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SUMMARY RECORD OF THE 43rd MEETING

Chairman: Mr. GOERNER (German Democratic Republic)

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The meeting was called to order at 10.45 a.m.

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

1. Mr. KRIZ (Czechoslovakia) said that his delegation would make a separate statement on the Draft Code of Offences against the Peace and Security of Mankind under agenda item 125.

2. Referring to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, he said that his delegation attached great importance to the effective guarantee of reliable communications between States and their diplomatic, consular and other missions; such communication was essential for the work of such missions and, more generally, for implementation of each State's foreign policy. The diplomatic courier and diplomatic bag served as one of the most important instruments of such communication. His delegation therefore unreservedly supported the Commission's efforts to codify rules governing that aspect of international law.

3. His delegation was pleased to see that the Commission had adopted a number of new draft articles in first reading. All the prerequisites for a speedy conclusion of the Commission's work on that issue had been met and he hoped that the formulation of draft articles would be completed as soon as possible.

4. His delegation endorsed the principles contained in the draft articles already adopted by the Commission. However, he drew attention to certain questions which called for further study.

5. He wondered whether draft article 14 did not go too far with regard to the obligations of the transit State. The latter did not have the possibility - which was given to the receiving State in article 12 - to declare a courier persona non grata or not acceptable.

6. He fully supported the opinion that the inviolability of a courier's temporary accommodation (draft art. 17) was not only justified but also necessary and he agreed to the text of the draft article as it had been adopted. However, further examination was required in respect of the justification of the exception contained in paragraph 3 of that text.

7. Commenting on two provisions (draft arts. 23 and 36) which the Commission had not as yet adopted but which were of vital significance, he said that he could not agree with those delegations which felt that draft article 23 should be amended or even deleted. The question of the immunity of a courier from the jurisdiction of the receiving State or the transit State was highly important for the granting of such immunity must be regarded as an indispensible prerequisite for the undisturbed discharge of his important functions. It should be borne in mind that a courier was an official representative of his State, acting in the name of that State and performing significant official tasks of a highly confidential nature. To subject

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him to pressure, which might be particularly serious in cases of criminal proceedings, would be detrimental to the discharge of his functions. His delegation therefore endorsed the text of draft article 23 as presented by the Special Rapporteur (A/39/10, footnote 70).

8. As for draft article 36 (ibid., footnote 84), the key provision of the entire draft, his delegation considered that the inclusion of that provision, which was designed to secure the inviolability of the diplomatic bag, was fully justified, not only in view of the importance of the diplomatic bag in communications between a State and its diplomatic and other missions, but also in the context of the protection granted to the diplomatic bag by the 1961 Vienna Convention on Diplomatic Relations and other Conventions governing that aspect of international law. He drew attention to the question of inspections carried out with electronic or similar means stating that it must be settled in such a manner as not to infringe upon the inviolability of the diplomatic bag, taking into account the possibilities provided by the latest detector technologies. His delegation could not consent to any modification of the proposed provisions, primarily of draft article 36, that was designed to weaken the protection granted to the diplomatic bag. The arguments that had been put forward recently in support of attempts to weaken the protection of the diplomatic bag had failed to pursuade him of the necessity to revise the régime designed to safeguard the inviolability of the diplomatic bag as set forth in the Vienna Convention on Diplomatic Relations and other legal instruments.

9. The new draft articles adopted by the Commission (arts. 13, 14, 16, 17 and 18) concerning the question of jurisdictional immunities of States and their property were in line with the restrictive approach to State immunity adopted by the Special Rapporteur. That approach, which was based on the theory and practice applied mainly in some Western States and which disregarded the practice of the entire group of socialist States and that of a number of developing countries, had failed to win unequivocal support even in the Commission. His delegation considered that the principle of jurisdictional immunity was a general one, based on the principle of the sovereign equality of States, that allowed only a few exceptions which might be determined only on the basis of the study of the practice of all States. However, the results of the work of the Special Rapporteur continued to give the impression that he attached too great importance to the legislation and practice of Western States. The total - or almost total - absence of legal practice in the field of jurisdictional immunity of States in the socialist countries did not mean that those States had adopted a restrictive approach to immunity. On the contrary, the non-existence of judicial decisions showed that no proceedings had been held in those countries against a foreign State. When an action against a foreign State was filed in a Czechoslovak court, the case was dismissed on the grounds that a foreign State could not be sued. Such procedural decisions taken by Czechoslovak courts were not made public as a rule.

10. Czechoslovakia considered that a State had certain prerogatives as a State, irrespective of what activities it pursued or what legal relations it entered. Those prerogatives included jurisdictional immunity. There were different views

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regarding the degree of that immunity, in other words, whether that immunity should be absolute or restrictive. His delegation realized that immunity could never be totally unlimited. That was particularly evident in cases involving conflicts of sovereignty between two States by virtue of their respective immunities. In such cases jurisdictional immunity had no place for its application would violate the sovereignty of the other State and would also violate the sovereign equality of States. In that connection, his delegation agreed with the approach taken in draft article 17 because to apply immunity in such cases would be to jeopardize the exercise of the sovereign right of each State to stipulate conditions and to impose fiscal obligations on any activities pursued by other subjects, including foreign States, on its territory.

11. The situation was quite different with respect to the other proposed draft articles. The issue there was not a conflict of sovereignty between two States but of the status of the State in relations governed by civil law or in other similar relations. His delegation had always considered that in such cases immunity from jurisdiction should be the rule and that exceptions could be based only on a waiver of immunity by a State on a purely ad hoc basis.

