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SUMMARY RECORD OF THE 32nd MEETTNG

Chairman: C r . VOICU (Romania)

CONTFNTS

AGFNDA ITFM 130: RFPORT OF THF INTERNATIONAL LAW COMMISSION ON THF WORK OF ITS THIRTY-FTGATH SFSSION (continued)

AGFNDA TTFM 125: DRAFT CODF OF OFFFNCES FGATNST THF PFACE AND SECURITY OF MANKJND: REPORT OF THE SECRFTARY-GFNFRAL (continued)

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The meeting was called to order at 10.45 a.m.

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

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. HAYES (Ireland) said that one of the reasons for the success of the work of the International Law Commission was the exchanges of views between the Commission and Governments, which ensured that research and creative thinking were combined with a recognition of political realities. His delegation intended to therefore respond to the Commission's reauest anh transmit its observations to that body. His delegation also welcomed the fact that the reduction in the length of the Commission's session, although it had prevented even greater progress, had been offset by a more effective organization of work and a more efficient use of time.

2. The adoption on first reading of the draft articles on jurisdictional immunities of States and their property and on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier marked the end of an important stage and provided a coherent basis on which the newly-elected members of the Commission could continue their work.

3. On the subject of jurisdictional immunities of States and their property, his delegation continued to believe that the concept of absolute immunity had little relevance when State activities increasingly exceeded the conventional scope of Government functions. Thus the distinction between acta jure imperii and acta jure gestionis should be retained, although the formulation of the provisions should, if necessary, be somewhat flexible.

4. In draft article 6, the words "and the relevant rules of general international law", in brackets, should be deleted. The draft articles on jurisdictional immunities of States represented a laudable effort to codify the law in a particularly sensitive and uncertain area. The retention of that phrase would constitute an abandonment of that objective and would cast doubt on the uoefulnese of adopting a set of draft articles with such a reduced scope. If the inclusion of the phrase should be necessary to ensure the adoption of the articles, it would mean that the subject was not yet amenable to codification. It was therefore to he hoped that future work on the draft would proceed to a successful conclusion, which would include the deletion of the bracketed phrase from article 6.

5. With regard to draft articles 21 and 22, his delegation believed that a State's immunity extended to the legal interests it might have in property which was neither in its possession nor under its control, and that the draft articles In question must cover that situation, without, however, extending the immunity to persons or bodies not entitled to them. Clearly, it would not be easy to find a wording that was both explicit and cotarminous with the objective. It could be argued that the term "its property", in the third line of the draft article, was broad enough to cover the point) however, greater certainty and clarity were called for. The bracketed phrase might be replaced with wording alonq the lines of "or affecting a legally protected interest it has in property".

(MC. Hayes, Ireland)

6. With regard to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, he noted that, for small countries like Ireland, the unaccompanied diplomatic bag was an important mode of confidential communication. Thus, there was no doubt that the diplomatic bag was inviolable and could not be opened or examined by any means. Any modification of that principle would undermine the confidentiality which was the bag's raison d'être. His delegation therefore favoured the retention of all the bracketed words in paragraph 1 of draft article 28. It was aware of abuses of the diplomatic bag and their implications, and thus would not be unwilling to consider reasonable measures to prevent such abuses, provided that the basic principle of the inviolability of the bag was respected.

7. Draft article 33, which permitted States, by means of a declaration to refrain from applying the articles to specified categories of diplomatic couriers or bags, would lead to an undesirable plurality of régimes and would detract from the effort to harmonize the law in that area. However, it seemed that several States had serious reeervationa regarding the uniform régime set out in the draft articles. Under the circumstances, his delegation had reluctantly concluded that article 33 should be retained, although it hoped that, with time, a uniform régime with no exceptions could be established.

