of section 10 of the 1946 Convention on the Privileges and Immunities of the United Nations and section 12 of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies. Hence draft Optional Protocol Two was structured in the same way as draft Optional Protocol One.

25. He drew attention to the relevant recommendations of the Commission in paragraphs 66 to 70 of its report. For the reasons explained in paragraph 69 and 70, the Commission recommended to the General Assembly that it should convene an international conference of plenipotentiaries to study the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier as well as its draft Optional Protocols and to conclude a convention on the subject.

26. It should also be noted that, since the Commission had elaborated a draft Optional Protocol on the status of the courier and the bag of international organizations of a universal character, the General Assembly's decision on the convening of a conference would also entail a decision on the participation of such international organizations in the conference. Apart from the issue of participation in the future convention, the conference would have before it, in addition to the task of finalizing the substantive rules, the usual problems relating to the final clauses of the convention and to settlement of disputes.

27. Last but not least, he drew attention to the resolution adopted by the Commission, which was reproduced in paragraph 71 of the report, and emphasized that the Commission had indeed been unanimous in expressing to the Special Rapporteur for the topic, Professor Alexander Yankov, its deep appreciation of the invaluable contribution he had made to the preparation of the drafts currently before the Committee.

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28. Turning to chapter III of the report, dealing with the draft Code of Crimes against the Peace and Security of Mankind, he said that the Commission's discussion had been based on the seventh report of the Special Rapporteur, which was devoted to war crimes and crimes against humanity. In that report, the Special Rapporteur had submitted two proposals relating to war crimes which were reproduced in footnote 67/ to the Commission's report. The Commission's discussion of those proposals had revolved mainly around three issues: (a) whether the concept of gravity (or seriousness) should or should not be included in the definition of a war crime under the draft Code; (b) which expression should be used to designate the legal rules whose breach could constitute war crimes, namely "the laws or customs of war" or "the rules of international law applicable in armed conflict" and (c) the method of definition, namely whether the definition should be of a general nature or whether it should be a list and, if so, whether the list should be exhaustive or indicative.

29. With regard to the question of gravity, many members had been of the view that in keeping with the definition of crimes against the peace and security of mankind adopted by the Commission, only war crimes of a very serious nature should be included in the draft Code. Minor violations of the rules of armed conflicts should not fall within the ambit of the Code. Several members, however, had stressed that international law permitted the trial of a member of the enemy's armed forces for a violation of some rule of the laws of war even if the violation was a minor one. In that connection, it had been made clear that the intention was not to change the usual meaning of the term "war crime" but only to determine which "war crimes" should be included in the draft Code. Paragraphs 91 to 103 of the report contained a detailed exposition of the views expressed on the concept of gravity as related to war crimes and on the connection of that question with certain texts contained in international law instruments.

30. Paragraphs 104 to 108 referred to the discussion held on the question of which expression should be used to designate the legal rules whose breach could constitute war crimes. It should be noted in that connection that there had been a definite trend in the Commission in favour of using the expression "rules of international law applicable in armed conflicts" for reasons related, among other things, to clarity, precision and a more faithful reflection of contemporary international law. It had been felt that the definition of war crimes as violations of the "rules of international law applicable in armed conflict" would cover both conventional law and customary law, as well as all types of armed conflict, to the extent that international law was applicable to them.

31. Paragraphs 109 to 121 of the report set out the different views expressed in the Commission on the method of definition to be adopted for the inclusion of war crimes in the draft Code. Both of the alternatives originally presented by the Special Rapporteur were general definitions without any list of acts constituting war crimes under the Code. Some members of the Commission had supported that approach invoking, among other things, the practical difficulties involved in drawing up such a list. The majority of members, however, had been strongly in favour of including a list of acts in the definition of war crimes under the Code,

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among other things, because of the need to ensure some uniformity in the implementation of the Code. While a few members had preferred a definition consisting of an exhaustive list of war crimes, most members had been in favour of a general definition followed by an indicative list of war crimes, which would avoid the practical difficulties involved in drawing up an exhaustive list. Such a list would also provide clear guidance to judges as to what kind of war crimes were considered to be serious violations of the rules of international law applicable in an armed conflict and therefore covered by the provisions of the Code.

32. As an expression of his sensitivity to the wishes voiced by the majority of the Commission's members, the Special Rapporteur had presented in the course of the session a reformulation of his proposed draft article on war crimes, the second alternative of which included, in paragraph (c), a non-exhaustive list of acts. The reformulated draft article was reproduced in footnote 72/ to the report. The Commission, as reflected in paragraphs 122 to 141 of the report, had proceeded to a detailed discussion of the proposed list. Several drafting and substantive proposals had been made regarding the various acts included in the list and some members had also suggested the addition of other acts to the list. It has also been proposed that the use of nuclear weapons should be included in the list of war crimes or in a separate article.

33. In his seventh report the Special Rapporteur had also presented to the Commission a draft article, consisting of several paragraphs, reproduced in footnotes 75/ to 79/ and 84/ to the Commission's report, which dealt with various crimes against humanity, namely: genocide; apartheid; slavery and other forms of bondage and forced labour; expulsion of populations, their forcible transfer and related crimes, and other inhuman acts including destruction of property as well as attacks on property and assets of vital importance for mankind, such as the human environment. The Commission had undertaken a general discussion on the questions of crimes against humanity as well as a specific discussion of the various crimes against humanity proposed by the Special Rapporteur.

34. Paragraphs 142 to 158 of the Commission's report summarized the general comments made on the question of crimes against humanity. The issues touched upon in that discussion had included the distinction between war crimes and crimes against humanity and the elements of the definition of the latter. It had been generally recognized that the word "humanity" should be interpreted as the "human race" rather than as a moral concept; crimes against humanity would then be crimes directed against the human race as a whole and involving the essential values of human civilization.

35. With regard to genocide, the Special Rapporteur's formulation reproduced in footnote 75/ was based on the enumeration of acts contained in the 1948 Convention for the Prevention and Punishment of the Crime of Genocide. However, the Special Rapporteur's enumeration of acts, unlike that of the Convention, was not exhaustive. That approach had been generally supported in the Commission.