12. He thought that it would be preferable for the Commission to concentrate in future on how to harmonize the varying views of States in respect of the extent of exceptions to jurisdictional immunity. The drafting of new articles apparently brought the work forward, but it seemed that their current wording would be acceptable neither to the group of socialist countries nor to a large number of developing countries.

13. His delegation was convinced taht the injurious consequences arising out of acts not prohibited by international law could not be effectively prevented or eliminated without international co-operation, in particular on jointly adopted international legal regulations. It had, however, some doubts whether a workable scheme for that field could be provided by codification, conceived only in general terms to be applied universally. The five draft articles submitted by the Special Rapporteur, which determined the subject of the codification, elaborated on some of the relevant aspects, namely the regulative functions of such codification, the international impact of the activities of States, and the physical consequences affecting a foreign State. The problem of determining the subject of the regulation was particularly important, since all other aspects depended on it. Pursuant to article 1, the regulation should cover "activities and situations" which "do or may give rise to a physical consequence" affecting another State. The latter phrase covered three types of activities and situations. First, injuries of a relatively lasting nature which were expected and, from the point of view of the source State, inevitable (such as pollution of the environment); secondly, injuries of a long-term nature which were also expected and inevitable from the point of view of the source State, such as long-term injurious climatic changes or permament and irreversible injuries; and thirdly, activities which caused no harm under normal circumstances but which involved risks of accidents with serious consequences, such as the transport of radioactive materials, objects in space, or oil tankers.

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14. As to the first group of activities, relatively minor cases of environmental pollution were often dealt with in bilateral negotiations between two neighbouring States or multilateral negotiations between States of a certain region. The types and circumstances of such injuries were so diverse that it would be extremely difficult to cover them all in a multilateral document supposed to be valid universally. It was definitely more appropriate to settle those problems through bilateral or regional arrangements.

15. As to the second group of activities, the global protection of the environment certainly required international co-operation. Those matters, however, did not fall within the responsibility of the affected State because the cases were connected with acts causing harm to the whole international community. The draft articles did not seem to be intended to regulate that type of case, and would in effect be unable to do so because the subject of legal regulation in such cases could not be constituted by liability, but only by injurious activities of States.

16. Cases falling within the third group of activities were often regulated in the practice of States by particular provisions taking into account the activities in question and the positions of the States concerned. Such regulations existed in all cases where States wished to transfer liability for possible injuries from the field of civil law to that of international law. It was unrealistic, owing to the specific circumstances, to strive for a universal regulation which might be conceived in only relatively vague terms.

17. The foregoing analysis showed that the doubts about the usefulness of the codification of those questions were justified. It was beyond doubt that international co-operation was essential in the prevention and elimination of injuries arising out of acts of States not prohibited by international law. Yet particular contractual regulations with due regard to the specific circumstances of each case, were preferable to a universal codification document as the method of achieving the intended goal.

18. It was necessary to mention another aspect of the problem: the fact that contemporary international law regulated the liability of States in such a way that States were not liable for acts committed by private persons, whether natural persons or legal entities. That was why States negotiated particular arrangements establishing international liability. It was natural that the scope of such liability and the ways of applying it varied from case to case. If the codification envisaged was really to be based on international liability, then it would have to establish the liability as such, which would be extremely difficult, owing to the circumstances mentioned.

19. With regard to the law of the non-navigational uses of international watercourses, he supported the concept of the framework agreement as envisaged by the Special Rapporteur and approved by the Commission. That concept should provide sufficient room for a specific arrangement among the States concerned. His delegation welcomed the abandonment of the term "international watercourse system", on which many negative comments had been made in the Sixth Committee as well as in the Commission.

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20. Another concept which had provoked criticism by many delegations, including his own, was the concept of a "shared natural resource". The basic position of his delegation was that, in the draft articles, emphasis should be put on the fact that watercourses formed an integral part of the territory of States and that States exercised their sovereignty over them while complying with their international obligations. His delegation therefore welcomed the deletion of the term in the revised text of article 6; it should, however, be considered whether the proposed modifications did not consist merely of terminology, without affecting the substance of the provisions.

21. As to the phrase "use of the waters ... in a reasonable and equitable manner", his delegation had already made a critical comment at the thirty-eighth session of the General Assembly on the vagueness and relative nature of that term when considering article 7.

22. With regard to the responsibility of States, there would be a need for explanations and comments on the 12 new draft articles.

23. As to article 5 (A/39/10, footnote 299), he considered the wording of paragraph (d) somewhat problematical. He took the expression "injured State" under subparagraph (i) to mean only that State party to a multilateral treaty in favour of which the respective obligation of the treaty had been stipulated, which did not necessarily include all States parties to that treaty. In the cases covered by subparagraphs (ii) and (iii), it appeared that all States parties to the respective multilateral treaty would be injured. It was not clear what would happen in the cases described in subparagraph (iv). Both the context and the nature of the matter indicated that, in such cases, all States parties to the multilateral treaty would be regarded as injured States, but that fact should be expressed more clearly in the text. As far as paragraph (e) was concerned, it would be necessary to consider whether the current wording was sufficient and whether it would not be suitable to distinguish, in cases of international crimes, between directly injured States, such as attacked States in cases of aggression, and other States.

24. As for article 6, there was a partial duplication in paragraphs 1 (a) and 1 (c), as the release of persons and the return of objects might sometimes mean the re-establishment of the situation as it existed before the wrongful act. Moreover, it would probably be more appropriate to indicate that the enumeration under subparagraph (a) was merely demonstrative, because, as currently formulated, it did not cover all possible cases. Clearly, a better solution would be to combine existing subparagraphs (a) and (c) in a general formulation which mentioned explicitly only the discontinuation of the wrongful act and the re-establishment of the original situation, thus sufficiently covering all eventualities. A comment was required to clarify what was meant by the internal remedies mentioned under subparagraph (b); they were supposed to be taken by the injured State, but it would be advisable to specify their nature. As to performance of the obligation as a form of redress, it might be considered whether the matter should not be left to customary law; in any case, it would be desirable for it to be clarified in a report of the Special Rapporteur.

