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SUMMARY RECORD OF THE 31st MEETING

Chairman: Mr. AL-QAYSI (Iraq)

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The meeting was called to order at 10.55 a.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 to 3; A/40/331-S/17209 and A/40/786-S/17584)

1. Mr. WOOLFORD (New Zealand) welcomed the report of the International Law Commission (A/40/10). However, the work could progress more rapidly if the Commission received sufficient support to bring it to a successful conclusion.

2. New Zealand had a special interest in the topic of international liability for injurious consequences arising out of acts not prohibited by international law, the study of which had previously been entrusted to a New Zealander. Although the elaboration of draft articles had barely begun, conceptually the structure was complete. His delegation was therefore pleased to note that the new Special Rapporteur did not intend to reopen general discussion on the basis of concepts which the Commission had already accepted. He had however raised some matters of substance on which he might wish to propose changes which he had not set out in any detail. The delegation of New Zealand therefore reserved its position pending a fuller report and further discussion in the Commission.

3. The whole thrust of the topic was to place emphasis upon the principles of neighbourliness and co-operation. States were encouraged, but not obliged, to conclude agreements designed to prevent, and if need be repair, transboundary harm when harmful effects were foreseeable. Nothing within the compass of the topic engaged the responsibility of the source State, except refusal to discharge the duty of co-operation. There could be no failure to discharge that obligation unless transboundary harm had in fact occurred. It was important that work on the topic should continue, for it would have a unique role to play in contemporary international law.

4. In the light of the considerable importance attached by a number of developing countries to the question of the draft Code of Offences against the Peace and Security of Mankind, his delegation wished to reiterate that it was not opposed to the idea of a Code, and was generally happy with the approach taken by the Commission. In particular, the decision to limit the content of the draft Code ratione personae to the criminal responsibility of individuals was extremely apposite. The question of the possible application to States of the notion of international criminal responsibility was better discussed under the topic of State responsibility, if indeed there was such a thing as the criminal responsibility of States.

5. Quite rightly, the Commission had decided to begin by identifying offences which constituted serious breaches of international law and making an inventory of the relevant international instruments. However, even if agreement could be

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reached on a list of offences falling clearly within the field outlined by the Commission, it would be difficult to define those offences through appropriate legal formulations. Whatever the outcome, no body was more qualified than the Commission to discuss the topic.

6. With regard to the topic of State responsibility, which comprised the totality of legal relations between sovereign States, the work performed by the Commission over the past 15 years was of the greatest importance.

7. Draft article 5 in part two was essential, since it defined the term "injured State" and hence identified the States which would be entitled to take countermeasures. In that connection, his delegation considered, like that of the Federal Republic of Germany, that a distinction must be made between directly injured States and indirectly injured States. As to the remaining articles proposed by the Special Rapporteur for part two, they were in general a satisfactory starting point of discussion, but more analysis of State practice in the matter was required.

8. New Zealand also supported the elaboration of a part three on implementation of responsibility and the settlement of disputes. In the light of the precedents afforded by the Vienna Convention on the Law of Treaties and the United Nations Convention on the Law of the Sea, New Zealand would welcome provision in part three for a compulsory conciliation procedure or, as appropriate, reference of the dispute to the International Court of Justice as suggested by the Special Rapporteur.

9. With regard to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, New Zealand welcomed the progress made but regretted that too much time had been spent on the topic.

10. New Zealand endorsed the functional approach to immunity taken by the Commission, which had resolved the controversy concerning former draft article 23 by restricting immunity from criminal jurisdiction, in new draft article 18, to "acts performed [by the courier] in the exercise of his functions".

11. The controversy over draft article 36 remained unresolved, but the draft submitted by the Special Rapporteur (A/40/10, note 103) should permit agreement to be reached. The principle of absolute inviolability of the diplomatic bag was well established in State practice. Recognition that the authorities of the receiving or transit State could request that the bag be returned to its place of origin if they had sound reason to believe that its contents were not in conformity with what was authorized by draft article 25 should make it possible to reach agreement on the subject.

12. Where draft article 25 was concerned, none of the multilateral conventions concluded in the field of diplomatic law had to date proposed a practical solution to the problem of verifying the legally admissible content of the bag. In all likelihood, therefore, there was no better solution than that proposed by the Special Rapporteur.

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13. With respect to jurisdictional immunities, New Zealand considered that it was urgent for the Commission to complete its work on the topic, because the growing number of national legislations dealing with State immunity increased the risk of disputes. An international legal instrument should be drawn up which took full account of the existing practice of States having different social and economic systems and specified and strengthened the relevant international norms. The draft articles already adopted were not prejudicial to any State and sought neither to constrict the benefits of sovereignty nor to undermine the value of diplomatic immunity.

