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SUMMARY RECORD OF THE 31st MEETING

Chairman: Mr. FRANCIS (Jamaica)

later: Mr. VOICU (Romania)

CONTENTS

AGENDA ITEM 1.30: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS
THIRTY-EIGHTH SESSION (continued)

AGENDA ITEM 125: DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF
MANKIND: REPORT OF THE SECRETARY-GENERAL (continued)

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The meeting was called to order at 3.05 p.m.

AGENDA ITEM 130: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS THIRTY-EIGHTH SESSION (continued) (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 (continued) (A/41/537 and Add.1 and 2)

1. Mr. SZEKELY (Mexico) expressed his concern about provisions in the draft articles on jurisdictional immunities of States and their property which did not faithfully reflect the general practice of States. In commenting on those draft articles Mexico had to be categorical because of its experiences in foreign courts when responding to abusive and unjustified claims in which international law had not always been respected and such fundamental principles as the legal equality of States, which made it impossible for one State to prosecute another, had been violated. That was why Mexico was extremely concerned about the restrictive tendency of a number of countries, particularly industrialized ones, to adopt legislation which weakened the principle of the sovereign immunity of States and thus did not reflect the legal wisdom and practice generally prevailing in the international community. Mexico was particularly concerned to see that the same excessively restrictive trend had continued in the elaboration of the draft articles, giving the impression that, in their preparation, attention might have been paid merely to the practice of a few States. Furthermore, Mexico had noted that more attention had been paid to the positions adopted by national and non-governmental professional organizations than to the comments and positions of sovereign States which were Members of the United Nations and to which the draft articles would be applied. If that inappropriate trend continued, Mexico might find it impossible to continue participating in that specific exercise relative to the codification and progressive development of international law, a move which would be totally inconsistent with its traditions.

2. Mexico maintained that it would be unacceptable for the draft articles to embody an artificial reversal of the current rule and practices of international law whereby exceptions or restrictions to the enjoyment of immunity would become the general rule and the granting and recognition of immunity the exception.

3. It was more relevant than ever to consider the true meaning of the terms "codification" and "progressive development", which were the raison d'être of the Commission. Codification must be as exhaustive as possible, based on the extensive State practice, precedent and doctrine. However, the codification of State practice regarding immunity was fraught with difficulties. Identifying State practice for the purpose of determining the norms of international law was facilitated in the case of States such as the common law States, whose legal systems were based on concrete case law, and in the case of States that had adopted specific legislation on immunity of States. It was also facilitated in the case of States which, despite the trends in the international community, still took a restrictive approach to State immunity. There were more complete records of judicial precedents in States where sovereign immunity was controversial as a

(Mr. Szekely, Mexico)

result of the restrictions imposed on it, than in States where it was respected. However, the majority of States, particularly those with civil law systems, such as Mexico, fell into the latter category; the legal principles they applied and the legal procedures they followed in cases involving immunity virtually precluded the formulation of historical evidence of their judicial precedents, and their practice therefore tended to be disregarded. He respectfully urged the Commission to rectify that situation.

4. With regard to the "progressive development of international law", as defined in article 15 of the Statute of the Commission, it would be interesting to know to what extent the General Assembly had intended the Commission not only to codify the law relating to the jurisdictional immunities of States, but also to engage in its progressive development, and to what extent the Commission should become involved in aspects of sovereign immunity not yet regulated by international law, OK on which there were no sufficiently developed norms. Work in that area would also be complicated by the diversity of State practice. Mexico believed that despite such diversity, there was a generalized trend towards granting sovereign States immunity from the jurisdiction of other States, except when the State acted as a private subject, particularly in the area of trade. A new convention on immunities of States should codify substantive law and develop procedural law, stipulating general norms for such questions as the form and time-limits for claims against a foreign State, the reply to those claims, and the various procedural opportunities available to States for asserting their immunity. The work on progressive development, like that on codification, had resulted in the elaboration of provisions which were not in complete conformity with the norms in force in the majority of States.

5. The Commission had already demonstrated a careful approach to its task by revising the 1985 text of article 24 so as to reject the idea that the property of central banks or State monetary authorities could be used in the enforcement of judgements or to ensure the payment of debts. No basis in such a restriction could be found in the legal practice or legislation of the few countries which had thus tried to limit the sovereign immunity of States. Such a restriction would create insecurity in the international financial system.

6. The Commission might benefit from the work carried out by the Organization of American States on a draft regional convention regarding immunities of States, which contained a more clearly delineated orientation, more faithfully based on the extensive practice of States.

7. MR. VOICU (Romania) said that the question of jurisdictional immunities of States and their property was extremely complex, because it lent itself to various political approaches and touched on public as well as private law. The purpose of article 3 was to facilitate the interpretation of the other articles and to avoid semantic difficulties in the interpretation of terms. The interpretive provisions were a precise indication of the will of the contracting parties. Interpretive definitions could be divided into two categories: synthesizing clauses and regulating clauses. Synthesizing clauses formulated, in conformity with the will

(Mr. Voicu, Romania)

of the contracting parties, the meaning of a term, more or less disregarding its sense in everyday language. The purpose of a synthesizing interpretive definition was to establish the legal meaning of a term having several significations, i.e. to isolate the particular meaning which had been given to it in the treaty by the contracting parties. Furthermore, synthesizing definitions could confer on the terms used a degree of precision and certainty which was ordinarily lacking in common usage.

8. Regulating clauses could introduce an interpretive direction, clarifying expressions whose meaning might be vague in the area of law. They indicated in a general but binding manner the limits for the interpretation of a treaty. The meaning prescribed in those clauses might differ from that usually ascribed to the term concerned, but it was the former meaning which was considered the authentic one for the purposes of the treaty in question.

9. The definition of the term "State" in article 3 seemed to combine the synthesising and regulating approaches. The terms "State property" and "interests" were used in numerous articles, but discussion within the Commission had revealed various points of view in that regard which might foreshadow divergent interpretations. In second reading, a number of articles should be reconsidered as the entire contents of the draft should be better co-ordinated and a uniform and more precise terminology should be used. In article 8, for example, it would be useful to improve the wording of subparagraphs (a) and (c). It must be specified that what was at issue was an international agreement "in force" and that the declaration before a court in a specific case should be made "in writing".

10. Referring to the draft as a whole, he said that a clearer definition should be given of State immunity in respect of activities carried out and property used in the exercise of diplomatic and consular functions. At a more general level, account should also be taken of the fact that States were engaging more and more frequently in economic activities within the framework of intergovernmental agreements and ought to enjoy complete jurisdictional immunity in respect of such activities. Exceptions to State immunity did not justify proceedings being brought against a State or its property in respect of contracts concluded or activities carried out by a State enterprise having a legal personality and a capital of its own.

11. Article 4, which specified the privileges and immunities not affected by the articles of the draft, was incomplete; in addition to the privileges and immunities accorded under international law to heads of State, those accorded to other persons exercising responsibilities within the State, such as the Prime Minister, the Minister for Foreign Affairs, the General Secretary of the party in power in certain States, and so on whose functions were sometimes comparable to those of the head of State, should likewise not be affected by the articles.

12. Part II of the draft gave rise to concern because it attempted to impose considerable limitations on State immunity by making it subject, not only to the articles of the draft, but also to all relevant rules of international law. The

(Mr. Voicu, Romania)

fact that the words in question appeared in square brackets drew attention to the lack of agreement on that point. The same applied to the title of part I II and to a number of passages in articles 18 to 21. The Commission should reconsider the issues concerned in second reading in the light of the comments made by Governments. His delegation, for its part, wished to reaffirm its view, which was shared by the developing countries, that foreign courts should not exercise jurisdiction over State-owned or State-operated ships engaged in commercial non-governmental activities. It also considered that the right to decide upon measures of constraint in respect of State property did not form part of the general jurisdictional powers of courts. If a state consented to the jurisdiction of a court, an express and distinct declaration to that effect was necessary in order to enable the court to take such measures. The principle was an important one in practical and political terms and should be more clearly reflected in the draft.

13. Turning to the question of the status of the diplomatic courier and of the diplomatic bag not accompanied by diplomatic courier, he said that his delegation had already commented on articles 1 to 27 at previous General Assembly sessions and he would therefore confine his remarks to draft articles 28 to 33. With reference to article 28, he associated himself with the view reflected in paragraph 7 of the commentary to the article to the effect that the inclusion of the phrase "... and shall be exempt from examination directly or through electronic or other technical devices" was necessary because the evolution of technology had created very sophisticated means of examination which might result in the violation of the bag's confidentiality. Moreover, authorizing the examination of the bag through electronic or other technical devices would place developing countries at a disadvantage. As for the first passage appearing in square brackets, he noted that it reproduced and developed in a satisfactory manner the provisions already codified in respect of the diplomatic bag, and in that connection particularly welcomed the idea that the diplomatic bag should be proclaimed inviolable wherever it might be.

14. The provision appearing in paragraph 2 of article 28 to the effect that the authorities of the receiving or of the transit State might require that the bag be returned to its place of origin amounted to proposing that the conditions applied to the diplomatic bag should be different from those specified in the four diplomatic conventions already in existence. As the majority of the Commission's members had recognized, the object of the draft articles was to supplement the relevant provisions of the conventions in question and not to modify the status of the diplomatic bag as it emerged from those provisions. In that connection, he pointed out that the authorities of the transit State were not mentioned either in the Vienna Convention on Diplomatic Relations or in the Vienna Convention on Consular Relations. Paragraph 2 of article 28 was also inconsistent with article 32 of the draft, which provided that "the provisions of the present articles shall not affect bilateral or regional agreements in force as between States parties to them".

(Mr. Voicu, Romania)

15. By providing for an optional declaration specifying the categories of diplomatic courier and diplomatic bag to which the draft would not be applied, article 33 also sought to institute a régime different from those provided in the existing diplomatic conventions. Besides, a plurality of régimes would make for complexity and confusion in practice and would detract from the effort to standardize the law in the area concerned. His delegation felt that a certain flexibility of application of the régime envisaged in the draft was necessary in order for it to be accepted by the largest possible number of States, and, in that connection, expressed a preference for a régime based on the Vienna Convention on Diplomatic Relations of 1961, the Convention on Special Missions of 1969 and the Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 1975.

16. Mr. Voicu (Romania) took the Chair.

17. Mr. ROMPANI (Uruguay) remarked on the very high quality of the work of the International Law Commission. Its report (A/41/10) had been carefully prepared. However, though it was easy to read, it presented many translation difficulties. For example, the word "mercantil", used in the Spanish version, was not in current use in his country, where "comercial" was preferred. The word "incoación", used in the Spanish version of article 24 of the draft on jurisdictional immunities of States and their property, was not in current use either. The Commission had been right to try to avoid formulating definitions. In his opinion, however, definitions were not only inevitable but obligatory in the area of criminal law, which could not dispense with specifying types of offences.

18. The provisions and commentaries on the jurisdictional immunities of States and their property were being studied by his Government, which would report on them before January 1988. He commended the Commission's concern to ensure "consistency in terminology and substance, correspondence between the draft articles, and conformity in language versions" (para. 18), and agreed with the Commission's use of the phrase "unless otherwise agreed between the States concerned" in a number of draft articles. Another formula used in the text was: "the immunity of a State cannot be invoked before a court of another State which is otherwise competent". In the Spanish version the wording "ante un tribunal competente de otro Estado" would be preferable to the wording "ante un tribunal de otro Estado, por lo demás competente" (art. 16). His delegation was in favour of retaining the following formula that sometimes appeared within square brackets: "and the relevant rules of general international law".

19. In some parts of article 18 reference was made to "commercial [non-governmental] service"; in paragraph 7, the term "government and non-commercial" was used without square brackets. For his delegation "non-governmental" meant private or individual. In the commentary to article 6, the Commission distinguished acts performed in the exercise of "sovereign authority of the State" from all others. For Uruguay, that differentiation was perfectly understandable.

(Mr. Rompani, Uruguay)

20. Turning to the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, he said that article 3, paragraph 1 (8), which defined "delegation", stated the obvious.

21. The topic of State responsibility raised a great number of problems. What was decided with respect to State responsibility must be linked to the draft Code of Offences against the Peace and Security of Mankind. Work on State responsibility should be guided by the following general principles. First, whenever an obligation established under international law was violated, a new relationship was established between the author State and the victim State; the latter was entitled to compensation, which the former was obliged to provide. Second, the failure to honour a commitment entailed an obligation to provide compensation. Third, the wrongful act must have resulted in harm or injury, not merely the risk of such harm or injury. Fourth, it was not necessary for there to be "criminal intent". Only the objective conduct of a State was to be taken into consideration. Fifth, the international responsibility of a State could also come into play as a result of acts of legislative organs, unauthorized acts of officials, acts of the judiciary, acts of individuals, and even the violation of the rights of nationals of a State. Neither the legislature nor the judiciary could be exempt from responsibility, since they were organs of power of the State and therefore a constituent element of the State. A State should incur international responsibility when its laws or decisions were contrary to international law or its agreed international obligations. It should also incur responsibility in cases where an official acting on behalf of the State went beyond the bounds of his authority. Those points should be taken into account in connection with the draft articles on State responsibility.

22. The Commission's point of departure was that all responsibility arose from an internationally wrongful act (art. 1), taking into account that the rules of customary international law should continue to govern the legal consequences of an internationally wrongful act of a State not set out in the provisions of part two of the draft (art. 3). However, that provision could in practice conflict with the norms of domestic law. Agreement must be reached as to when a customary rule was binding at the international level.

23. The Commission did not define the term "injured State", but inasmuch as it described what should be understood by "injured State", it presupposed that the internationally wrongful act should cause actual harm and not merely present a threat of potential damage. But it had avoided defining what should be understood by actual harm.

24. He drew attention to article 5, paragraph 2 (e) (iii), which referred to the infringement of a right created or established "for the protection of human rights and fundamental freedoms", and to paragraph 3, which referred to the question of an internationally wrongful act that constituted "an international crime". Those provisions should be linked to the provisions of the draft Code of Offences against the Peace and Security of Mankind.

25. Mr. GUEVORGIAN (Union of Soviet Socialist Republics) stressed the importance which his delegation attached to the activities of the Commission, which had done much useful work at its thirty-eighth session. Unfortunately, substantive difficulties had arisen in connection with the topic of jurisdictional immunities of States and their property, and those difficulties were inevitably reflected in the draft article⁵ provisionally adopted by the Commission in first reading. The difficulties arose first and foremost from the fact that the draft was based on the concept of limited or functional State immunity.

26. Soviet representatives had repeatedly pointed out that the concept of limited immunity could not serve as the basis for the codification or progressive development of international law, because it was inconsistent with the principle of sovereign equality of States, a principle whose universality and importance were self-evident.

27. The concept of sovereignty as an inalienable property of the State was reflected in the Charter of the United Nations. The legal content of the principle was set forth in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. From that document it emerged very clearly that the right of each State to juridical equality was a right inherent in State sovereignty; and from that it followed, in turn, that no State could exercise its authority in respect of another State. A State and its organs and missions enjoyed immunity from the jurisdiction of another State. Proceedings could not be instituted against them in another country's courts, and measures of constraint could not be exercised against the property of a foreign State without its consent. Of course, a State was free to exercise its sovereign right to consent to submit to the jurisdiction of a foreign court, but such consent had to be clearly stated, the State giving such consent also deciding whether consent should be given in each specific case or be provided for in an international agreement between the States concerned.

