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SUMMARY RECORD OF THE 35th MEETING

Chairman: Mr. AZZAROUK (Libyan Arab Jamahiriya)

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The meeting was called to order at 10.15 a.m.

AGENDA ITEM 135: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS THIRTY-NINTH SESSION (A/42/10, 179, 429)

AGENDA ITEM 130: DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND: REPORT OF THE SECRETARY-GENERAL (A/42/484 and Add.1)

1. Mr. McCAFFREY (Chairman of the International Law Commission), introducing the Commission's report on the work of its thirty-ninth session (A/42/10), said that several of the topics currently on the Commission's programme of work raised policy issues on which the guidance of States was essential. Accordingly, he appealed to all delegations to address those issues frankly and constructively so as to provide the Commission with a firm basis for the continuation of its work.

2. In organizing the work of its thirty-ninth session, the Commission had taken as a point of departure paragraph 3 of General Assembly resolution 41/81, in which the Assembly recommended that the Commission should continue its work on the topics in its current programme. In view of its practice not to hold a substantive debate on draft articles adopted in first reading until the comments and observations of Governments thereon were available, the Commission had decided not to consider the question of jurisdictional immunities of States and their property, nor the question of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, and to focus its attention on the four other topics on its agenda, each of which was the subject of a separate chapter of the report.

3. With regard to chapter II, devoted to the draft Code of Offences against the Peace and Security of Mankind, he noted that the Commission, up to its most recent session, in its consideration of the topic, had been mainly concerned with laying the ground for the formulation of concrete provisions. That work had led to a number of conclusions, which were recapitulated in paragraphs 16 to 19 of the report. Taking stock of the results of the exploratory phase, the Special Rapporteur had proposed, in the report submitted for the current year (A/CN.4/404 and Corr.1 and 2), a revised version of a number of draft articles contained in his previous reports, and had submitted to the Commission new texts for the first 11 articles. The Commission had discussed those draft articles in plenary meeting and, after receiving a report from the Drafting Committee, had adopted in first reading draft articles 1, 2, 3, 5 and 6.

4. Article 1 dealt with the definition of crimes against the peace and security of mankind. As was clear from the text, the Commission, having to choose between a conceptual definition and a definition by enumeration, had opted for the second solution, although it would return, at an appropriate future stage of its work, to the question of a conceptual definition. In that connection, the Commission had highlighted as specific characteristics of crimes against the peace and security of mankind their seriousness, the extent of their effect and the motive of the perpetrator. With regard to the inclusion of the element of intent in the

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definition, some members of the Commission had felt that the massive and systematic nature of the crime created a presumption of intent, while others had stressed that intent could never be presumed and must always be established. With regard to the inclusion of the expression "under international law" between brackets, some members had strongly supported the retention of that expression, which was to be found in several documents originating in the Commission, such as the 1954 draft Code and the "Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal". Other members had expressed the view that the expression might weaken the text and introduce confusion in the interpretation of the article, by giving the impression that the Code dealt with crimes committed by States, notwithstanding the Commission's decision to limit the Code to acts of individuals. They had also noted that the above-mentioned expression might raise the question of the relationship between international law and internal law. In that connection, the remark had been made that the inclusion of the expression "under international law" would make it necessary to add to the draft Code a provision on the incorporation of international obligations into the internal law of States. The view had also been expressed that the presence of such an expression would open up the question of whether crimes against the peace and security of mankind fell under rules of general international law, independently of the draft Code, as well as the question of the possible jus cogens nature of those rules.

5. Article 2, entitled "Characterization", provided that the determination of an act or omission as a crime against the peace and security of mankind was independent of internal law. It should be noted, however, that the draft article was limited to the characterization of specific acts as crimes against the peace and security of mankind and was without prejudice to internal competence with respect to other matters, such as criminal procedure and the extent of the penalty.

