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SUMMARY RECORD OF THE: 27th MEETING

Chairman: Mr. FRANCIS (Jamaica)

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The meeting was called to order at 3.10 p.m.

AGENDA ITEM 130: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS THIRTY-EIGHTH SESSION (A/41/10, A/41/498, A/41/406)

AGENDA ITEM 125: DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND: REPORT OF THE SECRETARY-GENERAL (A/41/537 and Add.1 and 2)

1. The CHAIRMAN observed that the 10 minutes that had passed since the time fixed for the beginning of the meeting had been devoted to an informal meeting of the members of the Bureau.

2. He invited Mr. Thiam, Chairman of the International Law Commission, to take a place at the Committee table to introduce the Commission's report.

3. Mr. THIAM (Chairman of the International Law Commission) said that the comments made each year on the report of the International Law Commission by the members of the Sixth Committee as representatives of sovereign States provided the Commission, a body of legal experts, with the necessary guidance for continuing its work,.

4. At its 1986 session, the Commission had been guided by paragraph 3 of General Assembly resolution 40/75 of 11 December 1985, in which the Assembly had recommended that, taking into account written and oral comments of Governments, the Commission should continue its work on the topics in its current programme, bearing in mind the clear desirability of achieving as much progress as possible in the preparation of draft articles on specific topics before the conclusion of the term of office of the current membership. Thus, the Commission had concentrated its efforts on completing its first reading of the drafts on the two topics dealt with in chapters II and III of the report.

5. Chapter IX of the report dealt with the topic "Jurisdictional immunities of States and their property". It had been included in the Commission's proqramme of work in 1978 and Mr. Sompong Sucharitkul had been appointed Special Rapporteur.

6. The Committee was well aware of the complexity of that topic. In addition to diverse policy approaches to the whole topic its substance related to both public and private law, especially domestic rules of procedure. Clearly, the task of drafting articles intended for universal application in that sphere was not an easy one.

7. The subject consisted of 28 draft articles divided into five parts: part I: Introduction; part II: General principles; part III: Limitations on State immunity or, alternatively, Exceptions to State immunity; part IV: State immunity in respect of property from measures of constraint; and part V: Miscellaneous provisions.

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8. Most of the draft articles had already been adopted at previous sessions of the Commission. At its 1986 session, the Commission had adopted the remaining articles and paragraphs of articlea, namely article 2 (para. 2) ; article 3 (para. 1) ; articles 4 to 6; and articles 20 to 28. As mandated by the Commission's statute, the newly adopted provision8 were accompanied by a commentary setting out explanations and the bases for their adoption.

9. In addition, the Commission had made certain drafting and editorial changes in the articles previously adopted, for coneietency in terntnology and substance. He drew the Committee's attention to paragraph 18 of the report for a more detailed account of those changes.

10. The purpose of article 3, on "Interpretative provisions", was to aid interpretation of draft articles when necessary. For example, paragraph 1 of article 3 was designed to aid interpretation of the word "State". Within the Commission it had been felt that while a general definition of the term "State" as such wao not possible or necessary, in view of the different doctrinal conception of its meaning, it would be useful, for the special purposes of jurisdictional immunities of States and their property, to identify certain elements which that term comprised.

11. Article 4, on "Privileges and immunities not affected by the present articles", was designed to preclude the possibility of overlapping between the present draft articles and certain existing conventions dealing with the status, privileges and immunities of specific categories of representatives of Governments. Consequently, existing diplanatic and consular régimes of immunity would remain unaffected. Likewise, under paragraph 2 of article 4, any privileges and immunities that Heads of State might. enjoy in their personal capacity under international law were likewise unaffected by the draft articles.

12. Article 5, on "Non-retroactivity of the present articles", precluded the applicability of the articles to proceedings instituted prior .to the entry into force of the articles as between the States concerned.

13. Article 6, on "State inununity", was an important article, designed to establish a delicate balance. After originally adopting the article at the thirty-second session, the Commission had referred it back to the Drafting Committee for reconsiderat ion. In drafting the article, the Commission had considered all the relevant doctrinal views. The difficulty in drafting the article had arisen from the fact that it dealt with the core of the diverse policy approaches to State inxnunity and was therefore still controversial. After a long discussion as to which principle came first, inxnunity or non-immunity of States, the Commission had, in a spirit of compromise, adopted the current formula which specified that inxnunity and non-immunity were two aspects part of the same rule; in other words, immunity existed together with its innate qualifications and limitations. That formulation of the principle seemed fair and reasonable to the Commission. The latter had, however, been unable to aqrce whether or not the provision should state that state immunity was also subject to the future

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development of international law. Some members had felt that it was essential to leave future State practice in that area unfrozen by the draft articles. Others had found such limitation unacceptable since in their view any reference to qeneral international law regarding exceptions to state immunity might result in interpretations which would render the draft articles useless. Finally, in a spirit of compromise, the Commission had decided to put the phrase in question in square brackets in order to draw the attention of Governments to the point and elicit their comments.

14. The theoretical difficulties he had just mentioned in regard to article 6 had arisen again with respect to the title of part III. The Commission had been unable to agree whether "limitations on State immunity" or "Exceptions to State immunity" would be more appropriate as the title of part XII. It had therefore placed the words "limitations" and "exceptions" in square brackets for further consideration in second reading in the light of the comments of Governments.

15. Article 20 on "cases of nationalization" was a general reservation provision, which highlighted that the draft did not prejudge any question regarding the extraterritorial effects of any measure of nationalization taken by a State affecting property, movable or immovable, industrial or non-industrial.

16. Articles 21 to 23 dealt with "state immunity in respect of property from measures of constraint". The expression "measures of constraint" had been chosen as a generic term, not a technical one in use in any particular danestic law. The part in question related to measures of execution, interlocutory measures or pretrial or prejudgment attachment. It provided in general, but subject to certain limitations, for the immunity of a State from all such measures of constraint in respect of the use of property, or property in its possession or control. The text and camnentaries to articles 21 to 23 were sufficiently clear in spelling out that principle and its qualifications and required no additional explanation.

