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SUMMARY RECORD OF THE 24th MEETING

Chairman: Mr. AL-QAYSI (Iraq)

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

AGENDA ITEM 138: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS THIRTY-SEVENTH SESSION (continued) (A/40/10, A/40/447)

AGENDA ITEM 133: DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND: REPORT OF THE SECRETARY-GENERAL (continued) (A/40/451 and Add.1 and 2, A/40/331-S/17209, A/40/786-S/17584)

1. Mr. ALEXANDROV (Bulgaria) said his delegation was pleased to note that the International Law Commission had made considerable progress in its work on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

2. With respect to draft article 18 as provisionally adopted, relating to immunity from jurisdiction, his delegation regarded the diplomatic courier as an official of the sending State who performed official State functions connected with the protection and transportation of the diplomatic bag. The safety of the diplomatic courier was a prerequisite for the normal exercise of his functions; he must therefore enjoy the same immunity from criminal jurisdiction as that enjoyed by members of the administrative and technical staff of missions and their families under the Vienna Convention on Diplomatic Relations and the other relevant multilateral conventions. Anything less than full immunity would not be in keeping with treaty practice and the universally acknowledged norms of customary law. Many of the arguments against granting the courier full immunity from criminal jurisdiction were based on the possibility of abuse. However, abuse was the exception rather than the rule. His delegation could not accept the preparation of norms on the basis of exceptions or on the basis of the presumption of bad faith on the part of the sending State. Furthermore, it should be borne in mind that the main goal of the draft was to ensure the protection of a State's freedom of communication with its missions abroad, not to benefit individuals. There was no reason to fear that the courier might be unnecessarily favoured as a person, especially as he was not exempt from the jurisdiction of the sending State, which could, if necessary, waive his immunity.

3. He wished now to turn to draft articles 36 to 43. The full inviolability of the diplomatic bag was intricately linked to, and could not be dissociated from, the inviolability of its contents. That idea was reflected in the relevant international conventions. The inviolability of the diplomatic bag was a basic guarantee of the freedom of official communications between a State and its missions abroad, and the draft should reflect that principle adequately. It was important that any kind of examination of the bag, whether direct or indirect, should be prohibited. The use of electronic or other mechanical devices would not be appropriate, given the confidential character of the contents of the bag. The use of such devices, if sanctioned, would place at a disadvantage a number of countries that did not possess them. What he had said regarding possible abuse of the immunity of the courier was equally valid in the case of the inviolability of the diplomatic bag.

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4. His delegation supported the comments made by members of the Commission concerning the improvement of draft articles 37 to 40. It believed that draft article 41 had been misinterpreted. The text did not concern bilateral relations but, rather, official communications between a State and its mission to an international organization or an international conference in cases where there were no diplomatic relations between the sending State and the host State. Although the wording of the text was in need of improvement, the draft article itself was both necessary and useful. Where draft article 42 was concerned, his delegation supported the observations in paragraphs 195, 196 and 197 of the Commission's report (A/40/10). The future document should be applied as lex specialis in respect of the status of the diplomatic courier and diplomatic bag. His delegation fully supported the goal of achieving a measure of flexibility in applying the régime established in the draft. It also endorsed the principle that the Special Rapporteur had tried to embody in draft article 43, although it would have preferred a uniform and universally recognized régime for the courier and bag based on the Vienna Convention on Diplomatic Relations, the Convention on Special Missions and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character.

5. His delegation endorsed paragraphs 298 and 299 of the report and believed that the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier should be considered on a priority basis at the Commission's next session, so that work on the topic could be completed.

6. Mr. DUISBERG (Federal Republic of Germany) reaffirmed his delegation's strong support for the Commission's proposal to limit the draft Code of Offences against the Peace and Security of Mankind, to the criminal liability of individuals. The extremely difficult question of the criminal responsibility of States would be better discussed under the topic of State responsibility. Any attempt to consider those two categories under one heading would probably condemn the draft Code to failure.

