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SUMMARY RECORD OF THE 25th MEETING

Chairman: Mr. AL-QAYSI (Iraq)

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The meeting was called to order at 3.25 p.m.

AGENDA ITEM 138: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS THIRTY-SEVENTH SESSION (continued) (A/40/10 and 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. SUSS (German Democratic Republic), referring to chapter III of the report of the International Law Commission (A/40/10), said that with the submission the previous year of an overall draft of Part Two of the draft articles on State responsibility, considerable progress had been achieved; as a result, substantive discussions could begin, and it was to be hoped that the codification might be completed in the near future. Having as its basis the conditions for the existence of responsibility specified in Part One, an instrument covering the whole issue of State responsibility would enable States to deal with individual cases of responsibility through more specific agreements.

2. Rapid and effective progress in that work required the readiness of all States to participate as well as corresponding efforts within the Commission. The overwhelming majority had accepted Part Two of the draft articles as a basis for discussion in so far as its basic structure and, in particular, the distinction made therein between the legal consequences of international delicts and those of international crimes were concerned. On that basis, it ought to be possible to find realistic solutions to questions that were still unclear or controversial. Such solutions should be based on the substance of the articles and should be flexible and focused on essentials so as to avoid encumbering the draft with questions that could not be settled within the framework of State responsibility.

3. The problem of defining the injured State, i.e. determining the party or parties whose rights had been infringed by an internationally wrongful act had been a central theme of the discussion. During the thirty-seventh session of the Commission, draft article 5, which contained a definition of the injured State, had been provisionally adopted. The text showed some improvement over the original draft, but remained unsatisfactory on some major points and required thorough revision.

4. It was essential to state in paragraph 1 of the current draft of article 5 which State was to be considered the injured State: it was in fact the State whose rights had been infringed by an internationally wrongful act. The question of which State or States might be affected in individual cases depended on the content and formulation of the primary rule breached and was unrelated to the question of legal consequences to be dealt with in Part Two of the draft.

5. Under article 5, it was possible to distinguish only basic categories of infringement. As had been made clear during the discussion in the Commission, the acts which constituted such infringements essentially fell into three categories:

(Mr. Suss, German Democratic Republic)

acts infringing a right arising from a bilateral treaty; acts infringing a right arising from a multilateral treaty; and internationally wrongful acts which constituted an infringement erga omnes, i.e. international crimes.

6. Cases in which the right infringed arose from a bilateral treaty were covered by article 5, paragraph 2 (a); however, no mention was made of the possibility of a breach of bilateral customary law. That point could easily be added.

7. Subparagraphs 2 (b) to (d) placed an exaggerated emphasis on sources and details which might be misleading and raise unnecessary questions that could not be decided in a convention on State responsibility. The cases described in them (breach of an obligation imposed by a judgement of an international court and infringement of a right arising from a treaty provision for a third State) might easily be dealt with under bilateral or multilateral agreements. It would therefore be better to delete the subparagraphs in question. There was no reason for a convention on State responsibility to provide an exhaustive list of all possible legal sources.

8. Cases where the right infringed arose from a multilateral treaty were covered under subparagraph 2 (e). At that point, it was possible to make a distinction between structures in which "bilateralization" was possible and those which were "genuinely multilateral" in nature [subparas. 2 (e) (i) and (ii)]. His delegation felt that that context did not allow for the inclusion of additional detailed categories of obligation and infringement in respect of multilateral treaties, as had been attempted, for example, in subparagraph 2 (f), which contained a reference to what had been called the "collective interests of the States parties" to a multilateral treaty. That was all the more reason why references in subparagraph 2 (e) (iii) to certain primary rules, such as the covenants on human rights, should be excluded. Their inclusion would create serious conflicts with existing primary rules, which alone ought to define an injured State, the responses it was entitled to make and the conditions under which it could make them. One might add that, because of their complex provisions on obligations, such human rights covenants typically contained special arrangements and procedures relating to responsibility and implementation. Such arrangements and procedures were in fact covered by the reservations made in articles 2 and 3; at any rate, it was impossible to make them retroactive or establish them in abstract terms in the convention on State responsibility, or to read them into existing legal relationships with the use of a general definition of the injured State.

