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SUMMARY RECORD OF THE 37th MEETING

Chairman: Mr. FRANCIS (Jamaica)

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The meeting was called to order at 3 p.m.

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

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

1. Mr. JACOVIDES (Cyprus) said that, although his delegation would have been happier if parts II and III of the draft articles on State responsibility had been completed in first reading, it was satisfied by the considerable progress made in other areas. Despite the time limitation, the Commission's 1986 session had been exemplary in terms of results and the business-like utilization of the available time and facilities. His delegation supported the organizational recommendation of the Planning Group of the Enlarged Bureau of the Commission as set out in paragraphs 245-261 of the report (A/41/10). Cyprus shared the view that every effort should be made to maintain future sessions at not less than 12 weeks, and that there was a need for the continued provision of summary records and for the updating of the useful United Nations publication, The Work of the International Law Commission. His delegation noted with approval the Commission's intention to continue to review with an open mind its methods of work so as to achieve optimum results. It also felt that, in arrangements for future elections to the. Commission, the applicable rules for nominations, time-limits for the submission of candidatures, and the like should be adhered to so as to ensure order and fairness. Free competition and a maximum range of choice were to be encouraged, and the existing rules, unless revised or modified, should be observed in future.

2. His delegation was satisfied with the Commission's continued constructive co-operation with other bodies, as described in paragraphs 262-264. Cyprus paid special tribute to the work of the Asian-African Legal Consultative Committee, which had made a tremendous contribution in the past three decades to the progressive development and codification of international law, with due regard to the special needs and interests of the developing countries of the Asian and African regions. He pointed out that, at the Eighth Conference of Heads of State or Government of Non-Aligned Countries, held at Harare recently, the Political Declaration included several paragraphs concerning such subjects as'the non-use of force and the peaceful settlement of disputes. They should be duly taken into account by the Commission in its future work, as they reflected the considered positions of the large majority of the membership of the international community. An opportunity should also be given to the Commonwealth, although not a regional organisation, to convey to the Commission its views on the topics with which it dealt.

3. The Special Rapporteurs, in preparing their reports, should pay close attention to legal sources and issues of special concern not only to the developed countries, but to the third world. The contribution of the newly independent States to the codification and progressive development of international law had been tremendous through their active participation in the lawmaking processes. The International Law Seminar had once again proven its value, especially for nationals of developing countries, and deserved full support.

(Mr. Jacovides, Cyprus)

4. What the Commission needed and was entitled to receive from the Sixth Committee was political guidance and as clear-cut answers as possible to the questions which it raised on such politically sensitive issues as the draft Code of Offences against the Peace and Security of Mankind and the topic of State responsibility, as well as on specific issues where it occasionally found itself deadlocked. The prevailing feeling among the representatives of States in the Sixth Committee could be the determining factor in breaking such deadlocks.

5. He noted with satisfaction that work on the topic of jurisdictional immunities of States and their property had, for most purposes, been completed. His delegation's view was that doctrinal differences should-be of less concern than achieving practical results. Cyprus was very interested in seeing the law develop on the basis of a pragmatic compromise between the two conceptual approaches, through a spirit of realistic adjustment to contemporary requirements.

6. His delegation also noted with satisfaction that work on the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplanatic courier had also been successfully concluded, although there were certain lingering areas of disagreement. The purpose of the draft articles on that topic should be threefold: firstly, to consolidate the existing provisions of the relevant conventions; secondly, to unify the rules so as to ensure the same treatment for all diplomatic couriers; and thirdly, to develop rules to deal with practical problems not covered by existing provisions. Although the paramount question was that of the diplunatic bag itself, it should not detract from the importance of protecting the courier and affording him certain minimum guarantees. The bag should be inviolable but not sacred, and the diplanatid courier should have adequate protection for the proper exercise of his functions; however, his personal inviolability, the inviolability of his temporary accommodation and of his means of transport as well as his immunity from jurisdiction, exemption from personal examination and inspection, and exemption from dues and taxes should be based on functional necessity so as to avoid abuse. Cyprus took that view partly because the final draft articles must be such that they would be acceptable to the large majority of States, and partly because in Cyprus, as in many small developing countries, special diplanatic couriers were rarely used, and it was therefore natural to be especially sensitive and somewhat circumspect in extending excessive privileges and immunities to the diplanatic *couriers* of other States.

7. His delegation welcomed the compromises reached at the 1986 session concerning the diplomatic bag and diplanatic courier. It trusted that the Commission would proceed in due course to the next step in the finalization of work on the topic, which was broad enough to include communications of international organizations and of recognized national liberation movements. Although many of the specific issues were already covered under the relevant multilateral conventions, the effort currently under way was timely and necessary in supplementing and harmonizing the existing international legal instruments.

8. As to international liability for injurious consequences arising out of acts not prohibited by international law, it was now clear that the topic was correctly centred on the need to avoid - or to minimize and, if necessary, repair - transboundary loss or injury arising as a physical consequence of an activity within the territory or control of another State.

(Mr. Jacovides, Cyprus)

9. The topic of State responsibility formed the core of international law. The proper elaboration of draft articles in that area was fundamental to relations between States. Every effort should therefore be made to complete work on the topic as soon as possible.

10. His delegation had no objection to the general reference in draft article 3 of part three to the means indicated in Article 33 of the United Nations Charter. Although that reference did not go very far towards effective dispute settlement, in the absence of any realistic alternative it remained valid. His delegation could accept draft article 5 on reservations. However, it saw merit in the suggestion that the question of reservations, being a key provision for the acceptability of the articles as a whole, should be left to a future diplomatic conference.

11. The important distinction in draft article 4 on dispute-settlement procedures between, on the one hand, issues involving jus cogens and international crimes, where recourse to the International Court of Justice was prescribed, and on the other, disputes concerning interpretation and application, where a compulsory conciliation procedure was called for, raised broad questions of legal philosophy. His delegation would have preferred to have all disputes arising in the context of the convention settled through a dispute-settlement system that entailed a binding decision by the International Court of Justice, or by a body set up to consider disputes involving international crimes.

