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SUMMARY RECORD OF THE 40th MEETING

Chairman: Mr. JESUS (Cape Verde)

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The meeting was called to order at 3.15 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. MIKULKA (Czechoslovakia) said that the Judgments of the Nürnberg and Tokyo Tribunals had established the idea that certain categories of offences existed which were punishable under international law without reference to national law. The current draft Code of Offences against the Peace and Security of Mankind should therefore constitute the juridical basis for the punishment of offences which, in the view of the international community, should not go unpunished, particularly where a State had failed to punish the offenders, or had justified or even ordered the commission of the offences.

2. With regard to the acts that constituted crimes against humanity, he said that neither the "mass" element nor the gravity of the act constituted an adequate criterion. The question was which yardstick the gravity and the "mass" element of the act should be measured against. The key element that distinguished crimes against humanity from ordinary crimes was the fact that the former were committed with the tacit agreement or upon the orders of the State. The common element in all crimes against humanity was that they constituted a threat to international peace and security.

3. He supported the reproduction in the draft Code of the provisions concerning apartheid contained in article 11 of the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid. The wording, however, should be general enough to refer to a system of apartheid wherever it existed. It was also preferable to clarify the relationship between the crimes of apartheid and genocide.

4. Offences such as trafficking in children and women, and slavery, should also be included in the category of crimes against humanity, where such offences were committed at the instigation or with the consent of a State.

5. Acts of terrorism, whether directed against a State or against individuals, should only be included where the perpetrators had been instigated by a State or had acted upon its orders. While there should be international co-operation in combating other terrorist acts, they should not be qualified as offences against the peace and security of mankind.

6. Care should be exercised in qualifying serious damage to the environment as a crime against humanity. It would first have to be established that damage had been caused deliberately and that a State had violated international obligations.

(Mr. Mikulka, Czechoslovakia)

7. On the question of war crimes, he could not accept the conclusions contained in paragraph 104 of the Commission's report (A/41/10) concerning the use of the terms "laws and customs of war" and "war crimes". His delegation would prefer a definition of war crimes which enumerated such crimes on the basis of codified rules, while leaving open the possibility of applying other current rules of international law not yet codified, which included the crime of a nuclear first strike.

8. In respect of other offences against the peace and security of mankind, the Charters of the International Military Tribunals had distinguished between the following separate offences: participation in a common plan or enterprise involving the commission of an offence against the peace and security of mankind; membership of any organization or group connected with the commission of an offence; with reference to crimes against peace, the fact of holding a high position. Those hypotheses should not be covered by the general theory of complicity and should be treated as separate offences.

9. Concerning the general principles of the draft Code, the rule nullum crimen sine lege should not affect the general rule that offences against the peace and security of mankind were punishable even where the acts in question did not constitute offences under internal law. Moreover, the concept of "law" could not be identified with the Code itself since the latter sought for the most part merely to codify offences that were already punishable under customary international law. It was only where the Code could define new offences which currently had no basis in customary international law that it would fulfil the role of a law. Such a law could have no retroactive effect in respect of offences committed before its entry into force. The principle of non-applicability of statutory limitations to offences against the peace and security of mankind should also be included among the general principles.

10. With regard to the application of the draft Code, he supported the Special Rapporteur's decision to opt for a system of universal jurisdiction while reserving the possibility of establishing an international criminal jurisdiction.

11. Mr. NGUYEN QUI BINH (Viet Nam) said that the elaboration of a draft Code of Offences against the Peace and Security of Mankind had gained increasing importance as a suitable means of strengthening international peace and security. Priority should therefore be given to the Commission's future work on that subject in conjunction with its work on the draft articles on State responsibility.

12. With regard to the definition of offences against the peace and security of mankind, his delegation had no objection to the division of such offences into three categories: crimes against peace, crimes against humanity and war crimes. A clear distinction should be made, however, between a crime against humanity and certain common crimes that resembled it. In addition, the principle of universal jurisdiction must be observed for the purpose of holding criminally responsible those individuals who had committed crimes against the peace and security of mankind. Determination of the criminal responsibility of individuals under the Code should not in any way imply the exclusion therefrom of the international responsibility of States for international crimes committed by State authorities.

(Mr. Nguyen Qui Binh, Viet Nam)

13. As to the substantive definition of crimes against peace, he was in full agreement with the structure of draft article 11 and with the list of offences contained therein. However, while the provisions of paragraphs 1, 3 and 4 appeared to have attained a sufficient level of elaboration, paragraph 2 should include preparation of a war of aggression in order to strengthen the preventive effect of the Code. The texts of paragraphs 5, 6 and 7 still required further elaboration. His delegation could not accept the definition of a mercenary contained in paragraph 8. The Commission should closely follow the discussions of the Ad Hoc Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries, and of the Sixth Committee on that question. With regard to the definition of acts which constituted crimes against humanity, the second alternative of article 12, paragraph 2, was preferable, since it drew the necessary distinction between common crimes and crimes against humanity. Substantial work was still required in respect of article 12, paragraphs 3 and 4.