9. The central role of the reservations contained in articles 2 and 3 in respect of Part Two as a whole must not be undercut by abstract definitions of the injured State. Those two articles, which, in his delegation's view, could not be applied solely to customary law, established the subsidiary nature of the provisions on legal consequences contained in Part Two. States could determine or rule out specific legal consequences at any time, and made frequent use of that option, particularly in the case of multilateral treaties. Their decisions should be respected absolutely, and any interference by means of a convention on State responsibility was impermissible. Consequently, his delegation could not accept the provisions set out in subparagraphs 2 (e) (iii) and 2 (f) of article 5.

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10. Injuries arising from acts constituting international crimes were covered at last in paragraph 3 of article 5. It was correct to note that, apart from the State directly injured, all other States were "indirectly" affected. That must be stated more explicitly, however, in order to indicate that there were many possible responses, depending on whether States were directly or indirectly affected.

11. Draft article 6, which, like the subsequent articles, had unfortunately not been considered by the Drafting Committee, regulated in general terms the right to reparation of States injured by internationally wrongful acts. The language should be explicit on that point. Earlier discussions had shown that the draft article was acceptable in so far as the more important points were concerned. However, some clarifications and modifications seemed necessary. There had been a widespread and justifiable demand to delete the phrase "to release and return the persons and objects held through such act" from subparagraph 1 (a) as well as subparagraph 1 (b) in its entirety. Subparagraph 1 (c) dealt with claims for restitution. Its implementation might prove unfeasible not only because it was materially impossible but also because it was legally impossible to do so, as demonstrated by multilateral conventions on the settlement of disputes. That point ought to be taken into account, in which case article 7 became redundant.

12. In the cases described in those provisions, or in cases when an injured State put forward a claim for compensation rather than restitution, compensation could be claimed in kind or in money. Only a State which had actually suffered damage was entitled to make such a claim, however. While it was right to say that the damage was not a constituent element of an internationally wrongful act, it was equally true that there could be no entitlement to compensation unless actual damage had been suffered.

13. The formula to be used in respect of claims for compensation should be as flexible as possible. The phrase "appropriate damages" might be suitable. From that perspective, the wording of article 6, paragraph 2, should be modified. Article 7 might be deleted. Finally, subparagraph 1 (d) of article 6 dealt with measures of satisfaction such as apologies, the punishment of those responsible, etc. It would perhaps be preferable to state clearly that the injured State was entitled to require the State that had committed the wrongful act to apologize and to punish those responsible or provide other forms of satisfaction.

14. Other possible legal consequences of an internationally wrongful act were measures by way of reciprocity and reprisal, covered in articles 8 and 9. They provided for the right of the injured State unilaterally to suspend the performance of its obligations towards the State which had committed an internationally wrongful act, so that the infringement might be stopped, the obligation breached complied with or, where applicable, the claim for reparations settled. The application of countermeasures by way of reciprocity or reprisal depended upon prior assertion of a claim for reparation; the entitlement to such countermeasures became invalid when the reparation was paid. More specifically, countermeasures might also be taken to oblige the author to discontinue the wrongful act, to abide by a reparation arrangement or dispute settlement procedure or to avert aggravation of the damage.

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15. In any case, measures by way of reciprocity and reprisal were admissible only if they were proportionate to the wrongful act. The performance of obligations could not be suspended if the obligations arose from a jus cogens norm (see art. 12 (b)) or if special prohibitions applied to them under international law (for example, the prohibition of reprisals in international humanitarian law). In accordance with general international law, reprisals that involved armed force or affected in any other way the territorial integrity or political independence of a State were prohibited as a matter of principle. That should be said expressly.

16. If the draft text incorporated the points just mentioned regarding principles applying to countermeasures, it should in his delegation's view be possible to transfer the essential elements to other articles and delete the remainder of articles 10 to 13. The procedural restrictions referred to, particularly in articles 10 and 11, would more properly belong in Part Three. While it was important to prevent as far as possible the misuse of countermeasures, the scope of the responses available to a State whose rights had been infringed should not be unduly narrowed.

17. The German Democratic Republic had repeatedly pointed out that it could not accept the concept that a State or group of States could claim for themselves the right to impose sanctions on another State. It was deplorable that the Special Rapporteur, in referring to articles 14 and 15, had used the term "criminal responsibility of the State". That was a term which the Commission had rejected at a very early stage (see the Yearbook of the International Law Commission, 1963, II, pp. 233 and 234). The terms could only cause confusion and blur the lines of distinction with the draft Code of Offences against the Peace and Security of Mankind. It would also obstruct efforts to determine the legal consequences of international crimes.