12. Generally, with regard to State responsibility, the issue was one of the direction the Commission should take. His delegation believed that it should continue to follow the trend in contemporary international law which attached considerable weight to international public order and obligations erga omnes, thereby responding to 'the legitimate expectations of the international community and remaining in the mainstream of public international law. His delegation urged the Commission to continue its work on the draft convention; even if it were not ratified at an early date by a large number of States, such an instrument would influence the conduct of States and constitute a reference text for international courts.

13. In his delegation's view, the Special Rapporteur had given adequate weight to the concepts of jus cogens and of international crime and, particularly, to the legal consequences of aggression, while paying due attention to the more traditional aspects of State responsibility. There was, of course, room for drafting improvements. His delegation welcomed the new version of draft article 5 of part two, particularly its new paragraph 3. He wished to emphasize that while flexible on matters of drafting, his delegation was strongly in favour of retaining the substance of article 5, paragraph 3, and articles 12 (b), 14 and 15 of part two, as well as the other progressive notions with respect to international crime in article 19 of part one and those in part three.

14. The draft Code of Offences against the Peace and Security of Mankind was a topic of the utmost importance. Such a Code would be a deterrent to violators of the rules encompassed in it. For the pragmatic reasons that his delegation had already stated in the past, it could go along with the approach that restricted the

(Hr. Sacovidee, Cyprus)

scope of the Code for the time being to individuals. However, that was without prejudice to his delegation's position regarding the responsibility of States. Cyprue supported the view that the Code, in order to be complete, needed to include three elements: crimes, penalties and jurisdiction. Anothe- point of concern was the title of the Code. Though the term "of fences" had long been used in the English version, it appeared logical that it should be changed to "crimes", thereby aligning the English with the Spanish and French versions. He felt that the term "crimes" would be more accurate legally and more weighty politically, but did not wish to make a major issue of the matter.

15. He agreed that the objective should be to concentrate on the hard core of clearly understood and legally definable crimes. However, there right be considerable differences in assessing them. For example, it might be considered that slavery or traff icking in narcotic drugs should cane under the scope of the Code as crimes against humanity. Another question was what should the content of the Code be based on. Existing applicable and generally accepted conventions should be relied on, but there were other sources of law, including less widely accepted conventions and United Nations resolutions, particularly when resolutions adopted unanimously by the General Assembly had also been adopted unanimously by the Security Council thus making them binding on all States Members of the United Nat ions under Article 25 of the Charter.

16. The fourth report of the Special Rapporteur was a good basis for further work. The division of offences into four categories was logical. There could be no doubt that genocide and apartheid were crimes against humanity. The forcible establishment or maintenance of colonial domination should certainly be included in that category, as should mercenarism, whether under a separate heading or under a more general rubric. The Illuatrative list of inhuman acts contained in the 1954 draft could be expanded to include, for instance, slavery and traff icking in women and children. The Special Rapporteur had rightly pointed out that the principles of the law of nations, the laws of humanity and the dictates of public conscience were the relevant factors ir determining what inhuman acts constituted crimes against humanity. They were t e same basic considerations which were relevant in determining whether a rule of international law was a peremptory norm of international law (jus cogens). It was significant to bear that parallel in mind.

17. The inclusion of serious damage to the environment under the category of crimes against humanity required much more reflection. There was indisputably a duty to preserve the environment, a breach of which created international obligations. But the question was at what point such breach became not only an international crime under the topic of State responsibility, but a crime against humanity under the draft Code. The relevant factor was the presence of criminal intent. The Commission should avoid expandlnq the scope of the Code so much that it became diluted or unacceptable to the majority of States. His delegation supported the suggestion that international terrorism, including the seizure of aircraft and violence against diplomats, could more ppropriately come under the category of crimes against humanity than under that of crimes against peace.

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(Mr. Yacovides, Cypru:)

Further thought should be given to whether international terrorism could come under both categories. International drug trafficking should be included in the Code under crimes against humanity, whether under "inhuman acts" or independently. While he recognized the difficulties involved, he considered that attention should be paid to that highly topical subject in the context of the draft Code.

18. With respect to war crimes, the Special Rapporteur was right to point out the problems in terms of terminology, substance and methodology. With regard to terminology, he was not in favour of the use of the term "crimes of armed conflict. in place of "war crimes". The latter term had a certain standing in international law and should be maintained, on the clear understanding that the word 'war" was used in its material sense of armed conflict and not in the traditional sense of inter-State conflict. While a war crime and a crime against humanity were distinct, they might overlap. But they did not have the same content or scope. A war crime could be committed only in times of armed conflict and against enemies. With regard to methodology, his delegation preferred a general definition. Not all violations of the law and customs of war, only grave breaches, constituted war crimes. As the law developed, additional categories of war crimes could be included. As for the legality of nuclear weapons, if and when there was a general convert ion prohibiting the use of such weapons, the violation of that prohibition would constitute a war crime. However, for the Commission to venture into the Wine-field of nuclear strategy and, in the absence of a universal treaty, to declare the use of nuclear weapons to be a war crime might not be the most adviaable course., It would be fut.le in practice and might even be counter-productive for the fate of the draft Code as a whole. His delegation therefore wished to leave the door open for future action if developments so warranted, and reserved its position on the subject.

19. The general principles set out in part IV of the Special Rapporteur's report A/CN.4/398 and Corr.1-3) deserved a closer look. With respect to heading A, on the juridical nature of offences, there could be no doubt that the offences involved were crimes under international law, defined directly by the latter, independently of national law. The fact that an act might or might not be permissible under internal law did not concern international law. With respect to heading B, on the nature of the of fender, since it had been agreed that for the time being only the criminal responsibility of the individual would be addressed, it was fair to state that any individual guilty of a crime under international law was subject to punishment. It was egually true that the individual accused of a crime enjoyed the jurisdictional guarantees granted to every human being. As for heading C, on the application of criminal law in time, the issue of non-retroactivity of criminal law wan more controversial. But the. problem was not insoluble. Everything depended on what leaning was ascribed to the word "lex" in the maxim nullum crimen sine lege. His delegation shared the view that the rule of non-retroactivity was not limited to formulated law. It related also to natural law and overriding considerations Of justice. The decisive factor was that the concept of justice prevailed over the letter of the law. He therefore entirely agreed with the Special Rapportcur 's Conclusion that in that context the word "law" must be understood in its broadest sense. Similarly, he agreed that statutory limitations were not applicable to

(Mr. Jacovidee, Cyprus)

offences against the peace and security of mankind. With regard to heading D, on the application of criminal law in space, unless and until there was a competent international court of criminal jurisdiction under the Code, the Special Rapporteur's conclusion that the system of international competence must be accepted for offences against the peace and security of mankind must be accepted.

20. In conclusion, he pointed out that activities relating to international law were allocated no more than 1.7 per cent of the regular United Nations budget, in contrast to 31 per cent for economic and social activities. The efficiency of the multilateral lawmaking process was threatened by further financial restrictions. Harmonious co-operation between the Sixth Committee, the International Law Commission and the International Court of Justice would greatly enhance the possibility of more importance being attached to international law, the only alternative to international anarchy.

21. Mr. KOURULA (Finland) said that, with regard to the status of the diplomatic bag and the question of its examination by electronic or other technical devices, his delegation shared the Special Rapporteur's view that there were two conflicting principles involved: the inviolability of the bag and the right of the receiving or transit State to protect itself from misuse of the bag. He hoped that agreement would soon be reached on draft articles in that area that would not be open to contradictory interpretations.

22. Having initiated considerations of the topic of the law of the non-navigational uses of international watercourses, his Government was particularly interested in its progress. That progress had been slow because of the complex legal and technical issues involved, in addition to the change of Special Rapporteur . The current Special Rapporteur had concluded that there was overwhelming support for the doctrine of equitable use as a general guiding principle of law for the determination of the rights of States in the area covered by the topic. The principle of equitable use was well eatablishea in the practice of States. On the other hand, its adoption as the basis of the law of international watercourses and, particularly, its practical implementation, left several questions unresolved. The Special Rapporteur's decision to evaluate all available evidence concerning the theory and practice of that principle was therefore the appropriate approach.

23. The notification procedure and its legal consequences were a very important aspect of the topic. Basically, notification involved the duty of States to inform other watercourse States of planned undertakings. In practice, the notification procedure made unilateral undertakings permissible under certain circumstances. In its future work, the Commission should take into account, in addition to the five draft articles submitted by the Special Rapporteur, other rules and recommendations referring to notification and its legal consequences - the 1961 resolution of the Institute of International Law (arts. 5-8), the Helsinki Rules of 1966 (art. XXIX) and the set of articles applicable to international water resources recently adopted by the International Law Association at its Conference in Seoul, article 3 of which contained rules on notification and objection.

(Mr. Kourula, Finland)

24. Article 10 of the Special Rapporteur's draft articles eetabliahed a duty to provide notice if a proposed new uae might "cause appreciable harm" to other watercourse States. In his delegation's view, the period over which that duty ● xieted was relatively long. Horeove r , it was stated in the comments with respect to the term *harm* that technically no legal injury was caused unless a State was deprived of its equitable share. That conclusion was confusing, because it seemed to exclude such harmful effects in the territories of other States that were not related to equitable sharing.

25. With reference to the four points which in the view of the Special Rapporteur required further consideration by the Commission, his delegation did not see any urgent need to define the term "international watercourse", the meaning of which was adequately explained in the working hypothesis accepted by the Commission in 1980. As far as the term "shared natural resource" was concerned, it shculd not be referred to in the text because of ite controversial nature. Thirdly, if an article concerning the determination of reasonable and equitable use was to contain a liet of the m-called relevant factors, such a list should not differ essentially from that contained in article V of the Helsinki Rules, which were part of the well-eutablished practice of States. Fourthly, concerning the relationship between the obligation to refrain from causing appreciable harm to other States and the principle of equitable use, those two principles were interrelated; that interrelationship wan not only formal but must be regarded as an essential part of the entire system of the riqhta and obligations of watercourse States.

26. He hoped that in 1987 the Commission would allocate more *time* to the topic of international liability for injurious consequences arising out of acts not prohibited by international law. Careful :onsideration should be qiven to the determination of priorities on which the Cc mmission would focus its attention. Plane to regulate the duty of the source State to inform and negotiate with other States provided a qood starting point for future work. His delegation agreed that it was time to begin drafting articles on the topic.

27. With regard to the topic of State responsibility, his delegation expressed the hope that time and facilities would be provided to speed up consideration of the topic. He concurred with the view that the Commission should draft articles that would ultimately be embodied in a general convention on State responsibility.

28. Laetly, in 1987 his Government would again financially assist a national from a developing country to attend the International Law Seminar.

29. Mr. LUKYAWOVICH (Union of Soviet Socialist Republics1 stressed the importance which his delegation attached to the early completion of an international instrument on of the topic of State responsibility. The main purpose of the draft being prepared by the International Law Commission was to define, in the form of a convention, the special responsibility incurred by States which committed international crimes such as acts of aggression, establishment of colonial domination or its maintenance by force, policies of genocide and apartheid, or acts aimed at unleaahinq a nuclear conflict. In the light of the functions of the

(Mr. Lukyanovich, USSR)

Security Council under Chapter VII of the Charter, the draft should give special attention to the question of the legal consequences of acts representing a threat to peace, breach of the peace or act of aggression. It should draw a clear distinction between State responsibility for international crimes and for internationally wrongful acts; in the latter case, the only relations involved were those between the offending State and the injured State, whereas an international crime also gave rise to relations of responsibility between the offending State and the organixed community of States represented by the United Nations.

30. The shortness of the discussion which had taken place in the Commission on the Special Rapporteur's seventh report bore witness not only to the Commission's lack of time, but also to the fact that the measures proposed in Part Three of the draft articles could not be considered fruitfully before the completion of work on Part Two. The differences of opinion reflected, in particular, in paragraphs 48 to 50, 53 and 55 of the Commission's report demonstrated the difficulties arising in that connection. However, despite existing shortcomings, work on the draft convention on State responsibility should be continued and given priority.

31. Referring to the subject of international liability for injurious consequences arising out of acts not prohibited by international law, he said that the main weakness of the Special Rapporteur's preliminary and second reports, briefy considered at the Commission's thirty-eighth session, was their insufficiently critical approach towards earlier drafts on the topic. International law had developed over the past 10 years; it was now generally accepted that material liability for damage caused as a result of lawful activities of States could arise only on the basis of agreements directly stipulating an obligation on the part of a State party to make reparation to other States parties for such damage. The Convention on International Liability for Damage caused by Space Objects was such an agreement. Instead of taking account of those developments, the Special Rapporteur proceeded on the assumption that States incurred international. liability for injurious consequences of acts not prohibited by international law which took place in its territory and on ships and in aircraft under its jurisdiction, i.e. of acts of every kind, including industrial and agricultural activities. Such a concept did not exist in international law. In the view of his delegation, the Commission should concentrate on specifying those types of activities which were most hazardous from the point of view of the possibility of injurious consequences in case of accident and on defining obligations with regard to co-operation between States in preventing accidents and eliminating their consequences, as well as to material liability for the damage caused. The Convention on Early Notification of a Nuclear Accident and the Convention on Assistance in Case of a Nuclear Accident or Radiological Emergency, which had been adopted by the International Atomic Energy Agency in September 1986 and had entered into force barely a month later, on 27 October 1986, were positive examples of agreements of that kind.

32. Lastly, referring to the law of the non-navigational uses of international watercourses, he said that his delegation considered the topic to be exceptionally difficult to codify and unsuitable for the drafting of a universal convention, if only because many countries had no international watercourses and would hardly wish

(Mr. Lukyanovich, USSR)

to become patties to a future convention. On the other hand, the Commission might usefully draft some general reconxnendatlon6 on the subject which riparian State6 could subsequently take into consideration when concluding agreement6 A legal régime for an international watercourse could be established only on the basis of agreements between the riparian State6, and practice in respect of such agreements varied a good deal. The establishment of a rinqle régime might violate the 6overeiqnty of sane of the State6 concerned. The fact that member6 of the Commission had failed to agree even on the key concept of "international watercourse" demonstrated the difficulties inherent in the topic.

33. In conclusion, he emphasized his delegation's appreciation of the work done by the Commission and expressed the hope that at the next session the Commission would concentrate on the most important and urgent item6 on it6 agenda and tackle them in a new, modern spirit.

34. Mr. TOMUSCHAT (Federal Republic of Germany) said that international liability for injurious consequences arising out of acts not prohibited by international law was a topic calling for courageous steps with a view to developing new rules, taking account of growing need6 in the field of environmental protection. Although 60me international legislation already existed, beyond the province of classic State responsibility the overall architecture of liability had not yet become fully discernible. If an international consensus wa6 to be reached, a cautious approach must be adopted.

35. The two Special Rapporteurs appointed by the Commission had demonstrated their intention to make a practical contribution to a current issue of legal policy. The scope of the topic must be manageable, and the goals must be kept simple. Certainly, it was necessary to clarify the conceptual basis of the work in question, but after that it would be advisable to focus on selected issues only.

36. It should be assumed that liability included prevention. Environmental damage, in particular, mostly could not be simply wiped out once it had occurred. Even if a generous payment was made by the source State to compensate for the damage, humanity a6 a whole suffered a 1066. All necessary precautionary measure6 must therefore be adopted in order to prevent deleterious effects. Moreover, in some areas, particularly where radioactive processes were concerned, an unforeseen incident might cause damage of such a magnitude that the repairing capacities of even an economically strong nation would be far exceeded. Neighbouring State6 could thus never be really sure that in the event of a major disaster they would at least receive financial compensation. It would be entirely unrealistic to leave the question of prevention aside. The international rules setting safety standard6 normally proved quite effective, but the same could not be said of the obligation to make good a loss sustained by another nation.

37. It would appear wise to confine the scope of the topic to physical activities giving rise to transboundary harm, since there wa6 a definite lack of applicable international standards. On the other hand, the principle of non-interference applied where legal and administrative measures were concerned. If a State

(Mr. Tomuschat, Federal Republic of Germany)

violated that standard of conduct, it committed an internationally wrongful act and would, on that basis, be liable to make reparation.

38. Before any actual injury had occurred, there was no specific legal relationship between the source.State and a potential victim State. In the case of a nuclear power plant, any State whose territory was within 2,000 kilometres could be considered virtually affected. However, the question was whether there should be a duty generally to inform all potential victims and possibly to negotiate acceptable safety terms with them. His delegation had some doubts in that respect. Eowever, there should always be a centre in some competent international organization for reviewing and discussing activities involving risk. Complex patterns of conduct involving a number of actors could not be reduced to the traditional scheme of a bilateral relationship.

39. The scope of activities relevant to prevention and the scope of activities likely to entail an obligation to make reparation should by no means be considered automatically identical. Prevention must operate on a large scale and be focused not only on activities that actually gave rise to transboundary injury but also on activities that might give rise to such injury. In such cases the source State should be generous to the potentially affected State, since no undue burden would be placed on the former State. However, a different assessment was needed in respect of activities that could entail an obligation to make financial reparation, in which case the interests of the source State had to be weighed much more carefully.

40. In principle his delegation endorsed the Special Rapporteur's view that the concept of State sovereignty was the pivotal element of liability for activities that were not wrongful per se. Every State was entitled to respect for its territorial integrity. In the political field States enjoyed protection as a result *of the* prohibition of the use of force and in accordance with. the principle of non-interference in the internal affairs of other States. However, States also required some kind of defence against other attacks on their integrity and even their existence, although such defence could be neither absolute nor comprehensive. The Latin maxim sic utere tuo ut alienum non laedas was too broad if taken literally. Everything hinged on the definition of laesio. Many minor inconveniences developed simply as a result of coexistence. However, there must be limits to what another State must tolerate. It would be exteremely helpful to have an overall definition, and a general assessment should take account-of such factors as: whether the source State had taken all the necessary precautions; the extent of the damage sustained by the affected State; and the gravity of the anticipated risk. However, such a general approach should only be adopted as a point of departure. The best course of action would be to identify the most prominent risk factors with a view to achieving a fair share of burdens. In the exercise of their sovereign rights, States were free to carry out even activities involving risk, provided that they complied with the necessary safety standards. However, if a risk materialized, they must face up to the corresponding financial consequences.

(Mr. Tomuschat, Federal Republic of Germany)

41. Any future treaty should contain agreed lists of clearly identified activities involving risk. Activities involving radioactive material were a particular concern. It was a sovereign right of every State to use nuclear energy for peaceful purposes, but the risks inherent in operating a nuclear reactor must be borne by the territorial State. It should be easy to reach agreement on the inclusion of any nuclear-related activities in the lists to be drawn up.

42. In the case of long-range air pollution, no exceptional risk was involved. Since all States contributed to pollut ing the air, it was extremely difficult to establish any causal link, except in very special cases. A special régime was therefore needed for long-range air pollution - perhaps even one that totally discarded the idea of establishing a rule on reparation.

43. Even once a list of activities involving risk had been established, various devices mitigating the effects of liability might be necessary in order to gain sufficient support. It would be possible to set a ceiling on payments due on account of reparation. Moreover, the establishment of insurance funds for the collection of the necessary monies before a disaster actually occurred could be considered. The relevant international organizations should play a key role in that connection. In particular, the conventions of the International Maritime Organization on oil pollution could serve as a model.

44. Mr. ABDEL KHALIK (Egypt) said that the interpretation into English of his delegation's first statement on the items under consideration, which had been delivered in Arabic at the 34th meeting, had been inadequate. It was to be hoped that due consideration would be given to the problem in question in the future.

45. Since some members of the Commission had not had an opportunity at the most recent session to comment on the Special Rapporteur's report on the law of the non-navigational uses of international watercourses, his delegation hoped that sufficient time would be set aside for consideration of the topic at the Commission's future sessions.

46. There was a growing conflict between the interests of States that had vested rights in the use of an international watercourse for non-navigational purposes and the interests of other States that might interpret the expressions "shared natural resources" and "reasonable and equitable usage of an international watercourse" as meaning that such vested rights should be reconsidered. The conflict would have a negative impact *on* relations *between* the States *in* question, if the Sixth Committee failed to solve the problem. In the meantime, the provisions of the relevant conventions must be strictly observed, so as not to prejudice vested rights. An appropriate addition should be made to draft article X to the effect that the application of the draft articles should not affect in any way the vested rights accorded to any State in accordance with an existing convention. At the same time, his delegation wished to reaffirm the importance of the equitable distribution of the water of an international watercourse in the light of all relevant factors, as well as the importance of negotiating in good faith and, if necessary, concluding

(Mr. Abdel Khalik, Egypt)

new treaties in order to create an equitable international system that respected the balance between the rights and the duties of States, and thus helped to maintain international stability.

47. The draft articles on the jurisdictional immunities of States and their property provided a good basis for a second examination of the topic, and his delegation endorsed the limited scope of the draft articles, which covered only the iaunity of a State from the jurisdiction of a judicial authority of another State, end not immunity from the jurisdiction of an administrative, executive or other authority.

48. On the question whether a contract for the salt or purchase at! goods or the supply of services was commercial or non-commercial, draft article 3 primarily took account of the contract's nature and purpose. In his delegation's view, the commercial nature of some contracts to which a State was a party was sometimes not in conflict with the jurisdictional immunity accorded to the State in question.

49. In draft article 6, the words "and the relevant rules of general international law" should be deleted. The main purpoee of drafting a convention to codify the jurisdictional immunities of States and their property was to unify the applicable international rules. If different interpretations of what constituted the relevant general international law were permitted, the applicability of the draft articles as a whole could be jeopardized.

SO. Where the title of part III was concerned, his delegation could accept either the expression "limitations on State immunity" or the expression "exceptions to State immunity", provided that it was understood that such exceptions or limitations were not intended to affect the general rule. In that connection, his delegation noted that, while draft article 11 stated that commercial contracts did not enjoy jurisdictional immunity, it omitted any specific reference to the close connection between the exercise of jurisdiction in respect of the commercial contract in question and the territory of the forum State. The draft article should make that connection clearer, particularly since in the case of the other exception in the area of contracts, which was stated in draft article 12 on contracts of employment, it was clearly indicated that the basis of jurisdiction was a close linkage between the contract and the territory in which the services had been performed or were to be performed. Draft article 12 also indicated that, as a condition for applyinq the exception, an employee should be covered by any social security provisions that might be in force in the State in which the services were to be performed. Since some developing countries did not apply specif ic social security rules, there was no need for such a provision. Draft articles 11 to 18 indicated that the various exceptions to State immunity only applied "unless otherwise agreed between the States concerned", thus reflecting the importance of the principle of agreement between the parties.

51. Part IV on State i-unity in respect of property from measures of constraint was beccming increasingly important in view of the growing practice on the part of private litigants, including multinational corporations, seeking relief through

(Mr. Abdel Khalik, Egypt)

attachment of property owned, in the possession of or used by developing countries. Part IV must be given careful consideration in order to safeguard the developing countries' interest in maintaining and expanding their natural resources.

