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SUMMARY RECORD OF THE 37th MEETING

Chairman: Mr. **DENG (Sudan)**

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

AGENDA ITEM 134: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTIETH SESSION (continued) (A/43/10, A/43/539)

AGENDA ITEM 130: DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (continued) (A/43/525 and Add.1, A/43/621-S/20195, A/43/666-S/20211, A/43/709, A/43/716-S/20231, A/43/744-S/20233)

1. Mr. ABADA (Algeria) said that he would confine his remarks to chapter IV of the report under consideration (A/43/10), covering the work of the International Law Commission on the draft Code of Crimes against the Peace and Security of Mankind. Algeria had often reaffirmed its conviction that such a legal instrument was not only necessary, but urgent.

2. It was unanimously agreed that the crime of aggression was one of the first crimes that should be included in the draft code. General Assembly resolution 3314 (XXIX), containing a definition of aggression, had undoubtedly facilitated the work of the Commission. In that regard, the sending of armed bands was a type of aggression and should not be set apart from it. Annexation, whatever its modalities, should also be regarded as a crime against peace distinct from other such crimes.

3. If preparation of aggression was kept as a crime distinct from aggression itself, it could, as was stated in paragraph 225 of the report, be of vital importance for deterrence and prevention, particularly of nuclear war. However, the concept warranted precise definition and additional considerations needed to be introduced in order to clarify it.

4. The concept of intervention seemed to have been discussed at length by the Commission. Of the two alternatives suggested by the Special Rapporteur, his delegation preferred the second. With a view to defining that concept more precisely, the Commission could also draw its inspiration from existing texts, including the relevant passages of the 1970 Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States (General Assembly resolution 2625 (XXV)).

5. Terrorism was a delicate problem, and *one* that was difficult to define. At the current stage of discussion, it was clear that, while acts occurring within the geographical limits of a State without any foreign support should be excluded, the draft code should cover terrorism committed by a State against another State. Moreover, the lack of a precise definition of that crime made that question more difficult.

6. Colonial domination remained a reality in several regions. Colonialism, as a political and legal concept, referred to conduct that was incompatible with the principle of the equality of the rights of peoples and of their right to self-determination. Given the two alternatives suggested by the Special Rapporteur, his delegation believed that they should be combined or merged.

(Mr. Abada, Algeria)

7. Mercenarism should also be made a separate crime. It was an activity aimed at violently undermining the sovereignty and political independence of States or suppressing the struggle of peoples deprived of the right to self-determination. The Commission should continue its work on that question in concert with the Ad Hoc Committee responsible for drafting a relevant convention. That did not rule out the possibility of co-ordinating the work of the two organs.

8. His delegation wished to reiterate that it was in favour of an international criminal jurisdiction. It expressed the hope that the Commission would soon begin to prepare the statute of a competent international jurisdiction for individuals.

9. **Ms.** LITCHFIELD (Swaziland) said that the evolution of the multilateral process had resulted in a strengthening in the importance of law. Despite the pressure exerted on it, the Commission should proceed cautiously and thoroughly with the vital items on its agenda. However, she would confine her comments to two chapters of the report under review: International liability for injurious consequences arising out of acts not prohibited by international law (chap. II) and the law of the non-navigational uses of international watercourses (chap. III).

10. Regarding the first point and in response to the Special Rapporteur's request for comments on the role which the concepts of "risk" and "harm" should play in the topic, the concept of "appreciable risk" should not be the only criterion for liability. That concept should be more closely related to prevention: if risk was evident in any activity, maximum efforts should be made to minimize or prevent adverse effects. The concept of "harm" should focus on the provisions related to the regime of liability and reparation.

11. Her delegation welcomed the views expressed by the Special Rapporteur in paragraph 68 of the report regarding draft article 3. That article should be very carefully drafted, so as to take into account the special interests of the developing countries. It should not be used by States as a pretext for repudiating the duty to exercise due care and diligence. Moreover, it should not serve as an argument to avoid any liability for transboundary harm. Therefore, her delegation unreservedly supported the principles of prevention and protection. It also considered that the States should demonstrate somewhat more purposefulness and good will.

12. Turning to the second part of her statement, on the law of the non-navigational uses of international watercourses, she welcomed the considerable progress made in the discussions *on* the draft articles. She would confine herself to a few general comments.

13. Co-operation and the exchange of data and technology were among the major aspects of international water law. That co-operation would admittedly be useful in cases where watercourse States had not attained the same level of development. Moreover, water was an essential resource for the survival of mankind. Watercourse States should therefore ensure its protection. Accordingly, the draft articles should deal with pollution and environmental protection. Polluted watercourses

(Ms. Litchfield, Swaziland)

would render the principle of equitable utilirrtion meaningless. That raid, thr determination of threshold levels of particular pollutant8 should be loft to the watercourse States. The flexibility of that solution would make it possible to adapt to the different situations in the variour countries.

14, Her delegation would supplement it8 Oral comments with written ones, which it would submit at a later date.

15, Mr. GARRO (Peru) said that the work done by the International Law Commission on the draft Code of Crimes against the Peace and Security of Mankind war very important, and the proposals made by the Special Rapporteur concerning the acts that could be so characterised were ● xtrrmoly interesting. He also appreciated, however, thr Commission's discussions On the various aspects of the issue, including aggression, mercenarism, preparation of aggression, thr sending of armed bands, and terrorism,

16, Hi8 delegation wished to reiterate certain remark8 it had made at the previous session. First, ♓◆ ● grood with the idea of drawing up a list of crimes against peace, since it considered that the offence covered by the future Code must be defined in the Code itself. It alro subscribed to the principle underlying article 3, paragraph 2, which ● xt8nded *the* Code's coverage to include individuals, without relieving the State of it8 responsibilities. In that connection, it might be useful to consider at the same time the work done by the Commission *on* the subject Of State responsibility. Lastly, *an* international court must be ret up that could ensure the praatiaal appliaation of the standard8 to be laid *down* by thr Code,

17, The drafting of the general principle8 war almort complete, since five new articles had been adopted. It was also noted with interest that a start had been made on drawing up th8 list of crime8 against mankind, since article 12 concerning aggression had also been adopted, It war to be hoped that work would continue along those line8 and that the Commission would exercise the utmost care in drafting articles which called for great legal precision.

18. With regard to Chapter II of thr report concerning international liability *for* injurious consequence8 arising out of act8 not prohibited by international law, his delegation noted the progress made in referring 10 draft article8 to the Drafting Committee. Those developments showed the extent to which the international community had become concorned about environmental protection. Peru conridered that it was essential to safeguard an environment capable of sustaining life and the development of all people8 on earth, especially those of the third world, which were least to blame for ecological deterioration.

19, The Commission had rightly aoncludrd that the best method consisted in adopting a series of criteria to circumscribe the subject, rather than trying to drew up a list of activitiec which would probably *never* be exhaustive. That said, activities responsible for so-called "creeping" pollution should not be overlooked,

(Mr. Garro, Peru)

20. Chapter II (Principles) war the result of the conclusions drawn by the Special Rapporteur from the discussions a t the previous session. His delegation attached partiaulrr importanao to the draft articles concerning "Freedom of ration and the limit8 thereto", "Co-operation", "Participation" *and* "Reparation". It would convoy in due course it8 views on the part to be played by thr concepts of "risk" and "harm", and meanwhile awaiced with interest thr outaomo of tho Drafting Committee'8 work,

21. The draft articles on the law of the non-navigational uses of international watercourses still presented some difficulties, but remained an interesting contribution to thr progressive development of international law, They also responded to the interest taken by thr international community in environmental protection, ● 8peci8lly water conservation and the safeguarding of the marine environment,

22. The extent of thr progress made by the Commission could be seen in the large number of nrw draft articles (14) which it propored, *On* tho subject of the "General principles", it wax clear that the obligation not to cause harm was linked to the principle of equitable utilisation and participation and that it constituted a specific ● pplioation of the principle of freedom of action, The progress made on articles 9 and 10 concerning the general obligation to co-operate and the regular exchange of data and information war also to be noted, However, those general rule8 murt be placed in the context of the principle8 of sovereign equality, territorial integrity and, more specifically, the permanent sovereignty of State8 over their natural resources and their ● oonomia activities.

