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SUMMARY RECORD OF THE 33rd MEETING

Chairman: Mr. AL-QAYSI (Iraq)

CONTENTS

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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.1-3; A/40/331-S/17209, A/40/786-S/17583)

1. Mr. BEN ABDALLAH (Tunisia) paid tribute to the work of the International Law Commission and expressed the hope that all countries would combine efforts to strengthen its action. Tunisia deeply regretted the aggressive behaviour of certain States which used violence as an instrument of their policies, and believed that concerted action should make it possible to enhance the effectiveness of the legal instruments most likely to help prevent conflicts and threats to peace. In that connection, his delegation endorsed the ideas put forward by a number of delegations, particularly Mexico. The Commission must be given the means to continue its action after conventions had been drafted, in order to promote their ratification and ensure that they achieved their full effect.

2. With regard to the Commission's methods of work, his delegation shared the views expressed in paragraphs 297 and 298 of the report (A/40/10): it was desirable, before the Commission's present term of membership concluded in 1986, that as much progress as possible be made in the preparation of draft articles, particularly on such topics as State responsibility and jurisdictional immunities of States and their property.

3. His delegation welcomed the Commission's co-operation with other bodies, in particular the Arab Commission for International Law. Tunisia attached considerable importance to the holding of seminars under Commission auspices and called on States to support efforts to that end. He paid tribute to the Governments of Austria, Denmark, Federal Republic of Germany and Finland, which had offered scholarships to participants from developing countries. Tunisia would also like to see the Yearbook of the Commission published more regularly, and endorsed the plan to publish a new revised edition of the publication The Work of the International Law Commission.

4. Turning to Chapter III of the Commission's report (A/40/10), on State responsibility, care must be taken to ensure that the draft article, on State responsibility did not interfere with other instruments already in existence or in the process of drafting, for instance the draft Code of Offences against the Peace and Security of Mankind. Considerable progress had been made on the latter draft, something which augured well for its adoption by the Commission. His delegation believed that the special legal consequences of international offences should be expanded on in the light of the progress made on the draft Code of Offences with regard to the qualification of internationally wrongful acts as offences, the main task being to draw all the legal consequences of those acts as they related to State responsibility. So far as the question of the criminal liability of States was concerned, his delegation believed that offences against the peace and security of mankind were often committed by States and that, in many cases, they could be committed only by States: that was the case with apartheid and annexation.

(Mr. Ben Abdallah, Tunisia)

5. Since States could be held responsible for acts committed by their organs or agents, his delegation believed that the criminal liability of the State must begin at the moment at which it committed an offence envisaged by the draft Code.

6. The definition of the injured State given in article 5 was acceptable, but a distinction should be made between States that were injured directly and those that were injured only indirectly, in view of the consequences of the two situations for the rights and obligations arising out of the internationally wrongful act. Concerning the content of Part Three, which was to deal with the implementation (mise en oeuvre) of international responsibility and the settlement of disputes, Tunisia endorsed the action taken by the Special Rapporteur and believed that the question of State responsibility, because of its political and legal aspects, required that binding dispute settlement procedures be sought. It therefore supported the proposals in paragraphs 114 and 115 of the report concerning the introduction of a compulsory conciliation procedure and the possibility of recourse to the International Court of Justice. Such machinery should also be reinforced by other means in order to avoid escalation and other measures of reprisal.

7. Turning to the question of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, the fact that four international conventions already dealt with that issue in no way diminished the usefulness of the Commission's work, which would make it possible to supplement existing provisions and to resolve the question of the diplomatic bag not accompanied by diplomatic courier. The revised text of article 36 concerning the inviolability of the diplomatic bag, as proposed by the Special Rapporteur in his sixth report, reflected to some extent a fine balance between the interests of the sending State and the legitimate security concerns of the receiving and transit States. The principle of the absolute inviolability of the diplomatic bag was tempered by the possibility of sending the bag back if there were serious doubts as to its contents, a solution which his delegation considered preferable to opening the bag. His delegation also believed that the system applicable to the consular bag by virtue of the Vienna Convention of 1963 should be disassociated from the systems for other types of bag, while enabling States to apply the special system envisaged for the consular bag whenever necessary.

