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SUMMARY RECORD OF THE 38th MEETING

Chairman: Mr. FRANCIS (Jamaica)

later: Mr. CASTROVIEJO (Spain)

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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. DJORDJEVIC (Yugoslavia) said that attention should be paid to the reasons why the International Law Commission had been unable to finalize its tasks in recent years. His delegation welcomed the enlargement of the Commission to 34 members, in the hope that broader participation and the combination of different legal systems and experiences would enable the Commission to achieve even more successful results.

2. The Commission should follow the development of international law and address new needs. In that connection, it would be useful if it carried out a thorough exchange of views on questions related to the needs in the area of the codification and progressive development of international law.

3. While his delegation was satisfied that the Canmission had completed the first reading of the draft articles on jurisdictional immunities of States and their property and the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, it was disappointed that the Commission had been unable to deal with other issues in greater detail, owing to the shortening of its session. Notwithstanding its support for the measures of economy and rationalization adopted by the United Nations, his delegation was of the view that the important work entrusted to the Commission under Article 13 of the Charter should not be thwarted in any way, particularly with regard to the issuance of documents and summary reccords, which constituted the indispensable travaux préparatoires for international conferences and conventions.

4. At the beginning of its new mandate, the Commission should deal in greater detail with its programme of. work for the next five years and should provide an approximate timetable for the completion of work on issues currently under consideration, with a view to expediting the adoption of draft articles and the holding of diplomatic conferences. It would be a very unwelcome development if the evolution of international law through the United Nations began to decelerate because of the general worsening of conditions in the political field, especially since the Canmission could make an important contribution to overcoming those difficulties and to the achievement of even more significant results in the United Nations.

5. The draft articles on jurisdictional immunities of States and their property represented a new contribution to international legal regulation of one of the very sensitive areas of international as well as domestic law. In view of the increasing interdependence of States, new forms of co-operation, and differences in the domestic legal systems of States, the broadest possible agreement should be reached on the provisions of the draft articles in order to create the necessary conditions for their adoption in the near future.

(Mr. Djordjevic, Yugoslavia)

6. Provisions gwerning the status of the diplomatic courier and the diplomatic bag not accanpanied by diplomatic courier were embodied in various instruments pertaining to diplomatic and consular relations. The Commission should therefore have no major difficulties in adopting the draft articles thereon.

7. The draft articles on State responsibility had provoked great, interest and had raised a number of important auestions. He therefore regretted that the Commission had been unable to consider them in more detail. Since the topic was of great importance for the formulation of prwisions in other areas of international law, he expected that work in that field would be continued with ever greater determination.

8. The Commission should seek to adopt a uniform legal definition of an offence against the peace and security of mankind. The current state of affairs in international relations and in international law called for a careful exploration of the possibility of including in the list of offences all those violations of international law which linked the Code to the contemporary international situation. He hoped that the Commission would find the time to undertake the very sensitive and important task of completing work on the draft Code as soon as possible.

9. The approach of the Special Rapporteur to the auestion of international liability for injurious cc ısequences arising out of acts not prohibited by international law had been good, and the Commission should proceed to draft concrete provisions as soon as possible. The experience gained from nuclear accidents and the need to conclude conventions on such matters had highlighted the importance of legal norms in that area.

10. The most logical approach to the law of the non-navigatiaral uses of international watercourses would be to elaborate a set of draft articles which established the general principles and rules governing the non-navigational uses of international watercourses, in the absence of agreement among the States concerned, and to provide guideline8 for the management of international watercourses and for the negotiation of future agreements. The sovereignty of States, however, should not be imperilled by such new rules, which should strive to achieve a balance between the needs of littoral States and the need to establish international co-operat on in the interest of all.

11. The Commission should devote greater attention ta the second part of the topic on relations between States and international organizations, since that part concerned rules which required codification owing to the evolution of international organizations.

12. The Commission should strengthen its co-operation with other bodies and organizations both within and outside the United Nations system, and should continue the useful practice of holding the International Law Seminar.

13. Mr. YIMER (Ethiopia) welcomed the drafting and editorial adjuatments that had been made by the Commission to previously adopted draft articles on jurisdictional immunities of States and their property with a view to ensuring consistency in terminology and aubatana. He endorsed the currant formulation of article 3, paragraph 2, and was of the view that, in determining whether a contract was commercial, account • hould be taken not only of its nature but also of its purpose. While he accepted the definition of the term "State" contained in article 3, paragraph 1, he maw no need for subparagraph (d).

14. Article 4, paragraph 2, was needed to preaerve the immunities and privileges of the peraons involved. However, an explanation in the commentary am to why heads of Government were excluded would have been in order.

15. His delegation preferred the words "Exceptions to State immunity" as the heading of part III of the draft articlea. under that heading, article 12 on contracta of employment and article 13 on personal injur'es and damage to property • hould help in finding solutions to numerous problems affecting innocent victims. We took it that article 16 on flacal matters applied without prejudice to the provisions of international diplaatic law. It was not clear whether the phrase "shall serve ma evidence. in article 18, paragraph 7, meant conclusive evidence or rebuttable evidence. He welcomed the inclusion of article 20 on cases of nationalization.

