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**SIXTH COMMITTEE**  
**38th meeting**  
**held on**  
**Friday, 11 November 1980**  
**at 10 a.m.**  
**New York**

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**SUMMARY RECORD OF THE 36th MEETING**

**Chairman: Mr. AM (Democratic Yemen)**

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The meeting was called to order at 10.10 a.m.

**AGENDA ITEM 1341 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, b/43/666-6/20211, A/43/709, A/43/716-6/20231, A/43/744-S/20238)**

1. **Mr. OESTERHELT** (Federal Republic of Germany), speaking on the topic of jurisdictional immunities of States and their property, said that in its written comments submitted at the beginning of 1988, his Government had drawn attention to the recent tendency in international practice to limit the immunity of States from the jurisdiction of the courts of other States. It would be desirable for the draft articles to be based to a greater extent on the provisions of the 1972 European Convention on State Immunity. Differences of opinion persisted between States that supported so-called "absolute immunity" and those that favoured "relative immunity". The draft articles represented a pragmatic compromise between those two schools of thought, a *general* approach with which his delegation agreed. However, several points still called for improvement.
2. His delegation welcomed the Special Rapporteur's recommendation that draft articles 2 and 3 should be combined into one article. Such a move would lead to greater clarity in the definition of the term "commercial contract". As to the subject-matter, in determining whether or not a contract was a commercial contract, courts in the Federal Republic of Germany considered only the nature and not the purpose of the transaction. His delegation noted with satisfaction that the Special Rapporteur's more recent proposal for article 2, paragraph 3, considerably diminished the importance of the purpose criterion. Nevertheless, his Government was not yet satisfied with the current text. Immunity should not be determined by the contracting parties, one of which in many cases would be a private company. Use of the "nature of the contract" criterion alone seemed adequate, and the "purpose of the contract" element should be deleted altogether. He stressed that, owing to a translation error, page 34 of the Special Rapporteur's preliminary report (A/CN.4/415) did not reflect the position of his delegation as clearly as it would have wished.
3. Since his Government's comment that purely factual occurrences were not covered by article 2, and hence article 11 had not been incorporated in the report, he wished to propose once again the adoption of the term "activity" from article 7 of the European Convention on State Immunity, which also made concrete activities such as fishing or drilling for oil subject to the limitations on immunity.
4. As to the fundamental question whether article 6 should refer to the "relevant rules of general international law", he felt that the compromise whereby that reference would be incorporated in the preamble would detract from its significance, and could cause the convention to rigidify that field of law. On account of its bilateral function, the principle of reciprocity laid down in

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(Mr. Oesterhelt, Federal Republic of Germany)

article 28 could not be a substitute, and the reference in article 6 should thus be retained.

5. His delegation favoured the proposed deletion of paragraph 2 (a) and 2 (b) of draft article 12, and of the reference at the end of article 13 to the presence of the author of the act or omission in the territory. The resulting provision corresponded to the legal situation under article 13 of the Paris Convention on Third Party Liability in the Field of Nuclear Energy and article XIV of the Vienna Convention on Civil Liability for Nuclear Damage. His delegation also supported deletion of the words "or property in which it has a legally protected interest" and "and has a connection with the object of the claim" in article 21.

6. Regarding the rules relating to the burden of proof, he questioned the wisdom of requiring the enforcing party to furnish proof that ground was stated for one of the exceptions to the rule of immunity. Article 21 should be reviewed in order to keep the difference between the criteria for immunity in cognizance proceedings and in enforcement proceedings as small as possible.

7. He believed that the concept of "segregated State property" and the wording of the proposed new article 11 ~~was~~ called for further clarification. It might be that the question of immunity was being confused with the question of against whom to direct court action. The courts of the State of the forum would have to clarify whether a claim existed against a State or a State enterprise, and then against whom legal action should be directed. States were free to give their companies a legal personality that would enable them to enter into contracts in their own name and be liable for their fulfilment only in respect of their own property.

8. Turning to the topic "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier", he said that his delegation welcomed the proposed deletion of article 33. Regarding article 28, a compromise solution appeared necessary in view of the widely differing opinions of States. His own delegation's proposal for that article might offer better prospect for such a solution than the three alternatives currently proposed by the Special Rapporteur.

9. As far as the important yet extremely difficult topic of State responsibility was concerned, his delegation wished to reserve its comments until the Commission had found an opportunity to discuss the matter on the basis of the preliminary report of the new Special Rapporteur.

10. In conclusion, he said that the debate during the previous two weeks had clearly shown that the topic-by-topic discussion of the report of the Commission was a step forward, since it enabled members to focus their attention on a specific subject at a given time. It had proved easier to listen to and concentrate on four short statements than on one longer one. The new structure of the debate on the item was to be welcomed, and he hoped that it would be maintained and even tightened.

11. Mr. \_ (China), referring to the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, said his delegation believed that it would be improper to have international organisations covered by the draft, although such organizations were subjects of international law, they could not be placed on the same footing as States. Practical difficulties would also arise from the fact that the nature, functions and charters of international organisations differed. Separate articles might be drafted to deal with official communications among international organisations, and between those organizations and States. The texts of articles 1 and 2 as adopted on first reading ought to be retained.

12. His delegation favoured retention of article 17 as a safeguard against loopholes, notwithstanding its perhaps limited practicability. With regard to article 28, it believed that any direct or indirect examination of the diplomatic bag was inadmissible. Scanning or other modern technical means of examination would violate the confidentiality of diplomatic correspondence, interfere with the normal conduct of State business and adversely affect friendly relations between States. Furthermore, the majority of countries, especially developing countries, did not have advanced electronic scanning technology at their disposal. If such technology were permitted, those countries would be at a disadvantage. At the same time, his delegation held that diplomatic bags were to be used exclusively for the purpose of government business, and that abuses such as drug trafficking and terrorist activities must be forbidden. Non-intrusive external security checks, such as the use of sniffing dogs, were thus permissible in cases where there were valid reasons to suspect that diplomatic bags contained forbidden substances. However, in no circumstances should the confidentiality of documents and other legitimate items be compromised. For that reason, his delegation agreed in principle with alternative C of the revised texts proposed by the Special Rapporteur.

13. Retention of article 33 would mean that several régimes governing diplomatic couriers and bags would coexist, thereby conflicting with the aim of a unified régime. The article should thus be deleted.

14. The achievements of the Commission over the past few years had been manifest and praiseworthy. None the less, there was a need for further improvement of its programme, procedures and working methods. Discussion of a number of topics had dragged on much too long, with little being achieved. In connection with some articles, after general debate and drafting by a committee, adoption by the full Commission often led to a further round of time- and energy-consuming general debate. Much effort was duplicated. The process of consideration and drafting should strive to take into account and co-ordinate the theories and practices of all the major legal and social systems, so as to arrive at results acceptable to all sides. At the same time, draft articles should not be rushed through a drafting committee prematurely. The Commission should adjust its current schedule and, if necessary, stagger certain topics so that the drafting work on priority topics could be accelerated. It should also institutionalise procedures that had proved their worth, in the interests of efficiency. The search for important new topics ripe for codification should proceed.

