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SUMMARY RECORD OF THE 44th MEETING

Chairman: Mr. FRANCIS (Jamaica)

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The meeting was called to order at 9 p.m.

AGENDA ITEM 130: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS THIRTY-EIGHTH SESSION (continued) (A/41/10, 406, 498)

AGENDA ITEM 125: DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND: REPORT OF THE SECRETARY-GENERAL (continued) (A/41/537 and Add.1 and 2)

1. Mr. KIILU (Kenya) said his delegation agreed with Sweden that the Sixth Committee was not the forum for detailed examination of the various topics. That should be the function of written replica and comment8 addreeaed to the International Law Commission. Statemente before the Committee should be confined to guidance specifically requested by the Commission.

2. The question of jurisdictional immunities of Staten and their property was inextricably linked to the concept of State eovercignty. Kenya approved the general outline prepered by the Commission, which, to a larqe dcqree, had succeeded in codifying the essential elements of the topic. However, some chanqee could be made where diveraencee of opinion still existed. In article 6, for example, the words "and the relevant rules of general international law" should be deleted. As State immunity was, in essence, a unitary principle, it should be limited only by exception8 contained in the draft articles themselves. The retention of the words in square brackets would be inconsistent with the very purpose of the draft articles.

3. Similarly, because State immunity was a unitary principle, Kenya prepared the word *exceptions" to "] imitations" in the title of part III. "Exceptions" better reflected the concept of State immunity as an integral feature of a unitarv principle, rather than as a set of rules Independent from the principle.

4. The interests of developing countries such as Kenya would be served if the term "non-governmental" were not bracketed in articles 18 and 23. As a developing country, Kenya entered into contracts in the performance of public duties which were, strictly speaking, not intended for commercial purposes. His delegation also believed that protection of Central Bank funds from measures of constraint (art. 23 (1) (c)) was extremely vital, and a reflection of the concept of State sovereignty.

5. Turning to the draft articles on the status of the diplomatic courier and the diplomatic baq not accompanied by diplomatic courier, he said that it was disturhinq to see square brackets in article 28, when there should be agreement on such a crucial provision. Kenya preferred to retain the bracketed words "be inviolable wherever it may be; it shall" as a loqical expression of the concept of the inviolability of diplomatic archives. That concept was specifically provided for in the 1961 Vienna Convention on Diplomatic Relations, and was recognized in customarv international law. In order to protect confidentiality, Kenya favoured retaining the phrase "and shall be exempt from examination directly or throuqh electronic or other technical devices". In article 28, paragraph 2, a fair balance

(Mr. Kiilu, Kenya)

had been struck by the provision allowing the baq to be opened by an authorired representative of the sending State or to be returned, if it was suspected of being used for an illegal purpose. Even if the exercise of those rights bv a receiving or transit State could aqqravate a dispute, there was nu alternative approach that would satisfy the interests of the parties concerned. Kenya opposed the inclusion of article 33 on optional declaration, because uniformity would be lost if State8 could declare the articles inapplicable in certain cases. Furthermore, confusion would arise if a multiplicity of leqal régimes were recoqnized in that article.

6. Referrina to paraqraph 60 of the Commission's report (A/41/10), on State responsibility, he said that a harmonized approach could be achieved ii! the Commission took into account developments on both the draft Code of Offencea aqainst the Peace and Security of Mankind and the topic of international liability for injurious conseauenccs arisina out of acts not prohibited by international law. In connection with the draft Code, a decision could be taken at a later staqe on whether to focus on crimes committed by individuals as opposed to States. That was an important issue in determininq the content of the Code rationе personae.

7. His deleqation approved the qeneral outline proposed by the Special Rapporteur for the catcqorixation of the crimes. The "mass" element seemed a useful criterion for determininq whether atrocities directed at a section of humanttv could be classif ied as crimes aqainst humanity. The concept of special intention, together with that of motive would also be a useful criter ion. Kenya aareed that the draft articles should mention apartheid, because apartheid was tnternationallv recoqnized as a crime aqainst humanity.

8. Kenya shared the Special Rapporteur's assessment thot it was difficult to fix a dividina line between war crimes and crimes aqainst humanitv 8S such (A/41/10, para. 108). Kenya would have stronq objections to an alternative formulation Of the traditional concept of "war crimes", for thouqh its meanina had changed in contemporary international law, its content had not. His delegation aqreed that the manufacture, possession and use of nuclear weaponn should be outlawed, and that it was inappropriate to include the concept of "first use" in the Code. Kenvn wall inclined to aqree with the Special Rapporteur that the issue of criminal jurisdiction should be left open for the time beinq. Admittedly, any code of offences must be accompanied bv enforcement measures, but immediate consideration of that issue would retard proqress in the formulation of the draft articlee.