16. With regard to part IV on State immunity in respect of property from measures of constraint, the question of execution only • roae after the auestion of jurisdictional immunity had been decided in the negative and a judgement had been given in favour of the plaintiff. It ahould be emphasized that consent by a State to jurisdiction did not imply consent to execution. He supported the inclusion in article 21 of the phrase "or property In which It has a legally protected interest". The term "non-governmental" in paragraph (a) of the same article should be deleted since the question whether a property was used for commercial non-governmental purposes would rarely arise in practice. He agreed with the Commission that measures of execution could ba taken against a specific property only if it had been earmarked for the satisfaction of the claim. The protection provided under article 23 was necessary and timely in view of the alarming trend in certain jurisdictions to attach or freeze aaaeta of foreign States. Article 26 on immunity from measures of coercion and article 27 on procedural immunities completed the picture on the question of State immunity from jurisdiction and execution. He shared the view that for reaaona of security or domestic law, States right sometimes not be in a position to submit certain documents or information to a foreign court.

17. With regard to the statue of the diplomatic courier and the dlplanatic bag not accompanied by diplomatic cour ier, he maw no need for draft article 19 on exemption from personal examination, in view of the existence of draft article 16 on personal inviolability. There seemed to be a contradiction between paragraphs 1 and 3 of article 17 On the inviolability of the temporary accommodation of the diplomatic cour ier. Paragraph 1 provided for the absolute inviolability of the temporary • ccmmodetion of the courier, while paragraph 3 provided for its inspection under certain circumstances.

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(Mr. Yimer, Ethiopia)

18. Article 22, paragraph 5, concerning the waiver of the immunities should be made stranger) it should not merely require the best endeavours of the sending State to bring ● brwt a jurt rettlewnt of a civil action against the diplomatic cour ier . Similarly, article 25, paragraph 2, on the content of the diplcmatic bag, should make it ‘incumbent upon the ● endinq State to ensure that the content of the bag conformed :o international law. He was in favour of the retention of the words ‘be inviolable wherever it may be; it shall” in article 26, paragraph 1. The evolution of technology had created sophisticated means of examination which right result in the violation of the confidentiality of the bag. The permitting of electronic examination as an additional option to the receiving State would involve a multiplicity of controls and would make satisfaction of the receiving State dependent upon subjective cr iter is.

19. On the question of the non-recognition of States or Governments or the absence of diplomatic or consular relations, his delegation was of the view that the explanatory remarks contained in the commentary, which confined the scope of the provision and expressed the real intentions of the Commission, should b effected in draft article 31 itself.

20. The language of draft article 32, which provided that the articles should not affect bilateral or regional agreements in force between States parties to them, might be construed to mean that the four multilateral Conventions an diplomatic and consular relatiam were affected or modified by the draft articles. Question8 would also arise with reqard to the treaty relations between States which were or right become parties to the four multilateral Conventions and to a future convention based on the draft articles. The Commission should therefore consider redrafting article 32 along the lines of the United Nations Convention on the Law of the Sea, which provided, inter alia that that Convention should not alter the rights and obligations of States parties which arose from other agreements compatible with the Convention.

21. Article 33 on optional declaration was necessary since it introduced flexibility in the draft articles. Moreover, many States were not parties to all four rultilatctal conventions on international diplomatic and consular relatiam, one of which, the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, had not yet entered into force.

22. With regard to the topic of State responsibility, his delegation shared tne view of the Commission that the absence of machinery for implementation relating to an obligation alleged to have been breached would lead to a danger of escalation as a result of the first unilateral reaction to an internationally wrongful act. Nevertheless, he doubted whether compulsory dispute settlement would work or would be acceptable to States in general. The freedom of choice by the parties should be preserved.

(Mr. Yimer, Ethiopia)

23. His delegation shared the views on draft article 3, reflected in paragraph 55 of the Commission's report (A/41/10). Draft article 5, dealing with the non-admissibility of reservations, was potentially a controversial one, and his delegation therefore shared the view that the question should be left to an eventual diplomatic conference on the draft articles.

24. Turning to the draft Code of Offences against the Peace and Security of Mankind, he endorsed the Special Rapporteur's decision to dispense with a definition of an offence against the peace and security of mankind and, instead, to enumerate the acts constituting such an offence. With regard to crimes against humanity, his delegation considered that although an act might be committed against an individual for the purpose of destroying an ethnic group in whole or in part, a mass element should be required to render an offence a crime against humanity. As for the meaning of the term 'crime", Ethiopia continued to hold the view that the Code should cover only the most serious offences. With regard to the possible distinction between "genocide" and "inhuman acts", it shared the view of those members of the Commission who were in favour of referring to "other inhuman acts" and placing that category at the end of the enumeration of crimes against humanity. It was also impressed by the argument that considerations of private gain could be involved in the commission of crimes against humanity, and it shared the doubts expressed by some of the Commission's members as to whether 'interference by the authorities of a State In the Internal or external affairs of another State" constituted in all cases a crime against humanity. Regarding the provision on apartheid, Ethiopia was of the view that the wording should be general enough to refer to such an institution wherever it existed; of the two alternatives proposed on that question in draft article 12, it tended to favour the first. If however, the second alternative were adopted, care should be taken to avoid inconsistency with the International Convention on the Suppression and Punishment of the Crime of Apartheid. On the question of terrorism, his delegation's position coincided with that reflected in paragraph 98 of the report.

25. With regard to the question of terminology arising in connection with war crimes, Ethiopia agreed with the view that the traditional terms "war crimes" and "violation of the norms and customs of war' should be retained even if war had become a wrongful act under international law, the term "armed conflict" being set aside for cases not covered by the concept of war stricto sensu. With regard to the problem of methodology, he endorsed the views reflected in paragraph 112.