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36. Concerning apartheid, the Special Rapporteur had presented two alternative formulations reproduced in footnote 76/. The first formulation contained a reference to the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid. The second formulation reproduced the entire text of article II of that Convention. The Commission had been generally in favour of including apartheid among the crimes against humanity. The majority of its members had shown a preference for the second alternative, with some reservations as to the citation of the source of the provision. A discussion had arisen in the Commission as to whether the relevant provision should contain a specific reference to the régime of apartheid "as practised in southern Africa". The arguments for and against that question were set out in paragraphs 164, 165 and 168.

37. The Special Rapporteur had also proposed the following formulation for inclusion among the crimes against humanity: "slavery and all other forms of bondage, including forced labour". There had been general agreement in the Commission on the need to include slavery among the crimes against humanity. The general opinion in the Commission had been that the expression "other forms of bondage" lacked precision and that its content should be clarified. It had also been observed in the Commission that the terms "forced labour" needed further clarification. The 1926 Slavery Convention, the ILO Convention No. 105 of 1957 and article 8 of the Covenant on Civil and Political Rights had been mentioned in that context, as well as the possible distinction between "forced labour" and the institution of "labour for public purposes" or "civic service" practised by some countries. Paragraphs 169 to 174 dealt in detail with the discussion of those concepts.

38. The proposed inclusion among crimes against humanity of the expulsion of populations, their forcible transfer and related crimes had given rise to a lively discussion which is reflected in paragraphs 175 to 184 of the report. While many members had welcomed the possible inclusion in the draft Code of a provision of that nature, other members had felt that some distinctions were necessary and that the Special Rapporteur's draft did not refer to the purpose of the expulsion or transfer, which should be a highly important factor in qualifying the existence of the crime. The cases of transfer of populations which had given rise to discussion had included the transfer of populations under treaties concluded in extremely grave and exceptional circumstances in the interest of preserving peace, and those carried out for humanitarian reasons. Lastly, some members of the Commission had felt that the crimes referred to in the proposed provision could be confused either with the crime of genocide or with the crime of apartheid.

39. The Commission had favourably received the proposal of the Special Rapporteur to incriminate, as crimes against humanity, all other inhuman acts committed against any population or against individuals on social, political, racial, religious or cultural grounds, including murder, deportation, extermination, persecution and the mass destruction of their property. Some drafting suggestions had, however, been made with regard to various aspects of the proposed provision. Special attention had been devoted in the discussion to the proposed inclusion among inhuman acts of attacks on property. Several members, noting that the

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proposed draft covered the mass destruction of the property of a population, had suggested that it should be expanded to cover expressly the protection of the cultural heritage of mankind, such as monuments of historical, architectural, artistic or archaeological significance. The work of UNESCO in that area had been mentioned, as well as the possibility of referring to the criteria established by that organization in defining the specific property recognized as the common heritage of mankind, the destruction of which would be a crime under the Code. Paragraphs 185 to 198 of the report reflected extensively the considerations mentioned in the Commission in connection with those issues.

40. The Special Rapporteur, as reflected in footnote 84/, had also proposed in his seventh report the incrimination as a crime against humanity of any serious and intentional harm to a vital human asset, such as the human environment. The Commission had received favourably the proposed inclusion of serious harm to the human environment among crimes against humanity. Suggestions had, however, been made to the effect that a reformulation of the relevant provision should take into account article 19 of the draft articles on State responsibility and article 55 of Additional Protocol I to the 1949 Geneva Conventions. The concept of ecological security and the element of intent had also been discussed in connection with the proposed provision as reflected in paragraphs 199 to 204. It should be noted, however, that several members had expressed the view that the notion of "vital assets" was somewhat vague and should be defined more clearly.

41. He then drew attention to the proposal reflected in paragraphs 205 to 210 of the Commission's report in connection with the incrimination of the international traffic in narcotic drugs. Several members of the Commission had considered that such traffic should constitute both a crime against peace and a crime against humanity: a crime against peace because it could have a destabilizing effect on some countries, particularly small countries; and crime against humanity because of its detrimental effects on the health and well-being of mankind as a whole. Important considerations had been raised in the Commission in connection with those issues, which were duly reflected in the report. The Commission had decided to request the Special Rapporteur to prepare a draft provision on international drug trafficking for its next session. In that connection, it should be noted that recent events in the international community had brought the question of drug trafficking even more to the forefornt. Furthermore, the Assembly had recently approved the inclusion of a suplementary item in its agenda, which had been allocated to the Sixth Comittee and was related to the above-mentioned issues. That being so, the Commission would be extremely grateful for any comments or suggestions that members of the Sixth Committee might wish to make on those issues.

42. While, for the time being, the Commission was concentrating on the substantive provisions of the draft Code, the question of effective implementation was always present and the Commission was taking care not to prejudge that important question, which would be taken up at a later stage. Some members of the Commission had referred to the question of implementation of the forty-first session. Some had suggested that national tribunals should be invested with the task of implementing

the Code; others would prefer the creation of an international criminal tribunal for that purpose. There had also been intermediate proposals which did not regard national tribunals and an international criminal tribunal as mutually exclusive. According to that view, national tribunals could act as courts of first instance and an international criminal tribunal could act as an appeals court competent to review the decisions of national tribunals. A detailed description of these comments are to be found in paragraphs 211 to 216 of the report.

43. In addition to taking action on the seventh report of the Special Rapporteur, the Commission had adopted three new articles to be included in part I of chapter II of the draft Code, devoted to acts constituting crimes against peace. He recalled that in 1988 the Commission had adopted the first article of that particular part of the draft, namely article 12 on aggression. In 1989 the Commission had adopted article 13, on threat of aggression; article 14 on intervention; and article 15 on colonial domination and other forms of alien domination. The remainder of the acts which the Special Rapporteur suggests should be included in the category of crimes against peace would be taken up in 1990. He drew attention in that connection to footnote 86/ to the report, which provided information on the work carried out thus far with regard to a future article 16 on serious breaches of obligations of essential importance for the maintenance of international peace and security. A proposal for the inclusion of an article on the preparation of aggression was pending and would also be taken up in 1990.

44. Returning to articles 13, 14 and 15, he observed that the title of each article indicated the crime, while the text described only the act which constituted the crime. The question of the attribution of the crimes under consideration to individuals would be dealt with later, in the framework of a general provision. All three articles should be read on the understanding that an appropriate introductory provision would be worked out at a later stage, as indicated in footnote 87/. Hence, the Commission was very well aware that the subjective element in the description of the crimes had not yet been formulated. It intended to draft a common chapeau to all the crimes covered by chapter II, attributing penal responsibility to those who were in a position to plan, order or organize the Commission of such crimes.

