*United Nations*
**GENERAL ASSEMBLY**
**FORTIETH SESSION**
***Official Records****

SIXTH COMMITTEE
27th meeting
held on
Monday, 4 November 1985
at 3 p.m.
New York

SUMMARY RECORD OF THE 27th MEETING

Chairman: Mr. AL-QAYSI (Iraq)

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85-57261 4661S (E)

Distr. GENERAL
A/C.6/40/SR.27
7 November 1985

ORIGINAL: ENGLISH

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The meeting was called to order at 3.15 p.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.1-3; A/40/331-S/17209, A/40/786-S/17584)

1. Mr. JACOVIDES (Cyprus) said that the current report of the Commission (A/40/10) maintained the usual high standard. The Commission, as renewed and expanded four years earlier, was obviously functioning well: it had made substantial headway with the draft Code of Offences against the Peace and Security of Mankind, State responsibility, the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and jurisdictional immunities of States and their property. Unavoidably, it had been able to consider only the preliminary reports on the law of the non-navigational uses of international watercourses and on international liability for injurious consequences arising out of acts not prohibited by international law. He also fully understood why the Commission would be unable to complete its first reading of Parts Two and Three of the draft articles on State responsibility by 1986, but hoped that it could complete its first reading of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier by the following year.

2. His delegation supported the organizational recommendations set forth in paragraphs 297 to 304 of the report and urged the Commission to continue to review its methods of work with an open mind. In particular, it would welcome the updating of the United Nations publication "The work of the International Law Commission". It also welcomed the constructive co-operation between the Commission and other bodies.

3. Cyprus was a full member of the Asian-African Legal Consultative Committee and was closely involved in the legal activities of the Council for Europe and of the Commonwealth. Moreover, it had recently become associated, as permanent observer, with the Organization of American States. His delegation welcomed the continuation of the Gilberto Amado Memorial Lecture. The International Law Seminar was also of particular value, especially for nationals of developing countries. Due care should be taken by the Selection Committee to ensure that deserving candidates from all regions were given the opportunity to attend.

4. The function of the current debate in the Sixth Committee was to give the Commission clear-cut answers to questions bearing on politically sensitive issues and political guidance on specific issues on which the Commission occasionally found itself in a deadlock.

(Mr. Jacovides, Cyprus)

5. While the international community clearly attached great importance to the draft Code of Offences against the Peace and Security of Mankind, the realities of power relations and the vagaries of politics all too often resulted in double standards in the application of international law relating to peace and security. The situation in Cyprus was a prime example. In preparing a Code of Offences as a contribution towards strengthening international peace and security and as a deterrent to actual and would-be aggressors, the Commission must take account of the results achieved in the progressive development of international law since the item had first been taken up. For example, in article 19 of the draft on State responsibility, the Commission had recognized that crimes and delicts could be attributed to States. The Special Rapporteur and the Commission were to be commended on their treatment of the topic so far.

6. For the time being, his delegation would support the arguments of those who were against including the criminal responsibility of States in the draft Code and who had suggested that the responsibility of States for acts classified as international crimes should instead be considered in the context of the draft on State responsibility. As a general proposition, it still maintained that, given the element of progressive development in draft article 19 on State responsibility, the criminal responsibility of the State must also be recognized, but agreed that the issue should remain in abeyance until it could be established how much progress could be made, under the item on international responsibility, in dealing with the responsibility of States for international crimes under draft article 19.

7. His delegation was pleased to note from the report of the Special Rapporteur that real progress had been made and, by and large, endorsed the Special Rapporteur's thinking. Where general principles were concerned, it was obvious that much more work would have to be done before the Nürnberg principles, as formulated by the Commission, could fulfil current requirements.

8. As for the scope of ratione personae, the perpetrators of primary offences against peace and security (whether directed against a State or against ethnic or religious groups) were individuals acting as authorities of a State. One of the chief purposes of the draft Code was to highlight the responsibility of those who abused sovereignty and misused power in order to commit acts constituting offences against the peace and security of mankind.

9. There was little doubt that the concept of the peace and security of mankind had a certain unity. While each offence had its own characteristics, all offences under that heading were extremely serious and hence in a narrower category than that of international crimes, as covered in draft article 19 on State responsibility. Of the two alternative definitions proposed by the Special Rapporteur, his delegation had a slight preference for the more synoptic version combining brevity with flexibility.

10. As for the part of the report by the Special Rapporteur dealing with acts constituting an offence against the peace and security of mankind, his delegation noted that the crimes listed covered only part of the available range, but the list

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was a good beginning. Where the crime of aggression was concerned, although the Definition of Aggression (General Assembly resolution 3314 (XXIX), annex) was not perfect, it would be unwise to attempt to change it. It should therefore form part of the draft Code and be cited in full, or a cross-reference should be made to it, the latter being probably preferable. In due course, the crimes of apartheid and genocide and, perhaps, international drug trafficking, should be added. It was right that the Definition of Aggression should form the basis of the work on the draft Code, especially in view of the history of the item and of the fact that the lack of a definition had been used until very recently as a pretext for not proceeding with the draft Code.