8. Concerning electronic inspection of the diplomatic bag, his delegation believed that that point had not been dealt with specifically and expressly because such inspection was prohibited under the general principle of the absolute inviolability of the bag. In that connection, Tunisia endorsed the Special Rapporteur's proposal at the end of paragraph 184 of the Commission's report.

9. Concerning the relationship between the draft articles and other international conventions and agreements, his delegation believed that paragraph 2 of article 42 might give rise to difficulties of interpretation concerning the scope of the specific agreements concluded between States with regard to the diplomatic courier and diplomatic bag. It would therefore be preferable to provide expressly that States could amend certain provisions of the draft articles by specific agreements.

(Mr. Ben Abdallah, Tunisia)

10. Concerning the provisions relating to the diplomatic courier, his delegation endorsed the functional approach offererd by draft article 18 (former article 23) and believed that all the necessary safeguards, including immunity from criminal jurisdiction, should be extended to the courier in respect of all action taken by him in the exercise of his functions. The functional approach also required that the permanent diplomatic courier and the ad hoc courier be accorded the same treatment with regard to the duration and cessation of the privileges and immunities provided for in draft article 21. The ad hoc courier should be covered until he actually left the territory of the receiving or transit State.

11. Turning to the question of jurisdictional immunities of States and their property, he said that the provisional adoption of draft articles 19 and 20 logically supplemented part III of the draft on exception to State immunity. In that regard, his delegation reiterated its hesitation to accept exceptions which went beyond exceptions resulting from commercial activities and which ran the risk of removing the substance from the principle of State immunity.

12. His delegation considered also that there should be a more global approach to the criteria for differentiating between State activities and private activities, to allow a better definition of the basis for exceptions to the principle of immunity of States and their property. The International Law Commission should therefore seek complementary criteria for distinguishing between acts jure imperii and acts jure gestionis, which took into account the socio-economic reality and the interests of States, expecially those of developing countries. In those countries, the public sector remained predominant, and the State therefore assumed the role of economic agent. In the strategic sector, the profit considerations of commercial activity were greatly outweighed by the goal of development. In that connection, each case should be judged on its merits. The distinction made in draft article 19 between a ship in commercial service and a ship in government non-commercial service reflected the reality of international commerce and did not raise any particular problem. However, that rule should not limit developing countries in their foreign trade, especially when implementation measures were taken. His delegation considered the restriction contained in subparagraph (b) of draft article 22, dealing with State immunity from attachment and execution, to be necessary.

13. He hoped for rapid progress with regard to the law of the non-navigational uses of international watercourses. His country considered that the draft articles could be regarded as a framework agreement, laying the foundations for later agreements on specific watercourses. The draft should also contain principles which were sufficiently precise and detailed to appeal to parties and to safeguard the rights of interested parties in the absence of a specific agreement, especially with regard to the reciprocal rights and obligations of States in co-operation concerning joint management and administration of international watercourses.

14. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, the Commission should continue its study, with the aim of establishing a suitable balance between the freedom of action of States and the right to appropriate compensation for damages caused by lawful activities.

15. Mr. RAMAKRISHNAN (India) said that the draft Code of Offences against the Peace and Security of Mankind was an offshoot of the Second World War. Later, cold-war situations had increased its importance. India, as a nation, believed in the precept of Ahimsa Paramodharmaha. Religious leaders, such as Buddha, had spread that message throughout the world. Mahatma Gandhi, the father of the Indian nation, had introduced the concept into the political life of the people. Later, Pandit Nehru had based the doctrine of Panchasheela on it, and had developed the policy of non-alignment.

16. On the question of the scope of the Code ratione materiae, the Commission had decided to limit it for the time being to the criminal responsibility of individuals. His delegation felt that, for various reasons, the concept of international criminal responsibility should also be extended to States. First, the mandate of the Commission covered not only individuals but also States, which were primarily responsible for the offences envisaged in the Code. Secondly, the history of the Code justified the inclusion of culpable States. Thirdly, any criminal code, if it was intended to be comprehensive, should cover all persons guilty of acts which it prohibited. Lastly, the exclusion of States, which were the principal offenders under the Code, would weaken it in the long run.