(Mr. Tang Chengyuan, China)

15. Noting the absence of a Chinese edition of the Yearbook of the International Law Commission, he expressed the hope that the Secretariat would make every effort to arrange for its early publication, and that, in accordance with General Assembly resolution 42/207 C, the official languages of the United Nations would be accorded equal treatment.

16. Mr. TREVES (Italy) said that in the light of his Government's stated position regarding electronic scanning of the diplomatic bag, the formulation for article 28 that his delegation preferred was the text reproduced in paragraph 429 of the report (A/43/10), including the words within square brackets. Consequently, it found none of the three alternatives proposed in paragraph 440 acceptable. The proposal submitted by the Federal Republic of Germany and reproduced in paragraph 433 of the report, though still far from Italy's position, seemed to open up more promising avenues.

17. Regarding the relationship between the draft article on the diplomatic courier and bag and the four relevant codification Conventions concluded under the auspices of the United Nations, he said that it might be premature to advance definite preferences. Much would depend on whether there would be radical departures of substance between the draft and one or more of the four Conventions. The answer to that question would largely depend on the resolution finally adopted in article 26.

18. None the less, his delegation believed that the verb "complement" used in the proposed article 32 to describe the relationship under consideration was too imprecise. While adequate to describe the relationship between a rule that was compatible, it was certainly not adequate to describe the relationship between rules with divergent contents. Moreover, it must be specified that whatever relationship was established, it would apply as between States parties to the instruments concerned. It must be borne in mind that while the 1961 and 1963 Vienna Conventions had been very widely ratified, the 1969 Convention on Special Missions had only 24 State parties, and the highly controversial 1975 Convention on the Representation of States in Their Relations with International Organisations of a Universal Character was not yet in force. Lastly, it might be interesting to consider whether accession to the new instrument on the courier and bag should be reserved for States parties to at least some of the relevant Conventions. That question, however, might perhaps be dealt with more productively outside the Commission.

19. With regard to jurisdictional immunities of States, his delegation agreed by and large with the pragmatic approach taken by the Special Rapporteur, and reflected especially in paragraph 693 of the Commission's report. While looking forward to the progress the Commission might make in the light of the comments of Governments, it felt that at the present stage, theoretical discussions were not productive.

20. Turning to State responsibility, he underscored the importance of the distinction drawn by the Special Rapporteur between "cessation" and "restitution in kind". The two concepts were very often confused, the former being sometimes seen

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(Mr. Traves, Italy)

as included in the latter. Independent treatment of cessation of the internationally wrongful act war particularly important for political reasons, as it contributed to the reinforcement of the violated primary rule and consequently to the rule of law in international relations.

21. With regard to the other aspects of the proposed new articles, he said that in article 7 it would perhaps be necessary to give some indication making it possible to identify exactly what restitution in kind consisted of, in addition to considering the conditions and exceptions.

22. The outline of parts two and three contained in paragraph 534 and 535 of the report was particularly noteworthy, firstly, on account of the Special Rapporteur's decision to treat separately the legal consequences deriving from an international delict and those deriving from an international crime; and secondly, for the decision to make a distinction within the chapter on the legal consequences of both delicts and crimes, a decision which should prove particularly useful in establishing appropriate distinctions between the consequences of delicts and crimes, and make it easier to tackle the question of settlement of disputes considered in part three.

23. Mr. CALERO RODRIGUES (Brazil), referring to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, said that his Government had duly responded to the Secretary-General's request for comments and observations on the draft articles provisionally adopted on first reading. It was gratifying that some of the suggestions made in that reply (A/CN.4/409) had been favourably considered by the Special Rapporteur.

24. Brazil agreed with the Special Rapporteur's proposal that the scope of the articles should be extended to cover couriers and bags employed for the official communications of international organizations. If such couriers and bags were not included in the scope of the draft articles, it would soon be necessary to draft a further instrument establishing a régime for them. It would, of course, be necessary to indicate to which international organization the articles would apply, but that should not be difficult. The Special Rapporteur's suggestion concerned only the couriers and bags employed for the official communications of an international organization with States or with other international organizations. Brazil believed that the internal communications of international organizations, between their different offices, organs or agencies, should also be covered.

25. Article 33 raised an issue related to the question of the scope of the articles. That article would allow States, through an optional declaration, to exclude from the application of the articles any given category of couriers or bags. No substantive arguments could be put forward to justify that deviation from one of the main purposes of the whole exercise, which was to establish a uniform legal régime for all couriers and bags. A practical justification had been advanced: the possibility that the optional declaration would allow more States to become parties to the proposed instrument. As indicated in paragraph 486 of the Commission's report (A/43/10), article 33 would be "the price to be paid in order to ensure a wider acceptability of the draft". However, except in one case, the

(Mr. Calero Rodrigues, Brazil)

written comments and observations submitted by Governments reflected serious doubts about the provision in question. The Special Rapporteur had therefore rightly proposed that it should be deleted.

26. Brazil was glad that no substantive changes in the provisions of part II and III adopted on first reading had been suggested. The proposed drafting changes improved the text. Article 8 would be more complete, and article 11 would be clarified. Article 21 would be made more precise with regard to the beginning of the privilege and immunities of a courier who was already in the territory of the receiving State at the time of his appointment. The question of the cessation of the privileges and immunities of the diplomatic courier *ad hoc* would also be dealt with adequately in the redrafted article. Articles 19 and 20 would be revised and amalgamated, with a more logical arrangement of paragraphs. Paragraph 1 of current draft article 19 would rightly be deleted. The proposed new draft article referred only to exemption from taxes and dues, and to exemption from inspection for the courier's personal baggage, but that exemption was not absolute. The proposed new article, together with other articles of the same part of the draft, should dispel any impression that the diplomatic courier was being given excessive privileges.

27. The "facilities necessary for the performance of his functions" that the receiving State or the transit State must accord to the diplomatic courier, under article 13, were only general facilities, and should not be construed as implying a heavy burden for the States concerned. Assistance in obtaining accommodation and in using telecommunications networks was to be given only "upon request and to the extent practicable". Entry should be permitted, but visas could not be required (art. 14). Freedom of movement must be assured, but only to the extent necessary for the performance of the courier's functions (art. 15). The courier enjoyed personal inviolability and was not liable to arrest or detention (art. 16), and enjoyed immunity from jurisdiction (art. 16). However, such immunity was not absolute. Immunity both from criminal and from civil and administrative jurisdiction applied only in respect of "acts performed in the exercise of his functions". The courier could be required to give evidence as a witness in cases not involving the exercise of his functions, and his immunity did not extend to an action for damages arising from a car accident. Moreover, he could be required to have insurance coverage against third-party risks when driving a vehicle.