11. His delegation basically endorsed the Special Rapporteur's analysis of the reason why the threat of aggression should be included as an offence against peace, and of the reasons why the preparation of acts of aggression should not be included. It also endorsed the analysis of the offence of interference in the internal or external affairs of a State, and the reasons given for including it in the draft Code. Terrorism, which was rightly included as an offence in the draft Code, was a very complex subject. The kind of terrorism concerned in the context under consideration was liable to endanger international peace and security and might be practised by an individual or by a group. State participation conferred on it an international dimension, and it was directed against another State. There were several other forms of terrorism, but for the purposes of the draft Code the present focus should be on State-sponsored terrorism. The definition laid down in the 1937 Convention for the Prevention and Punishment of Terrorism had rightly been amended to reflect certain acts that currently preoccupied international public opinion, notably the hijacking of aircraft and attacks on diplomats. However, it was important to remember that, in the context of the draft in question, the acts of terrorism dealt with were organized from outside and found support in a foreign State.

12. His delegation had no objection to the inclusion of the offence dealt with under the heading of "violations of the obligations assumed under certain treaties", but it might be suitably included in a more general category.

13. The maintenance of colonialism was a subject that must be carefully circumscribed. The term "violation of the right to self-determination" could be considered, but should not become a convenient slogan for opening the way to secession by national minorities in established States. Such use of the term was even more objectionable in cases where the national minority in question was purporting to act in an area controlled by a foreign army of occupation. Cyprus was experiencing the illegal effects of an attempt to abuse the principle of self-determination and therefore endorsed the terms used by the Special Rapporteur in that context.

14. His delegation reserved its position on the possibility of including the concepts of mercenarism and economic aggression in the draft Code. A case could be made for regarding economic aggression as a form of interference in the affairs of another State. As for mercenarism, General Assembly resolution 3314 (XXIX)

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referred to the sending of mercenaries as an act of aggression in the context of their being sent by or on behalf of a State, which might or might not be the case in a given situation involving mercenaries. His delegation was sensitive to the concerns of African and other newly independent States and would be guided by the outcome of the relevant work being done in other forums.

15. As State responsibility formed the core of international law, every effort must therefore be made to ensure that the Commission made real progress in its consideration of that topic. As a matter of principle, the Commission must respond to the trend that had clearly emerged and that was fully in consonance with the demands of contemporary international law, which attached considerable weight to international public order and obligation erga omnes. Since the adoption of the Charter there had been a series of positive developments lending further substance and content to the concept of international public policy and international legal order. The Commission should continue its work expeditiously with the aim of preparing the text of a draft convention, which, even if not ratified soon by a large number of States, would still influence the conduct of States and serve as a reference text for international courts and tribunals. The Special Rapporteur had already given due weight to the concepts of jus cogens and of international crime and to the legal consequences of aggression, while at the same time paying due attention to the more conventional and traditional aspects of State responsibility. Obviously, in the matter of drafting and rearrangement, there might be room for improvements. His delegation welcomed the new version of draft article 5 produced by the Drafting Committee and regarded all parts of draft article 14 as both logical and necessary.

16. Similarly, draft article 15 should certainly find a place in the text. Appropriate reference could also be made to non-recognition of the consequences of aggression or the obtaining of special advantage by the aggressor. With regard to Part Three of the draft articles on State responsibility, he recalled that Cyprus had always been in favour of effective and impartial third-party adjudication of international disputes.

17. His delegation welcomed the efforts made by the Special Rapporteur to overcome the difficulties encountered in connection with the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. The purpose of the draft articles should be: to consolidate the existing provisions of the relevant codification conventions; to unify the rules so as to ensure the same treatment for all diplomatic couriers; and to develop rules to cover practical problems not covered in existing provisions.

18. Although the paramount question was that of the diplomatic bag itself, it was important to protect the courier and give him at least certain minimum guarantees. What was needed was the proper balance. Cyprus rarely used special diplomatic couriers and was therefore somewhat circumspect about extending excessive privileges and immunities to the diplomatic courier of others. He welcomed the compromises achieved by the Commission and hoped that consideration of the item could be completed within the term of the Commission's current membership. The

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topic was broad enough to include communications of international organizations and accredited national liberation movements. Moreover, although many of the specific issues were already covered under the relevant multilateral conventions in the field of diplomatic law, the current effort was both timely and necessary.

19. Considerable progress had been made on jurisdictional immunities of States and their property. The Commission should press ahead and concern itself less with doctrinal differences and more with practical results. Cyprus was concerned to see the law developed on the basis of a pragmatic compromise between the two conceptual approaches, in a spirit of realistic adjustment to contemporary requirements.

20. His delegation noted with appreciation the new reports of the Special Rapporteur on the topic of relations between States and international organizations and, with regard to the law of the non-navigational uses of international watercourses, looked forward to the Special Rapporteur's statement of views on the major issues raised by draft articles 1 to 9.

