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SUMMARY RECORD OF THE 34th MEETING

Chairman: Mr. AL-QAYSI (Iraq)

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The meeting was called to order at 3.20 p.m.

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

AGENDA ITEM 133: DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND: REPORT OF THE SECRETARY-GENERAL (continued) (A/40/451 and Add.1-3, A/40/331-S/17209, A/40/786-S/17584)

1. Mr. PAWLAK (Poland) said he was pleased to note that the International Law Commission had made considerable progress on a number of topics. It was to be hoped that at its thirty-eighth session it would make progress on the topics of relations between States and international organizations, the law of the non-navigational uses of international watercourses and international liability for injurious consequences arising out of acts not prohibited by international law. His delegation welcomed the recommendations to which reference was made in paragraphs 297 to 306 of the Commission's report (A/40/10). It was essential that the publication of the Yearbook of the International Law Commission should be expedited and that the United Nations publication The Work of the International Law Commission should be updated and reissued.

2. His delegation welcomed the outline of the draft Code of Offences against the Peace and Security of Mankind submitted by the Special Rapporteur. At the current stage the scope of the draft Code should be limited to offences committed by individuals. The questions of offences against the peace and security of mankind and State responsibility must be clearly delineated. Consideration of the question of State responsibility could not be completely divorced from consideration of the draft Code. The issue of the responsibility of States for actions and policies that caused damage to others was a legitimate and important subject for consideration by the Commission, but consideration of that question in the context of the draft Code would simply delay completion of the text.

3. In preparing the draft Code, the Commission must formulate general principles of international criminal law. The draft Code should cover offences committed by individuals and make no distinction between the "authorities of a State" and "private individuals". Where the principles to be included were concerned, his delegation endorsed the views reflected in paragraphs 46 and 47 of the report.

4. With regard to the scope of the topic ratione materiae, his delegation agreed that the offences included in the 1954 draft Code formed a good starting-point for the updated draft Code. The Commission should make an attempt to define the offences that were to be included, making no distinction between offences against peace and offences against security. Neither of the alternative texts proposed by the Special Rapporteur for draft article 3 was entirely acceptable to his delegation. The first alternative consisted mainly of an enumeration of offences and did not specify the characteristics that were common to the offences in question. Moreover, the concept of a "serious breach" was still too vague. There was also a certain amount of overlapping, particularly where subparagraphs (c) and (d) were concerned.

(Mr. Pawlak, Poland)

5. Where part IV of the draft Code was concerned, account must be taken of weapons of mass destruction, and a reference must therefore be made to the Declaration on the Prevention of Nuclear Catastrophe laid down in General Assembly resolution 36/100, paragraph 1 of which was particularly important. His delegation believed that mercenarism constituted an offence against the peace and security of mankind. In defining the concept of mercenarism, the Commission must take account of the work carried out by the Ad Hoc Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries. His delegation endorsed the Commission's view that the taking of hostages, violence against persons enjoying diplomatic privileges and immunities, and the seizure of aircraft and vessels should be regarded as elements of international terrorism for the purposes of their inclusion in the draft Code. The concept of economic aggression should also be included in the Code, as should the concept of colonial domination, provided that colonial domination was dealt with as a specific aspect of the denial of self-determination. Two further offences that should be included in the draft Code were apartheid and wrongful acts causing considerable damage to the environment.

6. In dealing with the question of jurisdictional immunities of States, the Commission must take account of the principle of sovereign equality of States and the rule of State immunity from execution. The idea that a State could not be made subject to the public authority of another State without its consent had not been fully reflected in the proposals put forward by the Special Rapporteur. In fact, those proposals tended to exaggerate the impact of the legislative acts of certain Western countries on the issue of State immunity. In that connection, he wished to point out once again that, as far as Poland was concerned, foreign-trade activities were normally carried on by State-owned enterprises, which were financially independent juridical entities that were not entitled to State immunity in respect of any of their commercial activities in a foreign State. His delegation believed that insufficient attention had been devoted to the protection of States in the performance of their sovereign functions. Moreover, it appeared to be assumed that States tended not to fulfil their commitments.

7. His delegation endorsed the Special Rapporteur's view that the draft articles in part IV, concerning State immunity in respect of property from attachment and execution, constituted the area in which international opinion seemed to favour more absolute and less qualified immunity. The replacement of the concepts of "attachment", "arrest" and "execution" by the general expression "judicial measures of constraint upon the use of such property, including attachment, arrest or execution" had improved the text. In draft article 21, the concept of property in which a State had an interest must be made more precise. Moreover, where draft article 22 was concerned, his delegation could not accept the idea of permitting enforcement measures to apply in respect of property of foreign States without the consent of such States. Poland also believed that property forming part of the national archives or national cultural heritage of a State should be exempt from enforcement measures, regardless of whether it was in public or in private hands.

(Mr. Pawlak, Poland)

8. With regard to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, his delegation viewed draft article 18, on immunity from jurisdiction, and draft article 36, on the inviolability of the diplomatic bag, as key provisions. The revised text of draft article 36 was generally acceptable to his delegation. Paragraph 2 of that draft article should be modelled along the lines of article 35 of the 1963 Vienna Convention on Consular Relations. The revised text of draft article 37 appeared to represent an improvement, but its content did not correspond to its title. His delegation believed that permission for the entry, transit or exit of the diplomatic bag should, rather, be considered in connection with the content of draft article 4, on freedom of official communications. In draft article 39, the expression "in the event of termination of the functions of the diplomatic courier" might give rise to certain practical problems. Moreover, that provision must be read in conjunction with the text of draft article 11. His delegation believed that in draft article 40 the word "fortuitous" might give rise to difficulties. Moreover, that draft article should cover cases where the diplomatic bag was entrusted to the captain of a commercial aircraft or the master of a merchant ship, who were referred to in draft article 39.

9. In draft article 41, the term "receiving State" might give rise to the impression that the provision in question referred to bilateral relations only. Draft article 42 must define the position of the draft articles in relation to other treaties, where the status of the courier and the bag was concerned. It would be desirable to stress that the draft articles were intended to complement the existing codification conventions. His delegation would support the deletion of draft article 42, paragraph 1. The appropriate provisions of the Vienna Convention on the Law of Treaties would then apply. Where draft article 43 was concerned, "flexibility", as it was called in the report, would be inconsistent with the underlying objective of the draft articles and would result in uncertainty as to their application and interpretation.

10. Mr. FAIZ (Bangladesh) said that his delegation attached great importance to the topic of the law of non-navigational uses of international watercourses. It noted with dismay that there had been delays in the work on that topic. That fact was tacitly recognized in paragraph 287 of the report, which referred to "the importance of continuing with the work on the topic with minimum loss of momentum, in light of the need to complete the work on the topic in the shortest time possible". His delegation was concerned at the apparent loss of momentum in the past. However, it was gratified to note the Commission's confidence that it would be able to bring its work on the topic to an early, speedy and successful conclusion without any break in continuity. It was also pleased to note that the Special Rapporteur intended to build on the progress already achieved.

11. With regard to the definition of an international watercourse, the unity of a watercourse in terms of the interdependence of its component parts must be recognized at the outset. The description of a watercourse should be fundamentally based on the concept of the unity of hydrological cycles. The international character of a watercourse must be determined on the basis of its geographic

(Mr. Faiz, Bangladesh)

expanse over more than one State and not merely on the basis of how its water was used. His delegation could not accept the introduction of the concept of relativity into the definition of the international character of a watercourse. That concept was prejudicial to the interests of lower riparian States and was based on the erroneous assumption that it was theoretically possible for one State to use parts of a watercourse without affecting use by another State. It would be logical to regard an international watercourse as a shared natural resource that was subject to the principle of equitable distribution.