8. Part three of the draft articles on State responsibility, which concerned the implementation of international responsibility and the settlement of disputes, dealt with a topic that was at the centre of international law as well as especially complex and controversial. However, it seemed to be accepted that the provisions relating to the settlement of disputes and the implementation of State responsibility should be an integral part of the draft, a view with which his delegation concurred. That general acceptance had been predicated on a recognition of the inherent paradox in the topic, which in fact tended to legitimate actions that would normally be regarded as breaches of international legal obligations, and of the need to control that "disruptive" element. Yet controversy continued to surround the nature of the procedures for the settlement of disputes. Provisions regarding the settlement of disputes required that States parties should first seek a settlement through the means specified in Article 33 of the Charter, unless they were bound to make use of other procedures. If the search for a eolution under Article 33 of the Charter was unsuccessful, compulsory third-party procedures might be invoked. Such provisions (draft article 4 and the annex) were based on provisions of the 1969 Vienna Convention on the Law of Treaties and the 1982 United Nations Convention on the Law of the Sea. Such procedc es were applicable only in a very limited number of cases, i.e. questions of jus cogene or international crimes. The compulsory jurisdiction of the International Court of Justice and the prohibition in draft article 5 of any reservation thereon was the focus of the controversy. Those questions were related to difficult and controversial area8 of international law. His delegation believed It was essential, for at least two reasons, that disputes of that type should be settled at the highest possible judicial level: in the first place, referring the dispute to the Court guaranteed that cases would be examined and adjudicated by an authoritative body and with the necessary visibility! furthermore, the questions at issue were of vital interest, not only to the parties, but to the international community as a whole.

(Mr. Hayes, Ireland)

9. His delegation was in favour of a system for the settlement of disputes comparable to the one proposed in the draft articles. State responsibility was a field more likely than moat to give rise to conflicts, and one in which small States were at a disadvantage and must have recourse to third-party settlement procedures. Such procedures were residual, and the parties thue had ample opportunity to settle a dispute in the manner they preferred. Third-party settlement procedures were also graded, and were binding only in special limited cases. Finally, the standing of the International Court of Justice in the international community had greatly improved in the past 20 years and should continue to do so.

10. The commentary to article 2, paragraph 3, drew an unsatisfactory parallel with article 65, paragraph 5, of the 1969 Vienna Convention, since the latter provided for a single notification while the current draft articles provided for two notifications. Article 2, paragraph 3, might seem to dispense altogether with the notification under article 1 and the stage which that notification introduced. Such a solution did not seem justifiable, and the paragraph needed to be clarified. Article 4 (c) should exclude article 12 (b), which was already covered in article 4 (a). He had some doubts, moreover, about paragraph 9 of the annex, since small countries, which most needed third-party procedures might not avail themselves of them because of their prohibitive cost.

11. Unfortunately, the Commission had been unable to start the second reading of part one of the draft articles. His delegation hoped that the Commission would do so at its thirty-ninth session.

12. With regard to the draft Code of Offences against the Peace and Security of Mankind, his delegation wished to see a situation in which both States and individuals could be held criminally responsible for offences against the peace and security of mankind, and in which an international court would be given criminal jurisdiction. Regrettably, current circumstances did not permit that, and the Commission should therefore concentrate on the criminal responsibility of individuals in their capacity of government agents, and should explore the possibilities of a universal jurisdiction as an alternative to international jurisdiction. The options selected should be without prejudice to later consideration of other options, and the progress achieved might facilitate a review of at least one of them. His delegation would also like to include the use of nuclear weapons in the list of offences against the peace and security of mankind, but doubted that such a proposal would command sufficient support.

13. The topic entitled "International liability for injurious consequences arising out of acts not prohibited by international law" was certain to become increasingly important in the immediate future. While ite examination by the Commission was still in the formative stage, the reports of the Special Rapportcur and of the Commission revealed many interesting aspects which called for investigation. His delegation looked forward to further progress on that topic.

(Mr. Hayes, Ireland)

14. Ireland appreciated the Commission's determination to keep its programme and methods of work under review, and hoped that, despite the financial constraints, it would be given the resources and the necessary time to carry on its work. He welcomed the efforts to expedite the publication of the Year Book of the International Law Commission, and endorsed the request to the Secretariat to ensure the publication in 1987 of the fourth edition of The Work of the International Law Commission. He wished, finally, to encourage the Commission to pursue its fruitful collaboration with regional legal organizationa.

15. Mr. ROSENSTOCK (United States of America) announced his Government's intention to submit in writing its observations on the two sets of draft articles adopted in first reading at the thirty-eighth session of the Commission.

16. There were clearly two different approaches to the topic of jurisdictional immunities of States and their property. There was little point in claiming, however, that one of those approaches was favoured by common-law countries and the other by civil-law countries, or in establishing a dichotomy between developed and developing countr ies, or even in stating that the common-law countries or the advocates of more limited immunity had more precedents on their side. In that regard, a ouestionnafre seeking information on that subject had been sent to all States Members of the United Nations in 1979, and the documer ation received in reply had been submitted to the Commission. That should be enough to cast doubts on the accusations of partiality made against the Commission. The existence of two different approaches did not mean that the Commission's work could not have successful results or that the scope of such results was bound to be very limited. The comments made by the representative of Italy on that matter seemed particularly convincing (A/C.6/41/SR.30). It was not impossible to adopt a neutral position midway between thoae two approaches. Article 6, as provisionally adopted at the 1980 session, for example, seemed to meet that requirement. The version adopted in first reading appeared to have moved away from that middle ground and would leave it altogether if the phrase between brackets were deleted.

17. From the outset, his delegation had expressed misgivings as to the need or even the usefulness of elaborating a set of draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. While it appreciated the serious work done, for which it wished to thank the Special Rapporteur, it continued to have doubts as to whether it was appropriate to attach such priority to that topic.

18. Mr. ARANGIO-RUIZ (Italy) said it was regrettable that the Commission had been able to deal only with that portion of the Special Rapporteur's seventh report on the topic of State responsibility (A/CN.4/397 and Add.1) which concerned pact three of the draft articles, and that the five articles of part three had not been more fully discussed before they had been submitted to the Drafting Committee. Apart from the time shortage, a more thorough coneiderati n had been rendered difficult by the fact that it would have presupposed the atta.nment by the commission of a more advanced stage in the elaboration of part two. The Drafting Committee, however, had been unable even to reach agreement on article 6 of part two.

(Mr. Arangio-Ruiz, Italy)

19. In addition to article 5 on reservations, part three itself consisted of two portions: articles 1 and 2 on implementation, and articles 3 and 4 on the settlement of disputes (A/41/10, note 71).

20. Articles 1 and 2, which dealt essentially with some aspects of the action which the injured State might take under part two, were in substance - and should become at a later stage also in form - an integral part of the provisions of part two. The Commission should re-examine articles 1 and 2 carefully in order to make them more consistent with the actual practice of States in the phase following the finding of a wrongful act. In addition, as they stood, they envisaged perhaps an excess of notifications. In the situation covered by article 1, the injured State, rather than notifying its intention to invoke article 6 of part two, should demand whatever it felt entitled to demand from the alleged wrongdoers cessation of the allegedly wrongful conduct and restitutio or any other suitable form of reparation. The allegedly injured State would naturally make such motivated demands on the strength of article 6 of part two, but would not just invoke that article or notify its intention to do so. The need for a notification would arise only after the demands of cessation or reparation had met with a fin de non recevoir on the part of the alleged wrongdoer. At such stage, however, the object of the notification would not be the intention to invoke article 6, but the determination of the injured State to avail itself of the possibilities of reaction contemplated in articles 8 and 9 of part two, unless the alleged wrongdoer showed a better disposition to negotiate or proposed some settlement procedure other than negotiation. At such a stage, the parties would find themselves already in the situation envisaged in article 2 of part three rather than in the situation contemplated in article 1. That article should appear as an additional sentence or paragraph of article 6 of part two, to provide that the injured State should put forward its complaints and claims, and its justification thereof. The only notification to be contemplated in part three would be the notification referred to in article 2.

21. Articles 3 and 4 properly belonged to part three. His delegation was generally satisfied with the reference (art. 3) to the peaceful settlement procedures listed in Article 33 of the Charter, and with the relative innovations represented by the prwisions of paragraphs (a), (b) and (c) of article 4, which should all be accepted. It fully agreed, however, wi th the members of the Commission who had suggested that paragraphs (a) and (b) of article 4, or a separate paragraph of that article, should indicate clearly that a unilateral application for submission of a dispute to the International Court of Justice would be subjected to the proviso that the parties had not submitted the diepute to arbitration. It also shared the view that the provisions of part three seemed to be focused excessively on disputes arising only in the application of the articles in part two. It should be clear, on the contrary, that the dispute8 envisaged in articles 3 and 4 might relate to any issue arising in the interpretation or application of any of the articles in part one or part two, regardless of whether article 6 of part two had been expressly or implicitly invoked. Subject to those reservations, his delegation generally agreed with the content of articles 3 and 4 as they stood, with the exception perhaps of one point in article 4 (b), which as it stood provided for a judicial settlement in a situation in which the alleged

(Mr. Arangio-Ruiz, Italy)

wrongdoer had contested a countermeasure as constituting an international crime, but not in a case where the injured State had claimed that the wrongful act itself constituted an international crime. His delegation wondered whether the provisions of paragraph (b) should not be extended to include such a situation.

22. The three sets of "supplementary" consequences of international crimes as opposed to international delicts (A/CN.4/389, art. 14 and commentary), especially the "collective right" of all injured States (ibid., para. (3) of the commentary to art. 14) and the "rights and obligations as are determined by the applicable rules accepted by the international community as a whole" (art. 14, para. 1), required some clarification. Considering that an international crime was defined as a violation of an obligation that was "essential for the protection of fundamental interests of the international community" (Yearbook of the International Law Commission 1980, vol. II (Part Two), p. 32), and at the same time the weakness of community mechanisms that might come into play, the protection of those fundamental interests depended largely on the multiplicity of the States qualifying as injured States under article 5 of part two of the draft, which should, even if they were not directly injured, concur in the denunciation of the wrongful act and take measures to ensure cessation and reparation. The rights and obligations of those not-directly-injured States remained to be defined with the proper precision. The fact that that task straddled the borderline between the topic of State responsibility and the draft Code of Offences against the Peace and Security of Mankind should not unduly delay its accomplishment, for it was essential for progress in elaborating parts two and three of the topic of State responsibility and for progress with the draft Code.

23. The Commission had been wise to take an inductive approach to the four general questions on which the Special Rapporteur on the topic of the law of the non-navigational uses of international watercourses had focused the debater (a) the definition of "international watercourse"; (b) the applicability of the concept of "shared natural resources"; (c) the question whether a draft article should contain a list of factors determining the régime of the watercourse; and (d) the relationship between the concept of equitable allocation of the uses and benefits of a watercourse and the obligation of each watercourse State to refrain from causing appreciable harm to other States using the watercourse. His delegation was pleased that the Special Rapporteur had chosen to avoid general definitions of principle, which would enable it, before expressing its preferences to hear the pint of view of delegations of countries situated on continents where international watercourses - not to mention "systems" or "basins" - crossed vast regions.

24. His delegation adhered to the concept of a "framework agreement" consisting of rules and principles to be applied in the absence of agreement and of guidelines and recommendations. Italy believed that general rules and principles, especially the principle of equity, could be identified in that area for the purpose of codification and progressive development of the law in that area.

25. Mr. BUBEN (Byelorusaian Soviet Socialist Republic) said that the modern world required all States strictly to respect the rules of international law and called for the aualitative development of international law in the interest of universal secur ity. The work of the Commission wan therefore of primary importance.

26. With regard to jurisdictional immunities of States and their property, he said that the legal nature of the immunity of one State from the jurisdiction of the courts of another State waa baaed on the generally recognized and lonq-standinq principle "par in parem imperium non habet". Any draft-articles on that topic must therefore be based on the concept of full State immunity not limited or functional immunity. The International Law Commission's draft, however, tended towards the concept of limited immunity, which was contrary to the Charter principles of sovereign equality of States and non-interference in the internal affairs of States.

27. In his delegation's view, the purpose of draft article 3, paragraph 1, nhould be not to define the term "State" for the purposes of the draft, but to give a definition of the concept of the State in case of criminal proceedings instituted in the courts of other States, in other words, a definition of the organs of the State which represented it in its international relations and which enjoyed immunity in the exercise of their functions. Immunity should also extend to the property necessary for thoae organs to exercise their functions. Paragraph 1 was not satisfactory, especially subparagraph (b), which referred to "political suh-divisions of the State', a formula that was also out of place in draft article 7, paragraph 3. Was it justified to resort to new theoretical constructions which complicated the codif ication of international law? Perhaps it would be more euitable to remain with the terms used in article 7 of part one of the draft articles on State responsibility.

28. In draft article 6, the words "and the relevant rules of general international law" should be deleted, for it was not logical to seek reservations to immunity outside the framework of the draft while the very purpose of tho draft was to Codify the norms in force in general international law. In his view, draft article 13 had no baris in law; acts or omissions could be attrtbuted to States only on the basis of international law, and the question then was that of the international responsihilfty of States, which was not within the jurisdiction of national courts. No State could establish in its national legislation criteria for attributing an act to another State) nor could a national court set such criteria.