17. The Commission's decision to adopt the first alternative of article 2 was welcome because it ended controversy and covered any individual guilty of an act under the Code. Article 3, which provided the definition of offences under the Code, was given in two alternatives. His delegation was of the view that the solution to the divergence of opinion in the Commission would consist in adopting a mixed approach. An open-ended definition should be adopted, providing criteria to determine whether a particular act constituted an offence under the Code or not, and enumerating important internationally wrongful acts.

18. His delegation appreciated the Commission's decision to include aggression as an offence in the draft Code, and suggested that the Definition of Aggression contained in resolution 3314 (XXIX), adopted by the General Assembly on 14 December 1974, should be retained in the Code without any change. Intervention by a State in the internal or external affairs of another State was no less objectionable than aggression; its inclusion in the draft Code was therefore justified.

19. His delegation welcomed the Commission's decision to deal with the matter of international terrorism. The work done by the bodies concerned in the relevant forums should be taken into consideration His country was concerned at the rise in international terrorism, including State terrorism. All terrorist acts, including the hijacking of aircraft and ships, and the taking of hostages, were prohibited. His country condemned terrorism in all its forms, wherever and by whomsoever committed.

20. The inclusion in the Code of such other offences as the violation, by the authorities of a State, of the provisions of a treaty designed to ensure international peace and security, the forcible establishment or maintenance of colonial domination, mercenarism and economic aggression, would make it very

(Mr. Ramakrishnan, India)

comprehensive and detailed. His country supported the request by other countries to make the question of mercenarism the subject of a separate provision in the draft Code because of its special nature, and also because several States, directly or indirectly, allowed the continuing operation of training schools for mercenaries or terrorists, although some of those States professed to condemn terrorism and presented themselves as being in the vanguard of the movement to establish peace and harmony in the world.

21. There was no doubt that the adoption of article 5, which dealt with the definition of the term "injured State", was a major achievement. That definition, based on the source of obligations, was essential for the application of the articles in identifying the injured State. It was not free from criticism, because the list of injured States which it contained did not permit further extension. It would therefore be desirable for the Special Rapporteur to give further thought to that article.

22. The line of demarcation between articles 8 and 9 was so thin that there was no justification for two separate provisions. His delegation therefore suggested that the Special Rapporteur should explore the possibility of merging the articles in question. Articles 14 and 15 constituted an important link between the draft Code of Offences against the Peace and Security of Mankind and the provisions on State responsibility. Article 14, in particular, was a milestone in the development of international law; it discouraged States from committing international crimes and from helping other States, overtly or covertly, to commit such crimes.

23. It was gratifying that work on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and on jurisdictional immunities of States and their property was nearing completion. However, draft article 36, proposed by the Special Rapporteur, was not free from controversy. The diplomatic bag should not be opened under any circumstances. If there were reasonable grounds for suspicion about its contents, it could be returned to the sending State.

24. Mr. ROMPANI (Uruguay) said that the topics covered in the Commission's report (A/40/10) could not be commented on briefly. He would therefore concentrate on those aspects on which, in view of his long experience as a university professor and parliamentarian, he could make comments that were somewhat different from what had already been said during the detailed discussion of the report.

25. His Government had had the opportunity to present its views on the draft Code of Offences against the Peace and Security of Mankind. It had noted in particular, in connection with the content ratione personae and ratione materiae, that there were no sanctions for those who committed offences and no categories in which to place such offences as aggression, hostage-taking and terrorism. On 19 August 1985, his Government had said that it was also necessary to consider the conduct of States, organizations and other subjects of international law capable of commiting acts not exclusively under the heading of individual responsibility. It had also said that some general principles should be formulated for inclusion in

(Mr. Rompani, Uruguay)

the introduction. In addition, it had stressed the need to include in the Code the offences contained in the 1954 draft Code and not lose sight of the fact that the legal "property" to be protected was the peace and security of mankind and that, as a result, the offences that should be included in the Code were those which damaged that property and were consequently especially serious.

26. On that as well as on other topics covered in the Commission's report, there was a problem of translation, which had also been raised by the delegations of Venezuela and Spain. Some speakers had referred in detail to mistakes that were regularly found in Spanish translations. However, the Commission's report was one of the texts which contained the fewest such errors. Some expressions were impossible or extremely difficult to translate. It was therefore important to be fair to the translators and interpreters since they did not merely have to translate a word from one language into another, but a concept of a specific legal system into the language of another. For example, in Uruguayan domestic legislation, the words "crimen" and "criminal" had been replaced by the words "delito" and "penal" respectively. The distinctions made by the Commission were therefore not really applicable as far as the Uruguayan legal system was concerned.