9. Recent events had clearly demonstrated the importance of determining international liability for injurious consequences nrisina out of acts not prohibited bv international law. Clearlv there wan a need for international rules in that area. His deleqation wished to underscore the fact that while injury was the unifyinq link, prevention and reparation were absolutely essential aspect8 Of the topic. It aqreed that the Special Rapporteur should base his work on the amended version of the schematic outline in Mr. Quentin-Baxter's fourth report. The Commission should also address activities involving risk of injury beyond national jur isdict ion to other States, to the international community as a whole, or to outer space, which was the common heritaqe of mankind. The Convention on Early Notification of a Nuclear Accident, recently concluded in Vienna under the

(Mr. Kiilu, Kenya)

auspices of the International Atomic Energy Agency, illustrated how international organizations could assist States in fulfilling their obligations to inform and negotiate. Kenya was concerned about the question of the liability of developing countries for the activities of multinational corporations using imported, highly sophisticated technology. It would be unjust, to say the least, to assign liability to developing countries for activities over which they had little, if any, control.

10. In Africa, the use of watercourses was vital to the survival of both man and beast. Kenya therefore attached the highest priority to the completion of generally acceptable provisions on the uses of international watercourses. His delegation wished to endorse, in particular, the recommendation made by Mr. McCaffrey, the current Special Rapporteur, not to subject draft articles 1 to 9 to another general debate in the plenary Commission. Kenya also supported his Plan to follow the structure provided by the previous Special Rapporteur, who had proposed a comprehensive set of 41 draft articles. Mr. McCaffrey's proposals would serve to expedite the work of the Commission and could form the basis for generally acceptable solutions.

11. Kenya did not object to postponing the attempt to define the term "international watercourse". Any future definition, however, should avoid reference to the "system" concept, as it would prejudice any attempt to reconcile the competing interests of States. Moreover, to re-introduce the concept of "shared natural 'resource" would give the false impression that legal principles could be automatically deduced from the purely geological meaning of the concept.

12. It would not be particularly helpful to list the factors to be taken into consideration in determining reasonable and equitable use of an international watercourse. Experience had shown that each case must be decided on its own, taking into account all the particular circumstances involved. Previous river- and lake-basin agreements had demonstrated that co-operation and mutual accommodation among riparian States had been most effective. The Special Rapporteur and the Drafting Committee should find an acceptable means of expressing the close relationship between the obligation to refrain from causing harm to other States using an international watercourse and the principle of equitable utilization. Kenya supported the view that the Commission should elaborate a "framework agreement" in the form of draft articles setting forth rules on the non-navigational uses of international watercourses. States concerned would still be at liberty to conclude specific agreements relating to particular international watercourses.

13. Kenya expressed its appreciation to the countries which continued to provide fellowships in connection with the International Law Seminar, and urged the Commission to reappraise its methods of work with a view to functioning as efficiently as possible in future.

14. Mr. TUERK (Austria) said that his delegation was particularly pleased to note the provisional adoption of the draft articles on jurisdictional immunities of States and their property.

(Mr. Tuerk, Austria)

15. Austria doubted whether it was really necessary to refer to "political sub-divisions of the State which ☜❒♏ ● ntit.lrd to perform acts in the exercise of the sovereign authority of the State" in paraqraph 1 (b) of article 3. The definition of a State as comprehending "the State and its various organs of government" seemed to be broad enough to cover any political subdivision. The same observation held true for article 7, paragraph 3.

lb. Article 6 rained the delicate problem of whether to use explicit lanquage indicating that the rule of State immunity should be ● ubject to the future development of international law. After weighing the ● rqumentm in favour and against, his deleqation had come to the conclusion that it could accept such an addition. The question was whether reference should be made to the "relevant rules of qeneral international law" or simply to "international law".

17. With reqard to the title of part III, his deleqation preferred "Limitations on State immunity". It welcomed the qeneral reservation contained in draft article 20 with respect to all questions concerninq possible extraterritorial effects of measures of nationalization taken bv a State with reqard to property, movable or immovable, industr ial or intellectual.

18. His deleqation had no objection to the new title of part IV. It disaqreed, however , with the new text of draft article 21 and stronqly ● upported the previous version of that provtnion. The present text qreatly limited the possibility of enforcement measures reqardinq property that ● erved commercial non-qovernmental purposes, with the stipulation that such property had to have a connection with tha object of the claim or with the aqencv or instrumentality against which the proceed inq wan directed. Such a limitation as well as the limitation embodied in article 21 (b) seemed unjustified. I n his deleqation's opinion, it should o n the contrary suffice that State property had been allocated for the payment of debts Incurred hv the State.