17. However, he wished to draw the Committee's attention to two clauses in the articles in question. Articles 21 and 22, in elaborating the property protected by immunity under the articles, had included, in addition to property owned by or in the possession or control of the State, also property in which the State had "a legally protected interest". Under that clause the legally protected interest of the State in the property, such as in the form of an equity of redemption or revisionary interest, might remain exempt from measures of constraint. Some members believed that it would be useful to retain that clause. Others thought that the clause might unduly widen the scope of immunity from measures of constraint, extending it to property not even owned, possessed or controlled by a State. The Commission had finally decided to review the clause in second reading, in view of Governmenta' comments.

18. The other clause in the articles in question was in reference to limitations on immunity in relation to property in use or intended for use by the State for commercial [non-governmental1 purposes. The term "non-governmental" was placed in square brackets in articles 21 and 23. That clause was also used In article 18 on

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"State-owned or State-operated ships engaged in commercial service". The Commission had still been divided on the clause's appropriateness and had decided to cane back to it in second reading, having Governments' comments as a guideline.

19. Articles 24 to 28 dealt with miscellaneous issues, namely, service of process, default judgement, immunity from measures of coercion, procedural immunities and non-discrimination. They constituted the last part of the draft articles on the subject.

20. Finally, the Commission had decided, in accordance with articles 16 and 21 of its statute, to transmit the draft articles on the subject adapted in first reading to Governments for comments and observations.

21. He wished to make an appeal to the Sixth Committee to assist the Commission. Written comments and observations submitted by States on a draft completed in first reading were essential working tools for the Commission when it commenced the second reading. He therefore appealed to all Governments to respond to the invitation for comments and observations on the set of draft articles in question, an well as on the draft articles on the topic with which he was about to deal.

22. Chapter III of the Commission's report dealt with the topic "Status of the diplanatic courier and the diplanatic bag not accompanied by diplanatic courier". The Commission had successfully completed its initial consideration, provisionally adopting 33 draft articles in first reading. Those results were largely due to the efforts made by the Special Rapportcur.

23. The 33 articles were organized in four parts: Part I. General Provisions; Part II. Status of the diplomatic courier and the captain of a ship or aircraft entrusted with the diplanatic bag; Part III. Status of the diplomatic bag; and Part IV. Miscellaneous provisions.

24. During the process of provisionally adopting each draft article the Commission had exercised the utmost care in weighing the arguments on all sides so as to try to achieve in the final formulation an adequate balance between the interests in question.

25. Since the detailed presentation of draft articles 1 to 27 provisionally adopted by the Commission had already been done at the past three sessions Of the General Assembly, he would confine his remarks to the six draft articles that bad been provisionally adopted by the Commission in 1986 - draft articles 28 to 33.

26. Draft article 28, dealing with the protect ion of the diplomatic bag, had been regarded as one of the key provisions of the whole set of draft articles. It had also been very controversial. The members of the Comm. ttee would note that the provision contained some bracketed portions in its text, which showed the areas Of disagreement that persisted.

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27. It was hoped that the observations and suggestions to be made by Governments might, at the time of the second reading of the draft articles, help to bridge the gap between the various positions.

28. The unbracketed portion of paragraph 1, namely, "The diplomatic bag shall not be opened or detained", was a reproduction of the relevant provisions contained in the four existing multilateral conventions on diplaatic and consular law. The first bracketed element of the paragraph revolved around the question of whether the obligations not to open or detain the bag were an aspect of "inviolability'. The second element concerning the exemption from examination directly or through electronic or other technical devices reflected two basically different approaches. While some members of the Commission had felt that the evolution of technology made such an examination unacceptable, since it night affect the confidentiality of the bag's contents, other members had been of the view that the possibility of such an examination, wfthout necessarily affecting the confidentiality of the bag's contents, was indispensable, as the security interests Of the receiving ok transit States should also be reflected.

29. The unbracketed portion of paragraph 2 was intended to introduce a balance between the interests of the sending State in guaranteeing its security and protecting the bag and the interests of the receiving State, which also related to security. It therefore provided, as did the relevant article of the 1963 Vienna Conwntion oh Consular Relationa, that, if the competent authorities Of the receiving State, had serious grounds to believe that the bag contained something other than what was permissible, they might request that the baq should be opened in their presence by an authorixed representative of the sending State. If such a request was refused by the authorities of the sending State, the competent authorities of the receiving State might require that the bag should be returned to its place of origin.

30. The bracketed portions of paragraph 2 reflected three question.8 still open: whether, in addition to the receiving State, the transit State should also have the right provided for in the paragraph; whether the right conferred by the paragraph on the receiving State should be limited to the case of the consular bag stricto sensu or extended to all diplomatic bags; and whether an intermediate step should be created. qivinq the receiving State, in addition to immediately requeating that the bag be opened, the option of requesting that the bag be subjected to examination by electronic or other technical devices.

31. Two main aspects were to be noted in draft article 29: one was the obligation for States, in accordance with such laws and regulations as they might adopt, to permit the entry, transit and departure of the diplomatic bag; the other was the exemption of the diplomatic bag from customs duties, dues and taxes and related charges other than for storage, cartage and similar services.

32. Draft article 30 referred to certain obligationa on the part of the receiving or transit State when force majeure OK other circumstances either prevented the diplomatic courier or any person to whom the bag had been entrusted from

maintaining custody of it, or diverted the diplomatic courier or the diplomatic bag from their scheduled itinerary into the territory of an unforeseen transit State. The obligations rising from the "loss" of the bag constituted an expression Of international co-cperation and solidarity of States in the promotion of diplomatic communications and included the adoption of appropriate measures to protect the safety and integrity of the bag, much am proper storage or custody of the bag and the notification of the sending State. The obligations for the unforeseen transit State arising from such a loss included the duty of protection and the granting of the necessary facilities to allow the courier or the bag to leave its territory.