29. His delegation could not accept the text of draft article 15 (b) for although paragraph (a) arose logically from draft article 14, paragraph (b), which dealt with the rights of third persons, was directed against the interests of the developing countries and served those of the transnational corporations. Concerning article 18, he said that the provision according to which the State engaged in commercial service could invoke immunity was not justified. Ships used by States for public purposes should also enjoy immunity. A ship belonging to a Government was operated by the State for public purposes, and the State should enjoy immunity from foreign jurisdiction. A ship might belong to a State but be operated by a physic81 person having a legal status different from that Of the State; in such a case, any proceeding, including a proceeding "in rem" would have to be Instituted against the parson operating the ship. His delegation proposed that the words "non-governmental" enclosed in square brackets in paragraphs 1 and 4

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(Mr. Buben, Byelorussian SSR)

should be retained, so as to take into account the situation of many socialist countries and developing countries.

30. With regard to draft article 21, his delegation was in favour of maintaining the words "non-governmental" in subparagraph (a), because State property in the socialist and the developing countries wan used for public and for economic and social development purposes. The same was true for draft article 23, paragraph 1. His delegation reserved the right to submit comments on all the articles in due time. It considered that the ILC draft articles provided a good basis for adopting a convent ion, especially since the comments of States would be taken into account as the work progressed.

31. The draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, adopted by the Commission on first reading at its thirty-eighth session, were also a satisfactory foundation for future work in that area. The Byelorussian SSR had, on three occasions, sent written replies to the Secretariat's questionnaires on the subject.

32. If the diplomatic courier was fully to exercise his functions, he must enjoy complete immunity from the jurisdiction of the transit State and the receiving State. Immunity must be accorded to him as a civil servant of the mending State and could be granted to him only by the sending State. That was why his delegation could not accept the position whereby the diplomatic courier would be granted only functional Immunity so as to take the interests of the receiving and the transit States into account. In any case, the interests of those two categories of State8 were duly protected, in particular by draft articles 5 and 7.

33. The topic of protection of the diplomatic bag had been discussed at length by the Commission, especially with regard to draft article 28. The point of departure of the text should be the notion that the bag should not be opened or detained and should be exempt from examination directly or through electronic or other technical devices. Otherwise, the principle of inviolability would be infringed. Doubts concerning possible abuses of the diplomatic bag, which would be used to dispatch documents or articles other than those intended exclusively for official use, were unjustified, in view of draft article 25, paragraph 2. Legal guarantees against abuses were also provided for in draft article 5, paragraph 1. Different views on those important questions could be reconciled by deleting draft article 28, paragraph 2, in view of the optional declaration in draft article 33.

34. As for the topic of State responsibility, it was premature to comment on the seventh report submitted by the Special Rapportcur to the Commission at its thirty-eighth session, because implementation could not be considered until part two of the draft on the content, Corms and degrees of international responsibility had been drafted. Such wrongful acts as aggression, racial discrimination, genocide, apartheid, colonialism, the use of mercenaries, international terrorism and the militarization of outer space must be included among the international crimes for which the State was responsible. Unfortunately, the Drafting Committee had been unable to conclude its work, even on draft article 6. At its thirty-ninth session, the Commission must endeavour to work more expeditiously on that important topic.

(Mr. Buben, Byelorussian SSR)

35. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, his delegation did not share the Position taken by the Special Rapporteur that that liability must apply to all activities entailing risk, since that would be tantamount to making the State materially liable for all types of activities within its jurisdiction. That concept did not seem to be consistent with contemporary international law. It would be helpful to define various specific acts which might have injurious consequences and to draft provisions for the prevention of those acts as well as provisions on other matters relating to acts not prohibited by international law.

36. Concerning the law of the non-navigational uses of international watercourses, any system must be based on the agreement of the system States. Article5 must be drawn up to serve as recommendation5 corresponding to the characteristics of the watercourses of the system State5 concerned.

37. Regarding relation5 between States and international organizations, unfortunately the Commission had been unable, because of insufficient time, to consider the third report of the Special Rapporteur at its thirty-eighth session. His delegation had expressed its views on that subject in the General Assembly at the Courtieth session and reserved the right to comment on it again at the appropriate time.