28. Accordingly, his delegation was unable to accept one of the central provisions of the draft, article 6, in the form in which it appeared in the Commission's report. In his delegation's view, the article should simply state the general principle that a State enjoyed immunity, in respect of itself and its property, from the jurisdiction of the courts of another State. As for the words "and the relevant rules of general international law", at present appearing in square brackets, he shared the view reflected in paragraph (3) of the commentary to the article that the reference to general international law regarding exceptions to the principle of immunity rendered the entire draft useless and inadmissible (A/41/10, p. 35).

29. The concept of State immunity as he had expounded it did not mean that the State was bound by nothing in its relations with other States and could establish the order of its relations with other States exactly as it pleased. The true limit upon sovereignty was the sovereignty of all other States. International obligations freely and mutually assumed by States to respect the sovereignty of other States, including the obligation to respect the immunity of other States, was

(Mr. Guevoryan, USSR)

not a restriction upon sovereignty but its confirmation as a fundamental universal principle of inter-State relations. Immunity from foreign jurisdiction did not mean that the State enjoying immunity could ignore the laws of another State. On the contrary, it was under an obligation strictly to observe the other State's domestic legislation and, in particular, could perform only such acts as were permitted by that State.

30. Many of the draft articles proceeded from the view that a State, depending upon the functions performed, could act in different capacities and, accordingly, enjoy or not enjoy immunity. The articles separated State actions into actions of a public-law nature and those of a private-law nature.

31. His delegation was unable to agree with that premise inasmuch as it contradicted the principle of sovereign equality of States in all spheres of their mutual relations. A State was one and indivisible, as was State authority. All the organs and missions of a State acted on the basis of the authority of the State within the limits of their rights and obligations as established by the State. No State organ could be excluded from the general system, singled out or opposed to other organs. A State's trade missions acted, like other State organs, on behalf of the State, and enjoyed immunity from foreign jurisdiction.

32. A State's economic activities, including those carried out through commercial contracts, were not less important to the State than other forms of activity. The State engaged in economic activities, not as a private individual, but as a sovereign entity. A State sector of the economy existed in all countries. In socialist countries, it was the predominant sector; in many newly independent States, it was developing more and more strongly. His delegation therefore objected to the attempts made in the draft to single out and set aside so-called commercial activities on the pretext that they were not State activities proper.

33. Furthermore, it was inadmissible for a court to consider the activities of a foreign State and to qualify them in one manner or another without regard for that State's own opinion. That in itself constituted unacceptable interference in the internal affairs of States. It was wrong to equate the State with physical persons by denying it immunity in respect of actions which, allegedly, could also be performed by private individuals. In concluding a transaction in civil law, the State acted as a special subject of civil law in that it did not act in the interest of personal profit of private individuals, but in the interests of the State and the economic and social development of its people.

34. The above comments referred to many provisions of the draft, particularly in article 3, paragraph 2, article 11, article 15 (b), article 19 and article 21 (a). Those provisions, as well as a number of others to which his delegation had referred at previous sessions, were unacceptable and required substantial reworking, without which the draft could not count upon his delegation's support. It was to be hoped that the Commission would take those considerations into account in subsequent readings.

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(Mr. Guevorquian, USSR)

35. Turning to the question of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, he reaffirmed the importance which his Government attached to the adoption of an international document on that subject and welcomed the Commission's completion of the first reading of the draft articles in question. The issue which had given rise to most differences of opinion in connection with article 18 was the provision concerning the diplomatic courier's immunity from the criminal jurisdiction of the receiving State or the transit State. In that connection, he drew attention to the preamble to the 1961 Vienna Convention on Diplomatic Relations, according to which the purpose of privileges and immunities was not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States. In order to ensure the efficient performance of the functions of the diplomatic courier - the custody, transportation and delivery of the diplomatic bag - it was essential that he should be protected from pressure of any kind on the part of the receiving or transit State. One of the most serious forms of such pressure would be the threat of criminal proceedings.

36. Since the diplomatic courier's functions were not less important or confidential than those of any member of the administrative and technical staff of a mission, it was obvious that the scope of the diplomatic courier's immunities should not be less than that of the immunities of administrative and technical staff. Under article 37, paragraph 2, of the Vienna Convention, members of the administrative and technical staff of a diplomatic mission enjoyed the same privileges and immunities as diplomatic agents. Legal guarantees against abuses of the diplomatic courier's privileges and immunities were duly provided in article 5 of the draft.