19. With respect to draft articlv 24, his delrqatton welcomed the insertion of paraqraph 1 (c) and the new paraqraph 2. since those provisions partlv took into account previous observationa made by it. However, ha expressed reservations with reqard to the new subparaqraph (a), because under the leqislation of Austria and manv other Statca, arranqements between the parties reqardinq the service of process were irrelevant. Furthermore, his deleqmtion continued to have doubts concerninq the transmission of the relevant documents by mail to the head of the Ministry of Foreiqn Affairs. It rejected in particular the hterarchv of methods for the service of process laid down in paraqraph 1 of the draf article. Provisions should at least be made for the competent court to have the opportunitv freelv to choose hetween different methods in that respect.

20. Pnrsqraph 4 of draft article 24 was too restrictive, an it would mean thnt a fault in the service of process could be remedied only if the State entered an appearance on ths mer its of the cane. His deleqation preferred the previous text of Chat provision under which a fault concerninq service of process would be remedied reqardless of whether thr State concerned entered into the proceedinq on a purely procedural question or on the merits of the came. The basic idea of

(Mr. Tuerk, Austria)

remedying a fault in the service of process was, however, to ensure that at the time when the relevant document was in fact received, any such fault was no longer relevant.

21. With regard to draft article 25, his delegation welcomed the insertion of a clear time-limit in paragraph 1. The purpose of paragraph 2 was to ensure that a foreign State had at least three months to take legal remedies against a default judgement, not that a time-limit provided for in the code of civil procedure of the forum State was extended by another three months simply because the defendant was a foreign State. That should be reflected in the relevant commentary.

22. Referring to the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, he said his delegation was pleased to note that great efforts had been made to find compromise solutions on the various issues. It agreed with the division of the draft into four sections. A key provision was undoubtedly article 28, and it was to be regretted that the Commission had not been able to submit an agreed text to the General Assembly. He was, however, aware of the wide range of views concerning the draft article, and of the need to continue the search for a compromise. Austria had no objection to the assertion that the obligation not to open or detain the bag was consistent with the "inviolability of the diplomatic bag". However, it was not in favour of adding a statement of principle at the end of paragraph 1 to the effect that the diplomatic bag should be exempt from examination directly or through electronic or other technical devices. Electronic screening of diplomatic bags was admissible in connection with security checks at international airports, and in any case, the risk of transporting diplomatic bags without previous electronic examination could not be imposed on airlines. Austria nevertheless understood the apprehensions voiced by many that an examination of the diplomatic bag by electronic devices might affect the confidentiality of its content. As a possible compromise, it suggested that the presence of an authorized representative of the sending State should also be required in the event of an examination of the bag by electronic or other technical means. Furthermore, electronic screening by highly sophisticated means likely to affect the confidentiality of the official correspondance and documents of the sending State could perhaps be ruled out altogether. In any event, the representative concerned would be free to withdraw the authorization for an examination of the bag and to arrange for its return to the sending State if he felt that the devices used might endanger confidentiality.

23. His delegation had noted with satisfaction that the previous draft articles 39 and 40 had been combined into a single provision - article 30. However, it had considerable doubts as to the desirability of draft article 33, which provided for the possibility of excluding designated types of couriers and bags from the applicability of the draft articles. Such a provision, which was designed to introduce flexibility and thus to facilitate the acceptance of the draft articles by States, in fact ran counter to the very aim of the endeavours of the Commission, namely, the consolidation in a single instrument of existing rules of international law regarding the diplomatic courier and the diplomatic bag. The creation of a new plurality of régimes would call in question the usefulness of the entire exercise. In addition, there were enormous practical difficulties in having to apply different legal régimes in different countries to the same courier or bag.

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(Mr. Tuerk, Austria)

24. Turning to the question of State responsibility, and part three of the draft article8 concerning the implementation of international responsibility and the eettlement of disputes, he said it did not seem appropriate that the taking of measures, by way of reciprocity or by way of reprisal, by a State which had suffered from an internationally wrongful act, should be made dependent on a procedure which would take at leant two and a half years under the system laid down in article 3, paragraph 1. There were very few objects againmt which reprisals could legitimately be directed. The State which had committed the internationally wrongful act would withdraw its assets before the length procedure was completed. Countermeasures must have an immediate effect on a State if they were to be of any value. In the case of refusal by a State to continue to apply a treaty, there was no reason why the injured State should be under an obligation to apply the treaty, without any kind of remedy or compensation, for a lengthy period. It was not wise to base the whole of part tro of the draft articles on such a system, since it might become inapplicable in case of reservations by States with respect to part three. The prohibition of reservations contained in draft article 5 would probably not survive a codification conference, am it also extended to article 4, paragraphs (a) and (b), providing for the compulsory jurisdiction of the Lnternatlonal Court of Justice. States could not be prevented from making reservations against such a system of compulsory jurisdiction. The practice followed by States in that respect when becoming parties to the Vienna Convention on the Law of Treat ice was a case in point.