38. Mr. ALTANGEREL (Mongolia) said that his &legation attached special importance to the topic entitled "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier", which was being considered by the Commission, became the diplomatic courier and bag were essential for communication between States and their diplomatic representatives abroad. The maintenance of normal relations between States and their missions depended on the establishment of a codified international régime for the diplomatic courier and bag as a supplement to the provisions of existing conventions on diplomatic and consular relations. Hi8 deleaation was therefore in favour of drafting a new international instrument on that topic and welcomed the Commission's adoption in first reading at its thirty-eighth session of the set of article5 thereon, which it deemed satisfactory, except for draft articles 18 and 20 which still required considerable work.

39. Article lb, paraqraph 1, limited the immunity from criminal jurisdiction accorded to the diplomatic courier in respect of "acts performed in the exercise of his functions", whereas, in his view, the immunity should be unlimited and total, without any restriction placed on the exercise of official functions. Some deleaations considered that the provisions of article 18 were a compromise solution, but the importance of the role played by the diplomatic courier and the guarantees provided for in draft article 5 cast doubt on the legal merits of such restrictions. In practice, moreover, if a diplomatic courier abused the protection accorded to him by his status, the sending State was under an obligation to deprive him of that protected status.

40. Draft article 28 on the protection of the diplomatic bag had been the topic of lengthy discussion at the previous session of the Sixth Committee, and the Commiss on which had been unable to reach agreement on it at its thirty-eighth

(Mr. Altangerel, Mongolia)

session had therefore left a number of words in brackets. The diplomatic bag was a physical expression of the freedom of communication between the sending State and its diplomatic missions abroad and should, as such and according to the bracketed words in draft article 28, paragraph 1, be "exempt from examination directly or through electronic or other technical devices". Because of technical progress, the use of certain devices might indeed undermine the principle of inviolability because the confidential nature of the content of the bag would no longer be fully ensured. Since his delegation considered that the bag should be exempt from all examination, it was in favour of removing the brackets and of retaining the bracketed words in the text of draft article 28, paragraph 1. It was to be hoped that a new international instrument based on the draft articles would soon govern that area of international law.

41. Mr. HILLGENBERG (Federal Republic of Germany) stressed the great importance of the work of ILC and the need for its summary records to be continued in their existing, extensive form. As every expert in international law knew, much of ILC's influence was attributable to those documents.

42. ILC had concentrated on completing its consideration, on first reading, of two draft articles on the jurisdictional immunities of States and on the status of the diplomatic courier and the diplomatic bag. He noted that the former was rightly based on the principle of par in parem imperium non habet, but it was uncertain whether that was a reference to existing customary international law or a constituent provision. The precise delimitation of State activities enjoying immunity did not yet seem to be fully determined. Existing customary international law was increasingly interpreted to mean that acta jure gestionis were excluded from immunity, the determining criterion being the nature of the act and not the motive or purpose of the State activity.

43. The ILC's draft, on the other hand, contained a combination of diverse criteria. The retention of brackets, especially in draft articles 22 and 23, indicated that the problems had not been solved, which could also be seen from the cumulative use of the criteria "nature of the contract" and "purpose of the contract". It could be deduced from article 3, paragraph 2, that the criterion of "commercial contract" was not sufficient to determine the areas not enjoying immunity. According to the draft, that criterion should be supplemented by that of the "purpose of the contract". However, every Government activity had a public purpose and, if that criterion was to be used, immunity would be very extensive and State-trading countries would have an advantage over those whose economic activities were largely privately organized.

44. To avoid any misunderstanding, it would be desirable in draft article 11, paragraph 1, not to retain the formula "is considered to have consented to the exercise of that jurisdiction", which had been included in addition to the expression "cannot invoke immunity from jurisdiction" used elsewhere in the draft to indicate the limitations on immunity. Immunity in respect of claims concerning liability deserved further examination. The exclusion of immunity in the event of personal injuries or damage to property (draft art. 13) was, on the one hand, very

(Mr. Hillgenberg, Federal Republic of Germany)

extensive in that no distinction was made between the type of activity (jure imperii and jure gestionis); on the other hand, it could be inferred from the provision that all types of crose-frontier damage were not included and thus enjoyed immunity. ILC should study the relationship between those two points and existing customary international law.