7. The criteria set out in the draft Code should be strictly confined to crimes that were actually directed against the peace and security of mankind and were considered by most nations to be particularly atrocious. Since the purpose of the Code was to define criminal responsibility for specific actions, the definitions of offences must be clear and unequivocal. The articles submitted to date still fell short of that requirement.

8. The Commission should turn its attention at an early stage to the general part of the draft setting out the basic rules applicable in determining individual criminal liability and the proposed mechanism for implementation.

9. On the topic of State responsibility, he wished to stress once again that the purpose of the draft was to define the nature of internationally wrongful acts, to determine liability for them, to define the legal consequences and to identify the measures which the countries affected might take in response. Those were not merely questions of legal theory but related to the practical application of

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international law and called for the clearest possible legal guidelines. Without them it would be difficult to give the draft articles a preventive character and thus achieve the main objective, that of ensuring that the internationally wrongful act was not committed in the first place, or, if it was committed, that the reaction of the injured State was kept within the proper legal framework.

10. With regard to part two of the draft articles as provisionally adopted by the Commission at its thirty-seventh session, his delegation was pleased to note that the new language of article 5, paragraph 2 (e) (iii), recognized that fundamental human rights, apart from being protected by treaties, were or could be the subject of customary international law. On the other hand, a satisfactory solution had not been found for the fundamental problem of the range of possible reactions available to third States, particularly those not directly affected by the wrongful act. He reiterated his delegation's opinion that article 5 established the crucial legal link between the internationally wrongful act and the permissible reactions to it. A problem arose from the fact that in the present draft of article 5 the status of "injured State" was rightly accorded to States directly affected by the wrongful act (para. 1, and para. 2 (e) (ii)), but was also granted in just the same way to States not directly affected (para. 2 (f) and para. 3). It was necessary to make an adequate distinction between those two categories, both in view of State practice, which hardly justified the approach taken in article 5 in its present form, and because the indiscriminate conferring of "injured State" status might result in any State being able to claim that it was entitled to take countermeasures. His delegation felt that States that were not specifically and directly affected by the wrongful act should not fall into the category of "injured State", and that the range of possible actions should be adjusted accordingly. That applied in particular to article 5, paragraph 3, concerning an international crime.

11. As an international crime was by definition tantamount to an internationally wrongful act, the intention of article 5, paragraph 3, might at first be taken to be to enable all States, in the event of an international crime, to exercise the rights arising under articles 6 to 9 as proposed by the Special Rapporteur at the thirty-sixth session. It was still unclear whether and to what extent those rights would be restricted by articles 14 and 15.

12. Further thought would have to be given to the relationship between the rights of States not directly affected by an international crime and the possibilities for taking collective measures in response to international crimes under the United Nations Charter, as referred to in draft article 14, paragraph 3. In his delegation's view, whenever questions relating to the maintenance of international peace and security were involved, the procedures envisaged in the Charter would have to be applied. That should be clearly reflected in the draft. He doubted whether the provision in article 14, paragraph 3, as it stood would serve any other useful purpose. The international community did not as yet have any means of collective reaction other than those provided for in Chapter VII of the Charter. His delegation would like the Commission to consider again the whole range of problems pertaining to the measures available to States either collectively or

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individually and grade them according to the nature of the wrongful act and the extent to which States were affected.

13. Concerning part three of the draft, his delegation fully supported the Commission's intention to incorporate mechanisms for the settlement of disputes in the draft. That should be mandatory, particularly with regard to the delicate aspects of the draft which could hardly be left to Member States to judge for themselves. The three parts of the draft were closely interrelated, and only a survey of the whole would allow a final assessment of its individual parts and articles.