14. His delegation welcomed the provisional adoption of draft articles 19 and 20. However, it would prefer deletion of the term "non-governmental", which had been left in square brackets in paragraphs 1 and 4 of article 19. The distinction between acts jure imperii and acts jure gestionis had become a fundamental principle of present-day State immunity. Immunity could no longer be extended to States in respect of commercial activities. With regard to article 20, it was based upon the concept of implied consent to the supervisory jurisdiction of a court of another State and therefore should not be seen as an infringement of State sovereignty. His delegation therefore preferred the words "civil or commercial matter" to the words "commercial contract".

15. With regard to relations between States and international organizations, priority should not be accorded to the second part of the topic, since Governments were not keen on expanding privileges and immunities of international organizations. If, however, work was to proceed on that topic, the Commission must seek the views of international organizations themselves. The questionnaire addressed to them in 1978 had omitted to ask the basic question whether codification and development of the law in that area were necessary or desirable.

16. As to the topic of the law of the non-navigational uses of international watercourses, his delegation supported the Commission's endeavours, and noted the urgency of reaching an acceptable solution to the problems of fresh water.

17. His delegation was of the view that all the items on the Commission's agenda, apart from the topic of relations between States and international organizations, should be given equal emphasis during the thirty-eighth session. Nevertheless, in view of the possibility of completing work on jurisdictional immunities and the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, it would be natural to concentrate efforts on those two topics.

18. Mr. HERRON (Australia) welcomed the election of Mr. Zhengyu Ni to the International Court of Justice and of Mr. Jiahua Huang to the Commission. He noted, however, that, following the death of Mr. Quentin-Baxter, there had been a diminution of the representation in the Commission of the common-law legal system. There were notable imbalances in the composition of the Commission, whether looked at in terms of legal systems, forms of civilization or geographical distribution. There was, for example, no Nordic member and no member from Oceania, that vast region comprising many States with special interest in the law of the sea.

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Further, only 4 members represented the Islamic tradition of law and 6 the common-law system, whereas there were 19 from States with a mainly civil-law tradition. He hoped that the General Assembly would have in mind the redress of such imbalances.

19. Australia endorsed the recommendations made by the Planning Group established in order to review the Commission's programme and methods of work (A/40/10, chap. VIII). It would be timely, however, for the Group to introspect on the Commission's methods of work, since there appeared to have been a disquieting drift in the Commission's efficiency and effectiveness. The Commission and the Sixth Committee might give closer attention to improving the Commission's organization of work and production of documentation, and to the possibility that the approach of Special Rapporteurs to their topics might be sharpened. The commentaries of Special Rapporteurs on some of the earlier topics amounted to scholarly expositions of the relevant international law, whereas the commentaries on the topics currently before the Sixth Committee tended to be little more than a compendium of views expressed in the debate. In the choice of topics which it referred to the Commission, the Sixth Committee should confine itself to such topics as were developed in State practice, even if not codified. It should avoid topics on which there were entrenched political divergences, and the Commission, for its part, should refer such topics back to the Sixth Committee. It should not be regarded as incumbent on either a Special Rapporteur or the Commission as a whole to resolve internally and unilaterally all points of difficulty which arose on a topic.

20. The Commission had worked conscientiously and hard, but, although it had considered all items on its agenda except for item 8, its time had been poorly apportioned. Moreover, documentation was too prolix, a fact which hampered comprehension and entailed additional costs. His delegation therefore endorsed the Commission's decision to keep on its agenda for future sessions review of the status of its programme and methods of work.

21. With regard to the draft Code of Offences against the Peace and Security of Mankind, the Commission had not made worthwhile progress, partly because of the reopening of some issues that seemed to have been settled in earlier sessions, and partly because the deeper the discussion went, the more problematic it seemed to become. Nevertheless, Australia generally supported the Special Rapporteur's approach, particularly his proposal concerning the outline of the future Code. It also strongly endorsed the Commission's decision to limit the draft for the time being to the criminal responsibility of individuals. To try to broaden the scope of the Code in order to apply it to States would multiply the already considerable conceptual problems and would delay, perhaps indefinitely, the adoption of a complete set of articles. For similar reasons, the Australian authorities agreed with the Special Rapporteur that the Commission should begin by identifying the offences generally accepted as sufficiently serious to be included in the Code, and should let the general principles which characterized those offences fall into place in due course. It was far too early, moreover, to consider the implementation of the Code.

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22. With regard to the alternative drafts of article 2, the Code should apply to all individuals, not just to State authorities. The first alternative of draft article 3, which gave a detailed definition of an offence against the peace and security of mankind, was clearly better than a short general definition which was also likely to encompass international crimes like drug trafficking and aircraft hijacking. Draft article 4 should include a full definition of aggression, as in the first alternative, and not rely on a simple reference to a General Assembly resolution as in the second alternative.

23. To declare "preparation for aggression" an offence would be fraught with difficulty, given the maintenance by most States of a defence capacity equally capable of being used for aggression. The Code should therefore concentrate on actions which actually threatened the peace. As to "intervention", such an imprecise term was best avoided, in favour of specifying the actions which comprised unacceptable intervention. Lastly, it would be preferable to classify "terrorism" as an international crime rather than as "an offence against the peace and security of mankind". There might, however, be scope for including in the future Code particularly serious types of terrorism, for example actions which genuinely threatened the stability of a State.