52. On the subject of State responsibility, his delegation endorsed the Special Rapporteur's statement that was reflected in paragraph 42 of the Commission's report (A/41/10), in which he emphasized the residual character of the relevant draft articles and indicated that States remained free to establish "soft law" between them, just as the international community of States as a whole remained free to establish jus cogens.

53. Where the topic of international liability for injurious consequences arising out of acts not prohibited by international law was concerned, his delegation welcomed the indication given by the Special Rapporteur of his intention to use as raw material for his future work the schematic outline submitted in the third report, and the amendments introduced in the fourth report by the previous Special Rapporteur . His delegation shared the view that the concept of "injury' in the • enae of material harm was the only element that could directly link 'prevention* to "reparation" as primary rules governing the obligations of States in that regard. The comparative analysis made by the Special Rapporteur in order to solve the problem of the duality of the concepts of "responsibility" and "liability" in English legal terminology corresponded closely to the twin themes of prevention and reparation and proved that the law considered certain persons responsible for specific obligations before the event that produced the injurious consequences. That meant that, in the absence of an agreed régime for assigning direct responsibility to individuals in certain cases, the State would have preventive obligations, in addition to its liability for the injurious consequences of certain activities carried out in its territory or under its control. It was important that the queetion of the preventive obligations of States in that connection shwld be considered further.

54. Furthermore, it was import-ant that the scope of the topic should he expanded to include the dutiee of the source State to avoid, minimize or repair any appreciable or tangible physical transboundary loss or injury caused by an activity involving risk carried out in its territory or under its control. References to activities involving risk should not be confined to ultrahazardous activities, since it would be difficult to distinguish ultrahazardous activities from other activities involving risk in every single case.

55. With regard to the meaning of the expression "transboundary" and its effect on the topic's scope, he said that the expression should not apply only to national jurisdiction but should also cover injury caused beyond national jurisdiction, regardless of the existence of frontiers between the source State and the injured State.

56. His delegation noted with interest the discussions in the Commission on the obligation of a State to provide information about its intention to begin the activity in question and to negotiate. It was important to take special account of

(Mr. *Abdel* Khalik, Egypt)

the developing countr Lee' neede, in the light of the statement made in paragraph 213 of the Commission's report. Furthermore, his delegation endoreed the Special Rapporteur's intention to continue to take *such* needs into consideration, as well as his intention to begin, in his following report, the drafting of articles developing the ideas put forward.

57. His delegation noted with interest the third report submitted by the Special Rapporteur on relations between States and int trnational organizations.

58. Despite the current financial crisis of the United Nations, Member States attached great importance to the Commission's codification work. The Commission ehould be given the time needed for consideration of the complex topics on its agenda. Its next sesbion ehould last 12 weeks, and the resolution adopted by the General Aaeembly on agenda item 130 should include a specific provision indicating that the Commission's meetings should be given the highest priority in the distribution of the available financial resources for 1987. His delegation also wished to stress the importance of continuing the present system of summary records, which waa essential for the process of the codif ication and progressive developnent of international law.

59. Hr. OSNATCH (Ukrainian Soviet Socialist Republic) said that the slow progress of the Commission's work on the important topic of State responsibility was unwarranted and gave grounds ior concern. Although the Commission had decided to refer draft articles 1 to 5 of Part Three to the Drafting Caamittee, thoee texts would inevitably require further close and serious consideration; the Special Rapporteur himself had stressed the interrelationship between the three parts of the draft articlea, and eeveral members of the Commission had rightly pointed out that the measures forming the subject of Part Three could not be considered to good purpose until work on Part Two had been completed.

60. Referring to the draft articles in Part Three, he stressed the importance of procedural issues relating to the settlement of disputes arising from State responsibility. In his delegation's view, it would be fundamentally incorrect to insist on a compulsory procedure for the settlement of such disputes. The wording ehould leave no doubt as to the principle of freedom of choice by the parties to a dispute to choose any of the means of settlement provided in Article 33 of the Charter. The fact that in current practice States rarely referred disputes to the International Court of Justice could not be overlooked. References to obligatory procedures provided in the Vienna Convention on the Law of Treaties and to the 1982 Convention on the Law of the Sea were unconvincing, since those instruments reflected the specific characteristics of the subjects with which they dealt.

61. With regard to Part Two of the draft, much of which was still before the Drafting Committee, he reiterated his delegation's view that a clear distinction should be drawn between State responsibility for internationally wrongful acts and State responsibility for international crimes. Phe potential consequences of the two categories of acts might be incomparably different in nature and scope. Moreover, an international crime gave rise to relatione of responsibility not only

(Mr. Oenatch, Ukrainian SSR)

between the offending State and the injured State but also between the offending State and the organized community of States. Special attention should be given, in the light of the functions of the Security Council under Chapter VII of the Charter, to the question of the legal consequences of acts representing threats to peace, breaches of the peace, or acts of aggreaeeion. Viewed in that light, the draft articles referred to the Drafting Committee, and especially articles 14 and 15, could not be considered satisfactory. The other draft articles, too, were ineuf f iciently clearly worded. In view of the great importance of the subject of State responsibility, particularly in the present international situation, and of the advanced stage already reached in the elaboration of the topic, it was to be hoped that the Commission would make every effort to complete its work on the subject at the earliest possible date.

62. The situation regarding the topic of international liability for injurious consequences arising out of acts not prohibited by international law was very different. The Commission had mt yet gone beyond the stage of determining its fundamental approach, and, moreover, the time assigned to the topic at the thirty-eighth session had not been sufficient for a full debate. The Committee should seek to help the Commission to deal with the subject in a manner which corresponded to the interests and positions of the majority of States. His delegation considered that positive results could be achieved only if the Commission pinpointed specific types of activities which were most hazardous from the point of view of posaible injurious consequences and then determined the obligations of States in preventing and dealing with possible accidents. Under contemporary international law, material liability for damage caused by lawful State activities could not arise otherwise than on the basis of special international agreements directly stipulating the obligation of States parties to make reparation to other States parties for such damage. His dclegat ion fully shared and endorsed the view expressed in the Commission to the effect that special attention should be given to the interests and needs of the developing countries for the reasons set forth in paragraph 213 of the report.

