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SUMMARY RECORD OF THE 46th MEETING

Chairman: Mr. GOERNER (German Democratic Republic)

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The meeting was called to order at 3.15 p.m.

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

1. Mrs. OYEKUNLE (Nigeria), speaking on the topic of the draft Code of Offences against the Peace and Security of Mankind, said that with regard to the content ratione personae of the code, her delegation agreed with the restrictive definition, limiting its application at the current stage to the criminal responsibility of individuals. It agreed with some trepidation, however, in the light of the atrocious acts perpetrated by some States. Nigeria still felt that criminal responsibility could be attributed to States, even though they might not be subject to the criminal jurisdiction of injured States. If such important matters of substance in relation to the criminal responsibility of States were not dealt with in the code, they should be borne in mind when the topic of State responsibility was being finalized in the Commission.

2. With regard to the content ratione materiae, her delegation agreed that there was a need to establish more precise criteria for identifying offences against the peace and security of mankind. It was certainly appropriate to start by detailing the offences covered by the 1954 draft. With regard to offences covered since 1954 and the relevant instruments, her delegation felt that the most important of those instruments should include, but not be limited to, the following subjects: slavery and the slave trade; the granting of independence to colonial countries and peoples; prohibition of nuclear weapons and tests in outer space; economic aggression; apartheid and related crimes; and mercenarism. Some delegations might want to dismiss those items as political, but her delegation felt strongly that no useful code could be compiled unless one took judicial cognizance of the gravity of those offences committed by States and by, or through, individuals. She supported the "minimum content" approach, as a way of not weakening the effectiveness of the code. Nevertheless, the Commission should recognize the activities of States in the modern world and must not be inflexible in its approach.

3. Turning to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, she said that a clearly defined régime regulating the legal rights of the courier and the unaccompanied bag would guide States in their mutual relations. Although abuses existed and must be eradicated, the interests of States were paramount and must be protected in order to safeguard their sovereign rights. Her delegation was in agreement with the provisions of draft articles 24 to 29, as presented by the Special Rapporteur, granting certain immunities to the diplomatic courier, but only in the exercise of his official functions. Her delegation supported the principles contained in draft article 28; in practice the immunity referred to therein was granted on a reciprocal basis. Nigeria agreed in particular with paragraph 1 of article 24 as proposed by the Special Rapporteur, concerning the use of electronic and other devices. Her delegation hoped that States which used such detection devices would desist from doing so; in many respects their use was tantamount to denying the rights of States.

(Mrs. Oyekunle, Nigeria)

4. The question of the jurisdictional immunities of States and their property needed to be handled very carefully in order to avoid jeopardizing the sovereign rights of States. There was a need to take account of the practice of socialist countries and developing countries. The five draft articles provisionally adopted on exceptions to State immunity posed some difficulties for Nigeria, as a developing country. She noted the trend towards the restrictive theory of immunity and felt that, to be universally applicable, it should be properly stated in an internationally acceptable instrument which, although coercive in style and punitive in nature, would nevertheless serve as adequate notice to the developing States, which had suffered through the sudden change.

5. She wondered whether the express agreement between the parties to the commercial contract, provided for in draft article 12, paragraph 2 (b), would be accepted by the courts of a State which applied the restrictive theory. If that provision was not to be interpreted as running counter to the specific provisions of the municipal laws of the forum State or its public policy, the words "cannot invoke immunity" in paragraph 1 should be replaced by "may not invoke immunity". Article 13 was unnecessarily protective of States with advanced social security systems and might adversely affect developing countries, which were not given a choice of whether or not to place locally recruited employees under the local social security system. It appeared to be another way of taking away rights or options granted under the Vienna Convention on Diplomatic Relations, particularly in article 33.