24. Turning to the question of State responsibility, he said that the Commission should be wary of the doctrine of reprisals, most of which were prohibited under the law of armed conflict. His delegation saw considerable merit in the approach of the draft article in paragraph 131 of the report (A/40/10). Turning to the proposed compulsory conciliation procedure, which would interdict the escalation of the destruction of "primary" legal relationships brought about by invocation of the provisions in Part Two on reciprocity and reprisal, he acknowledged that the scheme was admirable in intent, but doubted whether it could be expected that States would agree to and implement it. The Special Rapporteur had done valuable work so far. Nevertheless, one wondered how far the topic could productively be pushed, and whether the present time was more propitious for success in codification efforts than it had been in 1969.

25. As regards the status of the diplomatic courier and the diplomatic bag unaccompanied by diplomatic courier, his delegation reiterated its misgivings about the need for a new convention. It was not clear that the international community was ready for the progressive development of law in that area. Of the four conventions regularly mentioned by the Special Rapporteur, the 1961 and 1963 Vienna Conventions on diplomatic relations and consular relations respectively could serve as a good basis since, in the main, State practice conformed with them. On the other hand, the 1969 Convention on Special Missions and the 1975 Convention on the Representation of States were far from being as widely accepted and extreme caution was therefore indicated in drawing any inferences from their provisions. The draft articles being developed should seek to improve rather than to widen the corresponding provisions of those Conventions.

26. The revised version of draft article 36 (A/40/10, para. 179, footnote 103) proposed by the Special Rapporteur, which made it clear that the bag might not be

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opened and was exempt from any kind of examination, was an improvement on that introduced at the Commission's thirty-sixth session. Australia did not favour the formulation contained in paragraph 182 of the report, which would make part of the proposed convention dependent on declarations by the parties, possibly leading to uncertainty. It therefore hoped that the Commission would decide on a provision applicable to all cases along the lines of the Special Rapporteur's draft, provided that the law concerning the contents of the bag was respected. If abuses in that regard continued to occur, his delegation might reconsider its position.

27. His delegation did not favour the plurality of régimes that would result from draft article 43 (A/40/10, para. 198, footnote 117) which conferred on States the right to make a "declaration of optional exceptions to applicability in regard to designated types of couriers and bags". The separate régimes for diplomatic couriers and bags, on the one hand, and consular couriers and bags, on the other, posed no problem since those régimes had been deliberately established in recognition of the different nature of diplomatic and consular services. Provisions of the kind contained in draft article 43, however, would introduce too much diversity and uncertainty.

28. In the context of the jurisdictional immunities of States and their property, the Australian Parliament was currently considering legislation on sovereign immunity which would remove the commerical activities of States from its scope.

29. The principal obstacle to progress on the topic was that certain States were not always willing, in respect of purely commercial activities, to be treated on an equal footing with non-State commercial entities, although the utility and equity of such a qualification on immunity had been demonstrated over many years in jurisdictions throughout the world. His delegation therefore had difficulty in understanding how equitable principles could emerge from the work on the topic if States did not show greater flexibility. Nor should the Special Rapporteur licence any class of States to be less responsible than any other in discharing financial obligations incurred in commercial maritime carriage. For its part, his delegation considered that draft articles 20, 21, 22 and 23 reflected accepted State practice and international law.

30. Draft article 19 was acceptable in its present form, except that consideration should be given to including in it the sovereign immunity aspects of the practice of arresting ships belonging to the same owner as ships which were the subject of a legal proceeding. In the view of the Australian Law Reform Commission, that practice could be applied to State-owned ships as long as both ships were in commercial service.

31. In the context of draft article 24, property predominantly in use for the purpose of maintaining and carrying out the functions of a diplomatic, consular or visiting mission should be specifically excluded from the definition of commercial property. Paragraph 1 (b) should, moreover, spell out more fully the military property to be considered immune.

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32. His delegation seriously questioned the utility of continuing work on the topic of relations between States and international organizations. A general multilateral convention on the privileges and immunities of such organizations did not at present seem to be appropriate. The report should have contained a summary account of the deliberations that took place at the five meetings devoted to the topic. That might perhaps have shown why no real progress had been made, as could be seen from the conclusions contained in paragraph 267. If work was nevertheless to continue, his delegation would like the Secretariat to seek the views of States and submit to the Commission information on the status of the multilateral conventions on the subject.

33. In connection with the matters dealt with in chapter VIII of the report, Australia wished to stress the importance it attached to co-operation with other bodies concerned with international law, particularly the Asian-African Legal Consultative Committee. It noted with concern the difficulties encountered by the Commission in funding its International Law Seminar and very much hoped that sessions would continue to take place with the same frequency and that the Asian region would be equitably represented.