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25. With regard to article 7, the report or comment of the Special Rapporteur should give more detailed explanations of the exact meaning of the provision. It was not clear which injured State was being referred to, since the legal relation that must exist between the person injured by the internationally wrongful act and that State was not specified. If it proved useful to leave that provision in the draft, his delegation wondered whether it might not be included in article 6 as an additional paragraph.

26. Some aspects of articles 8 and 9 required explanation by the Special Rapporteur. Those articles provided for both reciprocal measures and reprisals as means of coercion available to the injured State, the criterion of distinction between the two types of measures being the content of obligations the performance of which was suspended by the injured State. However, it was difficult to distinguish between reprisals and reciprocal measures, not because the above-mentioned criterion was unclear, but because reprisals were usually defined more broadly than in article 9 and comprised, in accordance with that broader definition, the reciprocal measures described in article 8. According to article 9, paragraph 2, and article 10, the principles of proportionality and subsidiarity applied only to reprisals under article 9. In view of the identical nature, as described previously, of the reprisals and reciprocal measures described in article 8, his delegation felt that the two above-mentioned principles should apply as well to reciprocal measures.

27. According to article 10, reprisals were understood to be an extreme measure of coercion which might be applied only after all means of peaceful settlement of disputes "available" to the injured State had been exhausted. That expression required further analysis: in the first place, it was necessary to clarify whether it covered all or any means of the settlement of disputes which might come under consideration; second, it should also be clarified whether the term also covered cases where there arose a situation so specific or so urgent as to make the use of any means of a peaceful settlement of the dispute in question impracticable (for example, a nuclear attack when a counter-attack would have the nature not of self-defence but of reprisal); and, third, there were many cases where the State alleged to have committed an internationally wrongful act did not consider its activities wrongful and even denied the existence of a dispute. In such a case, of course, there was no settlement, and reprisals might be taken on the basis of the other party's refusal to settle the dispute in any way.

28. Article 11 governed cases where reciprocal measures as described in article 8 and reprisals as described in article 9 were prohibited on the ground that they would violate the objective régime established by a multilateral treaty in relation to third States. The central idea of that provision was undoubtedly right, although there arose the question what means of coercion should be used in such cases if the situation did not correspond to that described in paragraph 2.

29. Article 12 limited still further reciprocal measures and reprisals, as it prohibited the suspension of the performance of obligations related to the granting of immunities to diplomatic and consular missions and their staff or of obligations

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stipulated by virtue of a peremptory norm of general international law. Both cases required further consideration. If one State violated its obligations relating to the granting of the above-mentioned immunities, a similar measure on the part of the injured State could prove to be an effective remedy for that situation. His delegation did not understand why such a possibility should be rejected. On the other hand, it unreservedly supported the principle that suspension of the obligations concerning the granting of privileges and immunities should not be permitted in response to the breach of an obligation of a completely different nature. In that regard, his delegation pointed out that article 12 did not mention privileges. Nor did it mention the privileges and immunities of the representatives of States to international organizations and the staff of such organizations, which were accorded by Member States on the basis of special agreements. It should be stressed that there was no reciprocal relation between a permanent mission of State A accredited to an organization in State B, on the one hand, and a diplomatic mission of State B accredited to State A, on the other. It was obvious that reprisals or reciprocal measures could not involve suspension of the granting of privileges and immunities to missions accredited to international organizations, since such missions enjoyed a specific status exceeding the scope of the bilateral relations of the two States. The rule contained in subparagraph (b) would require further examination in respect of the legitimacy of armed reprisals.

30. As far as the other proposed articles were concerned, his delegation would express its views subsequently.

31. Mr. MUDHO (Kenya) paid tribute to the memory of Mr. Quentin-Baxter. With regard to chapter III of the report of the International Law Commission (A/39/10) (Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier), he said that his delegation shared the view expressed in paragraph 115 of the report that the purpose of the draft articles should be threefold: first, to consolidate the existing provisions of the codification Conventions dealing with the courier; second, to unify the rules so as to ensure the same treatment for all diplomatic couriers; and third, to develop rules to cover practical problems not dealt with in existing provisions.

32. He welcomed the work done so far by the Commission, which seemed to have progressed well beyond its first objective, namely, the consolidation and unification of existing provisions of the codification Conventions. The observations of his delegation would relate to two main areas. With regard to the facilities that ought to be extended to a diplomatic courier, it shared the opinion that such facilities should be no more extensive than those enjoyed by the administrative and technical staff of diplomatic missions, with the emphasis placed on functional necessity, and it agreed that the short and transient nature of a courier's functions should not be used as a pretext to deny him facilities and concessions corresponding to that necessity, although those two circumstances should be duly taken into account. Second, from a practical point of view, there might be the danger of formulating general provisions on the basis of isolated or rare cases. For that reason, his delegation had misgivings about the usefulness of some of the 11 articles recently adopted by the Commission on a provisional basis

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and recommended that the Special Rapporteur and the Commission should review draft articles 15 to 20, some of which appeared to be excessive, while others - article 16, relating to personal protection and inviolability, and article 17, relating to inviolability of temporary accommodation - imposed an onerous burden on the receiving State which was not warranted by functional necessity.

