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Chairman: Mr. MIKULKA (Czechoslovakia)

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The meeting was called to order at 3.20 p.m.

AGENDA ITEM 142: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SECOND SESSION (continued) (A/45/10 and 469)

AGENDA ITEM 140: DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (continued) (A/45/437)

1. Mr. SUPHAMONGKHON (Thailand) said that in some situations international law could be enforced only if provision was made for the punishment of individuals who committed crimes against such law. International peace and security might depend on it. The list of crimes set out in chapter II of the draft Code should therefore be regarded as non-exhaustive, and thus subject to future expansion. The Code should cover only the most serious crimes, those upon which there was agreement among the members of the international community, and should give a clear definition of such crimes.

2. On the issue of the establishment of an international criminal court (A/45/10, paras. 93-157), the Commission had rightly noted (para. 117) that international crime had achieved such wide dimensions that it could endanger the very existence of States and seriously disturb international peaceful relations. International terrorism, aggression and illicit traffic in narcotic drugs came readily to mind. However, since the subject-matter was very complicated, it might be premature to establish an international criminal court. At present, effective systems based on the universal jurisdiction of domestic courts did exist for a large number of crimes, and the establishment of an international criminal court must not disrupt the satisfactory functioning of the existing systems. Moreover, account must be taken of the fact that the establishment of an international criminal court would meet with resistance, since it would be seen by many as a serious curtailment of national sovereignty. In any event, it was necessary to set up an effective universal system for the suppression of crimes against the peace and security of mankind. To that end, his delegation encouraged all States to conclude extradition and mutual assistance treaties dealing with various types of proceedings, as Thailand itself had.

3. On the subject of the non-navigational uses of international watercourses (A/45/10, chap. IV), Thailand believed that the purpose of any rules must be to promote co-operation between neighbouring States. The rules in question must therefore not be too precise. Thailand was concerned that the term "international watercourses" should not be defined too broadly, and would therefore prefer the word "system" to be omitted.

4. In view of the principle of the territorial sovereignty of States, the watercourse State of origin must enjoy priority use of the waters in question, provided that it did its best not to injure downstream States. It followed that the obligation to notify other watercourse States of measures with possible adverse effects applied only in cases where human activities were directly responsible for the potential effects. In other cases, notification should take place as soon as

(Mr. Suphamongkhon, Thailand)

practicable. Where draft article 28 was concerned, Thailand endorsed the principle that international watercourses should be inviolable in time of armed conflict. However, such inviolability should not extend to installations, facilities and other works.

5. With regard to the topic of international liability for injurious consequences arising out of acts not prohibited by international law (chap. VII), Thailand was of the view that the State of origin was fully liable for transboundary harm, regardless of any preventive measures that it might have taken, and that it must pay full compensation even if the harm was due to an act by a private entity.

6. Mr. PADMANABHAM (India) said that he would begin by commenting on the draft Code of crimes against the peace and security of mankind (chap. II). On the subject of related offences, he wished to propose definitions whose distinctive features he would like to see mentioned in draft articles 15, 16 and 17. A person abetted the commission of a criminal act when he or she instigated any person to commit such an act, or engaged with other persons in any conspiracy and internationally aided the commission of any criminal act. By way of explanation, voluntary concealment of material facts and facilitating commission of any such act should also be added. Conspiracy was an agreement between persons to commit an illegal act, or to cause such an act to be committed, or to commit an act that was not illegal by illegal means, or to cause such act to be committed, irrespective of the legality of the ultimate object of such agreement. Lastly, draft article 17, which specified that attempt to commit a crime against the peace and security of mankind constituted a crime against the peace and security of mankind, should also refer to any act towards the commission of a crime or to cause such a crime to be committed.

7. With regard to the issue of illicit traffic in narcotic drugs (paras. 77-88), India regarded such traffic as a threat both to the health and well-being of people and to the economy. It had adopted comprehensive, rigorous legislation and had become a party to the various international instruments, the most recent of which was the United Nations Convention of 1988 against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. It was therefore in favour of the inclusion of drug trafficking as a crime in the draft Code.

8. In principle, India was in favour of the establishment of an international criminal court (paras. 93-157). It would, however, advocate careful consideration of the complex issues involved, so that the General Assembly could decide on the matter in due course.

9. India believed that breach of a treaty designed to ensure international peace and security (paras. 89-92), particularly breach of arms-limitation and disarmament treaties, should be dealt with in a draft article in the Code.

10. India, which was a party to most of the United Nations conventions relevant to the preparation of the Code and was seriously considering becoming a party to the Protocols Additional to the Geneva Conventions, had adapted its legislation so as

(Mr. Padmanabhan, India)

to ensure compliance with the Geneva Conventions and the conventions concerning apartheid and international terrorism. It wished the Code to be an effective instrument of international legal significance.

11. On the question of international watercourses, dealt with in chapter IV of the report, draft articles 24 to 28 were unnecessary, since their content was already covered by draft articles 6, 8, 9 and 10. They went beyond the scope of the framework agreement on non-navigational uses of international watercourses and imposed unacceptable international obligations without much basis in international law. They therefore required careful re-examination and reformulation. His delegation reserved its right to comment on the subject at a later stage.

12. With regard to the status, privileges and immunities of international organizations, which formed the second part of the topic of "Relations between States and international organizations", dealt with in chapter VI, his delegation generally supported the approach adopted by the Special Rapporteur in his fourth report (A/CN.4/424 and Corr.1). It also supported the Special Rapporteur's view that it was necessary to be pragmatic and therefore to adopt a simple definition of an international organization, without listing the various types of international organizations. The draft should contain only general provisions, which could be modified according to the characteristics of each individual case so as to meet the functional needs of the organization concerned. Likewise, the basic principles set out by the Special Rapporteur were generally acceptable, particularly in respect of immunity from jurisdiction and the inviolability of premises.

