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SUMMARY RECORD OF THE 39th MEETING

Chairman: Mr, DENG (Sudan)

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The meeting was called to order at 3.15 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/43/625 and Add.1, A/43/621-S/20195, A/43/666-S/20211, A/43/709, A/43/716-8/20231, A/43/744-S/20238)

1. Mr. APENES (Norway), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), raid that in presenting joint rtatementr to the Sixth Committee, the Nordic countries hoped that they were making a contribution towards aonoenrue-building, rhorter debater, and a clearer and more concentrated line of argument,

2, In January 1988, they had presented written statements on the topics of "Jurisdictional immunitirr of States and their property" and "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier". With regard to the first of those topics, the Qovernmentr of the Nordic countries could support the approach of the now Special Rapporteur, who had tried to avoid giving prominence either to the restrictive theory or to the absolute theory of State immunity, concentrating instead on individual issues so as to arrive at a consensus as to what kind of activities of a State rhould or rhould not enjoy immunity from jurisdiction of another State,

3. With regard to draft article 6, the Nordic countries were not convinced that the solution recommended by the Special Rapporteur, which implied a legal "freeze" covering all situations, was appropriate at the current stage of development of international law. Thry preferred the wording proposed by Australia in its written comments (A/CN.4/410): "and the evolving rules of general international law relating to ouch immunity",

4, In his preliminary report on jurisdictional immunities of States and their property rubmitted in May 1988, the Special Rapporteur had indicated that the deletion of the reference to general international law in article 6 could to some extent be offset by the addition of proposed article 28. The Nordic countries were not convinced that such was the case, since the reference to general international law indicat-d the existence of a coherent practice accepted by a majority of States; that was very different, from the bilateral approach of draft article 28, which essentially concerned the application of the principle of reciprocity. The proposed article 28 could not fulfil the function which the Nordic delegation6 would like to see fulfilled by article 6, even if what might be called a "development clause" wore included.

5. Regarding the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, the Nordic delegrtionr welcomed the efforts to limit the scope of the draft articles and to eliminate provirionr that were not clearly essential, so as to make the final instrument more acceptable to the vast majority of States.

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6. In their view, when consideration was given to the question of the programme, procedures and working methods of the Commission (A/43/10, chap. VIII, sect. A), due account must be taken of the relationship between the work of the Commission and that of the Sixth Committee. The main prerequisite for the success of the Commission's work was constructive dialogue with Governments through the Sixth Committee.

7. In paragraph 5 of its resolution 42/156, the General Assembly had requested the Commission to indicate in its annual report, for each topic, those specific issues on which expressions of views by Governments, either in the Sixth Committee or in written form, would be of particular interest for the continuation of its work. It would be helpful for implementation of that resolution if the Commission could prepare a list of questions regarding which comments by States would be particularly welcome,

8. The Nordic delegations also noted that the practice of discussing the items before the Commission on a topic-by-topic basis was becoming increasingly widespread, and they urged other delegations to use that method to a greater extent, since, among other advantages, it made the debate on each topic more intellectually stimulating and simplified the distribution of documentation. In that regard, they once again stressed the importance of receiving the documentation of the Commission in good time.

9. The working methods of the Sixth Committee, and in particular the organisation of its work so as to support the work of the Commission more effectively, had been considered by a working group, whose positive conclusions would serve as a basis for a new constructive debate in the Sixth Committee and for a better dialogue between that Committee and the Commission.

10. In the view of the Nordic delegations, informal exchanges of views were likely to enhance the effectiveness of the Sixth Committee's work. In such an atmosphere, delegations felt freer to explain national interests, to disclose useful background information, and to exchange ideas which did not always fit into the framework of a formal statement in the Committee, It was a source of satisfaction that the usefulness of informal exchanges of views in the Sixth Committee had been generaily endorsed during the debate on the report of the Commission. In order to encourage the progressive development of international law and its codification, informal consultations should also be used to discuss priorities for the future work of the Commission, and to identify topics to be included in its long-term work programme.

11. The Nordic delegations attached particular importance to the rational distribution of the time allocated to the different topics, so as to take due account of their relative importance. They were satisfied that the law of the non-navigational uses of international watercourses and international liability for injurious consequences arising out of acts not prohibited by international law were among the topics that had been given priority. Every effort should be made to achieve progress on topics of pressing importance to the international community. It would be a disappointment if the Sixth Committee were unable to meet the challenges posed by international development. By indicating to the Commission an

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order of priority for its future work, the Sixth Committee was exercising its responsibility to give direction to the future legal work of the international community.

12. Over the next thrro years, the Commission war hoping to make decisive progress in the preparation of draft article8 on the rtatuz of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, and on jurisdictional immunities of States and their property. Several draft articles had already been provisionally adopted on first reading, and it was desirable that the Commission should complete its work by 1990, so that it might give higher priority to other topics which, in the view of the Nordic delegations, were more important.

13. Not every topic dealt with by the Commission should necessarily be laid down in a convention, The Commission could also prepare a set of principles, guidelines, or any other adequate instrument on a given topic. In general, it might be desirable to decide at an early stage on the form in which the results of the Commission's *work* would be presented.

14. Codification of international law was a long-term process. The Nordic delegations shared the Commission's view that it was desirable and necessary to compile information on international legal work taking place within and outside the United Nations, Most States had recognized that there was an increased need for codification of international law, particularly in areas where legal standards were not yet manifest. By organizing its work so as to optimize its interaction with the Commission on major contemporary legal challenges, the Sixth Committee could hope to contribute more productively to that end.

15. Mr. PIBULSONGGRAM (Thailand) said that his delegation had followed with interest the developmenta in regard to the law of the non-navigational uses of international watercourses. It was a particularly important question for Thailand, an agricultural country with a population whose livelihood depended a great deal on the use of watercourses which crossed or bordered its territory.

16. The permanent sovereignty of States over their natural resources was a widely recognized fundamental principle of international law. It followed that all States were entitled to use the international watercoursea which formed a part of their territory, free from outride interference. When the right of a State to the exclusive use of international watercourses was considered, due regard must be paid to the notions of "special dependence" and "historic use". Complementary to that right was the general obligation of States not to cause serious harm to other watercourse States, and consequently to keep the latter informed in a timely fashion of planned measures which might have adverse consequences for them.

17. His delegation, however, considered that the question of the obligations of watercourse States needed to be considered very carefully, because safeguards must be provided against the misuse of those obligations to impede planned measures of another watercourse State for political purpoaes. There should be no general requirement to reveal all information and data on a proposed use, or to consult or negotiate on all uses of international watercourses. Such requirements might be

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exploited for political objectives, and might grant a power of vrto to each watercourse State against any measure planned by another State. In the view of his dulegation, the obligation to notify other watercourse States of planned measures applied only if those measures might cause serious harm to thoze States. The exchange of information among watercourze States zhould be restricted to data which would be helpful in determining whether the planned measures in question might indeed result in serious harm to another watercourze State.

18. As to the notion of "appreciable harm", hiz delegation would have preferred the term "serious harm", but was prepared to accept the adjective "appreciable" in the interest of obtaining a consensus, and on the underztanding that for it the two terms were very close in meaning. His delegation considered that the right to exploit the living resources of international watercourzez must be exercised on the basis of the principle of equity, with the Possibility of establishing a mutually agreed maximum allowable catch,

19. As for the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, his delegation considered that reference should be made not only to the diplomatic courier's duty to respect the laws and regulations of the receiving State and the transit State, but also to his duty to respect the "sovereignty" of the receiving State and the tranzit State; it was his duty not to interfere in the internal affairs of those States. In addition, and to reinforce the credibility of the draft articles, a reference should be introduced to the responsibility of the sending State if it failed to respect the sovereignty, laws and regulations of the receiving State and the tranzit State.