33. Draft article 31 dealt with the legal effect on the status of the diplaatic courier and the diplaatic bag of non-recognition by a mending State or Government or the non-existence of diplomatic or consular relations. It provided that facilities, privileges and amenities accorded to the courier and the bag under the draft should not be affected in much circumstances.

34. The main purpose of draft article 32 was to reserve the position of existing bilateral or existing agreements regulating the same subject as the draft articles. The relationship between the dreft articles and the four conventions on diplaatic and consular law had been much discussed in the Commission.

35. The commentary on draft article 32 noted that the draft articles, whose main purpose was to establish a coherent and uniform régime for the status of the courier and bag, would complement the provisions on the same subject contalned in the four multilateral conventions he had referred to. In that connection, at least in the view of some ■ tntwm of the Commission, tbe complementary nature of the draft articles, which harmonized and developed the rules dealing with the legal régime of couriers and bags, right affect the application of some of the provisions of those conventions although the draft articles did not purport to amend them.

36. Finally, draft article 33 provided for the possibility of an optional declaration by States whereby, when expressing their consent to be bound by the draft articles or at any the thereafter, they night by written declaration exclude certain categor em Of couriers and bags from the application of tha draft articles. The draft articles also regulated the formalities, modalities and effects Of such a declaration and its possible withdrawal. Although some members had felt that much a provision would detract from the goals Of coherence and unlforrity in the legal régimes of couriers and bags, the Commission's view had been that it would later facilitate wider acceptance of the draft because it accommodated the reservations expressed in the pamt by members of the Commission and by representatives on the Sixth Committee regarding the desirable scope of the draft articles.

37. As with the previous topic, the Commission had decided, in accordance with articles 16 and 21 of its statute, to transmit the draft articles on the topic to Governments.

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38. State responsibility was the subject of chapter IV: a central issue in international law which had been under study for decades. The general plan for the draft articles on State responsibility now under preparation by the Commission was that part 1 would deal with the origin of international responsibility, part 2 with the legal consequences of international responsibility, and part 3, with the settlement of disputes and the "implementation" (mise en oeuvre) of international responsibility. The Special Rapporteur on the topic, Mr. Willem Riphagen, had submitted seven reports since his appointment in 1979.

39. The Commission had provisionally adopted part 1 of the draft articles, comprising 35 articles, in 1980. In due course the draft articles of part 1 would be further examined in second reading, in the light of views expressed by Governments.

40. With respect to part 2, the Commission had already provisionally adopted five draft articles. Draft articles 1 to 4, which were introductory in nature, had been adopted in 1983. Draft article 5, which the Commission had provisionally adopted in 1985, dealt with the definition of the expression "injured State. in various circumstances. The eleven draft articles proposed for part 2, which had been referred to the Drafting Committee in 1985, enumerated a number of unilateral reactions to an alleged internationally wrongful act. Draft articles 6 to 9 dealt with measures which an injured State could take against the author State of an internationally wrongful act. Draft articles 10 to 13 dealt with procedures, safeguards and exceptions to the rules set forth in draft articles 6, 8 and 9. Draft article 14 'dealt with international cc imes and additional consequences arising from an international crime. Draft article 15 dealt specifically with the international crime of aggression. Draft article 16 was a saving clause. The texts of those draft articles and a summary of the debate thereon could be found in the Commission's report for 1985.

41. As the Commission had noted in its report (pars. 65), the Drafting Committee had devoted five meetings to the consideration of draft article 6, but had not been able to conclude its work on that draft article because of lack of time. However, the Committee had made progress, as was indicated in footnote 73 to the report.

42. In the light of part two of the draft atticlee, the Special Rapporteur, Mr. Riphagen had submitted his seventh report to the Commission at its thirty-eighth session. The first section of the report contained five draft articles and an annex, with commentaries. That constituted part three of the topic, dealing with the settlement of disputes and the "implemerrtation" (mise en oeuvre) of international responsibility. The second section of the report concerned the second reading of part one of the draft articles. The second section had neither been introduced by the Special Rapporteur nor discussed by the Commission at its most recent session, however.

43. The Special Rapporteur had stressed the interrelationship between the three pe te of the draft as well as the residual character of the draft articles. The draft articles and annex in part three proposed a minimum of organizational

arrangements in connection with the subetantive rules of State responsibility, with a view to limiting the danger that the unilateral measures and countermeasures envisaged in part two of the draft articles might lead to an escalation. The proposed draft articles and annex closely followed the relevant provieione of the 1969 Vienna Convention on the Law of Treatiee, the 1982 United Nations Convention on the Law of the Sea, and the 1986 Vienna Convention on the Law of Treaties between States and International Organization8 or between International Ocganizat ions.

44. Draft articles 1 and 2 dealt with notif ication. According to draft article 1, a State which wished to invoke the provieione of article 6 of part two • hould notify the State alleged to be the author of an internationally wrongful act of ite claim and the measures required to be taken, as well as the reason8 for such measures. Draft article 2 provided that the claimant State wishing to take the additional measures stipulated in article 8 or 9 of part two, concerning measures adopted by way of reciprocity and reprisal, had to send a second not if ication to the State alleged to be the author of an internationally wrongful act to inform it that it intended to take such measures.

45. In the event of an objection to the measures taken or intended under articles 8 and 9 of part two by the State alleged to be the author of an internationally wrongful act or by another State claiming to be an injured State by virtue of the measures concerned, draft article 3, paragraph 1, obliged the States concerned to seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

46. If no solution was reached by the means envisaged in article 3, paragraph 1, within 12 months from the date on which tbe objection was raised, article 4 stipulated that any one of the parties to a dispute concerning the interpretation of article 12 (b) of part two, relating to jus cogens or concerning the additional rights and obligations referred to in article 14 on international crimes, could submit the dispute in writing to the International Court of Justice. In the case of a dispute concerning the interpretation of articles 8 to 13 of part two, article 4 further provided that any one of the parties could eet in motion the conciliation procedure specified in the annex to part three of the draft articles by submitting a request to that effect to the Secretary-General of the United Nat ions.