13. Lastly, he made several suggestions concerning the Commission's working methods and procedures: the report, which should concentrate on the substantive topics discussed by the Commission, should be transmitted promptly to the countries concerned, before the annual session of the General Assembly; the Commission should seek co-operation with other bodies, such as the Asian-African Legal Consultative Committee; after the end of the Commission's session, Governments should be sent a summary of developments with regard to each topic and the draft articles; the Commission (in particular the Drafting Committee) should have available a computerized data base enabling it to consult the texts of bilateral and multilateral instruments; a non-doctrinal approach, based on a more rigorous and business-like method, should enable the Commission to advance more rapidly in its work; lastly, events which facilitated the participation of developing countries, such as the International Law Seminar, should be encouraged.

14. Mr. NEDELCHEV (Bulgaria) said that the draft Code of crimes against the peace and security of mankind should become the corner-stone of the United Nations system for the maintenance of international peace and security, and thus of the international legal order.

15. With regard to "related offences", he noted that, according to paragraphs 35 to 39 of the report, three methodological approaches had been suggested, which he briefly summarized. In his view, the Commission should define those three concepts

(Mr. Nedelchev, Bulgaria)

and leave it to the competent courts to decide whether they were applicable in specific cases brought before them.

16. Referring to the debate which had taken place in the Commission concerning whether the draft Code should include an article on breach of a treaty designed to ensure international peace and security (paras. 89-92), he favoured a practical approach: if an act constituted a crime against international peace and security, it should be treated as such, whether or not it violated a treaty.

17. It was premature at the current stage to consider the question of establishing an international criminal jurisdiction; priority should be given to a definition of the crimes covered by the draft Code, as stated by the Commission itself (para. 118): "The system of universal jurisdiction exists for a large number of crimes, in some cases with the participation of a large number of States, and prosecution is carried out effectively in national courts. Proposals for a court must therefore take into account the danger of disrupting satisfactory implementation of the existing systems."

18. It was necessary for the Commission to finalize its work on State responsibility - the subject of chapter V - before the end of the United Nations Decade of International Law and to give priority to that topic in its future programme of work. The draft articles under elaboration should contain general rules which might not be directly applied in every possible case, and should be worded in a sufficiently flexible manner to give States the possibility of elaborating, where appropriate, specific rules on responsibility in various fields of international law, of negotiating the concrete terms of responsibility when a wrongful act had been committed, or of using other means of settlement of the issue.

19. He agreed with the Special Rapporteur's general conclusion that damage suffered by a State as a result of an internationally wrongful act could be broadly divided into two categories: material damage and moral damage. That distinction should also be applied to the consequences of an international delict. The general approach taken in draft article 8 (footnote 247), namely, that restitution in kind and pecuniary compensation should ensure complete reparation, and that the latter should be applied where the former remedy had failed to restore the status quo ante, was satisfactory. The payment of interest (draft art. 9, footnote 262) could hardly be separated from pecuniary compensation. In that regard, it was necessary either to delete the provision dealing with interest while taking into account that compensation should ensure full reparation of damage, including both damnum emergens and lucrum cessans, or to include a general obligation to pay interest in draft article 8, probably in paragraph 3.

20. Satisfaction (draft art. 10, footnote 263) should be a remedy applied only to moral injury in its traditional sense, namely to the infringement of the State's dignity, honour and prestige. The reference to legal injury should be deleted. As to the guarantees of non-repetition of the wrongful act, they should not be limited to moral damage. He had noted with satisfaction the Special Rapporteur's readiness

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to devote a separate article to that issue. With regard to the "punitive" nature of satisfaction, he shared the doubts expressed in the Commission and the Sixth Committee concerning its consistency with the nature and consequences of the delict.

21. The future instrument on international liability for injurious consequences arising out of acts not prohibited by international law should be a framework agreement containing a limited set of binding general rules and guidelines, and its main purpose should be to introduce into general international law the principle of international liability for transboundary harm as a result of lawful activities. It could also contain general criteria and rules for the implementation of liability unless otherwise agreed between the States concerned. In accordance with the same logic, draft article 21 (footnote 315) should simply state the obligation to pay compensation, and should be followed by another article indicating the circumstances under which the compensation might be reduced or even excluded. In view of the lawful character of the activities, only significant harm should give rise to liability, and the scope of compensation should be limited to the damnum emergens and to the cost of any reasonable operations to restore the conditions which existed prior to the occurrence of harm.

22. A clear distinction should be made not only between the concept of liability for harm as a result of lawful activity and the concept of responsibility for a wrongful act, but also between the concept of liability and that of risk. The last two concepts should be treated separately because one involved an obligation to compensate and the other an obligation to prevent. The concept of risk went beyond the scope of the draft since the fact of carrying out activities without transboundary harm could not give rise to an obligation to compensate. Nevertheless, there was merit in addressing the issue of risk in order to establish minimum standards for prevention and co-operation or, perhaps, to limit the scope of the draft to compensation for harm arising out of lawful activity involving risk. The operator should be held primarily liable, while the State of origin should bear subsidiary liability limited to that part of the operator's liability in respect of which the operator did not provide compensation. The State could be held primarily responsible when the given activity could be attributed directly to it, or when a treaty provided for liability for the whole activity under national jurisdiction or control.

23. In order to be generally acceptable and effective, the instrument under elaboration on jurisdictional immunities of States and their property should take into account, first, the existence of different national legislative approaches, and second, the fact that some States were in the process of reviewing their laws in that area. In the case of Bulgaria, there was no doubt that the radical changes which would be made to its laws in order to create the conditions for a transition to a market economy would have consequences for its national policy with regard to the topic under consideration.