45. The format of articles 13, 14 and 15 differed from that of article 12 in two respects. First, article 12 was very elaborate, the reason being that the Commission had felt it inadvisable to depart more than was strictly necessary for the purpose of the Code from the Definition of Aggression adopted by consensus by the General Assembly. Second, it opened with a paragraph 1, described in the commentary as "provisional", which sought to establish a link between the acts of aggression and the individuals who were subject to criminal prosecution and punishment for acts of aggression. The Commission was aware of the need to ensure consistency in the formal presentation of all the articles in chapter II and would revert to that question at a later stage.

46. In drafting article 13 on threat of aggression, the Commission had based itself on the crime of aggression as defined in article 12. The Commission had

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been concerned, first, to describe as specifically as possible the form a threat of aggression might take and its constituent elements, and, second, to distinguish between actual threats of aggression and mere verbal excesses. The text adopted singled out as possible forms of threat of aggression, declarations (in the sense of public messages in verbal or written form), communications (in the sense of intention, not broadcast publicly but contained in correspondence or orally manifested, even by telephone) and demonstrations of force, such as troop concentraions or displays of military strength. That, however, was only an illustrative list, as was apparent from the words "or any other measures". With regard to the distinction between an actual threat of aggression and mere verbal excesses, the phrase "which would give the Government of a State reason to believe" was intended to provide, in so far as possible, an objective criterion for determining whether a particular course of conduct or expression of intent amounted to a threat of aggression. Such determination would naturally depend on the circumstances of each case and could only be made ex post facto by the judge in the light of those circumstances. He drew attention to paragraph (7) of the commentary, which stated that some members had expressed reservations on the article.

47. With regard to article 14, the definition of intervention contained in paragraph 1 comprised two elements: the first element concerned the concept of impairment of the sovereign rights of a State (which the Assembly, in the declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, and the International Court of Justice, in its judgement in the Nicaragua case, had deemed to be an essential element of intervention). The second element consisted in the identification of the concrete acts which made intervention a crime against peace. In identifying those acts the Commission had based itself on the relevant paragraphs of the declaration just referred to. The Commission had been careful to retain only those which were of sufficient gravity to warrant their characterization as crimes against peace. For some members, only "armed" subversive or terrorist activities qualified for such a characterization; for others, any subversive activity which resulted in a serious impairment of the sovereign rights of a State should be regarded as a crime against peace, whether or not it involved the use of armed force. The word "armed" had therefore been placed in square brackets. The divergence of views underlying the placing of the word "seriously" between square brackets might to a considerable extent depend on a decision to maintain or delete the word "armed" in the first sentence. As for paragraph 2, it was in the nature of a saving clause and was based on article 7 of the Definition of Aggression. Its placement in article 14 was provisional, since a similar clause might prove necessary in relation to other crimes against peace.

48. Article 15 dealt with colonial and other forms of alien domination existing in the modern world; the first limb of the article was the "establishment or maintenance by force of colonial domination", a phrase borrowed from article 19 of the Commission's draft on State responsibility. In the Commission's view, the notion of "establishment or maintenance by force of olonial domination" had acquired a sufficiently precise legal content in United Nations practice to warrant inclusion as a crime under the Code.

49. The second limb concerned "the establishment or maintenance by force of ... any other form of alien domination", an expression which had the advantage of being all-embracing and of ruling out restrictive a contrario interpretations. As indicated in paragraph (3) of the commentary to the article, the phrase encompassed the concept of "foreign occupation". The commission had narrowed the scope of the somewhat elusive concept of alien domination first by linking it to the denial of the right of peoples to self-determination - again on the basis of paragraph 3 (a) of article 19 of the draft on State responsibility - and second by defining the content of that right by reference to the Charter of the United Nations. As indicated in paragraph (4) of the commentary to the article, the words "as enshrined in the Charter of the United Nations" should not be interpreted to mean that the right of peoples to self-determination had not existed prior to the Charter of the United Nations.

50. While there was progress in elaborating the draft Code, it was certainly slow. But account must be taken of the fact that at the Commission's 1989 session the Drafting committee had had to devote most of the time available to finalizing work on the draft on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. Furthermore, in his view, work on the Code could be much easier and more efficient if all States were convinced that the Code could become an important element of the United Nations security system and would considerably contribute to the strengthening of the rule of law in international relations. Many difficulties encountered in drafting articles of the Code were political, not legal.

51. He wished now to turn to chapter IV of the report, dealing with the topic "State responsibility". At the Commission's 1989 session it had been possible to discuss only the Special Rapporteur's preliminary report distributed the previous year. In his preliminary report, Mr. Arangio-Ruiz had described his approach to parts two and three of the future draft on the topic and had proposed two articles, namely article 6, on cessation of an internationally wrongful act of a continuing character, and article 7, on restitution in kind.

52. In terms of the structure of parts two and three, the Special Rapporteur had suggested to adhere, in principle, to the outline proposed by the previous Special Rapporteur, Mr. Riphagen, and approved by the Commission. He had, however, recommended that the legal consequences of international delicts and those of international crimes should be treated separately. The previous Special Rapporteur had opted for a combined treatment based on the least common denominator, it being understood that any additional consequences which might attach to the Commission of a crime would form the subject of separate articles. Mr. Arangio-Ruiz had recommended a different method of work, without prejudice to the possibility of reverting to the combined-treatment approach if it became clear that there were enough common elements between the two sets of consequences. He had also proposed that the chapters on the legal consequences of delicts and crimes should identify what he called the substantive legal consequences of wrongful acts, such as cessation and reparation in its various forms, and the so-called procedural consequences of those acts, such as the possibility of resorting to certain

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"measures" to secure cessation or reparation, which the Commission had so far designated as countermeasures. With regard to part three of the draft articles, which had been conceived by the previous Special Rapporteur in terms of implementation or mise-en-oeuvre and the peaceful settlement of disputes, the new Special Rapporteur had proposed to focus it on the settlement of disputes arising in the context of responsibility for wrongful acts. In the new Special Rapporteur's view, rules and principles concerning any onera incumbent upon the injured State as a condition for lawful resort to measures belonged in part two no less than did the rules or principles relating to measures.

