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SUMMARY RECORD OF THE 36th MEETING

Chairman:	Mr. AFONSO	(Mozambique)
later:	Mr. TETU (Vice-Chairman)	(Canada)
later:	Mr. AFONSO (Chairman)	(Mozambique)

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

AGENDA ITEM 128: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-THIRD SESSION (continued) (A/46/10, A/46/405)

1. Mr. LACLETA (Spain) said that while the International Law Commission had made slow progress in its consideration of international liability for injurious consequences arising out of acts not prohibited by international law, the topic was especially difficult in that it involved not merely codification but the progressive development of law. Liability in the absence of a wrongful act - or "responsabilidad objectiva" - was not an accepted concept in international law. However, the draft articles were based on the idea, that his delegation fully shared, that the innocent victim should not be left to bear the loss alone even if the party that had caused the damage was not guilty in the legal sense of the word.

2. There was a clear tendency in the Commission's work to stress the need to prevent and avoid damage, primarily, through the regulation of activities including risk; importance was also being attached to the preservation and protection of the environment; his delegation was not opposed to those trends, provided that they did not obscure the original meaning of the topic. Even if it were possible to determine precisely which activities involved risk with a view to regulating them it would not be possible to include all possible cases of transboundary harm that did not entail culpability. Any activity was potentially dangerous; where there was life there was risk.

3. It would clearly be difficult to secure wide acceptance of norms or a code of conduct in such a broad field; it was for that reason that the question had been raised of establishing an intergovernmental fund (A/46/10, para. 249) in order to ensure compensation to victims. His delegation did not feel it would be useful to draw up a list of dangerous substances. Nor did it feel it would be useful at the current stage to determine the legal nature of the instrument to be drafted; for the time being the Commission should concentrate on drafting a set of coherent, rational and politically acceptable articles; while his delegation would welcome a convention it was too soon to make that the final objective. His delegation fully supported the idea that the principle of liability should be based not on risk, but on the concept of harm (A/46/10, para. 241).

4. His delegation did not feel that the topic "Relations between States and international organizations" was a priority for the Commission. Nevertheless, it would be useful to have a codifying instrument setting forth the generally accepted norms in respect of relations between States and international organizations and especially the privileges and immunities of such organizations and their staff.

5. His delegation did not support the inclusion of new items in the Commission's programme of work; the Commission should concentrate on the three

(Mr. Lacleta, Spain)

major pending topics, and above all on the topic "State responsibility". The list of possible topics for future consideration was not very satisfactory, except perhaps for "The law of confined international groundwaters" and "legal aspects of the protection of the environment of areas not subject to a national jurisdiction", which were linked respectively with the law of the non-navigational uses of international watercourses and international liability for injurious consequences arising out of acts not prohibited by international law.

6. Mr. O'REILLY (Ireland) said his delegation hoped that the Commission would give priority to the topic "international liability for injurious consequences arising out of acts not prohibited by international law". It recognized the Commission's frankness in acknowledging lack of satisfactory progress. The two guiding principles of the Commission's work on the topic, the precept sic utere tuo ut alienum non laedas and the principle that the innocent victim should not be left to bear the loss alone, established limits to the topic which his delegation felt were appropriate. First, only lawful activities were covered; activities prohibited by international law were excluded since they were covered under State responsibility, as were the consequences of such activities. Second, there were two kinds of lawful activities which might come within the scope of the topic, those involving the risk of causing harm in a neighbouring State and those actually causing harm in a neighbouring State. His delegation felt that the Commission had strayed from that area. For example, there had been excessive concentration on environmental and ecological matters, including the questions of dangerous substances and of environmental accidents and ecological disasters, which did not fit appropriately into the topic. The question of "global commons" was also outside the scope of the topic.

7. The Commission needed to take decisions on some important issues before it could make progress on the topic. Controversial matters could not be set aside with a view to having them resolved when simpler issues had been settled, because those controversial matters concerned the fundamentals of the topic. His delegation was puzzled by the failure to adopt definitions on such key concepts as acts or activities involving risk, acts or activities with harmful effects and transboundary harm.

8. The continued ambivalence as to what kind of instrument the Commission should be working on was also impeding progress. His delegation felt that the objective should be a convention; that was a realistic goal provided that the Commission remained within the limits of the topic as originally perceived. The draft articles should set out basic rules and could constitute an umbrella convention under which multilateral agreements dealing with specific kinds of activities and bilateral agreements covering specific situations could emerge. The starting-point of the instrument should be the provisions set forth in article 6 enunciating the principle sic utere tuo ut alienum non laedas and reflecting Stockholm Principle 21. Having defined the two kinds of relevant activities, those involving risk and those actually causing harm, it would deal mainly with the corresponding remedies of prevention and reparation.

(Mr. O'Reilly, Ireland)

9. His delegation believed that the draft articles should be concerned exclusively with liability between States. The suggestion that liability might in some cases be imposed on the operator rather than on the State was another digression from the basic theme of the topic. Liability should rest clearly on the State of origin, leaving it to domestic law to determine whether the operator should be obliged to indemnify the State.

10. Mr. Tetu (Canada) (Vice-Chairman), took the Chair.

11. Mr. HAMAI (Algeria) said that the draft articles on jurisdictional immunities of States and their property represented a balanced and realistic synthesis of the concepts of absolute immunity and relative immunity. That synthesis was in keeping with the multiple interests of each State which, depending on the situation, could be either the forum State or the foreign State. It would also facilitate the broadest possible acceptance of the draft articles and once again illustrated the Commission's consensus approach which enabled it to pursue effectively its goal of promoting the progressive development and codification of truly universal international law.