14. With regard to war crimes, he favoured an approach that would take into account the progressive development of international law and offer room for the codification of new offences of that kind. The second alternative of article 13 therefore seemed preferable.

15. His delegation firmly believed that the subject should be included as a separate item on the agenda of the forty-second session of the General Assembly.

16. Mr. GOERNER (German Democratic Republic) said that the binding principle of individual criminal responsibility established by the Judgments of the Nürnberg and Tokyo Tribunals constituted a significant contribution to the development of general international law. In the Commission's current attempt to elaborate a draft Code of Offences against the Peace and Security of Mankind within the framework of the United Nations, three categories of crimes should be distinguished: crimes against peace, crimes against humanity and war crimes. Certain crimes, such as apartheid or the first use of nuclear weapons, could be characterized both as crimes against peace and as crimes against humanity. Those three categories had a historical background and clarified the Code's structure. The term "war crimes" should be retained.

17. With regard to the elements which constituted crimes against peace, the Code should strictly follow the wording of General Assembly resolution 3314 (XXIX). In particular, it should reaffirm the principle that "the first use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression", since that principle had far-reaching consequences for the definition of an aggressor. In addition to the threat of aggression, the planning and preparation of acts of aggression, including propaganda which incited aggression, should be listed among the elements of the crime of aggression. To abandon that approach would be to depart from international principles enunciated in the Charter of the International Military Tribunal, and would considerably weaken the preventive effect of the Code.

(Mr. Goerner, German Democratic Republic)

18. As to the elements which constituted terrorism, h· said that not every terrorist activity could be qualified as a crime against the peace and security of mankind. He had considerable doubts with respect to the current formulation of article 11, paragraph 4, of the draft Code. Only acts which were designed to undermine the sovereignty, territorial integrity, security and stability of another State should constitute crimes against peace.

19. While mercenarism should be included in the Code, the definition of a mercenary contained in article 11, paragraph 8, was unsatisfactory.

20. He noted with satisfaction that article 12 included genocide and apartheid in the category of crimes against humanity. It would be useful to know whether, in the case of offences which had already been dealt with in conventions, the full text of the relevant provisions should be incorporated in the Code, or whether a mere reference would suffice. His delegation had yet to take a final position on that matter, but preferred a uniform arrangement for the entire Code.

21. With regard to article 12, paragraph 3, his delegation was of the view that there must be a consistent pattern of systematic and mass violations of human rights in order for "inhuman acts" to be characterized as crimes against the peace and security of mankind. It believed that only far-reaching, sustained and serious damage to the environment resulting from the violation of specific treaties and conventions, or from the testing and use of weapons of mass destruction should be covered by the Code. The constituent elements of war crimes should be limited to grave breaches of the rules of warfare, as laid down in the four Geneva Conventions and in Additional Protocol I. Those rules applied only to an international armed conflict.

22. The first use of nuclear weapons constituted the greatest threat to the survival of mankind. His delegation favoured the inclusion of a provision qualifying it as an international crime against the peace and security of mankind. It was irrelevant under which of the three categories of crimes it would be mentioned. The use of weapons of mass destruction must be prevented until they were finally eliminated under disarmament agreements.

23. He agreed with the principles embodied in articles 3, 4, 5 and 6. His delegation particularly supported the Special Rapporteur's proposal to include the principle of universality with regard to the punishment and extradition of persons who committed crimes against the peace and security of mankind. It would be interesting to learn to which country the persons referred to would have to be extradited. Provision should be made to ensure that no asylum was granted.

24. His delegation interpreted article 8, paragraph 1, to mean that the victim of aggression should not be put on a par with the aggressor. With regard to the exceptions to the principle of responsibility set forth in subparagraphs (b) to (e) of paragraph 1, his delegation believed that, in the light of the experience of the Nürnberg trials, no such exceptions should be admissible in principle. Certain circumstances, such as superior order, could at best be considered as extenuating circumstances.

(Mr. Goerner, German Democratic Republic)

25. There was no need to extend the mandate of the Commission to include the drafting of a statute for an international criminal court. The aim should be the speedy elaboration of provisions which would form the core of the future Code. It was important that the codification project should remain a separate item on the agenda of the Sixth Committee. Experience had shown that that approach had had a beneficial effect on the Commission's work. It was a major reason why the Commission, for the first time since its establishment, had been able, within a few years, to submit a complete set of draft articles covering such a significant area of international law.

26. Mr. BARBOZA (Argentina) said that State responsibility was at the very heart of the law of nations. His delegation endorsed the remarks in paragraph 45 of the Commission's report (A/41/10) regarding the importance of the machinery for implementation relating to obligations alleged to have been breached. Legal regulations were necessary to avoid disorder and arbitrariness in matters pertaining to State responsibility.