24. With regard to the concept of State enterprises with segregated State property, he explained that under current Bulgarian legislation, the State bore no

(Mr. Nedelchev, Bulgaria)

liability for the obligation of enterprises, whether State or private enterprises, and enterprises, including State enterprises, were not liable for the obligations of the State or other enterprises. Furthermore, the new Bulgarian Law on Maritime Areas extended immunity only to warships and other vessels operated for non-commercial purposes, in accordance with the United Nations Convention on the Law of the Sea. From the point of view of Bulgarian law, the question of the immunity of State enterprises engaged in commercial activity did not arise. The problem lay in the concept of liability. That was why his delegation saw merit in the Australian proposal to add a safeguard clause in the draft articles to make it clear that they were without prejudice to the attribution of any liability to a given legal entity under the law governing the status and transactions of that entity.

25. With regard to the law of the non-navigational uses of international watercourses, his delegation reiterated its preference for a framework instrument providing States with guidelines for the conclusion of specific agreements on specific watercourses. The instrument should not go into detail, particularly with regard to procedure, nor should it establish general binding obligations which might affect existing agreements or unduly restrict the discretion of riparian States to conclude agreements. Despite the Commission's stated intentions, the draft articles did not always reflect that approach, and they should be amended on second reading with a view to devoting a large number of articles to general principles and basic rules. His delegation shared the doubts expressed in the Commission regarding article 26, on joint institutional management (footnote 123): the draft should not provide for the establishment of a permanent organization, and it should be left to the parties to future watercourse agreements to define the functions of any bodies set up under those agreements. Annex I, on implementation of the draft articles (footnote 126), in particular, article 3, paragraph 2, and articles 6 to 8, seemed to go far beyond the scope of a framework agreement.

26. Mr. DASTIS (Spain) said that it would not make sense to elaborate a code of crimes against the peace and security of mankind without also establishing a mechanism to ensure its implementation, and he welcomed the detailed study of the question of the establishment of an international criminal jurisdiction contained in paragraphs 93 to 156 of the report of the International Law Commission (A/45/10). His delegation agreed with the Commission that recent developments in international relations, which had strengthened the confidence of States in the possibility of basing international order on the rule of law, made the establishment of such a jurisdiction more feasible than when the matter had been studied earlier. Moreover, the international community gradually had grown increasingly aware that certain international crimes had achieved such wide dimensions that they could endanger the very existence of States and seriously compromise international peaceful relations. That was what had prompted the General Assembly, in its resolution 44/39, to request the Commission to address the question of establishing an international criminal court, a request which had been reiterated by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders. His delegation had also noted with interest the views on the subject recently advanced in the General Assembly by the foreign minister of a State which was a permanent member of the Security Council.

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27. As to the models suggested by the Commission in paragraph 155 of its report, the Commission should continue to explore the option of an international criminal court having only a review competence, since the other options (exclusive jurisdiction and concurrent jurisdiction) had many drawbacks which had been highlighted in the Commission's commentaries. His delegation favoured endowing the court with competence to issue advisory legal opinions on criminal matters at the request of competent United Nations organs. It reserved its position for the time being on the possibility of also allowing national courts to request such opinions (para. 134). With regard to penalties, the Code should, in accordance with the rule nulla poena sine lege, provide that penalties should be proportionate to the gravity of the crime committed and that the death penalty, which ran counter to his country's Constitution, should be excluded. It was still too soon to determine whether the court should be a permanent organ. The answer to that question would depend on the degree to which the idea was accepted by States and on the financial implications of a permanent court. The Commission had not yet addressed the question of the cost and method of financing, and it should do so in the future. His delegation agreed with the conclusion of the Commission (para. 157) to the effect that establishing an international criminal court would be a step in developing international law and strengthening the rule of law, but that it would be successful only if widely supported by the international community.

28. With regard to article 16, on international terrorism (p. 60), his delegation would wait to express its opinion until the Commission had reviewed paragraph 2 of the article, on participation by individuals, in the light of the future provisions on complicity and crimes against humanity. With regard to article X (p. 62), his delegation was prepared to give favourable consideration to appropriate penal machinery to combat drug trafficking. It urged the Commission to review the issue more thoroughly, bearing in mind its relationship with terrorism and mercenarism. The article should characterize as a crime only illicit traffic on a large scale and should take into account not only transboundary traffic, but also, traffic within the confines of a State.

29. Generally speaking, his delegation continued to believe that the main objective of the Code should be to elaborate an exhaustive list of carefully defined international crimes based as far as possible on the offences envisaged in existing international instruments, as that would facilitate general acceptance by States. The list should include only serious crimes which threatened the fundamental interests of the international community, and should observe the distinction between international crimes and offences established in the draft articles on State responsibility.

30. Turning to the jurisdictional immunities of States and their property, the condition imposed in article 12, paragraph 1 (footnote 79), to the effect that the employee must be covered by the social security provisions of the State of residence in order for immunity not to be invokable, should be deleted. However, the reference in subparagraph 2 (a) of the article to the effect that the employee had been recruited to perform services associated with the exercise of governmental authority should be retained. That formula was preferable to the text proposed in

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paragraph 177 of the report referring to the administrative or technical staff of a diplomatic or consular mission, which was too restrictive. As presently drafted, subparagraph 2 (b) could leave the employee totally without recourse. Accordingly, in the cases envisaged, instead of disallowing immunity, the subparagraph should replace the obligation to recruit or reinstate an individual with the obligation to pay compensation.