12. The new title of part III of the draft articles could prove to be an acceptable compromise for the proponents of the two variations suggested in the previous year. Article 2, paragraph 2, in determining whether a contract or transaction was a "commercial transaction", took into consideration the nature of the contract and its purpose, thus making it possible to ensure that the objective of the transaction was indeed commercial in nature. Otherwise, the jurisdictional immunity of the State would continue to have full effect. Article 18 established clearly the principle of State immunity from measures of constraint, along with several exceptions including that concerning express consent of the State. Article 22 assured the State of immunity from measures of coercion and procedural immunities, in particular establishing that a State should not be required to provide any security or deposit. All those measures were judicious and appropriate and were in full conformity with the well-established principle of international law par in parem imperium non habet, a principle which solemnly reaffirmed Article 2 of the Charter of the United Nations proclaiming the sovereign equality of all its Members.

13. The draft articles on the law of the non-navigational uses of international watercourses were based on two main ideas: equitable and reasonable utilization and participation (art. 5) which would preserve watercourses for future generations and ensure the protection of ecosystems, and the obligation not to cause appreciable harm (art. 7). The draft articles consisted of a number of rules designed to implement those two principal ideas; the main objective was to establish mechanisms for cooperation and coordination between watercourse States, thus contributing in the long run to the strengthening of good-neighbourly relations between States. His delegation welcomed the inclusion of groundwater in the sphere of application of the draft articles; the depletion of fresh water and the pressure of demographic growth, and the vital need to preserve the Earth's water resources, made it essential for the draft articles to cover that question in all its aspects.

(Mr. Hamai, Algeria)

14. With regard to the draft Code of Crimes against the Peace and Security of Mankind, the question arose of the sphere of application of the draft Code both in respect of competence ratione materiae and competence ratione personae. With regard to the former, his delegation had always felt that the Code should not include acts which, even though particularly serious, were not really crimes against the peace and security of mankind. The Code should be concerned only with acts of exceptional seriousness with substantial detrimental consequences for peace and security. The purposes and principles of the Charter should be the main criteria in identifying such crimes. His delegation could support the inclusion of the crimes specified in articles 15-20, 22 and 23, but felt that the use of nuclear weapons, whose capacity for mass destruction represented the greatest danger to the survival of mankind, should be included as an act constituting a war crime. At the same time, his delegation had reservations about the inclusion in the draft Code of acts such as illicit traffic in narcotic drugs or wilful and severe damage to the environment which were not necessarily crimes against the peace and security of mankind.

15. In respect of competence ratione personae, he noted that for the time being the Commission had limited the draft Code to the criminal responsibility of individuals but did not exclude application of the concept of international criminal responsibility to States at a later stage.

16. By virtue of the principle nulla poena sine lege, the Code must make provision for applicable penalties. His delegation supported the establishment of an international criminal court because without such a court the Code would be without effect. However, because of the hostility and hesitation of some delegations, the idea should be considered in more detail.

17. Little progress had been made on the topic "international liability for injurious consequences arising out of acts not prohibited by international law". His delegation agreed that priority should be accorded to the topic and that it was not desirable to reopen a general debate on its fundamental premises. The main objection raised to the draft articles was the absence in positive law of precise or general rules concerning liability stricto sensu and in particular reparation for transboundary harm caused by activities involving risk of such harm. His delegation noted that the topic was not really new: paragraph 188 of the Commission's report (A/46/10) referred to a considerable number of legal instruments on the question. In any case, even if the topic were new it should not be dropped from the Commission's programme of work because the Commission was supposed to be concerned with the progressive development of international law. The ever-growing interdependence of the members of the international community, particularly in areas as sensitive as the environment, required a realistic but also an innovative approach. However, the topic must not be reduced to the question of the deterioration of the environment, which was under consideration in other bodies; the Commission must concentrate on international liability for injurious consequences of activities which caused or were liable to cause

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transboundary harm. Special emphasis must be laid on the situation of developing countries, which were the main victims of such damage; because of their lack of technical and financial resources, developing countries could not adequately regulate activities involving risk or causing harm.

18. The list of topics suggested for the Commission's long-term programme of work had been judiciously chosen. Nevertheless, his delegation would prefer to accord priority to completion of the topics already on the agenda.

19. Mr. KIRSCH (Canada) said that the results of the Commission's work over the past 13 years on the topic "International liability for injurious consequences arising out of acts not prohibited by international law" were disappointing. The principles underlying the topic were not new. In fact, in a statement made at the 1972 United Nations Conference on the Human Environment, following the adoption of the Stockholm Principles, his Government had affirmed that a number of those principles had reflected customary international law governing the conduct of States in dealing with environmental problems. That view had been endorsed by others, including the United States, and had been founded on the landmark Trail Smelter case, which had begun in the 1930s. Yet, some members of the Commission and of the Sixth Committee maintained that customary principles of international environmental law did not exist and that the very concept of liability for injurious consequences arising out of acts not prohibited by international law had no legal foundation. As a consequence, during the entire time that the topic had been under review, not one article had been considered by the Drafting Committee or adopted by the Commission.

20. His delegation believed that progress by the Commission on the topic was long overdue. International environmental law, including that relating to the "global commons" and the United Nations Convention on the Law of the Sea, was evolving rapidly outside the Commission, as demonstrated by the adoption in June 1990 of the amendments to the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, the adoption in May 1990 of the precautionary principle in the Bergen Ministerial Declaration on Sustainable Development in the ECE Region and the ongoing international negotiations on climate change. Progress was also being made on other environmental issues, such as the protection of biological diversity, forest management and legal issues relating to the 1992 United Nations Conference on Environment and Development. The work of the Commission on the topic of international liability should by rights be the centre-piece of the evolving body of international environmental law and, as such, would represent the most significant contribution of the Commission to the development of contemporary international law. Unfortunately, such was not the case.