28. The purpose of article 17 was to protect the diplomatic courier's temporary accommodation. Except in emergencies, the premises in question could not be entered by the local authorities, and they should not be subject to either inspection or search. Nevertheless, once again, the prohibition in question was not absolute. The content of the article did not seem unwarranted. However, the first sentence of paragraph 1 could be omitted; it was unnecessary and might convey an inaccurate idea of the kind of protection to be given to the courier's living quarters.

29. As far as the status and protection of the diplomatic bag were concerned, article 28 seemed to give rise to the most problems. Brazil supported that provision, since examination by electronic or other technical devices could compromise the confidentiality of the contents of the bag. However, the receiving

**(Mr. Calero Rodrigues, Brazil)**

or the transit State needed some guarantees against abuser. Consequently, if the receiving State had serious reasons to believe that an abuse was being committed, it should have the right to request that the bag should be opened. If such a request was refused, the bag should be returned to its place of origin. That solution had been incorporated into alternative C proposed by the Special Rapporteur for article 28, and should be considered on the basis of its own merits. The argument that it would be a departure from existing law should not stand in the way of its acceptance. To a great extent, the drafting of the articles on the topic was a codification exercise, but it would be inappropriate to shy away from efforts to develop international law. The Commission should take emerging practices and needs more fully into account.

30. The Commission's report indicated that 1988 had been a fruitful year. Chapter I, section F, of the report was a welcome addition, since it summed up the Commission's achievements. The Commission had not considered the topic of relations between States and international organizations at all nor had it discussed either the topic of jurisdictional immunities of States and their property or the topic of State responsibility, but had instead simply heard the presentation of the relevant reports by the Special Rapporteurs. It should be noted, however, that the good results achieved with respect to other topics by the Commission at its 12-week session had coincided with the fact that only four topics had actually been considered. That could be taken as an indication that concentration by the Commission on a few topics might indeed be conducive to greater efficiency and to an increase in sessional output. It had been repeatedly suggested in the Sixth Committee that consideration of the topics on the Commission's agenda should be staggered. Although the Commission had been hesitant to adopt a formal decision to that effect, the *de facto* staggering of the consideration of its topics that had taken place seemed already to have produced favourable results. The Commission should therefore be encouraged to proceed in that direction.

31. Mr. (Israel) said that his delegation appreciated the considerable progress made by the Commission on the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

32. Where draft articles 1 and 2 were concerned, Israel endorsed the formulation "or with each other" suggested by the Special Rapporteur. It preferred the text of articles 1 and 2 as reproduced in paragraph 296 of the Commission's report (A/43/10). It appreciated the practical considerations that limited the subject-matter of the topic to couriers and bags used by States. Besides the issue of reciprocity, there was the fact that international organizations were different types of subjects of international law. With regard to the scope of the articles, Israel supported the Special Rapporteur's position on national liberation movements, as reflected in paragraph 304 of the Commission's report; it took note of the Special Rapporteur's views reflected in paragraph 305, and wished to add that there was no provision in the relevant international conventions that would serve as a basis for inserting the element in question into any framework of draft articles on the status of the diplomatic courier and bag. At the Sixth Committee's 26th meeting, France had advocated a pragmatic approach leading to appropriate



(Mr. Harel, Israel)

rules to fill various lacunae, while the Special Rapporteur had proposed the adoption of a comprehensive approach leading to a coherent and as uniform a régime as possible for all kinds of couriers and bags.

33. Israel believed that, if article 3, paragraph 1 (7), was adopted, it would be necessary to consider honorary consulates. Article 35 of the 1963 Vienna Convention on Consular Relations, which dealt with consular couriers and bags, also applied to article 58 of the Convention, which concerned the facilities, privileges and immunities of honorary consulates. International practice pointed towards an increasing number of honorary consulates, requiring proper communication channels for the accomplishment of their consular missions. Further consideration should therefore be given to that subject in the course of the final drafting of article 3, paragraph 1 (7).

34. Article 8 made no reference to the diplomatic courier's personal documentation. In the light of the Special Rapporteur's comments on the proposed revised version of article 8, which would include the terms "essential personal data", Israel believed that the issue of personal documentation should be considered.

36. Where article 11 and the amendment thereto were concerned, Israel wished to stress that the courier must remain duly protected even after he had handed over the diplomatic bag at its final destination. For practical reasons, it could be presumed that the courier might be given additional diplomatic mail or alternative courier tasks, and that he must therefore maintain his status. Israel endorsed the view that article 11, paragraph (a), as proposed by the Special Rapporteur, was unclear (paragraph 351 of the Commission's report). The paragraph offered no guidance as to when the courier's functions were fulfilled,

36. As to articles 28 and 18, Israel was of the view that the final formulation of acceptable provisions required serious reflection on the international community's priorities and on the trust placed by every State in the intentions, motivation and activities of other States in the context of the movement of couriers and bags. Enjoyment of absolute immunity by the courier, and inviolability of the bag must be approached with caution in order to achieve the correct balance and to ensure fulfilment of the basic aim of free movement for the diplomatic bag, whilst preventing betrayal of the trust upon which relations between States were founded.

37. Above all, the proposed draft articles should not extend beyond the parameters of the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations.

38. Turning to the topic of jurisdictional immunities of States and their property, he said that the fundamental difference of opinion between those advocating the restrictive theory of State immunity and those supporting the absolute theory was as great as ever. Israel therefore commended the Special Rapporteur for his useful work on the subject, particularly for his efforts to concentrate mainly on the kind of activities of a State that should or should not enjoy immunity from the jurisdiction of another State. Israel was currently

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(Mr. Haral, Israel)

drafting a law on State immunity in which it was possible to appreciate the general approach adopted by many countries: the exclusion of trade or commercial activities from the concept of State immunity. Those dealing in Israel with the preparation of the law in question found useful the Commission's preliminary work on the issue of drawing a clear distinction between acta jure imperii and acta jure gestionis. The principle par in parem non habet jurisdictionem, which had become an integral part of the ruler of international law, was based on the principle of equality of States, and - as a result of its implementation - a country was not bound in general by the jurisdiction of another country.

39. In connection with the issue of defining the term "commercial contract", the Special Rapporteur had recommended that the purpose of the contract "should be taken into account in determining the non-commercial character of the contract" (A/43/10, paras. 509 and 510). Israel wished to sound a note of caution in that connection, and to recommend further consideration of the issue of the applicability of the right criteria, particularly in the light of the relevant cases extensively dealt with in English law. Emphasis should be placed clearly on the nature of the transaction and on the legal relationship created by it, and the purpose or motive should be disregarded.

40. As to article 6, Israel continued to prefer the formulation "and the relevant rules of international law". For the same basic reasons, it was inclined to favour the term "limitations" for the title of part III of the draft. Moreover, it did not support the Special Rapporteur's recommendation to delete the term "non-governmental" in square brackets from articles 18, 21 and 73,

41. Israel was confident that the conciliatory spirit that had characterised the Commission's work would continue to prevail in the foreseeable future.

42. Mr. VONGSALY (Lao People's Democratic Republic), referring to the draft article 8 on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier adopted on first reading in 1986, said that the draft should cover the couriers and bags of such international organizations as the United Nations, its specialized agencies and the International Atomic Energy Agency. However, national liberation movements were of a temporary nature, since they ceased to exist once the corresponding States had regained their independence. His delegation in no way wished to minimize the importance of such movements. On the contrary, it had always supported them; it had, for example, permitted the Palestine Liberation Organisation to maintain an office at Vientiane, with all the privileges and immunities granted to a diplomatic mission. Since there were not many liberation movements, appropriate special agreements could be concluded between the movement and receiving State.

43. His delegation was not in favour of deleting article 17, which would result in a lacuna in the set of rules governing the legal status of couriers and bags. Since the diplomatic courier's temporary or permanent accommodation must not be violated, the Special Rapporteur should redraft the article in an appropriate manner.

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(Mr. Vongsaly, Lao People's  
Democratic Republic)

44. Paragraph 1 of article 18 was superfluous, since it duplicated article 16. Paragraphs 2 to 5 were acceptable, however.

45. Turning to article 27, concerning facilities accorded to the **diplomatic** bag, he recalled an **instance when** an unaccompanied diplomatic bag from his country had been delayed in a **transit** State for **nearly** three months. The transit State must unconditionally provide the facilities necessary for the **safe** and rapid transmission or delivery of the diplomatic bag. Article 27 should be retained in its present form **or** in a strengthened form.

46. With respect to article 28, concerning protection of the diplomatic bag, his delegation categorically opposed the language of paragraph 2 as it stood. The use of electronic or **other** technical **devices** to examine bags put developing countries at a disadvantage vis-b-via **technologically** advanced countries. The use of such equipment could foster abuses which might violate, and even indirectly **destroy**, official documents of the State to which the bag belonged. Freedom of **communication** between States and **their** missions abroad was a prerequisite in international relations. Under no circumstances should the content of the diplomatic bag be violated or be subject to inspection, even by sniffing dogs. Accordingly, his delegation favoured alternative **B** in paragraph 440 of the report.

47. The Lao People's Democratic Republic agreed that the draft articles should **seek** to apply a comprehensive approach leading to a coherent and as uniform a **régime** as possible concerning all kinds of couriers **and** bags. The draft constituted a solid foundation for the future **work** of the Commission on the topic, and the final text, once adopted, would further reinforce State practice under the existing codification Conventions in the field of diplomatic and consular law.

48. Mr. BRAUNE (German **Democratic** Republic), referring to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, said that the full implementation of the right to free communication between States and their missions abroad, as laid down in the 1961 Vienna Convention on Diplomatic Relations, was an indispensable condition for the **unimpeded** performance by those missions of their functions. Therefore, the official courier as a person duly authorised by the sending State must be guaranteed full protection under international law, **in** the interest of unimpeded communications between the respective State and its missions abroad. That concern was largely met in the draft articles prepared by the **Commission**.

49. His delegation continued to believe that article 28 should clearly provide for the diplomatic bag to be exempt from examination by any means. It also believed that there were favourable conditions for the completion of the Commission's **work** and for the submission **of** the text to the General Assembly for final consideration and adoption.

50. With regard to State responsibility, he said that his Government had always attached due importance to codification in that area, and had submitted in 1988 a **detailed** written statement on part one of the draft articles. Since the Commission

(Mr. Braune, German Democratic Republic)

had been unable, for lack of time, to discuss the preliminary report of the Special Rapporteur, his delegation would confine itself at the current stage to supporting the Special Rapporteur's intention to define the legal consequences of international crimes more precisely. It hoped that the Special Rapporteur would be guided in his work by the concept agreed by the Commission in 1963. It recommended that the Special Rapporteur's reports should not refer to each article separately, but rather deal with entire sets of articles, which would be a better way of ensuring that the project was completed in the near future.

51. Mr. CRAWFORD (Australia), referring to the working methods of the Commission, said that his delegation welcomed suggestions in the report of the Commission on its fortieth session (A/43/10) that consideration of particular topics should be staggered so that both the Commission and the Sixth Committee could concentrate on particular items in some depth. The establishment of a small working group within the Commission to consider proposals for its long-term programme would also be a positive development.

52. On the matter of logistical support for the Commission, he wished to mention two items. The first related to the increased use by the Commission of computer technology. His delegation was disappointed to note again that the matter had not been dealt with squarely, but would be reverted to "at a later stage". Secondly, the question of the United Nations bringing Special Rapporteurs to New York for the detailed debate on their topics in the Sixth Committee had been raised. On balance, his Government was not satisfied that the additional expenditure would be justified. The debates in the Committee were attended by the Chairman of the Commission and by a number of the Commission's members in various capacities. That and the fact that Governments could make written comments on draft articles led his delegation to believe that ample opportunity existed for feedback to Special Rapporteurs, although that had not always taken place as promptly as it should have. In his delegation's opinion, additional resources should be devoted to substantive work on the topics,

53. Another issue involved the extent to which there was undesirable overlap between particular subjects being studied by the Commission. A consistent approach needed to be taken on different international instruments dealing with the same or related subjects. One area of possible overlap was the discussion of the three topics of State responsibility, international liability for injurious consequences arising out of acts not prohibited by international law, and the law of the non-navigational uses of international watercourses. His Government did not believe, in the absence of widespread support for some reformulation of the respective draft articles, that they should be amalgamated or merged. The Commission's work on international watercourses was at an advanced stage. In international practice the problem of watercourses had usually been dealt with by specific treaty provisions rather than under a general régime of liability for "lawful" acts. In addition, a workable distinction should be drawn between injurious consequences and State responsibility, for while the latter topic was concerned with the general problem of liability for acts prohibited by international law, the item on injurious consequences was strictly limited to the subject of acts which were not, in the absence of particular forms of injurious

(Mr. Crawford, Australia)

consequences, prohibited by international law, that, while there might be no clear theoretical distinction between the two subjects, it was possible for the Commission, by careful attention to definitions, to draw a sufficiently clear functional distinction between them. What was clear was that the Commission should avoid any suggestion of inconsistency of approach on those items.

54. The Commission should give Special Rapporteurs a clear indication of its intentions some two years in advance so that they could prepare for a given session a detailed and comprehensive work-plan, rather than merely focusing on relatively few articles in a wider, but sometimes not fully worked-out, scheme. The advantage of such an approach was that the Commission would be dealing, especially in the later stages of the work leading to the adoption of draft articles, with complete drafts or complete sets of proposals, rather than with isolated provisions.

55. An additional development of the Commission's existing practices would be to allow the Drafting Committee a less interrupted opportunity for work in the early part of each session except the first session in any five-year period. There had at various times been a considerable backlog for the Drafting Committee. Rather than all members of the Commission being present at Geneva throughout the scheduled 12 weeks, it might be desirable for the Drafting Committee alone to be given the first two weeks to work on the drafts to be dealt with later in the session, so that the Commission itself could start with as developed a set of proposals as possible.

56. On the question of the Sixth Committee's own methods in considering the work of the Commission, his delegation agreed that the topic-by-topic method should be maintained.

57. With respect to the topic "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier", he said that Australia had already stressed that there was no need for a new convention on the item, since existing conventions, especially the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations adequately covered the field. There was a real risk that a new convention would result in a plurality of régimes applicable to the courier and bag, leading to uncertainty and division. The Commission should be very loath to undermine positions taken in conventions with such wide and comprehensive participation. Its reconsideration of the draft articles in 1988 had not met Australia's general concerns set out both in writing and at earlier sessions.

58. Referring to some of the changes made or proposed by the Commission in its most recent discussion, he said that the first related to the question of the extension of the draft articles to international organizations. The general practice of the Commission, which had been endorsed by the Sixth Committee and by successive diplomatic conferences, had been to distinguish between relations between States, on the one hand, and relations between States and international organizations, on the other, with the latter dealt with in separate instruments. In his Government's view, there was no justification for departing from that procedure in the present context. Accordingly, Australia did not support the

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**(Mr. Crawford, Australia)**

suggestion that international organisations, their courier<sup>8</sup> and bags should be included either in the tort or in an additional protocol.

59. His Government continued to have difficulties with the scope of protection afforded by article 17. If both the courier and the bag were inviolable, the need for additional protection for "temporary accommodation" was far from clear. The difficulty with the scope of the article was exacerbated by the failure in any way to define what constituted temporary accommodation. Both in the context of draft article 17 and in that of draft articles 18, 19 and 20, it was essential for the proposed articles to limit the immunity of a courier to what was strictly necessary for the performance of the function of the courier and the bag.

60. In relation to article 28, Australia was pleased to note that all three alternatives proposed by the Special Rapporteur would exclude electronic scanning or scanning by other technical devices, which corresponded with the current state of international law. However, his Government was concerned that the protection afforded to the free movement of the bag would be diluted by alternative C proposed for article 28. That alternative weakened the protection offered to the bag by article 27, paragraph 3, of the Vienna Convention on Diplomatic Relations. His Government shared the Special Rapporteur's view that the extension to transit States of any right to request the opening of the diplomatic bag might lead to unreasonable delays and impediment of the rapid transmission or delivery of the bag. At most, a transit State should be given the right to request opening of the bag or to return it in situations where there was some ground to believe that its contents were prejudicial to the safety or security of the transit State. It should be for the receiving State to deal with any other issues which might arise from the contents of the bag. For those reasons, Australia preferred alternative B as being most consistent with the provisions of the Vienna Conventions.

61. His delegation was pleased to note that the Special Rapporteur and the majority of the Commission favoured the deletion of article 33, which would have allowed still further diversity and derogation from the agreed régime.

62. **Mr. MIRZAIE-YENGEJEH** (Islamic Republic of Iran), referring to the topic "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier", said there was no doubt that completion of the relevant draft articles would pave the way for smooth communication between States and missions throughout the world. It was hoped that the Commission would concentrate at its forty-first session on the second reading of the draft articles, with a view to completing its mandate at that session.

63. With regard to the scope of the draft articles, his delegation did not agree with the suggestions made to delete from article 1 the words "or with each other". Those words were in consonance with existing legal provisions. Communication between the diplomatic and consular missions of a sending State in the receiving State was a common practice, and should therefore not be excluded from the scope of the present articles.

(Mr. Mirzaie-Yengejeh, Islamic  
Republic of Iran)

64. In his delegation's opinion, a discussion on the matter raised in paragraph 302 of the report (A/43/10) would not lead to definite results, because of the continuing divergence of views. Some States thought that no differentiation should be made between States and international organisations. Others, including his own, believed that although international organisations were created by States and were an important factor in contemporary international relations, they were a different subject of international law. His delegation therefore suggested that the present articles should be restricted to the courier and bag of States.

65. His Government had no difficulty with the extension of the scope of the articles to the couriers and bags of national liberation movements recognized by the United Nations, for two reasons: first, many countries, including his own, had given the missions of those movements full diplomatic status; secondly, the United Nations had adopted several resolutions requesting all States, in particular the hosts of international organisations and international conferences, to grant the delegations of national liberation movements recognized by the Organization of African Unity and/or by the League of Arab States the facilities and privileges necessary for the performance of their functions, in accordance with the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character.

66. Some States considered article 17 to be unnecessary, whereas others were of the view that the concept of inviolability of the temporary accommodation of the diplomatic courier should be strengthened. It seemed to his delegation that the text of the article struck an adequate balance between the interests of the sending State and those of the transit or receiving State. While it extended appropriate legal protection to the courier and bag, it stipulated that the temporary accommodation of the diplomatic courier should be subject to inspection if there were serious grounds for believing that there were in it articles, the possession, import or export of which was prohibited by the law of the receiving or transit State.

67. As to article 20, his delegation was of the view that the confidentiality of the content of the diplomatic bag should in no way be undermined. The inviolability of the diplomatic bag was based on a sound legal régime set out in the 1961 Vienna Convention on Diplomatic Relations. His delegation therefore associated itself with those delegations which had voiced strong objections to the examination of the bag directly or through electronic or other technical devices. It supported alternative A as presented by the Special Rapporteur, and considered that that formulation reflected existing law on the matter.

68. His delegation supported the suggestion made by the Special Rapporteur and endorsed by a large number of members of the Commission that draft article 33 should be deleted. The provision was directly opposed to the main purpose of the draft: the establishment of a uniform régime for all couriers and bags.

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(Mr. Mirzaie-Yangejeh, Islamic Republic of Iran)

69. The **inclusion** of an appropriate provision on the settlement of disputes could be **done through** an optional protocol, as in the case of the **1961, 1963 and 1969 Vienna Conventions**, or through the procedure adopted by the **1975** Vienna Convention, which **provided** for settlement of disputes through **consultation and conciliation**,

70. With **respect to the** programme of work of the **Commission**, his delegation shared the view that **every effort should** be made to maintain future sessions at not less than **12 weeks**. It supported the holding of the **International Law Seminar** during the sessions of the **Commission**, which would be of importance **especially** for the developing countries. His delegation **endorsed** the idea of **establishing** a small working group to formulate now proposal on the programme of work.