12. Another matter of concern to his delegation was the enumeration of factors that would determine "a reasonable and equitable" share of the uses of the waters of an international watercourse. The objective was to harmonize the needs of all parties with the overall availability of water resources. Given the technical feasibility of massive withdrawal or storage of water, or the diversion of the natural flow of an international watercourse, account must be taken of all the factors that adversely affected the overall availability of water. A logical extension of the principle of equitable sharing of the waters of an international watercourse would be to prohibit not only use by or activities of a riparian State that might cause "appreciable harm" to the rights or interests of another riparian State, but also use or activities having an adverse effect on riparian States. An enumeration of factors determining appreciable harm to or adverse effect on a riparian State must necessarily be a part of any agreement on the non-navigational uses of international watercourses.

13. Urging the Commission to give priority to the question of State responsibility in view of its considerable importance, he noted the progress already achieved in that area and drew special attention to article 5, which was essential for the application of the other articles. His delegation was generally satisfied with the definition of an "injured State" as contained in that article. However, there was scope for further elaboration on the legal consequences of international crimes. Moreover, the question of State criminal responsibility should have been addressed under chapter III of the draft on State responsibility, rather than under part II of the draft Code of Offences, because of the broader scope of chapter III.

14. Turning to the question of jurisdictional immunities of States and their property, he recalled the history of the doctrine of State immunity and its relationship to State economic intervention. In developing countries in particular, the State played a crucial role in economic development. The codification of international law on the subject should take due account of the paramount importance of the economic and commercial functions of the State in the developing countries, whose views on the matter must be reflected in the draft articles.

15. The codification of international law relating to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier must be aimed at achieving a balance between the sending State's safety and secrecy requirements on the one hand, and the security and other legitimate interests of the receiving or transit State on the other. The principles laid down in the Vienna Conventions

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on diplomatic and consular relations, particularly the principle of absolute inviolability, must be adhered to strictly, but the legitimate interests of the receiving and transit States must also be safeguarded. In that connection, his delegation noted with interest the possibility of allowing the receiving and transit States to call into question the contents of the bag if they had reasons to believe that it contained items other than those specified in draft article 25, paragraph 1.

16. Mr. KAHALEH (Syrian Arab Republic) welcomed the progress achieved on the draft Code of Offences against the Peace and Security of Mankind. His delegation believed that the Code would be effective and comprehensive only if it covered State responsibility as well as individual responsibility, particularly in respect of certain crimes such as aggression, the annexation of territory, genocide and racial discrimination, in which individual responsibility and State responsibility were inseparable. The different principles and criteria governing individual and State responsibility under national and international law respectively should make it easier to distinguish between the two types of responsibility and apply the respective sanctions. Although State responsibility was a separate topic, it must also be dealt with under the Code.

17. Regarding the definition of an offence against the peace and security of mankind, his delegation agreed with the Special Rapporteur's view referred to in paragraph 69 of the report, and supported the first alternative of article 3, which defined such offences on the basis of the maintenance of peace, the protection of fundamental human rights, the safeguarding of the right to self-determination and the preservation of the human environment. He also expressed support for the view recorded in paragraph 78 of the report and welcomed the inclusion of the acts mentioned in paragraphs 81 to 98, especially aggression, which the Security Council was no longer able to check in accordance with Chapter VII of the Charter. However, a clear reference should be made to the right of peoples and national liberation movements to struggle for their freedom, sovereignty and self-determination. Other acts might also be included, such as racial discrimination, genocide, the first use of nuclear weapons and the use of weapons of mass destruction. The list must remain open to possible additions to accommodate future changes in the international situation.

18. He reaffirmed his delegation's support for the articles in part two of the draft on State responsibility and drew special attention to articles 5, 6 and 14. It was necessary to clarify the concept of self-defence in connection with the Definition of Aggression because that concept had been repeatedly used as a pretext for carrying out acts of aggression. Under draft article 15, the Security Council would implicitly be responsible for imposing penalties, but such penalties would be without effect because of the abuse of the veto, and the existing situation, particularly in the Middle East, would not be improved. For that reason, an independent legal body must be established to deal with crimes coming under the topics of the draft Code of Offences and State responsibility. The effectiveness of the future instrument on State responsibility would ultimately depend on the elaboration of part three of the draft articles.

(Mr. Kahaleh, Syrian Arab Republic)

19. His delegation was satisfied with the progress being made on the question of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. It welcomed the provision on the granting of full immunity to the courier and supported article 21 on the duration of privileges and immunities. Articles 23 and 26 were important for the developing countries, which were sometimes unable to afford the services of a diplomatic courier. However, the examination of the diplomatic bag by electronic or mechanical means would constitute a breach of its inviolability.

20. Turning to the question of jurisdictional immunities of States and their property, he said that articles 19 and 20 had made limited jurisdiction the rule and exclusive jurisdiction the exception. That approach was based on the legal system of the developed countries, but conditions in the developing countries and the socialist countries should also be taken into account.

21. Concerning the non-navigational uses of international watercourses, his delegation hoped that the draft convention prepared by the previous Special Rapporteur would serve as a model for States in elaborating agreements on the subject, notably with a view to reconciling the joint utilization of international watercourses with the concept of full sovereignty over natural resources. With reference to article 9 of the proposed draft convention, he reaffirmed his delegation's support for the views expressed in the Commission's previous report (A/39/10).

22. Mr. MIMOUNI (Algeria), recalling the history of the draft Code of Offences against the Peace and Security of Mankind, stressed the need for such a code, particularly in view of the failure of the system of collective security and the current spread of international violence. Noting the different approaches reflected by the discussion on the scope of the topic ratione personae, as well as the Commission's decision provisionally to limit the draft to the criminal responsibility of individuals, he reaffirmed that the Code must cover the criminal responsibility of States as well, and that the Commission should deal with that question accordingly. Individuals acting under the cover of a State would otherwise enjoy immunity and escape punishment.

23. With respect to the two alternatives of article 2, he invited the Commission to refer to the distinction made in the 1954 draft with a view to covering both individuals and State authorities in the most appropriate manner. His delegation agreed with the view taken in paragraph 62 of the report (A/40/10). It also supported the idea of combining the criterion of extreme seriousness with that of the breach of certain essential international obligations, provided that offences against the peace and security of mankind were listed on a strictly selective basis. In that respect, the first alternative of article 3, which was related to article 19 of the draft on State responsibility, provided a satisfactory working basis. However, the views expressed in paragraph 73 of the report deserved further consideration. An offence which gave rise to the criminal responsibility of an individual acting as an authority of a State should logically also give rise to the responsibility of the State.

(Mr. Mimouni, Algeria)

24. He reaffirmed his delegation's conviction that the future Code must not consist of a compilation of reprehensible acts. The Commission must proceed from a selection of international crimes, on the basis of the extreme seriousness of their consequences for the international community and mankind. In that respect, he noted the difficulty of incorporating the Definition of Aggression contained in resolution 3314 (XXIX) in the draft Code, and suggested that the Commission's work might be facilitated if certain parts of the operative paragraphs of that resolution were deleted, especially the provision concerning the Security Council and evidence of aggression. The threat of, and preparation for, aggression should also be included in the draft Code, possibly in a single provision, and should be further clarified. His delegation welcomed the Special Rapporteur's intention to include terrorism and mercenarism. Economic aggression must not be ignored, because it was contrary to the principles of economic independence of States and permanent sovereignty over natural resources. The Commission should therefore endeavour to identify all the aspects of that concept. Noting the persistence of colonial domination, with special reference to Namibia, he said that the Commission should also consider the question of apartheid, which should be included in the Code as an offence against the peace and security of mankind.