33. With respect to article 23 (Immunity from jurisdiction), he said that the provision scarcely seemed justified, particularly where a crime had been committed. It was difficult to imagine circumstances in which prosecution of a diplomatic courier could be excused by the principle of freedom of communication and the need to safeguard the confidential nature of the courier's task. Indeed, draft article 36, which had been described as "key", provided for the inviolability of the diplomatic bag, a provision which his delegation fully supported. On the other hand, Kenya did not agree that in article 36, paragraph 2, there should be no reference to punishment on the ground that in certain jurisdictions the State merely prosecuted and left punishment to the courts. Since courts were government agencies, it was hard to imagine a State creating an offence without providing for a corresponding punishment.

34. His delegation reserved its comments on the latest group of draft articles submitted by the Special Rapporteur. It wished, however, to state that some of the draft articles yet to be considered by the Commission seemed to go too far, particularly article 25 (Exemption from dues and taxes) and article 27 (Exemption from social security).

35. Referring to chapter IV of the report (Jurisdictional immunities of States and their property), he differentiated between three groups of draft articles, relating to State immunity, or "absolute immunity", exceptions to State immunity ("restrictive immunity") and exceptions to restrictive immunity.

36. Recalling that the traditional rule had always been that, as a consequence of the principle of the sovereign equality of States, no State could be impleaded in the courts of another State without its consent, he observed that the rule dated back to the days when Governments and instruments of State were reserved exclusively for preserving law and order and for self-defence against external Powers, but that as State activities had extended to other areas, notably in the field of international commerce, the doctrine of absolute immunity had been questioned in the case of activities which were not strictly State functions. The success of the work of the Commission on the subject could be judged by the accuracy with which it reflected existing law as demonstrated in the practice of most - if not all - States.

37. One could not, on the one hand, argue that the non-governmental activities of States had increased to the extent that maintenance of the doctrine of absolute immunity would lead to injustices and, on the other, fail to show the numerous instances in which the plea of State immunity had left aggrieved parties without remedy. Moreover, as had been stated in the commentaries (para. 210), certain governmental activities in the field of aviation and maritime transport, for

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example, were not always motivated by profit-making. Indeed, Governments - especially those of developing countries - undertook such ventures as a public service, and often at substantial losses underwritten by the taxpayer. Yet those activities were not, in general, indulged in for national pride alone, since it was usually cheaper for the consumer/taxpayer to have his products transported by a national carrier.

38. Mention had been made of such eventualities as the disappearance of a ship, leaving sailors or repairmen without remedy. On the whole, however, the record of Governments did not justify such apprehension.

39. On a more general level, he noted that the Special Rapporteur, in seeking to illustrate the current trend towards a restrictive interpretation of the immunity of States, had limited himself to the practice and laws of fewer than half a dozen countries. As a result, the general assertion in paragraph 9 of the commentary to article 18, to the effect that in State practice increasing use was being made of exceptions whereby States could not invoke immunity from the jurisdiction of a court of another State in a proceeding relating to its participation in a company or other collective body, did not seem warranted. Article 2, paragraph 1 (g), posed difficulties inasmuch as it used the words "commercial contract" to define the expression "commercial contract" itself. With reference to article 9, his delegation wished to underscore the importance of paragraph 3.

40. Article 13 was likely to create more problems than it solved, in that it was not conducive to good relations between States. The examples given seemed arbitrary.

41. His delegation reserved its position on articles 14 to 18. It was, however, struck by the briefness of the references, in the commentaries to those articles, to the doubts expressed concerning the advisability of articles 14, 16 (b), in relation to improvement of the transfer of technology essential to the economic development of developing countries, 17 (Fiscal matters) and 18 (Participation in companies or other collective bodies). His delegation was gratified to note that the Commission would review some of those important provisions, and urged that such reconsideration should not be limited to terminology only.

42. With respect to the approach adopted to the law of the non-navigational uses of international watercourses, he noted that the Special Rapporteur had decided to abandon the use of the word "system", earlier employed by the Commission in defining the term "international watercourse". Like the expression "drainage basin", it had met with opposition in both the Sixth Committee and the Commission. Even if the word "system" was simply a descriptive tool, dropping it would not necessarily facilitate the search for a generally acceptable set of draft articles. It should be replaced by another, equally clear expression, which might be the "inherent unity of an international watercourse or the interdependence of the various parts and components thereof" already employed (A/39/10, para. 293). His delegation urged the Commission to agree on a definition.

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43. Regarding the revision of article 6 in order to clarify the concept of "shared natural resource", his delegation found innovative the expression suggested by the Special Rapporteur ("a reasonable and equitable share of the uses of the waters of an international watercourse", (A/39/10, para. 315), but, in view of the importance it attached to the matter, preferred not to comment further for the time being. It agreed with the remarks on that subject made by the representative of Ethiopia at the previous meeting.

44. Concerning chapter VIII of the report, his delegation thought that the Commission should continue to hold a single session of 12 weeks at Geneva from May to July every year. The Commission should, moreover, continue to employ the device of establishing working groups for new or special items. The Yearbook of the International Law Commission should be published more promptly, since, for countries like Kenya, it was an invaluable reference tool. The role of the Secretariat was critical in all those areas, and, while supporting the suggestion that the Legal Counsel might consider adding senior experts to the staff assisting the Commission, his delegation wished to express satisfaction at the dedication and professionalism of the Legal Counsel and his colleagues.

45. Lastly, he expressed his Government's appreciation of the opportunity offered to young Kenyan lawyers to participate in the international law seminars organized in connection with the annual sessions of the Commission. He urged those countries in a position to do so to continue to make voluntary contributions in order to allow a larger number of candidates from developing countries to attend those seminars.