31. Article 13 (footnote 85) should be retained and its scope should not be restricted to damage resulting from the use of means of transport. It should also be borne in mind that the acts or omissions to which the article referred could constitute internationally wrongful acts and that the settlement of the resulting disputes might already be governed by international treaties or agreements. A safeguard clause therefore should be included in a new paragraph recognizing the applicability of the provisions of such treaties or agreements. The same observation applied to article 16 (footnote 88), for it was not unusual for the fiscal obligations of a State or of its bodies in another State to be governed by bilateral agreements. In article 18 (footnote 90), the clause "used or intended for use in government non-commercial service" in paragraph 2 should be replaced by the expression used in article 96 of the United Nations Convention on the Law of the Sea, "used only on government non-commercial service". The question of harmonization aside, that solution would have the advantage of limiting immunity to cases in which the ship was in fact used for such purposes.

32. In article 19 (footnote 94), the exception should not be limited to arbitration agreements in civil or commercial matters, but should apply to all types of disputes with private individuals which the State had agreed to submit to arbitration. His delegation agreed to the deletion of article 20, which dealt with a matter that was too complex to be covered in a single article. It also agreed to the merger of articles 21 and 22 in the second alternative proposed by the Special Rapporteur (footnote 99). However, the new article 23 appeared superfluous in view of the provisions of article 11 bis (A/CN.4/431, p. 21), which accorded the same treatment to State enterprises engaging in commercial transactions with foreign natural or juridical persons as that applicable to natural or juridical persons. Lastly, in article 27 (footnote 103), the phrase "fallo en ausencia" in the Spanish text should be replaced by "fallo en rebeldía".

33. With regard to the law of the non-navigational uses of international watercourses (chap. IV), his delegation considered that the framework agreement formula was justified as a starting-point; it was, however, premature to take a final decision on the nature of the legal instrument which would incorporate the rules that were being drafted. His delegation hoped that the best solution would turn out to be that of an international convention.

34. It wished to reiterate its preference for an approach based on the concept of "watercourse" rather than that of "watercourse system", which was too vague and which, since it encompassed various hydrographic components (rivers, lakes, canals, glaciers and ground water), had territorial connotations. His delegation also found the concept of "ecosystems" ambiguous, even though it did not dispute that it

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could have a quite specific scientific meaning. It was too broad, and encompassed spatial units which went considerably beyond the concept of "watercourse". Also, despite the commentary on article 22 (p. 147), it could not always see the precise difference between the concept of "environment" and that of "ecosystem", all the more so in that reference was made in the definitions given in footnote 144 to the "non-living environment" and to the "environment". Finally, it continued to regard as unduly ambiguous the term "appreciable harm", which it would like to see replaced by "considerable harm" or "substantial harm".

35. The obligation of co-operation provided in article 25 (footnote 122) should be considerably qualified. The notion of equity mentioned in paragraph 2, while unassailable from a theoretical point of view, was generally reflected in practice by a political compromise between the interests of the States concerned which was the outcome of diplomatic negotiations. Furthermore, States would have difficulty in accepting the obligation of co-operation in paragraph 1 without making it subject to the prior conclusion of an agreement on financing the regulation works referred to in paragraph 2. Since in general international law there was no obligation to establish joint management bodies, and since the stipulation of such an obligation would probably go beyond the limits of a "framework agreement", paragraph 1 of article 26 (footnote 123) would have to be restricted to making a recommendation to that effect which States would take into account according to the specific features of each watercourse.

36. Article 28 (footnote 124) went beyond the scope of the draft, which should not deal with questions related to armed conflicts. The articles in annex I, on implementation (footnote 126), should be included in an optional protocol, so that States which decided to become parties to the framework agreement would not be obliged to accept the obligations provided under them at the same time. His delegation also had serious doubts as to the timeliness of convening the Conference of the Parties referred to in article 7, particularly if the Conference was supposed to take place "not later than two years after the entry into force of the ... draft articles". It would be better to include the provisions of articles 7 and 8, if they were retained, in the final provisions.

37. Turning to the topic of State responsibility (chap. V), his delegation said that it preferred alternative (b) of paragraph 1 of article 8 (footnote 247), since alternative (a) gave the impression that the purpose of compensation was to restore the situation that would have existed if the wrongful act had not been committed, whereas in fact it was necessary precisely when the re-establishment of that situation was impossible. The two alternatives seemed to be based on a notion of partial restitution in kind which was to be supplemented by compensation. It might be asked whether that was compatible with the very nature of restitution. It would perhaps be preferable to reserve the term "restitution in kind" for the case in which such restitution fully re-established the situation that would have existed if the wrongful act had not been committed.

38. His delegation approved of the reference to "any economically assessable damage" in paragraph 2 of article 8, and agreed that it should include any moral

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damage sustained by the injured State's nationals. In his delegation's view, non-material damage sustained by the State itself should also be included. It also approved of paragraph 3, which stated that compensation included any profits the loss of which derived from the internationally wrongful act. The provision should also mention interest, a question currently dealt with in article 9, which should be deleted. The term "uninterrupted causal link" in paragraph 4 might have too much ambiguity. It would be preferable to specify that the damage deriving from an internationally wrongful act was to be taken as referring solely to the loss of which it was the immediate and foreseeable cause.

39. The reference in paragraph 1 of article 10 (footnote 263) to "punitive damages" should be deleted because of its penal connotations, and particularly because the consequences of the offences would be dealt with separately. While agreeing that the guarantee of non-repetition of the wrongful act should be included as one of the modes of satisfaction, his delegation did not see why it should be confined to moral or non-material damage. A separate article, which would also provide guarantees of non-repetition in the case of material damage, should therefore be devoted to that issue.

40. Referring to the question of international liability for injurious consequences arising out of acts not prohibited by international law (chap. VII), he welcomed, first of all, the introduction of the term "significant risk", which was undoubtedly preferable to the expression "appreciable risk", since the latter did not imply the degree of gravity necessary for an activity to fall within the scope of the draft articles. Certain ambiguities would have to be eliminated, in particular in draft article 2 (e), where there could be no question of referring to "minor, though significant, transboundary harm".