47. Draft article 5 was a saving clause relating to reservations to part .hree.

40. The annex mandated the Secretary-General of the United Nations to draw up and maintain a list of conciliators. It also set out the procedure to be followed for bringing a dispute before the Conciliation Commission, and the time-frame withi which the Commission was required to report after it had been constituted.

49. Chapter IV of the report of the International Law Commission summarized the views expressed by members of the Commission on the proposed articles of part three of the draft.

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50. With regard to resort to the International Court of Justice, some members of the Commission had indicated that they did not favour compulsory referral of disputes to the Court, even in a select number of cases such as those referred to in draft article 4, paragraphs (a) and (b). In their view, the principle of free choice of means of settlement by the parties to a dispute was preferable.

51. Other members had stressed that the compulsory conciliation proposed in part three of the draft articles was provided for only in situations where countermeasures had been taken and where, consequently, the danger of escalation of the conflict arose. Furthermore, some members had stressed that the compulsory jurisdiction of the International Court of Justice was limited to cases in which a State alleged that a measure of reciprocity or reprisal overstepped the limits eet by a rule of jue cogena, and the alleged commission of an international crime gave rise to "additional rights and obligations"; the provisions should therefore be acceptable.

52. Still other members had expressed a preference for a wider scope for compulsory conciliation in order to cover all cases of disputes with respect to the legal coneequencee of an alleged internationally wrongful act.

53. At the end of the discussion, the Commission had referred to the Drafting Committee draft articles 1 to 5 and the annex in part three. Because of the exceptional shortening of the Commission's session, however, the Drafting Committee had not been able to give consideration to the draft articles and annex in part three.

54. Chapter V of the report was concerned with the draft Code of Offences againet the Peace and Security of Mankind, for which he himself was the Special Rapporteur.

55. As early as 1947, the General Aesembly had requeeted the Commission to prepare a draft Code of Of fences against the Peace and Security of Mankind. In 1954, the Commission had submitted a draft Code along with commentaries. The consideration of the draft had been postponed pending a definition of aqqreeaion. It was not until 20 years later, in 1974, that the General Assembly had adopted that definition. Seven years later, the General Aeaembly had invited the Commission to resume its work on the draft Code, taking into account the development of international law.

56. He had been appointed Special Rapporteur by the Commission in 1982 and had submitted four reports between 1983 and 1986. The fourth report, considered by the Commission in 1986, was divided into five part.8 covering the following matters: (I) crimes against humanity; (II) war crimes; (III) other offences; (IV) general principles; and (V) draft articles. It dealt with questiona which had not yet been considered. It also contained a first set of draft articles. The draft was not exhaustive. It was an outline, a framework, and the Commission would have to take fully into account the opinions expressed, and the suggestions made by the Commission. The complete text was reproduced in footnote 84 to t:he report (A/41/10).

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57. In connection with part I, devoted to crime8 aqainet humanity, the question of the criterion and content of such an offenoe had been debated. Notions such a8 "mass element", "systematic pattern" and "special intention", suggested by the Special Rapporteur, had formed the subject Of thorough discussion by the Commission. It had also gone into the question of the distinction drawn in the 1954 draft Code between "genocide" and "inhuman acts", and had considered whether the distinction should be maintained. The Commission had also discussed other unlawful acts not taken into consideration in the 1954 draft; thus, apartheid had been included in the draft Code. The question of including serious damage to the environment still required careful consideration. Was it an offence involving civil liability only, in other words, giving rise to a simple obligation to make reparation? When the offence was a gross one and caused serious harm to mankind, should it be considered also a criminal offence? The Commission would be interested to hear any opinion8 on that score.

58. The discussion regarding part II, dealing with war crimes, had centred on questions of terminology , substance and methodology. A8 to terminology, the question had arisen whether, taking into account the development of international law reflected, for example, in the Geneva Convention8 of 1949 and the Additional Protocols of 1917, the word "war" should not be replaced by the term "armed conflict*. In the traditional sense, war pitted State aqainst State, whereas the phenomenon, envisaged by the draft Code also covered eituatione in which the antagonists were not State8 alone. Moreover, since war today was no longer lawful in principle, was it correct to maintain the term "laws and customs of war"?

59. The substantive problems revolved around question8 of characterization. The same act could, at the same time, constitute a war crime and a crime aqainet humanity. That dual characterization resulted from a perfect concurrence of offencee, a phenomenon met with not only in international law but also in internal law.

60. The problems of methodology concerned the definition of war crimes. Should there be a general definition or an enumeration? Should those method8 be combined? The enumerative method, in turn, gave rise to the question whether the use of nuclear weapons should be included amonq war crimes.

61. Part III Of the report was entitled "Other offencee against the peace and security of mankind". What was meant were acts which, because of their link8 with an offence against the peace and security of mankind, themselves became offences. Thoae offences were complicity, conspiracy and attempt. With reference to complicity, the problem which he had raised regarding the content of the concept had formed the subject of extensive debate. The question was whether the meaning given to the concept should be limited or extended. In the latter case, the concept of complicity could cover acts committed not only prior to the principal act but also concomitantly with it or even after it, such a8 concealment of the perpetrator or of property. With regard to the concept of complot, the question had arisen whether it should be understood within the meaninq of conspiracy, implying the idea of collective responsibility. In that connection, the solutions of the Nürnberq Judgment had been considered, and were expounded in the report. As

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to the notion of attempt, the main issue involved had been whether it should cover only the commencement of execution of an act or whether it covered preparatory acts as well. With regard to all three concepts, which were borrowed from internal law, he stressed that their meaning could not remain precisely the same when they were employed in international law.