26. On the subject of complicity (part IV of the draft articles: other offences against the peace and security of mankind), while supporting the Special Rapporteur's view that the term could be extended to include concealment as well as failure by a superior in rank to exercise supervision and control, his delegation also agreed with those members of the Commission who considered that membership In an organization and participation in a common plan should be included as well. With regard to the autstion of complot, Ethiopia was in favour of extending that concept to crimes against ethnic groups and peoples, and considered that complot could entail collective responsibility. The view advanced by some members of the Commission that each member of a Gwernment was responsible only for his own acts was difficult to accept. On the question of attempt, Ethiopia shared the views expressed in paragraphs 129 and 131 of the report.

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27. Turning to part II of the draft articles (General principles), he aqreed with the Special Rapporteur's views as stated in paragraph 134 of the report, and expressed satisfaction with draft articles 3 and 6. Draft article 7 should not give rise to any controversy, aincc the principle of non-retrmctivity of criminal law was *now* firmly established in article 11 of the Universal Declaration Of Human Rights and other international inatrurente. With regard to draft article 5, he agreed with those members of the Commission who favoured the inclusion of a provision that the offences in question were not political crimes for the purposes of extradition. As to principles relating to the application of the criminal law in space, Ethiopia was in favour of the system of universal jurisdiction. On principlea relating to exceptions to criminal responsibility, it wan generally in agreement with the views expressed by the Special Rapporteur; however, the views of several members of the Commission on the subject of self-defence, reflected in paragraph 172 of the report, were also very interesting and merited consideration.

28. On the subject of international liability for injurious consequences arising out of acts not prohibited by international law, Ethiopia endorsed the Special Rapporteur's view that injury in the sense of material harm wan the topic's real unifying link. It did not, however, agree with the view of sane of the Commission's members that the topic should be confined to ultrahazardous activities. With regard to the scope of the topic, it endorsed the opinion that the term "transboundary" should not be confined to injury caused in neighbour ing countr its, but should also cover injuries caused beyond national frontiers whether or not the source State and the affected State were contiguous. On the auestion of the obligation to negotiate, Ethiopia supported the Special Rapporteur's proposal that the relevant provision should be simply deleted, so that the possible consequences of a breach would be subject to the provisions of general international law. If, however, a provision was considered necessary, his delegation shared the view that the obligation should not be a strict one and, consequently, was not in favour of providing sanctions in the corresponding articles. Ethiopia attached great importance to the views set out in paragraph 213 of the report to the effect that in the future elaboration of the topic, special account should be taken of the needs of developing countries.

29. On the auestion of the law of the non-navigational uses of international watercourses, he said that his delegation endorsed the decision to defer the question of defining the term "international watercourse" until a later stage of the work on the topic. As to the term "shared natural resource", Ethiopia agreed with those members of the Commission who considered that the term had become too contrwersial to be a constructive and generally acceptable part of the draft, but that effect could be given to the legal principles underlying the concept without using the term itself. It favoured a flexible approach to the auestion of whether the draft articles should contain a list of factors to be taken into consideration in determining what amounted to a reasonable and equitable use of an international watercourse. As for the relationship between the obligation to refrain from causing appreciable harm to other States uatng an international watercourse, on the one hand, and the principle of equitable utilization, on the other, he was inclined to concur with the view that a simple reference to the obligation not to cause

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appreciable harm would suffice. With regard to the form which the Commission's future work on the topic should take, hi8 delegation continued to hold the view that the "framework agreement" approach should be adopted a8 being the most generally acceptable. With respect to draft article X on the relationship between the draft articles and other treaties in force, his delegation wished to emphesize that the provision contained therein applied only to the parties to the treaties in question and in no way affected the right8 of third State8 whose vital interests were or might be affected by treatie8 concluded between only two or more of the riparian States of an international river regarding the use or apportionment of the waters thereof.

30. Mr. BENNOUNA (Morocco) said that codification in the area of State responsibility should be a8 flexible a8 possible, so a8 not to restr ict arbitrarily the right of State8 to adapt their responsibility according to the nature of their relations and the situations involved. The Special Rapporteur had rightly emphasized the residual character of the draft article8 on State responsibility. Morocco believed that the underlying philosophy of the Special Rapporteur's latest report was central to any judicial system worthy of that name.

31. With regard to draft article 4 of part three, hi8 delegation had difficulty in accepting the procedure of direct recourse to the International Court of Justice. Recent exper ience ehowed that, in order to ensure the effectiveness and proper ● ♎■)(■)(♌♦❐♋♦)(♑■ ofinternational justice, it would be desirable for States to be able to agree to such recourse, to the extent that they had not opted for a mutually binding optional clause declaration. The Special Rapporteur had sought to establish a parallel with article 66 of the 1969 Vienna Convention on the Law of Treaties, and to subject the rule8 of jus cogens to the same treatment, with regard to their existence, their interpretation, and the responsibility to which their violation gave rise. However, contrary to that Convention, which admitted reservations, draft article 5 ruled out that possibility. The refeference to article 309 of the United Nations Convention on the Law of the Sea did not seem appropriate, because the law of the sea had been negotiated and adopted a8 8 group of closely linked provisions, having a conprehensive and inseparable character. However, conciliation might be conceived as a procedure of ordinary law, which had the advantage of introducing a third party in order to reduce the tensions that resulted when reepcneibility came into play, while taking into account the sovereignty of State8 in the permanent settlement of their disputes.