27. With regard to draft article 3 of part three of the topic, his delegation noted the recommended use of the means set forth in Article 33 of the Charter of the United Nations. Should that fail, article 4 (c) of the draft provided for compulsory conciliation. His delegation believed that neither recourse to the Charter mechanisms and conciliation was too burdensome an obligation for the States or was incompatible with other conventions. The first two paragraphs of article 4, which established the competence of the International Court of Justice, could apply only in truly exceptional cases. There had been a certain reluctance, both in the Commission and in the Sixth Committee, to accept that obligation. However, it must be recalled that those provisions, particularly under article 4 (b), constituted a key concept in the development of the law with regard to international crimes. Paragraph (a) did not contain any radically new provision, because a similar solution already appeared in article 66 of the Convention on the Law of Treaties, although it had made no mention of arbitration. It would be useful to learn the reason for that omission, because it would be normal for the parties to choose such an option.

28. The "additional rights and obligations" mentioned in article 4 (b), namely those provided for in article 14 of part two, exceeded the consequences arising out of the common types of unlawful acts. Thus, part two of the draft was faithful to the idea that there were different consequences according to the importance of the breached obligation and according to the character of the breach itself.

29. There was a question concerning the relationship between judicial procedures and the procedures set forth in the Charter for the maintenance of international peace and security. Article 14, paragraph 3, of part two lent itself to various interpretations. It would be interesting to learn whether it meant that once the Security Council had intervened in a matter, judicial procedures could not be initiated.

(Mr. Barboza, Argentina)

30. There was also the question whether the competence of the Court would be restricted to the stage of the application of countermeasures, without reference to the wrongful act or the international crime which gave rise to them. That seemed logically impossible, because the lawfulness of the countermeasure, as well as the existence of the rights and obligations at issue necessarily depended on a determination as to such an act or crime. The alleged author State could either deny that its conduct constituted a wrongful act or a crime, or could acknowledge that fact, while disagreeing with such other aspects as the proportionality of countermeasures. In the first case, the Court would examine the conduct and determine the nature of the act. In the second case, commission of the unlawful act or the crime would be confirmed.

31. With regard to the law of the non-navigational uses of international watercourses, the changes of Special Rapporteur had delayed the work of the Commission. Argentina had always supported the broad outline drafted by the Commission, and regretted the step backward represented by some of the changes introduced pursuant to the last report of the former Special Rapporteur. His delegation believed that the Commission should defer the matter of attempting to define the term "international watercourse" and continue to base its work on the 1980 hypothesis. That type of deferment had always been useful, because the development of the topics had also led to a fuller understanding of their content and to an enhanced ability to define and delimit their scope. With regard to the term "shared natural resource", his delegation had already expressed its support of the explicit mention of that premise upon which all the applicable principles in that area were based.

32. As to whether there should be a list of factors to be taken into account in determining what amounted to a reasonable and equitable use of an international watercourse, it seemed necessary to consider what were the international community's values and priorities in that area. Argentina would prefer a general list of factors in the text rather than in the commentary.

33. Regarding the relationship between the obligation to refrain from causing appreciable harm to other States using an international watercourse, on the one hand, and the principle of equitable utilization, on the other, his delegation was of the opinion that it would be preferable not to make unmet needs the sole criterion, and merely to refer to "appreciable harm". Argentina supported the "framework agreement" approach.

34. With regard to the topic "International liability for injurious consequences arising out of acts not prohibited by international law", it was clear that accelerated and unforseeable technological developments conferred upon States and individuals an international or transboundary power. The emergence of certain factors affecting the human environment had created the need for new legal provisions. There was also a growing awareness of the importance of international solidarity because of increasing interdependence.

(Mr. Barboza, Argentina)

35. There were two sides to the concept of sovereignty: the freedom of every country to undertake or to allow in its territory the activities which it believed most beneficial; the undeniable right of every State to see that the use and enjoyment of its territory were not affected by the results of activities undertaken in other territories. States in whose territory activities were initiated which involved risks for other States had the obligation to warn those States of the nature of the activities, to co-operate with them, and to prevent and, if necessary, make reparation for any damage. Even in the absence of an agreed régime, the same State had obligations of prevention and reparation. The question whether there existed a rule of general international law referring specifically to dangerous activities was not crucial, because the basis for elaborating and applying such a rule apparently existed. His delegation hoped that the legal provisions which would finally emerge from the Commission would reflect the concept of "strict liability" and provide the mechanisms necessary for effective implementation, so that the régime would be acceptable to the international community.

36. Mr. BEESLEY (Canada) said that his Government shared the concern expressed by the Commission in paragraph 252 of its report over the reduction of the length of the thirty-eighth session from 12 to 10 weeks. Canada recognized the imperative need for the United Nations to exercise fiscal restraint and would support any measures which might enable the Commission to improve its effectiveness, such as increasing the time allocated to the Drafting Committee or organizing the programme of work in such a way that each topic received major consideration every other year; but it doubted whether, even with the help of such measures, the Commission would be able to perform its work adequately if the length of its sessions was thus reduced. The consequences apparent from the report at present under consideration were serious, and his delegation urged that every effort should be made to allow the Commission a full 12-week session. It also fully endorsed the Commission's views on the need to retain summary records, expressed in paragraph 253 of the report. It would be a significant loss to Governments in their endeavours to conduct their affairs in accordance with the rule of law if records of the Commission's debates were not available. Canada welcomed the efforts to ensure a regular schedule for publication of the Yearbook of the International Law Commission and looked forward to the publication of a new edition of The Work of the International Law Commission.

37. In a footnote to his second report on the non-navigational uses of international watercourses (A/CN.4/399 and Add.1 and 2), the Special Rapporteur had indicated that he considered a pre-existing use of the waters of an international watercourse to be only one of the factors which should be taken into account in the balancing of interests to determine an equitable allocation of the uses and benefits of that watercourse, and not a factor to which preference must be given. Canada endorsed that view and looked forward to seeing it reflected in future draft articles. The Special Rapporteur drew an analogy between the concepts of equitable allocation and equitable utilization in determining the distribution of uses and benefits of an international watercourse and the concept of equitable principles developed in the context of maritime boundary delimitation. His delegation

(Mr. Beesley, Canada)

believed that the concepts of equitable allocation and equitable utilization as applied to international watercourses covered a broader range of considerations than was implicit in the latter concept as it had been applied in the law of maritime boundary delimitation, and hoped that the Special Rapporteur and the Commission would give further consideration to the matter.

38. The topic of international liability for injurious consequences arising out of acts not prohibited by international law was one to which the Commission should give greater priority. The conduct of hazardous or ultrahazardous activities, whether they related to the use of nuclear energy, the passage of satellites over the territory of a State or the release of industrial waste into rivers, lakes, oceans or the atmosphere, was not a matter solely of interest to the State conducting them. The principle of State responsibility for such activities had emerged four decades previously in the Trail Smelter arbitration and Canada, which had been the defendant in that case, had accepted it. Since then, the principle had been further developed; it had been endorsed by the United Nations Conference on the Human Environment and was reflected in the Convention on the Law of the Sea and in the Convention on Long-range Transboundary Air Pollution developed under the aegis of the Economic Commission for Europe. His delegation welcomed the new Special Rapporteur's first substantive report on the topic, endorsed his decision to maintain continuity by adopting his predecessor's schematic outline, and agreed with his intention to proceed on the basis that all activities involving risk fell within the scope of the topic. A recently reported statement by the Minister of the Environment of the Federal Republic of Germany advocating that financial responsibility for transboundary pollution should be borne by the country which had caused an accident was of interest in that connection, as also was a recent report of pollution of the Rhine by chemical waste discharged in Switzerland, a non-member of the United Nations. That event not only brought home the immediate importance of the topic but also illustrated the interrelationship of several items on the Commission's agenda - injurious consequences, international watercourses and State responsibility. Neither the Committee nor the Commission could afford to lose sight of the linkage between those issues or of the pressing practical needs which the discussion of legal matters ought to reflect.

39. Turning to the related topic of State responsibility, he remarked that the length of time it had been before the Commission was a measure of its conceptual and practical difficulty. With reference to the Special Rapporteur's seventh report, which dealt with the question of implementation of international responsibility, his delegation favoured a limited range of operation for the principle of compulsory jurisdiction. Although the broader question of compulsory settlement of international disputes was a topic which the Commission might suitably take up in another context, its consideration at the present juncture could delay the completion of work on the substantive aspects of State responsibility.

40. It would be helpful if the International Law Commission were to broaden and intensify its contacts with other law-making bodies dealing with issues in such fields as trade and economic relations, transboundary pollution or even

(Mr. Beesley, Canada)

disarmament, which might have implications for items on the Commission's agenda. Through interaction with those other bodies the Commission could both provide and gain insight and encouragement and, in the process, enrich its own work as well as theirs.

41. Mr. EL RASHEED MOHAMED-AHMED (Sudan), referring to the topic of State responsibility, said that his delegation, while supporting the general approach adopted by the Special Rapporteur, took issue with the emphasis placed on the residual character of the draft articles in so far as they admitted of "soft law" between individual States even if the international community as a whole established jus cogens. It was surely one of the aims of the draft articles, besides providing a compendium of international obligations, to establish a method whereby "soft law" was transformed into "jus cogens". A compulsory procedure for the settlement of disputes was indispensable if the future convention was to be a meaningful one; States should be obliged to resort to such a procedure as soon as difficulties arose in connection with the application or interpretation of an international obligation. Referring to paragraph 49 of the report, he remarked that the use of the term "international crime" in the context of State responsibility was misplaced; it would be more appropriate to speak of a breach of an international obligation.

42. Turning to the draft Code of Offences against the Peace and Security of Mankind, he said that its content ratione personae should be extended to include the responsibility of States, especially since the definition of aggression in draft article 11 and that of war crimes in article 13 necessarily involved State responsibility. As regards the content ratione materiae, the need to include economic aggression was today more pressing than in the past. His delegation welcomed the inclusion of mercenarism and terrorism among offences against the peace and security of mankind and generally agreed with the definition of what constituted such offences; the word "peace", however, still needed to be defined. The categorization of offences as crimes against humanity, war crimes and crimes against peace was not intended as an alternative to an enumeration of crimes but only as a useful tool for international legislators as well as for judges, scholars and students of international criminal law. A procedural code was a necessary corollary of a code of crimes; in its absence, the necessary constitutional guarantees would have to be spelled out in the substantive text of the Code itself in order to ensure a fair trial for the accused. Lastly, he suggested that the Commission should be invited to consider the question of penalties, since a code of offences which failed to provide for penalties would not be complete.

43. With regard to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, he drew attention to the existence of a maxim in Islamic law corresponding to the maxim sic utere tuo ut alienum non laedas which was often quoted in connection with the topic. Parallel to the sovereign right of a State to carry on any activity in its territory regardless of the transboundary harm that might arise therefrom was the right of the injured State not to be harmed; and, if harm did occur, it was reasonable to expect that the brunt should not be borne by the injured State alone. Principles

(Mr. El Rasheed Mohamed-Ahmed, Sudan)

of good-neighbourliness, co-operation and good faith provided a basis for agreed procedures for the notification of the existence of the activity and its possible consequences and, when consequences occurred, for negotiations in good faith. International organizations had an important role to play in that connection. The suggestion for the establishment of an insurance fund made by the representative of Cyprus at a recent meeting of the Committee deserved serious consideration.

44. Referring to the law of the non-navigational uses of international watercourses, he said that his delegation preferred the term "system" to "international watercourse", which was not a legal term nor indeed a scientific one. The Commission would be well advised to seek the assistance of experts with a view to arriving at a clear and unambiguous scientific definition. The term "shared natural resource" was not clear with regard to acquired rights. The interests of riparian States were usually defined and governed by bilateral agreements and should not be affected by a framework agreement. His delegation would prefer a balance-of-interests approach taking account of all relevant factors and not of the demographic factor alone. His delegation felt that a non-exhaustive list of those factors incorporated in the text of a draft article would be acceptable, but was also prepared to accept the Special Rapporteur's position as reflected in paragraph 239 of the report. The Sudan preferred the term "harm" to the term "injury", which corresponded to a legal concept peculiar to the Anglo-American legal system. In conclusion, he said that the study of the topic could at best culminate in a framework agreement rather than in a multilateral convention in view of the large number of States not directly affected by the question of international watercourses and the diversity of problems arising in connection with the use of rivers in different parts of the world.

45. Mr. BRENNAN (Australia) said that the need for balanced representation in the International Law Commission of the main forms of civilization and the principal legal systems of the world should be borne in mind in electing members to serve on the Commission for the next five years.

46. The report of the Commission should contain a more scholarly exposition of the relevant international law with respect to each topic rather than a mere compendium of views expressed. The Commission should operate within the existing international legal framework. To some extent the current situation was a result of the Commission's having been assigned topics involving less codification and much more progressive development of the law than had been the case earlier. Australia believed that the Sixth Committee should refer to the Commission only such topics as were well developed in State practice; topics on which there were entrenched political divergences should be avoided.

47. Turning to the topic of the jurisdictional immunities of States and their property, he said that legislation that had come into force in Australia in 1986 had established that immunity from jurisdiction accorded to foreign States did not extend to the commercial or non-governmental acts of States. The type of transactions to which immunity would not apply was specified in the legislation. Australia had thus avoided the difficulties involved in allowing the motive behind a State's actions to determine its immunity.

(Mr. Brennan, Australia)

48. Generally speaking, the draft articles were satisfactory to Australia, which would forward its comments on them in due course. In the mean time, he noted that, in the area of execution, the recognition in Part IV of the draft articles that it was possible to execute against State property in certain circumstances was a significant clarification of the law in that area. However, execution was limited to the property specified in article 21 (a). There seemed no reason why all property used for commercial purposes and belonging to the foreign State in the relevant jurisdiction should not form a common fund against which judgement creditors might execute. A decision on whether the draft articles should form the basis for a diplomatic conference to adopt a convention should await the reactions of States to the draft articles and further consideration by the Commission in the light thereof.

49. Turning to the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, he recalled Australia's long-felt reservations as to the need for the topic to be considered at all by the Commission. Implementation and observance by States of existing international law were more important than writing new texts. Of the four Conventions cited by the Special Rapporteur, only the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations were a good basis for work on the topic, since they were widely accepted. His delegation would have preferred the Special Rapporteur to have followed a more inductive approach. It was disappointing that no major study of State practice had as yet been undertaken, which would have helped to determine whether State practice had developed beyond article 27 of the Vienna Convention on Diplomatic Relations in such a way as to require either codification or progressive development of international law in the area. The series of options in square brackets contained in article 28, the key provision of the draft articles, confirmed his Government's view that the subject was not ripe for codification or progressive development in the form of a multilateral convention. While his delegation regarded the inviolability of the diplomatic bag as most important, it also noted that abuse and fear of abuse of the bag were putting the inviolability under great strain. Such abuses could not be tolerated and were prejudicial to the proper conduct of diplomatic relations.