14. Turning to the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, he said that difficulties had been encountered in formulating generally acceptable provisions which went beyond the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations. That was particularly true of the Commission's efforts to supplement the rule governing the absolute inviolability of the unaccompanied diplomatic bag with a formula that would effectively prevent abuse without substantially diminishing the protection afforded to correspondence. His delegation thought that such a formula would be desirable, but so far none of the proposals was satisfactory. Any attempt to control abuse evoked the danger of the abuse of controls, which would in turn lead to countermeasures. His delegation proposed that the principle of the absolute inviolability of the diplomatic bag, which was established in State practice, should be adhered to without any modification of the relevant provisions of the two Vienna Conventions.

15. However, States must be able to reserve the right, in exceptional cases, for their competent authorities to request that the bag should be opened in their presence by an authorized representative of the sending State, if they had serious reason to believe that it contained something other than official correspondence. If that request was refused by the authorities of the sending State, the receiving State should have the option of returning the bag to its place of origin.

16. The newly proposed draft article 43 made allowance for the fact that only two of the four Conventions mentioned in draft article 3 were in force, and it provided for the important possibility of applying to the present draft reservations in relation to the two conventions that had not yet entered into force. In order for that possibility to be made absolutely clear, his delegation would like to see a specific reference to draft articles 1 and 3 inserted in article 43.

17. The purpose of the draft was not to equate the diplomatic courier's status with that of a permanently accredited diplomat, but to establish the extent of protection necessary to enable the courier to perform his functions and to ensure the inviolability of the diplomatic bag he carried. Accordingly, protection should not exceed what was actually necessary for fulfilling the function of courier; the provision in draft article 17 on the inviolability of the temporary accommodation of the courier was not justified. Protection afforded by other provisions of the

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draft was quite adequate for that purpose. Since temporary accommodation was usually a hotel, such inviolability would give rise to legal and practical problems. Draft article 17 should therefore be deleted.

18. The topic of jurisdictional immunities of States and their property was of considerable importance in the day-to-day application of international law. In view of the difficulties involved in formulating precise rules of international law concerning individual aspects of State immunity, it was important that a code which would affect the future application of international law should unequivocally endorse the body of fundamental principles that had already been established in practice, strengthen their validity and facilitate their further development.

19. His delegation had always regarded the distinction between acta jure imperii and acta jure gestionis and the corresponding denial of immunity to States in respect of commercial activities as a fundamental principle of present-day State immunity. On that central point, any step that might jeopardize the international standard already achieved and the indispensable degree of reciprocity it entailed should be avoided. That principle should be observed by the Commission in finalizing every article, including article 19, which was still to some extent a subject of controversy.

20. Due regard for that principle would ease the task of the Commission in finalizing parts IV and V of the draft. In the sensitive area of enforcement of judicial decisions, it would be decisively important for the practicability and acceptance of codified rules to make a sharp distinction between those areas where States were affected in the exercise of their sovereign rights and those which concerned other activities. Enforcement, in particular, called for clear rules based on established criteria, unencumbered by new and hard-to-understand formulas concerning their scope. That applied especially to article 21 of the draft. On the other hand, States must be free to agree on provisions adapted to the individual case in order to ensure the necessary degree of reciprocity. That needed to be taken into account, in particular in the formulation of article 24.

21. Mr. ROBINSON (Jamaica) said that the presentation of the work on a topic which followed the sequence in which the Commission had dealt with it did not facilitate an understanding of that work. While the Commission clearly needed to do its work in different stages, the question was whether it would not be feasible to have a methodology according to which, in one place in the report, there would be a reflection of the Special Rapporteur's presentation of a particular article with commentary, the Commission's examination of that article, any revision of the article by the Special Rapporteur, and the work of the Drafting Committee on the article. If such an approach was not technically feasible, a methodology of presentation which was closer to it than the current one was desirable.