45. In evaluating the draft, the practical effects of its provisions on court proceedings must not be neglected. It would be necessary, In particular, to consider an addendum to draft article 25 to the effect that a default judgment could be rendered only if "the Court has jurisdiction".

46. The provisions on measure5 of constraint were welcome in 50 far as the outdated theory of unlimited immunity had not prevailed. None the less, the requirement of a "connection with the object of the claim", specified in article 21, was strange because a claim was usually not connected with certs in objects. The difficulty was reduced by the alternative of a connection "with the agency or instrumentality against which the proceeding was directed" (draft art. 21, para. 2), but it was not eliminated because it was not clearly stated which connection the agency or instrumentality must have with the holder of the right. Finally, draft article 23 1 (c) was unacceptable in its present Corm, because it granted the assets of central bank5 immunity without restricting it to central bank5 purposes.

47. His delegation would submit detailed written comments on the topic in due course.

40. With regard to the status of the diplanatic courier and the diplomatic bag not accompanied by diplomatic courier, his delegation reaffirmed the views it had expressed at the fortieth session. The Commission, in its work of devising a uniform régime to govern the status of the diplomatic courier and diplomatic mail, encountered difficulties whenever the new provisions exceeded the limits of existing rules of the Vienna Conventions. That was particularly true of draft articles 17, 28 and 33.

49. Draft article 28, paragraph 2, could be interpreted as permitting the examination of the contents of diplomatic bags in any instance of suspected abuse. If the limits of absolute inviolability of the diplomatic bag were to be defined by a legal provision, such limits should be more clearly described. Public security and the safety of individuals should be the basic criteria in such exceptional situations. If there was strong suspicion or evidence that the contents of a diplomatic bag might endanger security, the receiving or transit State could take action, by virtue of the right of self-defence or of the duty to protect human life, and the sending State should be kept informed and granted an opportunity either to dispel the suspicion or agree to any mutually acceptable verification measure. Any possible amendment of existing provisions of the Vienna Conventions should be given careful consideration.

(Mr. Hillgenbcrg, Federal Republic of Germany)

50. Lastly, the possibility of optional declarations, provided for in draft article 33, would certainly introduce Bane flexibility and facilitate the acceptance of the text by States, but it might hinder the establishment of a coherent and uniform régime.

51. His Government reserved the right to submit detailed comments before the second reading of the ILC's draft.

52. Mr. BENNOUNA (Morocco) paid tribute to all the members of ILC who, despite the curtailment of the 1985 session, had managed to complete consideration, on first reading, of the draft articles on the jurisdictional immunities of States and their property and on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. He was convinced that the views to be expressed in the Sixth Committee would facilitate the adoption of new general multilateral conventions to supplement and strengthen the legal structure built by the United Rations in the quest for world peace through law.

53. Concerning the jurisdictional immunities of States and their property, he said that the wealth of domestic jurisprudence and practice of States, in contrast to the very limited diplomatic and international practice, was actually one of the main constraints on the codification and progressive development of laws on the topic. Not only were there manifest divergences between the courts of different systems, but there was also a great risk of concealing difficulties by making a general reference to domestic law and practice. The Commission must in fact choose between draft minimum rules that could be agreed by mutual consent and serve as a common denominator for all State legislation and practice, and draft exhaustive rules covering every question raised by immunity and its exceptions. In a spirit of realism it had chosen the first option, but as a compromise and in order to take acwunt of the "grey area" it envisaged providing a bracketed reservation, referring to "the relevant rules of general international law", in article 6, which dealt with the principle of immunity. Paragraph 3 of the commentary on that provision clarified the meaning of the phrase and its aim, which was to prevent the draft articles from freezing or deterring the future development of the judicial, executive and legislative practice of States.

54. His delegation doubted whether that aim could be achieved in that way. In its viw, understood thus the reservation about the "relevant rules of general international law" might give rise to pointless arguments about the very sources of that law. If it was really a matter of international custom, the authors omitted to mention, in addition to practice, the second fundamental element of customary rules, namely "opinio juris sive necessitatis" or the recognition of that practice by the other subjects of International law. That revived the problem of harmonizing national legislation and jurisprudence, which the draft sought to avoid.