6. Article 16 was too broad and might work against the interests of developing countries, which were not as technologically sophisticated as other States. The practice of all States must be studied before the codification work was completed, as it would be unfair if developing countries were faced with a fait accompli without having the opportunity to act or study the implications carefully. The term "fiscal obligations" in draft article 17 was too broad and might affect immunities granted under the Vienna Convention. Given the degree of reciprocity in existing State practice, she agreed that draft article 17 was prejudicial to the interests of some States and was also superfluous. Her delegation also had reservations on draft article 19, which might have a severe economic impact on developing States owning vessels. Many developing States acted as maritime carriers to save shipping costs, not to make profits. If adopted, the article would put the maritime transport and trade of developing countries in a disadvantageous position. She agreed that emphasis must not be unduly placed on distinctions made under admiralty law and hoped that members of the Commission would take into account the divergencies which existed in different legal systems before agreeing on an appropriate text of article 19.

7. The Commission should continue its work on the topic entitled "International liability for injurious consequences arising out of acts not prohibited by international law". The distinction between the words "territory" and "control" in draft article 1 was very fine; further discussion of State activities might throw more light on the matter. The term "physical consequence" should be given a wide meaning so as to cover instances of economic loss. The effect on the use and

(Mrs. Oyekunle, Nigeria)

enjoyment of resources should not be qualified, since such qualification might hinder the process of conflict resolution. The courts or arbitrators must be given the opportunity to assess the extent of damage in each case.

8. The Commission had done some useful work on the law of the non-navigational uses of international watercourses. There were still, however, considerable differences of views on the basic issues related to chapters I and II of the draft articles.

9. She noted with satisfaction the general plan for the overall structure of the draft articles on State responsibility, the third part of the plan - to deal with the settlement of disputes and the implementation of responsibility - was very important. She hoped that the topic would be one of those given priority by the Commission before the end of its present term of membership.

10. As far as the programme and methods of work of the Commission were concerned, her delegation supported the view that the Commission ought to determine first what could realistically be achieved on each of the topics before it before the end of its present term. Nigeria agreed with the approach outlined in paragraph 387 of the report (A/39/10).

11. Mr. RIOS (Chile) said that his delegation had supported the International Law Commission's mandate to elaborate a draft Code of Offences against the Peace and Security of Mankind. Concerning current work on the topic, he shared the opinion of the Special Rapporteur that it should be limited for the time being to the least controversial aspects. The debate in the Sixth Committee had shown that varying viewpoints and persistent doubts were preventing the implementation of the recommendations contained in paragraph 69 of the report of the Commission on its thirty-fifth session (A/38/10). His delegation shared the thinking that had led the Special Rapporteur to limit his second report to the content ratione materiae of the code. A catalogue of acts considered to be offences against the peace and security of mankind should be limited to the most serious offences. It was not incompatible with the Commission's mandate to start by elaborating that list and then return to the introduction and the most controversial questions, to pass from the particular to the general. Concerning the content ratione personae, his delegation agreed with the Commission's view that it should concentrate exclusively, for the time being, on the criminal responsibility of individuals.

12. The first part of the list of offences which constituted the content ratione materiae referred to offences listed in the 1954 draft. It was a sound basis for future work. The offences listed therein not only met the restrictive criteria but had repeatedly been recognized as as offences in normative instruments. Of offences in the first category, offences against the sovereignty and territorial integrity of a State (A/39/10, para.42), his delegation considered the most serious to be violations of the principle of non-use of force. It therefore believed that the basic content of article 1, paragraphs (1) to (6), and (8) and (9), of the 1954 draft should be reflected in the list currently being prepared by the Commission, without prejudice to drafting changes and other modifications that might be necessary to bring them into line with instruments adopted since 1954.

(Mr. Rios, Chile)

13. The second category of offences, crimes against humanity, included the crime of genocide. That horrible crime should not be excluded from the list. His delegation considered that the text of article 2, paragraph (10), needed drafting improvements, but not such as to affect the "specificity" of the "concept of crimes against humanity", referred to in paragraph 46 of the report. His delegation considered that the acts referred to in article 2, paragraphs (7) and (11), could serve as a basis for the list being preparared. However, it felt that there was considerable room for improvement under the third category, offences violating the laws or customs of war, in order to make it clear that only the most serious violations constituted offences against the peace and security of mankind. His delegation fully agreed with the Commission that the 1954 draft was a good point of departure and that the offences it listed should be included in the new draft articles.