46. Mr. MAZILU (Romania) said that the draft Code of Offences against the Peace and Security of Mankind was of great importance: the International Law Commission should define the responsibility of States and individuals in that field and draw up a complete list of offences against the peace and security of mankind.

47. It was true that "the criminal responsibility of the State cannot be governed by the same régime as the criminal responsibility of individuals, if only from the point of view of penalties and procedural rules" (A/39/10, para. 32), but the Commission must at some stage deal with that issue in accordance with its mandate. At the same time, many of the crimes which should be included in the code could be committed only by States: that was the case, for instance, with the first category of offences in the 1954 draft. A distinction should be drawn between offences of States and those of individuals, the former being the responsibility of States and the latter the criminal responsibility of the individuals who committed them. Similarly, their cruel or barbarous nature should be used as a criterion for defining offenses in the second category, but not necessarily for the first category.

48. The 1954 list of offences, prepared by the Commission should be reviewed in the light of instruments subsequently adopted by the United Nations and of other developments. Since the use of nuclear and thermonuclear weapons constituted the greatest risk to humanity, it should be included in the list of offences against

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the peace and security of mankind, and the Commission should clearly define the responsibility entailed in the use of those weapons or in direct incitement to use them. With regard to economic or political coercion, some members of the Commission had doubts concerning the expression "the intervention ... in the internal or external affairs of another State, by means of coercive measures of an economic or political character" (in article 2, paragraph 9, of the 1954 draft (A/39/10, para. 44). In that connection, he quoted article 32 of the Charter of Economic Rights and Duties of States (General Assembly resolution 3281 (XXIX)), which provided that "no State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights", and noted that, for much the same reason as that given in paragrah 44 of the Commission's report concerning article 2, paragraph 9, of the 1954 draft, economic coercion had not been included in the Definition of Aggression (General Assembly resolution 3314 (XXIX)), but that did not mean that it could not, in certain circumstances, constitute an offence against the peace and security of mankind.

49. The work on the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier was of major importance for the implementation of the principle of free communication between States and their missions abroad. While there were two elements determining the scope of application of the draft articles, namely the diplomatic courier and the diplomatic bag, the former's protection was essential for that of the latter and the Special Rapporteur had been right to adopt a comprehensive approach towards establishing a uniform régime for all types of couriers and official bags of States. His delegation appreciated the Special Rapporteur's efforts to strike an acceptable balance between the rights and interests of the receiving and sending States, and wished to make a few comments which might facilitate finding such a balance.

50. It could agree with the reservations set forth in article 17, paragraph 3, on the understanding that they would in no case permit the inviolability of the diplomatic courier or the diplomatic bag to be infringed or the delivery of the bag to be hindered or delayed.

51. The diplomatic courier must enjoy immunity from the jurisdiction of the receiving or transit State; otherwise, the rights and interests of the sending State would be violated and free communication with its missions would no longer be guaranteed. Article 23, paragraph 2 (A/39/10, para. 188), guaranteed the diplomatic courier immunity from the civil and administrative jurisdiction of the receiving or transit State in respect of acts performed in the exercise of his functions, and article 23, paragraph 4, was very important for ensuring the compliance with that provision. If the diplomatic courier could not refuse to give evidence as a witness, his immunity would be meaningless.

52. His delegation endorsed the wording of article 28 ("Duration of privileges and immunities") proposed by the Special Rapporteur in document A/39/10, footnote 76. Given the specific character and short duration of the courier's mission, it should

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be made clear that only the sending State could terminate his official functions: there was no doubt that it was for the sending State to determine which acts were performed in the exercise of official functions. In article 29, paragraph 1 (A/39/10, footnote 77), it should be made clear that only the sending State could waive the diplomatic courier's immunity from jurisdiction. His delegation interpreted article 29, paragraph 2, which provided that the waiver must always be express, as meaning that the sending State must give its express consent in writing. His delegation understood article 30 to mean that a member of the crew of a commercial aircraft or of a merchant ship could be employed for the custody, transport or delivery of the diplomatic bag if expressly authorized by the captain of the aircraft or the master of the ship.

53. The principle of absolute inviolability of the diplomatic bag not accompanied by the diplomatic courier, which conformed to the norms of customary law and to established practice among States and was set forth in the Vienna Convention on Diplomatic Relations, the Convention on Special Missions and the Convention on the Representation of States, was essential to ensure free communication between the State and its missions abroad, but it was also necessary for the transit State to assume particular obligations which the Special Rapporteur had rightly attempted to reduce to the necessary minimum in order to ensure receipt of the bag in extraordinary circumstances.

54. The provisions of article 41 should be applicable in practice in many cases, particularly in communications between a State and its missions to international organizations situated in States which it did not recognize or with which it did not have diplomatic or consular relations: a régime such as the one set out in the article was therefore essential.

55. It was necessary to view the draft on jurisdictional immunities of States and their property as a whole in order to have a clear idea as to how the principle of State immunity could be reconciled with exceptions meant to protect the interests of other States. The draft should define more precisely the immunity of States in respect of the activities and properties serving to accomplish diplomatic and consular functions, and it was also necessary to take into account the fact that States were engaging more and more in economic activities under intergovernmental agreements or contracts and must enjoy full jurisdictional immunity in that respect. Exceptions from State immunity did not justify legal action against a State or its property arising from contracts concluded or activities undertaken by a State enterprise which had legal personality and its own capital.