21. The position of his delegation on international liability for injurious consequences arising out of acts not prohibited by international law was that there was sufficient room, on the basis of existing practice, for elaborating on the basic principle of sic utere tuo ut alienum non laedas.

22. On the occasion of the fortieth anniversary of the founding of the United Nations, the Commission and the Committee could take pride in the role they had played in fostering co-operation and coexistence within the framework of international legal order, but, they also bore responsibility for continuing and improving their own performance. It must always be remembered that the only alternative to international anarchy and violence was international law.

23. Mr. ALEXANDROV (Bulgaria) said that the formulation of an instrument on State responsibility was of considerable legal importance. ILC should therefore try to make faster progress in that area, especially since its results during the current year had not lived up to his delegation's expectations.

24. Reports and articles presented should be based to a greater extent on State practice and precedent in international courts and tribunals including the International Court of Justice.

25. In view of the importance of the definition of the term "injured State" in determining international responsibility, draft article 5, as adopted by the Commission at its thirty-seventh session, contained certain weaknesses. For example, assuming that States parties to a multilateral treaty would not be equally affected by the breach of the treaty by a State, the degree of the infringement of a right of a State must be clearly specified. That question must be given careful consideration in order to avoid interference in the international affairs of States under the pretext of countermeasures provoked by a breach of a multilateral treaty or a customary rule of international law. Indeed, the difference between reprisals

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and interference in internal affairs could be made clear only if explicit criteria for the concept of "injured State" were formulated so as to reflect the degree of the infringement and the seriousness of its legal consequences. It followed that provisions on countermeasures should be drafted so as to ensure their proportionality to the nature and seriousness of the internationally wrongful act, on the basis of the principle of reciprocity. His delegation's comments should be taken into account in the drafting of articles 8 and 9.

26. Referring to article 7, he said that a separate provision on aliens was unnecessary since a general provision could cover all cases. Work on Part Two of the draft should not be dependent on the formulation of Part Three which, at any rate must proceed with caution because certain States had not always found it expedient to accept compulsory procedures for the settlement of disputes.

27. He took issue on the approach adopted by the Special Rapporteur in chapter V: instead of proposing more and more exceptions to the recognized principle of the absolute immunity of States, only a few exceptions should be provided for and it should be left to the discretion of States to waive immunity in individual cases. Important areas of State activity had been excluded from the scope of application of the principle of State immunity and the concept of relative or limited State immunity, as reflected in the proposed draft, was unacceptable because it was intended to improve the competitiveness of legal persons engaged in international trade, namely big companies and transnational corporations, to the detriment of States.

28. Referring to shortcomings in articles 19 and 20, as provisionally adopted by the Commission at its thirty-seventh session, he said that the term "non-governmental" in article 19, was unclear. The draft articles were based on the internal legislation of a limited number of States and did not take into account sufficiently the experience and legislation of the socialist and developing countries. For those reasons, the effectiveness of the proposed instrument was open to doubt.

29. Turning to chapter VI, he supported the method of work adopted by the Commission and the emerging scope of the draft, but the Commission at its next session might consider other manifestations of the legal personality of international organizations in addition to those set out in draft article 1. Progress in that area depended on the presentation of a large number of texts and an outline of the general structure of the draft with a view to making discussions more comprehensive and purposeful.

30. He supported the Special Rapporteur's intention to continue work on the non-navigational uses of international watercourses and the recommendations set forth in paragraphs 286 and 288 of the report. However, the possibility of discussing the substance of some of the texts already presented should not be ruled out in view of the importance and complexity of the subject-matter.

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31. Regarding the question of international liability for injurious consequences arising out of acts not prohibited by international law, he hoped that the new Special Rapporteur would take into consideration the critical comments and recommendations made by his and other delegations.

32. He expressed support for the conclusions and recommendations contained in paragraphs 297, 298 and 299 of the report, adding that, as a matter of priority, at its next session, the Commission must address the topics for which it was best prepared.

33. Mr. BEESLEY (Canada) said that, despite earlier progress on the non-navigational uses of international watercourses and despite the considerable scope for progress on international liability for injurious consequences arising out of acts not prohibited by international law, especially liability for trans-frontier harm, the Commission's work on those two very important items had been held up. However, the Commission had consequently concentrated on fewer items and had disposed of some of the backlog of the Drafting Committee. He encouraged the Commission to adopt that approach instead of trying to cover all the topics at each session. The practice of establishing and convening the Drafting Committee as early as possible should also be continued, as called for in paragraph 300 of the report.

34. Referring to State responsibility, and specifically to article 5, he said that, despite the Commission's useful analytical contribution to the codification process, attempts to define an "injured State" too exhaustively and precisely were likely to be counterproductive. Indeed, there were serious shortcomings in the wording of article 5, particularly in subparagraph 5 (2) (e) (ii) which lent itself to misinterpretation, especially since the commentary to the article did not provide sufficient clarification. The Commission should therefore simplify article 5, bearing in mind that its purpose was to determine entitlement to the exercise of rights under Part Three. In that connection, Parts One, Two and Three must be considered as whole.