20. On the granting of visas to the diplomatic courier, it zhould be pointed out that the principle of reciprocity must apply, As to the inviolability of the temporary accommodation of the diplomatic courier, hiz delegation would zupport the establishment of a reasonable balance between the legal protection of the courier and bag and the interest6 of the receiving and transit Stataz, keeping in mind that that inviolability was secondary to the protection of the national interests of the receiving and transit States. Likewise, concerning the protection of tho diplomatic bag, a proper balance must be established between the need co protect the confidentiality of the contents of the bag and the prevention of possible abuses.

21. Lastly, his delegation could not accep' any wording in the draft articles which amounted to de facto recognition of a sending State that waz not otherwise recognized by the receiving and transit States.

22. Mr. AL-BAHARNA (Bahrain) said that the Special Rapporteur's sixth report on the draft Code of Crimes against the Peace and Security of Mankind focused on the definition of aggression for the purposes of the draft Code, The Special Rappnrteur had followed the Definition of Aggression contained .n General Assembly reaolution 3314 (XXIX), but had omitted its provisions relating to evidence and ccnsequences of aggression, and interpretation of the Definition, considering that those were matters within the competence of the judge.

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23. The definition of aggression provisionally adopted by the Commission at its fortieth session contained certain provisions which did not appear to be essential, particularly paragraphs 5, 6 and 7 of draft article 12. Paragraph 5 stipulated that "any determination by the Security Council as to the existence of an act of aggression is binding on national courts". In the view of his delegation, that paragraph was devoid of practical usefulness since the Security Council was very often paralysed by the Charter provision relating to the right of veto. Furthermore, there was reason to doubt the legal validity of paragraph 5, and it should therefore be deleted. Likewise, the statement in paragraph 6 was self-evident, and not essential to the definition of the crime of aggression,,

24. With respect to paragraph 7 of draft article 12, the notion that warm of national liberation must not be conridered aggression should be formulated in a more direct manner. The first part of the paragraph could be deleted and the second part expanded by the inclusion of a reference to the right to zelf-determination. During its fortieth session the Commission had also considered various proposals by the Special Rapporteur on the threat of aggression, annexation, preparation of aggression, the sending of armed bands into the territory of a State, intervention and terrorism, breach of treaties designed to ensure international peace and security, colonial domination, mercenarism and other crimes against peace. On several of those questions, members of the Commission had profound differences of view, but the Commission should persevere with its efforts until it found the basis for a consensus.

25. As to whether preparation of aggression should be included as a separate crime in the draft Code, his delegation considered that since it was difficult to distinguish between acts amounting to preparation of aggression and legitimete acts of defence, preparation of aggression should not constitute a separate crime. On the other hand, the threat of aggression should constitute a separate crime since the threat of force, like the use of force, was prohibited by the Charter of the United Nations.

26. It did not seem necessary to include annexation as a separate crime in the draft Code, since it was already covered by paragraph 4 (a) of draft article 12, which characterized it as an act of aggression. It might be desirable to expand the scope of that paragraph by including a reference to the threat of force.

27. His delegation considered that the notion of intervention was a particularly complex one both in its nature and in its manifestations. The Commission should proceed with great caution in the matter. However, his delegation in principle favoured the inclusion of intervention as a separate crime.

28. It appeared from paragraph 246 of the report (A/43/10) that the Commission considered terrorism to be a form of intervention. His delegation took a contrary view: because it had become a grave menace in the contemporary world, terrorism must be considered independently of intervention and must be included as a separate crime against peace and against mankind. Furthermore, the reference to the definition of terrorist acts contained in the 1937 Convention on the Prevention and Punishment of Terrorism was not appropriate since that Convention, on the one hand,

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covered both internal and international terrorism and, on the other hand, did not encompass certain more recent forms of terrorism. It was therefore necessary for the Commission to reek to define the crime of terrorism by considering it exclusively from the international point of view and by expanding the scope of paragraph 3 (b) of draft article 11 so as to include actr committed against ships, airports and other related objects.

29. As for colonial domination, two definition8 were proporod in paragraph 6 of draft article 11, and his dolegation suggested that they rhould be combined, as had been suggested during discussions in the Commission.

30. Mercenarism should constitute a crime distinct from aggression, since the acts of mercenaries were directed againrt the civilian population, while aggression was directed against a State. The Commission rhould await the outcome of the work of the ad hoc committee on mercenarism and the Third Committee of the General Assembly, which were dealing with the matter, before taking *a* decision on the definition of mercenarirm.

31. His Governmc at considered that codification of the topic, which had lost none of its urgency, should be continued, since the Definition of Aggression adopted by the General Assembly had served for too long as a pretext for putting off consideration of the matte;.

32. Mr. AL-KHASAWNEH (Jordan) raid that as far as the law of the non-navigational uses of international watercourrer was concerned, his delegation had from the outset expressed reservations with regard to the framework agreement approach. The elasticity of the two concepts of "appreciable harm' and "equitable utilisation", and the prominence given to negotiating and concluding agreements among watercourse States left much ·oom for argument and therefore for injustice. While the special nature of watercourses and the requirements for their optimal and equitable utilization called for mutual adjustments, a careful balance nevertheless had to be struck between the need for permanent negotiation6 between States on the one hand, and the credibility *of* international law on the other. His delegation had serious doubts that the general structure of the draft articles achieved that balance. Given the elasticity of the normative rules, the faith placed by the draft in negotiation8 obscured the reality of power disparities between watercourse States. Negotiations depended on the relative power of negotiating States and the skill of their negotiators, not to speak of the advantages which geography might confer on one State over another. While his delegation was still of the view that the slaboration of the general convention was possible, it realised that the framework agreement approach adopted by the Commission had gained some acceptance. Its serious shortcomings could be mitigated, although not entirely eliminated, by drafting rules with binding force, so that the framework agreement was not only an instrument of a general residual nature in the absence of specific agreements. Furthermore, the framework agreement should contain more substantive rules, and provide for fact-finding machinery and a binding procedure for settling disputes.

33, His delegation thought that the draft should contain provisions relating to co-operation and the exchange of data and information, and it welcomed the adoption

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of articles 9 and 10 of part II a8 well as articles 11 to 21, which constituted part III. Although article 21 introduced a measure of flexibility into an otherwise rigid ctruaturo, the Jordanian delegation agreed with the representative of Austria that it only rtatrd the obvious. It would prefer a more explicit reference to the rolr of thr United Nations. Thr Organisation, like the specialised agencies, had an important role to play not only in situations where there were serious obstacles to direct contacts but in the wider context Of providing trahniaal assistance and information on watercourses. Such a role, which had born clearly envisaged at the Mar del Plata Conference and at the Dakar Meeting could be indispensable for de loping countries. His delegation failed to see why that role war eliminated from the draft, particularly since the former Special Rapportour, aware of its importance, had made provision for it in his own draft articles.