56. The principles of international co-operation, friendly relations and good-neighbourliness afforded a useful basis for the work described in chapter V of the Commission's report. The law on outer space, the law of the sea - particularly that relating to marine pollution by oil - and other areas of law constituted an evolution embracing the notion that States were under an obligation first and foremost to prevent damage and, only in the second instance, to limit such damage or provide compensation. The principle sic suo jure utere ut alienum non laedas, already laid down in the 1972 Stockholm Declaration, seemed consistent with the

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Special Rapporteur's extensive analysis of State practice. His delegation endorsed without reservation the scope of the draft articles as defined in article 1, while the definition of terms in article 2 also provided a basis for limiting the scope of the provisions. Like others, it considered that States should be encouraged to develop conventional régimes to prevent transboundary harm and provide adequate compensation should it occur.

57. On the issue of State responsibility, his delegation had already drawn the attention of the Commission to the necessity to define the concept of the injured State carefully. The elements of the definition proposed in article 5 (a) to (d) (ii) (A/39/10, footnote 299) seemed useful. The three categories specified in article 5 (d) (iii) to (e) required closer examination to the extent that they accorded the status of injured States to States which had not specifically and directly been affected by the wrongful act. The relationship between subparagraph (d) (iii) and (iv), on the one hand, and article 6, on the other hand, raised a problem in that it seemed impossible that every injured State pursuant to those provisions could demand a restitutio in integrum. On the issue of article 6, ILC should devote closer attention to the nature of the guarantees specified in its paragraph 1 (d). Article 5 (e) once again raised the issue of the definition of international crime given in part I, article 19, on which his delegation still had distinct reservations. ILC should give further consideration to that point in the light of the discussion on parts II and III of the draft. Over and above the issue of defining international crime, a decisive question was how to deal with the legal consequences of such a crime. The fundamental question as to whether the international community as a whole or every individual third State might react appeared to be answered by article 14, paragraph 3 (ibid.) according to which the exercise of the rights arising under paragraph 1 of that article was "subject ... to the procedures embodied in the United Nations Charter with respect to the maintenance of international peace and security". Since in the event of an international crime under article 5 (e) "all other States" were injured, the question arose as to whether they could all individually exercise the rights under articles 6 to 9 in view of the internationally wrongful act which was, by definition, inherent in that crime. That assumption could be made if article 14, paragraph 3, was not intended to subject those rights of third States, already established by article 5 (e) in conjunction with articles 6 to 9, to the procedures embodied in the Charter. After all, article 14 did not deprive third States of their status of "injured States" accorded to them under article 5 (e) which was the subjective criterion establishing their right of action under articles 6 to 9. The solution proposed by the Special Rapporteur should be reconsidered. Determination of the legal consequences of the internationally wrongful act of a State could not be left to the provisions and procedures in the Charter. On the one hand it might impose too great a burden on the United Nations and experience in similar matters had demonstrated that it might not work. On the other hand, in cases of a threat to the peace, breaches of the peace or acts of aggression, the United Nations was required to take the necessary measures in accordance with Chapter VII of the Charter, but that Chapter did not cover all the aspects of the international responsibility of States. ILC and the Special Rapporteur should make new efforts to prepare a comprehensive definition of the legal consequences of an

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internationally wrongful act of a State. Only in that way would the mandate given to ILC in that field be completed.

58. Mr. JACOVIDES (Cyprus) congratulated ILC on the progress it had made during its thirty-sixth session. He had no doubt that it would make every effort to expedite its work still further and that it would succeed in completing the programme of work outlined in paragraph 387 of its report (A/39/10).

59. He noted with satisfaction that ILC was continuing its constructive co-operation with other specialized bodies, particularly the Inter-American Juridical Committee, the Asian-African Legal Consultative Committee, the European Committee on Legal Co-operation and the Arab Commission for International Law. He also supported the International Law Seminar which was of particular value for the nationals of developing countries.

60. On the eve of the fortieth anniversary of the United Nations, it would be well to ponder the role of ILC and the Committee in the overall United Nations scheme. The criticisms often directed at the Organization called for a critical re-examination which would recognize the limitations and try to improve the overall performance and image of the Organization through corrective action. In his 1984 report on the work of the Organization in 1984 (A/39/1), the Secretary-General had pointed out that during the past 40 years, more had been done by the United Nations in codifying international law than had been accomplished during the previous centuries. The Committee and ILC could take pride in the role they had played so far in that process, but they also had the responsibility to continue and improve their own performance, thereby enhancing the public image of the United Nations as a whole. A continuing effort and an open mind were needed to remedy existing weaknesses and maximize possible improvements both in targets and methods of work, for, as the Secretary-General had said, it was only thus that the Organization would again prove to be responsive to change and continue to meet the growing expectations of mankind.

61. The role of the Committee was not to go into matters of detail which ILC had the expertise to accomplish, but to provide political guidance as clear cut answers as possible to the questions ILC raised on such politically sensitive issues as the draft Code of Offences against the Peace and Security of Mankind or State responsibility, when ILC found itself deadlocked. The majority opinion of the Committee was then a determining factor in breaking such deadlocks; that had, for example, been the case with draft article 23 on the jurisdictional immunity of the diplomatic courier.

62. It was in that spirit that his delegation approached the draft Code of Offences. It had to be stressed that the realities of power relations and the vagaries of politics were sometimes leading to serious divergencies in the application of the rules of international law relating to peace and security, as was the case in Cyprus. In such circumstances it became more urgent and more imperative to formulate such a code as a contribution to the peace and security of mankind and particularly as a deterrent to present and would-be aggressors. In

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doing so, due account should be taken of the result achieved in the progressive development of international law since 1954 and, in particular, of the important element of the recognition, in part I, article 19, of the draft articles on States responsibility, that crimes and delicts could be attributed to States.