21. With regard to the seventh report of the Special Rapporteur (A/CN.4/437 and Corr.1), his delegation wished to express its satisfaction at some aspects of the work. While in the past doubts had been expressed as to whether there could be liability under international law for acts that were not prohibited,

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there currently appeared to be widespread recognition of the need for progressive development of the law and codification in that field. His delegation joined in the increasing unwillingness to continue debating the question of which of those two aspects merited the Commission's attention. Its members could surely agree that States shared a common obligation to protect and conserve the environment and in elaborating that obligation, the Commission should be guided in particular by Stockholm Principle 21 and the three cases on which it was based: the Trail Smelter case, which had established that States had the obligation to avoid transboundary harm; the Corfu Channel case, which had established that no State could knowingly allow the use of its territory to the detriment of other States; and the Lake Lanoux case, which had established that States must take the interests of other States into consideration in their environmental planning.

22. His delegation considered it unfortunate that the Trail Smelter case had been cited as a reason for lengthy debate as to whether local remedies must be exhausted before States could be found liable, or voluntarily accept such liability. Like the delegation of Sweden and others, his delegation considered that the question of the liability of the operator need not be an obstacle to determining liability at the State-to-State level. To argue otherwise was to render the concept of national sovereignty and control meaningless.

23. His delegation had repeatedly indicated its preference for separate treatment of the concepts of risk and harm. It continued to hold the view that appreciable harm must be the primary basis on which liability was determined. The concept of risk should not be involved in determining liability but should give rise to preventive measures and be used to ascertain the level of preventive care necessary. Determining liability on the basis of risk would drastically reduce the scope of the draft articles since damage, even if substantial, could be excluded if it was the result of low-risk activities. Low-risk activities might have catastrophic consequences while high-risk activities might never cause damage. In elaborating the draft articles, the Commission must bear in mind that the main objective was to provide for compensation for damage incurred and a regime of reparation, independent of the concept of risk.

24. For similar reasons, his delegation did not believe that an illustrative list of activities involving risk should be included in draft article 2. The emphasis placed on the concept of damage in draft article 1 should, to the greatest possible measure, be reflected in draft article 2, the scope of which might be narrowed considerably by the inclusion of lists of dangerous substances or activities. The inclusion of such lists, in combination with the use of the concept of risk was a criterion for determining liability, might shift the Commission's focus from elaborating a convention on international liability for injurious consequences to elaborating a convention which would simply limit liability. In the view of his delegation, that certainly should not be the Commission's objective. It felt, moreover, that the originating State should clearly bear international liability for harmful

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activities caused by individuals under its jurisdiction. The Commission should not lose sight of the fact that there appeared to be consensus on the principle that the innocent victim should not be left to bear the costs.

25. His delegation was, upon preliminary consideration, favourable to the United Kingdom delegation's proposal that the title of the topic should be "International responsibility for transboundary harm". It was somewhat uneasy about the growing trend in the Commission towards replacing the word "act" in the title by the word "activity". It was the act of pollution which had given rise to liability in the Trail Smelter case even though the activities causing the pollution had occurred over a lengthy period of time.

26. His delegation felt strongly that the instrument should take the form of a draft convention which was intended to be legally binding. A code of guidelines would clearly be an inadequate response to the enormous needs of the international community; thus it would be wiser, at least in the early stages, to allow States that did not accept international responsibility for the damage they caused to the environments of other States or to the "global commons" to remain outside the convention. The principles embodied in a properly elaborated convention would almost certainly evolve into customary law, thus making it a "law-making convention" which would eventually be binding on all States.

27. The issue of any overlap between the topics of State responsibility and international liability should be debated outside the Commission so that it could proceed with the increasingly urgent practical task of developing international environmental law.

28. Despite the foregoing reservations, his delegation continued to support the major orientation of the draft articles proposed by the Special Rapporteur and agreed that the topic should be given high priority during the next quinquennium. The current state of international law, and the principle of equity, justified adoption by the international community of the principle that States were responsible for activities carried out under their jurisdiction. His Government would continue to promote that principle in all the appropriate forums, with a view to filling the gaps in conventional and customary law and in the interest of the progressive development of international law.

29. Mr. KENDALL (Marshall Islands) said that further development of international law was the most effective way to move the new world order in the direction of the peace and well-being sought by all. In the light of its mandate and the experience of its members, the International Law Commission should play a fundamental role in helping the world to attain that goal.

30. If codified, the topics contained in chapters IV and V of the Commission's report would provide significant and promising developments in international law. With regard to chapter IV, he wished to comment on matters

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of principle. First, the draft Code should define its relationship with existing multilateral conventions that dealt with the crimes contained in the Code. Secondly, the Code should describe those offences as precisely as possible. Thirdly, imprisonment and/or confiscation of property acquired as a result of the criminal acts would constitute appropriate punishments for those offences. Lastly, the Code should specify a minimum and maximum punishment.

31. His delegation was in favour of the establishment of an international criminal court, since that was the only means of providing the objectivity and impartiality required for the application of the Code. The European Court of Human Rights might provide an interesting model, in particular with respect to defining the relationship between national and international jurisdictions. The European Court had also developed a body of pertinent jurisprudence on the issue of the exhaustion of local remedies. Another useful source of inspiration might be the Inter-American Court of Human Rights.

32. His delegation was of the view that States, non-governmental and intergovernmental organizations, and individuals should have the right to bring cases to the attention of an international commission, which would act as a prosecutor's office and be attached to the proposed international criminal court. The commission would investigate the charges to determine whether there were grounds for prosecution; if grounds did exist, the commission would then be responsible for authorizing and undertaking the prosecution before the court.