25. Mr. KACHURENKO (Ukrainian Soviet Socialist Republic) said that the idea of preventing offences against peace and security of mankind formed the very basis of the Charter of the United Nations. In a situation of unceasing violations of elementary norms of international law, acts of violence, coercion and threats by certain States, the continuation of the International Law Commission's work on the Code of Offences against the Peace and Security of Mankind was a matter of particular importance. His delegation took the view that the draft Code should provide a clear definition of the concept of offences against the peace and security of mankind and should include a rough list of such offences in accordance with the criteria established in article 19 of the Commission's draft on State responsibility. Such an approach would ensure close co-ordination between the two instruments and would mean that all existing or new forms of international crimes were encompassed in the light of contemporary international practice.

26. The list of acts constituting an offence against international peace and security should include aggression, the first use of nuclear weapons, State terrorism, the use of mercenaries, violations of the laws and customs of war, genocide, apartheid, and the establishment or maintenance by force of colonial domination. On the other hand, the Code should not attempt to deal with internationally wrongful acts, which, by their nature and consequences, did not constitute international crimes representing a threat to universal peace and to the security of mankind. Neither should the Code include offences of an international nature which did not pose a special threat to international law and order, even in cases where States were co-ordinating their efforts to combat such offences through special international agreements.

27. With regard to the two alternatives of article 2 submitted by the Special Rapporteur, he reiterated his delegation's view that the concept of criminal responsibility of States was without substance, since such a category of State

(Mr. Kachurenko, Ukrainian SSR)

responsibility was unknown in contemporary international law. Only individuals could incur international criminal responsibility under the draft Code, all matters pertaining to State responsibility being regulated by the draft articles on that topic, and, in particular, by part two of the draft. Such international crimes as aggression, genocide and apartheid were, of course, perpetrated in accordance with State policy, but their actual perpetrators were always individuals who might or might not be State officials.

28. The preventive function and efficacy of the draft Code would be enhanced by the inclusion of a provision to the effect that State legislation should lay down severe penalties for persons guilty of offences against the peace and security of mankind, thus precluding the very perpetration of such offences. A similar purpose would be served by the inclusion of a provision on the non-applicability of statutory limitations to offences against the peace and security of mankind.

29. In conclusion, he expressed the hope that the International Law Commission would expedite its work on the preparation of the draft Code.

30. Mr. BAEV (Bulgaria) referring to the draft Code of Offences against the Peace and Security of Mankind, said that his delegation supported the decision to limit the scope of the topic ratione personae to the criminal responsibility of individuals at the current stage. There was at present no mechanism which could serve as the basis for implementing a régime of criminal responsibility of States. That did not mean that States could not be sanctioned for internationally wrongful acts, including international offences, but that question was being dealt with under the topic of State responsibility. It added that sanctions applicable to States were also envisaged under Chapter VII of the Charter of the United Nations.

31. The category of persons who might be perpetrators of offences against the peace and security of mankind should include individuals acting as the representatives of a State and private individuals. In the majority of cases, such offences were perpetrated by individuals acting as the representatives of a State. Such cases should be thoroughly covered in the draft Code. However, offences perpetrated by a group of individuals should also be taken into consideration. Otherwise, a certain category of offences would not be included in the Code although they constituted a grave public danger.

32. He supported the view expressed in paragraph 50 of the report of the International Law Commission (A/40/10) that specific criminal acts should be studied before any general principles could be formulated. Nevertheless, work on the formulation of those general principles should begin as soon as possible in parallel with the preparation of a list of offences. The Commission should be guided by the general principles of criminal law, the principles set out in the 1954 draft Code, the Nürnberg Principles, certain international treaties, and State practice. The principles of nullum crimen sine lege, jus cogens, and non-applicability of statutory limitations to the offences under consideration should be included among the general principles of the draft Code.

(Mr. Baev, Bulgaria)

33. He was pleased that the concept and meaning of offences against the peace and security of mankind had again been the subject of in-depth consideration by the Commission. His delegation endorsed its conclusion concerning the integral unity of the notions of peace and security. It also supported the idea of elaborating a general definition to supplement the list of specific offences. That definition would be based on general criteria relating to the increased public danger which offences represented as well as the general awareness of their harmful effect. In that connection, he preferred the second alternative of draft article 3 submitted by the Special Rapporteur. The term "international obligation" in the first alternative concerned subjects of international law, namely, States rather than individuals.

34. His delegation reaffirmed its support for the minimum content of the Code with regard to acts constituting offences. It also saw the need to update the definitions of offences contained in the 1954 draft Code in the light of subsequent developments. The Definition of Aggression adopted in 1974 should serve as the basis for formulating the definition of aggression in the current draft Code. Agression was the gravest offence against the peace and security of mankind. The concept of the threat of aggression and the concept of the preparation of aggression should both be closely studied with a view to their inclusion in the list of offences. It should be borne in mind that a powerful State could achieve its goals merely by threatening aggression, and there was an obvious need for prevention and punishment in such cases.

35. His delegation was particularly satisfied with the efforts that had been made to identify the basic elements of the concept of "interference" in the internal or external affairs of States, and supported the inclusion of State terrorism in the list of offences. The juridical aspects of colonial domination needed to be identified, for colonialism still existed in many parts of the world. Mercenarism should continue to be studied, particularly in relation to acts of aggression; the use of mercenaries against the sovereignty of States, to destabilize Governments and to suppress national liberation movements could endanger international peace and security. Since economic aggression could also jeopardize international peace and security, the Commission should continue to study it with a view to formulating an appropriate legal definition.

36. Genocide and apartheid should be among the offences discussed by the Commission in its future work on the topic. The list of offences would be incomplete if the first use of nuclear weapons was not added to it. The discontinuation of nuclear-weapon tests and the prohibition of the use of nuclear weapons and other weapons of mass destruction would be an extremely important step towards the strengthening of international peace and security.

37. Mr. GUILLAUME (France) recalled that the Commission had earlier indicated its intention to proceed by stages with regard to the draft Code of Offences against the Peace and Security of Mankind, endeavouring first of all to identify serious breaches of international law which might be considered to constitute international offences and then deciding which among those offences should be regarded as

(Mr. Guillaume, France)

offences against the peace and security of mankind. In spite of the difficulties involved, his delegation had thought that the effort would have been worth while. However, the Commission appeared to have abandoned the plan and to be currently engaged, on the one hand, in an abstract study of the concept of offences against the peace and security of mankind, and, on the other hand, in attempts to produce a precise definition of acts constituting such offences. With regard to draft article 2, his delegation shared the view that criminal offences could be committed only by individuals, not by States, and therefore welcomed the Commission's decision to reject the second alternative submitted by the Special Rapporteur. At the same time, it considered that to take a decision on the first alternative would be premature, since the scope of the Code ratione materiae would have to be clearly defined before it could be determined whether individuals having no State authority were or were not capable of committing an offence against the peace and security of mankind.