35. The concept of State responsibility for international crimes was not universally accepted and there was as yet no consensus on the inclusion of article 19. The Commission should therefore postpone the inclusion of article 14 on the consequences of State responsibility. However, his delegation was encouraged both by the amount of attention devoted to that important topic and by the fact that the Commission was concentrating on specific articles.

36. With regard to the jurisdictional immunities of States and their property, he said that the topic of Part Four of the Special Rapporteur's report was particularly important because it could determine whether such rights as might exist against a foreign sovereign State could ultimately be given real effect. In that connection, article 24 of the Special Rapporteur's draft deserved special attention, and it was hoped that the Commission would discuss the matter in greater detail the following year. Article 23, however, raised certain questions and its purpose was unclear.

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37. Noting the good prospects for completing the first reading of draft articles on the diplomatic courier and the diplomatic bag not accompanied by a diplomatic courier during the Commission's current term of membership, he reiterated his delegations's reservations about the extent to which the draft articles granted more extensive immunities than were strictly necessary, and expressed doubts about the need to elaborate extensively on matters already covered by other conventions. Indeed, the positions adopted under other conventions and the principle of the absolute inviolability of the diplomatic bag must be preserved.

38. With respect to relations between States and international organizations, his delegation supported the Commission's recommendation that the Special Rapporteur should proceed with "great prudence" and its suggestion that he should present a schematic outline of the subject-matter to be covered by the various draft articles.

39. Codification of offences against the peace and security of mankind would be useful only to the extent that the relevant draft articles centred around crimes on whose existence there was a broad consensus. The Commission should refrain from raising controversial, ideological questions likely to lead to sterile debates.

40. The Commission played a unique part in the development of international law. Yet it had never sacrificed universality to speed in producing drafts, and, although it was detached from political considerations, it fully appreciated the political implications of its work. The enlargement of the Commission had enabled it better to fulfil the requirements of article 8 of its statute by ensuring that the world's main legal systems were represented. The Commission's influence was much broader than that of the specific drafts which it prepared. For example, through the Vienna Convention on the Law of Treaties, the Commission influenced every treaty being negotiated; in addition it provided assistance in interpreting that Convention. Another example was the pioneering groundwork, research, analysis and synthesis carried out by the Commission for the Conference on the Law of the Sea.

41. In addressing the question of new topics for the Commission's agenda, the Sixth Committee should bear in mind the constraints on and capabilities of the Commission. Issues should not be referred to it simply because they could not be resolved in political forums; rather, its agenda must comprise items on which progress was possible. Although the Commission was subjected to the controversy inherent in the development of international law, its function was to provide acceptable formulations of legal principle by accommodating the interests of the international community as a whole - a formidable task - and his Government had full confidence in the Commission's capabilities.

42. Mr. YIMER (Ethiopia) said that the outline of the topic on the draft Code of Offences against the Peace and Security of Mankind provided a clear picture of the structure and content of the future Code and should facilitate the work of the Commission.

43. The Commission should give serious consideration to the need to formulate general principles parallel to the list of specific offences, although there was

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merit in the argument that criminal acts should also be examined before any general principles could be formulated in order to avoid excessive abstraction. In the consideration of specific offences under the Code, the Special Rapporteur should deal more concretely with the question of general principles as soon as possible.

44. The question of the criminal responsibility of States should be included in the draft Code, but should be taken up later. The purpose of the draft Code could not be achieved if the Code was limited to the responsibility of private individuals. Clearly, private individuals could commit offences against the peace and security of mankind, for example, by recruiting and training mercenaries and sending them to another State for subversive activities without any assistance from another State. It was also true that some private multinational corporations and organized criminal groups had the means to endanger the stability of States, particularly weaker States. His delegation therefore supported the first alternative proposed by the Special Rapporteur in draft article 2. The second alternative, restricted to State authorities, would not be consistent with the purpose which the future Code was intended to achieve.

45. The concept of an offence against the peace and security of mankind should be regarded as a single and unified concept, and should be carefully defined. The Special Rapporteur's proposals in paragraph 69 of the report provided a practical approach to the problem. Of the two alternatives proposed by the Special Rapporteur, the first alternative which set forth four criteria was to be preferred to the second alternative, which was too general and would raise the question of determining whether a specific act was an internationally wrongful act recognized as such by the international community as a whole.

46. A distinction should be drawn between the notions of "international peace and security" and "peace and security of mankind". The former related to crimes against peace and threats to peace, in essence affecting inter-State relations. The latter notion was broader than relations between States and incorporated values which made international law increasingly humanistic.

47. Draft article 4 of Part Five, on acts constituting an offence against the peace and security of mankind, appropriately placed aggression at the top of the list. General Assembly resolution 3314 (XXIX) was useful in identifying those acts which constituted aggression. Of the two alternatives proposed, namely draft article 4, sections A and B, his delegation preferred section A, although a general provision such as section B would serve the purpose.