33. His delegation did not favour making criminal proceedings contingent on prior determination by the Security Council as to whether the offence in question constituted an act or threat of aggression. Since the system lacked a mechanism for determining whether a political body was acting ultra vires, there must be a strict separation of the judicial functions of an international criminal court and the political functions of the Security Council. Furthermore, providing the Security Council with a means of blocking criminal proceedings might create a basic inequality between those accused of the crime of aggression, in violation of the principle of equality for all before the criminal law.

34. Turning to chapter V, he said that the Commission should accord priority to the topic of international liability. While it was his view that an international convention might be an appropriate instrument, he agreed with the Special Rapporteur that a final decision on the matter could be delayed until more progress had been made on the topic. In elaborating the draft articles, account should be taken of the special situations of the developing countries. The articles should deal not only with the activities causing transboundary harm but also with activities involving a risk of such harm; they should also include the principle of prevention.

35. His delegation believed that the articles should be based on the principle that the innocent victim should not be left to bear his loss alone. Compensation for loss should be obtained either by assigning liability to the

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State of origin or assigning civil liability to the operator, or a combination of the two. In the latter case, liability would initially be assigned to the operator, with the State bearing residual liability in the event that the operator could not be identified or compensation was inadequate. It might be appropriate to consider the creation of two distinct bodies: one to assign liability and the other to decide upon compensation. Lastly, any list of dangerous activities which might be included in the draft articles should be considered illustrative and non-exhaustive.

36. With respect to the Commission's long-term programme of work, he believed that priority should be granted to two topics: "Legal aspects of the protection of the environment" and "The legal effects of resolutions of the United Nations".

37. Mr. AL-BAHARNA (Bahrain), referring to chapter VI of the Commission's report, concerning relations between States and international organizations, said his delegation was gratified by the progress on that topic made by the Commission at its forty-third session. It wished to reiterate that the granting of immunities and privileges was based on the assumption that they were necessary to the efficient functioning of international organizations.

38. Turning to the draft articles, he observed that the main purpose of article 12 was to establish the inviolability of the archives of international organizations. That inviolability was based on the principle of the independence of international organizations, which was a prerequisite for the effective performance of their functions. His delegation therefore had no hesitation in endorsing that principle. None the less, like some members of the Commission, he advocated broadening the definition of archives to include modern means of communication such as computer files, electronic mail and satellite communications. It was his view that paragraphs 1 and 2 of article 12 would best be combined into a single paragraph and that the words "in general" in paragraph 1 should be replaced by the words "in particular".

39. His delegation accepted in principle the text of article 13 concerning the free circulation and distribution of publications and public information material, since that was essential to the functioning of international organizations. However, he felt that the list of materials should be broadened to include "high-tech" materials such as magnetic disks, diskettes and computerized products.

40. In the view of his delegation, the second sentence of article 14, requiring the consent of the host State for the installation and use by an international organization of a wireless transmitter, was quite restrictive and could be deleted. Neither the Convention on the Privileges and Immunities of the United Nations nor the Convention on the Privileges and Immunities of the Specialized Agencies contained a condition of that type.

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41. Article 15 addressed only part of the problem it dealt with, omitting the question of censorship of official communications, in particular censorship that could be imposed by a host State prior to the issuance of communications.

42. He agreed with the view expressed in paragraph 293 of the report that article 17 was "too restrictive for the rights of the international organizations" and that it was "too much in favour of the interests of States".

43. His delegation endorsed article 18, which contained the general principle that the property and income belonging to an international organization and intended for official activities were exempt from direct taxation. The Commission should consider incorporating in the commentary explanations of the terms "direct taxes", "indirect taxes" and "official activities", based on State practice.

44. He would appreciate clarification as to the distinction between the expression "for public utility services" in article 18 and the expression "for specific services rendered" in article 19. Unless there was reason to do otherwise, the same expression should be employed in both articles. In any case, it was important to harmonize the two articles, since they dealt with similar subjects.

45. Article 20 appeared to be in conformity with the norms laid down in the international conventions on privileges and immunities of international organizations. However, since difficulties had arisen from time to time regarding the meaning of the term "official use", which was used in article 21, and the analagous term "official activities", it might be desirable to explain in the commentary the meaning and scope of those terms. The explanation given in article 22 might not adequately meet the exigencies of the situation.

46. His delegation generally endorsed the text of article 21. However, it would prefer to replace the word "large" in paragraph 2 with the word "important", which provided a qualitative test.

47. Lastly, he expressed the hope that the draft articles would contain a provision stating explicitly that the privileges and immunities were intended for the efficient performance of the function of international organizations.

48. Turning to the Commission's long-term programme of work (paras. 328-330 of the report), he stressed the importance of that question from the point of view of the Commission's future. As the review organ of the parent body, the Sixth Committee had a responsibility to guide and direct the Commission in the choice of the right topics.

49. After referring to the Survey of International Law prepared by the Secretary-General in 1971 (A/CN.4/245), he emphasized that, in bringing up to date its long-term programme of work, the Commission should bear in mind the

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practical rather than theoretical nature of the topic envisaged. It was true that the Commission had in the past centred its attention on traditional international law, and there might also be an element of truth in a comment made by UNITAR in 1981 to the effect that the Sixth Committee had sometimes been reluctant to entrust high-priority issues to the Commission because it did not consider it to be receptive to innovation.

50. Now that the Commission had completed the codification of a large segment of traditional international law, the time had come for it to embark upon topics which were different both in nature and in substance from those considered during the past four decades. His delegation therefore wished to urge members of the Committee not to feel hesitant in entrusting to the Commission topics of an economic nature which required legal regulation.

51. One such topic ripe for codification and development was the new international economic order. The International Law Association had taken up the study of the subject in 1978, and its private law aspects were being studied by the United Nations Commission on International Trade Law. The International Law Commission, proceeding step by step and beginning with the more pressing needs of the international community, might possibly consider the public law aspects of the new international economic order.