53. During the discussion in the Commission, many members had concurred with the Special Rapporteur that the legal consequences of delicts and those of crimes should be dealt with separately, but, while there had been a measure of agreement that the Special Rapporteur's approach was acceptable from a methodological point of view, opinions had not been unanimous on the possible conceptual and drafting implications of that approach. Some members had felt that the proposed method was consistent with the basic distinction made by the Commission between wrongful acts identified as delicts and wrongful acts identified as crimes. Others had felt that attempting to make a sharp distinction between the consequences of delicts and those of crimes was artificial. A few other members had contested the distinction between international delicts and crimes as adopted by the Commission in part one of the draft. In their view, the category of crimes as envisaged in article 19 of part one had no real raison d'être and merely hampered progress on the topic.

54. Most members had agreed with the Special Rapporteur that separate treatment should be given to so-called substantive consequences and instrumental or procedural consequences. Some, however, had stressed that the distinction was not absolute. The remark had been made in that connection that treating only reparation as a substantive consequence of a wrongful act and resort to countermeasures as a consequence of a merely procedural nature as a result of its being aimed at securing cessation or reparation was unacceptable; reparation, it had been stated, was not the only legal consequence of a wrongful act nor was it the sole content of the relationship called State responsibility, inasmuch as the injured State also had a right, though not an unlimited right, to take countermeasures. Emphasis had been placed in that context on the need to define clearly the conditions under which countermeasures could be resorted to.

55. The Special Rapporteur's proposal to move the procedural legal consequences from part three to part two and to limit part three to the rules on the settlement of disputes had met with a favourable reaction on the part of many members, although some had pointed out that those measures could also be treated jointly with the question of dispute settlement and that both approaches found support in existing treaties.

56. He wished now to turn to the two articles proposed by the Special Rapporteur in his preliminary report. In presenting article 6, on cessation of an internationally wrongful act of a continuing character, the Special Rapporteur had pointed out that, in a system in which the making, modification and abrogation of

rules rested on the will of States, any act of a State which was not in conformity with an existing rule represented a threat not only to the effectiveness but also to the validity, and thus to the very existence, of the infringed rule, particularly in the case of an unlawful conduct extending in time. The Special Rapporteur therefore considered a rule on cessation as desirable not just in the interest of the injured State or States, but also in the interest of any other State that might want to rely on the infringed rule and in the global interest of the international community in the preservation of the rule of law. He had, furthermore, emphasized that the wrongdoer State was under an obligation to desist from its unlawful conduct without prejudice to the responsibility that it had already incurred because the primary obligation continued to be in force, and that cessation and reparation were two different concepts.

57. The discussion in the Commission had indicated that the need for a provision on cessation was not disputed. Comments had focused on the exact meaning of cessation and its relation to reparation.

58. Divergent views had been expressed in the Commission on whether cessation should be viewed as growing from primary rules or as being governed by secondary rules. Some members had felt that the first of those two approaches would blur the basic distinction drawn by the Commission between primary and secondary rules and would have the effect of making the consequences of a wrongful act rest on two different bases. Others had felt that that issue was of limited practical significance, pointing out in particular that an injured State would usually seek a combination of remedies and that courts were more concerned with ordering remedies than identifying the legal basis of those remedies.

59. Other issues which had been discussed in the context of article 6 had concerned: the distinction to be drawn between cessation and interim measures of protection; whether article 6 should provide not only for the author State's obligation to cease the wrongful action or omission but also for the injured State's right to demand cessation; and the meaning of the phrase "wrongful act of a continuing character".

60. With regard to the second of the articles proposed by the Special Rapporteur, namely article 7, on restitution in kind, the proposed text, after asserting the right of the injured State to claim restitution in kind from the State having committed the internationally wrongful act, listed three exceptions to the obligation to provide restitution in kind, namely (1) physical impossibility, (2) impossibility deriving from the incompatibility with a peremptory norm of general international law of the action necessary to provide restitution in kind and (3) excessive onerousness for the State having committed the wrongful act. The proposed article then clarified the concept of excessive onerousness in a paragraph 2 and provided in a paragraph 3 that no legally valid obstacle to restitution in kind could derive from the internal law of the wrongdoer State. The final paragraph dealt with the right of the injured State to claim reparation by equivalent or pecuniary compensation as a substitute for restitution in kind.

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61. Many members of the Commission had agreed that restitution in kind, as the most "natural" form of redress, was the primary remedy, and that restitution should be applied as widely and as universally as possible. Some members, however, had pointed out that restitution was not always physically or politically feasible.

62. As regards the meaning of restitution, there had been in the Commission a divergence of views corresponding to the divergence existing in State practice: according to one trend, restitution consisted in the restoration of the situation which had existed prior to the wrongful act, namely the re-establishment of the status quo ante, while, according to the other trend, restitution consisted in the establishment of a situation which would have existed if the wrongful act had not been committed. In that context the remark had been made that, inasmuch as the purpose of a claim for reparation was to wipe out the consequences of the wrongful act, that was to say, to establish a situation which would have existed if the wrongful act had not been committed, the term "restitution" should perhaps not be interpreted too broadly and should be limited to the restoration of the status quo ante. Attention had been drawn to the fact that the definition of restitution would apply not just to delicts, but also to international crimes, in relation to which restitution should not be limited to material aspects.

63. With regard to exceptions to restitution, it had been generally agreed that material impossibility was a valid ground. With regard to legal impossibility, many Commission members had agreed with the jus cogens exception to restitution, although one of them had found it difficult to see how restitution could be contrary to a peremptory norm unless the primary obligation from which it derived was also contrary to that norm, in which event it would be devoid of legal consequences and the question would not arise. With regard to obstacles deriving from municipal law, doubts had been expressed as to whether they should be totally ruled out as a basis for a possible exception. The remark had been made in that connection that, although domestic law should not be invoked to preclude international responsibility, the obligation of restitution did not extend to certain acts, such as the judgements of national courts, and that overlooking such domestic-law impossibilities might result in States being called upon to set aside or rescind national courts' judgements embodying a violation of international law. Attention had also been drawn in that context to the need to ensure that restitution claims were not made use of to restrict the right of peoples to self-determination and the right to nationalization. While the exception of excessive onerousness proposed by the Special Rapporteur had been viewed by some members as helpful in that regard, inasmuch as it would make it possible to safeguard the freedom of States to carry out any economic and social reforms which they considered necessary, reservations had been expressed by others as to an approach which would minimize the legal consequences deriving from an internationally wrongful act and reduce the scope of the obligation of reparation.