41. He wondered whether it was in fact desirable to deal jointly with activities involving risk and activities with harmful effects. In the case of the former, it was the element of prevention which took precedence, while in the case of the latter liability was the issue. That being so, it was hard to see how a single régime could be established for both categories of activities. In that connection, it should be recalled that the main aim of the draft was to be liability for damage caused, and a clear distinction should be drawn between the two parts. In particular, the exhaustive treatment of the obligations of prevention would only be justified if it were determined that non-compliance with those obligations would entail the international liability of the State. For the time being, the issue was not clearly addressed in the draft articles and should be examined in greater depth.

42. His delegation considered it neither useful nor desirable to draw up a list of dangerous substances, which, while out of place in an agreement of general scope, would be still less appropriate in a framework agreement. Furthermore, a non-exhaustive list would be insufficiently precise, while an exhaustive list was liable to become rapidly obsolete and to lead to difficulties if other substances had to be added. Finally, substances which were not dangerous could cause transboundary harm, whereas the use of substances which were theoretically dangerous might not entail any risk of that nature.

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43. His delegation could not acknowledge the primary liability of the State in cases in which the harm had been caused by private operators. The State must certainly regulate dangerous activities and ensure compliance with the obligations of prevention, but the activities of private operators were entirely at their own liability, since the liability of the State was merely subsidiary and could not be invoked except in a case of non-compliance with its international obligations and on the basis of its liability for wrongful acts.

44. In conclusion, he said that his delegation could not accept the assertion in article 28 that it was not necessary for all local legal remedies available to the affected State to be exhausted prior to submitting a claim to the State of origin for liability in the event of transboundary harm. It was essential that such remedies could be exercised effectively, just as it was essential to regulate dangerous activities and to guarantee liability for harm, if necessary by establishing a system of compulsory insurance or compensation funds. In principle, however, claims for compensation should remain at the domestic level, and should be addressed to private operators.

45. Mr. AL-BAHARNA (Bahrain) said that he was gratified to learn that the entire set of draft articles on the jurisdictional immunities of States and their property, as formally adopted by the Commission, was expected to be submitted to the General Assembly at its forty-sixth session. The problem of the jurisdictional immunities of States no longer stemmed from the opposition between the theory of limited immunity and that of absolute immunity, and from now on the Commission should base itself on considerations of reciprocity in order to finalize the rules and principles governing jurisdictional immunities. It should also resist the temptation to make any kind of radical changes in the draft articles, since such changes might upset the structure approved on first reading.

46. With regard to the title of Part III ("Limitations on" or "Exceptions to" State immunity), his delegation was prepared to support a neutral formulation such as "Activities of States in respect of which States agree not to invoke immunity" (A/45/10, para. 173).

47. In paragraph 184 of the report (A/45/10), the Special Rapporteur had proposed that the reference to the social security requirement in article 12, paragraph 1, be deleted and that subparagraphs (a) and (b) be reconsidered by the Drafting Committee. While supporting those proposals, his delegation would like the Drafting Committee to streamline the text, if possible by combining paragraphs 1 and 2, in order to convey beyond doubt the scope of the non-immunity principle with respect to contracts of employment.

48. His delegation in principle endorsed article 13 but would like its meaning and scope to be made clearer. As for article 14, which it considered to be too detailed, it supported the Special Rapporteur's recommendation to delete paragraph 1, subparagraphs (c), (d) and (e), which did not reflect the universal practice of States. With respect to article 15, his delegation was sceptical, at the current stage of codification, about the introduction of references to "a plant

(Mr. Al-Baharna, Bahrain)

breeder's right" and "a right in computer-generated works", which would tend further to restrict the scope of the immunity principle. It considered those "rights" to be innovations which could not be equated with well-recognized rights in regard to patents, trade marks, etc.

49. His delegation supported the Special Rapporteur's recommendation to delete the word "non-governmental" from article 18, with the proviso that the words "for commercial purposes", in paragraphs 1 and 4 of that article, were explained in the commentary as indicating that a ship engaged in a governmental mission would enjoy immunity. Such an explanation would facilitate acceptance of the deletion suggested by the Special Rapporteur.

50. With respect to article 19, his delegation preferred the term "commercial contract" to "civil or commercial matter". It did not favour the addition of the proposed subparagraph (d), which was not justifiable in law, and supported the retention of the last part of the chapeau ("a court of another State which is otherwise competent"), because its meaning was clear and its content less complex than the alternative formulation suggested by the Special Rapporteur. It also wished to reiterate that it was too late to make substantive changes to the text.

51. Article 20, concerning cases of nationalization, was too complex a subject to be dealt with in such a cursory manner, and his delegation shared the views of those members of the Commission who had suggested its deletion. The question of nationalization should be decided by the courts of the forum State in accordance with appropriate rules of public or private international law.

52. In part IV (draft arts. 21 to 23), which dealt with the well-founded principle of international law whereby consent to the exercise of jurisdiction by the forum State was not equivalent to consent to execution, the question facing the Commission was how best to give effect to that principle. His delegation did not agree with the Special Rapporteur (para. 218) that "limited execution ... would have a better chance of obtaining general approval" and shared the concern expressed in paragraph 221, namely, that the recent tendency to restrict State immunity from execution was a dangerous departure from the rules of sovereign immunity of States and should be curbed by the Commission.

53. The changes proposed by the Special Rapporteur in paragraph 220 of the report would tilt the balance in favour of the "limited" immunity principle, thereby upsetting the compromise achieved by the Commission when it adopted articles 21 to 23 on first reading. His delegation did not therefore support the proposed changes, which would amount to a radical departure from the text approved on first reading.