6. Articles 3, 5, and 6 dealt with general principles. In article 3, paragraph 1, the principle was enunciated that any individual who committed a crime against the peace and security of mankind was responsible for such crime irrespective of any motives invoked by the accused that were not covered by the definition of the offence. That paragraph limited the principle of responsibility and punishment to the "individual who commits a crime". That approach was in line with the Commission's decision to limit the draft Code, for the time being, to the criminal responsibility of individuals. Assuming that the criminal responsibility of the State could be codified, it would necessarily be governed by rules other than those applicable to individuals. Under article 3, paragraph 1, as long as an act met the criteria defined in the Code, its perpetrator was barred from invoking any other motivation as an excuse. While article 3 dealt only with the criminal responsibility of the individual, its paragraph 2 left intact the international responsibility of the State, in the traditional sense of the expression, for acts or omissions attributable to the State by reason of crimes against the peace and security of mankind of which individuals were accused.

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7. Article 5 laid down the rule of the non-applicability of statutory limitations to crimes against the peace and security of mankind. In adopting that rule, the Commission had taken account of the fact that in internal law, statutory limitation for crimes or other offences was neither a general nor an absolute rule. The need to prosecute the perpetrators of odious crimes during the Second World War, and the obstacle placed in the way of such prosecution by the rule of statutory limitation known to certain systems of national law, had led to the adoption on 26 November 1968 of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. Some States had limited non-applicability to crimes against humanity, excluding war crimes. Considering that it was not always easy to draw a line between war crimes and crimes against humanity, the Commission had provisionally adopted draft article 5, reserving the possibility of re-examining it when establishing the list of crimes against the peace and security of mankind.

8. Article 6 provided that any individual charged with a crime against the peace and security of mankind should be entitled to the minimum guarantees due to all human beings with regard to the law and the facts. Relevant provisions were to be found not only in a number of international human rights instruments but also in instruments dealing with certain aspects of crimes against the peace and security of mankind. The Commission had considered that an instrument of a universal character, such as the draft under preparation, should rely for guidance on the relevant provisions of the International Covenant on Civil and Political Rights. Article 6 was accordingly modeled closely on article 14 of the Covenant.

9. Referring to paragraphs 64 and [illegible] of the Commission's report, he said the Commission had noted that the title of the topic referred in some language versions to the concept of "crime" and in others to the concept of "offence". In order to ensure conformity in substance and in form between all the language versions, the Commission had decided that the word "crimes" would be used in all versions of the draft articles provisionally adopted. For reasons of terminological consistency, the Commission recommended to the General Assembly that it amend the English title of the topic to read "Draft Code of crimes against the peace and security of mankind". In paragraph 67 of the report it was stated that the Commission attached great importance to the views of Governments on various aspects of its work, in order that it might comply with General Assembly resolution 41/81, which requested the Commission to indicate in its annual report those subjects and issues on which views expressed by Governments, either in the Sixth Committee or in written form, would be of particular interest for the continuation of its work.

10. Chapter III concerned the law of the non-navigational uses of international watercourses. That topic had a long history, which was described in paragraphs 68 to 83 of the report. At its 1987 session, the Commission had had before it the third report of the Special Rapporteur on that topic (A/CN.4/406 and Corr.1, Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1). In that report, the Special Rapporteur proposed six new draft articles, numbered 10 to 15, concerning general principles of co-operation and notification and the question of exchange of data and information. The Commission had first discussed article 10 and had then proceeded

to take up draft articles 11 to 15 together. At the end of its debate, the Commission had decided to refer all six draft articles to the Drafting Committee. That explained why, at its 1987 session, the Commission had discussed articles 10 to 15 in plenary, but had provisionally adopted articles 2 to 7 on the basis of the Drafting Committee's report.

11. Part I of the draft contained articles 1, 2, 3, 4 and 5. He would start with article 2 since, in relation to article 1, the Commission had endorsed the Drafting Committee's decision to leave aside the question of the use of terms, with the consequence that throughout the text of the subsequent provisions the expressions "international watercourses" and "international watercourse systems" appeared in square brackets.

12. Article 2 dealt with the scope of the draft. The term "uses" was to be interpreted in its broad sense to cover all but navigational uses. In paragraph 1, the phrase "and of their waters" was intended to make it clear that the term "international watercourse" did not refer only to the channel itself but also to the waters contained in that channel. The term "measures of conservation" embraced not only measures to deal with degradation of water quality, but also those aimed at solving problems related to living resources, flood control, erosion, sedimentation and salt water intrusion. It furthermore encompassed the various forms of co-operation concerning the optimum utilization of international watercourses. Paragraph 2 recognized that in view of the interrelationship between navigational and non-navigational uses of watercourses, the exclusion of navigational uses from the scope of the draft articles could not be complete.

13. Article 3 defined the term "watercourse State". In the commentary, it was noted that the question of whether the geographic criterion was satisfied depended upon physical factors whose existence could be established by simple observation in the vast majority of cases.

14. Article 4 dealt with watercourse agreements. The Commission had oriented itself towards the preparation of a framework agreement that would provide general principles and rules in the absence of a specific agreement between the States concerned. That approach recognized that optimum utilization of a specific international watercourse was best achieved through an agreement tailored to the characteristics of that watercourse and took into account also the difficulty of reaching such agreements.

15. In paragraph 1, the phrase "apply and adjust" was intended to indicate that the provisions of the draft were essentially of a residual character. Paragraph 2 clarified further the nature and subject-matter of watercourse agreements. The first sentence made it clear that watercourse States were free to define the scope of the agreements they concluded. The second sentence listed the options open to watercourse States; in that connection, it would be desirable to refer to paragraphs 7 to 12 of the commentary. The phrase "to an appreciable extent" limited the scope of the proviso and conveyed the idea that there must be real impairment of use. Paragraph 3 addressed the situation in which one or more

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watercourse States considered that adjustment of the provisions of the draft to the characteristics and uses of a particular international watercourse was required and provided that, in that event, other watercourse States would enter into consultations with the State or States in question with a view to negotiating in good faith an agreement or agreements. Paragraph 18 of the commentary made it clear that watercourse States were not under an obligation to conclude an agreement before using the waters of the international watercourse. The Commission had recalled in that connection that the existence of a principle of law requiring consultations among States in dealing with fresh water resources had been explicitly supported by the arbitral award in the Lake Lanoux case.

16. The purpose of article 5 was to identify the watercourse States that were entitled to participate in consultations and negotiations relating to agreements concerning part or all of an international watercourse and to become parties to such agreements. Paragraph 1 was concerned with the case where the agreement dealt with the entirety of the international watercourse and provided that every watercourse State was entitled to participate in the negotiation of such an agreement and to become a party thereto. Paragraph 2 referred to agreements which dealt with only part of the watercourse and provided that any watercourse State whose use of the watercourse might be appreciably affected by the implementation of such an agreement was entitled to participate in the consultations and negotiations relating to such a prospective agreement. As indicated in paragraph 3 of the commentary, if the use of water by a State could be affected appreciably by the implementation of treaty provisions dealing with part or aspects of a watercourse, the scope of the agreement necessarily extended to the territory of that State. The right enunciated in paragraph 2 was qualified by reference to the criterion of "appreciable effect" and by the proviso "to the extent that its use is thereby affected". In that connection, he drew attention to the last two sentences of paragraph 8 of the commentary.

17. Turning to part II, he said that article 6 set forth the fundamental rights and duties of States with regard to the utilization of international watercourses for purposes other than navigation. Paragraph 1 stated the basic rule of equitable utilization. The rule was cast in terms of obligation but also expressed the right of watercourse States to utilize an international watercourse in an equitable and reasonable manner. The second sentence made it clear that while States should seek optimum utilization and maximum benefit, their pursuit of that goal should be consistent with "adequate protection" of the watercourse, an expression which covered not only measures relating to conservation, security and so on, but also measures of control in the hydrological sense of the term. Paragraph 2 embodied the concept of equitable participation which underlay co-operation with regard to such matters as flood control, pollution abatement programmes, drought mitigation planning, erosion control and so on. The details of such co-operative efforts should be provided in a specific watercourse agreement or agreements. The second sentence of paragraph 2 emphasized the affirmative nature of equitable participation by providing that it included not only the right to utilize the international watercourse but also the duty to co-operate with other watercourse States in its protection and development. Paragraphs 8 to 24 of the commentary

elaborated on the concept that each watercourse State was entitled to use the watercourse in an equitable manner and provided representative examples of support for the doctrine.

18. The purpose of article 7 was to provide for the manner in which States were to implement the rule of equitable and reasonable utilization contained in article 6. The concept underlying paragraph 1 was that, in order to assure that their conduct was in conformity with the obligation of equitable utilization contained in article 6, watercourse States must take into account all factors that were relevant to assuring that the equal and correlative rights of other watercourse States were respected. The list provided in paragaraph 1 was not exhaustive. Paragraph 2 anticipated the possibility that the need might arise for watercourse States to consult with each other with regard to the application of article 6 or article 7. The paragraph provided that in such a case watercourse States were under an obligation to enter into consultations in a spirit of co-operation. Under the terms of the paragraph, a request by one watercourse State to enter into consultations could not be ignored by other watercourse States. Reference should be made to paragraphs 6, 7 and 8 of the commentary.

19. As indicated in paragraph 118 of the report (A/42/10), the Commission would welcome the views of Governments on the draft articles provisionally adopted at the last session concerning the law of the non-navigatorial uses of international watercourses. As to the discussion held by the Commission on the six new draft articles proposed by the Special Rapporteur, he referred to paragraphs 93 to 116 of the Commission's report.

20. Turning to chapter IV of the report, concerning international liability for injurious consequences arising out of acts not prohibited by international law, he noted that the Special Rapporteur had presented to the Commission his third report containing six draft articles primarily dealing with the question of scope.

21. The Special Rapporteur had requested guidance from the Commission on the following issues: (1) whether the draft articles should ensure for States as much freedom of activity within their territory as was compatible with the rights and interests of other States; (2) whether the protection of the rights and interests of other States required the adoption of harm-preventive measures; (3) whether in case of injury there should be compensation; and (4) to what extent the view that an innocent victim should not be left to bear his or her loss was relevant. The Commission had focused on fundamental issues, as was evidenced by the summary to be found in paragraphs 134 and 194 of the report.

22. Many members of the Commission had pointed out that scientific and technological progress opened up ways of responding to the challenges of modern civilization, but entailed risks of serious injury, sometimes with long-term and catastrophic effects. International law should deal with certain types of transboundary injuries arising from the use of modern technology. As to the concept of liability for acts that were not prohibited, some members had viewed it as having no basis in customary international law. Other members had pointed out that a number of multilateral conventions primarily drew on that concept.

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23. On the question of the protection of innocent victims, it had been observed that the primary beneficiaries of activities entailing a risk of transboundary injuries were the States in whose territory those activities were conducted and their populations and that, for logical, legal, practical, social and humanitarian reasons, innocent victims could not be left to bear their loss. Attention had furthermore been drawn to the need to protect the interests of the State of origin. Emphasis had also been placed on the need to take into account the legitimate interests of developing countries which allowed multilateral corporations to operate within their territories.

24. With regard to the scope of the topic, some members had wished to cover only activities with physical consequences, while others had felt that the economic and social repercussions of human activity should also be dealt with. The Special Rapporteur had insisted that the scope of the topic should continue to be defined by reference to the criterion of "physical consequences" and had pointed out that only in the physical world was it possible to establish with any degree of certainty the cause and effect relationship between the activity and the injury, which was the basis for liability.

25. