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SUMMARY RECORD OF **THE** 29th MEETING

Chairman; Mr. JESUS (Cape Verde)

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The meeting was called to order at 10.35 a.m.

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

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

1. **Mr. MAKAREVITCH** (Ukrainian Soviet Socialist Republic) said that international law had a vital role to play in contemporary international relations. The correct understanding of the relationship between international politics and international law was a fundamental component of the new thinking in the nuclear age. In the nearly 40 years of its existence, the International Law commission had greatly contributed to strengthening the role of international law. In order for it to fulfil its function in the modern world, priority attention should be paid to those Of its tasks concerned with quaranteeing peace and security.

2. The draft articles on jurisdictional immunities of States and their property should be based on the concept of full immunity not limited or functional immunity. Such an approach was dictated by the principle of sovereign equality Of States, a fundamental principle of international law. The consistent use of the concept of full immunity in the drafting of all the articles on the topic was an important prerequisite if the future convention was to have meaning and be generally acceptable to States with different socio-economic systems. His delegation strongly objected to the tendency to use the concept of "limited" State immunity in the text of specific draft articles.

3. Another general shortcoming of the draft articles was that insufficient account was paid to the legislation and experience of socialist and developing countries, even though many delegations had pointed to the neqative effects of that approach on the future convention.

4. Article 6 was the key article. It should be concerned with strengthening the basic underlying principle of the immunity of a State and its property from the jurisdiction of another State. As currently worded, however, it failed in that area. His delegation believed that the words in square brackets "and the relevant rules of general international law" should be deleted from the draft article in second reading. They would allow an unjustifiably broad interpretation, provide a loophole for the violation of the underlying principle, and make the future convention meaningless. In parayraph (3) of the commentary to article 6, an attempt was made to justify the retention of the words appearing between square brackets, with the comment that "it was deemed essential that the future development of State practice be left unfrozen and undeterred by the present articles" (A/41/10, p. 35). His delegation was not convinced.

5. Articles 18, 21 and 23 were completely unsatisfactory. Their general shortcominq was the placing of the term "non-governmental" in square brackets, which suggested an attempt to use the concept of "limited" State immunity. Some

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delegations took the position that when an activity was of a commercial nature, the fact that it was undertaken by a State organ should not serve as a basis for State immunity from foreign jurisdiction. His delegation did not share that opinion. It wished to emphasize that a State fulfilled all functions, including "commercial" activities, in its governmental capacity, and must enjoy immunity from the jurisdiction of other States. A vessel belonging to a State could be used for governmental purposes, if it was used by a juridical or physical person having separate status, any suit could be brought against the operator of the vessel. His delegation therefore insisted that the term "non-governmental" should be retained in the text.

6. With respect to articles 21 and 23, his delegation wished to add that the division of State property and of state activities into various categories was not justified from a legal point of view. The consistent implementation of the principle of the immunity of State property from measures of constraint was essential. Therefore the relevant draft articles should be carefully worded to preclude any possibility of the provisions being used to justify measures of constraint with respect to the property of a State without its explicit consent thereto. Imprecise wording of those articles could lead to serious complications in relations between States.

7. In second reading the Commission should take into account the concern expressed by many delegations that draft articles 21 to 23 had been based to a large extent on the growing tendency in the national legislation of some countries to limit the immunity of States from foreign jurisdiction. His delegation was firmly convinced that full immunity of States and their property from such jurisdiction was essential.

8. The wording of paragraph 1 (b) of article 3, which was also used in paragraph 3 of article 7, was quite inappropriate. Moreover, article 13 and article 15 (b) were unacceptable. Article 13 in its present wording was contrary to international and national law. No State could establish criteria concerning the responsibility of another State in cases of personal injuries or damage to property) nor could a national court do so. In cases of personal injuries or damage to property caused by the actions of organs of a foreign State, the person harmed could count on the protection of the state of which he was a national. Article 15 (b) denied the right of a State to invoke immunity before the court of another State in cases of alleged infringement by it in the territory of the State of the forum of a right which belonged to a third party and was protected in the State of the forum. In practice, such a third party was usually a transnational corporation, whereas the State, using foreign patents and other types of intellectual or industrial property was usually a developing country. The adoption of article 15 (b) was likely to jeopardize the rights and interests of developing countries.