34. There was also a need to harmonise the terminology used in articles 8 to 21 with similar provisions in the United Nation8 Convention on thr Law of the Sea, namely articles 202 and 190 ("States shall, dir otly or through competent international organisations ..."); a measure of flexibility, with proper drafting, would not dilute the contents of the obligation. The rapid adoption of the draft article8 at thr Commission's most recent session should not obscure the need to reconsider those questions and it was to be hoped that the Commission ould find it possible to do so.

35. His delegation recognised thr • xtromo seriousness of the problem of pollution and environmental protection, and the need to address it adequately. It was a matter of grave concern that 80 per cent of marine pollution was land-baaed and roached the rear through rivers. It would be ironic *if* the duties accepted by State8 to deal with the "protection and preservation of the marine environment" (part XII *of* the Convention on the Law of thr Sea) were to be undermined because of a lack of adequate measures with regard to watercourses. The draft had been elaborated on the assumption that each watercourse war a self-enclosed ecosystem and the right8 and duties had been designed to deal with the ,eality *of* interdependence within a simple ecosystem. However, the introduction of the question of pollution and environmental protection moved the emphasis from interdependence within an ecosystem to interdependence among different ecosystems and called into question the very concept of an autonomou8 or even semi-autonomous ecosystem on which the whole draft was based. Was it possible to speak reasonably of the rights and duties of watercourse States - which could be easily identified by mere observation - when a non-ripatian State - for example an island State aituatated thousands of miles away - could suffer appreciable harm as a result of pollution generated in the watercourse7

36. It would not be easy to identify non-riparian States which might suffer appreciable harm on the basis of mere observation. It was difficult to see how the obligations to exchange data and information and those relating to notifications could be effectively discharged in such situations. A possible solution might be to design less rigorous rule8 applicable to State8 which were non-riparian but which might be harmed States. But such a solution could lead to manifest

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injustice: for example, when pollution was generated by the activities of one or more upper-riparian States, was then carried by a river and, after bypassing lower-riparian States because of its current, was deposited in a semi-enclosed sea where it caused appreciable harm to a State bordering that sea. In such a case should the harmed State be denied the benefit of the rights and protection afforded by the draft articles to a watercourse State merely because, on the basis of a geographic criterion, it was not considered to be one? That case demonstrated the inadequacy of a geographic criterion to determine interdependence. Furthermore, it had been stated on several occasions that the concept of good neighbourliness was not confined to situations of geographic proximity.

37. Another possible solution would be to construct a less rigorous régime than that found at present in the draft articles, perhaps on the basis of article 123 of the Convention on the Law of the Sea, relating to co-operation among States bordering on enclosed or semi-enclosed seas. In many respects, the position of watercourse States in relation to the watercourse was identical to that of States bordering enclosed or semi-enclosed seas. If the obligations contained in article 123 were rudimentary and had to be developed, that should not be difficult, since part XII of the Convention on the Law of the Sea set forth a number of detailed obligations. Whatever the solution adopted, it was obvious that, if it dealt with the question of pollution, the matter would be more relevant to non-riparian States; however, it would require a major revision of the drafts adopted so far, and even of the assumption on which the topic had been dealt with by the Commission.

38. With regard to the question of strict liability and responsibility for wrongfulness in the context of article 16, paragraph 2, his delegation thought it useful, first of all, to recall that whatever standard was employed, harm to the environment, especially if it was appreciable, was more likely to be beyond reparation or compensation. A standard of strict liability would ensure compensation for a harmed State, but because it was based on the assumption that the activity giving rise to appreciable pollution was not prohibited, it could lead to a situation where a rich State habitually polluted a watercourse and gave pecuniary compensation. Even if the harmed State accepted that arrangement, harm to the watercourse and its environment would be irreparable. Moreover, the concept of strict liability did not lend itself to damage that was not accidental or which did not result from dangerous activity. On the other hand, if a standard based on wrongfulness was employed, the problems relating to harm to the environment could not be completely resolved, for restitutio in integrum would be materially impossible in most cases, but at least other remedies attaching to wrongfulness would be available.

39. His delegation therefore thought that the applicable standard should be due diligence although it was aware that it was a flexible standard and could place the harmed State under an unduly heavy burden of proof, since only the source State had the means of proving whether or not it had exercised due diligence. The problem could be reduced by shifting the onus probandi to the source State and by providing for fact-finding machinery.

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40. His delegation did not share the view expressed in paragraph 165 of the report that the concept of due diligence could be acceptable only if it were linked to levels of development of a State. While his delegation, representing a developing country, was sympathetic to the concerns underlying that view and thought that a State's level of development should be taken into account in determining due diligence, it believed nevertheless that undue emphasis on that aspect was misconceived. In the first place, there was a definite correlation between the degree of development of a State and the amount of pollution produced in it. Secondly, more developed countries bordered on other developed countries than on developing ones. But more importantly, there should not be two laws, one for developing countries and the other for developed countries.

41. His delegation thought that the work on the topic of international liability for injurious consequences arising out of acts not prohibited by international law could be successfully concluded only on the basis of a greater infusion of progressive development of the law: in fact, it could be said that the Commission's work in that area had been one of ascertaining the degree of progressive development that was politically feasible. If that argument was accepted, certain conclusions would follow for the Sixth Committee and the Commission. The Sixth Committee should indicate clearly to the Commission that the political will necessary to support an exercise based almost entirely on progressive development did exist. A certain boldness was warranted since the members of the Commission had a duty, as jurists, to meet the desire of the international community by elaborating legal regulations governing non-prohibited activities giving rise to transboundary harm and to ensure that those who suffered when harm occurred would not be left to bear their loss alone. From that standpoint, the distinction between codification and progressive development lost its significance.

42. As far as the Commission itself was concerned, the progressive development of the relevant law called for creativity in drawing upon analogies from municipal legal systems and from the general principles of law within the meaning of article 38 of the Statute of the International Court of Justice, It also called for ingenuity in translating maxims embodying concepts of fairness and equity, such as sic utere duo ute alienum non laedas and "no innocent victim should be left to bear his loss alone", into specific obligations. Lastly, it called for daring in transforming ethical obligations evidenced, for example, by the payment of ex sratia sums to those who suffered harm, into legal obligations.

43. In other words, the exercise called for heavy reliance on legal logic, moderated by considerations of pragmatism, which might not always prove easy, as exemplified by the justifiable decision by the Commission to *restrict the* topic to activities with physical consequences. Yet, from a logical and moral viewpoint, the Commission's restriction was likely to undermine the unity of the topic. So as to reconcile logic and pragmatism, the Commission must, in confining the topic to physical aspects, demonstrate that it was not oblivious to the importance of other non-prohibited activities and that it would, in fact, deal with them, as the Special Rapporteur seemed to suggest (Cf. para. 55 of tne Commission's report) in a different context.

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44. A similar problem arose with respect to harm occurring outside the national jurisdiction of any State, when the interests of a multitude of States were involved. It might be useful to compare that situation to one in which there were a number of States of origin and a number of affected States. The Commission had based its work on a simple model of one State of origin and one harmed State, but to be truly useful the model might need to be revised in order to take account of the complexities of life. In any event, the Commission should keep the topic under consideration.

45. With regard to the title of the topic, there had been a number of comments calling for its modification: elegance aside, it seemed preferable to speak of harm rather than injury, the latter term connoting a legal injury and the former a factual harm, and to include the word "physical" in the title. The problem also related to the fact that the topic had strayed into the realm of general secondary rules governed by State responsibility. Nevertheless it was not uncommon for a title of such a topic to pose difficulties, and his delegation thought that it would be premature to modify it. Further, some overlapping of the topics of State responsibility and liability might be unavoidable. Lastly, the object of the draft - described as modest in paragraph 24 of the Commission's report - must not be overly modest: if the substantive rules were minimal or elastic and much was left to negotiations among the parties concerned, there was a strong possibility that the result would be a mosaic of rules representing the antithesis of codification.

46. With regard to article 1, the words "when such activities create an appreciable risk of causing transboundary injury" unduly narrowed the scope of the draft articles. The criterion of risk should be limited to prevention. With respect to reparation, that criterion had a basic weakness in that an activity might carry a hidden or imperceptible risk. If, in such a case, harm occurred, an innocent victim should not be left to bear his loss alone. The notion of appreciable risk was further narrowed by the provisions of article 2 (a).

47. The words "the jurisdiction of a State as vested in it by international law" had been the subject of much discussion in the Commission, a discussion which, in the view of his delegation, had been out of proportion to the general development of the draft articles. Further, the notion of "jurisdiction" or "control", as opposed to a territorial criterion, had the advantage of being more comprehensive and of having been used in other instruments, including the 1972 Stockholm Declaration (art. 22). Nevertheless, the terms in question raised certain problems and the Commission should keep an open mind on the point.

48. The word "appreciable" had been a source of confusion, and for good reason. In other instruments it was used to mean significant, while in others the two adjectives seemed to be synonymous. Moreover, in paragraph 28 of the report, it was used in the sense of foreseeable, whereas in paragraph 62 appreciable risk was defined as "greater than a normal risk". The Commission might wish to look into the question with the aim of bringing uniformity to the use of the adjective "appreciable" in the topic before it as well as in the topic on watercourses.

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49. With regard to article 6, while no one would contort the freedom *of* States to permit in their territory any human activity that they considered appropriate, it was difficult to see why it was only with regard to activities involving risk that that freedom mhould be compatible with thr protection of other States. The avoidance *of* harm ● hould be the guiding principle in striking a balance between the reality of interdependence on thr one hand and the tenacity *of* the concept of sovereignty on the other. Moreover, from a presentational point of view, ths words "any human activity considered appropriate" oould give the impression that prohibited activities were also included.

50. With regard to article 7, the principle of co-operation, dealt with in that article, should be further ● laboratod, Nevertheless, analogies with co-operation in the law of the non-navigational uses of watercourses could be misleading, for, in that topic, the States that would undertake the obligations were more readily recognizable. With respect to article 8, him delegation agreed with the view expressed in paragraph 91 of the report that it could be dropped without loss to the text.

51. With regard to article 9, him delegation agreed with the representative *of* Australia that it war not clear what war added by the word "presumably", given that in article 2 appreciable risk war defined as that which could be identified through simple examination. Further, he felt that the article mhould draw upon the language used in the provisions of the Convention on the Law of the Sea, to which he had referred in his comments on watercourses.

52. With respect to article 10, dealing with reparation, there was no reason wh/ the protection of an innocent victim mhould be limited to activities involving risk. Lamtly, the two criteria for settlement, namely negotiations and substantive rules, were acceptable to his delegation. A balance had to be struck between the need for negotiation6 between States on the one hand and the credibility of international law on the other, two notions that wore rometimer incompatible. But, as pointed out by the representative of Brazil, at one paint or another it had to be decided what would happen if the question was not settled by negotiation.

53. Turning to the draft Code of Crimes against the Peace and Security of Mankind, he noted that the promise of the Nuremberg judgemrnt had not been fulfilled, for, as the memories of the horrible deeds of the Second World War receded, so waned the resolve to elaborate a code that would make it possible to bring criminals to justice without requiring the defeat of the States of which they were nationals. The reason was that the Code, if elaborated, would apply to present-day leaders and heads of Government: it would take an extraordinary sense of justice and an unwavering commitment to the rule *of* law on the international plane for representatives of States to elaborate a code that could one day apply to their own leaders and heads of Government. Perhaps the only hope lay in an organ, such as the Commission, made up of members acting in their individual capacities. At the same time the difficulties for the Commission of acting in an area which was at the meeting place of law and politics and which touched everyone's sensibilities and deeply-held convictions could scarcely be exaggerated. That said, it could be

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asserted that the Commission's work on thr subject had been successful, for which *credit* rhould go first and foremost to the Special Rapporteur, Mr. Thiam.

54. In article 4, the concept of aut dedere aut judicare rhould be given greater precision, and an order of priorities indicated in cases where there were conflicting jurisidictional claims or where a State received multiple extradition requests. That would lead to greater certainty of the law applicable and help the requested State to discharge its duties with fairness. Although it was difficult to determine an order of priorities given the different considerations that had to be taken into account, the bases on which jurisdiction was asserted were not all of equal strength. While the primacy of jurisdiction based on the territorial principle war generally acknowledged, the same could not be raid of the protective principle and thr passive nationality principle, which some States did not oven claim for themselves. For the time being, he would simply note that as stated in paragraph (1) of the commentary to article 4, "the formulation of morr specific rule8 needed for the actual implementation of the Code and to be included in an appropriate part of the draft Code is loft until a later stage".

55. His delegation al80 considered that the text might be improved by defining, possibly in an article on the use *of* terms, the words "an individual alleged to have committed a crime", a8 had been proposed. It must be recalled, however, that in the convention8 to which reference was made in the commentary, including one, on the protection of diplomatic agents, which had boon prepared by the Commission itself, no need had been frlt *for* such a definition. Nevertheless, such a definition in the Code could be considered a useful addition to the judicial guarantee8 provided for in article 6.

56. Turning to article 7 (non bis in idem), he noted that too many possibilities were postulated in a single article to make for easy reading. Regarding the first exception to the basic rule, set out in paragraph 3, hi8 delegation agreed with the representative of Australia that the Commission should consider modifying it: subsequent prosecution under the Code should be for an offence that was significantly more serious in the circumstance8 than the earlier prosecution.

57. A8 for the second exception, set out in paragraph 4, the representative of Australia had said it war too broad. It must be pointed out, however, that the rule non bis in idem was not part of cuatomsry international law and that it8 inclusion in the draft we8 an instance of progressive development. Seen from that angle, the rule was itself an exception to the general rule which did not prohibit double jeopardy. That being so, the rule could not be treated differently on the basis of the principle on which jurisdiction was asserted. It was difficult to see why a victim State should be able to dispense with the rule while the State of which the alleged offender war a national should be precluded from retrying him. Although it had no strong view on whether the rule rhould be embodied Jr. the draft, hi8 delegation believed that if it was included it should be included without exceptions.

58. The presumption of good faith was a cardinal principle of international law. Accordingly, any trial in a particular State should be presumed to have been

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proparly conducted. On the othar hand, the rula non bis in idem war not to be found in thr conventions relating to different aspects of international terrorism. Since the aotr criminalised under those conventions would presumably baooma crimes under the Code, thr relationship between those instruments and the Code in respect to the rule rhould be furthar studied.

59. With ragard to article 8 on non-ratroaotivity, the basic rule enunciated in paragraph 1 war *an* applioatioa *of* tha principle nullum crimen, nulla poena sine lege. In one of his ● arlior reports, the Special Rapportrur had noted the divergence of opinion in doctrine on tha intorprotation *of* tha word lex in the maxim and ● xpraaaad the opinion that a wider interpretation would do away with the problam. However, it was diffioult to see how tha restrictive wording "or domestic law applioabla in oonformity with international law" could be interpreted as a sufficiently broad *intorprotation* of tha word lex. It war to be feared that it would open a considerable loophole that would ● nxblo criminals to escape being brought to justice.