62. A general question which had arisen in connection with part III had been whether it would not be more appropriate to consider the offences it included under "general principles", which formed the subject of part. IV of the report.

63. Sane members of the Committee had expressed the wish that a statement of general principles should appear earlier on. The Commission was fully aware of the need to devote an important part of its work to the study of general principles. The question was whether it was possible to state general principles before defining the content of the topic, in other words, the offences to which those principles had to be applied. That problem of methodology no longer arose to the extent that the draft Code now before the Committee contained a statement of general principles in its introduction, or, to be more precise, in part II of the introduction.

64. In his report, he had distinguished five categories of principles: (a) those relating to the juridical nature of the offence against the peace and security of mankind; (b) those relating to the official position of the offender; (c) those relating to the application of criminal law in time; (d) those relating to the application of criminal law in space; and (e) those relating to the determination and scope of responsibility.

65. Paragraphs 133 to 148 of the Commission's report (A/41/10) gave an account of the thorough and very important discussion on those five categories of principles. The principles in the first category, relating to the juridical nature of the offence against the peace and security of mankind, had not given rise to much controversy. Everyone had agreed that the offences concerned were crimes in international law whose definition and characterization were a matter of internat ional law independently of internal law. With regard to the second category of principles - those relating to the official position of the offender - there had been no difficulty in recognizing that the offender was a human being and, as such, entitled to all jurisdictional guarantees. The principles relating to the application of criminal law in time, in other words, statutory limitations and non-retroactivity, had also been generally accepted by the Commission.

66. As for the principles relating to the application of criminal law in space, many of the Commission's members had expressed reservations regarding the system of universal jurisdiction, and had stated their preference for an international criminal jurisdiction. Several solutions were, of course, possible. They were discussed in paragraphs 146 to 148 of the Commission's report (A/41/10).

67. The discussion in the Commission had also dealt with the fifth category, namely, principles relating to exceptions to criminal responsibility or, in other

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words, circumstances which relieved an act of its character as a criminal offence. In that connection, the concepts of "coercion", "state of necessity", "force ma jeure" and "self-defence" had given rise to an extensive debate as to their meaning, their effects and the differences and similarities between them. There had also been a discussion on whether error could constitute a defence. Several questions had also been raised with regard to "superior order" as a possible exception to criminal responsibility. As to the "official position of the perpetrator", the Commission's members had shared his view that it could not he accepted as an exception. Ae to "means of defence based on reprisals*, he had drawn a distinction between peacetime, when defence baaed on armed reprisals wan not admissible, and wartime, when defence based on armed reprisals was likewise not admieaible if the reprisals were carried out in violation of the laws and customs of war.

68. The conclusions of the Commission were set out in paragraph 185. An in-depth general discussion had been held on parts I to IV of the Special Rapporteur's fourth report. It had been decided to defer consideration of part V (the draft articles) to future sessions. Furthermore, the Commission had aqain discussed the question of the implementation of the draft code when it had considered the principles relating to the application of criminal law in space. En that connection, the Commission had stressed that it would examine carefully any guidance that might be furnished on the various options set out in paragraphs 146 to 148 of its report (A/41/10). It also wished to remind the General Asaembly of a 1983 conclusion, reproduced in footnote 100 to the 1986 report, which was in fact a request for clarification of the Commission's mandate.

69. Chapter VI of the report covered the topic of international liability for injurious consequencea arising out of acts not prohibited by international law. At the thirty-eighth session, the Special Rapporteur, Mr. Julio Barboza, had submitted his second report (A/CN.4/402 and Corr.1), in which he analyaed some theoretical bases as well as many sections of the schematic outline of the topic which had been propoeed to the Commission by the first Special Rapporteur. In the view of the present Special Rapporteur, certain ambiquitiee still existed in the topic, particularly in the interplay between different sections of the schematic outline which needed to he clarified in order to secure the uninterrupted development of the topic. Because of the shortening of the session, the Commission had been unable to allocate a sufficient number of meetings to the consideration of the topic and the report of the Special Rapporteur. Consequently, not all member8 of the Commission had been able to express their views on the report. In qenernl, however, it had become clear that the Commission agreed with the Special Rapporteur that there should be a linkage between important duties emerqing from the topic. Such a linkage was essential in order to maintain the unity and coherence of the topic and preclude the possibility of establishing dutiea which existed apart from and had no consequential impact on one another. The two moet important duties forming the basis of the subject were those of prevention and reparation. The concept of injury in the sense of material harm could constitute the linkage between the two duties. Injury could be that which had already occured or a potent ial in jury. Therefore, prevention was an integral part of the topic, since it focused on potential injury, while reparation concentrated on the actual harm.

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70. Another important issue discussed in the Commission was the scope of the subject. As usual, determination of the exact scope of any topic for codification was a matter which required a great deal of discussion and serious examination of what could realistically be achieved. The present topic was no exception. As the Sixth Committee would observe from paragraphs 203-205 of the report, no conclusive decision had been take!, regarding the scope of the topic. Some had preferred to include all activities, while others had expressed a preference for only ultra hazardous activities. It tad been pointed out, however, that the expression "ultra hazardous activities" was not a term of art but a purely subjective description. An activity which sane might currently consider as ultra hazardous might not remain so In future. Besides, the essential element was not so much the activity itself, but rather its potentially injurious consequences. The question also remained unresolved as to whether injuries caused in areas beyond the national jurisdiction of any State or to the common heritage of mankind should be covered by that topic. Obviously, those issues required more time for careful study and examination and, as the subject progressed, it should become easier to finally determine its exact scope. For the time being there was a general tendency to limit the scope to all activities involving risk.