9. His delegation preferred the words "exceptions" to "to limitation on" in the title of part III. It would have difficulty in accepting the draft articles unless the Commission made basic changes along the lines suggested.

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10. He was pleased to note that the **Commission's** work on the draft articles on the statue of the diplomatic courier and the diplomatic **bag** not accompanied by diplomatic courier was entering its final phase. An international instrument in that area was needed in order to harmonise and strengthen the existing rules, and to settle questions not covered in the relevant convention. Moreover, the practice of recent years demonstrated the need to enhance the **effectiveness** of norms in that area and ensure appropriate conditions for normal communication between States and their **representatives**.

11. **Article 18**, concerning immunity **from** jurisdiction, and article 28, concerning the protection of the diplomatic **bag**, both key aspects of the topic, required **serious revision**. The way in which the outstanding questions were **resolved** would have a decisive impact on the overall value of the future **legal** document, especially its practical value.

12. With **regard** to article 18, his delegation remained convinced of the necessity of providing the diplomatic courier with full, not functional, immunity from the criminal jurisdiction of the receiving or transit State. The inclusion in article 18, paragraph 1, of the words "in respect of all acts performed in the exercise of his functions" was not a compromise, as **some** delegations had maintained, but a departure from international practice **as** reflected in the 1961 Vienna Convention on Diplomatic **Relations**. That wording could **cause** problems of interpretation, for there was no agreement as to which State, the sending, the receiving **or** the transit State, had the right to **differentiate** between acts performed in the exercise of the functions of the **courier** and other **acts**. In most **cases**, the possibility of abuse and the necessity of protecting the interests of the receiving State and the transit State were the **arguments used** against granting **full immunity** to the diplomatic courier from the **criminal** jurisdiction of those States. In practice, however, abuse of immunity was the exception rather than the rule. Norms intended to be universal should not be **based** on the exception to the general rule.

13. Moreover, the draft articles contained **clearly** formulated provisions concerning the duty of the diplomatic courier to **respect** the laws and **regulations** of the receiving or **transit** State, and the duty of the sending State to ensure that the **privileges** and immunities **accorded** to its **diplomatic** courier were "not used in a manner incompatible with the object and purpose of the **present** articles" (art. 5, para. 1). The language of article 18 **suggested** that the **assumption** of bad faith on the part of the **diplomatic** courier or the **sending** State was the point of departure in the formulation of the draft. His delegation could not accept such an approach. The arguments advanced for not granting the diplomatic courier full immunity from the criminal **jurisdiction** of the receiving State and the transit State were based on references to article 16, which provided that the diplomatic courier "shall enjoy personal inviolability and shall not be liable to any form of arrest or detention", the implication being that that was sufficient to protect the **diplomatic** courier. However, his delegation considered, first, that article 16 in no way **obviated** the need to enunciate clearly the principle of the immunity of the diplomatic courier from the criminal jurisdiction of the receiving State or the **transit** State. Secondly, if reference **was** made to article 16, the **logical**

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conclusion to be drawn was that full, not functional, immunity should be **provided** to the diplomatic courier **from** such criminal jurisdiction. **It was** particularly **important** to determine whether the refusal to extend full **immunity was** not a **derogation** from generally **recognized** norms and treaty practice. His delegation considered that the words "in respect of all acts performed in the exercise Of his functions" should be deleted.