71. His delegation wished to propose a new topic to be examined by the working group for **inclusion** in the long-term programme. The international community had made every effort to ban war and to bring peace to the planet. It had established international political organizations such as the United Nations with the primary purpose of maintaining peace and security; developed various international instruments to regulate relations between States; and encouraged them to settle their disputes through peaceful means. However, international armed conflicts continued to occur in different parts of the world. His delegation therefore proposed that some thought should be given to the law of armed conflict. Existing rules and regulations pertaining to war had partly been formulated in the course of war through universal observance of some humanitarian aspects on the part of belligerents. Other rules of war, especially those in treaties, had been formulated following wars, taking into account the experiences of wartime. Examples included the 1925 Geneva Protocol and the 1949 Conventions relating to the protection of victims of war.

72. The eight years of war, the longest conventional war in the twentieth century, to which his country had been subjected had provided some significant experiences to be used in the future development and codification of the international law of armed conflict. Some of those experiences had involved threats and attacks against international civil aviation, air raids against commercial shipping in international waters and bombing of oil-rigs. There was a clear need to study rules and regulations of armed conflict and to formulate new restrictive rules. In view of its experiences during the war and in order to prevent any repetition of the crimes committed against it, his country proposed that the United Nations, on behalf of the international community, should enact, at an appropriate time, certain restrictive legal measures thereby contributing to the codification of a new set of international rules governing the conduct of war.

73. Mr. **ELTCHENKO** (Ukrainian Soviet Socialist Republic) said that the efficient organization of work on the draft articles relating to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier had conferred the necessary momentum on the Commission's work on the topic, which was now approaching completion. The Special Rapporteur's eighth report (A/CN.4/417) had been of considerable value in laying the groundwork for the Commission's deliberations during the second reading of the draft articles.



(Mr. Eltchenko, Ukrainian SSR)

74. The aim of the draft articles was to establish a consistent régime governing the status of all types of diplomatic couriers and bags, based on the provisions of existing conventions. That implied the consolidation, harmonisation and unification of the existing rules, on the one hand, and the development of specific and more precise rules for situations not fully covered by those conventions, on the other hand. International practice in recent years had pointed to the need to improve the legal regulations governing the status of the diplomatic courier and bag.

75. His delegation agreed that the draft articles constituted a solid foundation for an international legal instrument in that area. The proposed document should clearly set forth the norms which would ensure smooth official communication between a Government and its representatives abroad. It should also reflect the principles of inviolability of the diplomatic bag and personal inviolability of the diplomatic courier, which in many cases derived from the inviolability of temporary accommodation. For those purposes, article 17, and particularly paragraphs 1 and 3, should be amplified, as his delegation had advocated on earlier occasions.

76. The provisions of article 28, on protection of the diplomatic bag, should be clarified, in particular by affirming the inadmissibility of scanning the diplomatic bag by electronic or other technological means. Such a provision would comply with the norms established by the 1961 Vienna Convention on Diplomatic Relations.

77. Article 33 should be excluded from the draft in order to give the future instrument some measure of flexibility. The effect of the article would be to accord States the right to exclude from the scope of the instrument certain categories of diplomatic couriers and bags, thus creating a plurality of regimes which might cause confusion in the applicable law. It should also be pointed out that the article would essentially conflict with the aims of universalizing international legal norms, strengthening the status of the diplomatic courier, and enhancing the normal conduct of communication between States and their representatives abroad.

78. Mr. HAYES (Ireland) said that in addressing the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, the Commission had drawn upon the relevant provisions in the four Vienna conventions and sought to allow for such progressive development in the relevant sphere as was feasible. It was essential to maintain a proper balance in draft articles on all topics, and that should be easier in the case in question, since most States were both receiving and sending States. He supported the functional approach to the subject referred to in paragraph 293 of the Commission's report (A/43/10).

79. The draft articles should apply only to the couriers and bags of States, and should cover communications of missions or consular posts with each other and with their headquarters. He therefore supported the versions of articles 1 and 2 as adopted on first reading. With respect to article 13, he endorsed the conclusion suggested in paragraph 357 to the effect that the draft article could be redrafted

(Mr. Hayes, Ireland)

so as just to lay down the general duty of the receiving or transit State to assist the diplomatic courier in the performance of his functions.

80. Since his delegation was not convinced that functional necessity required the inviolability of a courier's temporary accommodation in addition to guarantees of inviolability for himself personally and for the bag, it favoured the omission of article 17. Likewise, articles 19 and 20 could be omitted, since the brevity of the courier's stay in the receiving or transit State made the exemption therein unnecessary, except in so far as they were already covered by the guarantee of his personal inviolability. His delegation approved of the revised version of article 27, on facilities accorded to the diplomatic bag since the new text met its misgivings about the vagueness of the previous version.

81. His delegation's approach to article 28, on protection of the diplomatic bag, was determined by the need to balance the respective interests of the sending and receiving States, i.e., to preserve the confidentiality of the contents of the bag and to prevent abuses, and by functional necessity, relating to the importance of the bag as a means of communication, particularly for small States lacking the resources for more sophisticated and more easily protected means of communication. Accordingly, his delegation firmly insisted that article 20, paragraph 1, must unequivocally lay down the inviolability of the bag. The formulation of that paragraph adopted on first reading, but without the square brackets, was adequate and his delegation was pleased that it had been included in 6aCh of the alternatives for article 28 proposed in paragraph 440 of the report. However, his delegation was also prepared to contemplate measures to prevent abuse, provided that those measures were clearly consistent with the inviolability of the bag. For instance, it could not accept that the bag could be subjected to examination by electronic devices, since it was not possible to ensure that the inviolability of the bag would not be affected, particularly bearing in mind technological advances to date and in the future.

82. His delegation approved of the purpose of article 31, on the effect of non-recognition and absence of relations, and considered the revised wording in paragraph 467 to be a significant improvement over the previous draft. However, the language still needed to be made more specific.

83. In the light of his delegation's position on the purpose and scope of the draft articles, it did not consider the optional declaration permitted by article 33 to be necessary or desirable and hoped that it would be eliminated from the future draft.

84. Mr. MICKIEWICZ (Poland) said that the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier should establish a uniform, comprehensive régime covering all kinds of couriers and bags employed for the official communications of a State with its diplomatic missions, consular posts or delegations. The draft articles should not cover international organizations, which were different subjects of international law; at least at the current stage, their communications should be governed by the relevant agreements between them and their host countries or between member States themselves.