71. Another issue discussed in the Commiasion was the duty to negotiate. The question had been raised as to who should negotiate what with whom. A related quest ion had been raised as to whether, in undertaking certain dangerous activities, compliance with the regulations proposed by international regulatory agencies would exonerate States from their obligation. The Special Rapporteur had felt that those problems were not insurmountable because a number of variables, including the location of the activity, the statistical data available regarding the injurious impact of certain activities, and so on, usually helped to determine with which State the acting or the source State should negotiate.

72. There was varied support in the Commission for the obligation to make reparation. For example, with reference to certain activities which resulted in extensive and catastrophic damage, one member had held the view that in such cases the question of liability should be set aside and the problem should be looked upon as belonging to the area of co-operation between States as membe. of the international community.

73. It had also been stated that many developing countries were not in a position to know everything about the full hazardous impact of certain activities conducted in their territory by foreign operators and, as a result, could have no real control over those activities. That element must therefore be taken into account.

74. In the view of the Special Rapporteur, many of the issues raised in the Commission did not contradict the principles which he had put forward, but rather were related '.o procedural difficulties. Therefore, the complexity of the procedure, at the current stage of development of the topic, should not overwhelm the Commission RO as to alter the principles themselves. The Commission had agreed that it was appropriate to begin drafting articles on that topic, developing the ideas put forward.

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75. Chapter VII concerned the law of the non-navigational uses of international watercourses. At its 1966 session, the Commission had considered the second report (A/CN.4/399 and Add.1 and 2) of the current Special Rapporteur, in which he presented his views on issues posed by the articles proposed by the previous Special Rapporteur and in which he presented five draft articles. However, for lack of time, not all members had been able to comment on the report.

76. As for the issues posed by previous draft articles propoaed, the Special Rappcrteur had raised four points. The first was whether the Commission could for the time being defer the matter of attempting to define the term "international watercourse" and base its work on the provisional working hypotheein accepted in 1980 (see A/41/10, para. 224). Most members of the Commission had been in favour of deferring such a definition until a later stage of the work. Some had been in favcur of adopting - at the appropriate time - the "system" approach, while others favoured the 'watercourse" approach. In any event, the Special Rapporteur had concluded that the matter of definition should be deferred for the time being. The second point was whether the term "shared natural resource" should be employed in the draft articles. Members of the Commission had been divided on that question. As result of the discussion, the Special Rapporteur had believed that the wisest course would be to give effect to the legal principles underlying the concept, without using the term itself in the draft. The third point had been whether an article concerning the determination of reasonable and equitable use should contain a list of factors to be taken into consideration or whether such factors should be referred to in the commentary. On that point also there was a division of views among members. The Special Rapporteur had supported the suggestion of adopting a flexible solution by confining, for example, the factors to a limited, indicative list of more general criteria. The fourth point had been whether the relationship between the obligation to refrain Prom causing appreciable harm to others and the principle of equitable utilization should be made clear. Member8 had recognized the relationship between those two principles, but were divided on how to expreae it in the draft. The Special Rapporteur had concluded that it would be for the Drafting Committee to find an appropriate and generally acceptable means of expre' ing that interrelationship.

77. In the course of the debate, the question had arisen as to the form of the Commission's work on the topic. With the exception of one member, the members of the Commission supported the "framework agreement- previously endorsed by both the Commission and the Sixth Committee.

78. Lastly, certain members had commented Pavourably on the five draft articles proposed by the Special Rapporteur concerning procedural rules applicable in cases involving proposed new uses of international watercourses. The Special Rapporteur intended to give further consideration to those articles in the light of the constructive comments made in the course of the debate.

79. Chapter VIII was devoted to other decisions and conclusions of the Commission. He drew special attention to paragraphs 249 to 261 of that chapter, dealing with the programme and methods of work of the Commission. Paragraph 250

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concerned the orqanisational tasks which would confront the newly-elected Commission members at its 1987 session. In paragraph 252, the Commission addressed the issue of the duration of its session. Having lost two weeks in 1986, the Commission had been unable to give adequate consideration to three topics or even to take up another. Other difficulties caused by lack of time were noted in that paragraph. The Commission had felt it should emphasize that the nature of its work on the codification and progressive development of international law as envisaged in the Charter, as well as the breadth and complexity of the subjects on its agenda, made it essential for its annual sessions to be of at least the usual 12-week duration.

80. The Commission was, however, very much aware of the seriousness of the financial crisis of the Organization (see A/41/10, pars. 260). In 1986 it had made certain changes in its schedule of meetings and reduced the length of certain sections of its report. In addition, conference services available had been limited or reduced. At the 1986 session, the Commission and its drafting committee had maintained a heavy and exhausting schedule of meetings, making virtually maximum use of the conference time and services placed at their disposal. Paragraph 253 of the report pointed out the fundamental importance of maintaining the current system of summary records for ❑ aetingm of the Commission, which constituted an essential requirement for its procedurea and methods of work and also for the codification process. In paragraph 257, the Commission also noted the importance of the timely and regular publication of its Yearbook. Lastly, in paragraph 258, the Commission had requested that an updated version be issued of the publication The Work of the International Law Commission, and in paragraph 273 it appealed to States to make contributions to the International Law Seminar which was sorely in need of them to survive.

81. In paragraph 259 of the report, it was pointed out that the Commission had taken note of a communication from the Under-Secretary-General for Political and Security Council Affairs, concerning General Assembly resolutions 40/3 and 40/10 entitled, respectively, "International Year of Peace" and "Programme of the International Year of Peace". The Commission having requested its Chairman to reply to that communication, he had, on its behslf, addressed a reply to the Under-Secretary-General for Political and Security Council Aefairs, in which he had noted, in particular, that the Commission supported the International Year of Peace and recognized the importance of achieving the objectives defined in the aforementioned resolutions.

82. Lastly, he wished to emphasize the importance the Commission attached to the debates on its report in the Sixth Committee. He urged all representatives to express their views, for that was the best assurance and the best encouragement to the Commission in its role of promoting the codification and progressive development of international law.