14. With **regard** to article 28, his delegation believed that the full inviolability of the diplomatic bag was a basic guarantee of the freedom of official **communication** between States and their representatives abroad. Therefore it was exceptionally important that the principle should be clearly established in the article. **However**, the numerous **square** brackets in the article testified to the lack of agreement reached in the Commission. Those in favour of including a **provision** on the possibility of inspecting the bag with the help of electronic or other technical devices, and also of opening the bag if there were serious **reasons** to believe that its contents were other than those provided for in article 25, had attempted to justify their position by referring to the need to protect the interests of the **receiving** or transit State.

15. His delegation was firmly convinced that it would be fundamentally incorrect **to** include in the draft a provision capable of weakening or casting doubt on the principle of the inviolability of the diplomatic bag. **It** was important to bear in mind that the legal **régime** being elaborated must be based on the principle of the voluntary fulfilment by States of their international obligations. Article 25 not **only** defined the permissible contents of the diplomatic bag, but obliged the sending State to take appropriate **measures** to ensure respect for the **provision concerning** its contents. His delegation considered article 28, paragraph 2, unacceptable as currently worded. It should be deleted. If there was no agreement **to** remove the square brackets around the word "consular", in other words, no agreement that the possibility of examination could apply only to the consular **bag**, article 28, paragraph 2, **would** be contrary to article 27, paragraph 3, of the 1961 Vienna Convention on **Diplomatic** Relations. In addition, the provisions concerning the **possibility** of *examining* diplomatic bags through *electronic or* other technical devices would place many developing countries at a disadvantage as compared to the developed countries.

16. Some delegations had expressed doubts about the need to include certain articles in the draft, in particular articles 17 and 33. His delegation considered that article 17 ("Inviolability of temporary accommodation") should be retained as it was one of the essential **components** of the set of measures required to ensure the **protection** of the diplomatic courier and the inviolability of the diplomatic **bag**. Article 33 ("optional **declaration**") should also be retained. **Those** in favour Of its deletion had stated that it could lead to a multiplicity of legal **régimes** and result in difficulties of interpretation. It **should** be noted, however, that the **Commission** had already agreed that in view of the different legal **régimes** governing the diplomatic and consular bags and the various categories of **diplomatic courier**, and because not all States were parties to all the Conventions enumerated **in** article 3, the possibility of optional exclusion⁸ would be considered. His delegation favoured the current wording of article 33.

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17. The draft adopted by the Commission in first **reading** could be an acceptable basis for a future convention only if the appropriate changes were made in the articles to which he had referred.

18. Mr. **PAWLAK** (Poland) said it was frequently forgotten that peace and harmonious co-operation **among** States could be achieved only through law. Efforts should be **concentrated** on reversing the trend towards anarchy in international relations and the reign of force, on the basis of an integrated approach to the development of international law.

19. The International Law Commission should fully exercise its role in the process of **building** a generally accepted international legal order. The Commission had contributed significantly to international law by laying the foundations of an international legal system **during** its first two decades. However, multilateral treaties were only part of those foundations. The Commission had, in the past, preferred to codify, **or** at most to **itemize**, rules already recognized, rather than actually develop the law. Perhaps for that reason, there was a growing **incoherence** in the United Nations legislative system **as** a whole.

20. He **noted** that international needs had changed and the system's priorities had shifted. The Commission, in order to fulfil its mandate, must become more **receptive to** the new international challenges and priorities, in particular in the newer areas of law, where a more active attitude should be taken. Moreover, since it took **so much** time to draft articles intended to serve as the basis for treaties, the active use of varied working methods such as model rules and **legal** guidelines, **as** well as concentration on a five-year agenda, would be helpful in accelerating the Commission's work.

21. **Only** 1.7 per cent of the regular United Nations budget was allocated to activities relating to international law. In order to strengthen the concept of peace and co-operation through law, it was indispensable to identify the international community's needs in the development of international law from the point of **view** of the maintenance of international peace and security and the promotion of friendly and mutually beneficial co-operation among States, as well as to enhance the coherence and efficiency of the lawmaking process within the United Nations system. It would be useful to set up a comprehensive **computerized** system covering States' **legislation** and treaty relations, in order to enhance knowledge of the **current** state of **legal** regulations and to facilitate the identification of problem areas and the formulation of legal norms. It would also be helpful to provide for better co-ordination of activities in the lawmaking **process**, by conducting a comprehensive survey of the activities of international organisations and institutions over the entire spectrum of public international law. The Commission's mandate could be broadened to include responsibility for co-ordinating such activities. Information on substantive aspects of the work of such institutions as the European Committee on **Legal** Co-operation, the Inter-American Juridical Committee or the Asian-African Legal Consultative Committee could be included in the section of the Commission's report relating to its co-operation with other bodies. The United Nations Juridical Yearbook might **also** include a review of such activities.

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(Mr. Pawlak, Poland)

22. While the aforementioned steps would facilitate the development Of international law and make it more efficient and more responsive to the needs of a **changing** world, they were only technical instruments. The decisive factor in the success of the process would be the will and determination of all States to develop a stable and comprehensive international legal order.

23. As to the Commission's report (A/41/10), his delegation noted with great satisfaction that the Commission had completed the first reading of the draft article 6 on jurisdictional immunities of States and their property. **Significant** efforts had been made to develop those draft articles on the basis of a pragmatic compromise between the two conceptual approaches. The compromise formula adopted in article 6 was well balanced. The inclusion of the reference to general international law regarding exceptions to the principle of immunity **would** render the draft articles useless and inadmissible, in the absence of precise exceptions valid for eventual parties to those articles.

24. His delegation felt that the title of part III should be "Exceptions to State immunity*", because that wording better **reflected** an integral feature of the **unified** principle of State immunity. Further clarification might be needed with regard to whether immunity from measures of constraint was separate from jurisdictional immunity. paragraph (1) of the commentary to article 21 stated that, theoretically, immunity from measures of constraint was separate from jurisdictional immunity of the State in the sense that the latter referred exclusively to immunity from **the** adjudication of litigation. That **approach** was not, however, appropriately reflected in the draft articles. For example, its title, as well as article 1 and part II, referred only to jurisdictional immunity. If, on the other hand, the assumption was made that immunity **from** measures of constraint was not a separate rule, but rather was derived from jurisdictional immunity, then the rules applicable to State **immunity from measures of constraint** should be set out in part II under "General principles", since **those** rules also constituted part of the general rule of State immunity. In such a case, part IV would become unnecessary .

25. Article 23 created certain **difficulties** for his delegation because of its relationship to article 21. Since article 21 expressed the general rule that State **property** enjoyed immunity from measures of constraint, and indicated which types of property were not protected by that general rule, a further enumeration in article 23 of specific categories of property not **subject to such measures could** only cast doubt on the general application of the rule of immunity. It might also lead to the interpretation that any type of State property not mentioned in article 23 could be subject to measures of constraint. To include in the commentary to article 21 a description of the categories mentioned in the article might be helpful for the future application and interpretation of the rule in question.

26. **His** delegation was very pleased to note that the **Commission** had completed the first **coding** of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. The Special Rapporteur was to be commended for his **diligence** in **seeking generally** acceptable solutions and for

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his fair-mindedness in handling a sensitive and difficult **subject**. Recent event⁸ had confirmed the urgent need to formulate an international legal **instrument** to fill the existing gaps in the relevant multilateral conventions, and to establish a unified **régime** applicable to the diplomatic courier and the **diplomatic bag**.

27. His delegation regretted that the Commission had been unable to achieve full **agreement** on the content of article 28, entitled "Protection of the diplomatic bag", a crucial provision in the draft articles. That provision should constitute a **fair** and generally accepted balance between the interest of the **sending** State in ensuring the protection, safety and confidentiality of the content of diplomatic bags and the security interests of the receiving and transit **States**. It was fully understandable that the protection of the **diplomatic bag**, which was **indispensable** for the normal exchange of official **communication** between a State and its **missions**, should not provide an opportunity for abuse to the detriment of the receiving and transit States. He noted in that connection the recent practice whereby diplomatic agents and couriers voluntarily subjected themselves to screening or search, in the **interest** of the safety and security of air transport. His delegation therefore felt that the wording of the provision should generally be kept in line with the provisions of the existing **multilateral** conventions on diplomatic and consular law. **For** the sake of the standardisation of rules **concerning couriers and bags**, paragraph 2 of article 28, should apply to **all** bags, not just to consular bags.