60. Article 12 called for a number of comments. First, resolution 3314 (XXIX) on the Definition *of* Aggression could be incorporated into the Code by mean8 of a renvoi or by raproduoing its contents iTheoCommission c o u l d also *inoorporata* in the Code the partr of tha Definition relevant to the criminal prosecution of individuals for the crime of aggression. In doing so, however, it oould be accused of ● olootivity. In that oonnrction, the Commission must take into consideration a number of legal instruments of widely differing degrees of acceptance by States and a number of United Nations resolutions that sometimes lacked the precision needed in criminal matters. Thr Commission murt alro take into account at least one care decided by the International Court of Justice. Clearly, the Commission should be left a wide measure of discretion in that domain.

61. Secondly, from a conceptual point of view, aggression could exist without a prior finding by the Security Council. Article 51 of the Charter authoriaed the exercise of the inherent right of self-defence before measures had been taken by the Council. *However,* even if the crime aggression could exist without a prior finding by the Council, as Jordan believed to be the case, it must be admitted that there were too many possibilities of abuse. The representative of New Zealand had rightly pointed out that national courts should be bound by a positive Nevertheless, State's accept and carry out the decisions of the Council under Chapter VII *of* the Charter (an obligation under Article 25) on the one hand and the independence *of* the judiciary on the other. The real problem was when there was no finding by the Council, and on that point he had in mind, not the use of the veto, but rather the Council's tendency to act as fireman and not as judge. Although it was difficult to be certain in the matter, his delegation inclined to the view that, in the absence of a prior determination by the Council, national courts and, with more certainty, an international criminal court, should be able to prosecute for the crime of aggression.

62. Mr. TUERK (Austria), speaking on the status *of* the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, said he regretted that some

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of thr concerns ● xprerred by his country in its written comments on the draft artioler adopted by the International Law Commirrion in 1980 had not been takan into consideration, although he realised that it would be impossible to have the suggestions of all States acoapted in each care. Nevertheless, in view of the oontroverrial nature of some of the questions rained, it would seem particularly important to arrive at oompromira formulationr, so as to enhance tha general acceptability of a draft oonvantion the need for which was not unchallenged.

63. On tha question of extending the scope *of* the draft articles to international organimationr and national liberation movementr, on which tha Chairman of the Commirrion had invited comments, he said that his delegation had no objection in principle. As the host country to a number of international organisations, Austria recognised, in the headquarters agreements concluded with those organisationr, the right to employ oourierr and bagr. National liberation movementr, in so far as they were represented by permanent observer missions to those organisations in accordance with the rtatutar and decisions of the international organisations concerned, enjoyed tha same rights. However, since the matte: had not raised any practical difficulties in the past, there reamed to be no need to include those entities rpeoifically in tha scope of the draft articles.

64, On the other hand, his delegation welcomed tha suggestion *of* the Special Rapportrut that a new rubparagraph (a) rhould be added to draft article 11 relating to the end of the functions of tha diplomatic courier, since such a provision would define in practice the moat common reason for the termination of the functions of the diplomatic courier.

65. In the care *of* draft artiola 13, which daalt with the facilities accorded to the diplomatic oourier, his country was particularly disappointed that its comments had not been taken into conridaration, as it appeared from the discussions in the Commission that its concerns were shared by a number of the Commission's members. His delegation hoped that at some further stage those concerns might be taken up, with a view to rarolving the issue.

66. Draft article 17, relating to the inviolability of temporary accommodation of the diplomatic courier, was an unnecessary and impracticable provision which could not be justified by legitimate concern for the safety of the diplomatic courier and the diplomatic bag. It was well, nevertheless, that the Special Rapporteur had stated (para. 378 *of* the Commissioner's report) that the question deserved further study in order to find a formulation offering better prospects for acceptance. His delegation trusted that in the course of the *second* reading of the draft articles, the Commissioner would be able to arrive at a solution to the question that took into account the views of a substantial number *of* Governments.

67, Draft article 28, on the protection of the diplomatic bag, was rightly referred to as the "key provision" of the draft. While it was regrettable that the Commission had not yet been able to resolve the problems posed by the draft article's provisions, his delegation was encouraged by the efforts of the Special Rapporteur and the members of the Commission to arrive at a generally acceptable solution. In that connection, although none of the formulations submitted by the

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Speoial Rapportour was entirely satisfactory, alternative C war on the right track notwithstanding the fact that it would entail tha revision of existing oonventionr. A8 a general rule, him delegation held the view that tha receiving State - and to a certain degree the tranmit State am well - had a legitimate interest in preventing the diplomatio bag from being abused in such a way that its national meourity would be jeopardised. Since current international law was at best unclear on the means at the dimpomal of receiving State8 for preventing much abuses, it would serve an important purpore to lay down clear ruler which would apply in every came where a State had good reason to believe that such an abuse was occurring. Such provisions should apply to all types of bags, which would rule out alternative B.

68. Since Austria war among those countries which held the view that electronic screening of diplomatic bags war in itself not prohibited by the rule8 *of* positive international law, ● xoept where the oonfidentiality of the legitimate content8 of the bag might be jeopardised, him delegation mtill had doubt8 am to the categorical stipulation in paragraph 1 of alternative C. Tha whole purpore of the provision - which war ♦□ • n8ure the oonfidentiality of the content8 of the bag - mhould alraady be reflected in the wording of that paragraph. Hence, him delegation did not share the Spaoial Rapporteur's opinion, in paragraph 450 of the Commissioner's report, that "the easiest way out, apparently, would be to adhere to the proposed mlternative B".

69. One of the merits of the current codification exercise was the unification in a single régime, of the various norm8 relating to the diplomatic courier and the diplomatic bag not accompanied by courier. Therefore, the possibility of optional declarations, am foreseen in draft article 33, war not justified, a view held, moreover, by the great majority of Governments and most member8 of the Commission. His delegation would therefore encourage the Speoial Rapporteur to delete that provision.

70. Hi8 delegation also mhared the Special Rapporteur's belief that it should be pommible to clarify, elsewhere in the draft convention, that the adoption of a uniform legal régime would not imply blanket acceptance of the provision8 of legal instruments to which a State war not a party. Such a safeguard clause should dispel States' fear8 that they might be bound by provisions of international agreement8 which they had not accepted, while obviating, the need to resort to a multiplicity of legal régimes. Lastly, hi8 delegation supported the proposal to add to the body of draft article8 a provision concerning the peaceful settlement of disputes.

71. The fundamental problem with respect to State responsibility was the question a8 to the final outcome of the Commission's respective endeavours. It would certainly be premature to suggest the final form which the draft articles on State responsibility should take, Perhaps that was a case where the results of the Commission's work might - at least in the initial phase - take the form of guidelines. Although it was premature to go into the detail8 of the various draft articles, draft article 6, relating to cessation of an internationally wrongful act

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of a continuing oharaatar, and draft article 7, on restitution in kind, were clear in content and, with □■ℳ ● xoeption, had bean formulated in conformity with State practice and doctrine.