64. As for the distinction between direct and indirect injury, some members had agreed with the Special Rapporteur that it was artificial. Others, however, had found it useful to the extent that it was compatible with the principle of exhaustion of local remedies: in their view, a State could not put forward a claim

on behalf of its citizens against another State unless its citizens had exhausted local remedies of the alleged wrongdoer State.

65. With regard to paragraph 4 of article 7, as proposed by the Special Rapporteur, he wished to raise a point concerning the injured State's right to choose between restitution and pecuniary compensation. Some members had agreed with the Special Rapporteur's approach but had felt that the whole matter could be evaluated only once an article on pecuniary compensation had been proposed. The remark had furthermore been made that the possibility of opting for pecuniary compensation should be ruled out not only in the case where such an option would involve a breach of an obligation arising from a peremptory norm of international law but also in the case where it would entail a violation of an obligation erga omnes arising out of a multilateral treaty.

66. The results achieved on State responsibility at the Commission's 1989 session might seem somewhat modest, given the topic's importance and the understandable desire of many delegations in the Sixth Committee to see the work in that major area of international law progress at a faster pace. However, after three years a fresh start was now being made, and the Commission was fully aware of the great importance of the topic.

67. With regard to chapter V, which dealt with the topic "International liability for injurious consequences arising out of acts not prohibited by international law", the Commission had had before it the fifth report of the Special Rapporteur, Mr. Julio Barboza, containing a revised version of the 10 draft articles which he had proposed the previous year and which had been referred to the Drafting Committee. In addition, the report had contained eight new articles for a new chapter. The Special Rapporteur had explained that he had revised the first 10 articles comprising chapters I and II, on "General provisions" and "Principles", in the light of the views expressed by members of the Commission and by delegations in the Sixth Committee so as to facilitate the work of the Commission and of its Drafting Committee.

68. The first change made by the Special Rapporteur in the first 10 articles consisted in giving an equally important role to the concepts of "harm" and "risk". Under the previous approach, the concept of risk had been the dominant criterion. Under the new approach, both activities causing transboundary harm and activities involving a risk of causing transboundary harm were covered. Harm and risk must however be "appreciable", a yardstick which had already been applied in the draft articles on the law of the non-navigational uses of international watercourses. Under the new approach, the scope of the topic was limited to "activities", understood as an aggregate of acts accomplished by many persons and oriented toward broad common ends, and did not extend to individual acts, unless they were inseparably linked to an activity involving a risk of transboundary harm.

69. Many members had supported the shift from the concept of risk to that of harm and risk, and had felt that the new approach struck a proper balance between the two components of the topic, namely prevention and reparation, even though it might

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entail some structural changes in the schematic outline which had been guiding the work on the topic since 1982. Some members, however, had held the view that over-emphasizing harm deprived prevention of any legal basis. In that context, it had been suggested that the Commission should keep in mind the possibility of establishing a list of activities to be covered by the draft articles.

70. Many members had preferred the concept of "activities" to the concept of "acts". Some, however, had expressed doubts as to its exact content and wondered if the distinction between the two concepts was as clear as the Special Rapporteur had assumed it to be. By way of example, reference had been made to individual acts which could cause transboundary harm such as the dismantling of a nuclear-power plant.

71. Another significant change had been made, in article 3, which now dealt with "assignment of obligations", instead of "attribution". Under the new draft article, a State was liable for activities with injurious transboundary consequences that were carried out in its territory or in other places under its jurisdiction or control. The text established a presumption that if an activity was carried out in the territory of a State or in other places under its jurisdiction or control, that State had knowledge of it or the means of knowing about it. However, during the debate the point had been made that limiting the formulae "jurisdiction and control" to places would exempt the home country of a transnational corporation from any responsibility for activities of the corporation outside its territory. In that context, some members had drawn attention to the need to take account of the special situation of developing countries. It had been pointed out that, as industrialized countries increasingly imposed strict environmental rules on the manufacture of chemical and toxic materials, industrial firms were moving their operations into developing countries where there were no such environmental rules, and that those countries, faced with the enormous burdens of poverty and external debts, were not in a position to resist what appeared in the short run to be an attractive economic opportunity.

72. The Special Rapporteur had orally raised two issues concerning the scope of the draft articles. The first had related to liability in respect of activities involving extended harm to many States or the risk therof. The Special Rapporteur had pointed out that for activities which might harm more than one State the procedural rules for prevention or the modalities of compensation would not be the same as for activities involving only two States. He had remarked that the work had, so far, been based on the premise that there was an identifiable State of origin conducting certain activities and an identifiable injured State suffering from them, and that if a larger number of parties were involved, the procedural rules designed for bilateral relations might not prove effective. The second issue raised orally by the Special Rapporteur had been whether the draft articles should cover liability in respect of activities causing harm to the "global commons". The Special Rapporteur had observed that, in the affirmative, the procedural rules would have to be re-examined since the harm done to the "global commons" would not directly affect the interests of any State in particular but the international community as a whole. The problem would be to identify the representative of the international community for the purpose of the fulfilment of procedural obligations and the payment of compensation.

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73. Activities causing injury to the "global commons" were generally recognized in the Commission as being on the increase and as posing an important problem. Some members, while being open-minded as to the best way of regulating such activities, had felt that in the absence of any régime it was incumbent on the Commission to give serious consideration to including them within the scope of the topic. Some other members had warned that such an expansion of the topic might render it unmanageable. The Special Rapporteur had expressed the intention of studying the matter further and reporting to the Commission the following year.

74. In the latter part of his fifth report, the Special Rapporteur had presented eight new articles for inclusion in a chapter III entitled "Notification, information and warning by the affected State". That chapter focused on procedural rules aimed at preventing transboundary harm. The Special Rapporteur had stressed that those procedural rules were based on the principle of co-operation, which entailed a duty for States to ascertain whether activities about to take place in their territory involved a risk of transboundary harm, and, if those activities entailed such a risk, to take certain steps in order to prevent or minimize the transboundary harm. The Special Rapporteur had relied extensively in drafting those articles on part III of the draft articles on the law of the non-navigational uses of international watercourses.