63. Having carefully noted the debate regarding the scope and methodology of the draft code, he agreed with the Commission's conclusion that the code should cover the most serious international offences, to be determined by reference to general criteria and also to the relevant conventions and declarations, including elements which had emerged in the context of decolonization, the need to protect human rights and the development of jus cogens. Although the code could not cover all international crimes, it should deal with crimes against the peace and security of mankind, which were the most serious of international crimes, whether or not they were politically motivated.

64. During the debate at the thirty-eighth session, his delegation, sharing the prevailing opinion in the Sixth Committee and taking into account draft article 19 on State responsibility, had given a positive answer to the question whether the criminal responsibility of States should also be recognized and set forth in the draft code. It still held that position, which seemed to it the only one capable of guaranteeing that serious offences, such as aggression, apartheid and annexation, would not go unpunished. It also believed that limiting the scope to the criminal responsibility of individuals would diminish the value of the code as an instrument of prevention and deterrence, and would disregard the progressive development of the law on that subject over the past 30 years.

65. Nevertheless, in the light of the practical arguments put forward by those members of the Commission who argued that the responsibility of States for acts classified as international crimes should be considered only in the context of the draft on State responsibility, his delegation believed that it would inevitably become necessary to delimit the respective scope of the code of offences and of the draft articles on State responsibility. It might be worth considering the possibility of holding the decision on the issue in abeyance until progress under the international responsibility item in dealing with the criminal responsibility of States could be assessed. That compromise solution might serve as a spur to progress on State responsibility, which was progressing too slowly, but it should not serve as an excuse for indefinite delay on the question of the draft code. The Commission's decision to devote its efforts at the current stage exclusively to the criminal responsibility of individuals, seemed to be consistent with the proposed compromise. His delegation would therefore go along with it for the time being, without prejudice to its position regarding the criminal responsibility of States.

66. His delegation was in full agreement with the inclusion, in the list of offences under the code, of the offences covered in the 1954 code, with appropriate modifications in substance and in form. In particular, it felt that in article 2 of the 1954 code, paragraph 1 on aggression and paragraph 8 on annexation of foreign territory should be reworded to take due account of the new definition of aggression. But it agreed that the 1954 draft was a good working basis.

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67. As far as offences since 1954 were concerned, his delegation would be in favour of the minimum content approach set out in paragraphs 52 to 62 of the report, bearing in mind that not every international crime was necessarily an offence against peace and security and also that the draft code would be weakened if it extended too far. By and large, it agreed with the Commission's conclusions as set out in paragraph 65 of the report. It attached considerable importance to the item, partly because of the circumstances in which Cyprus found itself, and it urged the Commission to devote as much time and effort as was needed in order to expedite its work on that significant topic.

68. The question of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier ws an item of practical, everyday importance but, given the possibilities of abuse demonstrated by recent events, not free of difficulties. In his delegation's view, the approach to the draft article should be threefold: first, the provisions dealing with the diplomatic courier in the conventions in force should be consolidated; second, the rules should be unified so as to ensure the same treatment for all diplomatic couriers; and third, new rules should be developed to cover practical problems not covered in the existing provisions.

69. His delegation agreed that the paramount question was that of the diplomatic bag itself, but it was still important to protect the courier and afford him certain guarantees. It was a question of achieving the proper balance. His delegation did not think that the status of the diplomatic courier should be assimilated to that of the diplomatic staff because, although the diplomatic courier should have adequate protection for the proper exercise of his functions, his personal inviolability and the other privileges and immunities which he could be granted should be based on functional necessity in order to avoid abuse. In taking that view, his delegation took into account the fact that the Commission must seek to present final draft articles likely to be acceptable to the large majority of States, and also the fact that a large number of small developing third-world countries, including Cyprus, very rarely used special diplomatic couriers and were therefore especially sensitive and somewhat circumspect in extending excessive privileges and immunities to the diplomatic couriers of other States. His delegation also considered that the topic was broad enough to include communications of international organizations and those of recognized national liberation movements, and again stated its conviction that the effort currently under way was necessary to supplement and harmonize the existing international legal instruments.

70. Turning to the jurisdictional immunities of States and their property, he said that his delegation was aware of the serious differences on doctrinal, practical and methodological issues involved in dealing with that topic, in particular the exceptions to State immunity. In its view, the Commission should press ahead and be concerned less with doctrinal differences and more with the need to achieve practical results. As a party to the 1972 European Convention on State Immunity, Cyprus was very interested in seeing the law develop, on the basis of a pragmatic compromise between the two conceptual approaches through a spirit of realistic

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adjustment to contemporary requirements. It was in that light that it viewed the five new draft articles, and it hoped that a compromise text would emerge which would remove the existing uncertainties and inconsistencies and unify and harmonize the different approaches currently evident in both the national and international field.

71. Regarding international liability for injurious consequences arising out of acts not prohibited by international law, his delegation welcomed the five introductory draft articles and thought that the three basic elements, the transboundary element, the physical consequence and the effect upon the territory of the other State, helped to define what was encompassed. The Commission should be able to proceed with less difficulty with its work on that challenging and thought-provoking subject. It would appear that the topic was now correctly centred on the need to avoid, or to minimize and, if necessary, repair transboundary loss or injury arising as a physical consequence of an activity within the territory or control of another State.