28. While accepting the substance of article 31, his delegation **was** of the **view** that the explanatory remarks in the commentary which defined the scope of the draft article should be reflected in the text of the draft article itself. **Article 32** also required **rewording**, since it was only **from** the commentary thereto that it could be learned that the term "**regional agreements**" was intended to denote any non-bilateral **agreement** on the same subject-matter other than the **multilateral** conventions on diplomatic or consular law. A question also arose as to whether the draft articles would affect the provisions of those conventions.

29. The Proposed wording of article 33 might indeed introduce some flexibility, allowing States to designate the category of couriers and bags to which they did **not** intend the articles to apply. However, it would undermine efforts to harmonise the law in that area. Should the State be given the option to apply the draft articles to all or some of the types of **couriers or bags**, uncertainty would result as to the **interpretation** and application of the draft articles as a whole. A question might also arise as to whether the separate **régimes** might, in practice, be too complex for the authorities concerned to handle. His delegation felt that **article 298** of the United Nations Convention on the **Law of the Sea** could not serve as an appropriate precedent, as that article **applied** wholly to procedures for the settlement of disputes, and did not concern the substantive **obligations** of States.

30. With regard to the Commission's conclusions, contained in chapter VIII of the **report**, his delegation felt that it was **indispensable**, in order to achieve progress on the important and complex **item** on the Commission's agenda, to restore **its** normal **12-week** session. Poland also shared the **Commission's** view that the current system of summary records should be maintained. As to documentation, his delegation trusted that the Secretariat Would make **every** effort to **expedite**

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publication of the Yearbook of the International Law Commission and to ensure that the new edition of The Work of the International Law Commission was published in 1987. Roth publications were extremely valuable aids for the **lawmaking process**.

31. Mr. SUESS (German Democratic Republic) said that his delegation attached great importance to the codification project on the jurisdictional immunities of States and their property. Since the draft articles did not adequately reflect the **positions** of the socialist States and many **developing** countries, the **German Democratic Republic** would submit comments to the Secretariat in due course.

32. The difference between draft articles 2 and 3 was unclear. His delegation therefore suggested that the two draft articles should be merged. The use of the term **"State"** in article 3, paragraphs 1 (a) and 1 (d), was acceptable, since only the respective government **agencies** were empowered to exercise the sovereign authority of the State. However, care must be taken to ensure that **self-contained economic** unit⁶ with a legal personality of their own could not in any way be **subsumed** under the term "State".

33. His delegat⁷ on strongly opposed the wording of draft article 6 that remained inside square brackets, since it meant that there could be further restrictions in addition to the exceptions laid down in the draft articles. The commentary to draft article 6 indicated that the text inside square **brackets** was designed to make allowance for future developments in international law. Although future developments could not be excluded, it had so far never been considered **necessary** to include such a rule in any convention. The "customary rules of international law, based on the judicial, executive and legislative practice of States" were to be reflected in the future convention, which amounted to allowing the practice of individual States that deviated from jointly established rules to change those rules. The German Democratic Republic strongly opposed such "further **development**" of international law, which was tantamount to sanctioning a breach of international law.

34. In draft article 21, the principle of State immunity from measures of constraint should simply be stated, and the latter part of the draft article - starting with the word "unless" - should be deleted. The German Democratic Republic was not in favour of the exception laid down in subparagraph (a) because it would impose on the courts the unreasonable task of assessing the intentions of States. The **assignment** of such responsibilities or **competences** to the courts could not but prejudice relation⁸ between States and open the way to arbitrary restrictions and measures of constraint directed against the property of States.