72. In paragraph8 104 to 129 of him report, the Special Rapporteur met forth argument8 against offering the ohoioe between restitution and oompenmation to a State whioh had committed an internationally wrongful act, or in a came where the wrongful act had been oommitted in relation to *a* foreign national. That *gave* rime to a quartion. Assuming that a State war ● ntitlad to nationalise foreign-owned property in ● xohange for due oompenmation, if the *State* whioh decided to nationalise failed to offer companmation, it war guilty of an internationally wrongful act. Did draft article 7, am propomed by the Special Rapporteur, imply that much *a* State, even if, *at a* later stage, it offered adequatm oompenmation, including interest, would mtill be under an international obligation to make restitution in kind? Him delegation trumted that the question would be faithfully transmitted to the Speoial Rapporteur, and anxiously looked forward to a response in the Commissioner's 1989 report.

73. Mr. LUKIANOVICH (Union of Soviet Sooialimt Republics), referring to the draft articles on the ● tatum of the diplomatlo courier and the diplomatic bag not accompanied by diplomatio courier, Said *that,* on the whole, the text ● 1aborated by the Commission provided *an* acceptable basis for the adoption of an equally aooeptmble international legal instrument. However, some Of it8 provisions would benefit from additional olarifioation. The draft mhould attempt to improve the regulation8 concerning oorrempondence between States, and mhould confirm and develop the norms relating to freedom of communications. In that connection, the principle of the courier's personal inviolability and, hence, the inviolability of him accommodation, mumt be reaffirmed. To that end, it would make sense to supplement article 17 by having its paragraph 1 read: "The temporary accommodation of the diplomatio courier shall be inviolable. The agents of the receiving State or, am the came may be, of the transit State, may not enter the temporary accommodation, ● xoept with the ● ☒□□ℳ○○ consent of the diplomatio oourier. Such consent may be assumed in case of fire or other disaster requiring prompt protective action, provided that all necessary measures *are* taken to ensure the protection of the diplomatio bag, am stipulated in article 28, paragraph 1".

74. In paragraph 3 of the same article, the receiving State or the tranmit State should be placed under the obligation, "in the event of inspection or search of the temporary accommodation of the oourier, to guarantee him the opportunity to communicate with tha mission of the rending State, so that its representative could be present during much inspection or search".

75. The principle of inviolability of the diplomatic bag must also be explicitly stated. Consequently, article 28, paragraph 1, should have the following wording after the bracket8 were removed: "The diplomatic bag shall be inviolable wherever it may be; it shall not be opened or detained and shall be exempt from examination directly or through electronic or other technical devices". That formulation would be in conformity with the current conditions of development 2nd the well-known

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provimion of artiole 27 of the 1961 Vienna Convention on Diplomatic Relations, the moat authoritative text in the field.

76. Article 28, paragraph 2, daalt only with the oonmular bag, for which it established a partiaular régime, mtigulating that the bag mumt be examined *or* returned to its place of origin. There war hardly any jurtifioation for withholding one partioular aspect from the general régime of communications. That *ran* counter to the prinoipal objective of the draft, which war to unify the international norms applioable in the field with a view to affording States greater freedom in communicating with their missions abroad. From that perspective, paragraph 2 *of* artiole 28 could be deleted.

77. Similarly, draft artiole 33, which provided for optional declarations, also failed to meet the objeotive □↗ ● mtabli8hing a mingle régime for all categories *of* couriers *and* bags listed in draft artiole 3. It should therefore be deleted. Article 33, which gave States the right to exclude certain categories of couriers and bags from the moope of the draft, might had to further oontradictionm in State practice and ● ubmtantially complicate communications between the sending State and its missions *abroad,* particularly in a case where tho bag mumt pars through another State.

78. Am indicated in *paragraph* 13 of its report, the Commission had barely considered the quemtion *of* jurisdictional immunities of States and their property. That subject went to the very heart of international law, and the aim *of* the codification exercise in that field mhould be to proclaim generally accepted norms and *met* forth provisions aooeptabla to all, taking into account the precedent8 established and the practice of States. In that connection, *the* future convention could confirm the jurisdictional immunities of States and their property by providing *for* certain well-defined ● xceptionm. That would remove the prevailing legal uncertainty due to the fact that some States had different approaches to the quemtion.

79. The full jurisdictional immunity of the State, bared on the principle of respect for sovereignty and non-intervention, had always been recognised in Soviet doctrine and practice. Certain States had rejected in their doctrines, legislation and practice, however, the concept of jurisdictional immunity in the traditional sense, and replaced it with *that* of functional immunity, As a result, application of the relevant principles was *weakened* considerably, and conflict was created in relations between States.

80. A close examination of the draft indicated that an attempt was being made to codify therein principle8 relevant to the immunity of States and their property on the basis of the concept of functional immunity, no account being taken of the position of States opposed *to* that concept. When an international instrument was being drawn up, however, the relevant views of States must be taken into consideration. To make up for that deficiency, parts of the text, in particular part8 III and IV, should be redrafted, and the number of cases in which a State could not invoke immunity should be reduced. If not, the very principle Of immunity would be undermined.

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81. For that purpose, on the basis of the legislation of a large number of countries, it would be appropriate to embody in the draft articles the concept of separate property, which war largely recognised in thr socialist countries and war also enshrined in numerous international principles *and* instruments, much a8 the Protocol of 23 September 1976 amending the Rome Convention on Damage Caused by Foreign Aircraft to Third Parties, article 1 of the 1969 International Convention on Civil Liability for Oil Pollution Damage, and artialr 2, paragraph 1, of the Convention relating to the Limitation of Liability of Owners of Inland Navigation Vessels of 1 March 1973, According tothatconcept,public● ♋♦□□□□)(♌□♌ hadalegal personality and possessed part of the assets which they were entitled to use or to transfer without involving State liability and without being liable to the State. That concept must be ● n8hrin.d in the Commission's draft ● rticlo, and the wry it was dealt with would determine his delegation's attituda to the draft.

82. As to specific articles, hi8 delegation considered that in it8 present wording, article 6, which dealt with the principle of State immunity, rendered the draft meaningless and would have the effect of making it possible for immunities to be restricted unilaterally. A8 a result, the future convention, which war intended to define the principle of immunity and to specify exceptions to it, would fail to achieve it8 objective. Having confirmed the principle of immunity in that article, the Commission proceeded to deal with the question of exceptions. Thr traditional theory of immunity allowed exceptions, provided that they had the express consent of the State in question, in other words, *of* a future State party to the relevant convention.

83. Surh being the case, part III of the draft could contain a number of provisions, the scope of which should be limited in order not to detract from the principle itself. The exception8 currently provided for in that part of the draft were unacceptable. For example, article 13 referred to an act or omission the author of which was a subject of law (but not a State) who war present in the territory of the State in question at the time *of* the act or omission. Pursuant to the draft, the State could *amend* that provision and prosecute the author of the act or omission. It was clear, however, that personal injuries or damage to prc srty could result from an act or omission by a natural or legal person. In both cases, the problem *of* compensation for such injuries or damage arose, and the draft article made no provision for regulation of such compensation. Whore the question of State liability arose, the rule8 of international law would apply. Those could not be defined by national courts. They were provided for in numerous international conventions. In it8 present farm, the article war unacceptable.

84. The wording of draft article 14, which dealt with ownership, possession and use of property, particularly the provision concerning the right to own, possess and use nationalized property situated in the territory of the State concerned, wae too vague.