83. Mr. KOROMA (Sierra Leone) said that his delegation was most interested in the co-operation of the Commission with other legal bodies, such as the Inter-American Juridical Committee, the European Committee on Legal Co-operation and the Asian-African Legal Consultative Committee and hoped that it would continue in the future. It welcomed the convening of the twenty-second session of the International Law Seminar and thanked the Governments which had made fellowships available to a number of participants. It hoped that new contributions would make future sessions of the Seminar possible. Because of the breadth and complexity of the work of the Commission, it also considered that the length of the annual sessions should continue to be 12 weeks as in the past.

84. The question of the jurisdictional immunities of States and their property reflected the main objectives of contemporary international law, namely, the elimination of international conflict, the development of the rule of law, the search for equity among nations and individuals and the promotion of economic development. No one doctrine could serve as a point of departure if the draft articles were to be acceptable to all States; an attempt should be made to reconcile the interests of all States, including those of the developing countries. Neither could the draft articles be founded on case law alone, since international tribunals had rarely had to adjudicate or arbitrate such disputes. Despite the theoretical tendency to favour restrictive immunity, it was absolute immunity that was invoked by most States in cases of litigation. It therefore seemed that progress still had to be made before a generally acceptable formula was found.

85. Draft article 6 was in line with the general principle of international law of the immunity of a sovereign State from the jurisdiction of the courts of other States. However, the wording of the draft and of draft article 11 left room for exceptions and allowed different interpretations which might defeat the codification of the rule. His delegation was of the view that the phrase in square brackets should be deleted because it could obscure the rule and delay its development.

86. In draft article 11 the Commission had attempted to codify certain exceptions, and it would therefore be preferable to use the word 'exceptions' instead of the term "limitations" in the heading of Part III. In draft article 21 in part IV ("State immunity in respect of property from measures of constraint"), his delegation favoured retaining the clause "or property in which it has a legally protected interest", which would make each State responsible for protecting its interest by providing evidence that its claim was legitimate. It also favoured retaining the term "non-governmental" in article 21 (a), because the protection of government property from measures of constraint was at issue. Moreover, draft article 28 on non-discrimination must be re-examined closely in order to avoid forms of application not in keeping with its intended purpose, which was to harmonize the rule of State immunity.

87. The draft articles had considerably clarified the law on the immunity of States and their property, and constituted a solid basis for future work on that matter.

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88. The Commiaaion had largely succeeded in elaborating a coherent and uniform régime on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. Draft article 28 on the protection of the diplomatic bag reflected existing international law and the practice of States and should be retained. The fundamental principles set forth in the draft article were tha inviolability of the bag, the confidentiality of the sending State's diplomatic correspondence and the sovereignty of the receiving and the transit States. AR it was worded, draft article 28 met the criteria for guaranteeing the security and confidentiality of the bag and preserved the interests of both the sending State and the receiving State.

89. With regard to draft article 33, entitled . ptional declaration", it was not desirable to permit States to designate categories of bags and couriers to which they did not intend the articles to apply. The exercise of such an option would be a source of confusion and would lead to a great number of régimes applicable to the courier and bag, which was contrary to the essential objective of the draft articles. The draft articles were already sufficiently comprehensive and should be examined further only to the extent that it was necessary to do so in order to achieve uniformity.

90. The Commission had continued to Rake progress on the topic of State reponsibilitv. The draft articles submitted to the Commission were based on the 1969 Convent ion on the Law of Treaties and the 1982 Convention on the Law of the Sea. They stipulated that disputes regarding international crimes and bus c eng must be referred to the International Court of Justice, whereas States could settle other disputes by any of the means provided under Article 33 of the Charter of the United Nations, including compulsory conciliation. His delegation supported the thrust of the draft articles, which had the desired flexibility and should help to facilitate the enforcement of the law either directly by parties ta a dispute or through third-party settlement.

91. His delegation welcomed the progress achieved by the Commission on the draft Code of Offencea against the Peace and Security of Mankind. It approved the approach adopted, i.e. use of the 1954 draft Code of Offencea and the relevant United Nations resolutions as the point of departure. It also agreed with the tripartite division of crimes against humanity, war crimes and other offences against the peace and security of mankind. It stood to reason that for an act to qualify as an offence against the peace and security of mankind account must be taken of its seriousness, of its "mass" nature and of the intention to cause injury.

92. The crime against humanity had now acquired an autonomous statue - which was different from that of war crimes - and could be committed even in time of peace. Sierra Leone supported the idea of providing a definition of what constituted a crime against humanity and listing such crimes. Furthermore, genocide should rank first among the crimes in question because of its extreme seriousness and the specific intent to destroy, in whole or in part, a national, racial, religious or ethnic group. The significance of genocide was more qualitative than quantitative. In a way, the individual victims were secondary to the real. victims, which were a nation, a religion or a race - an integral part of humanity.

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93. The fact that the régime of apartheid institutionalized racism on the basis of a constitution and a system of government qualified it as a crime against humanity. The 1973 Convention, which declared apartheid a' crime against humanity, had been in existence for over 10 years, and it was incorrect to assert, as in paragraph 94 of the report (A/41/10), that there had been few accessions to the Convent ion. Ninety countries had ratified it or acceded to it, and the States that had not yet done so did not necessarily oppose it. The International Court of Justice had wndemned apartheid on numerous occasions, and such a condemnation was a typical case of jus cogens. The Code should therefore contain a definition of apartheid that met all the requirements for constituting a crime against humanity within the meaning of the draft.

94. Mercenary activities must also be included among the crimes against humanity. Mercenaries violated the fundamental principles laid down in the Charter, and, what was more serious, they did not observe the laws and customs of war, did not respect the rights of the population and sometimes displayed wanton cruelty to civilians. That sufficed to include mercenary activities among the crimes against humanity.