55. While it did not deny the pressing need for further development of international law on the subject, his delegation thought it more reasonable to leave that problem to the means of dispute settlement which the Commission proposed

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to include in the second reading of the draft. Moreover, draft article 28 left the door open to reciprocal measures in the event of a restrictive application of the provisions of the articles. Lastly, it must be borne in mind that the reference to international custom was implicit in any international convention, which obviously took shape in a pre-existing and dynamic juridical environment that necessarily conditioned its application and interpretation.

56. The same general remark was valid for draft article 3 on "interpretative provisions". Despite its doubted usefulness, that provision, which referred to the practice of the State claiming immunity in order to judge whether the purpose of the contract was relevant to determining its non-commercial character, could give rise to numerous disputes. It would introduce an element of judgement external to the contract, the pursuit of which could moreover prove very risky.

57. Draft article 21, entitled "State immunity from measures of constraint", contained the bracketed phrase "or property in which it has a legally protected interest". His delegation thought the phrase worth keeping, provided it was made clear that it referred only to measures of constraint on property which affected the status of the interest involved.

58. Concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, draft article 28 was a key provision, the purpose of which was to balance the right to confidentiality of correspondence addressed to official representatives abroad with the right of the receiving State to ensure its security and respect for its legitimate interests and legislation. The conditions for that balance of Lnterests were falrly clear: the diplomatic bag was presumed to carry only official documents and, for that reason, could not be opened or detained) however, since that presumption was not indisputable, it could be challenged if the receiving State had serious reasons for thinking that the bag contained something other than correspondence. The bag could then be detained and searched in the presence of a representative of the sending State. If the latter refused to agree to that procedure, the bag would be returned to it.

59. That situation corresponded to existing practice, but the Commission had introduced a reference to the use of electronic or other technical devices doubtless in order, to take account of the latest developments in inspection equipment. That reference had not gained the consensus of members of the Commission, however, since it remained in sauarc brackets.

60. In his delegation's view, and in order to respect the balance of interests that the wording of draft article 28 sought to embody, recourse to such new methods of examination should also be subject to the prior agreement of the sending State. There would thus be some kind of parallelism between forms of examination, which was all the more necessary in view of the existing inequality between States with regard to means of examination, an imbalance which could become even greater in the future. It was therefore up to the receiving State to choose the most suitable method of examination, provided that there was not a succession of Inspections but rather a choice between the means available.

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61. Lastly, his delegation did not consider it justified to accord the same privileges to the receiving State and the tranoit State because the interests of the latter could not be affected in the same way by the contents of the correspondence or the bag.

62. Draft article 33, entitled "Optional declaration", was also a fundamental provision since it concerned the coherence and the very essence of the draft articles. Although the commentary explained that the optional declaration was the implementation of an agreed option and did not constitute a reservation, it seemed to his delegation that, terminology notwithstanding, the result was similar, since the aim was to limit the effect of the convention in respect of certain States Parties only. In addition, draft article 33 introduced what amounted to a general reservation concerning the very aim of the Convention as set forth in its article 1, when such a reservation would normally be prohibited under the Vienna Convention on the Law of Treaties. Although it allowed a State to be bound by only part of a treaty, that Convention restricted itself to regulating the procedures by which States gave their consent to be bound by the instrument, something which was very far from providing an option.

63. As for the mention of article 298 of the United Nations Convention on the Law of the Sea in the Commission's wmmentary, it must be recognized that that article could not serve as an argument by analogy, because it envisaged a right of choice only between dispute settlement procedures, a right which had been sanctioned by the treaty practice of recent years. Moreover, the option offered by article 33 could lead a State to waive the application to itself of customary rules, something which was also formally ruled out by the Vienna Convention.

64. His delegation emphasised that it had only wished to bring out some of the complex issues raised by draft article 33, the full implications of which the Commission should consider in second reading so that it could be brought closer into line with general international law. To maintain that that was the price to be paid for a universal convention or, at least, one obtaining the widest possible participation of States, was a risky and even dangerous bet if it ultimately weakened or challenged established customary or conventional rules. The work of codification would then be diverted from its primary aim, which was to consolidate rather than weaken existing customary practices that worked well.

65. Mr. DE SARAM (Secretary of the Committee) announced that Chile and France had become sponsors of draft resolution A/C.6/41/L.3 on the report of the International Law Commission.

The meeting rose at 1 p.m.