27. His delegation agreed with some of the highly relevant comments made during the discussion on the Commission's report. It did not intend to repeat them because when basic principles were not at stake, one should refrain from expressing certain objections in the interest of a generally acceptable solution, since it was impossible to please everyone. Recalling that frequently "the best was the enemy of the good", he said that it was not sufficient for a piece of legislation to be perfect; it must also be consistent with reality. In 1815, José Artigas, a Uruguayan national leader, had preached federalism based on the United States model and had suggested that the Constitution of the State of Massachusetts should be copied by his country. However, when, in 1830, the time had come to draft Uruguay's Constitution, the model used had not been that text, but many other texts, and naturally other realities had been taken into account. Similarly, in 1945, the renowned Spanish jurist Angel Ossoylo y Gallardo had elaborated a draft civil code for Bolivia - a carefully conceived and perfectly worded text that had never been implemented in Bolivia, which had continued to follow the guidelines of the Napoleonic Code, a very well written text and widely used model. Such detractors of the Napoleonic Code as Burke in England and Savigny in Germany had argued that law did not derive from legal texts but from a country's legal conscience, which was the product of a slow historical evolution. However, some peoples could not wait for the historical process to shape their legal systems.

28. Obviously, there was opposition to the texts adopted by the Commission primarily because of efforts to define what was formally known as the "type" of offence. In that regard, the Commission had made a special effort to define the notion of an offence against peace and security. Those terms were compatible with those used in the Charter of the United Nations. However, what was at issue was offences against the peace and security "of mankind", offences directed against all mankind and thus having as victims not isolated individuals or groups of individuals, but mankind as a whole. That was most similar to "natural offences", which also stemmed from "natural law": law deriving from historical circumstances and related contingencies.

(Mr. Rompani, Uruguay)

29. The Brazilian professor Roberto Lira had worked out the following formula, which he had proposed to the eighth conference on the harmonization of criminal law and had published in 1947 in the Revista argentina de derecho penal: "An offence against mankind is any act or omission constituting a serious threat or an act of physical or moral violence against a person because of his nationality, race or religious, philosophical or political beliefs. Punishment should be more stringent if the offence is committed by an agent of the State in the exercise of his functions or purporting to be in the exercise of his functions and if it is directed at a group of individuals." The notion of an offence "against mankind" indicated that the victim was mankind as a whole and, because the notion was sufficiently specific, it was not open to any uncertainty. Some might claim that the notion of "mankind" was too vague. However, such international instruments as the Universal Declaration of Human Rights contained that same undefined notion. Nor did it seem that the notions of "peace" and "security" were much more specific or concrete. It was also important to consider the theological notion of peace - a formula for balance between conscience, intelligence and will. If all men accepted peace as a moral imperative of their consciences and the goal to be achieved by their wills, the peace which everyone invoked would be a concrete reality.

30. With regard to "international delicts" and "internationally wrongful acts", it should not be forgotten that there was no offence or punishment unless criminal law had been specifically established. The Roman jurists had had the maxim "Omnia definitio in jure pericolosa est". However, criminal laws could not be accepted in a void nor could something so precious be left to the discretionary power of courts or authorities.

31. One of the great contemporary jurists, the Viennese Hans Kelsen, had concluded that not everything could be left to the subjectivity of those judging and punishing the acts of individuals and groups of individuals, and that naturally included the State. That was established by positive law, namely, the law that existed in a real and positive way and governed a given people for a given period of time. Uruguayan legislation made specific reference to that topic and all the others covered in the Commission's report. His country had acceded to international treaties and conventions which, in many cases, simply reiterated the provisions set forth in Uruguayan internal legislation or regularly applied in practice. Uruguay had already made considerable efforts to make its own legislation consistent with such important instruments as the Charter of the United Nations and the Universal Declaration of Human Rights. There was an analogy with a national constitution: all laws were potentially contained in the constitution, but they must be individually drafted since a constitution could not encompass all specific circumstances encountered in the lives of individuals or peoples.