52. Referring to the suggested list of topics in paragraph 330 of the report, he noted that three among them - topics (f), (g) and (h) - related to economic issues. The first of those topics, namely, "International legal regulation of foreign indebtedness", was a direct offshoot of the international debt crisis which had plagued the international community during the 1980s. The position of the indebted States had been made still more difficult by the absence of rules of public international law relating to monetary matters. There was consequently a need for the development of international rules relating to foreign debts.

53. The second topic, "The legal conditions of capital investment and agreements pertaining thereto", lent itself more readily to regulation through international law. The flow of capital from the industrialized West to the developing East had for some time formed the subject-matter of studies by economists. The question arose whether the time had come for international regulation of foreign investment through law. The third topic, "Institutional arrangements concerning trade in commodities", raised yet another economic problem which in the past had created difficulties for countries dependent on export earnings from one or several commodities.

54. All three problems impinged in one way or another on the economic sovereignty of developing nations. In view of the many difficulties involved, his delegation wished to propose that the Secretary-General should be authorized to carry out a study similar to the 1971 Survey to investigate the feasibility of codifying those three topics. Of the other topics in the list, (a) and (i) were sequential upon the topics of the law of the non-navigational

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uses of international watercourses and of international liability for injurious consequences arising out of acts not prohibited by international law and, as such, deserved to be included in the Commission's long-term programme of work.

55. At the same time, the Commission should avoid taking up items which fell within the mandate of other United Nations bodies or were already being considered by them. It was important that in choosing new topics for consideration during the next quinquennium of the Commission, the Committee should apply the criterion of practicability as well as that of meeting the international community's needs.

56. With regard to the possibility of splitting the session of the Commission in two parts, referred to in paragraph 339 of the report, he said that the Committee should not, at the current stage, concern itself with that question or with that of the venue of sessions of the Commission. The issue was a highly delicate one and should be left for the Commission to discuss at its next session, as it proposed to do. Since its establishment in 1947, the Commission had traditionally held one continuous annual session at the United Nations Office at Geneva. Any premature suggestion to change that long-standing tradition might affect the efficiency of the Commission's work or of the research work of its members, facilities for which were easily accessible at the Palais des Nations in Geneva. His delegation therefore urged that the matter should be left in abeyance pending a recommendation by the Commission.

57. Sir Arthur WATTS (United Kingdom), speaking on chapter VI of the Commission's report on the topic "Relations between States and international organizations", drew attention to a fundamental problem which arose in connection with the topic. One of the main criteria for determining the extent of the privileges and immunities to be accorded to a given organization were its functional requirements; yet each international organization had its own characteristics and requirements and hence a different need for privileges and immunities. To prepare binding, uniform rules to apply generally to international organizations of a universal character was therefore found to be difficult, and it might be better if the Commission directed its work on the topic towards developing guidelines and recommendations to be adopted by States and international organizations as they saw fit.

58. Turning to the question of the Commission's working methods (chap. VIII, sect. A), he recalled that at the previous session of the General Assembly a number of delegations, including his own, had expressed concern at certain aspects of the way in which the Commission worked. It was therefore gratifying to see from the report currently under consideration that the Commission had introduced a number of improvements in its working methods. It was particularly praiseworthy that the Commission, even in the last year of its current term, had recognized that changes needed to be made and had made them. Instead of attempting to consider the substance of all the topics on

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each agenda, it had adopted certain priorities; it had set itself the target of adopting sets of draft articles on only three topics, and, as everyone had noted, it had achieved that target. Such success had been due not only to the establishment of priorities but also, in large part, to the Commission's wise decision to allow two weeks of concentrated work by the Drafting Committee at the beginning of its forty-third session. That practice, in particular, was one which the members of the new Commission might wish to follow in building on the experience of the past five years.

59. His delegation agreed with the statement in the report of the Working Group on Long-Term Programme of Work, reproduced in the annex to the report of the Commission, that one of the ways in which the Commission could contribute to the objectives of the United Nations Decade of International Law would be to finalize the work on the topics currently on its agenda. It was indeed highly desirable that the new Commission should, during its term of office, complete work on State responsibility - perhaps the last of the classical subjects on the Commission's agenda - and on international liability for injurious consequences arising out of acts not prohibited by international law.

60. So far as new topics for inclusion in the Commission's programme of work for the next five years were concerned, his delegation, while fully agreeing with the selection criteria set out in paragraph 7 of the Working Group's report, wished to suggest an additional criterion, namely, that the topic should offer a reasonable prospect of being one on which Governments could come to some degree of agreement on the basis of the Commission's work. It was not possible, of course, to know in advance how the Commission's work on a topic would evolve; the test might therefore have to be the negative one of avoiding topics where eventual lack of general agreement seemed predictable. Whether expressed positively or negatively, the point had an important bearing on the standing of the Commission's work, and thus of the Commission itself, within the international community.

61. Against that background, he had to admit that, for the moment at least, his delegation was not particularly attracted to any of the topics listed in paragraph 330 of the report. The list, and other topics which might be suitable for consideration by the Commission, would require very careful thought. In any event, the new Commission would be fully occupied in the next two or three years, and hasty decisions were certainly not called for at the current juncture. In reflecting on the issue, it should be recalled that the Commission's work on the major classical subjects of international law was now largely completed; the time had come for a change of emphasis with regard to the subjects which the Commission should tackle, the procedures it should employ in doing so, and the results to be expected from the conclusion of its work. Subjects for future consideration by the Commission would probably tend to be much more specific than in the past. They would be required to meet the international community's practical needs, covering both specific short-term problems and, in new areas of international activity, the timely provision of a long-term legal framework. The changes taking place within the

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international community were making traditional concepts of the codification of interntional law obsolete. In a multi-structured world community with overlapping legal competences and a proliferation of treaty networks there was a need for coordination, with instruments which had become irrelevant or had been superseded being gradually discarded. The Commission might well be the appropriate body to undertake at least some of the work involved.