23, The Commission had also made good progress on "Planned measures" which made up the third part of the draft. It must not be overlooked, however, that the text on tha drawing board wao a draft framework agreement which would enable the Stat88 directly concerned to negotiate individual agreements.

24. With regard to pollution, hi8 delegation was looking forward to the outcome of the Drafting Committee'8 work on the Special Rapporteur's proposals and the comments of the Commission and the General Assembly. Peru would convey to the Commission in due course its replier to the questions raised in the report regarding the degree of detail to be included in the provisions relating to pollution and regarding the concept of "appreciable harm".

25. On the subject of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (chap. V), ho raid that hi8 country approved the work done by the Commission on the standardisation of régimes applicable to all diplomatio bag8 . The current draft wac very comprehensive, meticulous and well written, Divergences subsisted, but a balanced solution would have to be found,

26. tartly, with regard to the *work* programme, hi8 delegation would be glad to see thr Commission attain the aim8 set out in it8 report. It had received with interest the proposals concerning topics that might be included in the Commission's long-term programme.

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27. Mr. PHAN VAN THANG (Viet Nam) said that the drafting of the Code of Crimes against the Peace and Security of Mankind was an extremely important and also urgent task since it would make a major contribution to maintaining international peace and security and to ensuring respect for the rule of law throughout the world, His delegation considered thr definition of crime8 against peace contained in article 1 to be generally acceptable. A8 other delegations had said, that definition would make for a clearer reflection in the Code of the contemporary concept of criminal responsibility of individual8 for the most grievous and dangerour offences against the peace and security of mankind, It war therefore important for the Code to include a general definition of those offence8 which would itself contain criteria for their characterisation. The criteria rhould include the throat to the survival of mankind and modern civilisation and violation of human rights and fundamental principles of international law, That wae why the constituent elements of offence should be limited as well as being defined as clearly 88 possible.

28, The future Code rhould ensure the inevitability of punishment for offences against the peace and security of mankind, No motive should serve a8 a justification for such crimes, which rhould be subject to no statute of limitations. However, a clear distinction rhould be made between a crime against humanity and certain ordinary crimes. Hi8 delegation did not think that criminal responsibility of individual8 under the future Code rhould exclude the international responsibility of States for international crimes committed by their own authorities.

29. His delegation supported the formulation of draft article8 2, 3, 5 and 6 as agreed at the previous session. The determination by the draft Code of what constituted a crime must remain independent of internal law, States remained responsible and could not exonerate themselves from responsibility alleging that had punished those who had committed the crime in question. The non-applicability of rtatutory limitation8 to the crimes prohibited by the draft Code would no doubt increase it8 deterrent effect, Lastly, the guarantee8 provided in article 6 would certainly make the draft *more* readily acceptable to States.

30. The Commission had devoted considerable attention to that topic at its fortieth session, and hi8 delegation wished to make four comments on the new articles set out in chapter IV, section C, of the report. Firstly, draft article 4 (Obligation to try or extradite), which contained a provision that his delegation supported, should reflect the well-established rule of contemporary international law that war criminals must be tried and punished in the countries in which they had committed their crimes. That principle was enshrined in numerous international legal instruments, of which he gave several examples, The future Code should provide for universal jurisdiction for the prosecution of those who had committed such crimes. The principle of territoriality should take *precedence in* the application of criminal jurisdiction,

31. With regard to draft article 7, Viet Nam considered that the non bis in idem rule applied to national law. General international law did not oblige States to recognize judgements handed down by the authorities of other States in criminal

(Mr. Phan Van Thang, Viet Nam)

cams. A State was obliged to *do* that only if it hrd signed an international *convention* providing for the obligation in question.

32. Draft article 8 should not aonrtitute an obstacle to punishment in respect Of an act *or* omission generally recognised by international law as *a* war crime or as a crime against humanity. Lastly, draft article 10 was consistent with the Nürnberg Principle8 and with the provisions of article 86, paragraph 2, *of* Additional Protocol I to the 1949 Geneva Conventions.

33. Viet Nam had become a *party* to the Convention *on the* Prevention and Punishment of the Crime of Genocide, *adopted* by the General Assembly on 9 December 1948. It considered genocide *one* of the most dangerous crime8 ● gain8t the peace and security of mankind, On the fortieth anniversary of the adoption *of* that instrument, it hoped that the Convention would be rtriatly obrarved and that there would, therefore, be *no* resurgence of genocide.

34. There were still many difficult questions to be resolved before a generally acceptable solution could be *reached.* Nevertheless, drafting of the Code war *a* task of considerable political and legal significance. It8 adoption would constitute *a* major contribution to peace, security and legal *order,* Accordingly, the Commission must continua it8 activities in that *area snd* complete the *draft* Code as soon a8 possible a8 a matter Of priority. At it8 next session, it would consider the list of crime8 against the peace and security of mankind, defining their constituent elements, in other words, acts and conduct of individual8 in serious breach *of* international law,

35. Mr. SENE (Senegal) said, with *regard to* international liability *for* injurious coneequsnces arising out *of* act8 not prohibited by international law, that it was no longer necessary to demonstrate that the topic was important to the international community, for th8 aim was to fill in a *gap* in international law with regard *to* situations in which the traditional aonaept of international liability wee inoperative. States were engaging increasingly in activities presenting serious risks to other States. It would *be* unjust for innocent victim8 who had suffered as a result *of* activities which were legal under international law, *to* have no recourse or be left to rely on purely humanitarian, more *or* less random compensation, which would depend on the good will *of* the authors of the act8 in question.

36. The future convention should fulfil two essential function81 firstly, it should have a preventive role by making the author8 aware of the risks to which they subjected others, and prompting them to take preventive measures to minimise the effect8 of any accident; secondly, it should have a role in providing reparation, obliging the author of the *act* to repair the damage, not out *of* humanitarian concerns, but by virtue *of* the obligation *of* reparation which came into existence as soon as the link between cause and effect had been established. Draft article8 9 and 10 *took* recount of those *two* functiona, and their wording was largely acceptable.

(Mr. Sene, Senegal)

37, His delegation emphasised the importance it attached to the question of activities involving pollution risks, which must be covered by the future convention. The regrettable aonduat of certain ● nterpri8e8 from industrialised countries, which rought to make Africa a dumping-ground for industrial and toxic wastes, argued in favour of the inclusion of environmental concern8 in the convention.

38. With regard to the law of the non-navigational uses of international watercourses, he said that hi8 country, through which both the Senegal and the Gambia River8 flowed, war particularly interested in the Commission's work on that topic. Within the framework of the Organisation for the development of the Senegal River, Mali, Mauritania and Senegal wore carrying out unprecedented work in the subregion, adequately illustrating the benefits that riparian States could derive from systematic co-operation, The Commission's activities should encourage that type of co-operation, Accordingly, Senegal welcomed the approach that the Commirrion had adopted regarding the drafting of a general framework agreement flexible enough to permit riparian States to aonalude specific agreements.