32. With respect to the topic of international liability for injurious consequences arising out of act8 not prohibited by international law, the most important point was to determine the activities Involved. Otherwise, the régime of liability would have no adequate legal foundation, in the ● b8ence of specific conventions. A liet of activities involving risk and of the relevant preventive measures would be rapidly outpaced by technological and industrial advancer, and would not teally be consistent with the law of liability, which 8hould concentrate on general norms governing the source of the injury, the question of reparation and the settlement of disputes.

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33. On the other hand, the concept of abuse could serve to establish general principles for the protection of possible victims, without hindering the development of technology and its industrial application. A State abused a right when it exercised that right to the detriment of the equally legitimate right of a neighbouring State. The Special Wapporteur should list the legal elements involved in that approach.

34. Turning to the topic of the law of the non-navigational uses of international watercourses, he said that the Special Wapporteur had drawn attention to the relationship between the obligation to refrain from causing appreciable barn to other States using the international watercourse, on the one hand, and the principle of equitable utilization, on the other, and had pointed out that equitable utilization might entail sow factual "harm" without there being a wrongful act. His delegation shared the Special Rapporteur's concern, but was convinced that the judicious implementation of the principle of equity could facilitate the elaboration of an acceptable formula. The principle of equitable sharing could be matched by an obligation to negotiate in good faith. In that Spirit, his delegation fully supported the "framework agreement. formula proposed by the Special Papporteur for the draft as the whole.

35. Mr. PAWLAK (Poland), referring to the topic of State responsibility, said that the envisaged procedure for settlement of disputes should be harmonized with the implementation procedures to be adopted within the framework of the related topics of the draft Code of Offences against the Peace and Security of Mankind and of international liability for injurious consequences arising out of acts not prohibited by international law. The concept and content of international crimes having been defined in article 19 of Part One of the draft articles on State responsibility, it was entirely logical that Part Two should set out the legal consequences of such crimes and Part Three the machinery for implementation of State responsibility. A document on State responsibility would constitute a major contribution to the progressive development of international law and its codification, and it was to be hoped that the Commission's work on the subject would be completed in the near future.

36. With regard to the subject of international liability for injurious consequences arising out of acts not prohibited by international law, he said that although the schematic outline proposed by the previous Special Rapporteur and adopted as the raw material for his work by the present Special Rapporteur had met with sufficiently broad acceptance both in the Commission and in the Sixth Committee, certain fundamental questions, including that of the scope of the concept of international liability, still remained open. His delegation's view was that work on the topic should be continued on the basis of the principle that States had a duty to exercise their rights in ways which did not harm the interests of other States (principle 21 of the Declaration of the United Nations Conference on the Human Environment). To argue that the principle was inconsistent with that of State sovereignty was to overlook another essential aspect of the latter principle, namely, the right of every State to use its own territory without outside interference.

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37. After expressing the view that the term "liability" was the correct one to employ in connection with the topic, since liability could be incurred regardless of the lawfulness of the underlying cause while "responsibility" arose only from unlawful acts, he said that the topic should not be confined to ultrahazardous activities but should cover all activities involving risk. There could be no justification for leaving a potential victim without protection in international law. Moreover, the dividing line between activities that were ultrahazardous and those that were not was by no means clear, and there appeared to be no legal or practical reasons for developing such a concept.

38. The Special Rapporteur's idea of adopting strict liability as the basis for the obligation of reparation while bringing into play factors mitigating its automatic operation was a promising one. So far as the territorial scope of the topic was concerned, his delegation considered that the term "transboundary" should cover not only injury caused in neighbouring countries but also any injury beyond national frontiers, whether or not the source State and the affected State were contiguous. Given the present state of international law, such an approach would, of course, involve certain difficulties; but in a world increasingly exposed to the threat of massive pollution of the atmosphere or of the sea, actions not prohibited by law which caused catastrophic injuries in areas beyond national jurisdiction could not be without legal consequences. International organizations could undoubtedly play a role in that context.

39. Another aspect of the topic's scope was illustrated by the accident which had occured at Bhopal, India, when gas leaking from a pesticide plant operated by a foreign corporation's subsidiary had killed and injured thousands of persons. His delegation believed that the State of nationality of a multinational corporation should be made liable for harm caused by exported dangerous industries. In view of the substantially increased threat of widespread or even catastrophic transboundary harm facing the international community, it was to be hoped that the Canmission would give the topic an appropriate place on its agenda in the next five-year period.

40. With regard to the law of the non-navigational uses of international watercourses, a particularly topical subject in view of increasing problems of fresh-water supply all over the world, his delegation regretted that, owing to lack of time, the Canmission had been unable to make progress on the topic. In view of the diversity of international water courses, in terms of their physical characteristics and of the human needs they served, his delegation favoured the "framework agreement" approach as being the best suited for the elaboration of draft articles setting forth general principles and rules and providing general guidelines to facilitate co-operation among riparian States and the negotiation of future specific agreements relating to particular rivers.

41. An important aspect of the Commission's work to which special attention should be given during the next five-year period was that, with one exception, the topics remaining on the agenda were all closely interrelated. That fact should be reflected in the Commission's programme and methods of work. The Commission's

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decision to consider State responsibility and international liability separately had met with reservations on the part of some jurists on the ground that the latter topic derived from the former, the link between them becoming especially clear in the context of article 35 of Part One of the draft articles on State responsibility. The topic of the law of the non-navigational uses of international watercourses was, of course, also related to that of international liability. In his delegation's view, any practical difficulty that might arise from a joint approach to the interrelated topics would be outweighed by the possibility of considering tne problems involved within a broader context and finding more comprehensive and harmonious solutions.