37. For all those reasons, his delegation could not agree with those who opposed article 18 in general and the paragraph concerning immunity from criminal jurisdiction in particular. Nor could it accept the suggestions of those who favoured the idea of so-called functional immunity and argued that the diplomatic courier should enjoy immunity from criminal jurisdiction only in respect of acts performed in the exercise of his functions.

38. His delegation did not support the proposals to the effect that the provisions of the 1963 Vienna Convention on Consular Relations, whose article 35, paragraph 3, laid down the conditions under which the consular bag could be opened and returned to its place of origin, should be extended to the diplomatic bag. That would diminish the status of the diplomatic bag as established by the 1961 Vienna Convention, to the detriment of normal communications between the sending State and its diplomatic missions. In his delegation's view, draft article 28 should be based on the existing norms applicable to the diplomatic bag, and should stipulate that the bag should not be opened or detained and should be exempt from examination directly or through electronic or other technical devices. The present level of development of electronic and other technical devices made it possible to extract confidential information from the diplomatic bag, thus undermining the principle of the bag's inviolability and of the confidentiality of its contents. Accordingly, the use of such methods should be prohibited.

(Mr. Guevrguian, USSR)

39. The problem of possible abuses of the flag for the dispatch of articles other than those intended exclusively for official use could be solved only through legal guarantees against abuses much as those provided in draft article 5, and through scrupulous respect by States for their international obligations. Moreover, receiving and transit States had sufficient means of preventing the transmission of any prohibited articles and, in general, of stopping any abuses of immunities and privileges. In the event of such abuses, they could take the appropriate action within the framework of the international responsibility of States for internationally wrongful acts. Those were the only possible material guarantees of the observance of the international obligations concerned.

40. The draft adopted in first reading by the Commission could provide a sound basis for a future multilateral document on condition that, in second reading, the text of article 18, paragraph 1, was improved and the issues giving rise to differences of opinion in respect of article 28, paragraph 2, were resolved in a satisfactory manner.

41. Mr. FELICIANO (Philippines), referring to the topic of the jurisdictional immunities of States and their property, said that article 11 was a critical article setting forth a major limitation of or exception to a general principle of State immunity. Under that article the State could not invoke immunity in a proceeding arising out of a "commercial contract" entered into by it with a person or entity not having its nationality. The scope of "commercial contract" was clearly of critical importance. Article 2.1 (b) (i) and (iii) used the same term in describing contracts intended to be covered. Subparagraph (i) implied that there could be contracts of a non-commercial type for the sale or purchase of goods or the supply of services. The draft articles did not offer criteria for distinguishing commercial from non-commercial contracts in the context of the jurisdictional immunities of States. However, they appeared to permit reference to whatever criteria might exist in the internal law of the State of the forum. Article 3, on "interpretive provisions", referred to the "nature of the contract" and, somewhat secondarily, to the "purpose of the contract". His delegation submitted that the wording "nature of the contract" might be too abstract and general to afford guidance in determining whether immunity should or should not apply in a given case. The "nature of a contract" could not be considered separately from the "purpose of a contract". In any case, the concept of "commercial contract" probably differed from jurisdiction to jurisdiction. His delegation hoped that further consideration would be given to clarifying in what disputes concerning what kind of contracts jurisdictional immunity should be available to a State. At the draft articles stood, the only reliable way of establishing intention to invoke or waive the right to immunity was by explicit contract stipulation under article 11.2 (b), whether the contract was characterized as "commercial" or "non-commercial".

42. Turning to article 6, his delegation proposed that the words in square brackets "and the relevant rules of general international law" should be omitted. The draft articles would take precedence over pre-existing general international law to the extent that they changed it. Draft articles that did not modify general international law would simply coexist with it. To assume that article 6 referred

(Mr. Feliciano, Philippines)

to the development of subsequent norms of general international law inconsistent with the draft articles was to raise questions relating to us cogens.