62. As for procedures, they needed to be reconsidered both in the Commission and in the Sixth Committee. The Committee could not, of course, dictate to the Commission the procedures which it should adopt. At the same time, however, it should clearly indicate what it hoped to receive from the Commission, while leaving it to the Commission to decide how best to provide it. One of the Committee's requirements was undoubtedly for a speedy reaction by the Commission in appropriate cases. In its work on an international criminal court the Commission had shown that it could do extremely valuable work very quickly. Those possibilities could be further developed. Some attention might be given in that context to finding ways of appointing Special Rapporteurs immediately after the General Assembly had referred a new and urgent subject to the Commission, permitting work on the subject to begin straight away, without having to wait for an appointment to be made at the following summer's session so that, in most cases, a year was effectively lost before work could really begin. It might even be appropriate to consider whether the Special Rapporteur's system as a whole still responded in the most effective way possible to the needs of the 1990s. So far as the Sixth Committee was concerned, it should not hesitate in appropriate cases to indicate time-limits by which it would wish to receive the Commission's views on a particular topic.

63. Lastly, as to the end results of the Commission's work, he remarked that the traditional pattern of a set of draft articles prepared with a view to the holding of a conference at which a convention might be adopted seemed less appropriate than in the past. Legal guidelines, or a framework of legal principles, or draft model articles might all, in appropriate cases, be of greater practical value than draft articles designed to be adopted at a conference which, for various reasons, might never be held. Those alternatives might be particularly useful where the Commission was seeking to establish a legal framework in a new area of international activity.

64. In a rapidly changing world it was important that international law should hold a respected place, and important for international law that the International Law Commission should continue to play its valuable, constructive, scholarly and independent role. The relevance of international law to the international community's collective problems had seldom been greater. The same was true of the Commission's potential to establish a sound international legal framework for future generations. The Commission fulfilled its potential in a variety of ways. The Committee naturally tended to concentrate on the Commission's work on substantive topics, but the other activities noted in chapter VIII of the report, and particularly the annual

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International Law Seminar arranged by the Commission for the benefit of young international lawyers, mostly from developing countries, should not be overlooked. His Government regarded the Seminar as a most valuable contribution to the future of international law, and would be contributing $5,000 towards the cost of facilitating the attendance of suitable students.

65. Mr. MOMTAZ (Islamic Republic of Iran), speaking on the programme and working methods of the Commission (chap. VIII, sect. A, of the report), said that the subject was particularly relevant both because the current quinquennium was ending and because the Commission had completed its work on jurisdictional immunities of States and their property and had provisionally adopted on first reading a set of draft articles on the law of the non-navigational uses of international watercourses. Thanks were due to the Working Group on Long-term Programme of Work for its efforts.

66. In its report to the forty-fifth session of the General Assembly, the Commission had stated that there was broad agreement that, in selecting new topics, account should be taken of the pressing needs of the international community at its present stage of development (A/45/10, 325/, para. 2). His delegation agreed with that view and wished particularly to stress the need to adapt existing law to new realities. The ever-widening disparities between different countries in the economic sphere deserved special attention in that context. He therefore welcomed the inclusion of items (h), (f) and (g), all dealing with economic issues, in the list of topics from which the Commission intended to select topics for inclusion in its long-term programme of work.

67. A further factor that should be taken into consideration in the choice of topics was the realistic prospect of success of the proposed codification or progressive development of international law. The harmful consequences of a potential failure of the exercise could hardly be overemphasized. Topics which gave rise to major controversy among States should preferably be avoided, as also should areas in which the necessary jurisprudence was lacking. In other words, topics such as the rights of national minorities (topic (j) in the list) or the law of confined international ground waters (topic (a)) were best left aside. The time factor also had to be taken into account. In that connection, he endorsed the Working Group's view that most of the new topics should be susceptible to completion, if possible, within the Commission's next term (A/46/10, annex, para. 7). Now that the era of major codifications appeared to have ended, it was to be hoped that the Commission would arrive at conclusions more rapidly. In that connection, he stressed the importance of the topics currently under consideration and expressed the hope that due priority would be given to State responsibility and international liability for injurious consequences of acts not prohibited by international law. Lastly, he stressed that it was the right and duty of the General Assembly to indicate its priorities while respecting the Commission's autonomy in carrying out its mandate.

(Mr. Momtaz, Islamic Republic of Iran)

68. The Commission should also preserve its autonomy with regard to its working methods. In view of the growing number of topics which required scientific and technical expertise, and of the interdisciplinary nature of most of the subjects discussed by the Commission, the use of expert services was indispensable. The best way of overcoming that difficulty appeared to be to seek assistance from the United Nations specialized agencies or from independent experts. In addition, the Commission might decide to designate certain members to work with the Special Rapporteur in the elaboration of draft articles. While his delegation was strongly opposed to the creation of subcommissions, small working groups on technical subjects should not prevent the members of the Commission from participating fully in the adoption of all decisions.

69. In the view of his delegation, the General Assembly's role should be limited to bringing to the Commission's attention the constraints imposed by international relations. The Sixth Committee could provide flexible guidelines for the Commission's work. In order to faciliate cooperation between the Commission and the Sixth Committee, some delegations had urged that the Commission's report should be transmitted to Governments at the earliest possible date. His delegation supported that suggestion, as well as the proposal that the Commission's session should be split into two parts. Iran believed that it would be advisable for the Commission to consider the comments of Governments immediately after each session of the General Assembly, without waiting for its own annual session. Perhaps the Secretariat could submit a statement of the administrative and financial implications of that proposal.