32. With regard to the institution of arbitration, it had been said that all the consequences of arbitral awards involving those concerned with implementation, should be made binding on the contracting parties. That principle had been incorporated in the relevant provisions of the Uruguayan Constitution so that all treaties concluded by the Eastern Republic of Uruguay contained an arbitration clause irrespective of whether a commercial or political treaty was involved.

(Mr. Rompani, Uruguay)

33. Although Burke and Savigny had feared the "fossilization" that written texts would force on the law, one might well wonder what had happened to all the written texts embodying world-wide experience that had been briefly mentioned by Mr. Rompani. He had added that it was not possible to assess the actual impact those texts were still having. Lastly, with regard to the general principles adopted by the Nürnberg Tribunal, it should be remembered that although many were in favour of the implementation of those principles, some exceptions remained, such as the eminent Spanish lawyer, Luis Jimenez de Asua, who had espressed a number of important reservations on the verdicts pronounced by that Tribunal.

34. Mr. DJORDJEVIC (Yugoslavia) said that the proposals of the Special Rapporteur on how to approach the elaboration of the draft Code of Offences against the Peace and Security of Mankind were acceptable to his delegation, which hoped that the legal concept of an offence against the peace and security of mankind could be given a more precise and unified definition. He regretted that the Drafting Committee had been unable to consider any of the draft articles and observed that the list of offences should not merely serve for purposes of illustration. He hoped that greater attention could be given to the draft Code at the next session of the Commission.

35. In connection with the status of the diplomatic courier and diplomatic bag not accompanied by diplomatic courier, the proposed solutions were not controversial. He stressed the importance of practice in the field and expressed the hope that the Commission would be able to proceed to the first reading of the draft at its next session.

36. The pace of work of the Drafting Committee on the jurisdictional immunities of States and their property did not seem satisfactory. Furthermore, it was important to take full account of the diverse legal systems of States in order that the largest possible number of States could support the draft. The Commission should indicate when it expected to complete the draft and what its final structure would look like.

37. The work on State responsibility was following a logical and pragmatic course, which the Commission should continue to pursue. It was unfortunate that the Drafting Committee had been unable to adopt all the articles proposed by the Special Rapporteur. The work being done on draft article 5 gave reason to think that a broader and more detailed commentary on the draft article, particularly with regard to its legal sources, would facilitate its consideration and assessment by all States. There again, the Commission should establish a timetable for its work and the realization of the entire plan it intended to follow.

38. His delegation welcomed the reactivation of work on the draft articles on the relations between States and international organizations, where codification was highly desirable. It regretted that no significant progress had been made on the draft rules on the non-navigational uses of international watercourses. The previous Special Rapporteur had laid solid foundations for further work in that area. In any event, the draft articles should take account of the principles of

(Mr. Djordjevic, Yugoslavia)

State sovereignty, respect for permanent sovereignty over natural resources, and good-neighbourly relations. His delegation hoped that the new Special Rapporteur would follow the basic rules that had been evolved thus far.

39. His delegation would like the question of international liability for injurious consequences arising out of acts not prohibited by international law to receive greater attention, since it was necessary to establish the extent to which international law had been consolidated in the matter of nuclear energy, as well as in other areas in which exceptional technological progress had been recorded, in order to see whether new rules of international law could be formulated. In the light of the experience gained, the Commission should consider whether it should proceed further in the elaboration of legal provisions in the matter.

40. In conclusion, his delegation noted that the systematic work of the Commission and the Committee had profoundly changed the general features of international law since the Second World War. New problems, often of a more specific nature and concerned with the implementation of the law, had appeared and had considerably complicated the task of codification bodies. While aware of those circumstances, his delegation was nevertheless not fully satisfied with the outcome of the thirty-seventh session of the Commission, whose desire to devote an equal amount of attention to each of the items on its agenda should not lead it to reduce the number of specific proposals to be drawn up by the Drafting Committee and adopted by the Commission. It hoped that the Commission would make greater efforts at its next session to complete its work on the topics whose study was sufficiently far advanced and hoped that it would find the time to look into the possibility of proposing new extremely wide-ranging programmes of work. That would make allowance for basic needs in the field of the codification and progressive development of international law on the threshold of the twenty-first century.