25. It was gratifying that the comwnte submitted by Austria on part one of the draft articles had been taken into account by the Special Rapporteur. The observations made by Governments in relation to those draft articles in general merited further consideration in the ongoing effort to make the articles more widely acceptable.

26. In 1986, ecological catastrophes of unprecedented magnitude had demonstrated the urgent need to define the rights and obligations of States n connection with activities which were not prohibited by international law but might cause injury to other States. In respect of certain activities, whether ultrahazardoue or not, the questions of notification, prevention and co-operation, and especially the question of reparation for injury, required legal regulation.

27. His delegation recognized the importance of the Paris and Vienna Conventions on liability for nuclear damage, and favoured widespread accession to those instrumenta. A new international instrument was needed which would supplement the existing instruments with a universally acceptable system along the lines of the 1972 Convention on International Liability for Damage caused by Space Objects. The announcement by the Government of Switzerland of its intention to pay compensation to other countries affected by an accident at a Swiss chemical plant shared how States should proceed pending the entry into force of specific treaty rules.

28. On the general legal problems relating to liability, a framework treaty was needed containing general norms which could in turn encourage the conclusion of bilateral or regional agreements. It was regrettable that at its latest session the Commission had been able to allocate only a few meetings to the topic

(Mr. Tuerk, Austria)

'International liability for injurious consequences ● riainq out of acts not prohibited by international law". His deleaetion ● qreed that the word "act" should be replaced by "activities" in the English title of the topic so as to brinq it into line with the other lanquaqe veraiona. The proviaional definition of the scope Of the topic was a qood baaia on which to build. His delegation shared the opinion that the term "transboundary" not only referred to injury caused in neiqhbouring countries, but 8180 covered any injury caused beyond natural frontiers, whether the source State and the affected State were contiquou; or not. Recent mishap8 in the nuclear and chemical fields had clearly deaonatrated that pollution could effect wide areas and even diatant countries. On the question of reparation, the statement by the Special Rapportour referred to in paraqraph 199 of the Commission's report (A/41/10) merited particular attention. His delegation ● 9reed with the Special Rapporteur's ● uqqeation in paragraph 41 (c) of his report (A/CN.4/402) thet the first sentence of article 8 of section 2, and article 1 of sect ion 3 of the schematic outline should ba deleted.

29. Austria was at the same time an upstream and a downstrea:i State, and it was well aware of the political and economic problems involved in connection with the law of the non-naviaational uses of international watercourses. The Commission should complete the codification of qenerally recognized rules of international law on the topic as aoon as possible, in order to produce a framework agreement laying down general principle8 regarding the riqhts and duties of States which could serve as a baaia for the conclusion of bilateral or reqional ● qreementa. His delegation supported the Special Rapporteur's view that it would be appropriate to proceed first with the formulation of draft articles and later consider a possible eet of quidelines. It believed that the concept of "shared natural resource" was unacceptable as it could qive rise to Car-reachina allecations and claims. Care should ba taken not to introduce the concept through the back door by tryinq to build leqal principles upon it without usinq the term itself.

30. On the subject of the draft Code of Offencea ● qainat the Peace and Security of Mankind, it was qratifyinq that support had been ● xpreaaed for chenqino the word "offences" to 'crimes" in the Bnalish title so as to brinq it into line with the French and Spanish texts. His deleqation believed that the Commission's mandate d extend to the preparation of the atstute of a competent international criminal jurisdiction for individuala, which would not prejudoe the final outcome of the Commission's work on the draft Code.

31. It was crtemely important to continue the existinq eystem of summary records. In daily leqal work ralatinq to the provisions of international conventions, it was essential to be able to refer to the travaux pré aratoires. The Commission's reports should be made available, even if onlv in provisional form, as soon as possible after the conclusion of its aeaaiona, so as to facilitate thorouqh preparation by deleqationa for the debates in the Sixth Committee.

32. The International Law Seminar had proved very valuable over the years in ● nablinq youna lawyers, particularly from developinq countries, to qain a Cirat-hand insight into the work of the Commission; Austria, which had reqularly made contributions to the Seminar in the past, joined in the Commission's appeal to all States to contribute so that the Seminar could be continued.

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33. Mr. LACLETA (Spain) said that in future the Commission's sessions should not be shortened, and the Commission should endeavour to allocate to the Drafting Committee as many meetings as possible so that it did not lag behind in its work.