42. His delegation firmly believed that the crucial messages of the Nürnberg trials should be disseminated as widely as posaiblc and transformed Into generally accepted legal instruments. It therefore attached particular importance to the draft Code of Offences against the Peace and Security of Mankind. The most crucial problem presented by the topic was the implementation of the Code. The only practical solution was the one proposed by the Special Rapportcur in draft article 4: it provided that every State had the duty to try or extradite any perpetrator of an offence under the Code arrested in its territory, but did not prejudge the question of the existence of an international criminal jurisdiction. He recognized the difficulties inherent in that respect in such areas as extradition, means of obtaining evidence, and contradictory judgemente, but recalled that there already existed a general rule confirmed by international legal practice that war criminals should be prosecuted in the countries in which they had canmitted their crimes. All States should co-operate to extradite such persons.

43. In elaborating a catalogue of offences, the Canmiaeion should avoid including almost every conceivable violation of international law. The basis for identifying an international crime should be a general definition covering specific characteristics of such a crime. The proposed Code should not only reflect the present level of consciousness of the international ccnnmunity, but should be a pointer for the evolution of international law.

44. Of fences against the peace and secur i'.y of mankind might be characterized as acts which seriously jeopardized the most vital interests of mankind, violated fundamental principles of jus cogene and threatened human civilization and the primordial human right to life. The Commission might also consider the relationship between the prwisions of the draft Code and article 19 of the draft articles on State responsibility.

45. His delegation agreed with the substance of article 5 on the non-applicability of statutory limitations, but considered that the words "because of their nature' should be deleted. It was inappropriate to justify the provision in the text of the provision itself.

46. The Special Rapporteur had suggested in his report that crimes against humanity should include any serious breach of an international obligation of essential importance for the safeguarding and preservation of the human

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environment. While his delegation would opt for including "ecocide" in the catalogue of international crimes, it had doubts as to the Special Rapporteur's formulation: an individual, not being a subject of such an international obligation, could not breach it. He reiterated his delegation's view that the use of nuclear weapons should be included in the draft Code as an offence against the peace and security of mankind. Their use would present mortal danger to the very existence of mankind. His delegation also supported the inclusion in the draft Code of such offences as colonialism, apartheid, economic aggression and mercenarism.

47. The rule nullum crimen sine lege should be fully applied with respect to international criminal law. The Code should also contain provisions on co-operation among States, in conformity with the United Nations Charter, for the prevention of offences against the peace and security of mankind. In that connection, his delegation shared the view of the Netherlands Government, presented in document A/41/406, that it would be advisable for the general principles to include mutual assistance required between States for the apprehension, trial and punishment of the individuals responsible.

48. Mr. Castroviejo (Spain) took the Chair.

49. Mr. ROUKOUNAS (Greece), referring to the draft Code of Offences against the Peace and Security of Mankind, said that the Special Rapporteur's fourth report (A/CN.4/398 and Corr.1-3) took into account the wide acceptance of the distinction between war crimes, offences against the peace and crimes against humanity. The Commission should now be concerned with deciding, in the light of the current international situation, which acts should be included in the Code. There was no reason why some crimes should not come under more than one category. The Commission should also determine the juridical consequences of each category of offences. Otherwise certain situations would be included in the Code for historical reasons only. If the precise juridical consequences for each category, the definition of the act, the conditions in which it was committed and related offences were established, it would be easier to eliminate difficulties which might arise in relation to other existing international instruments.

50. In taking related international instruments into consideration, the Commission should not lose sight of the fact that the Code, because of its deterrent and preventive nature, should establish clear and precise norms of behaviour. If such instruments expressed the existing legal situation or the future needs of the international community, they should be utilized for the purposes of the Code. A more delicate problem was the question of the relationship between the Code and treaties in force. They should not be weakened.

51. Concerning the relationship between the Code and internal law, draft article 2 submitted by the Special Rapporteur stated that the characterization of an act as an offence against the Peace and security of mankind was independent of the internal order. That implied that individuals had international obligations which went beyond their national obligations. He noted that the 1950 Commission text had

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referred to the independence of international law with respect to penalties. Consequently, if an international tribunal existed, it could pronounce a sentence independently of similar sentences under internal law. The Special Rapporteur had used the term "characterization" because for the time being the concern was to qualify the offence. He wondered whether the use of such a formula could settle the various questions relating to the relationship between relevant international law and internal law, because it was also necessary for there to be harmony between international and internal law. Many of the offences mentioned in the draft Code already existed and it would be useful to refer to their treatment in internal law. It would be helpful to have a comparative list showing three types of State practice: the international text was reproduced in extenso in the internal penal code, with the possible addition of penalties; certain parts of the international text were incorporated; or reference was made to the international text in the internal penal code. In practice internal penal codes should contain identical or parallel rules to international law, because national action to combat international crimes was the rule while action by an international legal body was the exception.

52. Furthermore, with reference to the non-applicability of statutory limitations, in addition to the treaty there must exist a text of internal penal law which specified the existence of the crime and the penalty. The same applied to the law of extradition. There should therefore be a provision in the Code which would oblige States to transpose to their internal law the characterization and punishment of the crimes set out in the Code.