34. Mr. DIAZ GONZALEZ (Venezuela) said that he deplored the poor quality of United Nations documents in the Spanish language, particularly translations, a matter to which his delegation had frequently called attention. In the context of the draft Code of Offences against the Peace and Security of Mankind, he called attention to the footnote on page 6 of the Spanish version of the Commission's report (A/40/10). There, attention was called to the problem posed by the use of the words delito and crimen in the Spanish text and it was stated that, pending a decision by the Commission on the question of terminology, the word delito should be understood, in the view of its Spanish-speaking members, as including those unlawful acts of extreme seriousness for which the French version used the word crime. It was also stated in that note that the Commission itself, in article 19 of the draft on State responsibility, had drawn a distinction between international crimes and international offences. His delegation wished to stress that that was a fundamental distinction, given the different consequences that it entailed from the point of view of responsibility. It very much hoped that, in future, the words crimines and delitos would be used in the same sense as the corresponding terms in the French and English versions.

35. Generally speaking, his delegation endorsed those matters approved by the Commission with regard to the draft Code. It nevertheless felt that the draft, in being limited to the criminal responsibility of individuals, was being condemned from the outset to having little chance of practical implementation since the great majority of offences against the peace and security of mankind could only be committed by States, even if certain multinational corporations or criminal organizations could jeopardize the stability and security of small States. If the draft Code was to apply only to individuals, draft article 4 would appear to contain a contradiction inasmuch as the acts mentioned therein could only be committed by States. On the question of colonial domination, his delegation did not share the opinion that the notion belonged to the past. It was still alive and

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well in America, Africa and even Europe, and the Special Rapporteur had rightly included the forcible establishment or maintenance of colonial domination among the offences against the peace and security of mankind.

36. Article 5 of Part Two on State responsibility, the key article of the draft, had his delegation's support. It wondered, however, regarding the expression "collective interests of the States parties" in paragraph 2 (f), how a distinction could be made between the interests of the States parties to an international instrument such as the United Nations Charter and the interests of the community of States as a whole.

37. Draft article 7 recalled the régime of the capitulations. His delegation wondered exactly what treatment of aliens was meant. Classical international law recognized the notion of a "degree of minimum civilization", but that was a subjective notion. The same applied to the general obligation of vigilance presumably incumbent upon States (based on the definition given by the arbitrator Max Huber). Even though European law did not recognize the validity of the Calvo clause, legal thinking acknowledged that it was nothing but a confirmation of the rule regarding the exhaustion of internal recourse. If article 7 aimed to sanction that rule, his delegation supported that intention. What actually mattered, however, was the denial of justice, and that was already covered in other instruments. Article 7 therefore did not belong in the draft articles.

38. With regard to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, the Vienna Conventions on diplomatic and consular relations respectively and the Convention on Special Missions were sufficient to provide a satisfactory guarantee of the principle of the freedom of communication of States with their missions abroad. One should beware of granting a diplomatic courier any privileges and immunities which his functions did not justify and which would make his status equivalent to that of a diplomat. Whether States used a diplomatic courier or unaccompanied diplomatic bags, the best procedure would be to conclude bilateral agreements under the Conventions in force and on the basis of reciprocity.

39. The progress made with regard to jurisdictional immunities of States and their property, to which his delegation attached great importance, was commendable.

40. Venezuela welcomed the fact that the new Special Rapporteur appointed to study the law of the non-navigational uses of international watercourses had immediately set to work, and was sure that the work would advance rapidly under his direction. The report of the previous Special Rapporteur, which the Commission had not been able to consider, contained the elements needed for pursuing the subject satisfactorily. The Commission's debates on articles 1 to 5 and article X had resulted only in ambiguous decisions.

41. His delegation noted with satisfaction that the Commission had maintained close working links with the regional legal bodies, particularly the Inter-American Juridical Committee. Furthermore, it attached importance to the international law

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seminars and hoped that the voluntary contributions to fund them would be sufficient to allow them to go on.

42. Lastly, in view of some of the statements that had been made on the relations between States and international organizations, he recalled that the Commission had been asked to study the subject by the General Assembly, adding that it was important to continue working thereon.

43. Mr. Mützelburg (Federal Republic of Germany) took the Chair.

44. Mr. MIMOUNI (Algeria) congratulated the Commission on the work it had done during the thirty-seventh session, which reflected a desire to help build a legal order suited to the realities of the international society of the times and to meet specific needs.

45. In view of the deterioration in international relations and the Security Council's inability to enforce the law, the work being done on the topic of State responsibility and the legal consequences of internationally wrongful acts was particularly important. Part Two of the draft articles, bearing on the content, forms and degrees of international responsibility, required a bold approach to the questions arising from the different categories of wrongful acts, and a precise definition of the degrees of State responsibility.