18. On the latter subject, the draft articles were totally unsatisfactory. Article 14, paragraph 1, merely stated sweepingly that an international crime entails all the legal consequences of an internationally wrongful act and, in addition, such rights and obligations as are determined by the applicable rules accepted by the international community as a whole", while article 14, paragraph 2, named only some minimum obligations for States not directly affected. Worse yet, the exercise of rights and the performance of obligations in article 14, paragraph 3, were declared subject to the procedures embodied in the United Nations Charter. That reservation was also applicable to a State directly affected by a crime. As a consequence, the latter State, according to the present formulation, was in a worse position than the victim of an international delict. His delegation hoped that was not the purpose in mind.

19. The time had come to list in the draft text concrete and specific legal consequences of international crimes. For the State directly affected by the crime, those should include all the legal consequences pursuant to article 6 and subsequent articles, without the procedural restrictions usually imposed in the case of delicts; every other State would be entitled to demand that a wrongful act should be discontinued, restitution should be granted and safeguards against its

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repetition should be established, taking into account the international criminal responsibility of individuals. A statement to the effect that States could not claim immunity for acts they had committed should also be included. One should logically speak of safeguards against repetition in the case of international crimes, as opposed to international delicts, rather than satisfaction. It should be stated explicitly that on the basis of existing agreements, all States could join in appropriate countermeasures and in measures decided upon by the United Nations Security Council.

20. In respect of the gravest and most dangerous international crime, aggression (art. 15), the following legal consequences should be added: the right to individual and collective self-defence, the right of the State that was the victim of the aggression to suspend the implementation of all bilateral treaties (except those relating to a state of war) concluded with the aggressor State, and its right to intern the latter's nationals and confiscate their property within the territory under its own jurisdiction. Considering the specific character and legal consequences of the crime of aggression, the German Democratic Republic favoured giving the subject separate treatment in the draft, especially to thwart attempts at misuse, and adding the specific legal consequences that applied in the case of aggression alone.

21. With regard to Part Three, his delegation believed that all questions relating to the determination and enforcement of State responsibility belonged there. That included procedures for the application of countermeasures and/or sanctions, and issues related to the peaceful settlement of disputes. It would be incorrect in that context to narrow down the peaceful settlement of disputes to compulsory third-party dispute settlement procedures, as the Special Rapporteur had repeatedly advocated. Such a limitation would encroach inadmissibly upon any primary rule existing between States under the convention on State responsibility. The primary rules would in the process be changed and, basically, all international legal relationships would become subject to compulsory dispute settlement procedures. Such a proposal could not be seriously considered in the context of a convention which was to codify what was primarily existing law.

22. It should also be noted that the references to the Vienna Convention on the Law of Treaties and the United Nations Convention on the Law of the Sea were unconvincing. The part of the Convention on the Law of Treaties - which had, incidentally, been ratified by only a small number of States dealing with dispute settlement - represented a special arrangement between those States with regard to the validity, termination or suspension of treaties. Likewise, in the Convention on the Law of the Sea dispute settlement was tailored to suit the requirements of the law of the sea. In both cases, as always where agreements relating to the settlement of disputes were concerned, primary rules were at issue. In the light of those considerations, the German Democratic Republic appreciated the significance of questions of procedure in the matter of State responsibility and was in favour of a flexible enforcement system acceptable to States. It was misleading, however, to create the impression that, in the absence of an agreement on a compulsory dispute settlement procedure, there would be no State responsibility, no right to reparation and no right of an injured State to apply countermeasures.

23. Mr. GUNEY (Turkey) welcomed the fact that the Special Rapporteur on the draft Code of Offences against the Peace and Security of Mankind had indicated his intention to follow the Commission's decision at its thirty-sixth session that the draft code should be limited at that stage to offences committed by individuals, and to include the offences covered by the 1954 draft Code with appropriate modifications of form and substance. That was a cautious and realistic approach. It was more appropriate to treat State responsibility separately, within the draft articles on that topic.

24. With regard to the draft Code of Offences against the Peace and Security of Mankind, his delegation like many others fully shared the view that the Code should deal only with the most serious of serious offences. In that respect, it was essential to dispel uncertainties with regard to the content ratione materiae of the draft Code and the delimitation of scope ratione personae.