39. With regard to the draft Code of Crime8 against the Peace *and* Security of Mankind, the Commission had examined at it8 most recent session the sixth report of the Special Rapporteur, who had reviewed *a* number *of* acts that might be considered crimes against the peace and security of mankind. The report was to be commended for concentrating on specific issues. Aggression had thus been accepted by the Commission as a crime ● qainmt peace, *a* qualification that was evident from the provisions *of* resolution 3314 (XXIX) of 14 December 1974, in which the General Assembly had defined aggression. Given that the Commirrion hac had to suspend it8 work on the Code for two decade8 pending the adoption of that Definition, the inclusion in the draft of article 12, which contained the essential element8 *of* the resolution in question, was entirely appropriate. The same could not be said, however, of either the threat or the preparation of aggression; providing evidence *of* such activities involved almost insurmountable difficulties, and such concept8 should therefore be treated with the utmost caution, Furthermore, it war necessary to avoid enabling certain State8 to commit an rat of aggression under the pretext of eelf-defence in the face *of* the threat or preparation of aggression.

40. It had always been accepted that crime8 covered by the Code should be particularly serious ones. The Commission must endeavour to ensure that the act8 it included a8 crimes met that criterion, In that way, it would avoid any trivialisation of the notion through a proliferation of the situations to which it would apply.

41. Mr. AL-BAHARNA (Bahrain) said that he considered excellent the Commission's plan to establish a small working group to formulate proposals with regard to the future work programme, The choice of topics for codification called for considerable care, however. The Commission's work in that respect would be facilitated if the secretariat completed it8 survey of international law beforehand.

42. Method8 were an important issue. In 1987 and 1988, the General Assembly had asked the Commission to stagger consideration Of some topics in order to expedite

(Mr. Al-Baharna, Bahrain)

its work. In practice, however, that mrthod war affected by contingencies. By chance, the Commission had not had to consider at length "Jurisdictional immunitier of States and their property" or "State responsibility", and, a8 a result, it had been able to devote more time to the consideration of other topics. Accordingly, it war important to establish and to observe a five-year timetable of work. In that connection, he welcomed the fact that the Commirrion intended to concentrate, in 1989, on the second reading of the draft article8 on the status of the diplomatio courier, and, in 1990, on the draft articles on the jurisdictional immunities of States (paragraph 555 of thr report). The Drafting Committee rhould be given all the facilities it needed to complete it8 tark at the appropriate time. That Committee had a vital role to play. It was ● pprapriato to define objectively thr respective function8 of the Commirrion itself end the Drafting Committee 80 that the Commission did not become involved in fruitless deliberations. On the other hand, the working methods of the Drafting Committee rhould be rationalised, possibly making more use of computers. The Commission h&d indicated in paragraph 567 of the report that it did not havo ● efficient information to assess the possibilities offered by technology, A feasibility rtudy carried out by the Secretariat would help the Sixth Committee to take a decision on the subject.

43, In connection with the topic of international liability far injurious consequences arising out of acts not prohibitrd by international law, ho raid ho welcomed the faat that the Commirrion wished to concentrate on specific articles. While it was satisfactory that draft articles had been submitted for its considoration, it was not clear from the report whether differences between the members of the Commirrion as to the nature and scope of the draft articles had been resolved.

44, Like other delegations, hi8 delegation considered that article 1 was of thr utmort importance in that it created the framework within which the topic could be developed. The wording had boon changed since the third report, but that had not boon sufficient to remove the gaps, ambiguities and areas of controversy. For example, it might be asked whether the article rhould define the sphere of application either by referring to jurisdiction - excluding reference to territoriality - or by applying the criterion of "appreciable risk", which like the expression "jurisdiction of a State as vested in it by international law", was open to subjective interpretation, Since thr topic was of an abstract nature, greater precision was required in formulating article 1. His delegation hoped that the Drafting Committee would to-examine the article, with a view both to reflecting the variouo element8 of international law enunciated in the arbitral award in the Trail Smelter case and to making it clearer and more precise.

45. In article 2, the terms "risk" and "appreciable risk" were vague and ambiguous, and the article was thus inapplicable. Either those notion8 should not be mentioned in article 1 or their meaning rhould be clearly defined.

46. With regard to article 3, on attribution, the relevant commentary (para. 68) was liable to mislead the reader in that the provision dealt with an activity

(Mr. Al-Baharna, Bahrain)

involving risk, rather than *with* the harm that it caused. There rhould therefore be a better explanation of the scope of the articlr in the commentary. Furthermore, article 3 rhould indicate where the burden of proof lay in a case in which the State of origin did not know *or* had no "means of knowing" that an activity involving risk had taken place in its territory. His delegation supported the proposal *to* redraft the articlr concerned, in order ta express the notion that the State of origin rhould not *have* the obligations imposed on it unless *it had* means of knowing that the aativity had taken place.

47. His delegation reserved its position with regard to articles 4 and 5, since it wan too early to anticipate the régime to be ● &t&bliahod undrr the article8 and international agreements on the one hand, and under international law on the other.

48. In respect of chapter II (Principles), it would have boon desirable to have available all the articles in which the Special Rapporteur intended to elaborate on the ● xirtingprovisions, in order to see how the abstract principles contained in draft articles 6 to 10 would be transformed into practical norms of international law. Since it wan necessary to avoid stating the obvious ("States *are* free to *carry* out or permit in their territory any human aativity considered appropriate@' (art. 6); "... the duty to co-operate applies to States Of *origin* in relation to affected Staten, and vice versa" (art. 7)), the Commission would do well to re-examine the provisions concerned and to consider the possibility of combining articles 7 and 8, which were interrelated, in one draft article.

49. Draft ● rticloa 9 and 10, which were crucial *to* the ● ntiro régime and which rhould be formulated in such a way am to constitute a whole, called *for* the closest scrutiny. Thr current version of article 9 was vague and ambiguous. The concept of prevention rhould relate not only to activities involving risk, but also to all activities causing transboundary harm. Draft article 10 rhould be reformulated in simpler terms, without reference to the interests of the innocent victim or *to* the question of negotiation. The terms "prevention" and "reparation" had distinct meaning8 in *law,* and care rhould be exercised in defining those concepts so am to ensure that they were used with precision.

50. Turning to the topic of the law of the non-navigational uses of international watercourses, he raid he wan glad to note the Special Rapporteur's belief that work on the topic could be completed in first trading by 1991. He welcomed the four article8 submitted by the Special Rapporteur, but had a general feeling that the problem8 of pollution and environmental protection called for more alaborate treatment.

51. The obligation8 imposed in draft article 10 rhould be mado less exacting so that they might be acceptable to a larger number of Staten, In that connection, he suggested that less categorical wording rhould be used; it would be preferable to use "should" instead of "shall". Regarding the reference to recourse to a joint commirrion, it would *be* appropriate to include a clause to that effect, either in article 10 or in an independent article.

(Mr. Al-Baharna, Bahrain)

52. Draft ● rtialo 16 wan of vital importance for all States, especially watercourse Staten. The definition of the term "pollution" in paragraph 1 rhould closely follow the definition in paragraph 1 (4) of ● rtialo 1 of the United Nations Convention on the Law of the Sea and should be transferred to the ● rtialo *on* definitions. Regarding paragraph 2, ho said thrt thr terms "substantial" or "serious" were preferable to "appreciable" for the purpose of defining harm. As to the question of determining whether the liability arising from the causing of ● ppreci&blo harm through pcllutioa constituted strict liability, his delegation agreed with the Special Rapportour that violation of the obligation gave rise to responsibility for a wrongful act. In ordrr to make paragraph 2 clearer, the beginning could be modified to read: "Watercourse States rhould take all measures necessary to prevent the pollution of an international watercourse . . .". Doatrinal differences had led the members of the Commission to discuss the obligation of duo diligence in theoretical terms, when they rhould bo avoiding that typo of debate and concentrating on the formulation of practical propositions.

53. Him delegation approved of the thrust of draft article 17 on protection of the environment of international watercourses, but suggested that it rhould come before article 16, that it rhould include reference to the obligation to preserve thr environment, and that it rhould be harmonised with the relevant provisions of the Convention on the Law of the Sea. His dolegation reserved its position on article 18, minor the Special Rapportour had promised to formulato a comprehensive article on the sub-topia of water-related hasards and dangers.

54. In oonnration with the topic of thr status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, ho welcomed the progress made at the Commission's fortieth session. He wan particularly gratified to learn that the draft articles had born referred to the Drafting Committee for a second reading. He agreed with the Special Rapporteur's proposal that a convention on *thr* topic should be adopted, and considered that the Special Rapporteur had properly emphasised the importance of funational necessity in determining the status of all type8 of couriers and bags. While hi8 delegation was in favour □↗ ● xpaading the scope of the draft articles to cover the couriers and bags of international organisations, it felt that it wan too late to do so, and would therefore ɪ servo its position *on the* matter,

55. With regard to article 17, ho shared the view taken by some members of the Commission that it was possible to reach a compromise by deleting the first sentence of paragraph I, concerning the inviolability of the temporary accommodation, while leaving the remaining text unchanged.

56. With regard to artialo 25, ha ● ■♎□❒♋♏♎ the suggestion by one Government that it should include a provision restricting thr contents of the diplomatic bag with a view to avoiding the abuses that had come to light in recent years.

57. The acceptability of thr proposed convention depended to a large extent on article 28. It wan thus necessary to formulato a text that took ● CoOuat of thr conflicting interests of the sending States and the receiving or transit States.

(Mr. Al-Baharna, Bahrain)

58. In view of the highly controversial nature of the quortion □↗ ● loctronic @canning, the Committee must provide guidance to the Commission. The Commission rhould continue to study the quortion, without limiting itself to the three alternative8 proposed by thr Special Rapporteur.

59. *On* the quortion of whether or *not* the transit State rhould be affordrd the same right8 am the receiving State regarding the treatment of the bag, it seemed reasonable to differentiate between the two, in view of the qualitative differences in their positions. However, his delegation was willing to reconsider that stance, rhould it be necessary to strike a balance between thr interests of all States concerned.

60. Thr aurrrnt version of artialo 32 had been improved since the first reading, but it still did not fully conform to article 30 of the Vienna Convention on the Law of Treaties. Hence, tho Commission rhould re-examine it.

61. The criticisms levelled at ● rtialo 33 were justified, am it led to a plurality of régimes. It rhould be ● ithor deleted or modified so as to reflect the prevailing view of States members.

62. Provisions on settlement of disputes arising from the interpretation or application of the proposed convention rhould be incorporated in an optional protocol, a rolution that had been adopted for the 1961 Vienna Convention on Diplomatia Relation8 and thr 1963 Vienna Convention on Consular Relations.

63. He concluded by stressing that the topics aurrrntly on the agenda of the Commission were far more complex than had boon the case in the part, and were thus more time-consuming. He urgrd the Committee to help the Commirrion to accelerate its work by giving it the kind of guidance necessary ♦□ ● naul the success of the United Nations aodifiaation programme.

64. Mr. TUERK (Austria) raid that the discussions within thr Commission and in the Sixth Committee had clarified some of thr fundamental issues relating to the draft Code of Crimea against the Peace and Security of Mankind, by determining that the instrument rhould cover only the moat serious crimes and that its scope of application should be limited to individual@.

65. One of thr moat important questions still to be resolved related to thr statute of a aompetent international criminal jurisdiction for individuals. It would be logical to establish an international oourt, mince otherwise the Cods might not *have* the desired effect, quite apart from the problem of divergent interpretations of its provisions by national court@, However, it murt alro be *borne* in mind that thr topic under consideration wan the mort "political" question on the agenda of the Commission and that it wan intimately linked to the state of international relationa, which prompted some degree of scepticism. If relations continued to improve, it might become easier to reach agreement on questions on which opinion8 were still divided, Time was needed in which to refloat on the problem8 - some at them quite fundamental - if there wan a genuine wish to

(Mr. Tuerk, Austria)

● laboratcr a binding legal instrument and not just *a* declaration, The topic wan certainly *very* important in a longer-term perspective, but it seemed to be of less immediate urgency than some of the other items currently undrr consideration by the Commission.

66. His delegation considered that all the ruler formulated in 1954 rhould be reproduced *in* the present Coda, although they might have to be adapted to present-day requirements by eliminating only w'iat changed circumstances truly warranted. Him remarks were prrtiaulrrly true of annexation, which rhould appear in the draft *Code* am a separate crime againrt peace.

67. The relationship between the presen': draft Coda *and* General Assembly resolution 3314 (XXIX) of 1974 containing the Definition of Aggression wan quite different from thrt between the present draft Code *and* the Codr of 1954. The acts enumerated in thr Definition of Aggression were to be considered am guidelines designed to help the political organ8 of thr United Nation8 and State8 to determine whether or not ● qgro##ion ● xi8tod in a specific case. They had not, however, boon qualified am crimes againrt peace. It was thus surprising *to* road in paragraph 9 of the sixth report by the Special Rapportour (A/CN.4/411 and Corr.1 *and* 2) that there wan no longer any justification for the inclusion of annexation, which had boon referred to in *the* 1954 draft Code, since it was expressly mentioned in the Definition Of Aggression.

68. His delegation aonaurred with those members of thr Commission who considered that annexation rhould be regarded as a crime against *peace* and as such rhould be dealt with in a reparate provision in the draft Code, The various cases mentioned in the Definition of Aggression must be thoroughly ox&mined in order to determine whether they rhould be incorporated into the draft Code as crimes againrt peace and, if so, in what form, for *what* might be an adequate guideline for the political qualification of an rat *am* "aggression" wan not necessarily valid for determining that a crime against peace rhould be included in the draft *Code*. The rata ret forth in thr Definition of Aggression should, therefore, not automatically be qualified as crimes againrt peace. The forcible annexation of a State or of a part thereof by an aggressor wan undoubtodly a serious breach of the peace and rhould thus be provided for in the Code, But much annexation wan preceded by the invasion of foreign territory, If the invasion ● vokod only weak protests and wan for all practical purposes accepted, as in ths cases of Austria and Csechoslovakia in 1938 and 1939, the ● ♑♑❐♏♏❐❐❐ concluded the series of violation8 of international law with the annexation of the territories occupied, hoping that time would consolidate hi8 conquest. History had shown that this might encourage further acts of aggression against other countries.

69, In his view, draft artialo 11 as submitted by thr Special Rapporteur (Acts constituting crimes againrt the peace *and* security of mankind) was one of the *core* provisions of the draft Code, The threat of aggression murt feature in the draft Code but murt be so clearly defined am ta ensure that *no* State could uee the pretext of a so-called throat *to* justify its own acts of aggression. With respect to preparation of aggression, his delegation was inclined *to* share the view of

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(Mr. Tuerk, Austria)

those members of the Commission who regarded the notion as rather vague and thought that it would probably be difficult to draft any provision relating thereto with the required precision. With regard to the sending of armed bands into the territory of another State, such a form of aggression had been prohibited by international law for a long time, Such acts should be incorporated separately in the draft Code, and a separate draft article should be devoted to each.

70. The problem of intervention in general was a particularly delicate one and required further in-depth consideration by the Commission. Austria therefore reserved its right to revert to the subject at a later stage. However, as his country had already been contributing for many years to the fight against international terrorism, he wished to address the question in greater detail. Firstly, the provisions on terrorism should form the subject of a sepatate draft article. However, the delegation of Austria was not in favour of reproducing the definition of terrorism contained in the Convention on the Prevention and Punishment of Terrorism of 1937. Its provisions had to be considered in the light of developments over the past 50 years, and particular prudence was called for in defining international terrorism, which was the only form of terrorism that should be subject to the rules of the draft Code. The international community had not yet succeeded in finding such a definition and for its part the Commission should restrict itself to giving a description of terrorist acts. The European Convention on the Suppression of Terrorism of 1977 provided a good example.

71. With regard to the list of terrorist acts as proposed by the Special Rapporteur, he considered that the text required revision in the light of the conventions recently adopted on the subject, particularly the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the Protocol, supplementary to the Montreal Convention of 1971, relating to the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, adopted by consensus in Rome and Montreal respectively in the spring of 1988. The Rome Convention, which had been drawn up on the basis of a joint initiative by Austria, Egypt, Italy, also referred to General Assembly resolution 40/61 on international terrorism. It would, however, as members of the Commission had pointed out, be too far-reaching to include acts calculated to damage public property.

72. With respect to the breach of treaties designed to ensure international peace and security, the relevant provision should relate only to treaties with a universal scope of application and cover only the most serious breaches of such treaty obligations. The Code should also not place States which were not Parties to treaties relating to the maintenance of international peace and security in an advantageous position in relation to States adhering to such treaties.

73. As regards colonial domination, the delegation of Austria was in favour of a general formulation along the lines of the second alternative submitted by the Special Rapporteur, which perfectly covered that phenomenon without expressly mentioning it. On the threshold of the twenty-first century, there was no reason to retain in the draft Code historical forms of colonialism which, at least it was hoped, would soon be things of the past.

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74. As to the question of mercenaries, the Commission should defer consideration until the Ad Hoc Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries had completed its work. Finally, with respect to the massive expulsion by force of the population of a territory, such violations should certainly find their way into the Code, but, as the Special Rapporteur had pointed out, they were situations which came within the category of crimes against humanity and should therefore be considered in that context.

75. Turning to the articles provisionally adopted by the Commission at its fortieth session, he said that he would confine his remarks to article 4, which related to the obligation to try or extradite. Paragraph 2 of that article represented a compromise between those who wished to uphold the discretionary power of the State in whose territory the alleged offender was present and those wishing to give preference to extradition to the State in whose territory the crime had been committed. Austria would be in favour of the first alternative, but would also be willing to accept the second. One example of a provision which might be useful to the Commission in that regard was provided by paragraph 5 of article 11 of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, according to which a State Party which received more than one request for extradition should pay due regard, in selecting the State to which the offender or alleged offender was to be extradited, to the interests and responsibilities of the State whose flag the ship was flying at the time when the offence was committed. A similar formulation might be incorporated in the draft Code.

76. Mr. TARUI (Japan), referring to the draft Code of Crimes against the Peace and Security of Mankind (chap. IV), said that his delegation wished to reaffirm that it was essential, in order to punish the perpetrator of an act such as aggression, to establish *an* international mechanism such as an international criminal court. If the international community was not prepared to do so, it was pointless for the Commission to be engaged in the hasty drafting of a code for the punishment of such offenders. It must proceed with caution, keeping to a legal perspective and seeking to prepare rules which would be really useful in today's world.

77. With respect to draft article 11 appearing in the Special Rapporteur's sixth report, before preparing a list of crimes the Commission should bear in mind that its members help opposed views on a number of important issues, such as the establishment of an international criminal court, the types of punishment to be provided for and the theoretical definition of a crime against the peace and security of mankind. The Commission should consider the matter in greater depth. With respect to crimes against the peace, the category should not be unduly expanded and should be limited to offences that could be qualified as crimes against the peace and security of mankind in the strict sense of the term.

78. Turning to the topic entitled "Status of the diplomatic courier and the diplomatic bag *not* accompanied by diplomatic courier", he noted that the Commission had held constructive discussions at its last session on the scope of the draft

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● ttialer and the inviolability and immunity of diplomatic courier8 ♋■♎ the protection of thr diplomatic bag, He hoped that work *on* the topic would aontinuo to progress in the same manner.

79. Draft article 28 (Protection of the diplomatic baq) had, as in the past, given rise to copious comments. The three altrrnativr texts prepared by the Special Rapporteur took into account the previous discussions, and none of them had boon *ignored.* It was to be hoped that the Commirrion would find a solution to the problem of the inviolability of the diplomatic bag which would ● n8uro a balance between the right8 and duties of the sending State, the receiving State and the transit State. *A8* for the relationship between article 33 (Optional declaration) *and* the four international conventions in force, it rhould be borne in mind that the basic aim Of the drrft war to complement those instruments and to ● 8tebli8h a uniform régime for all categories of diplomatic couriers and diplomatic bags, The Commission should therefore take care not to makr the relationship between applicable conventions too complicated.

80. His delegation had followed with great interest th8 work of ths Commiaaion on the topic entitled "Jurisdictional immunities of States *and* their property", which was an important area of international law requiring the early adoption of unified ruler . His delegation commended *the* realistic approach adopted by the Special Rapportour, who had taken care *not* to go too deeply into theoretical controversy while the positions of States remain divided between those subscribing to the theory of absolute immunity of States and those favouring restrictive immunity. He hrd attempted to determine, on a case-by-case basis, what type8 Of activities rhould enjoy sovereign immunity *and* what type8 should not, The delegation of Japan hoped that thr debate would continue on the remaining issues with a view to reaching balanced solutions.

81. *Japan* attached great importance to the topic ● ntltlod "State responsibility" and hoped that a measure of progress would have been made at the next session of the Commission.

82, Mr. TANOH (Ghana) referring to international linbility *for* injurious consequences arising from act8 not prohibited by intrrnatioeal law, said that his delegation was inclined to th.nk that harm and not risk rhould be the basis of liability, That question gave rise none the less to several difficulties which rhould be given further thought before a conclusive approach war adopted,

83. The notion of liability based on the occurrence of harm (within the moaning of draft article 1) could render thr subject-matter too broad and too difficult to manage: lawful activities carried out under the jurisdiction of a State which might cause appreciable harm to other States - although unlikely to do so - were as numerous as they wore difficult to catalogue. Tranrboundary harm might be caused by activities which normally were not dangerous by nature and did not impose *an* obligation of diligence on neighbouring States *when* carried out in the territory of a given State. Without an obligation of diligence, there could not be, in the case of *an* aaaidont, liability based on failure to carry out that obligation and

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incurring reparation. baring liability solely on harm in the context of the draft articles might therefore have the unintended result of broadening unduly the conaapt of the liability of States to the • xtont that activities to whiah the obligation of duo diligence had not until now applied would be included in the scope of the draft articles. It would seem that that scope mhould be limited to activities that am a matter of international publia policy required strict regulation and entailed liability irrespective of fault. The normal rules of liability would apply to harm caused by activities whiah were outside that framework,