43. Article 16 in its existing form was a substantive departure from a rule of immunity recognized in customary law. It related to taxes, which were imposed by a public authority, and not to charges for specific services rendered. Article 16 needed considerable reworking or preferably, should be deleted. In article 19 reference should be made to proceedings relating to the enforcement of an arbitral award. Furthermore, it should be made clear that the provisions of article 21 on the immunity of State property from measures of constraint were applicable in enforcement proceedings in commercial arbitration, as well as in pre-arbitration injunction proceedings. His delegation was pleased to note that article 23 took balanced account of the interests of third world countries in specifying categories of State-owned property considered as used for non-commercial or governmental purposes. Article 23.1 (c) was of special interest to many developing countries since it was essential for ensuring that the restructuring of the foreign debt of a country's public or private sector was carried out in an orderly manner.

44. The draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier constituted a model for the formulation of practical provisions which accommodated the interests of sending, receiving and transit States. Articles 4, 18, 19 and 20 gave a diplomatic courier the privileges and immunities accorded to regular diplomatic officials, which appeared essential for the efficient and unhampered manual carriage and delivery of official communications between a State and its diplomatic and other missions abroad. Those privileges and immunities were balanced by a corresponding obligation on the part of the sending State to refrain from uses of the bag incompatible with the basic objective of freedom of official communications, and by the duty of the courier to respect the laws and regulations of the receiving and transit States and to refrain from interfering in their internal affairs. The receiving or transit State could terminate at any time the functions of the courier or declare a particular courier unacceptable. Basic protection was accorded to the diplomatic bag itself; the authorities of the receiving or transit State were prohibited from opening or detaining it. The words within square brackets in article 28, paragraph 1, should be retained as necessary and useful in describing the ambit of the inviolability of diplomatic bags. Article 28, paragraph 2, needed careful consideration since the security and fiscal interests of transit States were not ordinarily engaged by the passage of diplomatic bags through their territories. Where no non-permissible article was found after a sending State had consented to the examination of its bag by any procedure, the receiving State should perhaps be required to make appropriate amends to the sending State.

45. In the current state of international relations, the enforcement of the draft Code of Offences against the Peace and Security of Mankind should be based upon the principle of universal jurisdiction rather than on the more complex notion of international criminal jurisdiction. With regard to the substantive definitions of crimes against peace, while paragraphs 1 and 4 of article 11 of the draft Code had reached a useful level of specificity, further work in refining and specifying the concepts of assistance, encouragement and toleration was required. Paragraphs 5

(Mr. Feliciano, Philippines)

and 6 embodied important and promising concepts which needed development. The relevance of the degree of seriousness of an alleged criminal breach of treaty obligations and the need to formulate methods of measuring or describing such degree of seriousness needed to be addressed. Paragraph 7 of article 11 clearly awaited textual elaboration. With respect to paragraph 8, he suggested some re-examination of the basic assumption that the legal or criminal quality of "mercenarism" was contingent upon such factors as the presence or absence of "desire for private gain" rather than upon the legal or criminal quality of the objectives sought through the use of mercenaries. The question might also be asked whether mercenaries should be treated as instruments or means of combat and whether the principles and rules on permissible weapons and modes of hostilities should be applied to them and to their acts when a determination of lawfulness was being made.

46. With regard to the definitions of acts constituting crimes against humanity, he noted the addition of new categories of crimes: apartheid, "inhuman acts" against "elements of a population on social, political, racial, religious or cultural grounds", and serious breaches of international obligations concerning the preservation of the human environment. It was clear that substantial and interesting intellectual work on that subject awaited the Commission.

47. The topic of international liability for injurious consequences arising out of acts not prohibited by international law was potentially far-reaching in scope and posed formidable intellectual challenges. The efforts to establish the obligations on the part of an acting or source State to inform and to negotiate with potential victims were encouraging. He welcomed the early recognition by the Commission that particular account should be taken of the special difficulties that confronted developing countries.