34. Despite the time constraints, the Commission had made considerable progress on the draft Code of Offences against the Peace and Security Of Mankind. His delegation shared the view that the content ratione personae of the draft code should be limited to the criminal responsibility of individuals. It was also in favour of a precise characterization of offences although the Commission should identify offences by reference to a general criterion and to relevant conventions and declarations on the subject. A mere enumeration of acts regarded as international crimes could not help strengthen peace and security if it was not accompanied by implementation mechanisms, including an appropriate jurisdictional mechanism; otherwise, the Code would serve only as verbal ammunition for accusations among States.

35. Draft article 4 affirmed the universal nature of the offences in question, a principle that his delegation fully supported, and also proposed a system of universal jurisdiction, without excluding the possibility of establishing an international criminal jurisdiction. The Commission's mandate could include an in-depth study of that question and of the possibility of drawing up a statute for an international jurisdiction, despite the difficulties, political rather than legal, which would be involved, even if the jurisdiction was not competent to consider the question of the responsibility of the State on behalf of which the individual had acted. It was unlikely that a State would ever be brought before an international criminal jurisdiction, and it was not clear to what extent it would be possible to bring an individual before an international jurisdiction.

36. His delegation had no difficulties in principle with draft articles 1 to 7. With regard to article 2, it seemed obvious that the characterization of an act as an offence against the peace and security of mankind under international law was not independent of the 'international order" since there was no single internal order. Article 7, paragraph 2, could affect the problem of characterization and could give rise to certain difficulties in relation to the principle nullum crimen sine lege. Even greater difficulties were created by article 8, paragraph 1, where it was unclear whether "self-defence in cases of aggression" referred to self-defence on the part of the State or on the part of the individual. Even when acting on the authority of a State which was legitimately defending itself against aggression, an individual could be personally responsible for an offence. That was not made sufficiently clear in paragraphs 171, 172 and 173 of the report (A/41/10). Reprisal as an act of the State did not justify the commission of individual criminal acts.

37. His delegation did not have difficulties with article 10 or article 11; it noted that the definition of aggression was taken from General Assembly resolution 3314 (XXIX), which also referred to the competence of the Security Council in accordance with the Charter. The Commission, as a subsidiary body of the General Assembly, must take that situation into account, possibly in the rules on the application of the Code, which must accompany the Code if it was to be an effective instrument.

(Mr. Laclota, Spain)

38. His doleqation approved the inclusion of qenocide and apartheid in the cateqorv of crimes aqsinmt humanity. While it preferred the ● ocond altarnative of article 12, paraqraph 2, it believed that the text should be objective and that the first three lines ● hould be ● nnded. It shared the views set forth in paragraphs 83 to 87 of the Commission's report, and recoqnized the importance of the "mass" element in the Come of inhuman ● ct8. It undermtood the reservations arisinq from the use of the ● xpreamion "war crime" in view of the unlawfulness of war itself, but agreed with what was stated in parsqraph 105 of the report and therefore oould accept the use of the ● xpreoaion.

39. Spain preferred the ● ocond alternative of the definition of war crimes. In respect of nuclear weapon5, without taking a position on the moral and political questions involved, him deleqation agreed with what was stated in paraqraph 114 of the report. In connection with paragraph 120, on the subject of complicity, his deleqation preferred the method of distinquishinq between separate offences, as in the Charters of the International Military Tribunals, and did not feel that the responsibility of a superior, or of a ● ubordinrte, should be baaed on the idea of complicity. It also felt that complct and conspiracy should be specifically considered, a5 well as ● xtenuatinq circumstances.

40. Rio deleqation welcomed the progress made by the Commission on the topic of State responsibility. It believed, however, that draft article 5 of part two did not clearly distinquirh between the State directly injured and the States which ● uffered only indirect injury, a question which was of qrest importance Par the rubrequant articles. It welcomed the new draft articles in part three, for it had always insisted on the need, especially in relation to article 19 of part one, for an effective procedure for the settlement of disputes. Spain supported the idea underlyinq the articles as a whole, and hoped that the Commission would complete a coherent draft before beqinninq the second readinq of part one.

41. With reqard to the topic of international liability for injurious coneequcncea arisinq out of acts not prohibited by international law, his deleqation welcomed the clarificationa made to the schematic outline mo that it referred solely to material transboundary damaqe. It also felt that the topic ahould not be confined to prevention of damaqe, but nhould also cover the question of reparation when damaqe occurred. Moreover, the principle of objective responsibility should be recoqnized under international law, as it often was under domestic law.