14. With regard to acts identified as offences since 1954, he noted that colonialism and apartheid had been included by the Special Rapporteur as elements of the "minimum content" of the code. His delegation felt that although the final definition of the conditions under which they would constitute international offences would require much work in order to reconcile divergent views, there was no denying that in recent years a series of instruments had been adopted which declared those two phenomena to be incompatible with international public order. Similarly, there was abundant international legislation with respect to serious damage to the environment. However, his delegation felt that only those acts that caused the most serious damage caused to the human environment could constitute international offences.

15. The possible inclusion of the use of atomic weapons in the list of offences against the peace and security of mankind had given rise to considerable debate in the Commission. The horrors and suffering that they could cause seemed to justify strict prohibition of their use. However, no express prohibition of their use existed in international law. Many felt that such a prohibition would undermine the concept of deterrence. As the Special Rapporteur had pointed out, the Commission must choose between what was desirable and what was feasible; his delegation felt that the Commission should follow the path of realism.

16. He agreed that extreme caution should be exercised with regard to any additions to the list of offences, other than those previously considered. As the Commission had concluded, too broad an instrument would weaken the scope of the draft.

17. With regard to the jurisdictional immunities of States and their property, a generally accepted instrument that would codify existing international practice was urgently required. His delegation felt that such an instrument might include rules that would crystallize customary law and reflect the practice of a considerable section of the international community. Chile was in general agreement with the approach of the Special Rapporteur and the Commission to the topic. Although his delegation accepted the fundamental principle of jurisdictional immunity and the structure of the draft articles, it shared the concern expressed by several

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delegations with regard to the draft articles that had been provisionally adopted. It had misgivings about the exceptions to the principle of immunity which were contemplated in draft articles 13, 14, 16, 17 and 18. As has been pointed out, an indiscriminate number of exceptions would undermine the basic principle of immunity. Only exceptions that met a recognized need should be incorporated in the draft, providing that they respected the principle of sovereign equality of States. The latter principle should be reconciled with that of co-operation.

18. When a State undertook the same activities as an individual in the territory of another State, it should not benefit from jurisdictional immunity. The difficulty of reconciling immunity and exceptions to immunity on the one hand, and sovereign equality and co-operation on the other was reflected in the draft.

19. The provisions of draft articles 13, 14, 16, 17 and 18 appeared to depend on the will of the parties concerned and to be therefore binding only in so far as those parties had not entered into any other agreements. The phrase "Unless otherwise agreed between the States concerned" at the beginning of each draft article permitted different behaviour from that called for in the provisions. In such conditions, those exceptions could not easily become norms of customary law. The problems encountered in the work on the topic were not the fault of the Commission or the Special Rapporteur, but were due to the fact that the subject-matter was still evolving. While some State systems adhered to absolute immunity unreservedly, others accepted it only in exceptional circumstances. In practice, there was a tendency to restrict the scope of immunity; Chile accepted certain restrictions on or exceptions to immunity. However, in the elaboration of the draft, international developments should not be prejudged. He noted the situation with concern because what was perceived as future developments was frequently only an extrapolation of the practice and legislation of a small group of countries with a similar, fairly well developed legal system. Caution should be exercised with regard to the controversial and important topic of immunity. The draft should reflect not only the practice of developed countries but of the international community as a whole, especially the developing countries, which were in the majority.

20. Mr. KAHALEH (Syrian Arab Republic) said that the International Law Commission was one of the most important United Nations bodies, especially as other bodies had become less effective owing to the non-implementation of the provisions of the Charter. That its work almost always led to a consensus reflecting all legal and political doctrines proved its value to mankind.

21. The Commission should give the necessary priority to work on the draft Code of Offences against the Peace and Security of Mankind, particularly in view of the international situation, which was marked by tension, the use of military force to impose supremacy and acts of aggression. His delegation agreed with the Special Rapporteur's approach, which stressed individual criminal responsibility while recognizing the need to consider at some later stage the responsibility of States. In many cases, however, individual and State responsibility could not be separated. There was also a need for deterrents to prevent the commission of such

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offences and for appropriate international measures to punish those responsible and provide compensation for the victims. There seemed to be general agreement that the statutory limitations should not apply in respect of offences covered by the Code.