63. Lastly, referring to the law of the non-navigational uses of international watercourses, he said that the discussion in the Commission, brief as it had been, had confirmed his delegation's view that the topic was an exceptionally difficult one owing to the tremendous variety of non-navigational uses of watercourses as well as of hydrological régimes, physical and geographical peculiarities and other features. Legal rules governing the use of a particular international watercourse could and should be established only on the basis of agreements between the riparian States. The Commission could achieve positive results, not by drafting articles for a future multilateral convention or even a so-called framework convention, but by preparing recommendations which watercourse States might use in concluding agreements among themselves concerning a specific international watercourse. Bearing in mind that eventual application, the Commission should endeavour to draft texts which were simple, concise and readily adapt: hle to the conditiona of different international watercourses.

64. Mr. MAHIOU (Algeria) said that the enlargement of the Commission in order to take account of the varioua legal systems in the world had been beneficial, and had not hindered work on the codification and progressive development of international law. It would be useful if the Drafting Committee could meet at the very beginning of each session and make a substantial contribution to the elaboration of the draft articles. During its next session, the Commission should undertake the second reading of one of the sets of draft articles whose first reading had been completed at the thirty-eighth session. Concentrating on both sets of draft articles might delay discussion on other matters deserving due attention.

65. The phrases and words in square brackets conferred an impression of incompleteness on the draft articles on jurisdictional immunities of States and their property. In an area which was strongly influenced by internal legal systems, it was difficult to reconcile completely the various approaches. His delegation believed that the Commission should pay further attention to article 3 in second reading, in order to produce a more satisfactory definition of the term "State" and to harmonize the language verions. The French expression "prérogatives de puissance publique" and the English expression "sovere ign authority' were not really equivalent and could lead to serious differences of interpretation.

66. The disputed content of article 6 and the reference to "the relevant rules of general internat ional law" seemed to have crystallised underlying differences of approach. Every treaty provision was subject to the test of time, and its interpretation depended on the practice of the international communit '. His delegation believed that the interpretation should be neither too rig d nor too flexible. It hoped that the Commission would delete the phrase in square brackets. It also believed that the heading of part III should be "Exceptions to State immunity".

67. The wording of article 19 should be brought into line with that of article 11, by retaining the expression "commercial contract" and by deleting "civil or commercial matter". It might be useful to consider placing article 20 elsewhere, because its content did not restrict it to part III alone.

68. Article 21 highlighted the difficulties which the Commission faced in taking account of the various concepts, definitions and mechan isms of the judicial systems of different countries. Measures of constraint were often of such a specific nature that an analytical, enumerative, flexible approach was necessary. The draft articles must make it possible to identify State property without unduly expanding or restricting the definition of such property. In articles 21 and 22, the purpose of the reference to property in which the State had a legally protected interest was to further identify that concept.

69. With regard to the status of the diplanatic courier and the diplomatic bag not accompanied by diplomatic courier, his delegation believed that it was important to put the existing differences of opinion in perspective. Cases o' abuse were of marginal importance, considering the practice of States as a whole. The Commission should avoid mechanisms and procedures which aroused or encouraged suspicion. The wording of article 28 was too detailed and complicated in an area where simplicity

(Mr. Mahiou, Algeria)

and brevity would make an equitable compromise possible. The sending State would be guaranteed the confidentiality of the diplomatic bag, and the receiving State would be protected against possible abuses by a provision enabling the latter to request a single control and, failing that, to requeat that the suspect bag should be returned. The reference to the transit State had no convincing justification and was likely to introduce additional difficulties.

70. The Drafting Committee must give priority to the articles on State responsibility. Articles 6 to 16 posed complex drafting problems requiring particular attention. His delegation supported the overall thrust of part three concerning the implementation mechanism, and hoped that its elaboration would continue with a view to the production of a coherent whole.

71. With regard to the non-navigational uses of international watercourses, the Commission should avoid reopening wide-ranging discussions which had already taken place. It would be more beneficial to concentrate on a certain number of draft articles, particularly the least controversial ones. It might be useful to accept certain concepts on a provisional basis, and revise them as and when necessary.

72. The work on international liability for injurious consequences arising out of acts not prohibited by international law had reached a sort of critical stage. The Commission had taken a giant step in delimiting its field of concern, and should begin seeking a more concrete approach. The time had come to submit draft articles to States in order to enable them to see the approach of the Commission more clearly and to enable the Commission to benefit from their constructive comments.

73. Prince AJIBOLA (Nigeria) said that the complexity of the topic "Jurisdictional immunities of States and their property" could not be underestimated in the light of increasing economic development and interdependence, and varying State practice among industrialised, socialist and developing countries such as Nigeria, which engaged in State trading as a means of economic survival. Recent court pronouncements and divergent State practice tended to discard the theory of absolute immunity. Nigeria was concerned about certain decisions taken by United States courts in cases which appeared to be of a commercial nature, but which indirectly involved the Government, such as the purchase of cement and other materials for developing the infrastructure. The fact that a national court could decide on the scope and application of the existing law on State immunity caused friction in international relations. His delegation believed 'that the work of the Commission on the topic of jurisdictional immunities was of paramount importance, particularly to developing countries.

74. The provision in draft article 2, paragraph 2, was welcome if its purpose was to confine the definition of terms in paragraph 1 to the context of the convention on jurisdictional i-unities, because those terms might have different meanings under other international instruments or under the internal law of a State. Article 6 laid down the main principle of State immunity. Although there could be no theory of absolute immunity, Nigeria believed that, when States performed acts in the exercise of their sovereign authority, they enjoyed undisputed immunity, as

(Prince Ajibola, Nigeria)

recognized in article 6. The phrase in square brackets should be an integral part of that article. Otherwise, the rule of immunity would not be subject to the future development of international law. General international law included customary rules of international law baaed on the practice of States. The future development of State practice should be left unfrozen and undeterred by the formulation of the draft articles.