41. Mr. Nguyen QUY BINH (Viet Nam) said that in his delegation's view the Commission had outlined a fairly clear picture of the structure and content of the future Code of Offences against the Peace and Security of Mankind. Nevertheless, many problems still remained to be clarified.

42. With regard to general principles, his delegation considered that formulation of the general principles in parallel with consideration of the list of offences would be an effective approach. Principles I to IV formulated by the Commission in 1950 could form a good basis for work and should be supplemented in the light of new developments in international law over the past four decades. Those principles could also help to relieve certain problematic issues relating to delimitation of the scope of the draft Code ratione materiae.

43. Regarding the subjects of law to which international criminal responsibility might be attributed, his delegation continued to hold that the objective must remain the definition, at a later stage, of the responsibility of the State itself with regard to acts constituting crimes against the peace and security of mankind. It had made clear the reasons for that stance. It believed that later discussions would render clear the extent, forms and degrees of that aspect of State

(Mr. Nguyen Quy Binh, Viet Nam)

responsibility as well as the relationship between offences against the peace and security of mankind and that of State responsibility. In order not to complicate the work of the Commission, his delegation agreed with the decision that the Commission should concentrate first on the basic principle of the criminal responsibility of individuals.

44. On that point, his delegation deemed it necessary to provide for the possibility of offences against the peace and security of mankind being committed by private individuals as well as by individuals exercising public power. It would be unrealistic to try to distinguish between those two categories of persons in order to limit the Code only to State officials or functionaries. It was sufficient that the method of enumeration should be applied to the acts which constituted the offences. That method coincided with the common agreement that the Code would be limited only to those crimes characterized as the most serious.

45. While believing in the unity of the concept of offences against the peace and security of mankind, his delegation was in favour of the primacy given by the Special Rapporteur to offences against international peace and security. In identifying the acts which constituted aggression, it did not quite agree with the view that the 1974 definition of aggression was intended for a political organ and not a judicial one. However, it favoured the first proposed alternative for article 4 since it tended to apply the enumerative approach, which was more logical than that of general definition. With that approach, the Commission could determine later whether to retain certain provisions of the resolution which were found out of place in a definition stricto sensu, or even to supplement it.

46. With respect to the threat of aggression, his delegation wanted it to be retained as an offence despite the difficulties of making a determination in certain circumstances. It did not think that the question of preparation of aggression was of little interest legally and that it should not be punished unless the aggression had taken place. The preparation of aggression must be outlawed in order to deter aggression by States.

47. His delegation deemed it important to include intervention in the internal or external affairs of another State among the offences, in view of the implications of such behaviour for international peace and security. Great importance was attached by developing countries to such a provision, and his delegation agreed with the approach of listing the acts which constituted intervention. It also supported the inclusion of terrorism, in accordance with the approach taken by the Commission, and deemed it necessary for the draft Code to refer to the forcible establishment and maintenance of colonial domination because the cruel effects of that lingering reality in many cases went beyond those of an act of aggression, as the case of Namibia showed.

48. His delegation supported the inclusion of mercenarism, and had already explained why. Mercenarism should be the subject of a separate provision in the future draft. His delegation hoped that a number of other questions, such as the use of atomic weapons or economic aggression, would be included among the acts of

(Mr. Nguyen Quy Binh, Viet Nam)

aggression referred to in article 4 of the draft. Lastly, it hoped that the Commission would make considerable progress during its thirty-eighth session and reiterated the importance it attached to the inclusion of the item under consideration in the agenda of the forty-first session of the General Assembly.

49. Mr. ZEMANEK (Austria) said that although the work of the Commission again deserved praise, the serious difficulties which had plagued the codification process for some years, even though they did not originate in the Commission, could not be ignored. On several occasions, the weak record of ratifications of and accessions to existing codification conventions had been deplored by the Sixth Committee, the Commission and the legal community. In fact, only the 1961 Vienna Convention on Diplomatic Relations and, to a lesser extent, the 1963 Vienna Convention on Consular Relations, had attracted a sufficiently large number of ratifications to justify the claim that they established general international law. Other conventions, which were also intended to supersede uncertain customary law or a variety of treaties, had in reality only increased the complexity of the material they were intended to govern by adding a competing source to those already existing, thereby defeating the purpose of the codification progress, which was to establish certainty and clarity.