22. While the offences covered by the 1954 Code should be retained, the new Code should also include offences recognized as such since 1954 in conventions, declarations and United Nations resolutions. It should therefore refer to colonialism, apartheid, terrorism, mercenarism, damage to the environment, aggression, and the first use of nuclear weapons, as well as any other acts that the international community saw fit to include. It should be clearly stated that peoples and national liberation movements had the right to resort to armed force to gain freedom, sovereignty and self-determination. Since the Code was a general instrument, it could contain provisions which paralleled those contained in more specific legislative and conventional instruments. The Code should cover only the most horrific and barbarous offences, as its effect would be weakened if its scope was extended to include lesser offences such as the forgery of passports.

23. He welcomed the progress made on the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. Those articles must include a special provision on international organizations and national liberation movements. The Special Rapporteur was correct in basing his approach on the four conventions already adopted on diplomatic and consular law. The articles struck a balance between the interests of the sending State, which needed to maintain communications with its diplomatic missions abroad, and those of the receiving State and the transit State, which needed to safeguard their security. Privileges and immunities should be extended to the courier only in so far as was necessary to ensure the security and inviolability of the bag. In that way, it would be possible to avoid the rare abuses that did occur. He agreed that the inspection of the bag using electronic or other means was a violation of the principle of inviolability, as modern electronic devices could be used to read the official correspondence which it contained, thus undermining the confidentiality and defeating the purpose of the bag.

24. The topic "Jurisdictional immunities of States and their property" was important because it was related to international trade. Existing juridical practice protected developed countries rather than developing countries. It was essential, therefore, that legislation on the subject should be produced as a matter of urgency. His delegation noted with satisfaction that the Special Rapporteur had attempted to strike a balance between the notions of absolute jurisdiction and restricted jurisdiction. There should not be too many exceptions to State jurisdiction, because the principle of State sovereignty must not be violated.

25. Despite the untimely death of the lamented Special Rapporteur, work on the topic "International liability for the injurious consequences arising out of acts not prohibited by international law" must continue, because the existing rules governing responsibility for internationally wrongful acts did not meet the needs

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of all countries. Those needs could be met only by increased measures of international co-operation of the kind exhibited in multilateral treaty régimes designed to regulate particular transboundary dangers. There must be guarantees to preserve the balance between freedom to act and freedom from harm. Without such guarantees developing States would always be disadvantaged in the negotiation of claims or treaty régimes. Guarantees were also important to the preservation of a proper balance between obligations to avoid transboundary loss or injury and obligations to provide reparation if loss or injury did occur.

26. With regard to the topic "The law of the non-navigational uses of international watercourses", his delegation agreed that a framework agreement should contain basic legal principles generally accepted with regard to international watercourses but should also encourage the conclusion of specific watercourse agreements. A balance should be struck between the entitlement of each watercourse State to an equitable share of the uses of the waters of an international watercourse and the need to maintain the territorial sovereignty of States. His delegation agreed with the view, mentioned in paragraph 284 of the Committee's report, that there should be an article expressly prohibiting the diversion of waters.

27. With respect to the topic "State responsibility" his delegation endorsed the provisions of draft articles 6 and 14, which were basic to the entire draft. The principle of self-defence should be more precisely defined. That principle, which was embodied in Article 51 of the Charter of the United Nations, had been wrongly invoked by certain countries to justify acts of aggression.

28. At a previous meeting the representative of China, speaking of the results of the Commission's work, had suggested that the same results might be achieved by other means than international conventions. He had mentioned the possibility of manuals of general rules. The representative of the United States had also advised the Committee not to move towards international agreements which would not command the necessary majority for implementation. In that connection, his delegation wished to point out that the signatories to some international conventions which enjoyed majority support had endeavoured to obstruct implementation of the provisions of those conventions. For example, in the Security Council, a draft resolution calling upon Israeli forces to respect the provisions of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War had been vetoed. What mattered was political will and good faith in the implementation of international norms.