75. The title of part III should be "Exceptions to State immunity". State immunity was a general rule or principle of international law, and any derogation from it must be regarded as an exception.

76. Nigeria had been a victim of the growing practice among private litigants to seek relief through attachment of property owned, possessed or used by developing countries. If it was admitted that *no sovereign State could exercise its sovereign power over another equally sovereign State", it followed a fortiori that no measures of constraint, by way of execution or coercion, could be exercised by the authority of one State against another State and its property. Therefore, his delegation welcomed the principle underlying the provisions of article 21. It also favoured keeping the clause "for property in which it has a legally protected interest*, so as to cover any interest whatsoever which a State might have in the property.

77. The phrase concerning commercial (non-governmental) purposes in articles 21 and 23 created problems of interpretation. It was perhaps intended to cover cases where States, particularly developing ones, engaged in activities of a commercial and governmental nature. Ambiguity would be dispelled if the term "non-governmental" was deleted. Lastly, Nigeria hoped that the rules which would eventually emerge would in no way restrict the developing countries from the normal pursuit of their trading activities necessary for the economic survival.

78. With regard to the statue of the diplomatic courier and the diplomatic bag not accompanied by diplanatic courier, his delegation agreed that the bag should not be opened OK detained, in accordance with the baric principle of the inviolability of the archives and documents of the mission, recognized by customary international law. It was also a substantive element of the rule that the bag could not be opened without the consent of the Bending State, and that that obligation Bhould be extended to the receiving or transit State in order to ensure legal protection for the bag at all times. His delegation therefore suggested that the rule in article 28, paragraph 1, should be stated without the square brackets. The use of electronic and other mechanical devices to protect the contents of the bag might amount to an infringement of the immunity accorded to the bag, and it involved an interference in the sovereignty of the sending State.

79. The text of the second paragraph of article 28 was intended to introduce a balance between the interests of the sending State in ensuring the protection, safety and confidentiality of the contents of its diplomatic bag and the security interests of the receiving State. Although diplanatic bags had been subjected to abuses in recent times, the protection of the diplomatic bag should be considered

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as a fundamental principle for the normal functioning of official communications between States. The provision allowing the competent authorities of the receiving State to request that the bag should be opened in their presence by an authorized representative of the sending State was inappropriate, since the inclusion of that provision might give rise to persistent disputes between the sending and receiving States. Moreover, the bracketed portion of the first sentence of paragraph 2 was contrary to existing law and imposed a subjective criterion on the receiving State as to whether a bag should be accepted. His delegation suggested that the Commission should abide by the well-established rule of absolute inviolability, while possibly providing for some flexibility in its application. A provision for the return of the bag to its place of origin in the event of serious suspicion as to its contents was preferable to a provision requiring that the bag should be opened or scanned by electronic device. Furthermore, his delegation was of the view that the provisions of the draft articles should apply to all bags including consular bags, since the purpose of the draft articles was to unify rules on couriers and bags. Similarly, whatever rights were accorded to the receiving State under the draft articles should also be accorded to the transit State, so as to avoid a plurality of régimes.

80. With regard to draft article 33, the right to make a declaration of optional exceptions to applicability in certain cases, the right to formulate that declaration and the right to withdraw it, as reflected in the present text, were the same rights as those conferred under treaty law on a State by virtue of its Sovereignty. Nevertheless, the text currently proposed might enable States to contract out of the application of the present rules. Furthermore, the flexibility which the new articles sought to provide would be inconsistent with the underlying objective of the draft articles, namely, the establishment of a coherent and uniform régime governing the status of the courier and the bag, and would result in uncertainty as to their interpretation and application.

81. The topic of State responsibility could not be completely divorced from the draft Code of Offences against the Peace and Security of Mankind. It would be convenient for the Commission to deal specifically with the question of international crimes committed by States under the topic of State responsibility. The nature of the topic required that there should be a mode of settlement of disputes relating to internationally wrongful acts allegedly committed by a State and the consequential rights of the injured State. The method finally adopted should be mandatory.

82. His delegation agreed with the Commission that the draft Code of Offences against the Peace and Security of Mankind should cover only the most serious international offences, which would be determined by reference to a general criterion and to the relevant conventions and declarations. With regard to the content ratione personae, his delegation agreed with the Commission that the draft Code should be limited to the criminal responsibility of individuals at the current stage, without prejudice to subsequent consideration of the possible application to States of the notion of international criminal responsibility. The present formulation of the text was broad enough to cover crimes committed by an individual

(Prince Ajibola, Nigeria)

as an agent of a State, exercising power in the name and on behalf of that State. While his delegation supported the "minimum content" approach In order not to weaken the effectiveness of the draft Code, it would favour the inclusion of provisions dealing with colonialism, apartheid and economic aqqression, as well AR possible provisions concerning the use of atomic weapons, mercenarism and other acts employed to infringe State sovereignty and undermine the stabi lity of Governments or oppose national liberation movements.

83. A code unaccompanied by penalties and by a competent criminal jurisdiction would be ineffective. The Code would therefore be ideally implemented through an international criminal court, if one could be established. However, a treaty for that purpose might not receive sufficient acceptance by Stateu, and his deleqatlon therefore felt that a model law would suffice at the current. stage.

84. His delegation looked forward to seeing further progress on the topics of international liability for injurious consequences arising out of acts not prohibited by international law, and the law of the non-naviqational uses of international watercourses.

85. Because of the nature of the Commission's work and the maqnitudc and complexity of the topics on its agenda, the annual session should last at least 12 weeks. His delegation also recommended that the Commission should continue with its present system of summary records. Lastly, it noted with satisfaction the co-operation between the Commission and other bodies and recommended that it should continue.

The meeting rose at 6.20 p.m.