50. With regard to the topic of State responsibility, he considered that it was wise to draw on two widely accepted multilateral instruments as the foundation for Part Three. That was the approach most likely to elicit support from States for the proposed dispute-settlement procedures. Important elements in that Part were the emphasis on compulsory conciliation as means of preventing the escalation of a dispute, while other options, including judicial settlement and the approaches set out in Article 33 of the Charter were left open as means for the definitive peaceful resolution of a dispute. Although some States had not accepted as obligatory the jurisdiction of the International Court of Justice, his delegation hoped that the principle of choice of the means for peaceful settlement of disputes by the parties concerned would not lead to avoidance of such settlement. With respect to paragraph 60 of the report, his delegation would prefer the dispute-settlement procedures to be handled separately and not linked to the other topics referred to. State responsibility was a fundamental principle of international law. The other topics were more concerned with the progressive development of international law and as such raised both political and legal issues.

(Mr. Brennan, Australia)

51. To assist the rationalization of work, his delegation would like the draft Code of Offences against the Peace and Security of Mankind to be considered only under the International Law Commission report. One possibility would be for all the topics dealt with under the Commission's report to be listed in future as sub-items under the agenda item "Report of the International Law Commission".

52. His delegation generally supported the approach of the Special Rapporteur to the draft Code, particularly his proposal to produce an outline of the topic dealing with the scope and principles of the Code, on the one hand, and the specific offences to be included, on the other.

53. The topic of international liability for injurious consequences arising out of acts not prohibited by international law was an important one, deserving priority attention. Australia agreed that primary emphasis should be placed on prevention rather than reparation, with the duty of reparation arising only once every effort to avoid or minimize loss had failed. That would ensure that all acts in the territory of a State were conducted with as much freedom as was consistent with the interests of other States. Australia felt strongly that the source State had an obligation under customary international law to inform any State that might be affected of activities in the former's territory which it considered dangerous and to provide all data necessary for the latter to make its own evaluation. Australia endorsed the emphasis given to the duty of affected States to attempt to negotiate a régime to govern hazardous activities and the emphasis given to "shared expectations". The draft articles should not be limited to ultrahazardous activities. They should refer to any injury caused beyond the national frontier of the source State. No distinction should be drawn between the activities of a State and activities of private individuals or entities in a State. Compensation should not depend on the internal law of any country, except in so far as internal law was evidence of "shared expectations".

54. Lastly, he said that the Commission should not effect financial savings to the detriment of the provision of summary records, the regular publication of the Yearbook or the timely issue of documents. His delegation was particularly concerned at the delay in issuing the final report of the Commission, which left Governments insufficient time to study that important document. In that connection, it might be helpful to reconsider the timing of the annual session of the Commission, and it might be possible to make more efficient use of the time available during the session. Australia considered that for its 1987 session the Commission should meet for ten weeks, as in 1986.

55. Mr. RIPHAGEN (Netherlands), commenting on the topic of the non-navigational uses of international watercourses, noted that draft article 1, paragraph 2, brought navigational use within the scope of the draft articles, "in so far as other uses of the waters affect navigation or are affected by navigation". Such uses were by no means exceptional. Furthermore, the question arose as to what was actually covered by the notion of "non-navigational use". The building of bridges over an international waterway could affect navigation and, on the other hand, navigational uses might cause pollution of its waters. From a legal point of view,

(Mr. Riphagen, Netherlands)

there was a connection between the topic and that of liability for injurious consequences arising out of acts not prohibited by international law. Both involved problems of reconciling a natural unity on the one hand and a politico-legal division of the world into sovereign States on the other.

56. There were many more international conventional régimes relating specifically to international watercourses than to other natural phenomena and the time was ripe for a comprehensive codification and progressive development of rules of international law in that field. Since circumstances differed from one international watercourse to another and along the same watercourse, a "framework agreement" should be aimed at. The Special Rapporteur had described the thrust of that approach as being "to elaborate draft articles setting forth 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 guidelines for the management of international watercourses and for the negotiation of future agreements". The first goal addressed existing substantive rules of conduct and the second future substantive rules of conduct to be laid down in agreements between the States concerned. Furthermore, international mechanisms - procedural rules and substantive rules - were the expression of international watercourse management.

57. The link between the two aspects was revealed in the Commission's discussion concerning "the relationship between the obligation to refrain from causing appreciable harm to other States" and the "principle of equitable utilization". The Commission as a whole recognized that equitable utilization could not by definition constitute a breach of the obligation to refrain from causing appreciable harm to other States. But that obligation depended on what was meant by equitable utilization. The distribution of uses could be effected by agreement between the States concerned, by decision of the competent international institution, by a form of third-party dispute settlement, or by a combination of those methods. In any case, it amounted to a form of management of the international watercourse as a whole. As to the manner of effecting that distribution, a law of international watercourses implied a shift from territorial distribution to functional distribution. There was a double distribution to be made: between different uses and the same uses by different countries; in fact, that was to be done in one operation. The Commission had taken no definite stand on the matter; to state simply in the framework agreement that distribution must be "equitable" was a somewhat poor guideline. More substantial guidance was needed. It was probably as important to list factors which should not be relevant as factors which were relevant. It might also be possible to establish priorities, mentioning circumstances that were more relevant than others. The question also arose as to how far other factors than the use or non-use of the waters of an international watercourse could be considered relevant.