42. In connection with chapter VII of the Commission's report, his deleqation was somewhat concerned about the possibility of a renewed debate on the definition of international watercoureee or on certain concepts. The draft articles submitted by the previous Special Rapporteur offer a qood basis for work in formulatinq new draft articles based on the fundamental principle of the sovereiqnty of the State and the principle that no State mhould exercise its sovereiqntv in such a way as to cause harm to others. The aim was to ensure equitable use of international watercourses by establishinq a basic régime which could be developed or supplemented throuqh co-operation amonq the States concerned. Equitable use on the basis of the concept of the sovereiqnty of each State must he clearly differentiated from full co-operation deeiqned to secure optimum use, which in some cases would not he possible.

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(Mr. Laclets, Spain)

43. It was regrettable that no progresa had been made in the consideration of the topic of ralations between States and international orqanirmtiona. His deleqation hoped that the Commission would continue to review its workinq methods and draw up a detailed programme of future activities, without precludinq the possibility of taqqerinq consideration of the items on its agenda. So that it could study topics in greater depth and also allow Governments and deleqationa more time to study them.

44. The report of the Joint Inspection Unit on "Publications of the International Court of Justice" (A/41/591) referred to the possibility of translatinq publications of the Court into official lsnquaqea of the United Nations other than English and French at no additional cost. The recommandationa were of great importance in the effort to ensure that the work of the hiqheat leqal body of the United Nations was known throughout the world. His daleqation would mupport the draft resolution which the deleqation of Mexico intended to submit to the General Assembly in 1987.

45. Ma. HIGGIE (New Zealand), referrinq to chapter VIII of the report of the International Law Commission (A/41/10), said there was welcome evidence that Commission members were lookinq closely at questions of orqaniaation. While the Commission had been doinq so for some time, what was new was the seriousness of the financial crisis Cscinq the United Nations. No United Nations body could stand aside from the effects of the financial situation, and no deleqation could fail to bear it in mind when reviewinq the work programme of each committee.

46. Her deleqation maintained its strong commitment to the purposes and work of the Commission. To promote the rationalization of the Sixth Committee's aqenda, her deleqation endorsed the proposal made by a number of deleqationa that the draft Code of Offences aqainat the Peace and Security of Mankind should be dealt with under the item relatinq to the Commission's report.

47. The auqqeationa made by the delegation of Sweden aimed at iaprovinq the coat-•CCectivenesr and "time effectiveness" of the discussion of the Commission's report were very appropriate. They could be impleaentad with some Clexibility to allow Cor the position of smaller States; many of them d'id not have adequate resources to preaent written submissions in a timely fashion.

48. At the same time, it was true that the Commission itself could play a more useful role in helping to structure the debate in the Sixth Committee. One way vas to exclude from its report topics which had not received substantive conoiderstion at the particular year's session. In that cane, the debate in the Committee would focus on the topics dealt with in the report.

49. With reqard to the Commission's own methods of work, the auqqeation had been made on a number of occaaiona that the Commission might formalize the process whereby in any one year some topics received substantive attention and others did not.

(Me. Higgie, New Zealand)

50. Her delegation welcomed the successful conclusion of the first reading of the draft articles on jurisdictional immunities of States and their property, which could serve as a useful model or atarting-point for domestic legislation. Her Government would shortly introduce legislation which would implement the restrictive approach to immunity already adopted by the New Zealand courts, and was therefore studying the draft articles with qreat interest.

51. With regard to draft article 6, her delegation had sane sympathy for those who advocated the omission of the reference to "the relevant rules of general international law". Its inclusion appeared to undercut the usual purpose underlying the process of codification. War delegation's own view would depend ultimately On the final form of the completed draft articles. It was concerned, in particular, about some aspects of part IV, such am measures of constraint, and noted that article 21 was unnecessarily restrictive. It did not see a legal or philosophical justification for limiting measures of execution to property which had "a connection with the object of the claim". Her delegation would support the extension of a State's immunity to cover property not only in its possession or control, but in which it had "a legally protected interest".

52. With regard to State responsibility, her delegation supported the Special Rapporteur's approach in part three of the draft articles, and endorsed the emphasis on compulsory conciliation as a means of preventing the escalation of a dispute while at the same time leaving open other options for peaceful nettlement, Including recourse to the International Court of Justice.

53. Turning to the draft Code of Offences against the Peace and Security of Mankind, she said that her Government was not opposed to the idea of a Code and was in general satisfied with the approach taken by the Special Rapporteur. It supported the decision to limit the draft Code to the Ci iminal responsibility of individuals while maintaining consideration of the crimes of States under the topic of State responsibility. That ensured that there was no confusion of objectives or confusion of political and legal methodologies in the Commission's handling of the two topics.

54. Her delegation was also in favour of the approach adopted by the Canmission in identifying acts which constituted serious breaches of international law, making an inventory of the international instruments which characterized acts as international crimes, and neltcting the most serious of them for inclusion in the draft Code.