85. Article 20 wae extremely vague and could not, therefore, serve a8 a basis for the exceptions to the rule laid down in article 14. The rule8 provided for in paragraphs 1 (b) to 1 (e) of article 14 could be interpreted a8 opening the way to

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foreign jurisdiction, even when there was no relationship between tha property end stat. courts. Draft article 16, which dealt with State-owned or State-operated ships● ■ incommercialservice, could pose numerous problemr for States; incorporation of the concept of separate State property would *do* much to hrlp solve thorn. Article 20, darling with cases of nationalisation, could be interpreted in such a way that it rendered ineffectual the principle ● rteblirhod in international law with regard to act8 of nationalisation outside national territory. Thr wording of the first part of article 21, concerning State immunity from matters of constraint, war consistent with thr requirements of contemporary international law. Nevertheless, paragraph (8) of that article limited considerably the principle● XprO88Odtherein. Articles 21 and 23 could be considered together and reworded in the light of the comments made.

86. His delegation considered that, far from being ● xh8u8tivo, thr ● xempl.8 given demonstrated the need for a serious revision of the articles, reflecting tho substantive proposals put forward by thr Soviet Union among others. The preparation of an international instrument could then be continued in a constructive spirit.

87. Mr. WATTS (United Kingdom) said thrt hi8 delegation was very disappointed with the outcome Of the Commission's discussions at it8 fortieth session with regard to the rtatur of the diplomrtia couries ● ■ the diplomatic bag not accompanied by diplomatic courier. As they stood, the draft ● rticl.8 would do nothing to help curtail abuses of the diplomatic beg of the type that had boon well publicised in recent years. He hoped that radical changes could still be made, because, if not, the necessary consensus would not ● Xi8t *and* it would be impossible to justify convening a diplometio conference to adopt an international instrument, ● specially at a time when the finances of the United Nation8 were in such a parlous state,

88. His delegation was firmly opposed to any ● xten8ion of the scope of the draft article8 to cover bag8 used by international organisations and national liberation movements. The status of bag8 used by the former should be regulated by the relevant agreements relating to the organisation in question, while it would simply be unacceptable to give special treatment to those used by the latter. It was, in any case, too late to make a change that was so fundamental that it raised a host of now and complex issues.

89. The written comment8 submitted by hi8 Government on draft article 8 (A/CN.4/609), referred to in paragraph 330 of the report (A/43/10), appeared to have been misunderstood. It8 intention had born to suggest not that there should be a limit on thr size and weight of the beg, but only that such information should be included in the official document8 provided to the courier.

90. A8 it stood, draft article 13 (Facilities accorded to the diplomatic courier) would impose an unjustifiable burden on receiving and transit States.

91. With regard to the point raised in paragraph 366 of the report, which referred to draft article 15, hi8 Government did not recognise any exception to the rule that the courier muet make his own travel arrangements.

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92, As they stood, artiale 16 and, more prrticulrrly, articles 17 and 18 were likely to hinder any possibility of the draft article8 being generally acoopted. He was, however, pleased to note that former paragraph 1 of draft article 19 had been deleted, Draft article 22 rhould not be interpreted a8 applying to the courier'8 personal inviolability: a courier aould consent, for ● xunplo, to a body search at an airport without any need for a formal waiver of the immunity in question. His delegation was disappointed thrt the Commission had not felt able to strengthen draft article 24, as had been suggested in hi8 Government's written comments.

93. With regard to article 25, hi8 delegation was particularly concerned about the comments made in paragraph 414 of the report, It war axiomatic that a rending State could not import through the diplomatic bag articles whose importation or poLsession we8 prohibited in the receiving State.

94. The ● xaminrtion of the diplomatia bag through ● leatronic device8 (draft article 28) must be permitted in certain clearly defined circumstances, since the draft article8 would otherwire be totally unacceptable. Similarly, the United Kingdom had always taken the position that airline8 could refuse to accept on board a person who, *for* whatever reason, was not prepared to meet their security requirement8 .

95, Lastly, the United Kingdom considered that transit States rhould have the rune right8 under the draft article8 a8 receiving States.

96. Turning to the draft articles on the jurisdictional immunities of States and their property, he stressed, with regard to draft artiale 2, paragraph 1, that the political subdivisions, agencies and instrumentalities of a State should enjoy immunity only when they were acting in the exercise of sovereign authority, That was an important question *of* substance and not one of interpretation, 88 paragraph 508 of the report seemed to suggest. The provision proposed in paragraph 3 of the same draft article as a mean8 of determining whether or not a contract wae commercial seemed interesting. Subject to further consideration, it might be acceptable to his delegation if the draft article8 as a whole were shown to be generally acceptable.

97. Contrary to what was suggested in paragraph 504 *of* the report, the word8 "and the relevant rules of *general international law*" in square bracket8 in draft article 6 should be retained because they allowed the necessary flexibility for taking into account future developments in the law.

98. His delegation remained a8 yet unconvinced of the need for a provision such as the one aet forth in artic:e 11 bis (Segregated State property) proposed by the Special Rapporteur, which wa: not justified by State or treaty practice. The intention seemed to be that State8 rhould be immune in certain circumstances involving proceedings against a State enterprise. If such was the care, that thought could be expressed more succinctly and clearly,

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99. His delegation was surprised by the Special Rapporteur's doubts about tile need for subparagraphs (b), (c), (d), and (e) of article 14 (para.514 of the Commission's report) and would oppose any suggestion that those subparagraphs should be deleted.

100. It was to be hoped that at its forty-first session the Commission would be able to give higher priority to the question of State responsibility.

101. With regard to the planning of the Commission's activities for the remainder of its members' five-year term of office, the Commission should seek as a matter of priority to complete its work on the draft articles on the jurisdictional immunities of States and their property and the status of the diplomatic bag; its desire to complete by 1991 the first reading of the draft articles on the law of the non-navigational uses of international watercourses should also be approved. However, there was little value in the Commission making a special effort to complete the first reading of the draft Code of Crimes against the Peace and Security of Mankind by 1991 or spending more time on consideration of the second part of the topic of relations between States and international organisations, which was unlikely to yield better results than consideration of the first part of the topic had. Instead, the Commission should concentrate its efforts on making further progress on State responsiblity.

102. Where the Commission's future programme of work was concerned, it was to be hoped that the Commission would concentrate on topics for which there was a real practical need and some reasonable prospect of a satisfactory outcome.

103. His delegation wished to stress once again that the Commission's report should be distributed to Governments in good time so that they could give it proper consideration before the debate in the Sixth Committee. Only in that way could the Commission and the Sixth Committee show that they took each other seriously.

104. The Working Group set up in accordance with paragraph 6 of General Assembly resolution 42/156 had done some extremely valuable work. If the Commission and the Sixth Committee continued to work together in that way to carry forward their dialogue, it would be possible, with the assistance of the Secretariat, to do full justice to the important subjects under consideration by the Commission.

105. Mr. MAYNARD (Bahamas) said that, because of the difficulties experienced by delegations in submitting their views on a report as long as that of the Commission, the Commission should be called the "Frustration Commission". An effort should be made to shorten the report.

106. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, article 8 should be deleted since participation was a form of co-operation and it was therefore already covered in article 7. The principle laid down in article 10 (Reparation) should apply in the absence of an agreed regime between the State of origin and the affected State. However, another approach should be considered more closely, namely, that of taking

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as a general principle the obligation to make full reparation and then introducing exceptions. The draft articles could provide that the victim State might have to bear some loss, not only as a result of contributory negligence, but also owing to the particular nature of the kind of liability under consideration.

107. With regard to the law of the non-navigational uses of international watercourses, his delegation agreed to the formulation of a framework agreement which laid down residual rules and would, since it expressed customary law, influence even the conduct of States which were not parties to it.