53. His delegation was in favour of establishing an international penal jurisdiction to try offences under the Code. Universal competence was not the rule in current international relations and should not necessarily always be equated with the principle aut dedere aut punire. The Commission could begin by confirming the concept of universal competence, where it existed and in the light of its specific aspects under different conventions. It could then consider universal competence or co-operation between States for other offences.

54. Turning to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, he said that with regard to the "activities" to be considered (para. 201) it would be useful to establish the specific areas which were most likely to involve risk, especially for the environment. They might include industry, nuclear energy, new technologies, space exploration, the transport by sea and land of sources of energy, and the peaceful use of the sea or of international watercourses.

55. His delegation agreed with the proposal contained in paragraph 204 of the Commission's report (A/41/10) not to confine the topic to "ultrahazardous activities", if only because of the continual advances of science.

56. On the basis of existing treaties and practice, rules of conduct should be established that respected the unity of the topic and accorded suitable importance to prevention and reparation.

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57. With reaard to the lxation of activities involving risk, his deleaatton considered that the 1 imited concepts of "territory" and "control" were insufficient. It would be better to include areas beyond national jurisdiction.

58. The concept of injury was central to any attempt at establishing rules. Yet different activities involved different legal consequences and the seriousness of the injury was therefore relative. Different definitions of injury and lomm were qiven in the 1972 Convention on International Liability for Damage Caused by Space Objects and in the 1979 Con ention on Lonq-Ranqe Tramboundary Air Pollution. Unforeseeable injury should also not be ignored.

59. Three situations at least should be encompassed in the proposed réqime. The first was one in which, because of the development of international law, a lawful activity became unlawful, for example nuclear testing in the atmosphere. In the second situation, the lawful activities were requlated by special conventions; for example, reparation for hydrocarbon pollution of the sea was requlated by conventional rules. The third situation was one in which lawful activities were requlated by a general convention.

60. His delegation had consistently emphasized the need to etrenqthen the preventive element in any requlation relatina to injuries caused by lawful activities at the internat ional level. There wan scope for the United Nations to play a larqer role In that field. It was time for a more detailed consideration of the topic.

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

62. Mr. AL-BAHARNA (Bahrain) said that the question of jurisdictional immunities of States and their property had qained practical significance with the increase in the camnerclal activities of modern States, necessitatinq codif ication of the subject. No other topic of international law had such profound implications for national law and procedures. The word "qeneral", in the phrase in square brackets in draft article 6 on that subject, should be deleted because it obfuscated the meanina of 'international lav". With reqard to part III, either version of the headinq was acceptable. Bahrain supported the text of draft article8 21 and 22, provided that the word 'constraint" in the headinqs was replaced by the more precise terms "attachment and execution".

63. His deleaation was in aareement with the provisions of article 23. It might be useful to add another clause, providinq for the exemption of other types of State properties which were similar to those enumerated in the article, because it was impossible to stipulate all the categories of State property which, in the future, could be considered immune from att chment.

64. With reaard to the draft articles on the status of the diplomatic courier, his dcleqation favoured the deletion of the passaqes in square brackets in article 28, which would simplify the wordinq and make it analoqous to that in article 35, paraqraph 3, of the 1963 Vienna Convention on Consular Relations.

(Mr. Al-Bsharna, Bahrain)

65. Bahrain had some miaqivinqa reqardinq the leqal effect of the revised article 32, according to which earlier bilateral treaties would prevail over the draft articles. Bahrain preferred the previous text, which had ensured the preservation of the codified law of the multilateral conventions on the subject.

66. Be urged the incominq Commission to aive prioritv to the item on State responsibility. His deleqation was of the view that the Vienna Convention on the Law of Treaties and the proposed Convention on State responeibilty differed in nature and scope. The question of the implementation of international responsibility and the settlement of disputes should be considered without drawing an analogy between the two Conventions. He urqed the Commission to adopt a practical approach to that intricate problem, and to bear in mind that the world community of States was reluctant. to accept compulsory third-party procedures for the settlement of disputes. Lastly, the Special Rapporteur's use of the expression "soft law" with regard to norms established between States waa somewhat ambivalent and misleadinq. The question of the freedom of States to establish norms differing from the standards of the proposed Convention must be carefully examined.

67. The draft Code of Offences against the Peace and Securitv of Mankind concerned the welfare, happiness and the very safety of mankind. The proposed draft Code should deal only with offencea which threatened the very foundation of modern civilization and the values it embodied. No practical purpose would be served in broadening the cateqory of such offences to include crimes which were not truly international or were covered by other international instruments. Apart from qenocide, a modern definition of crimes against humanity should include heinous crimes such as apartheid, serious damaqe to the environment and drug traffickinq.

68. With reqard to part III, his deleqation was of the view that the terms "war cc imes" and "violation of the laws or customs of war" should be retained in draft article 13, because wars were still beinq waged, although they were prohibited. It Preferred a qeneral definition illustrated by an enumeration. The use of nuclear weapons and other waapona of mass destruction must be banned, because it was contrary to the principles of humanity and to the dictates of public conscience. Both loqic and principle made it necessary to reaard crimes aaainst peace and humanity and war crimes as universal crimes.