48. While it was not easy to formulate a provision on the preparation of aggression, it should be possible to draw up a provision based on article 2, paragraph 3, of the 1954 Code. In order to deter aggression, it was necessary to outlaw the preparation of aggression.

49. The question of intervention in the internal or external affairs of another State should be one of the most significant provisions of the draft Code. It was one to which developing States attached great importance, given the problems

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created for small States in relation to their territorial integrity, unity, political independence and stability. His delegation, therefore, did not concur with the view that acts of intervention did not have the character of seriousness to justify their inclusion in the draft Code.

50. The phenomenon of terrorism was one of the most urgent and serious problems currently facing mankind and should therefore be included as one of the offences against the peace and security of mankind. His delegation agreed with the Commission that the 1937 Convention for the Prevention and Punishment of Terrorism could serve as a starting point but that it had to be updated to cover new manifestations such as aircraft hijacking and violence directed against persons enjoying special protection such as diplomatic and consular agents. The right of peoples under colonial rule to self-determination should not, however, be prejudiced in the formulation of provisions on terrorism as an offence against the peace and security of mankind, given the tendency on the part of some to regard genuine freedom fighters as terrorists.

51. His delegation favoured the inclusion of the question of forcible establishment or maintenance of colonial domination as an offence against the peace and security of mankind. Although the colonial era was coming to an end, there were still cases of colonialism which remained unresolved, an outstanding example of which was the case of Namibia.

52. Economic aggression constituted a serious enough act to justify its inclusion in the future Code. It was one of the most serious problems facing developing States and had serious implications for their sovereignty and political and economic independence. It might threaten the stability of a Government or the very life of a people.

53. With regard to Part Two of the draft articles on the topic of State responsibility, the words "may require" in paragraphs 1 and 2 of article 6 were too weak and should be replaced by the words "shall be entitled to require", in order to bring out more forcefully the rights of the injured State. Regarding article 7, his delegation opposed the inclusion of a provision giving special protection to aliens, which could create unnecessary problems for inter-State relations. The term "manifestly disproportional" used in draft article 9 was too vague. An alternative formulation could be that the exercise of the right should be commensurate with the seriousness of the internationally wrongful act committed.

54. The point concerning Article 33 of the United Nations Charter in relation to draft article 10 was worth further consideration. It could be argued that the procedure in question could be time-consuming and not always effective. It should therefore be stated that the limitation contained in paragraph 1 should apply only if the dispute settlement procedure was not only available but also effective.

55. The expression "the applicable rules accepted by the international community as a whole" in paragraph 1 of draft article 14 was too vague and could be replaced by the term "the applicable rules of international law". The minimum obligation of solidarity would be strengthened if paragraph 2 of draft article 14 assigned more active duties to every other State.

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56. The definition of the term "injured State" in draft article 5 was a fundamental provision and required careful consideration. While the need for the provision contained in subparagraph (iii) of paragraph 2 (e) was readily acceptable, it dealt with one of the most controversial areas of modern international law. Given the double standard applied by some in relation to human rights and the fact that the principle of non-interference in the internal affairs of States was violated supposedly in the name of human rights, one would need to move with caution in stating that any other State was the "injured State" in so far as human rights were concerned. Subparagraph (iii) did not prejudge the question to what extent "primary" rules of international law imposed obligations on States for the protection of human rights and fundamental freedoms, which meant that not every single act regarded as incompatible with respect for human rights would necessarily give rise to the application of subparagraph (iii). The question of the legal consequences of an international crime, dealt with in paragraph 3, might require further consideration. The question was whether all other States could act individually with regard to an international crime in the same way as if their individual rights had been violated.

57. On the question of a possible Part Three in the draft articles on State responsibility, his delegation agreed that articles on the settlement of disputes were necessary for the proper implementation of Parts One and Two. There was, however, merit in the view that caution should be exercised in the elaboration of Part Three in view of the reluctance of States to submit to compulsory third-party settlement procedures.

58. On the topic concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, the possible scanning of the diplomatic bag by electronic means would constitute an erosion of the inviolability of the diplomatic bag with incalculable repercussions on inter-State relations. Regarding draft article 36, the return of the bag to its place of origin, in the event of serious suspicion as to its contents, was preferable to a requirement that the bag should be opened. The practice of electronic scanning of diplomatic bags would violate the confidentiality of the bag and would place the developing countries at a disadvantage vis-à-vis developed States which had the technical means to perform such scanning. The sending State should decide whether to allow the suspected bag to be opened or sent back home unopened.

59. Regarding the plurality of régimes concerning the bag, it would be difficult to apply the régime of the consular bag to all bags. The solution might lie in differentiating between the consular bag and other bags and then to give States the option to apply to all bags the more qualified régime applicable to the consular bag. Draft article 37 should deal only with matters relating to exemption from taxation, leaving all matters of customs exemption and related questions to be the subject of draft article 36.