58. The concept of equitable utilization tended to lead to an integrated approach to the distribution problem, whether or not the international watercourse system was called a shared natural resource. But in formulating the relevant factors to be taken into account in solving the distribution problem, care should be taken

(Mr. Riphagen, Netherlands)

that neither upstream nor downstream States had preferential treatment. That would imply that the length or volume of the "hydrographic components" of an international watercourse situated within the political boundaries of each "system State" (A/41/10, para. 224) was irrelevant for the application of the "equitable utilization" concept. Similarly, existing uses should not have priority over new uses. However, he wondered whether in an integrated approach territorial sovereignty and the maxim qui prior est tempore potior est iure could be completely ignored. Procedurally, he felt that management problems required some form of institutional mechanism. There again, legal "principles and rules" - being rules of conduct - and "guidelines concerning institutional mechanisms" (para. 242) seemed to be inextricably interwoven.

59. Mr. GUNEY (Turkey), referring to the topic of the jurisdictional immunity of States and their property, supported the idea of a draft article on the immunity of sovereigns and other heads of State. Draft article 3, paragraph 1 (a), assimilated such persons to the State itself and, consequently, the entire draft article would apply to the sovereign or the chief of State in the same way as to the State itself. It seemed preferable, however, to have a separate provision for the sovereign or the head of State in that regard.

60. Article 21, which defined the rule of the immunity of States with respect to their property, particularly in connection with measures of constraint, might expand the scope of immunity to include property which did not belong to the State and which was neither in its possession nor under its control. The comments of Governments would facilitate the search for an appropriate and generally acceptable solution.

61. He did not think that draft article 25 was useful, since it dealt with the jurisdictional immunities of the State as a legal entity and not with the immunities of representatives as natural persons. Since the diplomatic conventions in force governed immunities ratione personae, it was neither necessary nor appropriate to maintain the present text of draft article 25.

62. Article 28, which created some problems, was the most important provision of the entire draft, since it enabled any State to restrict without limitation the immunities and privileges provided for in the draft articles on grounds of reciprocity. His delegation considered, however, that the question of the limitation of the application of the draft articles should be separated from that of its extension and that two separate paragraphs should be provided for that purpose.

63. Referring to the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, he noted that article 28 contained some passages in square brackets. The main substantive questions which remained to be resolved were the extent to which the draft article should provide a uniform régime for all bags and the nature of that régime. It was to be hoped that those questions could be resolved in the light of the comments of Governments. At present, by mentioning electronic or other technical devices, the article was oriented towards inequality between States, because many countries, in particular those in the developing world, did not possess such advanced devices.

(Mr. Guney, Turkey)

64. In his delegation's opinion, the commentary on draft article 32, which stressed that the main purpose of the draft articles was the establishment of a coherent and uniform régime governing the status of the courier and the bag with a view to complementing the provisions on the same subject in the four multilateral conventions, was quite appropriate and should be maintained in its present form.

65. As to the topic "The law of the non-navigational uses of international watercourses", his delegation would confine itself at present to taking note of the second report of the Special Rapporteur, since the ILC had been unable, for lack of time, to consider the topic in detail and to make comments on that report.

66. In conclusion, he said that his delegation agreed with the idea expressed in paragraph 250 of the Commission's report concerning the organization of its work for future sessions, in the light of general objectives and priorities and taking into account relevant General Assembly resolutions.

67. Mr. KAMAL (Bangladesh) said it was regrettable that despite the value of its work, the Commission had been obliged to shorten its session for lack of financial support. He therefore hoped that that particular development would not become a regular feature, given the fact that the expenses related to the development of public international law represented only 1.7 per cent of the regular United Nations budget. His delegation strongly supported the maintenance of summary records not only as an essential requirement for the progressive development and codification of international law, but also for the proper understanding and interpretation of the texts adopted. Furthermore, it was high time for the international legal community to have the benefit of an updated version of the Yearbook of the International Law Commission. In view of the great usefulness of that publication, his delegation would support initiatives for appropriate budgetary allocations.

68. Referring to the topic "Jurisdictional immunities of States and their property", his delegation noted the narrow scope of the proposed draft articles. They covered only the question of jurisdiction by national courts, which were only one of the national authorities capable of affecting immunities of other States. The title of the topic should clearly reflect the scope of the work. It was true, however, that the emergence of a future instrument in that area would be of great help in overcoming the confusion arising out of the apparent distinction between acta jure imperii and acta jure gestionis.

69. It could not be denied that the sovereign equality of States was the very basis of public international law. At the same time, in case of conflict of sovereignties arising out of inter-State dealings, the immunities accorded to States were basically a matter of comity and reciprocity based on the realization that without a minimum enjoyment of immunity, the international legal order based on sovereign equality of States might suffer irreparable damage. Faced with the restrictive interpretation of sovereign immunities on the part of some States and the upholding of absolute immunity on the part of others, the Commission had been quite successful in charting a delicate course. His delegation continued to

(Mr. Kamal, Bangladesh)

support the general thrust of the Commission's endeavour in that respect, so long as proper account was taken of the concerns and the needs of the developing countries.