54. His delegation was not fully satisfied with the new text of article 24, which was, however, far less ambitious than the one proposed by the Special Rapporteur and adopted on first reading. Each State had its own rules as to the service of process, to which the courts attached the greatest importance. On the other hand, it could not be assumed that States would be willing to modify their domestic rules

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of civil procedure in order to make them conform with the future instrument. It would therefore be advisable to add a new subparagraph (a) to paragraph 1, reading "in accordance with the rules of civil procedure of the State of forum", and to renumber former subparagraphs (a) and (b) as (b) and (c). The incorporation of that clause would facilitate acceptance of paragraph 4.

55. In paragraph 3 of article 24, it was necessary to delete the words "if necessary" and to add, as suggested by the Special Rapporteur, the phrase "or at least by a translation into one of the official languages of the United Nations".

56. His delegation endorsed article 25, on the understanding that article 24, paragraph 1, would include the new subparagraph (a) as suggested, in order to give States additional protection against default judgements. It had no objection to the inclusion, at the end of article 25, paragraph 1, of the words "and if the court had jurisdiction in accordance with the present articles" (para. 233). Finally, the words "if necessary" should also be deleted, as in the case of article 24, paragraph 3.

57. His delegation suggested that draft article 26 be replaced by the following text: "Where a State enjoys immunity in a proceeding before a court of another State, the court cannot issue any order against the State requiring it to perform or refrain from performing a specific act".

58. It did not seem necessary to include draft article 28, which was modelled on article 47 of the Vienna Convention on Diplomatic Relations of 1961 and on article 72 of the Vienna Convention on Consular Relations of 1963. The rule of non-discrimination, although logical in the case of diplomatic or consular agents, made little sense in the case of States. His delegation therefore believed that the draft article should simply be deleted.

59. Turning to the question of the law of the non-navigational uses of international watercourses (chap. IV), he said that the Commission should not abandon the framework agreement approach, which was the only way for watercourse States to conclude agreements which were compatible with their particular needs and circumstances. He noted with satisfaction the assurance given in that respect by the Special Rapporteur in paragraph 258 of the report.

60. In the opinion of his delegation, draft article 24 dealt with two different subjects, since paragraph 1 addressed the relationship between navigational and non-navigational uses, while paragraph 2 addressed the absence of priority among uses. It suggested that those paragraphs be converted into two separate articles. In paragraph 1, it would like the words "other use" to be replaced by "other use or category of uses", which would better convey the sense of the principle. Paragraph 2 was by far the most important provision of the article, and the problem of conflicts between uses of a watercourse called for more comprehensive and detailed treatment. Articles VII and VIII of the Helsinki Rules of 1966 offered a useful model in that connection.

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61. With respect to article 25, the term "regulation" should be defined either in the body of the article itself or in the article on general definitions. In paragraph 1, his delegation shared the view of some members of the Commission that the obligation to co-operate should be expressed more flexibly in order that co-operation might be effected either directly or through regional or international organizations as well (para. 270). It hoped that the Commission would elaborate paragraph 2 by including some of the provisions governing the regulation of international watercourses adopted by the International Law Association at Belgrade in 1980. Provisions of that nature should help to facilitate the solution of conflicts.

62. Article 26, concerning joint institutional management, was definitely an important component of the draft articles. Recent treaties had seen an extension of the role of joint commissions in the management of international watercourses. There was, however, no legal obligation to consult with a view to establishing a joint body or organization (para. 277), and his delegation therefore recommended that the Commission should proceed cautiously in formulating an article on institutional management. Moreover, with reference to the proposal that the obligation to consult should be made subject to certain conditions, it could not agree with the reasoning of the Special Rapporteur (para. 288) and thought that a statement of conditions might make the text more realistic and acceptable to a large number of States. It also felt that paragraphs 2 and 3 should be merged, as they dealt with the functions of the management organization referred to in paragraph 1. It supported the inclusion of the definition of "management" in the text of the article rather than in an annex and would prefer to see the term "joint organization" replaced by "joint commission", which seemed to it to be more appropriate.

63. His delegation agreed with the general thrust of draft articles 27 and 28, concerning the protection of water resources and installations. However, the importance of dams and other hydraulic installations in modern-day life made their protection imperative both in time of peace and in armed conflicts. It therefore supported draft articles 27 and 28 and would not object if the Commission co-ordinated them with other articles, provided that their scope and effect were not reduced. It agreed with the suggestion made in paragraph 303 of the report that the word "inviolable" should be replaced by a more felicitous term.

64. The draft articles presented in annex I stated principles which his delegation found contentious and unorthodox in both nature and content. Draft articles 2 and 3 might require changes in national laws. For example, article 2 would mean that a nuisance in a downstream State would be equated with a nuisance in an upstream State. As long as the rules of liability for tortious acts were not internationally uniform and as long as the rules of procedure and evidence differed from country to country, it was not possible to establish a rule such as the one contained in draft article 2. The same criticism applied mutatis mutandis to draft article 3, which would require changes in national laws and procedures as regards the cause of action and forum of suit. Moreover, the two articles went beyond the scope of a framework agreement, as did articles 6 to 8, as some members of the

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by recognizing international conventions as the primary source for the identification of international crimes. A number of issues relating to the binding nature and enforceability of the legal sources invoked, such as custom and general principles, could thus be avoided. It was therefore essential for the Commission to rely on conventional international law as a basis for developing a theory in order to achieve legal certainty. However, it must not be forgotton that there had never been a definitive list of international crimes, nor had there ever been a conclusive theory as to the definition of an international crime.