69. With reqard to the law of the non-navigational uses of international watercourses, his deleqation noted with pleasure the considerable progress which had been made in codifying the applicable principles and rules on that subject. It appreciated the contributions made by the previous Special Rapporteura, includinq the instructive report of Mr. Evensen. Mr. Evensen's tentative draft convention, consisting of 39 draft articles, enabled Governments and the Sixth Committee to consider the propoaed convention in its entirety rather than as individual articles, A procedure which had formerly tended to prolong the debate in the Commission and the Sixth Committee.

(Mr. Al-Baharna, Bahrain)

70. His delegation agreed that the Commission should defer the definition of the term "international watercourse" and delete the term "shared natural resources" in the text of the draft articles. It also ● upportad the more familiar end generally accepted concept of reasonable and equitable share of the uaea of the waters of an internstionsl watercourse, comaended in the 1966 Helsinki Rules of the International Law Association. An article on reasonable and equitable use should enumerate the relevant Cactora in an illustrative way in the body of the text rather than in the commentary. Bahrain supported the ● framuork agreement" approach, in ao far as it provided guidelinea for the negotiation of future agreements. Its status ahould be properly defined with regard to future aqreements among watercourse States.

71. The Commission ahould consider the organization of its work for coming aeaaiona, which should be of at least 12 weeks' duration , with a view to focusing attention on those areas in which moat progress oould be achieved before the conclusion of the mandates of its members.

72. Wr. OSMAN (Somalia), commending the Commission for the quality of its work, said that it was to a larqe extent the focal point for the expectations of the international community concerning the progressive development of international law.

73. With regard to the draft articles on jurisdictional immunities of States, he said that a State must enjoy immunity from the jurisdiction of courts of foreign countrlea. Jurisdiction in respect of activities of a purely commercial nature should be considered an exception to the general rule of sovereign immunity, not a limitation on it.

74. The term ● commercial contract" needed some clarification. States sometimes ● ngeged in certain activities which might apparently be considered commercial in nature but which could not in reality be bracketed together with generally known commercial activities. Some developinq countries faced such a problem, since in order to achieve some measure of economic developent, they had adopted a mixed-economy system and established corporations with a view to undertaking specific activities in the interest of the State. Such cans should therefore be considered from a different standpoint8 that night require further elaboration of the concept of "commercial contract' with reference to certain other cri tar is such as profits or commercial gains.

75. His delegation noted with satisfaction the provision that States would enjoy immunity from measures of constraint, including any measures of attachment and execution, on the use of their property. However, it feared that in view of the diminished immunity of States under the draft articles, that type of protection of State property might have only a marginal impact.

76. With regard to the status of the diplomatic courier and the diplomatic baq not accompanied by diplomatic courier, he said that the purpose of the diplomatic baq was tc facilitate free communication by the sending State with its representatives abroad. It was theretore necessary to extend protection to it under the draft

(Mr. Oman, Somalia)

articles in order to guarantee confidentiality. That had been achieved by article 28, and the principle that the diplaoatic bag should not be opened or detained constituted the moot significant aspect of that mean5 of diplomatic communica t ion. His deleqation underutood the reasons for qiving the receiving State the right to screen and even open the bag in the presence of the diplomatic courier, but it did not underatand the rationale for qivlnq the same right to the transit State.. The extension to the transit State of rights accorded to the receiving State could create diff i:ulties. Hi5 deleqation therefore atresaed the need for the deletion in article 28, paraqraph 2, of the words "or the transit". On the other hand, it supported the retention of the words in brackets in the second lint of article 28, paraqraph 2, since it felt that the baq, because of its inviolable status, should not be subjected to examination through electronic or other technical devices.

77. The elaboration of the draft Code of Offtnces against the Peace and Security of Mankind was necessary to prevent the use of force in international relations and deter individual5 and their régimes from committing grave crimes such as apartheid and other offtnces involvinq massive violations of human rights. He noted with satisfaction the progress made by the Commission on that topic. While it had taken the 1954 draft Code as a preliminary basis for its work, it had also updated the earlier draft by taking account of other relevant instruments and conventions.

78. The scope of the Code was limited at the present staqe to criminal responsibility of individuals, without prejudice to subsequent consideration of the possible application to States of the notion of international responsibility. While his deleqation had no objection to such a limitation, it felt that some clarification might be necessary in a situation where individuals who acted as representatives of the State committed such crimes as aggression or other offences against the peace and security of mankind. in which case a combined sanction would be required.

79. In reqard to crimes against humanity, his delegation concurred with the Special Rapporteur's view that a "mass element" was necessary to characterize an offence a5 such a crime, and that a "motive" was an essential constituent of the crime. Tt also shared the view that an offenct of that nature should form part of a systematic pattern or plan directed against a human group on grounds, for instance, of racial or reliqlous hatred.

80. Hi5 deleqation welcomed the inclusion of apartheid in the draft Code, and recalled that apartheid had been defined in the International Convention on the Suppression and Punishment of the Crime of Apartheid as a crime against humanity. Furthermore, it5 criminal nature had been emphasized in numerous resolutions of the United Nations, the Orqaniration of African Unity and the Non-Aliqned Movement.

81. Hi5 dtleqation also endorsed the view that crimes against humanity should include colonialism, the forcible denial of the inalienable right to justice and self-determination, and flaqrant, persistent and massive violations of human rights.