29. Mr. PHOLO (Lesotho) said that the practice of sending and receiving classified documentation through diplomatic bags carried by couriers was of long standing and of indisputable value. Lesotho was convinced that the practice should be respected and that the courier should be accorded the necessary immunities and privileges to the extent that they were essential for the smooth conduct of his functions. Practical necessity should be regarded as the key element in the definition and elaboration of the courier's immunities and privileges. Provided that the courier was acting in the performance of his official functions, he should enjoy immunities

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and privileges. His delegation was totally opposed to the view that the courier should be regarded as an appendage to the diplomatic bag. It was, therefore, prepared to support draft article 16 as provisionally adopted by the Commission and draft article 20 as originally proposed by the Special Rapporteur. His delegation did, however, have some reservations with respect to draft article 17 as provisionally adopted. So long as there was no well-defined standard which could be used to establish a prima facie case to justify inspection or search of the temporary accommodation of the diplomatic courier, paragraph 3 of that draft article would open the way to abuse. His delegation had similar reservations concerning paragraph 3 of draft article 19 as provisionally adopted.

30. Lesotho welcomed the work done on draft articles 9 to 12, which appeared to maintain a reasonable balance between the interests and concerns of the sending and receiving States. It also welcomed the provisions of draft article 13, which were flexible in that they did not stipulate the extent or the quality of the facilities to be accorded to the courier.

31. With respect to draft article 23 (A/39/10, para. 188), his delegation was of the opinion that although the diplomatic courier was an official agent of the sending State, acting on its behalf, he was not a diplomatic agent and should be accorded privileges and immunities only in respect of acts performed in the exercise of his functions. Therefore, the last sentence of paragraph 2 of article 23 was acceptable to his delegation.

32. Bearing in mind the confidential nature of the courier's work, the text of draft article 24 as presented by the Special Rapporteur was adequate. His delegation had some reservations concerning the words "serious grounds" in paragraph 3 of the article, but appreciated that it would be difficult to find another formulation that would be acceptable to receiving States.

33. His delegation had no difficulty in accepting the text of draft articles 25, 26 and 27 as presented by the Special Rapporteur; their provisions were already embodied the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations.

34. It was not clear from the text of draft article 28 as presented by the Special Rapporteur whether the functions of a courier came to an end when he delivered the diplomatic bag in the territory of the receiving State or when he returned to the sending State. That lack of clarity might lead to polemics.

35. Draft article 29 as presented by the Special Rapporteur was acceptable in that it encompassed principles already accepted in public international law and reflected in, for example, article 32, paragraph 1, of the Vienna Convention on Diplomatic Relations.

36. His delegation had no difficulties with draft article 30 as presented by the Special Rapporteur. With respect to draft articles 31 and 32, it was of the opinion that the sending and receiving States should come to an agreement

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concerning the size of the diplomatic bag. If the size of the bag was such as to cast doubt on its contents, the receiving State should return it unopened to the sending State. In that way the confidential nature of the contents would be respected.

37. Mr. ABDELRAHMAN (Sudan) said that the political nature of the topic "Draft Code of Offences against the Peace and Security of Mankind" overshadowed the legal aspects. Nevertheless, the conclusions reached by the Commission (A/39/10, para. 65) were satisfactory.

38. With regard to the content ratione personae of the code, his delegation believed that the criminal responsibility of individuals acting as agents or on behalf of States could not eliminate the international responsibility of their principals for the consequences of their wrongdoings. A thorough consideration of the criminal responsibility of States should be undertaken in the future. To that end, a study on the civil responsibility of States might supplement the Commission's future studies.

39. With regard to the content ratione materiae of the code, his delegation hoped that the Commission would deal with the substance and form of the offences listed in the 1954 draft. It favoured the inclusion of apartheid in that list. A decision on whether mercenarism should be included should be deferred until the Ad Hoc Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries had completed its deliberations.