22. His delegation attached great importance to the work on the topic of the draft Code of Offences against the Peace and Security of Mankind. It was disappointed to note the element of confusion about the relationship which the topic bore to the question of State responsibility. Since the draft Code was only an aspect of the

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larger question of the criminal responsibility of States, which itself was but an aspect of the wider issue of State responsibility, it was difficult to understand how the international criminal responsibility of States for offences under the Code could be left to the draft on State responsibility, as envisaged in paragraph 54 of the report (A/40/10). Such an approach would do a disservice to the whole question of the criminal responsibility of States for offences against the peace and security of mankind, and would whittle down the importance of the consideration of that topic. The Commission must address the question of the criminal responsibility of States for offences falling under the Code. Work on the Code should not await the elaboration of general principles governing the subject. The method of examining concrete cases was consistent with the pragmatic, empirical and inductive approach called for by the subject. His delegation noted, however, that the elaboration of the general principles was a part of the outline and would be produced at a later stage.

23. The purpose of the Code would not be achieved if it was limited to individuals, since most offences against the peace and security of mankind were committed by States, not by individuals. The omission of the criminal responsibility of States therefore lent a certain artificiality and unreality to the Commission's work.

24. The Code should not exclude the possibility of offences against the peace and security of mankind being committed by private individuals who did not exercise "power of command". The example set by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was limited to public officials, should not be followed. To confine the Code to State functionaries was to ignore the vast power currently wielded by some private individuals and conglomerates.

25. The views of his delegation on the question of the definition of an offence against the peace and security of mankind were not yet fixed. It would like to see how the Commission's treatment of that question developed. None the less, there was some merit in the idea of not defining the offence by one criterion, but through an enumeration of the acts which constituted the offence. His delegation had some difficulty with the definition in the first alternative mentioned in paragraph 71 of the report. That definition borrowed so heavily from article 19 of the 1976 draft on State responsibility that it was almost indistinguishable from it. On the basis of that definition, it would be very difficult to make a distinction between an act which constituted on international crime under article 19 and an act which constituted an offence against the peace and security of mankind under the first alternative. A better approach would be to state that an offence against the peace and security of mankind was an international crime within the terms of the definition in article 19, and that it was constituted by certain acts, which would be enumerated.

26. The second alternative definition, also mentioned in paragraph 71 of the report, was even more problematic. The possibilities of categorizing acts as offences on the basis of that definition were endless. The definition was so

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elastic that even an act which would be nothing more than a delict could be treated as a crime once its wrongfulness was recognized by the international community. Such a definition would undo the excellent work done in article 19 of the 1976 draft in constructing a meaningful distinction between an international delict and an international crime.

27. The definition of an international crime committed by a State contained in article 19 could serve as the definition of an international crime by an individual, provided that the term "international crime" was not confused with similar expressions such as "war crime" and "crime against peace", used in certain conventions to designate certain monstrous crimes which States parties were required to punish. It was important to distinguish between the individual and the State in the area of the legal consequences.

28. The outcome of the work on the implementation provisions of the Code would determine whether the Definition of Aggression, with its reference to the role of the Security Council in determining aggression, was reflected in the Code in its entirety. It would be regrettable if the Security Council, with its well-known drawbacks and deficiencies, were given a certain competence in respect of the offence of aggression. That might be inevitable, however, since the Code had been formulated under the aegis of the United Nations and was therefore bound to adopt the Definition of Aggression.

29. His delegation preferred the wording in article 2, paragraph (2), of the 1954 draft Code to the wording of article 4, section B, submitted by the Special Rapporteur. It did not agree with the view expressed in paragraph 87 of the report that, where there were preparatory acts and the aggression did not take place, "no wrong would seem to occur". It was odd to establish a substantive criminal offence without outlawing ancillary offences such as those involving attempts and complicity. His delegation was of the view that one term, either "intervention" or "interference", but not both, should be used in draft article 4, section C. It was concerned by the question of whether the legality of sanctions authorized by the United Nations was preserved by the formulation contained in paragraph (b), section C, which referred to "exerting pressure, taking or threatening to take coercive measures of an economic or political nature against another State in order to obtain advantages of any kind". If it was not, it might be necessary to introduce the provisions in the Code on acts constituting offences with a formulation corresponding to the phrase in the chapeau to paragraph 3 of article 19 of the 1976 draft: "Subject to paragraph 2, and on the basis of the rules of international law in force, ...". That formulation meant that an act which was otherwise in accordance with international law would not be an offence. It would also take care of the concern that some acts were no more than legitimate means of negotiation between States and should therefore not constitute offences under the Code.