25. The Commission's decision to include international terrorism in the draft Code as an act constituting an offence against international peace and security merited every support, since the examination of various forms of terrorism, its motives and the methods which it employed demonstrated that it endangered the security and stability of States as well as the security of persons and property. His delegation therefore welcomed draft article 4, section D, submitted by the Special Rapporteur, which took full account of the new forms of modern terrorism, in particular the seizure of aircraft, the taking of hostages and violence directed against persons enjoying international protection, especially diplomatic and consular agents.

26. With regard to the question of State resonsibility, he recalled that, when the Commission had provisionally adopted articles 1 to 4 with the commentaries referring to them, it had not made a decision whether the draft articles should contain a reference to jus cogens. His delegation had joined those which had had serious reservations regarding the notion of jus cogens. At the Vienna Conference on the Law of Treaties, that notion had been the most controversial question. It continued to be so. It was still not known how jus cogens arose, nor which currently were the peremptory norms. Consequently, the express mention of jus cogens article 12 (b) or, under the circumstances, anywhere in the draft was neither justified nor legally convincing. Such mention would only add more confusing elements to an already difficult and complex text.

27. While it was true that the legal consequences of internationally wrongful acts should vary according to the seriousness of the acts, too much categorization had complicated the codification and the progressive development of law regarding State responsibility. Theoretical constructs and new concepts of legal norms which radically departed from existing law must be avoided. Under the circumstances, it was difficult to see, at the current stage of the work, the true impact of the proposed articles: to assess it, it would be necessary to have the remaining draft articles.

28. That said, his delegation was satisfied with the Commission's progress in its consideration of the question of the State responsibility, and considered that the

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drafting of a set of coherent articles on the legal consequences of internationally wrongful acts should continue. With regard to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, the Commission had decided to refer the revised text of draft articles 23, 36, 39, 42, and 43, contained in the sixth report of the Special Rapporteur, to the Drafting Committee. His delegation noted with satisfaction the progress which had been made on that question.

29. Since the status of the diplomatic courier and the diplomatic bag was governed essentially by the relevant provisions of existing international instruments, the principal objective of the Commission's work on the subject should be limited to adding to several points of the existing basic provisions. In the process, the Commission should adhere to the principle of functional necessity and take full account of the interests of the sending, receiving and transit States. Draft article 36 entitled "Inviolability of the diplomatic bag" continued to be a source of controversy in the Commission. The possible use of electronic procedures for examining the bag had resulted in long discussions, and the prevailing opinion seemed to be that electronic scanning of the bag, even if carried out under strictly controlled conditions, could not only affect the confidential nature of its contents but would also place the developing countries at a disadvantage. The Special Rapporteur's conclusion that it would be necessary to abide by the well established rule of absolute inviolability, while providing for some flexibility in its application, seemed wise and acceptable.

30. With regard to chapter V, "Jurisdictional immunities of States and their property", the Commission at its thirty-seventh session had had before it articles 19 and 20, which completed Part III of the draft. Given the unprecedented extension of the economic and financial activities of the State, it was becoming more and more difficult to draw a line between acts of the public power (de jure imperii) and acts committed by the State by the same right as a private person (de jure gestionis). That distinction no longer constituted a sufficient criterion and could not be used as a legal basis for exceptions to immunity. In order to break the deadlock, the Commission should find criteria which were better suited to the current circumstances, without, however, unduly delaying its work on the subject.

31. With regard to chapter VI, entitled "Relations between States and international organizations", the Special Rapporteur had submitted his second report to the Commission, which had not been able to examine it at its last session because of a lack of time. The Special Rapporteur should therefore submit to the Commission at its next session an outline of the plan which he intended to follow on the subject.

32. With regard to chapter VII, entitled "The law of the non-navigational uses of international watercourses", his delegation noted, as far as the approach and the methods adopted were concerned, that the new Special Rapporteur had submitted a preliminary report which reviewed the Commission's work on the topic to date. The views of the members of the Commission regarding the recommendations of the Special Rapporteur on further work had been widely held, and had once again made it

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apparent that the law of the non-navigational uses of international watercourses continued to be the most controversial subject studied by the Commission. The Special Rapporteur had drawn attention to the fact that no consensus had been reached on the major issues raised by articles 1 to 9, which had been referred to the Drafting Committee in 1984.