84. If risk, however, warn the governing principle in determining the • xirtmnco of liability, it would seem that the current draft articles would be sufficient to determine thm scope of the subject-matter am limited to those • ctivitimo where thrre warn a real likelihood of appreciable harm and therefore fell withia th' publia policy régime of strict liability,

85. An inherent difficulty in baring liability • ololy on the occur ence of appreciable harm warn that much an approach could concmivrbly do away with the distinction between • ctivitiom for which liability was incurred *on* tha basis of fault (wrongful acts, omissions or failure to carry out the obligation of duo diligence) *and* those for whiah there war objective liability linked to the concept of public policy. Thr problem was illustrated by the rule of duo diligence adopted with regard to draft article 16 on pollution in the draft articles on the law of the non-navigational uses of international watercourses and by the fact that pollution could very well fall within the scope of thm régime of strict liability • mtablimhod by the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law. Suoh conceptual problems also appeared in the current text of draft article 5: i f the régime of strict liability war accepted, one might ark what room was loft for the application of rules governing liability arising out of wrongful acts and omissions. The fact of injury within the moaning of draft article 1 mhould involve liability in so far am the conditions outlinrd therein wore satisfied. Thus, wrongful acts or omissions aonmtituting a failure to carry out the obligations referred to in draft article8 7, 5 rnd 9 would only • 6tablimh mitigating or aggravating circummtancmm to ba taken into account in determining the amount of reparation under draft article 10. By applying different concepts of liability to the same trmnmboundary injury, draft article 5 undormcorad the uncertainty am to the nature and basis of liability applicable to the topic and the type of activities to bc regulated by the draft *articles*,

86. The obligation to make reparation in the event *of* unintended or unforeseen harm, which arose logically from thr concept of liability bared on harm, might loosen the usefulness of thm draft articles in ensuring co-operation between States to prevent injury even with respect to activities whiah were found to have potentially harmful tranmboundrry affects. The notion of risk war clearly more suitable to a régime of prevention rnd co-operation - whiah was thr • rrential element of the draft articles - in so far am prevention • nd co-operation could not possibly cover all activities. In that regard, draft articles 7, 8 and 9 • hould be

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worded in such a way as to show more clearly the obligations imposed on States concerning co-operation, prevention and notification and related actions for lessening harm,

87. If a definitive decision was taken to use the word "harm" and not "risk" as the basis of liability, draft article 1 should be rendered in a manner that clearly showed that the draft article established a distinct area of strict liability engendering State responsibility. To do so, it was necessary to lay down criteria outlining the general characteristics for those activities that entailed exceptional risks, on the one hand, and on the other, activities which by their nature were not dangerous but could cause substantial injury in the event of an accident. In that connection, his delegation noted with satisfaction the intentions stated by the Special Rapporteur in paragraph 50 of the Commission's report (A/43/10). Ultimately, only a cut-off point distinguishing responsibility under the draft articles from other types of responsibility under general international law would make it possible to define clearly the scope of the subject-matter.

88. His delegation viewed favourably draft article 3 (Attribution) because it took account of the problems of developing countries, which did not always have the means to ascertain the risks which might be caused by activities carried out under their jurisdiction.

89. Ghana was ready to consider new ideas that clarified the subject-matter and laid a tangible basis for draft articles 5 to 10 so that they could be widely accepted by the international community.

90. With regard to the draft articles on the law of the non-navigational uses of international watercourses, his delegation was satisfied with the approach taken by the Commission, which was to elaborate a framework agreement laying down additional rules. However, the principles laid down in draft article 8 (Obligation not to cause appreciable harm) and draft article 6 (Equitable and reasonable utilisation and participation) were so important that they should be applicable irrespective of the specific characteristics of any watercourse system and should not be derogated from in specific agreements concluded by States. Those two draft articles logically imposed on States an obligation to co-operate in ensuring optimum utilisation of international watercourses and obtaining the greatest benefits while protecting the environment through the mechanisms provided for under draft article 9 (General obligation to co-operate) and draft article 10 (Regular exchange of data and information). The provision laid down in draft article 10, paragraph 2, with regard to data or information "that is not reasonably available" was sufficiently flexible to enable States to conclude specific agreements for the exchange of confidential data and other sensitive information in accordance with the general obligation to co-operate envisioned by draft article 9.

91. The procedures required in respect of planned measures (arts. 11-21) were too elaborate and there was a danger of unconscionable delays as a result. It would be unfortunate if States were to take advantage of their complexity to prevent implementation of planned measures or else to create the kind of difficulties that

gave rise to frequent charges of bad faith among the parties involved in conmultationm or negotiations in that context. Him delegation ● harod the view of the representative of Brasil that States mhould be loft to resolve those important procedural questions among themselves. Theframework ● groomont shouldbe restricted to ● mtablimhing important principles, of both a procedural and a substantive nature, that mumt be taken into account in the specific agreements concluded by watercourse States with regard to planned uses and measures.

92. Him delegation welcomed the draft artialrm dealing with pollution and ● nvironmontal protection. In principle, the obligation mot out in article 16, paragraph 2 (A/43/10, *footnote 49)* offered ♋■ ● ccoptablo preliminary basis for elaboration. Ghana's hesitation in fully ● ndorming the paragraph am it mtood stemmed from unanswered questions am to where pollution would be dealt with in the draft articles *on* international liability for injurious consequences arising out of ● otm not prohibited by international law, Article 16, paragraph 3, indeed, encouraged much hesitation. There murt be consistency in the treatment of the question of pollution under both sets of draft articles. In that connection also, him delegation had taken note with satisfaction of thr intention to bring the question of pollution carried by inland waters into thr sea within the purview of the draft artialrm,

93. The draft Code of Crimes against tho Peace and Security of Mankind would moat definitely have to incorporate pre-existing concepts of wrongful acts under general international law, but it was also important to take aaaount of the evolution of the law in areas to be governed by the draft Code. The draft Code should almo recognise the competence of judicial organs to make determinations am to when a criminal activity proscribed by it had come into being. Him delegation did not clearly understand the intent behind the words "prima facia" in article 12, paragraph 3. Although it was true that the Charter conferred on the Security Council the primary responsibility for the maintenance of international peace and security, that did not moan that the Council had ● xclumivo competence ta determine whether aggression had taken place or not. Aggression war a matter of fact *and* of law whose existence was independent *of* the Security Council's determinations. It war to be feared that article 12, paragraph 3, as currently worded, might introduce undue political considerations on points which could be established by the courts.

94. Him delegation supported the concept of including a paragraph on mercenarism in the draft articles. However, thr definition taken from article 47 of Additional Protocol I to the 1949 Geneva Conventions had become outdated. Perhaps a better approach would be to adopt a definition based on thr work currently bring done to draft a convention on mercenarism. On the other hand, a definition of mercenarism might no longer be necessary when suah a convention came into force, Article 12, paragraph 4, would then be sufficient to bring ercenarism within the scop« of the draft Code.

95. Am to the definition of colonialism, him delegation supported the observations in paragraph8 255 and 256 of the Commission's report.

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96. Articles 7 and 8 raised important substantive and procedural issues. His delegation was in full accord with the need for the safeguards in question. Thm phrase "was criminal in accordance with international law or domestic law applicable in conformity with international law" in article 8, paragraph 2, validated thr independence from national law of offences under the draft Code.