108. Although the question of pollution should be dealt with in a separate part of the draft articles, the number of articles on the subject should be kept to a minimum. The criterion of due diligence (paras. 163-168 of the Commission's report) should be retained with regard to the obligation imposed in article 16, paragraph 2 (footnote 49, p. 57) of the report. It would make it possible to adapt liability to different situations, such as the level of a State's development. The burden of proof was on the State which was the source of the pollution. The interdependence of neighbouring States made it necessary to tolerate a minimum level of pollution (para. 153 of the report). The Commission rightly qualified the term "harm" and retained the adjective "appreciable" instead of "substantial" because it implied authorisation of a lower level of pollution (para. 154). The concept of the "environment" was preferable to that of "ecology", which was covered by the term "environment".

109. The outline and schedule suggested by the Special Rapporteur were quite acceptable.

110. Many of the issues relating to the two questions of due diligence and responsibility for appreciable harm had arisen, not because of difficulties with the liability topic, but because of problems relating to other topics.

111. His delegation was in favour of including the threat of aggression (paras. 217-221 of the Commission's report) as a separate crime in the draft Code of Crimes against the Peace and Security of Mankind. However, the organization of armed bands within the territory of a State for the purpose of incursions into the territory of another State should not be considered a crime separate from the crime of aggression.

112. With regard to intervention (paras. 231-255), the rule of non-intervention was part of customary international law. Draft article 11, paragraph 3 (footnote 225, p. 151), should include the provision contained in article 2, paragraph 9, of the 1954 draft Code, concerning "coercive measures of an economic or political character". The notions of "disturbance or unrest" (para. 3, second alternative, (1)) and "activities against another State" (subpara. (ii)) should be clarified.

113. Until the work of the Ad Hoc Committee on the drafting of an international convention on mercenaries had completed its work, conclusions regarding the treatment to be accorded to mercenaries could only be provisional (paras. 268-274).

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The deliberations in the Ad Hoc Committee suggested, however, that mercenarism should be considered a crime distinct from aggression. The problem of mercenaries used by drug traffickers *referred* to in paragraph 271 of the report was of particular concern to his Government,

114. The obligation in article 4 (Obligation to try or extradite) was satisfactory to his delegation.

115. Diplomatic bags not accompanied by diplomatic couriers must be inviolable. At the same time, the legitimate security concerns of the receiving and transit States should be taken into account. In that regard, his delegation had taken note of the communication from the International Conference on Drug Abuse and Illicit Trafficking contained in paragraph 437 of the report.

116, The elaboration of alternatives A, B and C for article 28 (Protection of the diplomatic bag) (p. 241 of the report) represented commendable progress towards a compromise. His delegation's preliminary view was that, to place the transit State on the same footing as the receiving State with respect to opening the bag not accompanied by courier might cause delays and also impose additional burdens on the sending State, which would need to provide personnel to be present at an inspection in each transit State.

117. His delegation was gratified that the Commission intended to concentrate in 1989 and 1990 on the second reading *of* the draft articles on the topic, as well as *of* the draft on the jurisdictional immunities of States and their property.

118. With regard to the latter draft, given the dogmatic views on the theories *of* absolute immunity and restricted immunity, the debate should not remain at a theoretical level, but should concentrate on individual issues in order to reach a consensus on the kind of activities in respect of which States should enjoy immunity, The presentation of the topic by the new special rapporteur augured well for further progress. He hoped that article 11 bis (Segregated State property) - although currently cumbersome in its drafting - would prove a balanced compromise.

119. With respect to State responsibility, restitution in kind was the primary form of redress for an internationally wrongful act. At the moment, his delegation had no objection to the two criteria (proportionality and serious jeopardy of the political, economic or social system of the wrongdoer State retained in article 7, paragraph 2, in order to determine at what point restitution in kind could be deemed to be excessively onerous. However, it would be desirable to clarify whether both or only one of the criteria should apply. His delegation favoured the second option. Paragraph 1 of the same article also did not specify whether the criteria in its subparagraphs (a), (b) and (c) should be cumulative or not. He believed that they should be. Moreover, the concept of "serious jeopardy" should be clarified so that it did not provide the wrongdoer with a loophole for avoiding making reparation.

120. With a view to facilitating the work of delegations in the Sixth Committee, the Commission should perhaps consider using summaries *of* the type contained in

(Mr. Maynard, Bahamas)

paragraph 535 of the rrport more frequently, in order to indicate the stage it had reached and what war ● nvieaged next.

121. Lastly, his delegation r)mmended the Secretariat for the high quality of its work end the Commission for its pivotal role in the codification and progressive development of international law.

122. Mr, (Canada) raid that the Commission deserved credit on several counts; (a) for its efforts to improve ite working mrthodr and to ● etehliah a coherent plan of work for the current quinquennium; (b) for the more effective functioning of its Drafting Committee, which had cleared up a tremendous backlog; (c) for its commendable punctuality; and (d) for its willingness to move resolutely from codification to the more difficult and complex task of the progressive development of international law.

123. That having been said, the Commission's working methods could still be improved, and it would be useful to examine a few examples of proposals emanating from various sources: (a) with aview to ensuring continuity, the members' terms of office could be staggered, with a certain number of the seats coming up for election every two to three years, instead of having all the seats come up for election every five years; (b) with a view to ensuring the regular contribution of new talent, a time-limit of two or three terms of office could be set for every member of the Commission; (c) with a view to lessening fatigue, two sessions could be held per year instead of one, with the total number of weeks remaining the same; (d) with a view to ensuring chat the Commission was kept abreast of other activities in the area of the development of international law, a biennial update of the 1971 Survey of the International Law Commission (A/CN.4/245) listing such activities could be prepared] (e) with a view to enabling members of the Commission to be fully informed on all subject areas in its agenda, the suggestion made in paragraph 570 of the report (A/43/10) could be adoptedr (f) with a view to enabling Governments to be prepared on time, all the special rapporteurs' reports could be transmitted to them an soon as they were issued; (g) with a view to ensuring harmonization of the texts produced by the Commission with other international instruments, a computerised data base could be developed . particularly for the benefit of the Drafting Committee - of texts of bilateral and multilateral instrumontr relating to the rubjecta under study by the Commission; (h) with a view to facilitating the technical aspects of its work, the Commission could more frequently consult with experts, as envisaged in article 16 (e) of its rtatute; (i) with a view to expediting the work of the Drafting Committee, further flexibility in the latter's membership should be permitted, so that while a core group might be maintained for all subjects, an agreed number of "ex officio" members might be utilized for certain subjects; (j) with a view to enabling Governments to cope better with the mass of material emanating from the Commission, its report could be shortened - for example through the elimination of the historical material - and, instead of all subjects being dealt with in a single report, a separate one could be prepared on each topic, for distribution as soon as it was issued; (k) with the same aim, at the end of each session Governments could be sent summaries of the developments on each topic, along with draft articles, if

(Mr. Tetu, Canada)

any; (1) to enrich the debate in the Sixth Committee, the necessary funding could be provided to enable each Special Rapportrur to be present in New York during the debate; and, lastly, (m) the Sixth Committee could recommend the deferral or deletion from the Commission's agenda of items in which Governments appeared to have little interest,

124, At the current stage, the suggestions he had made were not formal proposals but were designed to stimulate a constructive dialogue.

The meeting rose at 6 p.m.