75. The discussion on articles 10 to 17, as proposed by the Special Rapporteur, had focused on the underlying basis of procedural rules for prevention. Many members had emphasized that those rules applied to activities that were not wrongful and that the proposed articles, which were closely modelled on the draft articles on the law of the non-navigational uses of international watercourses, did not seem to take that fact fully into account.

76. The envisaged procedures had furthermore been viewed as too detailed and cumbersome and as too rigid, given the diversity of the activities and situations coming within the scope of the topic. Other comments which had been made in relation to articles 10 to 17, as proposed by the Special Rapporteur, had included the suggestion that, in the establishment of procedures for notification and assessment of activities, expert bodies could be appointed by Governments and could fulfil, under the auspices of international organizations, such tasks as the gathering and evaluation of information on the activities concerned and the assessment and monitoring of those activities. Another remark had been that the obligation to negotiate under article 16 should not be equated with an obligation to conclude an agreement at the end of such negotiations.

77. The Special Rapporteur had expressed the intention to revise articles 10 to 17 in the light of the comments they had elicited, but had warned that, in order for the obligation of prevention to have any meaning, a minimum of binding procedural rules had to be contemplated in order to ensure the involvement of the potentially affected State and to provide some yardsticks whereby that State could determine whether preventive action was actually being taken.

78. At the end of the debate the Commission had decided to refer articles 1 to 9 to the Drafting Committee.

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79. The Commission was aware that the elaboration of a comprehensive régime of liability was of fundamental importance to the international community, as evidenced by the innumerable initiatives which were being taken around the world in the ecological and environmental field. But the very topicality and magnitude of the question required that it should be approached with utmost seriousness and care and on the basis of a comprehensive analysis of all its aspects and ramifications. It was that type of approach which was reflected in chapter V of the Commission's report and which explained why progress was perhaps not yet as manifest as might be desired.

80. Chapter VI of the Commission's report, which was devoted to the topic "Jurisdictional immunities of States and their property", reflected genuine progress towards the finalization of the draft articles provisionally adopted on first reading by the Commission in 1986. However, the generally held view was that the pace of work on the topic should take into account the existence of a number of unresolved issues of a substantive nature, as well as the fact that the particular area of the law in question was in a state of flux in a number of States.

81. The current year's discussion had been based on the preliminary report of the Special Rapporteur, Mr. Motoo Ogiso, which had been circulated in 1988 but not considered then for lack of time, and on his second report, submitted in 1989. In his preliminary report, the Special Rapporteur had summarized the written comments and observations of Governments on the draft articles adopted on first reading and had proposed changes in the light of those comments and observations; he had, furthermore, drawn attention to a part VI on settlement of disputes which had been proposed by the former Special Rapporteur in his eighth report in 1986, but had not been included in the draft provisionally adopted on first reading. In his second report, the Special Rapporteur had commented further on certain draft articles and proposed additional changes.

82. Owing to lack of time, the Commission had not been able to accord the same degree of attention to all of the 28 draft articles adopted on first reading. It had thoroughly examined the five articles comprising part I, entitled "Introduction", and the five articles comprising part II, entitled "General principles", as well as two of the articles which were to appear in part III of the draft, devoted to limitations on (or exceptions to) State immunity, namely article 11 on commercial contracts and a new article 11 bis proposed by the Special Rapporteur on segregated State property. Those twelve draft articles had been referred to the Drafting Committee for second reading. As for articles 12 to 28 the discussion thereon could not be completed for lack of time and would be resumed the following year.

83. It was well known that the views of members and the practice of States in their approach to State immunity were divided. That had been reflected in the debate, but it had not dominated the discussion. The Commission had avoided entering again into a doctrinal debate on general principles. Instead, its discussion had concentrated on individual articles aiming to arrive at a consensus on what kind of activities of the State should enjoy immunity from foreign jurisdiction and what kind of activities should not enjoy such immunity.

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84. He wished to draw attention to the suggested merger of articles 2 and 3 into a single article on "Use of terms". In connection with those two articles, it had been suggested that the definition of the term "State" should encompass the constituent parts of a federal State. It had also been proposed to clarify the conditions under which a political subdivision of the State would enjoy jurisdictional immunity and to define the term "State" in such a way that it did not include State enterprises with segregated State property which were engaged in commercial activities. Other issues which had been raised included the question of the formulation of criteria for determining whether a contract was a commercial contract or not, and the question of the relative importance to be given to the "purpose" test and to the "nature" test.

85. Article 6, which set forth the principle of State immunity, was one of the key provisions on which consensus had yet to be reached. The views of members, as well as of Governments, were divided on the bracketed phrase "and the relevant rules of a general international law". Some had supported the retention of that phrase in the interest of flexibility, while most members had favoured its deletion on the ground that it might result in arbitrary restrictions on the codified rules, thereby defeating the very purpose of the Commission's work.

86. Whether the title of part III should refer to "limitations on State immunity" or to "exceptions to State immunity" was another question on which Commission members' views had been divided. There had, however, been general agreement that the title of part III should be decided upon after completion of the second reading of the substantive articles. To facilitate consensus a more descriptive title had been suggested, such as "cases in which State immunity may not be invoked".

87. Among the articles in part III which had been most extensively discussed, he wished to single out article 11 bis which had been proposed by the Special Rapporteur in response to the written comments and observations of a number of socialist States and to the comments of some members, and which dealt with commercial contracts entered into by a State enterprise on behalf of a State, with a foreign national or juridical person. Under the article, the State concerned could not invoke immunity from jurisdiction in a proceeding arising out of such a contract unless the State enterprise had segregated State property and was subject to the same rules of liability as a national or juridical person. It had, however, been noted that in general such enterprises did not act on behalf of the State but on their own. With a view to explaining further the legal concept of State enterprises with segregated property, several proposals had been made to make clear that State enterprises - judicial persons which acted on their own behalf and were liable with their own assets when entering into a commercial contract - did not enjoy immunity from jurisdiction and could not be identified with the State itself or other State enterprises. There had been general support in the Commission for the inclusion in the draft of a provision along those lines in order to address the special situation of socialist States and possibly also of developing countries in respect of their State enterprises. At the same time, it had been recognized that the concept of State enterprise with segregated State property should be considered in greater depth by the Commission. Some members had felt it preferable to cover

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that concept in the definition of the term "State", rather than to have a separate article on the subject.