30. It was better to omit the vague definition of "terrorist acts" contained in article 4, section D, and simply identify those acts which constituted "terrorist acts". His delegation believed that the case for the inclusion in the draft Code

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of an offence relating to the maintenance of colonial domination was unquestionably strong. It believed too that if mercenarism was not dealt with in a separate provision, the part of the draft Code which referred to mercenaries should be strengthened. However, there was a good case for a separate provision on mercenarism. In addition, the provisions in the draft Code relating to pressure should be strengthened so as to take special account of economic aggression not involving forcible measures.

31. The proposed outline of part 3 of the draft articles on State responsibility had taken as its model articles 42, 65, 66 and 67 of the Vienna Convention on the Law of Treaties, as well as the annex thereto. Care should be exercised in making the analogy with the régime of treaties because the element of consensuality, essential to the operation of that régime, was not present in the régime of State responsibility.

32. While supporting the idea of a compulsory conciliation procedure and a binding third-party system for the settlement of disputes, his delegation wondered whether the suggested referral of disputes to either system would best serve the interests of the international community. Although paragraph 115 of the report (A/40/10) referred both to jus cogens and international crimes as meriting special attention, it was only disputes relating to the articles on international crimes that were subject to the binding third-party system. No mention was made of the articles dealing with jus cogens. While there was a relationship between them, the régime of jus cogens and that of international crimes were not necessarily coterminous.

33. The legal consequences of international crimes could be further elaborated in the draft articles. His delegation did not understand the observation in paragraph 117 of the report that the criminal responsibility of States should be considered by the Commission under either the topic of the draft Code of Offences or the topic of State responsibility. The proper place for the criminal responsibility of States was the draft on State responsibility, which was wider in scope than the draft Code of Offences. His delegation was concerned at the attempts to diminish the significance of work on the criminal responsibility of States.

34. Article 6 should be as exhaustive as possible since it related to an area in which certainty was required. The suggested addition of "inter alia" to the chapeau to paragraph 1 could have the effect of legitimizing any requirement made by the injured State of the author State. If "inter alia" was used, some formulation such as "in accordance with international law" would have to be included in the text as a controlling element.

35. There was no need for a special provision on the position of aliens, since that question could be covered in article 6. The provision also came close to a statement of a primary rule of State responsibility, with which the Commission was not concerned at the current stage of its work.

36. His delegation did not see any significant difference between the phrase "the applicable rules accepted by the international community as a whole", used in

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article 14 paragraph 1, in identifying the legal consequences of an international crime, and the suggested replacement "the applicable rules of international law".

37. On the question of the identification of an injured State when the internationally wrongful act was an international crime, paragraph 3 of draft article 5 as provisionally adopted, identified the injured State as "all other States". The International Court of Justice, in the Barcelona Traction Case, had referred to obligations of a State towards the international community as a whole relating to rights which all States had a legal interest in protecting. In relation to such obligations, there might be a corresponding right resident in any member of the international community to take action in vindication of a public interest. The question was whether the concept of obligations erga omnes was fully reflected in the identification of an injured State in draft article 5.

38. His delegation noted with satisfaction that the interaction between the Sixth Committee and the Commission had served to advance the work on the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. It supported the deletion, from paragraph 1 of the revised draft article 36 submitted by the Special Rapporteur in his sixth report, of the phrase "unless otherwise agreed by the States concerned", since the residual entitlement to make contrary agreements was already set out in article 6, paragraph 2 (b). It was generally in agreement with the new text.