48. In view of the changes in international life over the past 38 years and the emerging concern for cost-effectiveness, the time had come to initiate a comprehensive review and assessment of the work of the Commission and to try to anticipate and manage the impact of financial constraints on its role. Such a review would cover the subjects dealt with by the Commission, its methods of work, and the degree of success it had achieved in discharging its mandate concerning the codification and progressive development of international law. In the review of the subjects dealt with by the Commission, attention should be paid to the relationship between such subjects and the felt or anticipated needs of the international community, and to the amenability of the chosen subjects to systematic formulation and treatment in normative terms. Attention should also be paid to the modes of selecting subjects for the Commission and to the question of whether such modes needed to be changed. A possibly useful approach to a review of the Commission's methods of work would be to compare them with those employed by other institutions, both governmental and non-governmental, with related mandates. A review of the degree of success achieved by the Commission assumed prior clarification of what success should mean for such an institution. A possible line of inquiry would relate to the relevance of the experience of UNCITRAL. The International Law Commission itself should undertake that self-examination under the aegis of the Sixth Committee.

49. Mr. Francis (Jamaica) resumed the Chair.

50. Mr. CRUZ FABRES (Chile) said that respect for international law and the fulfilment by States of their international obligations were increasingly vital to the task of maintaining international peace and security. International co-operation buttressed by juridical norms was indispensable to countries striving to promote economic development and the well-being of their peoples.

51. Respect for international law had always been the corner-stone of Chile's foreign policy. His country therefore unreservedly supported the process of codification and progressive development of international law. In that regard, the recently adopted Vienna Convention on the Law of Treaties between States and International Organisations or between International Organizations had built upon the foundations already established by the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character. The Vienna Conference on the Law of Treaties had demonstrated that States still had the spirit of commitment and the political will to continue the process of codification and progressive development, in response to the new challenges and needs of the times.

52. On the topic of jurisdictional immunities of States and their property, his delegation was of the view that the property of a State could not be attached by the jurisdictional organs of another State without the express consent of the first State, by virtue of the principles of sovereign equality of States, equality of rights, and mutual respect.

53. The formulation of the fundamental principle of State immunity had been rendered difficult by the involvement of States in industrial and commercial matters. A consensus existed on jurisdictional immunity in respect of acts committed in the exercise of the prerogatives of State power. He did not share the restrictive view that such immunity constituted an exception to the principle of territorial sovereignty of the State of the forum.

54. A specific reference to general international law in article 6 would jeopardize the usefulness of the draft articles. The future development of international law should be based on a proper assessment of the norms which best responded to the juridical needs of the international community.

55. The 1954 draft Code of Offences against the Peace and Security of Mankind was a good basis for the current work of the Commission in that area. The draft Code should, however, refer only to those international crimes, such as economic coercion and terrorism, that were of a most serious nature and morally reprehensible. His delegation had always condemned economic coercion, which was a violation of the United Nations Charter and of the basic principles of international law. Economic coercion currently took dangerous forms including attempts to influence the technical decisions of financial institutions. In its formulation of norms on the topic, the Commission should reject such practices, which hindered the development of international law.

56. It was essential to ensure that the perpetrators and instigators of terrorist acts did not go unpunished. He noted with dismay that certain States had made

(Mr. Cruz Fabres, Chile)

terrorism is an intruder of their foreign policy. Terrorism constituted a new form of aggression and an act of war, and should therefore be treated as an offence against the peace and security of mankind. Chile supported the Security Council's efforts to combat international terrorism at the political level.

57. International terrorism usually launched direct attacks against the political independence of States by fomenting civil strife and subversion and undermining the political process. Chile, whose head of State had himself been the target of a recent terrorist attack, vigorously condemned international terrorism and the objectives which it sought to achieve. The prevalence of terrorist attacks worldwide underscored the urgent need to secure the necessary consensus in the international community in order to free its members from the scourge of terrorism.

58. The draft articles raised a number of difficult technical questions. In view of the interest demonstrated by many countries, however, he was certain that appropriate formulae for resolving them would soon be found.

The meeting rose at 6.05 p.m.