38. In that connection, draft article 3 seemed to raise more problems than it resolved. The second alternative proposed was a transposition pure and simple of the text of article 19 of the draft on State responsibility, with regard to which his delegation entertained the most serious doubts and which, moreover, was concerned with States and not with individuals. Furthermore, the concept of an "internationally wrongful act recognized as such by the international community as a whole" was far too vague to be included in a document which set out to define certain offences. Acts and situations which aroused universal political condemnation did, of course, exist, but that was not the point at issue. The draft Code set out to establish a new category of offences and, for that reason, obviously had to be couched in extremely precise terms. Unfortunately, neither of the alternatives proposed for article 3 met that condition; nor did article 4 on acts of aggression.

39. The unleashing of a war of aggression was, of all acts, unquestionably the one which should be covered by a code of offences against the peace and security of mankind. But the problem of defining an act of aggression was far from simple. The temptation to refer to General Assembly resolution 3314 (XXIX) was naturally great but, as some members of the Commission had rightly pointed out, that resolution was intended for a political organ and not a judicial one. Moreover, under the resolution the Security Council had power to determine that acts other than those enumerated constituted aggression or that acts which were enumerated did not do so. The Commission should surely adopt the same approach and exercise a similar degree of caution, since it was inconceivable that an act not regarded as aggression by the Security Council should be qualified as such in a code intended for the use of national and international judicial authorities. At all events, the matter required further and deeper reflection.

40. His delegation also shared the view of those members of the Commission who considered that the notion of intervention was too vague to be regarded as an offence against the peace and security of mankind. On that point, as also on the subject of terrorism, a good deal more thought was needed. As for the subject of the use of nuclear weapons, he wished to reiterate his delegation's strong and

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unchanging view that, in the interests of preserving its credibility and its authority as a juridical body, the Commission should refrain from pronouncing itself upon the matter. In order to achieve any progress in the exceptionally delicate and difficult field covered by the draft Code, the Commission must eschew political apriorism and adopt a strictly juridical approach.

41. Turning to the subject of State responsibility, he said that it was difficult to assess the value of article 5, without knowing what rights would be enjoyed by the injured State. There was a serious risk that all the injured States referred to in article 5 might be understood to enjoy similar if not identical rights with regard to countermeasures or reparation, for example. Accordingly, paragraph 1 of article 5 should be revised to refer only to the State whose right had been infringed and which, as a result of that infringement, had suffered direct injury. Paragraph 2 of the article should be deleted.

42. In respect of articles 6 and 7, while appreciating the Special Rapporteur's attempts at clarification, his delegation continued to take the view that a more general and more flexible formulation was needed. In connection with articles 8 and 9, he remarked that none of the alternative texts proposed corresponded precisely to the present state of international customary law, for example with regard to the traditional interpretation of the concept of reprisals. In any case, his delegation did not consider that the question of countermeasures or of sanctions should be dealt with in the draft. It was also seriously concerned about the implications of article 14, especially if read in conjunction with paragraph 3 of article 5.

43. Article 12 of the draft on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier should specify that a diplomatic courier declared persona non grata or not acceptable must be able to complete his task by delivering the diplomatic bag to its destination. Paragraph 1 of article 12 and paragraph 2 of article 21 in conjunction with the commentary thereto could be understood to mean that since the courier's functions could come to an end before he left the territory of the receiving State, he could for that reason be prevented from completing his mission.

44. His delegation considered that the question of immunity from jurisdiction was adequately covered by article 27 of the 1961 Vienna Convention on Diplomatic Relations. It therefore favoured the deletion of article 18, paragraph 3 of article 21 and paragraphs 3, 4 and 5 of article 22. It had no difficulty in accepting paragraph 1 of article 21 and paragraphs 1 and 2 of article 22. While continuing to have doubts as to the usefulness of article 23, it would not object to its being maintained if such was the general wish. In that case, however, the text adopted should not be more restrictive than that of the Vienna Convention, and the reference to "regular lines" envisaged by the Commission should therefore be dropped. The provision in paragraph 3 of article 23 was useful and enjoyed his delegation's full approval. Paragraph 1 of article 24 did not give rise to any problems since it was identical with paragraph 4 of article 27 of the 1961 Vienna Convention; paragraph 2, on the other hand, should be redrafted in such a way as to

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make it clear that indications of the destination and consignee were not the only visible external marks of their character which the packages constituting the diplomatic bag had to bear. The text of paragraph 4 of article 27 of the Vienna Convention should be reproduced verbatim in paragraph 1 of article 25. His delegation was not convinced of the usefulness of paragraph 2 of article 25, or of article 26, but would be prepared to go along with the majority view in that respect.

45. With regard to the articles which had not yet been considered by the Drafting Committee, and in particular article 36 in conjunction with article 43, he said that his delegation would oppose any solution which would modify the régime of the diplomatic bag by infringing its inviolability. It therefore could not agree to the bag being returned to its place of origin (para. 2 of art. 36 as proposed by the Special Rapporteur) and, a fortiori, to a State being given the possibility to make a unilateral declaration that it would apply to the diplomatic bag the rule applicable to the consular bag, as mentioned in paragraph 182 of the report (A/40/10). Such an option would be absolutely contrary, not only to the 1961 Vienna Convention, but also to international customary law. His delegation was also opposed to any agreement inter se and to any optional régime in that field. Lastly, referring to article 41, he remarked that the Special Rapporteur's explanation to the effect that the purpose of the article was to contemplate the situation of non-recognition or absence of diplomatic or consular relations between a sending State and the State host to an international conference or an international organization was not incorporated in the body of the article. In any event, in line with its general position concerning the scope of the draft articles, his delegation considered that article 41 was out of place.

46. Turning to the topic of jurisdictional immunities of States and their property, he recalled, in connection with article 19 relating to State-owned or State-operated ships engaged in commercial service, that France was a party to the 1923 Geneva Convention on the International Régime of Maritime Ports and the 1926 Brussels Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, both of which used the criterion of the use to which the ship was put to determine its status. Article 96 of the United Nations Convention on the Law of the Sea provided that ships owned or operated by a State and used only on government non-commercial service should, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State. Thus it could be seen that to enjoy immunity a ship should be owned or operated by a State and be used in non-commercial service. If it was used for commercial service, the ship lost its right to immunity. Draft article 19, on the other hand, negatively defined ships that could not enjoy such immunity. In his delegation's view the words "non-governmental" should not be retained in that article, since, under the above-mentioned Conventions a State-owned ship in commercial service did not enjoy any immunity. Moreover, by retaining a negative definition, the current text of article 19 afforded jurisdictional immunity to State ships in private non-commercial service. That was a substantive modification of the provision contained in the Convention on the Law of the Sea and he questioned whether it was opportune. Rather, the Commission should rely on the definition in article 96 of that Convention, in which case draft article 19 should not be included in the part

(Mr. Guillaume, France)

of the text relating to exceptions to State immunity. His delegation had doubts about supporting article 20 on the effect of an arbitration agreement. With regard to State immunity from execution, he merely wished to recall, in connection with article 22, that according to traditional French concepts, immunity from jurisdiction and immunity from execution were two quite distinct immunities.

47. Certain of the concepts used in part IV of the draft needed to be clarified, particularly that of property in the "control" of a State or in which it "has an interest". The scope of part IV should be revised in the light of the definition of State property that would appear in article 2, paragraph 1 (f).

48. Article 24 listed the types of State property which would enjoy permanent immunity from execution. He considered that any such list would be incomplete, and could create difficulties regarding items that had been omitted. It would be better either to establish the principle of immunity and any possible exceptions thereto, or to use a general formula to designate property which should be considered as having immunity.