39. The relationship between draft article 42 and the four relevant United Nations Conventions was important. An analogy might be drawn with the relationship between the 1946 Convention on the Privileges and Immunities of the United Nations, which was applicable to all States Members of the United Nations, and later agreements between the United Nations and member States which hosted certain United Nations agencies. Such agreements were supplementary to the 1946 Convention, and in cases where there were provisions in the Convention and the agreements dealing with the same subject, such provisions were to be interpreted in such a way as not to narrow the effect of either instrument. A similar formulation might be used in draft article 42.

40. His delegation had difficulty with the new draft article 43, and was sympathetic to the view that the option of a State to apply the draft articles to all or some of the types of couriers and bags would result in a flexibility that would be "inconsistent with the underlying objective of the draft articles and would result in uncertainty as to their interpretation and application" (A/40/10, para. 199). It was not convinced of the wisdom of allowing the optional declaration, which was really a disguised reservation that would relieve the declarant State of substantive obligations under the draft articles.

41. If the new draft article were retained, it would be important to keep paragraph 2, which allowed for the withdrawal of a declaration. The possibility of withdrawal would not lead to instability in international relations. On the contrary, withdrawal of the declaration could only serve to strengthen the régime of rights and duties under the draft articles.

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42. Article 18, which granted the courier immunity from criminal jurisdiction in respect of acts performed in the exercise of his functions, was a good compromise between those who advocated absolute immunity and those whose preference was for no immunity. It might be necessary, however, to have a cross-reference to article 16 which, in its provision for personal inviolability, would appear to run counter to article 18. In the absence of the explanations given in paragraph (7) of the commentary to article 18 as to the meaning of the phrase in paragraphs 1 and 2 "performed in the exercise of his functions", the phrase might be understood differently. Such a situation created a worry about the interpretation of the phrase, since recourse to the travaux préparatoires of a treaty for the purposes of interpretation was exceptional. His delegation had difficulty with the provision in draft article 18, paragraph 4, for a courier to give evidence "in other cases provided that this would not cause unreasonable delays or impediments to the delivery of the diplomatic bag". Once a courier was properly required to give evidence in cases not involving the exercise of his functions, that requirement should be met in all situations, and should not be departed from on the ground of delays or impediments to the delivery of the bag. The interests of the administration of justice, particularly in the field of criminal law, must override the concern for the safe and speedy delivery of the bag. His delegation was therefore in favour of deleting the proviso in question.

43. His delegation was unhappy with the word "normally" in article 21, paragraph 1, since it left the impression that there were other exceptional cases apart from the two mentioned in the article.

44. Perhaps to a greater degree than any other topic under consideration by the Commission, the topic of the jurisdictional immunities of States and their property raised still unresolved issues of policy affecting the relationship between developed and developing countries. With regard to the question raised in draft article 19, many developing countries felt that State-owned ships engaged in commercial service for a public-sector purpose should be granted immunity. The proper criterion for determining jurisdictional immunity was not so much the nature of the activity in question, as its purpose. If that purpose was governmental and related to the public sector, immunity should apply. His delegation supported that view, which was not fully reflected in article 19, paragraph 1.

45. The law on international arbitration, referred to in draft article 20, had been developed not merely without reference to developing countries, but against them. One wondered why consent to arbitration necessarily entailed consent to the supervisory jurisdiction of a court of another State "competent to supervise the implementation of the arbitration agreement", as indicated in paragraph (b) of the commentary. A more convincing demonstration was needed of the basis and validity of that exception than was offered by the formulation of the article itself or the commentary.

46. The reasons given in the report as to why no substantive work had been done on the topics entitled "Relations between States and international organizations" and "The law of the non-navigational uses of international watercourses", were wholly acceptable. His delegation looked forward to the Commission's work on those topics at its thirty-eighth session.