60. The provision contained in draft article 41 on the non-recognition of States or Governments or the absence of diplomatic or consular relations served a useful purpose and should be included. His delegation, however, had some reservation on

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the general nature of the provision, which might be interpreted "as imposing obligations on a receiving State, on a bilateral plane, with regard to couriers and bags from a sending State with which the former did not maintain diplomatic or consular relations or in a situation of non-recognition of the State itself or its government" (A/40/10, para. 193). The problem lay in the wording of the draft article and not in its substance; drafting a revised formulation should therefore not prove difficult.

61. On the topic of the jurisdictional immunities of States and their property, his delegation was of the view that the question of immunity from attachment and execution could not be left aside, since property almost invariably came into direct contact with jurisdictional immunities. With regard to specific provisions, the formulation of article 21 on the scope of Part Four was acceptable. In that connection, the distinction between Parts Two and Three, on the one hand, and Part Four, on the other, should be borne in mind: jurisdiction normally referred to the power of adjudication, whereas immunity from attachment and execution related to immunity of States from prejudgement, as well as post-judgement attachment of their property. It was a well established principle of international law that the waiver of immunity from jurisdiction did not automatically entail waiver of immunity from execution. In the area of immunity from attachment and execution, international opinion seemed to favour more absolute immunity. The general approach taken by the Special Rapporteur in Part Four attempted to balance the competing interests of developing countries and States with different socio-economic systems. The suggestion that article 21 should indicate the relationship between immunity from jurisdiction and immunity from execution was worth considering.

62. Draft article 24 should be limited to modalities of attachment and execution and the proviso at the end of paragraph 1 should be deleted. The draft article was a very significant provision of Part Four. The opening clause placed a limitation on the consent that a State might give and was therefore contrary to the sovereign power of States. In view of recent cases involving property of diplomatic and consular missions, subparagraph (a) of paragraph 1 of article 24 was an essential provision. Subparagraph (c) was important to developing countries, since they maintained a portion of their foreign currency reserves abroad for various international payments. Paragraph 2 of article 24 gave added protection to State property by stressing that none of the properties listed in paragraph 1 would be regarded as property used or intended for use for commercial purposes.

63. His delegation shared the view that the words "commercial" and "non-governmental" in draft article 19 should be interpreted cumulatively. One solution would be to delete the word "non-governmental".

64. In cases involving State-owned ships, his delegation saw no reason why the State owning the ship should be proceeded against, when in fact a separate entity such as a shipping corporation operated State-owned ships.

65. On the question of relations between States and international organizations, his delegation endorsed the Commission's conclusions set forth in paragraph 267 of its report.

66. Mr. ARANGIO-RUIZ (Italy) noted that the "chapeau-plus-non-exhaustive emuneration" device should avoid the risk of any gaps in the definition of "injured State" in the draft articles on State responsibility. Nevertheless, such a solution did not touch upon the major problem of determining the consequences which the legal quality of "injured State" entailed. A distinction would need to be made according to whether "injured States" were directly or indirectly affected by the internationally wrongful act or crime. Since that question remained open, the provisional adoption of draft article 5 must be understood as a preliminary step.

67. The relevant parts of the report of the Commission, the text of draft article 5 and its commentary as well as the summary records, indicated that the "monistic" concept of "injured State", referred to by the representative of the Federal Republic of Germany, did not imply a parallel "monistic" treatment of "injured States". Article 5, as provisionally adopted, was not intended to be more than a general definition of the States which, by the fact of possessing the right corresponding to the obligation, non-compliance with which constituted the wrongful act, were legally affected by the act. Article 5 contained a definition and not operative rules. Such rules were still open for discussion and further elaboration. Article 5 did not belong to the operative provisions of Part Two of the draft articles on State responsibility. It was a complement to the definition of the wrongful act given in Part One. It completed, by indicating as a matter of principle the legally affected States, the definition of the subjective element of the wrongful act.

68. With regard to the other draft articles examined in 1985, the most essential considerations to be taken into account at the 1986 session were set out in paragraphs 108 to 163 of the Commission's report. Development seemed to be particularly desirable in articles 10 and 11. While the "suspensive" effect of draft article 10 was justified, it could have been further clarified. There appeared to be some discrepancy between the text of article 10 and the purpose of that article as described in most paragraphs of the commentary. Paragraph 1 of the article was not sufficiently clear, either with regard to the degree of automatic availability of the third-party (binding) procedure, or with regard to the binding character of the result sought. The phrase "ensure the performance" did not necessarily convey the notion of a directly binding result. Moreover, the indication of "international procedures", in the plural, might conceal delaying alternatives. The strengthening of the conditions suspending countermeasures otherwise open to the injured State would promote broader acceptance of effective compromise clauses and general arbitration or judicial settlement commitments on the part of States. Indeed, the existence of well-structured and automatic compromise clauses, or equivalent third-party settlement commitments, would protect the weaker party from unduly harsh countermeasures. He urged caution regarding the last paragraph of the commentary on article 10. The possibility of recourse to obligatory conciliation procedures should be more adequately reflected in the text of article 10. Moreover, the language of the relevant commentary was too loose for the suspensive effect not to be abused by the real or alleged wrongdoer.