40. Turning to the topic "Jurisdictional immunities of States and their property", he said that consideration by the Commission of part III of the draft articles had been tainted by ideological and conceptual differences. The Commission should deal with the concerns of developing countries in a manner that would enable those countries to pursue their socio-economic programmes. Sovereign States were equal before international law and as such had equal rights and duties. A balance ought to be struck between the conflict of sovereignties in those rights and duties.

41. With regard to the topic "The law of the non-navigational uses of international watercourses", It was important to strike a balance between the interests of riparian States on the one hand and the issue of State sovereignty and the right of States to benefit from natural resources within their territories on the other hand. His delegation welcomed the abandonment of the "system" concept. The existing term "international watercourse" tended to be clearer and did not give rise to ambiguity. The definition in draft article 1 of the term "international watercourse" and, particularly, the reference therein to "relevant parts or components" were unsatisfactory. The Special Rapporteur was right to stress that watercourses varied in character, but insertion of the word "relevant" before the words "parts and components" did not improve the definition. On the other hand, it would not be proper to enumerate the various hydrographic parts and components of a watercourse in a framework agreement. For the sake of clarity, an attempt should be made to replace the "parts and components" with words more capable of giving a hydrographical and hydraulic description of different régimes of watercourses.

(Mr. Abdelrahman, Sudan)

42. Draft article 4, paragraph 1, should refer in unequivocal terms to the validity and effect of watercourse agreements concluded by States. The proposed framework agreement should not venture to qualify agreements already concluded and implemented. The declaratory nature of the articles should be preserved; the other arrangements provided for were uncalled for. The wording of article 4, paragraph 2, did not appear to reflect the meaning it was intended to convey. His delegation was particularly unhappy with the term "to an appreciable extent". A State was not only forbidden to stop or divert the flow of a river (and for that matter a watercourse) which ran from its own territory to that of a neighbouring State, but likewise to make such use of the water of the river as either caused danger to the neighbouring State or prevented it from making proper use of the flow of the river on its part. In the light of that principle, the term "appreciable extent" was insufficiently explicit. There should be a rational endeavour to use language that lent itself to correct and acceptable interpretation.

43. His delegation noted with satisfaction the words "negotiate in good faith" in draft article 4, paragraph 3. In that connection, he wished to stress that considerations of good-neighbourliness and solidarity, and belief in a common destiny, had always been significant in negotiations leading to the conclusion of bilateral agreements regarding the use of watercourses. There might be room for the term "co-operation" in paragraph 3, for the use of that term in modern bilateral and multilateral agreements had made it an acceptable general legal formulation.

44. His delegation would reserve its position on draft article 5, paragraph 2, until the vagueness of the term "to an appreciable extent" had been removed. Article 5 was of a novel nature; for that novelty to be accepted, it was imperative that the ambiguity introduced by that term should be eliminated.

45. As to draft article 6, his delegation had doubts about the notion of reasonable and equitable sharing. That notion, if applied to particular régimes of watercourses, would mean that many factors would have to be taken into consideration. In that connection, his delegation did not fully agree that the demographic factor was paramount. Consideration should also be given to geophysical and socio-economic factors, as well as national security and sovereignty. Since all those factors were inseparably linked, it was erroneous to base determination of reasonable and equitable sharing on just one of them. In the opinion of his delegation, therefore, there was a need to determine what constituted a reasonable and equitable share.

46. Draft article 8 provided a non-exhaustive list of factors to be taken into account in determining reasonable and equitable utilization of the waters of an international watercourse. The list was of limited value and served no practical purpose in the body of the draft article. It could, if necessary, be retained in a commentary to the article or in a footnote.

47. With draft article 9, his delegation was again faced with the difficulty of accepting the notion of "appreciable harm". The domain of the article came close

(Mr. Abdelrahman, Sudan

to that of international liability for injurious consequences arising out of acts not prohibited by international law. To establish a link between the two topics, it seemed appropriate to defer formulation of the article until the ambiguity created by the term "appreciable harm" had been dispelled.