(Mr. Mickiewicz, Poland)

85. His delegation supported the concept of the inviolability of the courier's temporary accommodation, as a logical consequence of the well-founded, traditional inviolability of the diplomatic courier as a person exclusively responsible for the safety and confidentiality of the diplomatic bag. Accordingly, while it generally endorsed draft article 17, it had doubts concerning paragraph 3 and believed that the guiding principle in paragraph 1 should not be weakened. Since the diplomatic courier normally remained very briefly in a receiving or transit State and usually stayed in the premises of the diplomatic mission, granting him full legal protection even outside the mission should not cause practical problems.

86. Draft article 15 still gave rise to misgivings. The functional approach adopted therein did not correspond to the generally applied practice whereby States granted diplomatic couriers diplomatic visas and full immunity from criminal, civil and administrative jurisdiction. The balance between the interests of sending States and those of receiving or transit States seemed to be reached at the expense of the main purpose of the draft articles, which was to ensure unimpeded communications. The proposed limitations could cause insecurity or delays in the fulfilment of the courier's functions, or even make it impossible for him to discharge them.

87. The comprehensive legal régime which the Commission was seeking to formulate should adopt the highest standard embodied in article 27 of the Vienna Convention on Diplomatic Relations, which had been ratified by 152 States. His delegation therefore had reservations regarding the solutions proposed in alternatives B and C for draft article 28, since they might reduce the protection given to the diplomatic bag. Moreover, the differentiation between the diplomatic and consular bags was not of practical importance; currently, diplomatic bags usually were also used in communications with consular posts,

88. While his delegation shared the view that the measures taken to prevent abuse in a few cases should not affect the legitimate activities of the vast majority of States which made proper use of the diplomatic bag, it would listen to the current discussion with an open mind, particularly in regard to the request that the diplomatic bag should be returned to its place of origin in exceptional cases. The rule of the confidentiality of the diplomatic bag should, however, always be fully observed. Accordingly, he was opposed to any examination of the diplomatic bag, either directly or using electronic, X-ray or other advanced technological devices.

89. His delegation favoured the deletion of draft article 33, which undermined the concept of the uniformity of the régime and could lead to considerable confusion in the practice of States.

90. Lastly, he emphasised that his delegation could accept the great majority of the draft articles and hoped that once some necessary improvements had been made, the entire draft would be completed in the near future.

91. Mr. KOTSEV (Bulgaria) said that his delegation welcomed the comprehensive approach taken by the Commission to the scope of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic

**(Mr. Kotsev, Bulgaria)**

**courier.** The inclusion in article 1 of the provision extending the scope of applicability to couriers and bags of international organisations of a universal character was a further contribution to that approach. Such a step was particularly important given the increasing role of international organisations in world affairs. A further improvement in the principle of free communications was the retention of the inter se concept in article 1. The legal justification for protecting communications among the missions of a State could be found in the four Vienna codification conventions, in particular article 27, paragraph 1 of the 1961 Vienna Convention on Diplomatic Relations.

92. His delegation fully endorsed the concept of functional necessity as a basic condition for determining the legal status of the courier and the bag. When considering the need to find a balance between the confidentiality of the content of the bag and the security and interests of the receiving and transit States, the focus should be on the effective performance of the official functions of the courier and the bag.

93. With respect to article 18, on immunity from jurisdiction, his delegation believed that the diplomatic courier must be granted full immunity from criminal jurisdiction in the receiving State, as a minimum guarantee for the normal fulfilment of his function. The courier was an official representative of the sending State and performed functions which were of even greater importance for its interests than those of mission administrative and technical staff, who already enjoyed full immunity from the criminal jurisdiction of the receiving State. The fact that a courier's mission was brief and temporary only increased the need for clear-cut and effective guarantees that would ensure the timely performance of his functions.

94. Noting the positive outcome of the discussion in the Commission on draft article 28, relating to protection of the diplomatic bag, he expressed satisfaction that the first paragraph of each of the three proposed alternatives was based on the common denominator afforded by the relevant provisions of the codification conventions providing for identical treatment of various kinds of diplomatic bags. Such treatment was supported by State practice and was a well-established norm under contemporary international law. His delegation could not accept alternative C which constituted a serious deviation from the 1961 Vienna Convention. Alternative E1, while in line with existing international law, ran counter to the main purpose of the draft articles, namely, to tender existing international rules on a subject uniform in order to improve communications between States and their missions abroad. His delegation therefore preferred alternative A, which was more concise and permitted the necessary flexibility.

95. Article 32 did not define clearly the relationship between the draft articles and other existing diplomatic and consular conventions and contained provisions which deviated in substance from the relevant provisions in those conventions. The relationship therefore should be elaborated more precisely.

96. Despite the shortcomings to which he had referred, his delegation felt that the draft articles constituted a solid basis for the elaboration and adoption of a

(Mr. Kotsev, Bulgaria)

reparata binding legal instrument. It hoped that the Commission would spare no effort to complete the second reading of the draft articles at its next session, and that sufficient time would be allocated to the Drafting Committee for that purpose.

97. Ms. MULINDWA MATOVU (Uganda) said that the topic of international liability for injurious consequences arising out of acts not prohibited by international law was of increasing importance in an age in which nuclear accidents and industrial pollution were not uncommon. The resulting injury or harm was not confined within borders or to persons directly concerned with the activity causing the accident or pollution. It was thus for the international community to address itself to the task of minimizing the adverse effects of technological advancement and of ensuring compliance with the principle that there should be reparation where there was damage. Her delegation accordingly welcomed the fourth report submitted by the Special Rapporteur containing the 10 draft articles submitted to the Commission for consideration.

98. The provision in draft article 1 that the articles would apply to activities carried out under the jurisdiction of a State or under its control introduced a qualification which recognized the possibility that some areas of a State might not be fully under its effective control. Although the qualification might raise other issues, such as the question of what constituted effective control, it seemed likely that such problems could be resolved. As to the concept of "appreciable risk", her delegation felt that certain injuries might occur without appreciable risk, and that they too should fall within the scope of the draft articles.

99. In connection with article 3, her delegation believed that attribution should be based on a determination whether the activities which occasioned the harm had indeed occurred within the jurisdiction of the State of origin. Her delegation had reservations as to the advisability of subordinating the application of the draft articles to other international agreements at such an early stage of the drafting process.

100. With regard to the principles embodied in articles 6 to 10, her delegation generally had no objections.

101. In connection with pollution, it was her delegation's view that while there might be specific bodies of law prohibiting pollution in specific areas, the absence of a general international law prohibiting pollution generally warranted the inclusion of such a provision in the draft articles.

102. Turning to the topic of the law of the non-navigational uses of international watercourses, she said that the law relating to the utilization of watercourses was of special interest to her country, which was the source of one of the world's longest rivers, the Nile, and which shared many of its extensive lakes and rivers with neighbouring States. With regard to the use of the term "water course system" in the draft articles provisionally adopted by the Commission, her delegation still favoured the term "watercourse" for the reasons it had explained in its statement the previous year.