49. Mr. BOUABID (Tunisia) said that his delegation had noted with satisfaction the structure proposed by the Special Rapporteur for the draft Code of Offences against the Peace and Security of Mankind and the proposal to start by drawing up a list of international offences and afterwards to consider general principles.

50. The future Code should focus on the criminal responsibility of States. Since many offences against the peace and security of mankind were or could be committed by States, failure to provide for the criminal responsibility of States would deprive the Code of much of its meaning.

51. With regard to the criminal responsibility of individuals, the question was whether by "individuals" was meant persons acting in a private capacity or agents of the State. His delegation preferred the first alternative of article 2, which referred to "individuals" without distinguishing between private persons and authorities. That would enable all offences to be covered, regardless of the status of their authors.

52. Concerning the definition of an offence against the peace and security of mankind, his delegation considered that the second alternative proposed by the Special Rapporteur for article 3 was more restrictive than the first. The first contained the elements that the Commission had recognized as being of the greatest importance for safeguarding the fundamental interests of the international community and which could constitute the basis of a definition of offences against the peace and security of mankind.

53. His delegation was surprised that the crimes of apartheid and the use of nuclear weapons had not been defined in the report as offences against international peace and security. He hoped that the Commission would consider those items, especially in the light of the Sixth Committee's debate on them at the previous session. In connection with the offence of aggression, it would be

(Mr. Bouabid, Tunisia)

preferable not to include the full text of the Definition of Aggression contained in draft article 4, for the sake of concision and in order to avoid the difficulties referred to in paragraph 83 of the Commission's report. A brief reference to that Definition would be sufficient, although the text of resolution 3314 (XXIX) might possibly be attached as an annex. The second alternative of section A of article 4 therefore seemed to be more appropriate.

54. The threat of aggression should be included in the draft Code. On the other hand, further thought should be given to the concept of the preparation of aggression referred to in article 1, paragraph 3, of the 1954 draft. It should be further clarified, especially with regard to its constituent elements.

55. With regard to the offence of intervention in the internal or external affairs of States, his delegation was not in favour of listing as offences the specific acts which constituted intervention, which could in fact take multiple and sometimes subtle forms that were not easily enumerated. However, both the term "intervention" itself and the wording of the heading needed to be improved. A heading such as "interference in the affairs of another State" might be more pertinent and precise. The difference in meaning between the terms "intervention" and "interference" deserved to be examined.

56. With regard to the offence of terrorism, his delegation was pleased that the Commission had considered the international dimension of that offence when it endangered the security and stability of another State, its inhabitants and their property. Draft article 4, section D, as proposed by the Special Rapporteur appeared to take account of the considerable upsurge in terrorist activities since the 1937 Convention for the Prevention and Punishment of Terrorism. Because the nature of terrorism was evolving, the list of terrorist acts in paragraph (b) of section D should be considered as being merely indicative, and the first part of paragraph (b) should be amended accordingly.

57. His delegation reiterated its wish to see economic aggression, mercenarism and the forcible establishment or maintenance of colonial domination included separately in the future Code. Such acts were of such a serious nature that they should not be left out or incorporated under more general headings.

58. Mr. SENE (Senegal) said that the draft Code of Offences against the Peace and Security of Mankind must be placed in the historical context of the Second World War, which had caused untold suffering and one of whose principal causes had been the violation of law by certain States. In the view of his delegation, it was important to elaborate the Code for two reasons. The first was the capacity for mass destruction which increasingly endangered international security. The second was the need for mankind to protect itself against violations of the rules which guaranteed its very existence. The violation of such rules must be considered an offence against the peace and security of mankind and punished as such.

59. Efforts to establish such rules, however, came up against the controversial question of the definition of the concept of "offence against the peace and security of mankind". Some members of the Commission favoured a general

(Mr. Sene, Senegal)

definition, others an enumeration of those acts which constituted offences against the peace and security of mankind. Viewed separately, each of the two approaches presented advantages and disadvantages. His delegation therefore supported the Special Rapporteur's attempt to reconcile them by proposing a general, though precise, definition accompanied by the enumeration of some of the offences which were generally considered to be offences against the peace and security of mankind. Such an enumeration, however, should not be restrictive and should leave room for further additions.

60. Concerning the scope of the Code, he said that his delegation was convinced that States should be held responsible for offences against the peace and security of mankind. Most of the acts constituting offences against the peace and security of mankind could be committed only by States. The weight of the responsibility of the State should be proportional to the importance of the rule breached. Rules of law were not all equally important to the international community, and genocide, for example, could not be penalized in the same way as the non-fulfilment of an obligation to grant reciprocal treatment in matters of trade. The State was the primary subject of international law. The recognition of individuals as subjects of international law was still limited, and the Nürnberg Tribunal was still an isolated example which should be kept in its historical context. Consequently, a code of offences against the peace and security of mankind which referred only to the responsibility of individuals would not be very effective at the practical level.

61. For reasons of legal consistency, in addition to those he had just put forward, his delegation considered that the criminal responsibility of the State should be dealt with in the Code of Offences itself and not in the draft articles on State responsibility. The special nature of the criminal responsibility of States demanded recourse to special rules, whereas the draft articles on State responsibility were concerned with the ordinary law of responsibility. Nevertheless, his delegation approved the Commission's wise decision to limit its consideration to the criminal responsibility of individuals for the time being. The decision had been made for reasons of methodology and, as the Special Rapporteur had made clear, did not in any way prejudice the possibility of examining the criminal responsibility of States at a later stage.

62. The possibility of applying further rules to States was provided for in the draft articles on State responsibility, article 2 of which stated that "without prejudice to the provisions of articles 4 and [12], the provisions of this Part govern the legal consequences of any internationally wrongful act of a State, except where and to the extent that those legal consequences have been determined by other rules of international law relating specifically to the internationally wrongful act in question." Although that article could be interpreted as envisaging the application of the provisions of Chapter VII of the Charter, it could also apply to other special rules such as those embodied in the Code of Offences.

(Mr. Sene, Senegal)

63. The debates which had taken place on the draft Code, the differing positions reflected in the report and the length of time that the draft Code had been under consideration showed that the Commission was confronted with a difficult task. The efforts it had made over the years to carry out that mission merited the Sixth Committee's sympathy and support.

64. Mr. AL-DUWAIKH (Kuwait) said that, despite the considerations outlined in paragraphs 46 to 50 of the Commission's report, his delegation believed that it would be best, in considering the draft Code of Offences against the Peace and Security of Mankind, to begin with the question of general principles. That might help overcome the difficulty of defining criminal acts in which political factors were involved.

65. With regard to the delimitation of the scope of the topic, his delegation endorsed the approach of the Special Rapporteur in deciding to limit the draft to the criminal responsibility of individuals, without prejudice to the possibility of later considering the criminal responsibility of States. An in-depth study should be made in order to determine the category of individuals to be covered by the draft, on the basis of the analysis contained in paragraph 58 of the report. His delegation did not support the view, mentioned in paragraph 59 of the report, that some offences against the peace and security of mankind could also be committed by private individuals without any participation, order or instigation by a State. Any act that constituted an offence against the peace and security of mankind would have to be so grave that it could only be committed by or with the assistance of a State. Such an act could not be committed with the limited capacities available to individuals, but only in the context of unequal international relations where powerful States imposed their hegemony on weaker States by various means, including the use of individuals and institutions. His delegation considered that neither of the alternatives of article 2 submitted by the Special Rapporteur was clearly in keeping with the true nature of the problem. A more careful study of the topic was required.