35. His delegation had reservations about draft article 28, which might **lead** to erroneous conclusions about the application of the future convention. International law **recognized** both the principle of reciprocity and the right of States to conclude international **agreements** on all matters affecting them.

36. The **German Democratic Republic** noted with satisfaction that the Commission had adopted a set of draft articles on the status of the diplomatic courier and the

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diplomatic **bag** not accompanied by diplomatic courier. It was important that the project in question should be concluded, at an early date, in the form of an internationally binding instrument, applicable to all kinds of official diplomatic courier and official diplomatic bag within the meaning of the existing convention on the subject.

37. The core of the project was formed by the draft articles on the facilities, immunities and privileges to be accorded to the diplomatic courier and the diplomatic **bag**, with a view to guaranteeing the **legitimate** interests of the sending, receiving and transit States. The inviolability of the diplomatic **bag**, the confidentiality of its contents, and national security interests could be adequately safeguarded only on the basis of the generally **recognized** principles of diplomatic law. The future instrument should codify all the immunities and privileges that were indispensable for the independent and unimpeded exercise of the diplomatic courier's functions, which were directly derived from the sovereignty of the sending State. On the other hand, possible **control** and **restrictive** measures on the part of the receiving or transit State would have to be strictly limited to measures directly protecting such State's **legitimate** national **security** interests. As they stood, the draft articles did not meet that basic requirement in every respect. That was particularly true of draft article 28, which provided for the examination and/or return of the diplomatic bag to its place of origin. His delegation could not accept the current version of that draft **article**, which would allow the treatment of the diplomatic bag to fall below the generally recognised standards. Furthermore, the future instrument **must not** open the way for any erosion - for example, through an optional declaration, as provided for in draft article 33 - of the rules set forth in the existing convention on the **subject**; nor must it lead to the application to the diplomatic courier OK diplomatic **bag** of the restrictive rules laid down in the Vienna convention on Consular Relations.

38. His delegation endorsed the Commission's decision that the draft articles set forth in chapter III, section D.1, of its report should be transmitted through the Secretary-General to Governments for comments and observations, and that Government should be requested to submit such **comments** and observations to the Secretary General by 1 **January** 1988 (A/41/10, **para.** 32).

39. On the subject of the non-navigational **uses** of international **watercourses**, his **delegation** welcomed the fact that the Special Rapporteur remained **committed** to the preparation of a framework instrument that dispensed with unnecessary details. The Proposed **instrument** should serve as a set of guidelines for States for the conclusion of specific treaties on co-operation in **the** management of a **given** international watercourse. The question was whether the codification process should lead to a convention.

40. The Special Rapporteur's ideas on draft articles 1, 9, 10 and 14 **gave** rise to a **number** of problems. His **delegation** did not support the Special Rapporteur's **proposal** to return to the Commission's working hypothesis of 1980 and thus to the "system" concept, which was very similar to the drainage-basin concept and **was** incompatible with the principle of the sovereign right of every State to use the

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section of an international watercourse that ran through its territory. The German Democratic Republic had welcomed the previous Special Rapporteur's abandonment of the "system" concept. It was in favour of further work on the topic on the basis of the international watercourse concept, by which it meant rivers that crossed or formed the border between two or more States.

41. The German Democratic Republic proposed that draft article 6 should enunciate the principle of the permanent sovereignty of States over their natural resources and recommend, on that basis, to riparian States that they should make the necessary arrangements for the management of the water resources of international watercourses. The decision as to what form such management should take must be left to the States concerned. Moreover, the treaties referred to by the Special Rapporteur as proof of the universal recognition of the principle of the "reasonable" and "equitable" sharing of water use were confined to questions relating to the quantitative distribution of the available water resources. The applicability of that principle to qualitative demands on water resources, particularly where pollution was concerned, was not documented. Draft article 9, which dealt with the duty to refrain from causing "appreciable harm", should require every Watercourse State to refrain from and prevent within its jurisdiction such activities as exceeded its equitable and reasonable share of the uses of an international watercourse. It was only by agreement between the watercourse States that it could be determined what in a specific case was to be understood by the expression "reasonable and equitable share of the uses".