55. The Code would be more effective if it operated in the framework of nn international criminal jurisdiction. AR had been noted, a properly constituted tribunal with such jurisdiction would convey a more lantinq impression of objectivity than would a domestic court.

5 The Code was likely to be adopted only if it was confined to precisely defined offences which were unequivocally seen as very serious crimes by the international community at large. The Code would be doomed to failure if it included within its

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(MR. Higgie, New Zealand)

ambit concepts such am economic aggression. Not only was subjectivity inherent in any discussion on such a matter, but there were in addition insurmountable definitional problems.

57. References in the Code to nuclear weapons were also unlikely to be acceptable to a qraat number of States. Her Government had made clear its view that New Zealand was not to be defended by nuclear weapons. It recognized, however, that because of different strategic circumstances, there would inevitably be differences of approach to the reduction and eventual elimination of nuclear weapons. For that reason, it foresaw major difficulties in any attempt to include nuclear weapons within the scope of the draft Code.

58. Recent events had confirmed the importance of the topic of international liability Cor injurious consequences arisinq out of acts not prohibited by international law, and had vindicated the approach taken by the first Special Rapporteur. Her deleqation therefore endorsed the views of some representatives that priority should be qiven to its consideration. It also endorsed the approach of the Special Rapporteur in mtartinq with the schematic outline prepared by Professor Quen t in-Baxter, thereby ensuring continuity. It agreed with the decision to Place primary emphasis on prevention rather then reparation, vith the duty of reparation arising only after every effort to avoid or minimize damage had failed. That would ensure that all activities within a State's territory were conducted with as much freedom as was consistent with the interests of other Ststes. The Special Rapporteur should continue his work on the premise that all activities involvinq r isk, not simply ultrahaeardoue ones, Cell within the ambit of his topic.

59. In conclusion, she emphasized the linkaqes between that topic and those of international watercourses and State responsibility, and expressed the hope that in the liqht of the obvious and preesinq need, the Commission would be able to make siqnificant proqress on those topics.

60. Mr. MCKENZIE (Trinidad and Tobaqo), referrinq to the draft articles on jurisdictional immunities of States and their property, said that the reference by the International Law Commission to a "grey zone" attested to a number of legal theories in existence relatinq to the exact nature and basis of State immunity- In the view of his deleqation, the final text of draft article 6 should contain a reference to "the relevant rules of qeneral international law", because it was doubtful that universal aqreement was possible on the exact dividinq lir e between immunity and non-immunity.

61. On the question of service of process, paraqraph 1 (d) of draft article 24 was very unsatisfactory and should be excluded from the final text. The provisi n deroqated from the "middle-qround" approach to service of process, and could very well result in an inordinate number of default judaements.

62. Concernino the statue of the diplomatic courter and the diplomatic baq not accompanied by diplomatic cour ier , his delegation Cavoured the adoption of article 28, paraqraph 1, in its current form, tncludinq the words in brackets. The principle that the diplomatic baq should be immune from search was a corollary to

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the qenerally recognized tenet of the inviolability of the archives and documents of a mission. Such immunity had moreover been reflected in the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations. The first 8at of bracketed words in article 28, paraqraph 1, correctly reflected the concept of inviolability. The second set of bracketed words was intended to ensure respect for the confidentiality of the diplomatic baq.

63. Article 28, paraqraph 2, sought to achieve a balance between the interests of the mending State in ensuring the protection, safety and oonfidentislity of it8 diplomatic baq and the security interests of the receiving State. His deleqation was inclined to the view that 8uch a provision miqht qive rise to abuse motivated by the desire to breach the confidentiality of the b89. A better approach to the problem would be an alternative formulation which would provide that, if the Competent authorities of the receiving State had serious ground8 to believe that the diplomatic baq contained somethinq other than permissible articles, then the receiving State miqht require that the baq be returned to its place of origin.

64. His deleqation favoured the adoption of article 29, which reflected State practice and international law,. It also aqreed with the formulation of draft article 30, subject to the written comments of his Government. Draft article 31 required ra-examination in order to dispel any Confusion a8 to its real scope. It must in particular be spelt out clearly that the provision did not relate to the de facto effect8 of non-recognition or absence of diplomatic and consular relations. Him deleqation was of the view that the Commission in second readinq should consider a reference in draft article 32, to the complementary relationship between the current draft article8 and the four multilataral Conventions on diplomatic and consular law adopted under the aegis of the United Nations. Draft article 33 required further examination in the light of the effort to harmonize the law in that area. An optional declaration could open the way for States to modify unilaterally the leqal régimes established by the four Conventions.