46. Draft article 15 on the legal consequences of aggression deserved to be treated as a separate provision. However, if the proposal referred to in paragraph 155 of the report (A/40/10) were to be followed, the Commission should proceed cautiously because of the doctrinal divergences attaching to the invocation of self-defence. Moreover, since the legal consequences of an international crime were broader than those of other internationally wrongful acts, it would be particularly useful if the Commission were to concentrate on developing them further.

47. Given the distinction established in draft article 19 between international delicts and crimes, it was to be expected that both types of illicit acts would entail, respectively, different legal consequences. It therefore seemed rather paradoxical that draft article 14 should limit itself to enumerating a few obligations of a negative and passive nature incumbent upon States with regard to an international crime. Hence it was hard to conceive that State obligations could be limited solely to not recognizing aggression, the policy of apartheid, or the practice of slavery or genocide as legal, and to not rendering assistance to the State which had committed such crimes. Protection of the basic interests of the international community must be comprised in specific obligations of States and entail collective reprobation and reaction, but draft article 14 did not reflect that sufficiently. From that point of view, it also seemed advisable to add a subparagraph (d) stipulating the obligation to prosecute the perpetrators of international crimes.

(Mr. Mimouni, Algeria)

48. With regard to draft article 9, his delegation had already underscored the danger of bringing in the notion of "reprisal" and the necessity of treating it with all due caution. The reference to the principle of proportionality seemed reassuring, but it would not be superfluous to include in draft article 9 the express prohibition of armed reprisal, as warranted by the reference in draft article 12 (b) to peremptory norms of general international law. Similarly, his delegation questioned the wisdom of article 16 (c) regarding belligerent reprisals, which were banned by international law. The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations and provisions 51 and 90 of Additional Protocol I to the 1949 Geneva Conventions constituted arguments in favour of deleting the subparagraph.

49. In draft article 5, the definition of the injured State was essential, as it was the cornerstone of the entire mechanism to be established by the draft article. The wording of that provision would be clearer if it were to draw a distinction between the State directly injured and those that were only indirectly injured. Moreover, the enumeration in the provision did not take into account all the sources which could give rise to obligations. Of special note was the fact that the provision itself and the Special Rapporteur's comments failed to mention resolutions of international organizations or unilateral acts constituting independent sources of primary rules.

50. Draft article 6 could be simplified by not entering into over-obvious considerations. For example, paragraph 1 (a), referring to the release of persons and return of held objects, seemed superfluous and, by the same token, the merit of article 7 was not apparent since its substance had already been covered in the previous article.

51. His delegation welcomed the substantial progress made on the status of the diplomatic courier, and the diplomatic bag not accompanied by diplomatic courier and the provisional adoption of 27 draft articles, which offered some hope that a complete document might be adopted at the thirty-eighth session of the Commission.

52. Among the draft articles considered by the Commission at its thirty-seventh session, draft article 36 on the inviolability of the diplomatic bag had been discussed in great detail. With regard to paragraph 1 of that provision, the basic justification for the inviolability of the diplomatic bag was concern for the effective protection of its contents. If the confidentiality of its contents was to be ensured, electronic control devices could not be used. Given the principle of reciprocity applied in such situations, the use of such devices would be prejudicial to some developing countries not in a position to use them themselves.

53. Even though the rule of absolute inviolability had been accepted, the wording of paragraph 2 called for some comment. Given the variety of régimes applicable to official bags under the 1961 and 1963 Vienna Conventions on diplomatic and consular relations, respectively, the Commission might have been expected to try to unify and harmonize the applicable rules on that topic. However, the middle-of-the-road

(Mr. Mimouni, Algeria)

approach adopted by the Special Rapporteur, in his attempt to draft a generally acceptable legal rule, had resulted in a provision whose wording was not satisfactory to any school of thought. The paragraph gave the receiving State or the transit State the discretionary power to return the diplomatic bag to its place of origin, which amounted to extending the precarious régime of consular bags to all types of bags and hence called into question the régime applied to diplomatic bags under the 1961 Vienna Convention. Paragraph 3 of the text, reproduced in paragraph 182 of the report, was based on the same rationale. A satisfactory solution would be to strike a balance between the principle of the inviolability of the bag and the security of the transit or receiving State, and it would seem that only by trusting to good faith could the difficulties of striking the balance be overcome, but it should be remembered that the validity of a principle could not be challenged because it had been contravened or abused.

54. Another of the most controversial points was that of immunity from jurisdiction accorded to the diplomatic bag, the subject of draft article 18. While some delegations considered that immunity from criminal jurisdiction was superfluous and useless in practice, others, among them his own, thought that the status of the diplomatic courier and the courier's functions gave him absolute immunity from the jurisdiction of the receiving or transit State. The wording used by the Special Rapporteur, which tended to restrict jurisdictional immunity to the acts performed by the diplomatic courier in the exercise of his functions, was a compromise and solved the problem only in part. There were still differences of opinion as to which State would be entitled to draw the distinction between the acts performed in the exercise of the diplomatic courier's functions and those which were not. Because of the decisive role played by the diplomatic courier in the State's exercise of its right of official communication, there should be no restriction on his privileges and immunities, and immunity from jurisdiction was the basic condition for the effective exercise of his functions. Draft article 16, on the inviolability of the diplomatic bag, gave the diplomatic courier all necessary protection: it protected him against arrest and detention, and his official functions justified his immunity from the criminal jurisdiction of the receiving or transit State and his exemption from the obligation to testify. It went without saying that immunity from criminal jurisdiction did not release the diplomatic courier from the duty to respect the laws and regulations of the recipient State and the transit State or prevent the sending State from exercising its jurisdiction in the event of an offence committed by its courier.