72. The law of the non-navigational uses of international watercourses was a topic of great practical importance to many States, which explained both the interest and the divergency of views evident on the topic. His delegation noted that there was no unanimity on the two major issues relating to the general approach to the topic, namely the replacement of the term "international watercourse system" by the term "international watercourse" and the replacement of the concept of "shared natural resource" by the term "a reasonable and equitable share of the uses of the waters of an international watercourse". Much work remained to be done before real progress could be achieved, and his delegation hoped that early arrangements would be made for continuing the work under the guidance of a new Special Rapporteur.

73. The topic of State responsibility formed the core of international law and was fundamental to relations between States. That was why every effort must be made to ensure that the Commission could make real progress on the question and be in a position to complete, within its current term of membership, the first reading of parts II and III of the draft articles on State responsibility. The issue with regard to part II was to a large extent one of direction and it would no doubt be very useful for the Commission to know the Committee's attitude on the matter. While excessively ambitious targets should be avoided and caution exercised, there should be no compromise on questions of principle. The Commission should go forward, undaunted by the difficulties, and discharge its responsibilities in the progressive development of international law, thereby effectively responding to the legitimate expectations of the international community and remaining in the mainstream of public international law.

74. Since the adoption of the United Nations Charter, the notion of jus cogens had been formally adopted in the 1969 Vienna Convention on the Law of Treaties and, in the current state of development of the international community, that concept, even though it might not be easy to apply, was no less valid and must not be abandoned. His delegation therefore urged the Commission to continue to work on the text of a draft convention which, even if not ratified promptly by a large number of States,

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would still influence the conduct of States and constitute a reference text for international tribunals. The draft article submitted by the Special Rapporteur had given due weight to the concepts of jus cogens and of international crime and, particularly, to the legal consequences of aggression, while at the same time paying proper attention to the more conventional and traditional aspects of State responsibility. A number of suggestions had already been made for improving the wording and the arrangement of the draft articles. Those were matters of detail which should not obscure the essential issue, which was the need to give due weight to the legal consequences of international crimes and of aggression in particular. Thus, his delegation had no objection to the recasting of draft article 5 (e), as long as the principle was retained that an international crime constituted a wrongful act against all the members of the international community. His delegation would object, however, to any attempt to delete or drastically alter the text of draft article 14, all of whose provisions were logical and necessary. Similarly, his delegation was in full agreement with draft article 15, which should have a place in the draft produced by the Commission.

75. While it recognized that flexibility in wording might be necessary to facilitate general agreement, his delegation emphasized that the principles deriving from the United Nations Charter, such as the concepts of jus cogens and international crime, were not open to compromise, because international public policy and international legal order, dictated by the higher interests of the international community, were concepts which had definitely emerged in international public law. Those were the concepts that helped the small States against the arrogance of power.

76. Technical bodies of the United Nations, and especially the Committee, should not lose sight of the wider issues of social policy and of the role of international law in shaping events in the real world. The primary duty of those bodies was to contribute to making the world a better, more just and safer place through the elaboration of rules designed to protect against the abuse and the arrogance of power.

77. Recently there had been some examples of the peaceful settlement of disputes through third-party settlement on the basis of the rules of international law. Those examples were unfortunately all too rare, and many other disputes remained unresolved, causing injustice and human suffering. The problem of Cyprus, which was the outcome of unremedied aggression, continuing occupation, mass violation of human rights and attempted secession, would not have arisen if the relevant rules of international law had been applied. It was his delegation's conviction that it could be solved fairly and quickly to the benefit of all the people of Cyprus and of peace in the region, if the rules of international law were applied objectively and, if need be, through reference to an international tribunal.

78. Mr. KOLOSOV (Union of Soviet Socialist Republics) drew the Secretariat's attention to the fact that the press releases on the Committee's debates were not always accurate and did not give equal treatment to the statements of all delegations. He referred in particular to press releases GA/L/2376 and GA/L/2378,

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covering meetings at which the representative of the Soviet Union and the representative of the United States had made statements of identical length. Yet in the first of those press releases, 17 lines were devoted to the statement of the Soviet representative and 41 lines to that of the United States representative, and in the second, 47 lines to the statement of the Soviet representative as against 77 lines to that of the United States representative. In press release GA/L/2378, moreover, while the title of the draft Code of Offences against the Peace and Security of Mankind was given in full in the case of all other statements, in the account of the relevant part of his own statement reference was made only to a "draft Code of Offences". As for the second sentence, "The first use by any State of nuclear weapons would inevitably cause a chain reaction which would lead to universal catastrophe", it was presented in such a way that it appeared to have no bearing on the subject. In press release GA/L/2376, the phrase attributed to the Soviet representative: "Those in favour of limited immunity differentiated between public and private rules of States", was exactly the reverse of what he had said. He asked that those two press releases be corrected and reissued and that the Secretariat ensure that such errors and such examples of discrimination did not occur again. There were already enough misunderstandings among States without the Secretariat contributing to them.

79. The CHAIRMAN read out an extract from a letter from the Under-Secretary-General for Public Information regarding the nature and purpose of press releases, stating in essence that they were not official records. They were produced for use by journalists and were written to suit their requirements, accuracy, balance and speed being the major criteria. The aim was to write with clarity, as concisely as possible. In the interests of speed, the releases were generally written in final form while meetings were taking place and were made available to correspondents as soon as possible, often within an hour after meetings adjourned. Unlike official summary records, press releases sought to emphasize broad issues which were of interest to the media. They were issued only in English and French. Any factual error brought to the attention of the Department of Public Information was immediately corrected. It was, however, not possible to make other kinds of correction such as stylistic corrections or to add material not originally included. The Under-Secretary-General concluded with the hope that that explanation would prevent misunderstandings.

80. He was sure that the Press Section would take due note of the request made by the representative of the Soviet Union.

The meeting rose at 1.15 p.m.