42. In draft articles 10 to 14, the Special Rapporteur's goal was to further develop the concept of the duty to notify, consult and negotiate. His delegation doubted whether any State practice that could provide a basis for the draft articles actually existed, and had difficulty in following the Special Rapporteur's logic. Draft articles 10 to 14 should be fully revised once again, since they seemed to run counter to the principle formulated in draft article 9. The Commission should confine itself to the principle of the duty of notification concerning certain situations, while recommending to States the adoption of information and consultation mechanisms commensurate with their obligations under special agreements on the management of international watercourses.

43. The outcome of further codification work on the law of the non-navigational uses of international watercourses depended largely on whether it would prove possible to develop general principles governing equitable and mutually beneficial co-operation between riparian States, irrespective of their objective inequality where the possibilities for water use and the effects of such uses were concerned.

44. Mc. CALERO-RODRIGUES (Brazil), referring to the draft code of Offences against the Peace and Security of Mankind, said that the General Assembly could no longer delay its reply to the question whether the Commission's mandate extended to the preparation of the statute of a competent international criminal jurisdiction only for individuals, or for States as well. The reply, which should be given at the current session, could take the form of either a paragraph in the resolution to be adopted on the Commission's report or a separate decision.

(Mr. Calero-Rodrigues, Brazil)

45. Another question related to the very scope of the draft Code ratione personae. At the time of the adoption of the decision to prepare the draft Code, the basic idea had been to provide a set of rules for the conduct of individuals, whether or not agents of a State. The whole system of criminal law, both domestically and internationally, was based on the concept of individual responsibility. Since the concept of collective responsibility had been abandoned, the existing system of penalties would have to be changed considerably if penalties for criminal conduct had to be applied to States. If article 19 of part one of the draft on State responsibility was retained, the legal consequences of international crimes perpetrated by the State should be set out in part two of the draft. Mixing the concept of the responsibility of individuals with that of the responsibility of States would make the preparation and adoption of the draft Code an extremely difficult task. His delegation therefore believed that the General Assembly should instruct the Commission to take only the criminal responsibility of individuals into consideration in preparing the draft Code. If delegations were not prepared to give such a straightforward answer, the Assembly could recommend that the Commission should adopt that approach for the time being, without prejudice to the possibility of subsequent consideration of the question of the criminal responsibility of States.

46. Many Governments, including the Brazilian Government, were not convinced of the feasibility of establishing an international criminal court. Yet, from a technical point of view, the establishment of an international jurisdiction to apply the draft Code might seem essential. Alternatives could be explored, of course, and his delegation had recommended a full study of the possibility of having recourse to a system of universal jurisdiction. However, there were weighty arguments against such an approach⁸ it had been pointed out that supreme courts ensured the uniformity of judicial practice at the national level, but that there was nothing to guarantee the uniformity of universal practice. Although his delegation continued to have doubts about the solution to be adopted, it had concluded that the General Assembly must pronounce on the question without delay. It should state that the Commission's mandate did indeed extend to the preparation of the statute of a competent international jurisdiction. It should add that the preparation of the statute would be without prejudice to the exploration of alternative systems for the application of the draft Code, such as the system of universal jurisdiction. The General Assembly would not be committing itself to accepting the establishment of an international criminal court. It would be requesting the Commission to submit to it a working paper that would clarify some issues and, in due course, facilitate the adoption of a final decision on the question. The Commission's work on the statute might prove fruitless, because States might ultimately decide not to establish a court. However, nobody could guarantee that any of the Commission's work on the draft Code was not a futile exercise.

The meeting rose at 12.25 p.m.