88. Since only some of the members of the Commission had had an opportunity to make their views known on articles 12 to 28, the discussion would have to be resumed the following year. However, he would like to draw attention to the previous Special Rapporteur's proposal for the inclusion in the draft of a part VI on settlement of disputes. While the current Special Rapporteur had expressed readiness to present his views on the subject, some members had favoured leaving the matter to a diplomatic conference. The Commission would welcome an indication of the General Assembly's preference in that report.

89. The discussion of the topic "The law of the non-navigational uses of international watercourses", which had been dealt with in chapter VII of the Commission's report, had been relatively brief and had taken place on the basis of the fifth report submitted by the Special Rapporteur, Mr. Stephen Mc Caffrey, which had consisted of two parts.

90. The first part had been devoted to the subtopic of water-related hazards, dangers and emergency situations, and had proposed two new articles. The second part of the report had comprised chapters on the relationship between non-navigational and navigational uses and on regulation of international watercourses, it had proposed two new articles, namely article 24 entitled "Relationship between navigational and non-navigational uses; absence of priority among uses" and article 25 entitled "Regulation of international watercourses".

91. Since the second part of the Special Rapporteur's report had not been considered, he would now focus on the work accomplished under that topic in the first part of that report, more specifically, on the two new articles proposed in relation to water-related hazards, dangers and emergency situations. It was on those two articles that Governments' comments would be most welcome.

92. Article 22 laid down in its paragraph 1 a general obligation of watercourse States to co-operate on an equitable basis with a view to preventing or mitigating water-related hazards, harmful conditions and other adverse effects. Paragraph 2 contained a non-exhaustive list of the steps to be taken by watercourse States in fulfilment of their obligations under paragraph 1. Paragraph 3 laid down an obligation to take measures necessary to ensure that activities which affected an international watercourse were so conducted as not to cause the problems addressed by the article.

93. The article had generally met with approval, although a few members had questioned the usefulness of paragraph 3 on the ground that the problem was adequately covered by article 8. With respect to paragraph 1, the view had been expressed that the list of problems should be supplemented by a reference to water-borne diseases. The remark had been made, on the other hand, that the list was illustrative and that attempting to produce an exhaustive list would be inappropriate in a framework agreement. The phrase "on an equitable basis" had

been supported by some members but criticized by others. With regard to paragraph 2, the comments made had generally been in the form of questions. Thus, the relationship between subparagraph (a) and article 10 had been queried and clarification had been requested as to the meaning of the phrase "both structural and non-structural", which the Special Rapporteur had subsequently proposed to replace by "joint measures, whether or not involving the construction of works". As for paragraph 3, it had been viewed by some members as unnecessary and by others as calling for drafting improvements.

94. In article 23, paragraph 1 required that immediate notification should be given to potentially affected States and relevant intergovernmental organizations of any water-related danger or emergency situation originating in the territory of a watercourse State or of which that State had knowledge. That paragraph offered a definition of the phrase "water-related dangerss or emergency situations". Paragraph 2 laid down an obligation immediately to take all practical measures to prevent, neutralize or mitigate the danger or damage to other watercourse States. The Special Rapporteur had explained that the paragraph applied principally to dangers or situations resulting from human activities, and that with respect to those of natural origin, the chief obligation was that of prompt notification and provision of information. Paragraph 3 laid down an obligation of co-operation among States in the area affected by a water-related danger or emergency situation with a view to eliminating the causes and effects of the danger or situation and preventing or minimizing harm therefrom. Lastly, paragraph 4 provided for an obligation of watercourse States jointly to develop, promote and implement contingency plans for responding to water-related dangers or emergency situations.

95. While the comments on paragraphs 1 and 2 had been basically of a drafting nature, paragraph 3 had given rise to a number of substantive observations. The phrase "States in the area" had been viewed by some members as vague and by others as reflecting an unnecessarily limited approach, taking into account the cases in which voluntary assistance had been provided by States not in the area. In response to the observation that States and international organizations not parties to the future instrument could not be bound by it, the Special Rapporteur had indicated that the text could be re-drafted to make it clear tht non-parties were not bound by the obligation in paragraph 3. On the question of the provision of assistance, the remark had been made that States possessing certain types of technology, such as remote sensing capabilities, should be encouraged to provide assistance to potentially affected States by sharing data relating, for example, to flood forecasting. As for acceptance of outside assistance, the overall view had been that the matter should be dealt with in terms of an encouragement rather than of an obligation and one member had proposed a new article 23 bis along those lines. The question of providing modalities through which assistance could be rendered had also been raised.

96. With regard to articles 24 and 25, which the Commission had not discussed, a summary of the Special Rapporteur's presentation appeared in paragraphs 677 to 682 of the report. The topic of the law of the non-navigational uses of international watercourses was at a fairly advanced stage, and adoption on first reading of a

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complete set of articles thereon before the end of the current quinquennium seemed at the current state to be an achievable goal.

97. With regard to chapter VIII, which was devoted to the second part of the topic "Relations between States and international organisations", the Commission had had before it the fourth report of the Special Rapporteur, Mr. Diaz-Gonzalez, which had contained 11 draft articles, namely article 1 to 4, comprising part I, entitled "Introduction", articles 5 and 6, comprising part II, entitled "Legal personality", and articles 7 to 11, comprising part III, entitled "Property, funds and assets". The report had been introduced by the Special Rapporteur but could not be discussed for lack of time.

98. The bulk of chapter IX, entitled "Other decisions and conclusions of the Commission, "was devoted to the agenda item entitled "Programme, procedures and working methods of the Commission and its documentation". Under that item the Commission had taken up the requests addressed to it by the Assembly in paragraph 5 of its resolution 43/169. With regard to the planning of activities, the programme of work which the Commission had set itself the previous year for the remainder of its members' five-year term of office remained basically valid. Indeed, in 1989 the Commission had attained the first of its goals under the said programme of work since it had completed the second reading of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and had submitted to the General Assembly a complete set of draft articles and two draft optional protocols on the question. The Commission intended to make every effort to complete by 1990 the second reading of the draft articles on the jurisdictional immunities of States and their property. It furthermore intended to give priority during the remainder of the five-year term of office to the topic "Draft Code of Crimes against the Peace and Security of Mankind" and to the topic "The law of the non-navigational uses of international watercourses".