50. Numerous reasons had been advanced in explanation of that state of affairs, one of which merited attention in the current context. It seemed that the appetite of the international community for new international conventions, manifesting itself in the deliberative bodies of the United Nations, exceeded by far that community's capacity to digest the resulting conventions in a speedy process of ratification or accession. That "indigestion" had been attributed to various causes, such as administrative inertia, overburdened national legislators or simply disinterested States. All those causes were difficult to influence, and in all probability would not change in the foreseeable future.

51. There remained the fact of "overfeeding", and the General Assembly bore a certain amount of responsibility for it, especially in relation to the work of the Commission. The Commission had from time to time reviewed its work and had established a plan of work which had been discussed in and approved by the General Assembly; but then the General Assembly added new topics to the Commission's list, some even with high priority. As a result, the Commission's agenda was overcrowded, and that body was in a quandary. Considering all topics at one session made it difficult to achieve progress on any of them; concentrating on only a few might lead to the criticism that it disregarded instructions from the General Assembly.

52. The Commission had opted for the first course (A/40/10, para. 297), with the result that only a few drafts had been prepared in recent years. The hope expressed in the Commission's report that the Commission would finish the first reading of the draft articles on the status of the diplomatic courier and of the diplomatic bag not accompanied by diplomatic courier and on jurisdictional immunities of States and their property at its next session, before the conclusion of its present term of membership, seemed truly optimistic. As for the

(Mr. Zemanek, Austria)

Commission's expressed desire also to complete a first reading of Part Two and Part Three of the draft articles on State responsibility, the language used by the Commission suggested that it had little hope of doing so. Moreover, the overcrowded agenda was also responsible for the length of time between the beginning of work on a topic and the finished draft; changes of special rapporteurs or of the Commission's membership were not infrequent, which delayed the work even further.

53. Most of those problems could be solved only by the General Assembly. Since it did not seem feasible to extend the Commission's sessions if its membership was to include professionals with a major occupation, the General Assembly must refrain from "inventing" new topics and must review the priorities for the existing ones. The Commission also justly complained about the delay in the publication of its Yearbook. That delay was extremely regrettable because the required dialogue between the Commission and the legal experts of States was only possible when the results of the Commission's work were accessible.

54. Turning to the question of State responsibility, and in particular the outline of the possible content of Part Three of the draft articles submitted by the Special Rapporteur in his sixth report (A/CN.4/389), he found the allocation of subjects to either Part Two or Part Three to be defective in one important aspect. When the Commission had adopted its concept of State responsibility (A/90/10/Rev.1, para. 40) it had distinguished between substantive "primary" norms and "secondary" norms of State responsibility. Any violation of a "primary" obligation created a new legal relationship, which was reflected in a "secondary" norm, as for instance, in the duty to stop the violation of the "primary" obligation or in the duty to compensate for in the damage caused by the violation. Part Two of the draft articles was devoted to those new legal relationships arising out of the violation of a "primary" obligation. To include reprisals in that part, as proposed by the Special Rapporteur, was a misinterpretation of the Commission's concept. Reprisals were legitimate only after a duty arising out of the new legal relationship had not been fulfilled, as, for example, when the violation of the primary obligation was not stopped despite the request to do so, or when the duty to pay compensation for a damage was not fulfilled. The proper place for reprisals was therefore in Part Three, which dealt with the implementation of international responsibility.

55. On the other hand, his delegation supported the proposal of the Special Rapporteur to include in Part Three provisions for a compulsory conciliation procedure, in order to avoid the escalation of disputes concerning either the existence of a violation of a "primary" obligation or the non-fulfilment of a duty arising out of such a violation. Since the establishment of the non-fulfilment was a condition for the legitimacy of reprisals, the proposed procedure confirmed his delegation's opinion that reprisals should be dealt with Part Three.

56. His delegation noted with concern that no article had been proposed to deal with "satisfaction" for an internationally wrongful act that had not caused any material damage. It was, of course, quite true, as the Special Rapporteur mentioned in footnote 38 to paragraph 11 of his commentary on draft article 6, that

(Mr. Zemanek, Austria)

the International Court of Justice in its Judgement on the Corfu Channel Case had held that its dictum on a violation of international law was in itself appropriate satisfaction (ICJ Reports 1949, p. 36). But that solution worked only if an international judicial organ intervened, and not all cases of international responsibility were submitted to one. A provision on "satisfaction" should therefore be included in the draft articles.