70. The draft articles should be explicit. The reference in brackets in article 6 to the rules of general international law seemed unnecessary since it was contrary to the objective of transparency. Furthermore, the inclusion of article 19 entitled "Effect of an arbitration agreement" seemed illogical, since the aim of any arbitration clause in such a situation was precisely to avoid the jurisdiction of any particular national court. The article should therefore be deleted.

71. The Commission's task with regard to the topic "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier" was essentially to maintain a balance between the security interests of the receiving State and the confidentiality of the sending State. Although not unanimous in their prescription on that aspect of diplomatic relations, the four main Conventions were heavily aligned towards the concept of inviolability of the courier and the bag. His delegation would therefore prefer to maintain that bias as far as practicable in any future instrument. However, it would not be averse to including a provision for return of the bag to the sending State on security grounds.

72. With regard to the topic "State responsibility", his delegation agreed that parts two and three of the draft were interlinked, because the mechanisms for implementation depended to a large extent upon cases to be dealt with in part two.

73. Referring to the Code of Offences against the Peace and Security of Mankind, he said that States as well as individuals should be held criminally responsible for such offences, and an international court should be given criminal jurisdiction in that regard. The Commission might wish to concentrate on the criminal responsibility of individuals in their capacity as government agents.

74. His delegation supported the inclusion of apartheid as a crime against humanity. The use of nuclear weapons should also be in the list of offences against the peace and security of mankind.

75. With respect to the topic "International liability for injurious consequences arising out of acts not prohibited by international law", his delegation hoped that the Commission would be able in 1987 to allocate more time for the discussion of that important issue.

76. On the subject "The law of the non-navigational uses of international watercourses", his delegation agreed with the view expressed in paragraph 230 of the Commission's report (A/41/10). Since political borderlines did not coincide in most situations with hydrological and geographical unities and since more than two thirds of some 200 international river basins were not yet governed by agreements among the riparian States, there existed the possibility of serious conflict in the sharing of water resources. The world community therefore had a duty to formulate at least a "framework agreement" consisting of general principles and rules governing the non-navigational uses of international watercourses.

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77. The report contained an important survey of legal materials such as decisions of international tribunals, international instruments including declarations and resolutions, and studies by international organizations. In that way, the Special Rapporteur had been able to link the results of the earlier stages of the Commission's work with the objectives of the resumed study of the topic.

78. His delegation agreed with the Special Rapporteur's conclusion that there was overwhelming support for the doctrine of equitable utilization as a general guiding principle of law for the determination of rights of States in respect of the non-navigational uses of international watercourses. Furthermore, that principle was well established in the practice of States.

79. With regard to the definition of international watercourses, he wondered why such an important matter had been deferred, since it formed the basic edifice for the construction of other draft articles. It was the task of lawmakers to overcome difficulties posed by theoretical concepts and to avoid solutions which could not conform to objective facts. Accordingly, in view of the statement in paragraph 235, his delegation found the conclusion given in paragraph 236 rather hasty.

80. Bangladesh believed that the unity of a watercourse in terms of the interdependence of its component parts had to be recognized in the first place. Water resources of an international watercourse should by definition comprise the total quantum of water that flowed into and through it from beginning to end. The international character of a watercourse had to be determined by its geographic expanse and historical flow over more than one State, and not merely by the old and new use of its water. His delegation could not accept the introduction of the idea of relativity in defining the international character of a watercourse for the following reasons: firstly, because it was legally unsound and lacked precision; secondly, because it was prejudicial a priori to the interest of lower riparian States, as it gave rise to an unequal situation vis-à-vis upper riparian States, assuming the technical feasibility of controlling the flow of water; finally, it assumed wrongly that it was theoretically possible for one State to use parts of the water without affecting its use by another State. It would, therefore, be logical to consider an international watercourse as a shared natural resource subject to equitable distribution.

81. With regard to the use of the term "shared natural resource", the Special Rapporteur thought that the wisest course for the Commission would be to give effect to the legal principles underlying the concept without using the term itself in the text. In that respect, it must be pointed out that the reciprocal rights and obligations of the States concerned were inevitably centred on the shares which formed the subject of their rights and obligations. As such, any alternative formulation must clearly bring out that equation of rights and obligations.

82. Another area of concern to his delegation was the enumeration of factors that would determine a reasonable and equitable share of the uses of the waters of an international watercourse. The solution had to be based on a perspective broad

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enough to take into account such factors as geographical features, climate and environment, demography and economic condition of the total hinterland of the international watercourse. The objective was to harmonize the needs of all the parties with the overall availability of water resources.

83. A logical extension of the principle of equitable sharing of waters of an international watercourse would be to prohibit not only the use or activities of a riparian State which might cause appreciable harm to the rights or interests of another riparian State, but also those having adverse effects on riparian States. To meet the criticism that the notion of "appreciable harm" was vague, it would be necessary to enumerate in any agreement on non-navigational uses of international watercourses the criteria for determining appreciable harm to or adverse effects on a riparian State.

84. With regard to the relationship between the obligation to refrain from causing appreciable harm to other States using an international watercourse, on the one hand, and the principle of equitable utilization, on the other, his delegation hoped that the Special Rapporteur would be able to find suitable and generally acceptable formulations.

The meeting rose at 6.30 p.m.