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(Ms. Mulindwa **Matovu**, Uganda)

103. With regard to article **7**, factors relevant to equitable and reasonable **utilization**, her delegation would reserve further comment until it had more closely examined the **factors** concerned, although it agreed in principle with the approach taken in the draft article as adopted.

104. On the obligation not to cause appreciable harm, her delegation considered that the existing wording of article **8** made the concept behind the article appear rather vague, and it should accordingly be further **elaborated**.

105. The obligations to co-operate and to exchange data and information were important for the optimum utilization of watercourses by all watercourse States, but States should not be obliged to incur unforeseen expenses in order to provide information to other States.

106. While her delegation supported the notions contained in articles 11 to 21, it felt that they were rather too elaborate for a framework agreement. It would be sufficient to state the steps to be taken before the implementation of planned measures without detailing each step.

107. Referring in conclusion to chapter IV of the Commission's report, **on** the draft Code of Crimes against the Peace and Security of Mankind, she recalled **that** her delegation had commented in detail at the previous year's session of the Sixth Committee on the draft articles as adopted by the Commission at its thirty-ninth session, and would therefore confine its remarks to the additional articles adopted at the fortieth session.

108. In connection with article 4, paragraph 3, her delegation would favour the establishment of an international criminal court enjoying the recognition of Member States and having competence to try both individuals and States, with the power to make binding decisions and to enforce those decisions. Such **attributes** might not be achieved easily, but without them the effectiveness of such a court would be debatable.

109. Regarding the obligation to try or to extradite, as provided for in article 4, her delegation took the view that, in cases other than those in which both the victim State and the State where the acts were committed consented to the extradition, the culprit should be extradited to the international **criminal** court, if such a court were established, or to either of the two States referred to. That would **remove** the possibility that an inadequate penalty might be imposed by the State where the culprit was present, thus necessitating a request for extradition by either of the two States most affected. It would also allay the fear that the provisions might **leave** a loophole by which States might disregard **the** criminal judgement handed down by another State.

110. The non bis in idem rule in article 7 contained an element of natural justice, and her delegation would support its inclusion in the draft Code. The safeguards contained in the article itself would provide the necessary balance for ensuring justice for both the perpetrator and the victim. The principle of

(Ms. Mulindwa Matovu, Uganda)

non-retroactivity embodied in article 8 was also one of the basic principles of natural **justice**, and her delegation therefore supported its inclusion in its existing form.

111. Her delegation had no strong objections to articles 10 and 11 as formulated, and strongly supported the characterisation of aggression as a crime against peace in article 12. In the latter case, it had some questions as to who would attribute the responsibility referred to in paragraph 1, and queried the qualification contained in subparagraph **(g)** of paragraph 4, where the criterion of gravity might have the effect **of** excluding acts of aggression which might not amount to much in **themselves** but might have far-reaching consequences.

112. While agreeing with the acts so far characterised as constituting aggression, her delegation subscribed to the view that the list should not be exhaustive, and that it should be open to judges to characterise other crimes by referring to the general definition.

**113.** In conclusion, her delegation wished to reiterate its appreciation **of** the seminars held by the International Law Commission each year. The seminars were very important, especially for developing countries, and she appealed to organisations and States that were able to do so to extend financial support so that more participants could benefit from **them**.

114. Mr. LOULICHKI (Morocco) welcomed the fact that the International Law Commission would be in a position at **its** next session to complete a second reading of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. His delegation would confine its comments to those articles that had given rise to **divergent** views in the Commission.

115. It was not surprising that the question of extending the scope of the draft articles to cover the couriers of international organisations had occasioned **some** differences of opinion, since such organisations were heterogeneous in their composition, functions, objectives and size, and could not easily be grouped together in one **category**. Similarly, the **régime** of privileges and immunities differed **from** organisation to organisation, depending on the headquarters **agreement** to which they were parties. The existing international practice seemed to be satisfactory, and unless there was a consensus to the contrary on the part of the international **organizations**, and particularly those of a universal character, it did not seem necessary to apply to their couriers the **same régime** of privileges and facilities as applied to the couriers of States. On the other hand, it might be possible to adopt an additional protocol for organizations of a universal character within the United Nations **system**, as had been **suggested** by **some members** of the Commission, which had agreed to study the question further, in the light of reactions from Governments, before taking a final decision.

116. With regard to article 21 on the duration of privileges and immunities, his delegation thought that the provision should be retained, provided that the existing paragraph 1 was replaced by the proposal contained in paragraph 398 of the

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(Mr. Loulichki, Morocco)

Commission's report, which was considerably more precise as to the moment at which the diplomatic courier began to enjoy privileges and immunities.

117. In article 5, on the duty to respect the laws and regulations of the receiving State and the transit State, paragraph 2 would benefit from the elimination of its second sentence, which would seem to be covered by the general obligation to respect the laws and regulations of the receiving or transit State.

118. Article 28, on protection of the diplomatic bag, was one of the articles which had given rise to most debate in the Commission. It directly raised the problem of achieving a balance between the concern of the sending States to ensure the inviolability of the contents of the diplomatic bag and the concern of the receiving or transit State to ensure compliance with its laws and regulations, if necessary by requesting the opening of the bag or its return to the State of origin. In his delegation's view, the article should include an affirmation of the inviolable nature of the bag, as was the case in the three variants proposed by the Special Rapporteur. In that connection, his delegation maintained its reservations regarding any examination of the diplomatic bag by electronic means. The unprecedented sophistication of such means justified the fears of the developing countries that the confidentiality essential to the diplomatic bag would be violated. The article would then go on to reflect the concerns of States which might have serious doubts as to the official and legal contents of the bag. Of the three versions proposed by the Special Rapporteur, alternative A was unacceptable because it contained no provision to that effect. Alternative B, to which his delegation was favourably inclined, combined the regimes of the diplomatic bag and the consular bag, and thus did not seem to be in line with the aim of ensuring uniformity in the draft articles. Alternative C was equivalent to a revision, restrictive in effect, of the régime established by the 1961 and 1963 Vienna Conventions, and could give rise to practical difficulties,

119. Draft article 32 should be carefully studied before any final decision was taken on the relationship between the draft articles and existing international agreements. In its future deliberations, the Commission should retain the new wording proposed by the Special Rapporteur in paragraph 474 of the Commission's report as a basis for negotiation.

120. In conclusion, he said that the effect of adopting article 33 would be to multiply the regimes which would emerge from the future instrument, whereas the intended effect of its implementation was specifically to harmonise international practice. Ultimately, it might lead to a situation in which States might evolve a practice which was contrary to the objective and purpose of the future instrument, as a number of members of the Commission had pointed out. In his delegation's view, sufficient flexibility would be ensured by a provision enabling States parties to enter reservations.

The meeting rose at 12.50 p.m.