65. On the topic of the draft Code Of Offences against the Peace and Security Of Mankind, hi8 deleqation considered that althouqh, qenerally speaking, some mass element was required for an offence to be characterized as a crima against humanity, the draft 8hould also cover crimes committed aqainst a smaller number of individuala. The Code should include only the moat serious offences and should not apply to acts of a qeneral criminal nature that. did not belonq to the category of of fences aqainst the peace and securr ity of mankind.

66. On the question of crimes against humanity not covered by the 1954 draft. his delaqation believed that apartheid 8hould be expressly referred to. It would prefer the full reproduction in the Code of the provisions of article 11 of the International Convention on the Suppression and Punishment of the Crime of Apartheid. The Commission should also consider for inclusion as a crime against humanity, acts committed in order to subject a people to a réqime not in keepinq with the riqhts of peoples to self-determination and to deprive such people of human riqhts and fundamental freedoms.

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67. On the problem of terminology relating to the concept of war crimes, his delegation favoured the proposal to replace the word "war" with the words "international or non-international armed conflict", am defined by the 1949 Geneva Conventions and the Additional Protocols thereto. It felt, however, that the traditional concepts of "war crimes" and "violation of the laws and customs of war" should find expression in the Code. As to the aubstantive problems referred to in paragraphs 77 to SO of the Special Rapporteur's report (A/CN.4/398), his delegation had no difficulty with dual characterixationa. It favoured a definition of "war crimes" combining the two alternativea proposed hy the Special Rapporteur.

68. In the view of his delegation, account should be taken in the Code of the extended concept of complicity in international law. The concept should cover concealment, as well am membership in an organization and participation in a common plan. His deleqation had reservationa regarding the inclusion in the Coda of the concept of collective responsibility, even if it was restricted to crimes aqainst peace, such am aggression. On the question of "attempt", mere preparation should not be reqarded as a criminal act.

69. With respect to the principles relating to the application of the criminal law in time, referred to in part IV of the Special Rapporteur's report, his delegation was inclined to the view that positive law should be the basis for charactorixing an act a8 an international crime. Accordingly, it had misgivings regarding the value of article 7 relating to the non-retroactivity of offences aqainst the peace and security of mankind.

70. In connection with the principle8 relating to the application of the criminal law in space, his delegation supported the approach of the Special Rapporteur in opting for universal jurisdiction in the absence of an international criminal jurisdiction, but reaerving the possibility of establishing an international criminal jurisdiction. With respect to the principles relating to exceptions to criminal responsibility, his deleqation was in general agreement with the distinctions drawn by the Special Rapporteur.

71. Trinidad and Tobaqo wished to reiterate that a code of offences against the peace and security of mankind unaccompanied by penalties and a competent criminal jur iediction would be ineffective. It expected the Commission to act in accordance with its mandate in that area and tackle the problem of inplerentation as soon as possible.

72. In conclusion, his deleqation wished to endorse fully the views expressed by the Commission in paraqraph 253 of its report (A/41/10) concerning the importance of continuing the current system of summary records, which constituted a crucial requirement for the process of codification and progressive development of international law. The records of the Commission constituted the travaux préparatoires of the relevant provisiona of conventions prepared essentially by the C-mission, and as such were invaluable.

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73. Mr. THIAM (Chairman of the International Law Commission) said that the Commission looked forward to the written comments of Governments on the draft articles on jurisdictional immunities of States and their property, and the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

74. The rate of progress on other topics had been uneven. Considerable progress had been made regarding State responsibility. As to the Code of Offences, the complete set of draft articles submitted to the Commission afforded a sound basis for future work. Law and politics were inextricably linked in that topic, with the result that certain aspects could not easily be settled by the Commission alone. It would require the assistance of the international community and, in particular, an input from the Sixth Committee.

75. Concerning the non-navigational uses of international watercourses, most delegations seemed to favour a framework agreement. The aim was to avoid dogmatic positions and rigid terminology as much as possible, with a view to achieving the major objective, namely, reasonable use in a spirit of co-operation and with respect for sovereignty and legitimate interests. With regard to liability for injurious consequences arising out of acts not prohibited by international law, the aspects of prevention and repatriation must both be borne in mind, with the issue of prevention providing an important new dimension to the topic. Preventive procedures would need to be defined, as well as the appropriate procedures for negotiation between the interested parties, including the international community when its interests were involved.

76. Relations between States and international organizations had not been discussed owing to lack of time, but the Commission would devote appropriate attention to the topic in the future.

AGENDA ITEM 129: REPORT OF THE AD HOC COMMITTEE ON THE DRAFTING OF AN INTERNATIONAL CONVENTION AGAINST THE RECRUITMENT, USE, FINANCING AND TRAINING OF MERCENARIES (continued)

77. Mr. DE SARAN (Secretary of the Committee) announced that Mali had become a sponsor of draft resolution A/C.6/41/L.7.

The meeting rose at 11.40 p.m.