57. His delegation was also surprised by the Special Rapporteur's formulation of draft article 6, paragraph 2, and draft article 7, with respect to the amount of compensation to be paid in case material damage resulted from an internationally wrongful act. Far from meeting the standard set out in the PCIJ Judgement in the Factory at Chorzów Case as maintained in the Commission's report of the previous year (A/39/10, para. 370), article 6, paragraph 2, fell far short of it. The Commission should take as a model article XII of the 1972 Convention on International Liability for Damage Caused by Space Objects, which had been negotiated by States representing all ideologies and interest groups and had been accepted by a large number of States.

58. As to the specific consequences of international crimes, dealt with in draft article 14 proposed by the Special Rapporteur, a satisfactory answer would be found only if a broad consensus could be established on the acts which constituted international crimes. His delegation supported the view expressed in paragraph 117 of the Commission's report regarding the relationship between the subject of international responsibility and the draft Code of Offences against the Peace and Security of Mankind. That relationship should, however, be kept in mind when selecting terminology to be used in both drafts. According to draft article 16 on State responsibility, which the Commission had already adopted provisionally, every breach of an international obligation was an "internationally wrongful act" (para. 1), but only the breach of an international obligation so essential for the protection of fundamental interests of the international community that its breach was recognized as a crime by that community as a whole constituted an "international crime" (para. 2).

59. That terminology was not followed by the Special Rapporteur on the draft Code of Offences against the Peace and Security of Mankind. In the second alternative he had proposed for article 3 (A/40/10, para. 71, footnote 34), he had termed "any internationally wrongful act recognized as such by the international community as a whole" an offence against the peace and security of mankind. That was tantamount to declaring that every breach of an international obligation should be considered an offence against the peace and security of mankind. The requirement in the text that the internationally wrongful act should be recognized as such by the international community as a whole did not invalidate the above observation, because the obvious intention of the text was that it should apply to any obligation under general international law and not merely to jus cogens norms or to international crimes. If the text were adopted as currently formulated, the unwarranted suspension of an extradition treaty or the non-application of a provision of an international trade agreement would not only constitute an internationally wrongful act, entailing the responsibility of the author State, but

(Mr. Zemanek, Austria)

would likewise be an offence against the peace and security of mankind. That was obviously not what the draft Code of Offences against the Peace and Security of Mankind was about.

60. In the new draft article 5 on State responsibility provisionally adopted by the Commission, paragraph 2 (f) provided that the term "injured State" meant, if the right infringed by the act of a State arose from a multilateral treaty, any other State party to the multilateral treaty, if it was established that the right had been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto. In paragraph 23 of the commentary on that article, the Commission cited, as an example of such a collective interest, the concept of a "common heritage of mankind", as recently accepted in respect of the mineral resources of the sea-bed and subsoil beyond national jurisdiction. His delegation believed that paragraph 2 (f) was superfluous for two reasons: first, because the violation of a clause protecting the collective interests of all parties to a multilateral treaty would necessarily affect "the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty", and was thus covered by article 60, paragraph 2 (c), of the Vienna Convention on the Law of Treaties and by paragraph 2 (e) (ii) of draft article 5 itself; secondly, because the requirement of an express stipulation to that effect in the multilateral treaty in question made it a "primary" rule of that treaty and not a "secondary" rule of State responsibility.

61. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, work done so far had shown that, in the absence of a special international convention, no undisputed basis could be found in general international law for a claim in the matter, since the maxim sic utere tuo ut alienum non laedas did not constitute a general principle of law. It was thus truly necessary to elaborate the draft articles. His delegation noted, therefore, with satisfaction that the new Special Rapporteur did not intend to reopen the general debate but intended to pursue work on the topic along the already accepted lines.

62. As concerned the law of the non-navigational uses of international watercourses, his delegation also noted with satisfaction that the new Special Rapporteur intended to continue the work of his predecessor without a radical change of course.

The meeting rose at 12.50 p.m.