47. Mr. RASSOL'KO (Byelorussian Soviet Socialist Republic) said that the draft articles on State responsibility did not give clear answers to the questions relating to the content, form and scope of State responsibility for international crimes, because they failed to define specific types and categories of such crimes. That was especially true of draft articles 14 and 15. Draft article 14 stated in general terms that "an international crime entails all the legal consequences of an internationally wrongful act" but did not define the categories of such crimes. Therefore, the duty of States to combat them remained very abstract. The same applied to draft article 15, which stated: "An act of aggression entails all the legal consequences of an international crime", without indicating that the Charter of the United Nations prohibited acts of aggression and provided for specific measures if they were committed. The Special Rapporteur had not defined crimes such as aggression which came into the category of international crimes. His delegation considered that such unlawful acts as aggression, the policy of racial discrimination, genocide, apartheid, colonialism, the use of mercenaries, international terrorism, propaganda and preparations for nuclear war, the militarization of outer space, the use of force against the territorial integrity and the political independence of States, and other offences against the peace and security of mankind should be included in the category of international crimes, entailing the responsibility of States. That should be reflected in the draft.

48. It was also essential for the draft to define State responsibility both for international crimes and for international delicts, and part two of the draft should contain a special section on each category. Some essential provisions were missing from the articles relating to the rights of the injured State. For example, article 6 did not provide for measures which could be taken by a State to redress a situation in which individuals had been killed. In such a case, monetary compensation was insufficient; more serious measures must be considered to punish those guilty.

49. Draft article 7 concerning the treatment to be accorded by States to aliens in the event of a breach of an international obligation did not relate to the topic. Draft articles 8 to 13 were too vague.

50. Turning to the topic of jurisdictional immunities of States and their property, he said that his delegation did not agree with article 19, paragraph 1, in part III regarding lack of immunity from jurisdiction before a court in respect of a ship owned or operated by a State which "engaged in commercial [non-governmental] service". A State-owned ship was always used for purposes of State and therefore must enjoy immunity from foreign jurisdiction. Any other approach would damage the interests of a State using its own property. That article touched on a very important area of the law of the sea relating to a State's conduct of its foreign trade.

51. There were serious shortcomings in the wording of draft articles 21 to 24 in part IV. One common to them all was that, according to their provisions, immunity did not apply to property "in use or intended for use by the State for commercial and non-governmental purposes". All State property should be immune from any

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measures of constraint or enforcement. Indeed, the draft articles in part IV suffered from the same shortcoming as those in the previous parts in that they reflected the unacceptable idea of limited or functional immunity. His delegation considered that only by basing the draft articles on the principle of the sovereign equality of States was there a chance of working out a generally acceptable draft on jurisdictional immunities of States and their property.

52. One of the most important topics being examined by the Commission was the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. His delegation did not agree with those delegations which considered that article 18 as provisionally adopted by the Commission was duplicated by the provisions of article 16. The latter article spoke only of "personal inviolability" and did not specify the immunities the courier enjoyed, which were established in article 18. That was an important point because granting of complete immunity to the courier was essential for him to fulfil his functions on behalf of his State.

53. His delegation agreed with those delegations which considered that the provision concerning the immunity of the courier from the jurisdiction of the receiving State or the transit State must be retained in article 18.

54. With regard to draft article 36 as proposed by the Special Rapporteur, referring to the inviolability of the diplomatic bag, there had been attempts to include a provision on the possibility of inspecting the bag with the help of electronic devices. In view of the advanced level of modern electronic technology, it was clear that confidential information could be extracted from the bag in that way without its being opened. To maintain its inviolability, the bag must be exempt from any inspection.

55. He hoped that draft articles 36 to 43 would be ready for consideration at the thirty-eighth session of the Commission and that the text of the draft articles as a whole would be completed during that session.

56. On the topic of relations between States and international organizations, he said that the first draft article submitted by the Special Rapporteur would provide guidance for further work on the topic. However, the question arose as to the basis on which international organizations should be subject to the domestic law of States. That had not been and could not be established under international law, only on the basis of individual agreements with each organization. It was therefore not appropriate to raise the matter in the context of the topic.