95. On the subject of war crimes, the terms "war crime" and "violation of the laws and customs of war" should be retained, even though war had become a wrongful act under contemporary international law. Where methodology was concerned, a definition of a "war crime' combined with a list of such crimes would achieve the objectives of the draft Code and would not hinder the development of the law in that area. The appropriate time to consider the concepts of complicity, conspiracy and attempt would be when draft articles on those subjects were submitted to the Commission. His delegation had confined its remarks to what it considered the most serious offences on which there was general aqreement on inclusion in the Code. General agreement was not yet possible on such other offences as economic aggression and the use of nuclear weapons.

96. The topic dealt with in chapter VI was slow to develop owing to its very nature. The Special Rapporteur had wrrectly indicated out that the main basis in international law of the duty of the source State to repair any appreciable or tangible transboundary injury was liability for risk (strict liability), while adding that liability for risk was not a monolithic concept, i.e. it must not be equated with absolute liability, which did not allow for exception. As impeccable as the Special Rapporteur's analysis might he, it did not make the topic autonomous, because that topic was still not independent of the topic of State responsibility. In adopting that position, his delegation was not forgetting the rule that States must refrain from causing transboundary harm and that if such harm did occur, the affected State must be compensated on the basis of strict liability. It was merely saying that the path towards State responsibility was the one to take. However, it did not rule out the possibility of developing the topic autonomously, and in such an event it would co-operate in developing the topic as it had in the past.

97. With regard to the law of the non-navigational uses of international watercourses, his delegation supported the principle that riparian States should

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refrain from causing appreciable harm to shared water resources and co-operate in the use of the river on an equitable basis. The Commission should endeavour to give effect to the principles underlying the concept of a shared natural resource without necessarily using the term itself since it was now controversial. A framework aqreement elaborating general principles and rules could serve as either guidelines or a residual agreement for the riparian States.

98. Mr. BADR (Qatar) connnended the Commission for the progress which it had made at its 1986 session on the draft Code of Offencee againet the Peace and Security of Mankind. At the fortieth session of the General Assembly, his delegation had stated that it favoured the second alternative for draft article 2, which defined "persons covered by the present articles" only as "State authorities which commit an offence against the peace and security of mankind" (A/40/10, footnote 28). Owing to the particular nature of such offences and the scale on which they were perpetrated, they could not be committed by individuals acting on their own. Some indications in the current version of the draft articles (art. 8 (a) and (c) and arts. 9 and 11, pars. 4) implied that its framers shared that view. However, it would be preferable to state explicitly in the current text of draft article 3 that the draft article only covered the agents or authorities of a State. Draft articles 10 to 14, which defined offences against the peace and security of mankind, represented progress in comparison with draft article 3 of the earlier version. The second alternative for draft article 12, paragraph 2, was preferable to the first not only because it would make the future Code a self-contained instrument, but also because the first alternative contained a reference to religious discrimination whereas religion was not a constituent element of apartheid. The reference to a particular country in the second alternative should nevertheless be deleted in order to maintain the general nature required of all normative texts.

99. The Commission's general approach to the subject of the jurisdictional immunities of States and their property, which assumed the existence of a rule of public international law requiring all States to grant immunity from the jurisdiction of their courts to all other States and which therefore limited the Commission's work to the identification of agreed exceptions to that rule, was a source of difficult ies because it tended to reduce to a minimum the number of such exceptions. Both the doctrine and the case-law of many States attested to the fact that the existence of a general rule of immunity was far from being recognized by the majority. One must not be misled by such maxims as par in parem non habet imperium, which furthermore dated only from the fourteenth century. If the myth of a qeneral rule of immunity were abandoned, it would be eaaier to reach agreement on a truly restrictive approach to immunity such as that reflected in multilateral conventions and in a great deal of recent national legislation. His delegation strongly favoured retaining the phrase that appeared in square brackets in draft article 6; international law seemed to be evolving inevitably towards a more and more restricted immunity.

100. At. the thirty-ninth and fortieth sessions of the General Assembly his delegation had already explained why the purpose of an act should not he taken into

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consideration in determining its commercial or non-commercial nature. He cautioned against the adoption of a provision such as the one set forth in draft article 3, paragraph 2, which ignored the position of a considerable number of the most important trading nations (the 1' Congreso del Partido case was an example) and which might therefore considerably reduce the general acceptability of the draft articles. He hoped that the Commission would reconsider that provision and realize that the compromise solution which it represented was not satisfactory. It did not necessarily serve the interests of the developing countries because they, like other countries, were sometimes defendants and at other times plaintiffs.

101. Draft article 21 was preferable to the previous draft article 22. Hevertheleso, his delegation regretted that subparagraph (a) provided that, even if the property was in use or intended for use for commercial purposes, in order to bu subject to measures of constraint, it must also have a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed. The second part of that additional requirement appeared to be redundant, since the juridical personality of such an agency or instrumentality was distinct from that of the State and the first part unduly protected from measures of constraint to property which should not enjoy immunity. similarly, draft article 23, paragraph 1 (c), ran counter to the current trend of not granting immunity to the property of central banks or other monetary authorities of a foreign State situated in the territory of another State when they were in use or intended for use in commercial transactions.

102. His deleqation proposed that article 19 (c) should be reworded so that it read: "(c) the recognition and enforcement or the setting aside of the award,".

103. With regard to the law of the non-navigational uses of international watercourses, it was highly desirable that the members of the Commission should overcome their mostly political differences concerning the definition of an "international watercourse" and recognize the obvious advantages of the broader concept of the "system".

104. With reqard to future wrk, his delegation supported the Commission's decision to give priority to the topics which were already in an advanced state of preparation and shared the Commission's opinion concerning the special rapporteurs (A/41/10, para. 251) and the duration of the session (A/41/10, pars. 252).

The meeting rose at 5.55 p.m.