66. With regard to the definition of an offence against the peace and security of mankind, although his delegation preferred the Special Rapporteur's approach based on article 19 of the draft on State responsibility, it considered that the ultimate definition would be based on that of criminal offences and their relation to the violation of interests relating to the maintenance of peace. The view that the concept did not have to be defined since many national codes did not define "crime", but merely provided for a range of penalties, with the harshest applying to "crimes" as opposed to lesser offences, could not be accepted. The offences falling within the scope of the draft were of a special character and could not be equated with the crimes committed by individuals that were punished by the national codes. The approach adopted in the Definition of Aggression was a precedent that could be followed in the definition of an offence against the peace and security of mankind. Such a definition must be clear and simple in order to include the various forms such offences might take.

(Mr. Al-Duwaikh, Kuwait)

67. His delegation questioned the importance of drawing a distinction between the notions of "international peace and security" and "peace and security of mankind" in the context of the discussion of acts constituting an offence against international peace and security. The Special Rapporteur, whose views on the matter were summarized in paragraphs 76 to 78 of the Commission's report (A/40/10), should have based his discussion on established historical facts and on the norms of international law, rather than on mere intellectual inference. The distinction made would enlarge the scope of the draft Code because of the complex and heterogeneous elements covered by the two notions. A clear and unified concept must therefore be sought.

68. Aggression was one of the greatest offences against the peace and security of mankind. His delegation favoured the first alternative of article 4, and considered that the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX) should be incorporated rather than simply being referred to without the text in full. Precision was required in defining the threat of aggression and the preparation of aggression since they could be military, political or economic in nature. The existence of a threat of aggression or of preparation of aggression could be established with ease from evidence of mobilization, demonstrations of force and statements made by political leaders. Such acts of aggression should, however, be characterized as indirect and should not be equated with direct aggression. It was more difficult to establish the existence of the threat or preparation of economic aggression or to define their nature and scope since they were bound up with complex political circumstances.

69. His delegation favoured the inclusion in the draft Code of an article concerning intervention in the internal affairs of States. The Commission should avoid drawing a distinction between internal intervention and external intervention and should instead adopt a unified concept of intervention in the internal affairs of States. The external affairs of States were to be considered a reflection of their internal affairs.

70. Terrorism should be considered an offence against the peace and security of mankind. The draft article submitted by the Special Rapporteur was based on the 1937 Convention for the Prevention and Punishment of Terrorism as updated to take account of new forms of terrorism, including seizure of aircraft and violence directed against persons enjoying special protection, especially diplomatic or consular personnel. A distinction should nevertheless be made between acts of terrorism carried out by individuals and those fostered and supported by States.

71. His delegation favoured the inclusion in the draft Code of an article on the forcible establishment or maintenance of colonial domination, and rejected the argument that the notion of colonial domination belonged to the past. That notion should, moreover, be interpreted broadly.

72. While his delegation supported the inclusion of an article on mercenarism, the text relating to that offence should be based on the work of the Ad Hoc Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries.

(Mr. Al-Duwaikh, Kuwait)

73. The question of economic aggression must be handled with delicacy. Such aggression had the aim of coercing States in order to obtain from them the subordination of the exercise of their sovereign rights which was prohibited by article 32 of the Charter of Economic Rights and Duties of States.

74. The overall structure of part two of the draft articles on State responsibility was generally acceptable. His delegation was pleased that the Commission had provisionally adopted article 5, the keystone of the draft articles in part two. It agreed with the view stated in paragraph (5) of the commentary that States, when creating "primary" rights and obligations between them might well, at the same time, determine which State or States were to be considered "injured" State or States in case of a breach of an obligation imposed by that "primary" rule, and thereby determine which State or States were entitled to invoke new legal relationships and even which new legal relationships were entailed by such a breach. The text of the new article was unclear with regard to a third State that might be considered an "injured" State or that might be entitled to object to new legal relationships entailed by such a breach. The Special Rapporteur should give greater attention to the situation where there were more than two States parties to the dispute. There did not seem to be any convincing reason for the inclusion in article 5 of paragraph 2 (e) (iii), and it should be deleted. Paragraph 3 also seemed to enlarge the scope of the article in an unjustifiable manner. Moreover, the Special Rapporteur should see to it that there was a clearer link between the introductory text of paragraph 2 and the subsequent subparagraphs.

75. Satisfactory progress had been made on the topic concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. While there were clear rules in the relevant multilateral instruments, problems did not always necessarily arise from abuse but from differing views of the legal aspects of particular cases and the adoption of a unified régime would settle such questions and eliminate doubt. His delegation felt that there was a certain incompatibility between the provisions of the revised text of draft article 36 and those of draft articles 42 and 43. Those latter two articles might also prove not to be in keeping with article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations.

76. The Commission should expedite its work on the topic concerning international liability for injurious consequences arising out of acts not prohibited by international law. The appointment of a new Special Rapporteur on the topic would facilitate the process. It was the developing countries and the poor countries that suffered the greatest loss or injury from activities within the territory of other States.

77. Mr. VAN TONDER (Lesotho), commenting first on the draft Code of Offences, said that his delegation would have preferred the Commission to take up the question of the criminal responsibility of States immediately, rather than limiting the draft Code at the current stage to the criminal responsibility of individuals. Many of the offences contemplated were sanctioned or carried out by States directly or

(Mr. van Tonder, Lesotho)

through private individuals or groups of individuals. It was no solution to the problem to address only the instruments of the offence, without at the same time addressing the powers which manipulated the whole machinery. His delegation believed that States could not be lightly absolved of responsibility for the acts of their citizens. As a minimum, a State should be called upon for an explanation in respect of individuals. The justification for such accountability was even greater in the case of officials or authorities of the State, since it was generally accepted in contemporary international law that a State incurred responsibility for any acts contrary to international law committed by any of the executive or administrative agents or officers of the State. It was awkward, therefore, to refer only to the criminal responsibility of individuals and to say nothing about the State involved. For instance, according to the Definition of Aggression only States were capable of aggression. The criminal responsibility of States must therefore be reflected in the Code. It would also be very helpful if the questions of implementation and jurisdiction vis-à-vis States could be taken up at the same time as the criminal responsibility of States.

78. His delegation was doubtful of the advantages of draft article 3, relating to the definition of an offence against the peace and security of mankind, particularly when it was compared with article 4. Since the latter article enumerated acts constituting offences against the peace and security of mankind, article 3 was unnecessary. However, paragraphs (a), (b), (c) and (d) of the first alternative of article 3 should be incorporated in article 4. There seemed to be no real legal purpose in having 3 and 4 as separate articles. Combining them would be a great step forward towards defining the offence, which was central to the Commission's work on the Code, particularly since they were apparently the subject of a broad consensus.

79. His delegation would like to see the term "aggression" defined in the section dealing with definitions and the use of terms, if the Code was to contain such a section. A reference to General Assembly resolution 3314 (XXIX) or a definition of aggression in a footnote would be less desirable. His delegation was also in favour of including among the acts constituting an offence against the peace and security of mankind the threat of aggression, the preparation of aggression, intervention in the internal and external affairs of States, and terrorism, always provided that the latter was not construed in a way prejudicial to the struggle for self-determination and independence. It was also in favour of including the violation by the authorities of a State of the provisions of a treaty designed to ensure international peace and security, although it would prefer to say "States" rather than "authorities of a State".