97. Lastly, him delegation welcomed in principle thr elaboration of a statute for an international criminal jurisdiction to try offences under the draft Code. It was not unmindful of the highly political issues raised by the draft Code and the need for an international climate in which respect for law was the norm, in ordar to avoid drafting a text that might facilitate intervention under the pretext of bringing any given head of State before that intrrnational criminal jurisdiction.

98. Mr. RAKOTOZAFY (Madagascar) observed, with regard to international liability for injurious consequences arising out of acts not prohibited by intrrnational law, that momt States accepted the concept of objective liability only in vary specific cases and that activities involving risk were still generally tolerated since they were agents of progress.

99. Him delegation generally favoured the concept *of* international liability arising out of the causal link between an activity involving risk and *an* injury, am a means of protecting the international acmmunity from the sometimes negative effects of technological progress. Although it was impossible to draw up an exhaustive list *of* dangerous activities, the Commimmion mhould not completely abandon the idea of listing much activities, in order to encourage States to conclude specific agreements in different areas.

100, The primary goal of the Commimoion mhould be to elaborate a framework agreement defining the general principle8 that might guide States in drawing up specific agreements. It war in fact difficult, at the current stage of the thinking, jurisprudence *and* practice of States, to know if a given dangerous activity aould ipso facto automatically bring into play a State's liability, It was easier to have Governments accede to an inmtrumrnt when thm rights and obligations were contracted voluntarily. The Commission mhould give greater attontion to elaborating mechanisms for preventing tranmboundary harm and to determining condition6 for reparation that would take into account the rights and interests of the innocent victim. Thr approach taken by thr Special Rapportmur, keeping under consideration both the concept *of* "appreciable risk" and the concept of the occurrence of "transboundary harm", seemed acceptable because, on the one hand, thr causal link between the injury *and* the activity involving risk was the basis of State liability for activities that were not prohibited and, on the other hand, tho occurrence of harm was the condition for the ● ximtmnce of the obligation of reparation.

101, Tho Special Rapporteur should define more specifically the rules brought into play by draft articles 6 to 10.

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102. The draft articles on the rtatur of the diplomatic courier and the diplomrtia bag not accompanied by diplomatic courier, which aahirvrd • satisfactory balance between the respective rights and obligations of the sending, the tranrit and the receiving State, provided an excellent basis for elaborating a future international instrument and a good ● xxmplo of tho codification and progressive development of the aanvontional rules in force and of the international practice of States with regard to diplomatic law,

103. The articles of part one (General provisions) had to do with principles or definitions generally accepted by the international community. The importance of the freedom of official communications (art. 4) and the duty to respect the laws and regulation6 of the receiving State and the tranrit State (art, 5) could not be over-•mphariard,

104. The provisions of part II ◆ℳ❒ℳ ● rrentially intended to guarantee the freedom and safety of the mission entrusted to the diplomrtia courier, Rightly, the Commission had generally done no more than to codify the ruler ret forth in the four relevant Vienna Conventionr (an diplomatic relations, an consular relations, on special missions and on the representation of States in their relations with international organisations of a universal character). To the extent thrt it had engaged in the tark of progressive development of diplomatic law (e.g., by bringing the etatue of the diplomatic courier as much as possible into alignment with that of a diplomatic official), it had not exceeded its mandate, which was to elaborate provisions likely to ensure the protection of the diplomatic courier and the inviolability of the diplomatic bag. That *war true,* for instance, of the ruler concerning the personal inviolability of the diplomatic courier (art. 16) and the inviolability of temporary accommodation (art, 17). The latter inviolability could not be inferior to the guarantee provided by modern penal coder against any intrusion into private domiciles. For that reason, his delegation could not endorse the exceptions provided for in article 17, paragraph 3.

105. In view of the examples offered by recent diplomatic history of abuse of diplomatic privileges and immunities, the principle of full immunity from criminal jurisdiction could not be looked upon favourably by the international community as a whole, Accordingly, the generalised principle of functional immunity provided far in article 113 seemed to offer *an* acceptable compromise, *even* if it might be difficult to apply in practice,

106. Articles 19, 20, 21, 22 and 23 all originated in principles derived from the conventional practice of States and presented *no* special difficulties.

107, The articles in part III (Status of the diplomatic bag) were not, *on* the whole, confined to codifying rules already ret forth in the four existing diplomatic instruments and ta reflect the practice of States in thrt area, However, only article 28 was truly *a* source of controversy. His Government was in favour of deleting all of the square bracket@ in paragraph 1 of the ● rtiole, Even if the word "inviolable" was used *in* the Vienna Conventions only to characterise official correxpandence, it was clear that it applied to the brg itself.

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Furthermore, to delete any reference to the prohibition of all ● x8mination, direct or indirect, would be to give undue aanrideratian ta the concerns of the receiving State - whose interests wore already sufficiently taken into account by the provisions of article8 5 and 25 - to the detriment of the principle of the confidentiality of the document8 contained in the bag. Lastly, as the third world States did not have the same device8 as the industrialised State8 for aonduoting electronic or technical examinations, the lack of a reference to the prohibition of such examinations would put them in a position of inferiority.

108. The proposal in article 28, paragraph 2, ta extend to all type8 of bag, including the diplomatic bag, the checking procedure provided for in article 35, paragraph 3, of the Vienna Convention on Conrular Relations, departed from the rules set forth in the diplomatic convention8 in force, and war inconsistent with article 32, according to which the provisions ret forth in the draft articles should not "affect bilateral or regional agreements in force". Hi8 dolegation therefore reserved its position on that paragraph, In *any* case, it was resolutely opposed to the use of electronic or other technical devices. Moreover, any conceivable check could be performed only by the competent authorities of the receiving State, not those of the transit State. If the tranrit *State* had doubtr as to the content8 of the bag, it would be incumbent on that State to take the security measures which it deemed appropriate, including enjoining the diplomatia courier to leave its territory immediately. If, however, *a* majority of States wore to declare themselves in favour of an examination of the bag, under the aonditiono provided for in paragraph 2, the Commission ohould consider the possibility of compensating the sending State if *the* bag *war* returned to its place of origin.

109. Concerning part IV (Miscellaneous provisions), articles 30 and 31 appeared to be pertinent and acceptable,

110. Article 32, which wao intended to establish a safeguard clause having the scope of the clause provided for in article 30, paragraph 2, of the Vienna Convention on the Law of Treaties, did not present a problem as far as bilateral agreements wore concorned, As for regional agreementa, it seemed that the Commission assigned a broader connotation to those terms than did Article 62 of the Chartor. Moreover, in mentioning only bilateral or regional agreements, it seemed to have opted in favour of excluding the four *Vienna* Convention8 from the scope of appl ication of the article. Xt Eollowed that those Convention8 would coexist with the instrument to be adopted *on* the basis of the draft articles. It would, therefore, be desirable to make it clear that the new régime was intended to supplement those Conventionr, *and even* to modify them on certain points (as war currently true of article 28, paragraph 2). Laotly, article 32 rhould rtipulate that the draft article8 did not affect bilateral or multilateral agreements other than the four Vienna Conventions.