(Mr. Osman, Somalia)

82. His delegation was of the opinion that the definition of war crimes should be general in nature, au indicated in paragraph 112 of the Commission's report. While the work of the Commission on that subject was limited to the enumeration of offences against the peace and security of mankind, for the Code to serve its intended purposes, it should not only identify and define offences, but should also provide for penalties and specify the mechanism for trial and punishment of of fenders. He noted the reference in draft article 4 to "international criminal jurisdiction', but had the impression that the challenging task facing the Commission in the future would be the problem of implementation.

83. As to the topic of the non-navigational uses of international watercourses, his delegation noted that there had been disagreement on the definition of the term "international watercourse" and the concept of "shared natural resources". While supporting the "framework agreement approach", he stressed the need for the draft articles to be laborateu in a flexible manner and for them to seek to achieve an equitable balance between the rights of the riparian States concerned. In view of the importance of water resources for the economic development of many countries, his delegation urged that the subject should be given the priority it deserved.

84. With regard to the Commission's programme of work, his delegation agreed with the idea that for the purpose of continuity, a Special Rapporteur for a topic who was re-elected a member of the Commission should continue as Special Rapporteur for that topic. As to the duration of the Commission's sessions, it was to be regretted that the prescribed 12-week annual session had been curtailed bacause of the current financial constraints facing the United Nations. His delegation believed that the normal duration should be maintained in view of the nature and magnitude of the Commission's work. It also agreed that the present system of summary records should be continued. As to co-operation with other bodies, his delegation noted with satisfaction that the Canmission had been represented at the meetings of a number of regional bodies. Similarly, the Commission had had the benefit of hearing statements by observers fran those bodies. Such an interchange of information among jurists dedicated to promoting the rule of law at the international and regional levels was a sound and useful practice.

85. It was noteworthy that the International Law Seminar had been held in Geneva during the thirty-eighth session of the Commission and that it had been attended by 24 lawyers and professors of different nationalities. His delegation attached great importance to the continuation of such seminars in view of their immense value for young lawyers, especially those from developing countries. Somalia therefore joined in the appeal addressed to all Member States to make generous contributions so that the Seminar could continue to be held.

86. Mr. KULOV (Bulgaria) said that the topic of State responsibility deserved particularly serious consideration. The elaboration of a document on that topic would be a major contribution to the progressive development of international law and its codification. The Commission had mwed closer to completing the first stage of its work on the topic, and should consider the subject on a priority basis at its next session. The proposed texts should be based to the qreatest possible extent on State practice and on the practice of international arbitral tribunals and the International Court of Justi e.

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(Mr. Kulov, Bulgaria)

87. His delegation again wished to emphasize the need for the cautious elaboration of part three of the draft articles, in view of the fact that a number of States did not always consider it appropriate to accept procedures for the settlement Of international-disputes through their automatic referral to a third party. That did not mean his delegation was opposed to accelerating work on the draft text as a whole, and on part three in particular. Moreover , it was obvious that the draft articles on international responsibility of States could not be considered complete without articles relating to the settlement of disputes. In his delegation's view, however, the system of implementing State responsibility should be as encompassing and flexible as possible.

88. With regard to draft articles 4 and 5 of part three and the annex, the dispute-settlement procedure envisaged was not only less flexible, but was quite different from similar procedures adopted in universal international conventions. It prwided for the compulsory jurisdiction of the International Court of Justice in cases where a dispute could not be settled through the means set forth in Article 33 of the Charter of the United Nations. However, the Vienna Convention on the Law of Treaties contained a procedure whereby a dispute was submitted to the Court only if the parties could not reach a common agreement to submit it to arbitration. The conciliation procedures envisaged under other universal international conventions were also more flexible. They also allowed reservations, while such a possibility was excluded under draft article 5. Furthermore, the conciliation procedure provided for in the annex was not sufficiently flexible.

89. The procedure for the peaceful settlement of disputes should be flexible and acceptable to the parties. The Commission should undertake a further detailed analysis of the procedures contained in various international conventions, taking into account the specifics of the subject-matter of each convention.

90. In his delegation's view, the work of the Ccanmission would be expedited and the consideration of issues would be more comprehensive if there were more draft articles accompanied by a greater number of comprehensive commentaries.

91. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, his delegation shared tne view that the Commission should have proceeded only from the principle of material liability for injurious consequences. The basic objective should be to study activities which carried the greatest risk , with a view to formulating relevant norms and working out principles of co-operation among States in avoiding the in jur ious consequences arising out of such activities. His delegation supported the recommendation contained in paragraph 219 of the Commission's report (A/41/10).

92. He fully supported the cautious approach of the Commission to the elaboration of the topic "The law of the non-navigational uses of international watercourses". As indicated in the report, the five draft articles submitted by the Special Rapporteur had been the subject of a general discussion which had revealed a number of contradictions in basic terminology. In his delegation's view, contradictions could be overcome if the Commission sought universally acceptable formulations,

(Mr. Kulov, Bulgaria)

which should in turn be generalized and simplified as much as possible. As far as the legal force of the document was concerned, it would probably be most appropriate for that problem to be resolved by Governments.

93. Ris delegation regretted that for lack of time the Commission had been unable to consider the topic "Relations between States and international organizations". However, it was aware that to make progress the Commission should have prior ities in its work. It noted with satisfaction that members had been guided by that goal during the Commission's thirty-eighth session.

AGENDA ITEM 124: PEACEFUL SETTLEMENT OF DISPUTES BETWEEN STATES (continued)

94. The CHAIRMAN announced that Ecuador had become a sponsor of draft resolution A/C. 6/41/L, 2,

The meeting rose at 6.25 p.m.