69. Greater precision would also be desirable with regard to the relationship established in article 11, paragraph 2, between recourse to countermeasures and any

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"procedure of collective decisions for the purpose of enforcement" provided in the multilateral treaty of which the wrongful act was a violation. Article 11, paragraph 2, and the commentary thereon should more precisely specify the features of effectiveness that the collective mechanism and its result should possess in order for the suspensive effect on countermeasures to be demonstrated by the fact that the mechanism was envisaged in the treaty or any protocol thereto. A positive indirect effect might be exerted on the quality of the collective mechanisms adopted by States in the future when they concluded multilateral treaties.

70. With regard to the definition of crimes, his delegation continued to favour a distinction between "delicts" and "crimes". The Commission should evolve a more satisfactory formulation of the sub-categories by which international crimes were non-exhaustively defined. In particular, greater justice should be done to the cause of human rights so eloquently evoked in the Committee recently, inter alia, by the representative of Mexico. That and other gaps in the definitions should be filled when the three parts of the text were considered as an organic whole. Reciprocal cross-adjustments of the various articles would presumably be inevitable in other areas as well.

71. An adequate answer should be found to the difficult but inescapable problem of the effective implementation of the condemnation of international crimes within the framework of Parts Two and Three of the draft articles. With regard to the proposed Part Three, although it would be difficult to secure the acceptance by States of an effective system of mise en oeuvre and dispute settlement for a set of articles covering such a broad subject as State responsibility, it appeared equally difficult to do without such an effective system. The views of States wishing the inclusion of such a system as well as the views of States which were opposed to it must be given adequate consideration. Whatever the outcome, it was incumbent on the Commission to consider the matter thoroughly, and his delegation looked forward to the draft articles to be submitted by the Special Rapporteur in 1986.

72. Lastly, his delegation considered that the purpose of the suggestion in paragraph 129 of the Commission's report was to call attention to a gap in articles 6 to 9, namely, the omission of any indication of the obligation normally incumbent on an injured or allegedly injured State not to rush into countermeasures before notifying the wrongdoer or alleged wrongdoer of the illegality and injurious nature of its conduct and proceeding to suitable diplomatic exchanges. Such a phase normally should precede not only recourse to countermeasures, but also any recourse to or proposal concerning any available peaceful settlement procedures. The point should be incorporated in the draft articles in Part Two - perhaps in article 6 - and in the commentary.

73. Mr. NGUYEN QUY BINH (Viet Nam) said that his delegation considered the Commission's work on State responsibility one of its most important codification activities and believed that the completion of the draft articles on the content, forms and degrees of State responsibility could serve as a good basis for the Commission's work. However, further elaboration was required, particularly with respect to the legal consequences of international crimes. Attention should be paid, in particular, to the relationship between State responsibility and other

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topics dealt with, such as the draft Code of Offences against the Peace and Security of Mankind, and to international legal practice relating to the treatment of international crimes. Inadequate attention had been paid to the latter point.

74. With respect to article 5, greater precision was needed in the definition of the injured State or States. Moreover, because States were not equally affected by the same wrongful act or crime, a distinction should be drawn between States which were directly injured and other States; without such a distinction, some States might over-react, adopting unjustified countermeasures and remedies. Furthermore, international crimes differed in nature and therefore had different legal consequences, and some crimes affected only certain States.

75. With regard to chapter IV on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, his delegation welcomed the substantial results achieved and shared in the expectation that the Commission would be able to present a complete set of draft articles adopted in first reading by 1986.

76. It was essential that the diplomatic courier be granted full immunity from criminal jurisdiction. The addition of the phrase "all acts performed in the exercise of his functions" was not a compromise, as some delegations held, but a retreat from customary practice as reflected in the Vienna Convention on Diplomatic Relations, and would give rise to problems of interpretation and application.

77. His delegation considered that the established principle of "absolute" inviolability of the diplomatic bag must be adhered to without any modification of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations. The Commission's text should include an explicit provision guaranteeing the absolute confidentiality of the contents of the bag, and barring any attempt to establish control over abuses, including censoring the bag through electronic scanning. Where States had serious reason to believe that the confidentiality of the bag had been abused, the régimes provided for by the two Vienna Conventions would apply. His delegation therefore preferred a clear-cut provision along the lines of the proposed new paragraphs 1 and 2 of article 36 suggested in paragraph 182 of the Commission's report. The introduction of an optional régime based on reciprocity, as evidenced in the proposed new paragraphs 3 and 4 of article 36 (para. 182), might be acceptable if it were a two-way option whereby States would voluntarily decide whether to apply to all kinds of bags the régime established for diplomatic bags or the régime applicable to consular bags. The application of the rules of reciprocity also required further elaboration.