70. Mr. VOICU (Romania) said that his delegation's comments on the Commission's report were of a general and preliminary nature because the drafts under consideration required further study by Governments and specialized national bodies.

71. With regard to chapter II, his delegation noted with satisfaction that the Commission had taken into account a number of the observations which Romania had made concerning previous versions of the draft. He welcomed the Commission's decision to replace the terms "limitations on" and "exceptions to" with the more general experession "proceedings in which State immunity cannot be invoked"; that formulation was very close to the neutral one suggested by his country, namely, "activities of States in respect of which States agree not to invoke immunity".

72. His delegation had also taken note with interest of the recommendation on the convening of an international conference of plenipotentiaries to consider and adopt the draft articles on jurisdictional immunities of States and their property and of the Austrian proposal to host the conference at Vienna, should it be convened.

(Mr. Voicu, Romania)

73. With regard to chapter III, his delegation noted that the Commission had taken into consideration the relevant contributions of the International Law Association which had dealt with the subject in 1980. He welcomed the solution adopted concerning the question of joint institutional management which showed that the best approach was to draft recommendations on which States could base their own definitions of the responsibilities and powers of whatever body they decided to establish. His delegation also recalled the doubts previously expressed with regard to the appropriateness of dealing with aspects of the topic relating to armed conflicts by means of a framework agreement; such an approach could impinge on the law relating to armed conflicts or on other drafts being prepared by the Commission, such as the draft Code of Crimes against the Peace and Security of Mankind.

74. Turning to chapter V, he said that States of origin must unquestionably take appropriate measures to prevent or minimize the risk of transboundary harm. In that connection, the role of consultations should be emphasized and all States concerned should be urged to consult with each other in a spirit of cooperation. Obviously, consultations did not preclude the adoption of unilateral preventive measures; the Special Rapporteur's texts and comments were fully relevant in that regard. At the same time, he emphasized the practical value of requiring the State of origin to counteract the effects of an incident which had already occurred and which presented an imminent and grave risk of causing transboundary harm.

75. The question of whether the future convention should apply to harm caused in the territory of a single State or of several States was irrelevant, because if such harm affected several States, there must obviously be rules which would apply to that situation. However, if the activity of a State caused harm to the "global commons", the situation went beyond the scope of the draft under consideration. In addition, his delegation was of the view that the future convention should provide for the direct liability of transnational corporations operating in the territory of other States whose activities might cause transboundary harm. In that connection, his delegation saw merit in the statement made at the previous meeting by the representative of Japan emphasizing the need for the Commission to specify the relationship between the proposed convention and existing conventions or those which were likely to be concluded in the future on either a multilateral or a bilateral basis.

76. As to chapter VII, his delegation regretted that the Commission had been unable to consider the topic "State responsibility" owing to lack of time. Romania agreed with other Member States that State reponsibility was one of the key topics in international law and required extensive study. However, should the Commission conclude that the topic was not yet ready for codification, the Sixth Committee might suspend consideration of it until such time as it could be dealt with successfully.

77. Turning to chapter VIII, he noted with satisfaction the improvements in the Commission's working methods and welcomed the decision to invite Special Rapporteurs to attend the meetings of the Sixth Committee devoted to the Commission's report.

(Mr. Voicu, Romania)

78. Drawing attention to the topics listed in paragraph 330, he said that the Commission would obviously be unable to deal with 12 new items in the immediate future. As emphasized by the Committee of Legal Advisers on Public International Law of the Council of Europe, the topics to be dealt with by the Commission should respond to the pressing needs of the international community, should be of a predominantly practical nature and should be susceptible to completion in a few years' time. He endorsed the view expressed by the United Kingdom representative, namely, that the topics envisaged should be those on which Governments were likely to be able to reach agreement on the basis of the Commission's work. Taking into account those considerations, his delegation believed that the Commission should complete its work on the remaining items on its agenda before undertaking new ones. Accordingly, the question of the Commission's future programme of work should be the subject of informal consultations, with participation by members of the Commission.

79. Mr. SHESTAKOV (Union of Soviet Socialist Republics) expressed his delegation's hope that the Commission would embark on the second reading of the draft Code of Crimes against the Peace and Security of Mankind and of the draft articles on the law of non-navigational uses of international watercourses at its forty-fourth session, in 1992, without awaiting the comments and observations of States due to be submitted to the Secretary-General by 1 January 1993. Any delay in the preparation of those important drafts was to be avoided. His delegation took the view that during the next quinquennium the Commission should concentrate on the completion of its work on the still outstanding topics, namely, the draft Code of Crimes against the Peace and Security of Mankind; the law of the non-navigational uses of international watercourses; State responsibility; international liability for injurious consequences arising out of acts not prohibited by international law; and relations between States and international organizations. As for the list of topics from which the Commission intended to select topics for inclusion in its long-term programme of work (A/46/10, para. 330), his delegation, taking into account the views expressed on the subject by many delegations in the Sixth Committee, wished to suggest that the Commission should select only such topics as fell within the scope of its competence and were likely to be widely supported by States. In conclusion, he expressed the hope that the Commission would make an important contribution to the attainment of the objectives of the United Nations Decade of International Law.

80. Mr. NJENGA (Observer, Asian-African Legal Consultative Committee) said that since the Second World War the emergent Asian and African States had encountered the constraints of operating in a world legal order which showed little concern for their problems. The Asian-African Legal Consultative Committee had been established as a forum for exchange of views and information on legal matters of common concern to the two regions. In recent years its programme of work had focused on projects and studies relating to the law of the sea, international protection for refugees, international economic cooperation for development and issues relating to the United Nations Conference on Environment and Development.