74. Turning to draft articles X and Y, relating to illicit traffic in narcotic drugs as a crime against the peace and security of mankind, his delegation considered that the new version thereof was ambiguous for the following reasons: firstly, the text failed to specify that the drugs were used for an illegal or unlawful purpose; and secondly, because the provision did not indicate what exactly constituted traffic "on a large scale". The Commission should therefore be more precise in drafting those provisions. At all events, it was unnecessary to deal with the topic in the draft Code, the national legislation and judicial systems of States effectively punished crimes related to drug trafficking. From a legal point of view, it was the responsibility of the State on whose territory the crime was committed to institute proceedings. Furthermore, between 1912 and 1982 such crimes had been the subject of 15 international conventions, of which he gave several examples. As a signatory of the 1988 International Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Indonesia was profoundly committed to the international campaign against illicit trafficking, and was in the process of streamlining its national legislation in order to bring it into line with the provisions of the Convention. It was more effective to deal with such offences under domestic legislation and it was premature to tackle them at the international level, if only because of the current lack of an international mechanism to punish those engaged in such traffic.

75. With regard to the establishment of an international criminal jurisdiction, his delegation had fundamental doubts regarding absolute universality, which made it possible for States to impose their political views through criminal prosecution. It was hardly realistic to imagine that an international criminal court could have coercive powers when deciding on the conduct of States in matters that were in essence politically controversial.

76. The International Court of Justice did not have criminal jurisdiction, but if the States Members of the United Nations wished it to have such jurisdiction, they could so decide, and proposals to that effect had occasionally been made. Even if the Charter was not modified, the Court did have the power to deal with issues of international criminal law if those issues were submitted as damage actions or cases calling for injunctive relief. However, recent history had demonstrated that international criminal law was not self-executing or truly enforceable, even when the International Court of Justice had ruled. Attempts to establish a coercive sanction apparatus to enforce obligations imposed by international law presupposed the existence of an international authority which was superior to sovereign States. Practical considerations would seem to favour more flexible and less

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69. There was an even more substantive issue - the use of State practice as the basis for draft articles. State practice was no doubt of the greatest importance but, as some members of the Commission had already pointed out, more weight must be given to its contemporary or more recent manifestations. For example, little inspiration could now be drawn from the Boxer Rebellion.

70. The Commission must choose its new topics with the utmost care and in constant consultation with the Committee. Topics designed to provide practical answers to current issues of legal policy in various areas of international life should have precedence over topics in which doctrinal and theoretical interests prevailed. As the Commission's Working Group had said, a topic relating to the legal aspects of the protection of the environment would certainly have to be included in the Commission's agenda, for otherwise, as already pointed out, it might be bypassed by other forums. But each item must be allocated the time necessary for its consideration and the results must be presented to the General Assembly as quickly as possible. Lastly, the Commission should have the courage to defer, or even to adjourn sine die the consideration of certain topics. The Committee should not allow years of hard work to be wasted because Governments were not ready to accept the draft articles on a given topic.

71. As a conclusion to the methodological part of his statement, he endorsed the request by other delegations that the Commission's report should be reduced to more manageable proportions. Some parts had already been considerably shortened but further efforts still seemed necessary, no matter how hard a task that meant for the drafters. A report which for lack of time could not be studied thoroughly by the people to whom it was primarily addressed, i.e. the representatives of States, lost much of its practical value, no matter how high its academic standard.

72. Turning to chapter IV of the report, concerning the law of the non-navigational uses of international watercourses, he recalled that Austria was situated on one of the great rivers of Europe and was an upstream State as well as a downstream State. The Special Rapporteur on the topic had now covered most of the ground, so that the Commission was now in a position to grasp the range and scope of the draft articles. His delegation had consistently supported the idea of a framework agreement containing the fundamental legal principles accepted by the entire international community and providing a basis for the conclusion of bilateral, regional or subregional watercourse agreements. But the Commission had perhaps aimed too high and had devoted too much time to the drafting of very detailed regulations, thereby compromising the original concept of a framework agreement. Of course the examination of specific details would be useful inasmuch as it would remind States of the points to be taken into consideration in the conclusion of specific agreements, but the Commission should not go too far beyond the existing State practice. The new political situation in Europe, and in the Danube basin in particular, would undoubtedly have significant effects on the transnational management of a river which was one of Europe's main watercourses. If the Commission completed its work on the topic speedily, its conclusions would be of the greatest relevance for all the States of the Danube.

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separate article. The provisions of article 28, on the status of international watercourses in time of armed conflict, should be reviewed in the light of established rules of international law governing armed conflicts.

81. On the issue of jurisdictional immunities of States and their property, the Commission must draft provisions that reconciled the two concurrent theories prevailing in that area, namely, the concept of absolute immunity and the concept of limited immunity. Generally speaking, sovereign States should be immune from legal proceedings, regardless of whether their activities were of a public or a private character. However, a key element that should be taken into consideration when making that distinction was the clauses that were generally included in bilateral, regional and global agreements governing restrictions on jurisdictional immunities of States and their property.

82. Mr. VAN DE VELDE (Netherlands) said that the framework agreement format which the Special Rapporteur had chosen for the draft articles on the law of the non-navigational uses of international watercourses was that of a general instrument containing principles and other general rules which riparian States must supplement according to the needs and other relevant factors associated with a particular watercourse. Thus while accepting in principle article 24 as it related to the various uses of a watercourse, his delegation wished to note that situations differed from one watercourse to another and that, in certain cases, navigation could be considered to be the priority use of a watercourse.

83. His delegation also endorsed the duty of riparian States of a watercourse to co-operate, which was set out in article 25. The question remained, however, as to what that article added to article 9, which contained the general obligation for riparian States to co-operate in order to "attain optimum utilization and adequate protection of an international watercourse [system]". As worded, paragraph 1 of article 25 raised the question of the form and scope such co-operation should have. To the extent that the reference to the identification of needs and opportunities for the regulation of international watercourses might be interpreted in too restrictive a sense, he wondered whether paragraph 2 of the article should be retained.