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111, Tho essential purpose of the draft, which was to establish a coherent and uniform régime, was seriously affratad by articlr 33 (Optional declaration), which would havr the effect of multiplying the régimes of couriers and bags and of spreading confusion in diplomatic and conrular relations, since on thr same route there could be a courier *or* a bag under different régimes (that of the sending State, that of the transit State *and* that of the receiving State), not to speak of the possibility of withdrawal of the declaration, as provided for in paragraph 3, which, moreover, would take effect at *an* unspecified time. It was questionable to what extent the articlr in fact ● rtablirhod an option of making reservations of the type which the International Court of Justice had prohibited in its ruling on the North Sea continental shelf cases. A now and very thorough rtudy of article 33 was therefore essential; its simple deletion could not be ruled out, if it proved to be aontrary to tho goal of achieving uniformity in diplomatic and conrular law.

112, The draft articles *on* the jurisdictional immunities of States and their property ● dogtod on first reading (b/41/10) were likely to achieve a balanced compromise between, on the one hand, the rule of ● broluto immunity supported by the developing States which, like the socialist States, carried *on* commercial activities in the interest of the rconomia and social development of thr nation, and, on the other hand, thr need to impose certain limitation@ on thr application of that rule which were justified by the requirements of international economic relations. Indeed, development needs and economic interdependence made it impossible to disregard the position of the Western developed countries - which favourrd limited or functional immunity to the ● xtont that they lrft mort of their commercial and economic activities to thr private sector - and their increasingly dominant practices. Moreover, the principle of immunity from measures of constraint apart from immunity from jurisdiction, ● mbodiod in part IV, was *an* essential counterweight to the restrictions imposed on the exercise of jurisdictional immunitior (part III), The *draft* articles could therefore reasonably constitute a eatirfactory basis for the elaboration *of a* multilateral convention on the topic.

113, It war unfortunate that article 2 (Use of terms) concerned only the terms "court" and "commercial contract", It would have born useful to define *at* the outset a number of other terms used in the draft. That was the case, for example, for "property" (patrimonial *or* not?), "interests" (legally protected or not? - article 14) and "ships" (articlr 18). Those terms rhould have at least been the subject of interpretative provisions. Those contained in article 3 were useful. The text of article 18, paragraph 2, on the scope of the term "ships" might have been added, The interpretation given to the term "State" should be ● *gprovod,* because it would clarify article 7, paragraph 3.

114. Article 3, paragraph 2, appeared to be acceptable in so far as it provided that the purpose of the contract rhould be taken into account if, in the practice of thr State that invoked immunity, that purpose wao pertinent for determining whether a contract was commercial in naturo or not. Such a formulation was likely to protect the interests of States called upon to enyage *in* ● ctivitiw which, while mooting certain criteria of traditional commercial law, were designed in aatual

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faat for the purpose of serving a publia interest *and* thur made acceptable the exception provided for in artiolr 11 (Commercial contracts).

115. Article ü (State immunity) contained the fundunrntrl rule upon whiah all thr draft articles were based. It ● ohirvvd *an* ● aaoptablx balance by affirming the existence of immunity as a general rule of intornrtional law while ● aoommodating thr restriotive● ooptionr ● numoratod in part III. The phrase placed in square brackets ("and the relevant rules of general intornrtional law") rhould le deleted, because it would moan that the Commission *had boon* unable to codify the topic, whiah would considerably reduce the scope of its work, The modalities for giving ● ffaot to State immunity, proposed in artiolr 7, appeared to be ● oooptablo *on* the whole.

116. Part III should be ● ntitlod "Exceptions to State immunity" rathrr than "Limitations on State immunity", becauseit rot forth ● xaoptionr to a general principle of international law and not limitationr as such. It might be considered that those ● xcoptionr were too numerous *and* might rob the principle of its content . On closer examination, however, the ● xooptionr retained derived from the commercial character of tho activities considered, from the traditional principle of lex rai aitu or from the law of thr place *In* which thr injury or damage occured.

117, Once thr criteria rot forth in article 3, paragraph 2, were accepted, thr exception provided for in ● rtialo 11 (Commerial aontraatr) no longer caused a problem.

118. Article 12 (Contract8 of employment) would certainly protect local labour and was therefore favourable to developing countries, whose national. were called upon more often than those of industrialised States to take employment in thr service of foreign entities (including State ● ntitirr),

119. It appeared *that* the oondition rot forth at the end of article 13 ("if the author of the act or omirrion was present in that territory at the time of the aot or omission") was intended ♦□ ● xaludo tranrboundary injury *and* d:mage. If that was the case, it would be desirable to may so ● ☒□❐□♦♦●△ in the text and to provide justification in the commentary.

120, His delegation agreed with the exception provided for in article 14 (Ownrrvhip, possession and use of property), the exception concerning all forms of intellectual and indurtrirl property (artiolr 15) and the exception uoncerning fiscal matters (article 16). It should, however, be made clear that thr latter exception was to apply without prejudice to diplomatic law.

121. The provisions of article 19 rhould be linked morr closely to those of article 3, paragraph 2. Hence in determining the commercial character of the use of the ship, it was necessary to refer not only to "commercial purposes" but also to the practice of the State concerned. Thr square brackets around the word "non-governmental" in paragraphs 1 *and* 4 rhould therefore be deleted. Purthrrmore, the wordr "government and non-commercial character" were not *in* square brackets

7.

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(Mr. Rakotosafy, Madagascar)

122. The exception providrd for)(■ ● rtialo 19 seemed fully justified: it merely sanctioned arbitrrtion practice and the rules set forth by arbitration regulations, Qartioularly those of ICC and the conventions on international commercial arbitration, His delegation would, however, like to see the addition of a paragraph (d) concerning the recognition *and* ● nforaomont of arbitral awards, because thorr questions were expressly referred to the competent court (see article 54, paraqraph 2, of the Washington Convention *on* the Settlement of Investment Disputes between States *and* Nationalr of Other States).

123. His delegation fully approvrd of thr position adopted by the Commission with regard to cases of nationalisation (article 20).

124. Part IV clarified the problem of immunity from execution and codified the norms and international practice in the area. Its three aonrtituent articles were necessary *and* adequate. All the square brackets in ● rtialo 21 rhould be deleted. The link between the phrase "or property in which it has a legally protected interest" and article 7, paragraph 2, as well as articles 14 and 15, should be stressed more clearly in the commentaries. The rrquirsmrnt that there must be a link with thr object of the claim, contained in paragraph (a), was necessary in view of tho tendency of certain creditors *to* effect a general ● xooution of all the property of the drbtor State.

125. Article 23 seemed on thr whole to sanction the generally-accepted rules concerning the use of property associated abovr all with the exercise of the sovereign authority of the State. However, his delegation had reservations about paraqraph 2, which was diffioult to reconcile with the very idea of permanent protection of certain categories of State property and was prrtioularly dangerous for heavily-indrbtrd States, which might, under pressure, be prompted to allocate some of thr protected property for thr ratirfaotion of the claim which was the object of a proceeding before the aourt of another State accordance with article 21, paragraph (b), or consent to thr adoption of measures of oonrtraint on that property.

126. The articles in part V were acceptable on thr whole. The limitations relative to service of process set forth in article 24 sanctioned the principles urrd in national and international practice in the area. Thr same applied to articles 25 (Default judgement), 26 (Immunity from measures of coercion) and 27 (Procedural immunities). However, his delegation had reservations about article 28, paragraph 2, which appeared to offer the possibility of a unilateral restrictive application of thr provisions of the draft articles, which would negate thr objective of codifying the topic. At moat, it might be possible to draw on article 6, paragraph 2 (b), of the draft. articles on the status of the diplomatic courier and subordinate restrictive application to respect for the object and purpose of the draft articles, and to the interests and obligations of third States, in aooordanor with article 41 of the Vienna Convention on the Law of Treaties.

The meeting rose at 6.10 p.m.