(Mr. Njenga)

81. Close and continuing cooperation between the Consultative Committee and the United Nations dated back to 1956, when the Consultative Committee had undertaken a systematic examination of the work of the International Law Commission from the Asian-African perspective. Since then, the Consultative Committee had regularly reviewed the work of the Commission, and the Chairman of the Commission had expressed the view that the Asian and African States could make a useful contribution to its deliberations. The Consultative Committee also had close links with the International Court of Justice.

82. One topic of particular concern to the Consultative Committee was the problem of refugees. Its secretariat, in collaboration with the Office of the United Nations High Commissioner for Refugees, had accordingly organized a workshop on international refugees and humanitarian law in October 1991, with the aim of enhancing the awareness of Governments and promoting ratification of the relevant international conventions. Participants in the workshop had recommended that the Consultative Committee should consider the possibility of preparing draft model legislation which might be of assistance to Governments in drafting their own legislation on matters relating to refugees.

83. The Consultative Committee had also been following with keen interest developments in the field of the environment, international trade law and the law of the sea. In the field of trade law the Consultative Committee maintained fruitful official relations with both UNCTAD and UNCITRAL. With regard to the law of the sea, the Consultative Committee considered that the Commission could usefully include in its new work programme an item on the identification and codification of the legal elements of the peaceful uses of the ocean bed and sea floor.

84. In conclusion, he said that the thirty-first session of the Consultative Committee, to be held in Pakistan in January 1992, would, he hoped, provide an opportunity for the developing countries to establish a concerted position on the issues to be discussed at the 1992 United Nations Conference on Environment and Development.

85. Mr. Afonso (Mozambique) resumed the Chair.

86. Mr. VUKAS (Yugoslavia), referring to chapter VI of the Commission's report said that the texts submitted by the Special Rapporteur constituted a useful summary of the contemporary practice of States and international organizations and a suitable adaptation of the rules of diplomatic law to the specific situation of international officials and their activities. Furthermore, the drafts were based on existing multilateral conventions and on the headquarters agreements concluded by international organizations; thus, an early and successful outcome of the Commission's work on the topic could be envisaged.

(Mr. Vukas, Yugoslavia)

87. With regard to chapter VIII, he said that the Working Group established to consider the Commission's long-term programme of work, and the Commission itself, had chosen topics of great importance to the international community. It was logical for the Commission to devote itself increasingly to the progressive development of international law. With regard to the specific topics listed by the Commission in paragraph 330 of its report, it would be useful to systematize the legal rules concerning international migrations (topic (c)), extradition and judicial assistance (topic (d)) and the legal aspects of disarmament (topic (e)), in view of the abundance of regional, subregional and bilateral norms on those subjects. While that would be a difficult task, it would be less difficult, from the technical point of view, to codify and develop new rules concerning the three topics relating to international economic law, namely, the international legal regulation of foreign indebtedness, the legal conditions of capital investment and agreements pertaining thereto, and institutional arrangements concerning trade in commodities. Obviously, it would be difficult to reconcile various economic interests, particularly those of the developed and the developing countries.

88. His delegation had some doubts concerning the two topics in the list relating to environmental law. With regard to the international legal aspects of the protection of the "global commons", Yugoslavia had already stated its views in the context of other discussions. As to the law of confined international groundwaters, his delegation did not know whether the international community had sufficient technical information to be able to develop legal rules in that area.

89. With regard to topic (e), an analysis of the legal effects of resolutions of the United Nations, prepared by a body with the Commission's reputation, would be very useful in assessing the role of these resolutions in the system of sources of comtemporary international law.

90. As a member of a commission of inquiry established by the International Labour Organisation, he believed that it would be useful for the Commission to examine topic (k), "International commissions of inquiry (fact-finding)" and in particular to study the role of such commissions as a means of settling international disputes in comparison with other means.

91. With regard to the rights of national minorities (topic (j)), he said that, following the Second World War, the issue had been poorly received in the United Nations; apart from article 27 of the International Covenant on Civil and Political Rights, no other legal rules had been adopted. A draft declaration on the rights of national, ethnic, religious and linguistic minorities, proposed by Yugoslavia in 1978, had not yet been adopted. Most non-European countries had not had much interest in the question. The situation had changed, however, with the disappearance of the divisions in Europe. Within a very short time, both the East and the West had begun to show enthusiasm for the development of rules for the protection of minorities. The most significant results had been the adoption by the

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Conference on Security and Cooperation in Europe of a document signed at Copenhagen and the preparation of a draft convention by the Council of Europe. Extremist nationalism had, however, put an end to such efforts. Recent events had again demonstrated the impossibility of arriving at a satisfactory definition of national minorities. Nevertheless, the link between the rights of national minorities and the rights of peoples was one of the most serious issues in the current Yugoslav crisis. The problem of minorities could not be studied and solved in isolation; it was merely one aspect of the broader problems of multinational societies.

AGENDA ITEM 126: PROGRESSIVE DEVELOPMENT OF THE PRINCIPLES AND NORMS OF INTERNATIONAL LAW RELATING TO THE NEW INTERNATIONAL ECONOMIC ORDER (continued) (A/C.6/46/L.6/Rev.1).

92. The CHAIRMAN said that Niger had joined the list of sponsors of draft resolution A/C.6/46/L.6/Rev.1.

AGENDA ITEM 131: REPORT OF THE SPECIAL COMMITTEE ON THE CHARTER OF THE UNITED NATIONS AND ON THE STRENGTHENING OF THE ROLE OF THE ORGANIZATION (continued) (A/C.6/46/L.7)

93. The CHAIRMAN said that Mali, Nicaragua and Niger had joined the sponsors of draft resolution A/C.6/46/L.7.

The meeting rose at 1.05 p.m.