80. The concept of the threat of aggression had already won universal acceptance in Article 2, paragraph 4, of the Charter. The forcible establishment or maintenance of colonial domination should also be included in the Codes since the United Nations was still unfortunately seized with the problem of the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples. The question of mercenarism should be included, in respect both of the mercenaries themselves and of those who organized them. When the issue had been discussed earlier, many delegations had been of the view that States were invariably behind mercenaries.

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81. Turning to the draft articles on State responsibility, he said that, in his delegation's view, draft article 19 of part one, on international crimes and international delicts, and article 4 of the draft Code of Offences overlapped, although the offences were not as well defined in article 19 as in article 4. It might be better to have crimes and delicts in two separate articles, which would mean rearranging chapter III of part one. It would have to be decided where the criminal responsibility of States was to be included, however, whether in the draft Code or in the draft articles on State responsibility. With regard to the latter, his delegation would prefer the deletion of article 2 of part one, on the grounds that it served no useful purpose. It was also disturbed by the provisions of articles 5 and 7. In its view, the presumption was that organs of a State acted in that capacity at all times, the burden of proof being on the State which claimed that an organ was not acting in an official capacity. The onus should not be shifted to the plaintiff State, particularly since it was generally accepted in contemporary international law that a State incurred international responsibility if damage was caused as a result of acts performed under cover of their official character, if the acts contravened that State's international obligations. Any other view would render the whole question of State responsibility illusory. A formulation along the lines of draft article 10 of part one would be an improvement on draft articles 5 and 7. Regarding article 14, he commented that failure of the State to perform its international duty of preventing the unlawful acts, or failure to arrest the offender and bring him to justice, would entail a breach of that State's international obligations. His delegation found paragraph 2 of draft article 19 vague and felt that clarification was also needed in regard to draft articles 22 and 27. It recommended deleting the second part of paragraph 2 of draft article 29, on the grounds that it was not necessary. Draft article 30 would lead to the escalation of tension between States. Peaceful means of settlement should be resorted to before retaliatory measures were taken. His delegation found the phrase "irresistible force" in article 31 vague and would prefer the use of "force majeure".

82. Regarding part two of the draft articles, his delegation found the method used to describe an injured State in article 5, as proposed by the Special Rapporteur in his fifth report, rather difficult to follow. The word "means" in the chapeau did not go well with the "if" used in the subparagraphs. Article 6 was unnecessarily detailed, and his delegation would prefer a more all-embracing remedy for an injured State, accompanied by some formulation regarding implementation and jurisdiction. Article 7 referred to an internationally wrongful act as a breach of an international obligation. In his delegation's view, an internationally wrongful act could stand on its own as an injurious act. Articles 8 and 9 seemed somewhat unconstructive, even with the provisos in articles 10 and 12. His delegation's comments regarding articles 5 and 7 of part one applied to article 13 of part two also. It agreed with the recommendation that article 14 should be examined in relation to article 19 of part one. It also agreed that paragraph 1 of article 14 was vague regarding the definition of rights and obligations. The whole article should be redrafted after a decision had been taken on article 19 of part one regarding consequences, which had not yet been clearly defined. Article 16 of part two seemed exhaustive but if it was in fact not so, it should receive further

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consideration. His delegation looked forward to further major improvements in the articles on State responsibility and to a redrafting of part three on the implementation of international responsibility and the settlement of disputes.

83. He was gratified to see that a good deal of progress had been made in respect of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. His delegation had carefully studied the text of draft article 36 proposed by the Special Rapporteur on the inviolability of the diplomatic bag, and felt that it went a long way towards striking a balance between the interests of the sending, receiving and transit States, especially since it would be applied on the basis of reciprocity. If the secret and confidential nature of the bag was to be respected at all times, it was only logical that it should remain inviolable at all times and should therefore be exempt from any kind of examination, directly or through electronic or other mechanical devices. Small developing countries which did not possess sophisticated electronic and mechanical screening devices would be placed at a disadvantage if the articles were to give such a right to receiving and transit States. His delegation also welcomed the inclusion of the phrase "unless otherwise agreed by the States concerned". If there were serious doubts concerning the contents of the bag, it was only reasonable that the matter should be discussed by the parties concerned for the purpose of reaching a reasonable compromise.

84. Paragraph 2 of the draft article would seem to provide a reasonable safeguard against possible abuse by the sending State since it provided that if the authorities of the receiving State or the transit State had serious reason to believe that the bag contained something other than official correspondence, they could request that it should be returned to its place of origin. His delegation's interpretation of the draft article would accommodate the solution envisaged in article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations, in that if a State was so suspicious about the contents of the bag as to request that it should be returned, it would be up to the sending State to decide whether the bag should be returned or opened for inspection by the receiving State. The language proposed by the Special Rapporteur could perhaps be improved to reflect that such an option was available to the sending State. It would be unreasonable to allow the receiving State the unfettered right to decide exclusively and unilaterally on the return of the bag. His delegation would therefore concur with the Special Rapporteur's conclusion that, as a general rule, article 36 should provide that the diplomatic bag should remain inviolable at all times; that it should not be opened without the express consent of the sending State; and that it should be exempt from customs and similar inspection or examination through electronic or other mechanical devices, which might be prejudicial to its inviolability and confidential character.

85. Regarding draft article 37, his delegation agreed that the phrase "in accordance with such laws and regulations as they may adopt" was superfluous. The whole issue of customs and other inspections was adequately dealt with in article 36. Article 37 should therefore be confined to matters covering exemptions from taxation and should be revised accordingly.

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86. Although both articles 39 and 40 seemed to cover situations of force majeure or fortuitous event, the particular sets of situations addressed in each article were not identical, since, according to the Special Rapporteur's explanation in paragraph 187 of the Commission's report (A/40/10), article 39 related to situations where the bag was no longer in the custody of the diplomatic courier, whereas article 40 catered for situations in which the courier and the bag deviated from the normal itinerary although the courier might still have custody of the bag. It was logical that the State not initially foreseen as a transit State should be under an obligation to provide the sending State with the necessary information regarding the whereabouts of the courier and the bag. The aim of the provision was to safeguard the inviolability and confidentiality of the bag, and to ensure its safe delivery to the appropriate authorities of the sending State. Care should be taken, therefore, to produce a proper formulation so that the desired effect was realized. His delegation continued to believe that there was no need to merge articles 39 and 40.

87. His delegation fully supported draft article 41. The rights and obligations of the receiving and transit States should not be based on the existence of diplomatic relations. That would interfere with the whole practice of sending confidential correspondence by way of the diplomatic bag. Even if the sending State entrusted the protection of its interests to a third State acceptable to the receiving State, it should be borne in mind that the appropriate authorities at the customs inspection posts and entry points would be those of the receiving State, and that it would be most undesirable for them to be given leeway to open and inspect the bag on the basis of non-recognition of the sending State.

88. His delegation had no serious problem with the text of draft article 42 proposed by the Special Rapporteur, particularly if it was understood that the words "without prejudice" in paragraph 1 meant that the new provisions were intended to complement the four existing Conventions, especially the 1961 and 1963 Vienna Conventions. The explanation of article 43 in paragraph 198 of the report persuaded his delegation of the desirability of such an article.

89. With respect to the draft articles as provisionally adopted by the Commission, Lesotho welcomed the functional approach envisaged in the formulation of article 18 regarding immunity from jurisdiction, and also supported the text of article 23 as it stood.

90. In general, his delegation was satisfied with the Commission's work on jurisdictional immunities of States and their property. It noted that there was a broad consensus in the Sixth Committee on the draft articles on that topic. His delegation too supported the draft articles and looked forward to reviewing them at the forty-first session of the General Assembly before they were finalized.