84. His delegation was not opposed in principle to article 27, concerning the status of international watercourses and water installations in time of armed conflict; however, further reflection as to how the article related to existing rules of international law on armed conflict, and particularly as to whether the term "inviolable" was appropriate in relation to watercourses, was required. Articles 3 and 4 of annex I contained very important rules concerning recourse under domestic law and equal right of access of any person in another State who had suffered appreciable harm or was exposed to a significant risk thereof. In view of the importance of those rules, one might ask whether it would not be preferable to include them in the main body of the text rather than relegating them to an annex.

85. With regard to the draft Code of crimes against the peace and security of mankind, he concurred with the Commission's conclusion that it was desirable to

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gave some examples. Further, "punishment of the responsible individuals" had no precise meaning as a form of satisfaction in so far as punishment, in countries governed by the rule of law, was a matter of due legal process. It was also questionable, in the case of paragraph 4, whether it was wise to exclude measures falling within domestic jurisdiction. There were cases of human rights violations, for example, where assurances against repetition could be given only if the country's legislation was changed. Lastly, and in general, article 10 was to a large extent based on the assumption that a judicial award would be rendered. However, as long as mandatory jurisdiction was the exception rather than the rule, it might be asked whether the inclusion of the concept of satisfaction was needed at all. The draft article on that question should proceed from the assumption that a negotiated settlement would, in most cases, be the objective of the parties.

78. The question of the impact of fault on the forms and degrees of reparation was dealt with in paragraphs 408 to 412 of the report. His delegation had difficulty in understanding why, if fault was a necessary element for measuring State responsibility, as argued in that passage, the concept had been eliminated from part one of the draft.

79. Chapter VII, "International liability for injurious consequences arising out of acts not prohibited by international law", proposed a complete set of draft articles, thus bringing out the extreme complexity of the subject. The aim of elaborating a uniform régime of liability for the purpose of protecting the environment was perhaps too ambitious. States might be reluctant to accept that type of régime, especially one concerning strict liability which might apply to as yet unknown circumstances and which would in reality amount to an open-ended obligation by States. It would be better, therefore, to adopt a functional sector-by-sector approach leading to separate legal instruments for different situations. There would thus be a different approach concerning hazardous activities on the one hand, and harmful activities on the other: in the first case, damage would entail State responsibility if a primary rule of international law - for example, agreed standards - had been violated, or, if such primary rules did not exist, would be governed by a régime of strict international liability; harmful activity, however, should be tackled within the framework of State responsibility, which would presuppose the determination of primary rules as to levels of permissible emissions. That general rule would be supplemented by the civil liability of the operator in cases where the source of damage could be identified.

80. He referred, in that connection, to the approach of the Standing Committee of the International Atomic Energy Agency, which was working on the question of liability for nuclear damage. If the system it proposed - which he outlined - came into operation, it would constitute a major step forward in respect of State liability.

81. Reviewing briefly the proposed draft articles, he said that draft article 2 (footnote 305) included in its paragraph (b) a list of "dangerous substances" which did not seem very useful: moreover, though a hydroelectric dam

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could not be considered a "dangerous substance", it could nevertheless present a "significant risk". Paragraph (g), concerning "preventive measures", should specify somewhere that the "cost" of such measures must be reasonable. As to paragraph (h), he wondered who was to define what was "normally tolerated". Draft articles 7 and 8 (footnote 307) would profit from revision. Article 10 (footnote 308) could pose a problem if the country of origin had adopted lower standards with respect to a particular substance than the other country concerned.

82. Article 11 (footnote 309) should establish the clear obligation of States to require the collection of information if certain dangerous substances were to be used. Otherwise, the State might not even be in a position to have "reason to believe" that activities falling within the scope of the draft articles were being carried out in its territory. In article 17 (footnote 312), the concept of "an equitable balance of interests" could usefully be replaced by "good faith", which was a well-established concept in international law. As it stood, article 21 (footnote 315) posed problems, in so far as there were situations, of which he gave an example, in which the obligation of the State of origin should go beyond a mere duty to negotiate.

83. Chapter V of the draft articles, on civil responsibility (footnote 321), required in-depth study, in particular with a view to bringing its provisions into line with the provisions of the other chapters. Article 31, "Immunity from jurisdiction", should be adjusted to reflect the stipulations of the draft articles on jurisdictional immunities of States and their property.

84. In conclusion, he referred briefly to chapter VI of the report, on relations between States and international organizations. In his view, the International Law Commission had been right to defer consideration of that topic. Austria, which was host to several United Nations bodies, saw no urgent need for the elaboration of general rules governing relations between States and international organizations, on the one hand, because the treaties establishing those institutions contained general provisions on their legal status, and on the other, because there were specific multilateral treaties governing privileges and immunities. In addition, host countries concluded specific headquarters agreements which covered practically all the questions dealt with in the draft articles in question. When considering with the subject in future, the Commission should bear in mind that there were many other more urgent questions of international law.

AGENDA ITEM 119: PROGRAMME PLANNING

85. The CHAIRMAN recalled that under agenda item 119, the Chairman of the Fifth Committee of the General Assembly had asked the Sixth Committee for its comments on the proposed medium-term plan for the period 1992-1997 (A/45/6). He read out the letter he had prepared in reply, suggesting that programme 9 of the proposed plan should be completed by a more detailed incorporation of the objectives of the

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United Nations Decade of International Law. To that end, the annex to the letter contained the text of two footnotes for insertion at the end of paragraphs 9.8 and 9.38 of the document in question. If he heard no objection, he would take it that the Sixth Committee wished to transmit that letter to the Chairman of the Fifth Committee.

86. It was so decided.

The meeting rose at 6.25 p.m.