55. As for the duration of privileges and immunities, his delegation questioned the soundness of the distinction made in draft article 21 between the diplomatic courier and the courier ad hoc. The distinction appeared to be unjustified and inoperative in that the courier's official functions constituted the basis for according privileges and immunities.

56. Finally, if such provisions as draft article 6, paragraph 2 (b), draft article 42, paragraph 2, and draft article 43 could be justified, there was a danger that such flexibility might lead to a proliferation of régimes applicable to official bags, thus casting doubt on the effectiveness of an international instrument and hence on its usefulness.

(Mr. Mimouni, Algeria)

57. His delegation welcomed the Commission's constructive co-operation with various regional legal bodies and hoped that the Commission would be able to achieve the goals that it had set for its thirty-eighth session by completing as soon as possible the first reading of the three topics referred to in paragraph 299 of its report.

58. Mr. ILLUECA (Panama) noted with satisfaction that work on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier seemed to be drawing to an end.

59. Draft article 16 on the protection and inviolability of the diplomatic courier was not sufficient to ensure the courier effective immunity from jurisdiction which was nevertheless necessary for him to perform his functions. The functional approach of draft article 18 was a compromise formula reconciling the different opinions expressed on the issue by the Commission and the Sixth Committee. In its present version, draft article 18 limited immunity from criminal jurisdiction to acts performed by the courier in the exercise of his functions, which made it clear that immunity from criminal jurisdiction, with regard to both the receiving and the transit State, would not cover offences in general law or serious misuse of the diplomatic bag. It was also specified that the diplomatic courier would likewise enjoy immunity from the civil and administrative jurisdiction of the receiving State or, as the case may be, the transit State, subject to the same reservations.

60. Although draft article 21 on the duration of privileges and immunities was based on certain relevant provisions of the four Vienna Conventions, his delegation disagreed with the final provision of draft article 21, paragraph 1, according to which the privileges and immunities of the diplomatic courier ad hoc ceased at the moment when the courier had delivered to the consignee the diplomatic bag in his charge. It was inadvisable to deprive the diplomatic courier ad hoc of his privileges and immunities since he did not live in the receiving State and had to return to the territory of the sending State.

61. Although draft article 36 was acceptable, the text might well be expanded since it was neither realistic nor desirable to make provision for a régime of inviolability which would uniformly apply to all official bags, whether diplomatic, consular or other.

62. He endorsed the approach adopted by the Special Rapporteur to ensure that the draft articles supplemented the provisions relating to the diplomatic courier and the diplomatic bag which appeared in existing multilateral conventions. The same concern was evident in draft article 43 concerning the declaration of optional exceptions, which had been prepared with a view to retaining a certain amount of flexibility.

63. Although the intent of draft articles 42 and 43 was to set forth constructive proposals, many uncertainties subsisted, and the Special Rapporteur should take into account the views expressed by the Committee and clarify and reword the text of those draft articles, which were to be considered by the Commission at its thirty-eighth session.

(Mr. Illueca, Panama)

64. The Commission would be able to complete the first reading of the draft articles on jurisdictional immunities of States and their property in 1986 only if compromise formulas were adopted to reconcile the views of the developed States, the socialist States and the developing States on that question. It was an extremely complex subject involving juridical, political and economic factors.

65. One of the main difficulties the Commission must overcome derived from the fact that it had adopted Part III, entitled "Exceptions to State immunity", i.e., draft articles 12 to 20, before completing the formulation of draft article 6, which had given rise to, and still gave rise to, views so different that, after having adopted it provisionally, the Commission had referred it again to the Drafting Committee and had decided to reconsider it at its future sessions. That was why it would be useful for the members of the Sixth Committee to formulate criticisms, observations and positive suggestions designed to improve the text of draft article 6, which was undoubtedly the keystone of the entire draft article because its aim was to assert clearly and unambiguously the basic principle of State immunity.