99. With regard to the future programme of work, the Commission had established a working group to deal with the matter. The Working Group had explored various avenues in the course of a number of meetings but had considered it premature to formulate any concrete suggestion at the current stage. It would hold further meetings at the following session to continue the consideration of the questions within its mandate.

100. The rest of chapter IX was self-explanatory, but he wished to draw attention to the Commission's awareness of the need to allocate additional time to the Drafting Committee, the steps being taken by the Commission to facilitate the consideration of its report by the General Assembly, and the possibility of enabling Special Rapporteurs to attend the Sixth Committee's debate.

101. The Commission had achieved one major concrete result at its forty-first session with the adoption of a complete set of draft articles and two draft optional protocols on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. Progress on the other topics might not have been as spectacular, but it was real and would no doubt materialize before the end

of the current term of office in the form of several complete sets of provisional or final draft articles. The progress achieved was largely due to the successful staggering of the consideration of the different agenda items and the constructive spirit which had characterized the discussion at the forty-first session.

102. Today, important topics on the Commission's agenda were much more progressive development - the search for a law as it should be rather than codification of existing customary rules. That had a far-reaching influence on the Commission's working methods; it implied and presupposed a large element of political decision-making and therefore urgently called for a close relationship with the Sixth Committee. After all, the Commission was not dealing with particular relations between several States, which could be solved on a bilateral or regional basis. It tried in respect to certain areas to transform the political will of the international community into general legal rules. Whenever that had been done successfully, it constituted an essential contribution to the strengthening of the rule of law in international relations.

103. Mr. CRUZ (Chile), referring to the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier adopted on second reading by the Commission, said that in general the text adopted dealt in an organic and systematic fashion with all matters relating to the diplomatic courier and bag, concentrating on the principles of diplomatic law laid down in the Vienna conventions on diplomatic relations, consular relations, and the representation of States in their relations with international organizations of a universal character. Chile had duly submitted its comments and observations on the draft articles (A/CN.4/409/Add.3), and was pleased to note that some of its observations had been taken into account in the text adopted, particularly those concerning draft articles 31 and 32.

104. Chile noted with satisfaction the Commission's success in drawing up a coherent, up-to-date draft convention establishing an appropriate status for the diplomatic courier clearly geared to the current needs and means of communication of States and international organizations, and supported the convening of an international conference of plenipotentiaries to consider the draft articles.

105. Mr. ROSENSTOCK (United States of America) said that the debate on the Commission's report was the highpoint in the Committee's session, and his delegation reserved the right to revert to general comments on the Commission's work under the subtopic to be dealt with at the end of the discussion of the report.

106. As to the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, the Commission had recommended that the General Assembly should convene a diplomatic conference to adopt a convention. The convening of a diplomatic conference was an expensive proposition both for the Organization and for participating States. Consequently, any decision to convene such a conference should not be made lightly. Consideration must be given to the question of whether a convention was the appropriate following stage and, if so, whether a convention should be elaborated at a conference or by the Sixth

(Mr. Rosenstock, United States)

Committee, following such precedents as the conventions on special missions, the protection of diplomats and hostage-taking.

107. The draft articles submitted to the General Assembly reflected compromises reached in the Commission on issues that had generated considerable controversy. Unfortunately, the Commission's final report containing the draft articles had not been circulated to delegations until late in September, which had not permitted the careful consideration of the articles necessary for the Committee to reach a decision on the Commission's recommendation to elaborate a convention through the convening of a diplomatic conference.

108. The topic had been addressed by the Commission and acted upon by the United Nations and by most Member States in the 1960s and 1970s. The existing régime for the diplomatic bag generally was provided in article 27 of the 1961 Vienna Convention on Diplomatic Relations. The régime reflected a practice extending back for centuries and had been adopted as well in a conference convened by the United Nations in 1963 to deal with consular missions, modified to permit the authority of the host State to refuse certain bags to consular missions under certain circumstances. The same basic régime had been incorporated into conventions adopted by conferences convened by the United Nations dealing with special missions, in 1969, and international organizations, in 1975.

109. The use of the diplomatic bag remained vital to the operation of diplomatic missions and to the efficient conduct of foreign relations. Attempting in the draft articles to deal with the special features of the different adaptations of the régime in other contexts complicated the existing law in the area in question and was, in his Government's view, unnecessary. The number of problems that had actually arisen had been relatively small, and the Committee should consider whether such problems were not better resolved bilaterally, by the States concerned, within the current general framework. The draft articles developed by the Commission might serve as a model for States seeking to address particular problems. The United States therefore recommended that, after hearing preliminary comments at the current session, the Assembly should defer further action until its forty-fifth session.

110. Mr. MARTINEZ GONDRA (Argentina), referring to the work on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, said that the draft submitted by the Commission for consideration by Governments harmonized, supplemented and consolidated the régime laid down in the conventions on the subject adopted under United Nations auspices, as well as in existing regional and bilateral agreements and in the applicable norms on the subject.

111. His delegation noted with satisfaction that the Commission had concluded that the ultimate objective was the codification and progressive development of a comprehensive and uniform régime for all couriers and bags; it recognized the endeavour made by the Commission to provide - by means of draft Optional Protocol one on the status of the courier and the bag of special missions and by means of draft Optional Protocol two on the status of the courier and the bag of

(Mr. Martinez Gondra, Argentina)

international organizations of a universal character - appropriate instruments for States wishing to extend application of the draft articles to such couriers and bags.

112. The Commission's draft reaffirmed the principles and norms concerning the personal inviolability of diplomatic, consular and other couriers. Particularly noteworthy was the reaffirmation of the principle that the diplomatic bag was inviolable wherever it might be, as well as the statement explicitly prohibiting the opening or detaining of the bag and its examination directly or through electronic or other technical devices.

113. Argentina noted with satisfaction that the draft contained provisions to prevent abusive or inappropriate acts and acts that might give rise to violations of the régime for the topic in question.

114. With regard to the Commission's recommendation to convene an international conference of plenipotentiaries to consider the draft articles, with just one exception past practice had been to adopt conventions on diplomatic and consular law on the topic at diplomatic conferences. There did not appear to be any reason to depart from that procedure, which Argentina considered preferable, while being willing to consider the financial reasons for adopting an alternative procedure.

The meeting rose at 12.40 p.m.