91. In connection with the International Law Seminar, his delegation wished to pay a tribute to all those Governments which continued to make fellowships available to participants from developing countries. It urged other Governments which possessed the necessary resources to give serious consideration to financing that valuable

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project, which allowed lawyers from developing countries to become better acquainted with the work of the International Law Commission and other relevant organs of the United Nations in Geneva.

92. Mr. CULLEN (Argentina) said that the financial difficulties which threatened future International Law Seminars were a cause of great concern in view of the importance of those Seminars to young jurists.

93. With regard to the draft Code of Offences against the Peace and Security of Mankind, his delegation was in favour of an acceptable, pragmatic criterion for the delimitation of the scope of the topic ratione materiae. It supported the Commission's decision to limit the scope of the topic ratione personae, at the current stage, to offences committed by individuals, since the concept of criminal responsibility of States presented difficulties which could jeopardize future work on the topic. In addition, such limitation of the scope of a topic was a good technique which the Commission normally adopted in the initial stages of its work.

94. The status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier was not adequately covered by the existing international conventions. They contained differences in a number of areas relating to the treatment of the diplomatic bag, the consular bag and the question of immunity from jurisdiction. The principal objective of the work on the topic should be to try to facilitate official communications between States and their missions abroad. It should also lead to the elaboration of a legal framework and of specific provisions governing the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

95. With regard to the law of the non-navigational uses of international watercourses, his delegation looked forward to the resumption of discussions based on the general organizational structure provided for in the outline for draft articles on the topic. It regretted that two of the basic concepts included in the first outline had been modified, the concept of "system" and that of "shared natural resources". The elimination of those two concepts had removed the justification for several of the draft articles.

96. On the topic of State responsibility, his delegation saw no need for the inclusion of article 7 among the draft articles proposed by the Special Rapporteur in his sixth report. That provision seemed to refer to only one of the cases covered by article 6. Moreover, the concept of reciprocity, referred to in article 8, should be considered in relation to the object of article 9, namely, the question of reprisal, especially since the concepts of violence and proportionality were closely related. His delegation concurred with the notion contained in article 10 that no measures of reprisal should be taken by the injured State until it had exhausted the international procedures for peaceful settlement of the dispute. The article on aggression should not be omitted from any future instrument since aggression constituted something more than the mere suspension of the performance of an international obligation. His delegation looked forward to part three of the outline in order to have an overall perspective of the system to be proposed for the settlement of disputes.

97. Mr. VREEDZAAM (Suriname) said that since the Judgment of the Nürnberg Tribunal had addressed acts committed by individuals in their capacity as agents of a State, such acts had been committed equally by the State in question because of their imputability to that State. The Judgment of the Tribunal and the punishment of the individuals concerned had been possible only because of the defeat of the State on whose behalf those crimes had been committed during the Second World War. While accepting the decision of the International Law Commission that the draft Code should be limited at the current stage to offences committed by individuals, his delegation felt that the concept of the criminal responsibility of States was as important as that of the criminal responsibility of individuals. History had shown that States had been more involved in offences against the peace and security of mankind than invididuals acting in their private capacity.

98. While States could not be punished in the same manner as individuals, they could be liable for damages caused by individuals acting on their behalf. His delegation would prefer the use of the term "liability" instead of "responsibility" to indicate that the State should be liable for such damages.

99. With regard to the outline of the future Code, his delegation concurred with the methodology set out in paragraphs 43 to 64 of the Commission's report (A/40/10). It shared the view expressed in paragraph 47 concerning the principles of nullem crimen sine lege and non-retroactivity, and the applicability of jus cogens with its non-temporal element. It also endorsed the concept of complicity and the requirement of a "concursus plurium ad delictum", referred to in paragraph 49. The Special Rapporteur should deal with the question of general principles in his next report to enable members of the Commission as well as Governments to address themselves to them more specifically in future.

100. With respect to the delimitation of the scope of the topic ratione materiae, Suriname believed that the purpose of the draft Code could not be achieved if it were limited to the responsibility of private individuals, since most offences against the peace and security of mankind were committed by States. The distinction between "private individuals" and "the authorities of a State" was a useful one in that it indicated that "the authorities of a State", although individuals, acted on behalf of the State, while "private individuals" acted on their own behalf.

101. On the question of whether private individuals could commit offences against the peace and securty of mankind, his delegation did not agree that the draft Code was primarily intended to prevent the abuses to which the exercise of power might give rise. It was intended, rather, to protect the peace and security of mankind and was addressed to anyone who was capable of committing an offence against peace and security. He supported the view, moreover, that some private multinational corporations and criminal organizations had sufficient means to endanger the stability not only of small States, but of the great Powers as well. He therefore supported the first alternative of article 2, which was broader in scope than the second.

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102. His delegation endorsed the view that it was unnecessary to define the term "offence against the peace and security of mankind". Such offences were constituted by the breach of obligations intended to defend the most fundamental interests of mankind, namely, the maintenance of peace, the protection of fundamental human rights, the safeguarding and preservation of the human environment, and the preservation of the human race.

103. His delegation supported the views expressed in paragraphs 75 to 78 of the report, particularly the distinction between the notions of "international peace and security" and "peace and security of mankind". Acts affecting relations between States, such as violations of their sovereignty or territorial integrity or the undermining of their stability, should be considered offences against international peace and security.

104. With regard to the specific offences to be included in the draft Code, his delegation was of the opinion that aggression, the threat of aggression, and the preparation of aggression should all be included. The preparation of aggression was a necessary step before the act of aggression itself could materialize.

105. The notion of intervention in the internal or external affairs of States was of great concern to his Government. Such intervention had caused it serious difficulties in the maintenance of its public functions. It therefore fully supported the view that intervention should be included in the future Code. The notion of terrorism should also be included. Under the pretext of self-defence, States had joined individuals in carrying out acts of terrorism, and some States had even managed to outdo individuals in the commission of such acts.

106. His delegation rejected the view that colonial domination belonged to the past. Colonialism still existed, as demonstrated by the existence of the Fourth Committee as well as the Trusteeship Council. The future Code should incorporate the modern manifestations of the violation of the right of peoples to self-determination.

107. Notwithstanding the fact that it was mentioned in the 1974 Definition of Aggression or the fact that it was being dealt with by the Ad Hoc Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries, the question of mercenarism should be dealt with in the future Code in order to enhance its effectiveness in the preservation of peace and security. Mercenarism had been used as a weapon by some States to destabilize other States, and consequently it affected inter-State relations and endangered international peace and security.

108. With regard to economic aggression, his delegation fully supported the views expressed in paragraph 98 of the report (A/40/10), particularly the view that measures of an economic nature, in addition to their psychological impact, might constitute a form of aggression which could threaten the stability of a Government or the very life of the people of a country. His Government had experienced such aggression, which had always been motivated by the political objectives of intervention and domination.

(Mr. Vreedzaam, Suriname)

109. Suriname would be following closely the Special Rapporteur's work on war crimes and crimes against humanity. The use of nuclear, bacteriological and toxic weapons constituted a war crime and a crime against humanity. The prohibition of the use of such weapons should not be aimed solely at the prevention of the abuse of power, but also at the protection of humanity as a whole. The prohibition should therefore be included in the future Code. States which were in possession of such weapons should also be subject to the rules to be laid down in the future Code.

OTHER MATTERS

110. Mr. DE SARAM (Secretary of the Committee) announced that Guyana had become a sponsor of draft resolution A/C.6/40/L.7.

The meeting rose at 7.30 p.m.