66. In the view of his delegation, the wording of draft article 19 was unsatisfactory and could be improved. That was what emerged from paragraph 3 of the commentary concerning that draft article (A/40/10, p. 152), which stated: "The difficulties inherent in the formulation of rules for the exception under article 19 are manifold. They are more than linguistic". Similarly, paragraph 10 of the commentary (ibid., p. 154) indicated that the words "operate" and "operation" in paragraph 1 (and also in paras. 2, 3 and 4), must be understood against the background of the Brussels Convention of 1926 and of existing State practice. Both terms referred to the exploitation or operation of ships in the transport of goods and passengers by sea. It was a positive commentary which facilitated understanding of the text because the terms "exploitation" and "operation" were presented as synonyms. But the term "exploitation" denoted an idea of profit which the term "operation" did not necessarily imply. That was why a term better suited to the purpose of that provision should be used. The distinction between "exploitation" and "operation" was important to the extent that it introduced the notion of profit which attached to commercial transactions and it acquired a particular meaning for the developing countries.

67. Some representatives had expressed the fear that the draft article might have serious economic consequences with respect to ships owned by developing States. In that connection, he noted that many developing States engaged in maritime transport in order to economize rather than to make a profit and that certain governmental activities in the field of air and sea transport were not so much profit-oriented as a public service and involved considerable financial sacrifice for the taxpayers. That was why his delegation felt that the brackets in paragraphs 1 and 4 of draft article 19 should be removed so as to incorporate the expression "non-governmental" in the text.

68. The law of the non-navigational uses of international watercourses was of major concern to Latin America, where public opinion closely followed the

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Commission's work on that question. The new draft articles to be submitted should take into account the various observations already formulated and try to reconcile divergent opinions in order to obtain general approval.

69. The preliminary report on relations between States and international organizations inclined one to conclude that the Commission should adopt a broad approach and cover in its study regional organizations, including, of course, those whose membership consisted of the States of the American continent. The draft article on the legal personality of international organizations submitted by the Special Rapporteur was entirely acceptable. As for the two alternatives, his delegation felt that the two paragraphs of the text proposed should be considered as two separate draft articles, numbered 1 and 2.

70. With respect to the draft Code of Offences against the Peace and Security of Mankind, his delegation thought that, to be effective, it must envisage penalties and the establishment of an international criminal jurisdiction. It did not favour the idea of limiting the content ratione personae of the draft Code to the criminal responsibility of individuals. The impossibility of applying coercive means to States which infringed international law - closely linked to the use of the right of the veto in the Security Council - made it particularly necessary to have an international criminal jurisdiction, not only to administer justice but also as a means of maintaining international peace, security and legal order. The draft articles formulated by the Special Rapporteur should serve as a basis for delimiting the scope of the future instrument, defining an offence against the peace and security of mankind and studying a number of acts which constituted such offences.

71. As far as application of the Code was concerned, the draft must formulate the statute of the international criminal jurisdiction, providing appropriate procedures to give effect to the responsibility of individuals and States, while making it clear that natural or legal persons could be prosecuted when they committed the offences covered by the Code. It was necessary to define an offence against the peace and security of mankind as a single and homogeneous concept in order to ensure respect for the obligation to protect interests concerning the preservation of peace, respect for basic human rights, the self-determination of peoples and the protection of the human race and its environment. It approved the Commission's proposal to include the offences covered in the 1954 draft Code, with appropriate modifications of form and substance.

72. The observations made by the Spanish-speaking members of the Commission with respect to the use of the words "crimen" and "delito" in international law were sound. The distinction between the two terms was clearly expressed in the commentaries on draft article 19 on State responsibility. Panama wanted colonialism, apartheid, serious damage to the human environment and economic aggression to be duly provided for in the draft Code. The genocidal acts of the Pretoria régime in southern Africa, apart from deserving universal condemnation, should serve as clinical examples for defining in the Code the different types of offences and crimes which should involve punishment of the perpetrators of offences against the peace and security of mankind.

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73. His delegation was pleased that the Special Rapporteur intended to devote his subsequent report to war crimes and crimes against humanity.

74. In conclusion, his delegation regretted the delay in the publication of the Yearbook of the International Law Commission, which was an essential instrument for the progressive development and codification of international law. It also hoped that the fortieth anniversary of the United Nations would provide an opportunity to update and re-edit the publication "The Work of the International Law Commission", the previous edition of which dated back to 1980. Lastly, it stressed the importance of the International Law Seminar which was held during the Commission's sessions in Geneva and thanked the Governments of Austria, Denmark, Finland and the Federal Republic of Germany for the fellowships they had provided to participants from the developing countries.

75. Mr. SZEKELY (Mexico) said that his delegation was deeply troubled by the draft articles on the jurisdictional immunities of States and their property, which seemed to it to be based on a fundamental error and to have been developed in accordance with a misguided method of work.

76. In one respect, it had been obvious from the beginning that an appreciable number of delegations were hostile to the propensity to base the draft text not on the general practice of the States that went to make up the international community but on the domestic laws of some of them. They did not represent general practice, since they did not respect the integrity of the principle of the jurisdictional immunity of sovereign States but imposed on it exceptions. In those circumstances, the title of chapter V of the Commission's report should rather have been "Draft articles on the exceptions to the jurisdictional immunities of States and their property". In turning its back on the general principle of absolute immunity in favour of that of restricted immunity, or the absolute relativity of immunity, the Commission did not act in accordance with the true opinio juris of the international community on the subject. The draft articles were therefore unacceptable to his delegation.