48. Draft articles 7, 8 and 9 constituted the proper basis upon which the entire draft could be built. If the conflict generated by imprecise use of notions persisted, the draft would continue to be unbalanced. Perhaps an ad hoc working group should be established to try to settle the matter.

49. Mr. BRING (Sweden) said that his delegation was in general agreement with the nine draft articles submitted on the topic of the law of the non-navigational uses of international watercourses. It supported the avoidance of references to "systems" and hoped that the proposed term "international watercourse", instead of "international watercourse system", would facilitate an agreement on a future framework treaty. It had no objection to the deletion of the formula "shared natural resource" in the Special Rapporteur's second draft, and found the introduction of the concept of "reasonable and equitable use" very helpful. It supported the suggestion that the well-known expression "shared natural resource" could be usefully retained, not in the legal text itself, but in a commentary.

50. Sweden supported the approach of a framework agreement, allowing for the conclusion of more specific supplementary agreements adapted to different watercourses, as a way of facilitating a universal agreement on the matter. It must be recognized, however, that the framework approach led to the inclusion of general and vague language. There was therefore need for efficient dispute-settlement procedures, and a future framework agreement should include compulsory fact-finding and conciliation procedures as well as binding provisions for third-party settlement of disputes.

51. Draft article 28 bis (A/39/10, footnote 286) should be retained in one form or another. The installations and works in question should not, when used for peaceful purposes, be the object of attack during an armed conflict, since such an attack might have effects on the territories of countries not involved in the conflict.

52. With respect to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, the law in question had to be distilled from treaty provisions, State practice and general principles. Codification of the rules in a single instrument would be extremely useful. The draft articles should provide no more guarantees of immunity and inviolability than were actually required for the smooth transmission of diplomatic communications. At the same time, the reasonable security and safety interests of receiving and transit States should be safeguarded. Recent unfortunate incidents had pointed to the need for a right of verification for such States. His Government did not object to a certain use of electromagnetic and other sensors for such purposes. In his delegation's view, it would not be prudent to elaborate a convention that went beyond the functional needs of the diplomatic courier or far beyond the basic protection already provided for in the Vienna Convention on Consular Relations and the Vienna Convention on Diplomatic Relations.

(Mr. Bring, Sweden)

53. With respect to the jurisdictional immunities of States and their property, his delegation supported the approach based on the concept of restrictive immunity with regard to government activities for commercial purposes, as well as the underlying distinction between acts jure imperii and acts jure gestionis. Account must, however, be taken of the fact that the distinction between commercial purposes and governmental service was not always workable with regard to developing countries.

54. As to the draft Code of Offences against the Peace and Security of Mankind, he welcomed the limitation of the content ratione personae to the criminal responsibilty of individuals, and supported the "minimum content" approach with regard to the scope ratione materiae. He had some difficulty, however, with the list of offences included in paragraphs 52 to 62 of the report (A/39/10). "Colonialism" was unsatisfactory as a legal concept and would have to be specified in order to be categorized as an offence against the peace and security of mankind. A positive prohibition of the use of nuclear weapons, in the context of a code of offences, would be a deeply meaningful gesture. Any absolute prohibition of use or first use would, however, have to be agreed upon among the nuclear Powers themselves, before such rules could fruitfully be registered in a wider context. Declarations of no first use could be an important first step towards an absolute prohibition of nuclear weapons in a multilateral treaty. Such declarations would be facilitated by the establishment in rough parity of a lower level of conventional forces.

55. Another problem concerned the concept of economic aggression, which was not appropriate from a legal point of view. The coercive procedures of an economic nature that might be relevant could be classified as violations of the principle of non-interference. Not all violations of the principle of non-interference could appropriately be labelled offences against the peace and security of mankind. It was difficult to envisage an expansion of the principle of non-interference leading to new offences being subsumed under the heading of offences against the peace and security of mankind. While the International Law Commission should promote the progressive development of international law, the offences to be enumerated could all be labelled as violations of existing international law. The peace and security of mankind would be best maintained if the distinction between offences against peace and security and other violations of international law was strictly upheld so as to underscore the gravity of the former category of offences.