57. The elaboration of any kind of universal convention on the law of the non-navigational uses of international watercourses was unrealistic, since a legal régime covering international rivers could be established only with the consent of the riparian States, not on the basis of an international agreement of a universal nature. The Commission should confine itself to making general recommendations for possible use by States in elaborating their own agreements in that area.

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58. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, his delegation's views remained the same as in previous years.

59. Lastly, commenting generally on the work of the Commission, he said that delegations had stalled on a number of draft articles. The methods of work of the Commission needed to be improved, and all its members should participate actively and contribute their experience. The Commission should try to complete work as soon as possible on topics it was currently considering.

60. Mr. MORAGA (Chile) said that Chile was following closely the enormous codification endeavour being undertaken by the Commission, which had made a valuable contribution to the definition of concepts and would, without question, continue to do so.

61. With regard to the draft Code of Offences against the Peace and Security of Mankind, it was important that progress should be made on the question of acts constituting an offence against international peace and security. The Drafting Committee would have a fundamental role to play in that connection.

62. Where the question of State responsibility was concerned, the definitions of the expressions "internationally wrongful act", "author State" and "injured State" were of particular importance and must be dealt with objectively.

63. In connection with the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, it was essential to draw up rules to safeguard the communications of States, notwithstanding the technological advances that were taking place.

64. His delegation noted with interest the reports of the Special Rapporteur on the jurisdictional immunities of States and their property and the corresponding recommendations made by the Drafting Committee. Account must be taken of the interests of all parties, and the principle of sovereign equality of States must be observed.

65. Mr. HERRERA CACERES (Honduras), referring to the question of State responsibility, said that it would be appropriate to reverse the order in which the texts of draft articles 3 and 4 appeared. The text of draft article 5 might be made more precise, if agreement could be reached on the inclusion of the expression "the infringement of the right". The Spanish text of paragraph 1 could be reworded to read: "... cualquier Estado que haya sufrido una lesión en uno de sus derechos ...". Paragraph 2 should then be reworded so as to define infringement of a right, which was actually what was dealt with in paragraph 2, subparagraphs (a) to (f). If that approach was adopted, paragraph 3 should be merged with paragraph 1.

66. With regard to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, he wished first of all to refer to draft article 4 on the freedom of official communications. He noted that paragraph 2 of that draft article required reciprocity. However, since reciprocity was a minimum

(Mr. Herrera Caceres, Honduras)

requirement, his delegation wished to suggest that paragraph 2 should be reworded so that it read: "the transit State shall accord ..., as a minimum, the same freedom and protection as is accorded by the receiving State." Furthermore, it would be appropriate to relocate the text of draft article 4 so that it was close to draft articles 13, 14 and 15.

67. Draft article 12, which dealt with the diplomatic courier declared persona non grata or not acceptable, was closely linked to draft article 11, paragraph (b). It might therefore be appropriate, in the Spanish text of draft article 12, paragraph 1, to replace the word "comunicar" with the word "notificar". Furthermore, the current wording of draft article 12 did not take sufficient account of draft article 9, paragraph 2. His delegation wished to suggest that the sending State should be required to refrain from appointing the diplomatic courier, or to revoke an appointment already made, if the person was a national of the receiving State.

68. His delegation believed that draft article 14, which dealt with entry into the territory of the receiving State or the transit State, should also deal with the departure of the diplomatic courier. In that connection, he wished to draw attention to article 13, paragraph 2, of the Universal Declaration of Human Rights, which established that everyone had the right to leave any country, including his own, and to return to his country. That right would be of particular importance to a diplomatic courier who was a national of the receiving State. Moreover, in the event of a foreign diplomatic courier being declared persona non grata or not acceptable, draft article 21, paragraph 2, provided that his privileges and immunities should cease at the moment when he left the territory of the receiving State, or on the expiry of a reasonable period in which to do so.

69. His delegation wished to encourage the Commission to maintain its co-operation with other bodies, particularly the Inter-American Juridical Committee. It also considered the International Law Seminar extremely useful.

The meeting rose at 1.15 p.m.