77. In another respect, despite the clearly expressed hostility of delegations, the Commission was continuing to elaborate the draft articles without reverting to the provisions already provisionally adopted, which were precisely those that should contain the basic and general norms underlying a codified régime of the jurisdictional immunity of States. That method of work placed his delegation, and certainly many others, in a particularly difficult situation, since it obviously could not effectively decide on draft articles 18 to 24 if the earlier provisions were completely unacceptable to it. It should therefore be clear that its statement at the current session should not be interpreted as a negation or modification of its hostility towards draft articles 1 to 18.

78. Mexico viewed with particular concern the development, in the few countries whose domestic laws had served as the basis for the establishment of the draft articles, of a growing tendency to restrict the jurisdictional immunity of States through amendments to the relevant laws. Its concern was all the more justified by

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the fact that numerous unfounded proceedings had been instituted against it before foreign courts, faced with which it could only ensure respect for its immunity at the cost of an increasingly difficult defence.

79. His delegation, like that of Brazil, would prefer if, rather than hastening the process of the first reading of the draft articles, the Commission allowed itself a longer period of time in order to enable it to work in a more leisurely fashion and maintain the customary high quality of its work.

80. It was regrettable that the draft articles had been considered unfavourable to the interests of the developing countries. It was essential for the codification under way not to be based solely on the study of legislative practice, which was necessarily restricted to the few States that had legislation on the subject, but also on the practice of the courts and ministries of foreign affairs of all countries.

81. His delegation considered that draft article 19 should make room for the notion of the immunity of State-operated ships used for commercial governmental purposes; that draft article 20 was not applicable to inter-State arbitration; and that Part IV, containing articles 21 to 24, should be based on the principles of express consent and sovereign equality and should, in fact, appear in Part II of the draft, setting forth general principles. Immunity from jurisdiction and immunity from execution were two inseparable elements of the same legal régime. There was also a danger, for example, that Part IV might apply only to State property and not that of its organs, agencies or instrumentalities, which were covered by draft article 7, paragraph 3. Moreover, his delegation considered that the provisions of draft article 22, paragraph 1 (a), and of draft article 3, paragraph 1 (a), duplicated each other.

82. The foregoing remarks had been made subject to the need for a return to a legal philosophy fully according with the general practice of States. Thus, draft articles 1 to 18 should stipulate:

(a) Who should determine the nature or the finality of the commercial contract and what means should be considered for the settlement of disputes on the matter;

(b) That a State enjoyed immunity with respect to the jurisdiction of another State by virtue of international law and not by virtue of the articles of the draft;

(c) That the obligation imposed on the State to give effect to the immunity of other States was incumbent on all its organs and authorities, and not only on the judicial authority;

(d) That States had the obligation of giving effect to the immunity of others by themselves refraining from acting against them in the case of a proceeding instituted by non-governmental natural or juridical persons under their jurisdiction or control;

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(e) That a proceeding instituted before a court of a State should be deemed to have been brought against another State not only when it actually had the objective of obliging that State to submit to the jurisdiction of the court but also when it had the same goal indirectly;

(f) That the representatives of a State against which a proceeding had been instituted, mentioned in draft article 7, paragraph 3, were competent public servants indisputably distinct from diplomatic or consular representatives; and that it was for the State itself to decide, in accordance with the domestic laws in force, whether the proceeding was or was not directed against juridical persons who should be considered as its organs, agencies or instrumentalities and whether the acts of which they were accused were or were not performed in the exercise of prerogatives of a public nature. (For that purpose provision would be made for a signed certificate similar to that prescribed in draft article 19, paragraph 7, to determine the governmental and non-commercial character of a ship or cargo.);

(g) That States should adopt domestic laws and regulations to prevent onerous and costly proceedings having the direct or indirect effect of obliging States against which a proceeding was instituted to participate in the proceeding as if they were subject to the jurisdiction of the forum;

(h) That States should adopt laws, regulations and other legal provisions to prevent natural or juridical persons subject to their jurisdiction or control from instituting abusive proceedings before their courts to the detriment of the immunities or dignity of other sovereign States;

(i) That the declaration of a State consenting to the jurisdiction of a particular court should be made in writing and in an express and unequivocal manner;

(j) That the intervention of a State in a proceeding before a court of another State or the performance of any act relating to the merits thereof disqualified it from invoking immunity from jurisdiction except where such an intervention or act was undertaken in order to present evidence for the immunity invoked or claimed by that State;

(k) That failure on the part of a State to enter an appearance should not be considered as consent to the exercise of jurisdiction by a foreign court nor, a fortiori, the loss of the immunity conferred upon it by international law.

83. His delegation considered that, once those legal criteria were incorporated into the draft articles, the text would become viable and the Commission would be able to obtain the general support required for the fulfilment of its mandate on the subject.

The meeting rose at 1.15 p.m.