33. In his next report, the new Special Rapporteur should take stock of the situation and consider, in the light of discussions in the Commission, the Sixth Committee and the General Assembly, whether, in the interests of realism and efficiency, there was any real chance of the work on codification being completed. His delegation, like a number of others, was not convinced that the question as a whole was yet ripe for codification, and the revised draft of a convention comprising 41 draft articles which had been submitted by Mr. Evensen in his second report (A/C.4/381) had only confirmed their fears in that respect. From the point of view of both their form and the concepts which they contained, those revised draft articles were more like a General Assembly resolution than a genuine legal instrument. Some of them could be considered only as general guidelines for States, and not binding rules. To include guidelines in a "framework agreement", as had been envisaged, was neither feasible nor useful. Sight should not be lost of the fact that the Commission's main task was to further the codification and progressive development of international law by establishing draft articles destined to serve as a basis for future treaties setting forth laws and legal obligations, which was not the case in the present instance. Perhaps the law on the subject did not even lend itself to the elaboration of a draft model agreement. His delegation did not consider it advisable to request the Commission, in order to gain time, to sacrifice the traditionally outstanding quality of its work.

34. As far as the working methods of the Commission were concerned, his delegation fully shared the opinion expressed in paragraph 297 of the report and considered that it was important to establish priorities for the next session. In that respect, it would certainly be preferable for the Commission to try to complete, before conclusion of the present term of membership, the first reading of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and on jurisdictional immunities of States and their property. It hoped that the Yearbook of the International Law Commission would be published regularly and on time, and it was in favour of updating the publication entitled "The Work of the International Law Commission". His delegation was satisfied with the co-operation between the Commission and other bodies and wished to emphasize the importance it attached to the International Law Seminar. He would like the list of participants at each session of the seminar included in the relevant part of the report of the Commission, as had been the custom.

35. Mr. ECONOMIDES (Greece), referring to chapter II of the Commission's report, entitled "Draft Code of Offences Against the Peace and Security of Mankind", said that, because of the ineffectiveness - not to say the breakdown - of the collective security system of the United Nations, efforts should be directed towards extending

(Mr. Economides, Greece)

the whole draft Code, particularly its provisions relating to the establishment of truly international jurisdiction, to include the criminal responsibility of States themselves. Such an extension should be the final objective. His delegation shared the opinion expressed in paragraph 55 of the report and that expressed on the subject by other delegations, including Jamaica.

36. With regard to the definition of an offence against the peace and security of mankind, his delegation favoured a short formulation based on article 19 of the draft relating to the international responsibility of States. That definition should contain three elements: (a) the fact that a violation of an international obligation relating to international peace and security had occurred; (b) the basic nature of that obligation; and (c) the effects deriving therefrom, that is to say, the recognition by the international community as a whole that the violation of such a basic obligation constituted an offence against the peace and security of mankind.

37. His delegation shared the opinion of those who considered that the draft that was being elaborated should apply to all physical persons, private individuals or persons acting as the authorities of a State. However, as far as persons in the latter category were concerned, the position they occupied should be considered an aggravating circumstance for the purposes of the imposition of a penalty.

38. The Definition of Aggression contained in General Assembly resolution 3314 (XXIX) should be included, if not as a whole in the future Code, at least as to its relevant components, which were the definition stricto sensu and the part relating to the consequences of aggression. His delegation was very much in favour of elaborating appropriate provisions concerning the threat of aggression and the preparation of aggression that would be as effective as possible. In effect, the preparation of aggression, as soon as it became apparent or pressure was asserted, actually became a threat. Those two items - threat and preparation - should be considered in close connection. He accepted the substance of the provisions relating to international terrorism and intervention in the affairs of another State, although he recognized that those provisions as a whole needed further elaboration - especially in the light of contemporary practice. Lastly, article IV, section E, as proposed by the Special Rapporteur, appeared to be rather anachronistic, since it did not reflect current conditions of international life. If it was to be retained, two basic additions at least were necessary: firstly, it should be specified that such a treaty, which would be intended to ensure international peace and security by imposing restrictions or limitations on national sovereignty, should itself be in accordance with the Charter of the United Nations and the Vienna Convention on the Law of Treaties; and, secondly, the text should provide for such restrictions or limitations to be lifted in cases of self-defence, for, as a norm of jus cogens, self-defence took priority over a mere treaty obligation.

39. With regard to chapter III, entitled "State responsibility" - a topic that he considered fundamental because it lay at the very centre of international law - he said that at the current stage he would limit his comments to a few preliminary

(Mr. Economides, Greece)

remarks. Concerning the settlement of disputes, he supported the Special Rapporteur's suggestions contained in paragraphs 114 and 115 of the report. He considered them to be a basic minimum, for international responsibility, being an eminently legal topic in content and nature and extremely important as it directly involved the State itself as a sovereign entity, called for particularly high-level, impartial and binding procedures for the settlement of disputes. For that reason, his delegation wondered whether, instead of the proposed conciliation procedure, it would not be better to provide for mandatory arbitration procedures.

40. For the same reason, his delegation was, in principle, in favour of extending the competence of the International Court of Justice to questions other than those referred to in paragraph 115 of the report. He shared the opinion expressed in paragraph 117 of the report, that the special legal consequences of international crimes should be further elaborated. For that purpose, it should be made clear in article 14 that international crimes, and in particular aggression, could produce no legal effect, and that consequences other than those set forth therein should be specified, including the unlawfulness of an annexation or State succession resulting from the illegal use of force. His delegation also supported the suggestion contained in paragraph 147 of the report, which would strengthen the minimum obligation of solidarity provided for in article 14. He was of the opinion, moreover, that provision should be made for the case of a State committing several international crimes or other illegal acts against another State, simultaneously or successively. The cumulative total of such acts should constitute a particularly serious situation with regard to responsibility.

41. His delegation wished to emphasize that it would be impossible, in the nature of things, not to consider relevant cases of jus cogens in the draft articles on State responsibility. Jus cogens was now the fundamental, and primordial component of the contemporary legal order. Aggression, therefore, which constituted the most serious international crime, in large part because it resulted from the violation of a rule of jus cogens - the principle of non-use of force - should be addressed in a special provision of the draft because of its importance and its extremely serious consequences. His delegation shared the views expressed earlier in the meeting by the delegation of the German Democratic Republic on the subject. Lastly, he considered that the notion of self-defence should be defined as clearly and precisely as possible.

42. With reference to chapter IV, entitled "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier", his delegation, which had repeatedly stated its preference for a text restricted to the question of the diplomatic bag not accompanied by diplomatic courier, noted that work was continuing over a much wider front encompassing the whole question of the status of the diplomatic courier, a question that was currently regulated by four different conventions.

43. Concerning the draft articles contained in the Special Rapporteur's sixth report, the wording of article 36, dealing with the inviolability of the diplomatic bag should be simplified and should avoid tackling very controversial questions.

(Mr. Economides, Greece)

The provision seemed not to go far enough with regard to the bag of a diplomatic mission and, on the contrary, to go very far with regard to the bag of a consular post. That showed the difficulties encountered when one tried to unify different institutions in a rather artificial manner. Furthermore, the question of examination by electronic devices - being subject to the general prohibition of examination - should not be dealt with expressly. That was why his delegation favoured the wording proposed by a member of the International Law Commission which appeared in paragraph 182 of the report. It also believed that draft article 41, entitled "Non-recognition of States or Governments or absence of diplomatic or consular relations" was largely superfluous and could be deleted. Finally, paragraph 1 of draft article 42 should be more clearly worded and the terms of paragraph 2 should be made considerably more flexible.

44. On the subject of chapter V, entitled "Jurisdictional immunities of States and their property", his delegation noted that the two draft articles 19 and 20 provisionally adopted by the Commission were drafted, like preceding articles, in appropriate terms; in particular, the distinction in article 19 between a State-owned ship in commercial service and a ship in government non-commercial service was pertinent and reflected a delicate balance long since established in international commerce. His delegation endorsed the idea advanced by the Brazilian delegation that, in 1986, the Commission should try as a matter of priority to complete its first reading of the draft on jurisdictional immunities, whose significance was obvious.

45. With regard to chapter VI, entitled "Relations between States and international organizations (second part of the topic)", his delegation hoped that a preliminary outline of the question as a whole would be submitted in 1986 and that the Special Rapporteur and the Commission would give as complete a definition as possible of an international organization as a subject of international law, a definition which was currently lacking.

46. His delegation believed that the question dealt with in chapter VII, "The law of the non-navigational uses of international watercourses" was the most urgent and one of the most important of those currently before the Commission. On the whole, it shared the position taken by the new Special Rapporteur, Mr. McCaffrey, regarding the further consideration of the nine articles already referred to the Drafting Committee and of the other articles of the draft, and hoped that there would be specific texts to comment on in 1986. At the current stage, a remark was necessary concerning the aim being pursued: in paragraph 288 of its report, the International Law Commission stated that its task was "to find solutions that were fair to all interests and thus generally acceptable", whereas in paragraph 273, it noted that it was "possible to identify certain principles of international law already existing and applicable to international watercourses in general". Those two apparently paradoxical quotations were not so in reality because the question of international watercourses simultaneously concerned both the codification and the progressive development of international law, within the meaning of Article 13 of the Charter. His delegation, for its part, attached great importance to the question of codifying such a vital issue and believed that the principles of

(Mr. Economides, Greece)

conduct on natural resouces shared by two or more States adopted by consensus at Nairobi in 1978 were extremely useful in that respect.

47. With regard to the question of international liability for injurious consequences arising out of acts not prohibited by international law, his delegation thanked the new Special Rapporteur for his preliminary report and hoped that the Committee would have tangible results to consider on that important question in 1986.

48. Mr. LUKYANOVICH (Union of Soviet Socialist Republics) noted the progress made in the work of the International Law Commission since its previous session. He recalled that his country wished the Commission, whose agenda included subjects of varying degrees of significance, to give priority to the most important questions in the forefront of which was the draft Code of Offences against the Peace and Security of Mankind, the major consequence of which was obvious at a time when the behaviour of certain States was regularly taking the world to the brink of catastrophe. His delegation would return to that aspect during consideration of the agenda item expressly devoted to the draft Code.

49. On the subject of State responsibility, his delegation recalled the need to take account of the functions of the Security Council, and also of the juridical consequences of threats to peace and security in the current state of international law. Responsibility for internationally wrongful acts created bilateral relations between the State committing the acts and the injured State, whereas responsibility for international offences concerned relations between the State committing the offences and the organized international community.

50. The Special Rapporteur's draft on the subject proposed only one of the possible approaches. Moreover, the structure of the second part of the draft was excessively complex. Paragraph 2 of draft article 5, for example, seemed to be rendered useless by over-complication, while paragraph 3 also seemed superfluous in that there was generally only one victim of each act. The drafting of draft article 6 should be improved, and draft articles 14 and 15 did not establish satisfactory rules for the consequences of the responsibility envisaged. The Commission had before it another proposal on the subject which it ought to consider. The Drafting Committee had a lot of work to do to improve the texts of the draft articles which had been referred to it.

51. On the subject of the status of the diplomatic courier and of the diplomatic bag not accompanied by diplomatic courier, the results of the International Law Commission's activities provided grounds for hope that the first reading of the draft could indeed be successfully completed at the thirty-eighth session. The USSR hoped that the draft would be finalized as soon as possible because it would appreciably assist the conduct of international relations between States. However, it was essential that the draft should reinforce and standardize existing rules and create rules in areas not covered by the instruments in force.

(Mr. Lukyanovich, USSR)

52. Draft article 18 dealt mainly with the diplomatic courier's immunity from the criminal jurisdiction of the receiving or the transit State. The immunity of States with respect to the jurisdiction of other States was an indispensable element of international relations, and the rule enunciated was in accord with the provisions of the Vienna Convention on Diplomatic Relations and with existing international law. The courier must be assured against any pressure, of which the threat of criminal proceedings would be the most serious. The Vienna Convention specified that immunity had no other aim than to permit the performance of the functions of diplomatic missions as representatives of States, and the immunity accorded to the courier by draft article 18 corresponded to the immunity of technical and administrative personnel. The functions of the courier were certainly as confidential as those of the latter category of personnel, so the arguments put forward against recognizing the courier's immunity from criminal jurisdiction were without merit. In any case, the draft itself provided for limits to immunities by providing that States and couriers had to respect the laws of the transit or receiving State.

53. With regard to examination of the diplomatic bag, his country considered that the draft articles should be based on the principle that the bag should not be detained or inspected by any means whatsoever. That position was consistent with the Vienna Convention on Diplomatic Relations and the Commission had considered the question in depth at its twenty-seventh session. Moreover, the draft itself contained safeguards against possible abusive use of the bag (draft art. 25). Lastly, the whole of the legal system in question depended on the principle of good-faith compliance by States with their international obligations.

54. Concerning the jurisidictional immunities of States and their property, his country expressed concern over the apparent tendency to base the draft on the notion of limited immunity. Such a solution was impossible, since it would run counter to the principle of the sovereign equality of States which underlay current international relations, as confirmed in the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV)) and the Final Act of the Conference on Security and Co-operation in Europe. No State could exercise authority over another State or its organs without the latter's agreement. The proponents of limited immunity were constructing artificial grounds to assert that a State engaged in commercial activities renounced its immunity. As far as they were concerned, a State could act in several capacities. In reality, a State was an indivisible entity exercising all its functions, even economic ones, as a State and never as an individual.