56. The item itself should not be accorded higher priority than other items on the agenda of the Commission, and could more usefully be discussed in the Committee in the context of its consideration of the report of the Commission.

57. Mr. BEN ABDALLAH (Tunisia) said that the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier was of practical interest since the diplomatic bag was an indispensable instrument for the development of relations between States. The régimes and practices governing the diplomatic bag should be unified and harmonized in order to ensure free and speedy communication between States and their missions. The principle of the inviolability

(Mr. Ben Abdallah, Tunisia)

of the diplomatic bag as set forth in the Vienna Convention on Diplomatic Relations should be observed. The legitimate concerns over certain abuses should not lead to that principle being relegated to the background. His delegation was convinced that the Commission would use innovative methods to find a proper balance between the interests of the sending State and the justified security concerns of the transit or receiving State.

58. Privileges and immunities were granted to the diplomatic courier on account of his function, which was to deliver the diplomatic bag with the required dispatch. Draft article 23 as presented by the special Rapporteur was essential for enabling the courier to fulfil his mission under the best conditions.

59. His delegation attached particular importance to the topic of the jurisdictional immunities of States and their property. It was aware of the difficulties arising from the existence of two schools of thought based on different political and economic realities; the first advocated broad jurisdictional immunity and the other an immunity limited to the strict attributes of sovereignty. Tunisia had expressed its reluctance to go beyond the exceptions relating to commercial activity, and had formulated reservations on the exceptions relating to employment contracts and civil liability. It also had reservations on the new exceptions contained in articles 16 and 17, particularly article 16 on patents, trade marks and intellectual or industrial property. That exception was likely to hinder the economic and industrial development of developing countries by restricting the transfer of technology.

60. With respect to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, the search for greater solidarity among States justified efforts to provide reparation for transboundary damage caused by lawful activities. The question of liability without fault should be considered in more depth in order to establish a proper balance between the freedom of States to act and their right not to be harmed.

61. As to the law of the non-navigational uses of international watercourses, the concept of "international watercourse" contained in draft article 1 was a more accurate reflection of reality than the "system" concept. His delegation did not object to the abandonment of the concept of "shared natural resources" in draft article 6. It was nevertheless important to retain the spirit of the initial text, particularly as it related to the notion of sharing. Each State which bordered on an international watercourse should have the right, within its territory, to a fair share of the use of its waters in a spirit of good-neighbourliness and mutual respect between States. It was therefore important to regulate the use of such waters in a reasonable and equitable manner in order to avoid any conflicts or injustices.

62. With respect to State responsibility, the Commission should approach the question of the inclusion of aggression and its specific consequences in the draft articles in such a way as to avoid the risk of overlap between the draft articles on State responsibility and other instruments existing or under preparation, such as the draft Code of Offences against the Peace and Security of Mankind. Further,

(Mr. Ben Abdallah, Tunisia)

the question of reprisals should be approached with great caution and maximum safeguards, because of the abuses that had occurred. There was need to consider its replacement by peaceful methods of reparation. Article 9 of the current draft did not take those concerns into consideration, and its application as it stood might add an element of confusion and uncertainty to international relations.

AGENDA ITEM 127: REPORT OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW ON THE WORK OF ITS SEVENTEENTH SESSION (continued) (A/39/17; A/C.6/39/L.3, L.5)

63. Mr. TUERK (Austria), introducing draft resolution A/C.6/39/L.5, said that it reaffirmed the conviction that the progressive harmonization and unification of international trade law would significantly contribute to universal economic co-operation among all States, to the elimination of discrimination in international trade and, thereby, to the well-being of all peoples. Furthermore, it reaffirmed the mandate of UNCITRAL, as the principal legal body within the United Nations system in the field of international trade law, to co-ordinate legal activities in that field and to promote efficiency, consistency and coherence in the unification and harmonization of the law. It invited Governments, relevant United Nations organs, institutions and individuals to make voluntary contributions towards the participation of candidates from developing countries in regional seminars and symposia in the field of international trade law.

64. Draft resolution A/C.6/39/L.5 was adopted by consensus.

The meeting rose at 6.10 p.m.