78. The work of the Commission with respect to the jurisdictional immunity of States and their property (chap. V) gave rise to serious concern in two respects. Firstly, the overall concept adopted by the Special Rapporteur was based on a lopsided view of what was referred to as "restricted immunity", which was not supported by the majority of States and which would result in draft provisions that ran counter to the principle of the sovereign equality of States and were unlikely

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to be universally accepted. Secondly, the Special Rapporteur's excessively long list of exceptions to State immunity had rendered illusory the principle of immunity. In many cases, the exceptions had been based on highly questionable arguments. In his delegation's view, in most cases exceptions to State immunity could arise only on the basis of a waiver of immunity. Consequently, the general rule of State immunity should prevail and the Commission, rather than hastily approving the draft articles, should concentrate on how to harmonize the varying views of States regarding the extent and forms of exceptions to jurisdictional immunity.

79. Turning to the Commission's work on the law of the non-navigational uses of international watercourses, he said that his delegation was fully conscious of the difficulties inherent in elaborating articles on the subject. Efforts should focus on achieving a correct balance between the rights and duties of all riparian States, an objective which the Commission had not yet achieved. The subject did not lend itself to effective codification unless the effort were restricted to the drafting of guidelines. His delegation had doubts about certain concepts contained in the proposed draft articles. It considered as fundamental the right of permanent sovereignty over natural resources and the right of each State to determine how the watercourse in its territory should be used. Because the obligations of States regarding the use of various international watercourses varied according to the different types of, and views concerning, watercourses, such obligations lent themselves more appropriately to codification in regional agreements, rather than in an international convention.

80. Mr. KHALIK (Egypt) said that, while his delegation had hoped that the Commission could have provisionally adopted more than one article on State responsibility, the adoption of article 5 was no meagre achievement in view of the difficulty in finding an adequate definition of the term "injured State". The Commission had correctly maintained a balance between the source and the nature of the infringed right by combining both in the draft article.

81. His delegation agreed that the remaining articles proposed by the Special Rapporteur formed a good basis for the future instrument and that further elaboration of the articles would make them widely acceptable. Among the points requiring further elaboration, article 6 did not take into consideration the need to exhaust all international means with respect to legal remedies before the internal laws of States were permitted to govern such remedies. With respect to articles 8 and 9, a clearer distinction was needed between the grounds for suspension by the injured State of the peformance of its obligations towards a State which had committed an internationally wrongful act. It was also necessary to establish a link between the provisions in those two articles and those in article 11. While article 10 sought to limit the application of article 9 to a certain extent, it was not intended also to limit the provisions of articles 6 and 8, which should be subject to the same restrictions. Articles 12, 14 and 15 also needed further clarification.

(Mr. Khalik, Egypt)

82. With regard to the Special Rapporteur's reference to the need for a Part Three on implementation and the settlement of disputes, the elaboration of such a part would be a delicate matter since it must take into consideration internationally applicable rules. Although his delegation was not yet ready to pronounce itself on the advisability of including the proposed part, it agreed that the Special Rapporteur should prepare concrete proposals for draft articles.

83. It could be seen from chapter IV, concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, that the Commission had achieved considerable progress on the topic. His delegation welcomed the decision to delete the square brackets from article 12, paragraph 2. As to the highly controversial paragraph 1 of article 18, in a spirit of compromise his delegation would not object to the words "in respect of all acts performed in the exercise of his functions", if the formula were generally accepted at a later stage and on the understanding that the formula provided the minimum requirements of criminal immunity, which could be enhanced by applying reciprocity in accordance with article 6 of the draft articles.

84. With respect to the last part of the first sentence of article 21, paragraph 1, he felt that the actual moment when the courier began to exercise his functions was not defined with adequate clarity. Moreover, his delegation saw no reason for the cessation of the privileges and immunities of the diplomatic courier ad hoc at the moment when he delivered the diplomatic bag in his charge: such a courier usually left the receiving State after a short period of time, during which he should enjoy privileges and immunities, as did the case for the diplomatic courier whose functions came to an end in accordance with article 11 (b). With regard to article 22, on waiver of immunities, his delegation could accept paragraphs 1 to 4, but felt that paragraph 5 was not sufficiently clear. A distinction must be drawn between civil actions brought in cases pertaining to the exercise of the courier's functions and civil actions having no bearing on the exercise of those functions; the latter must be dealt with through national legislation and co-ordination between the judicial authorities of the countries concerned.

85. He welcomed the considerable improvement that had been made in articles 24 to 27 and hoped that ILC would be able to finalize the first reading of that group of articles at its next session.

86. In view of the very sensitive nature of the subject of chapter V, jurisdictional immunities of States and their property, his delegation agreed with the suggestion that the Commission should be given additional time to finalize its first reading of the draft articles. With regard to article 19, his delegation believed that foreign courts should not be permitted to exercise jurisdiction over ships owned or operated by States in commercial governmental services and therefore believed that the word "non-governmental" should be retained. As to article 20, his delegation was pleased that the title of the article had been made more specific. It also could accept the principle enunciated in that article in view of the guarantees provided therein.

(Mr. Khalik, Egypt)

87. Lastly, while his delegation welcomed the improved texts of articles 21 to 24, in the proposed Part Four on State immunity in respect of property from enforcement measures, it felt that the subject could easily be incorporated in Part Two of the draft articles.

The meeting rose at 6.25 p.m.