55. Draft articles 19, 22 and 24 all had the same defect. Article 19 was unacceptable because State-operated ships were serving State purposes and the State was entitled to immunity. However, if a State-owned ship was operated by a different person, legal action might be taken against that person. Articles 22 and 24 allowed for the the enforcement of execution procedures against State property in use or intended for use by the State in commercial and non-governmental service. The separation of State property into different categories was no more

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acceptable than making distinctions among State activities. Those provisions were therefore unacceptable since they would allow one State to exert authority, and especially force, over another State. His country had already specified that, in its opinion, the principle of absolute immunity was more valuable in international relations, since it ensured the necessary stability without hindering the peaceful settlement of disputes. The Special Rapporteur's analysis of Soviet practice in that sphere had not been accurate and he had drawn erroneous conclusions.

56. With regard to the law of the non-navigational uses of international watercourses, his country considered that it was impossible to establish universal regulations. Each watercourse had its sui generis nature, and many States were not familiar with the notion of international watercourses. There did not seem to be any need for a convention; guidelines would be sufficient. The only way to define an international river system was by means of a convention between the coastal States. The deliberations at the thirty-seventh session of the Commission had indicated that there was conflict on that point between the members.

57. On the subject of international liability for injurious consequences arising out of acts not prohibited by international law, his delegation recalled that, in accordance with contemporary international law, there could not be liability for those activities except by virtue of an agreement between States.

58. The draft on the question of relations between States and international organizations provided that organizations were subjects of both international and internal law. Once again, an agreement between States was necessary before an organization could be recognized under internal law.

59. His delegation was in favour of approving the Commission's report on the work of the thirty-seventh session (A/40/10).

60. Mr. HWANG (Observer, Republic of Korea) said that the basic approach in preparing the draft Code of Offences against the Peace and Security of Mankind was to recognize the international community as a whole as having criminal jurisdiction over an individual regardless of the consent of the State of which that individual was a citizen. That approach could, on the one hand, widen the scope of traditional international law and, on the other, give rise to a new controversy over State sovereignty under the present structure of international relations.

61. In order to be effective, the code should satisfy certain conditions. First of all, the terminology of the present draft must be clearly defined; otherwise its purpose might be defeated. It should be recalled that the General Assembly had postponed the approval of the Commission's 1954 draft code pending the formulation of a definition of aggression, which had not been adopted until 20 years later, in 1974. Such terms and expressions as "terrorism", "mercenarism" and "economic aggression" must be clearly defined beforehand, as well as any other offences to be included, so as to avoid controversy over the principle of nullum crimen sine lege, as had been the case before the Nürnberg Tribunal.

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62. The content of the draft Code's ratione materiae should also be defined according to strict and clear criteria that would make it possible to determine acts and practices regarded as offences against the peace and security of mankind. The offences covered in the draft code fell into three broad categories: offences against peace, war crimes and crimes against humanity. It was thus essential to draw a common denominator in the provisional list of offences and to establish criteria by which to decide whether certain acts should be included. By that means it would be possible to determine, for example, if apartheid, declared a "crime against humanity" in General Assembly resolution 39/19, and "drug trafficking", also described as a "crime against humanity" in General Assembly resolution 39/141, were qualified to be included in the list of offences against the peace and security of mankind.

63. His delegation appreciated the Commission's efforts to establish criteria by using the concept of "extreme seriousness" as a characteristic of an offence against the peace and security of mankind. It found, however, that that criterion was still too vague and that the concept must be further elaborated.

64. Lastly, the question of implementing a draft code of offences must be considered if such an instrument was to establish effective international criminal law. To that end, it was necessary to agree to the universal jurisdiction of the code or to establish an international court, or even to do both. Otherwise, the code might be degraded to nothing more than a tool to solve post bellum questions applied unilaterally by the victors of future wars.

65. In conclusion, he noted that many problems remained to be solved, in particular, the question of the criminal responsibility of States. The code of offences against the peace and security of mankind would become effective international criminal law only when the international community itself was better organized to the extent of having its own enforcement system. Meanwhile, the draft Code must be prepared, not as a collection of political slogans, but as an international criminal code permitting no lacunae.

The meeting rose at 5.20 p.m.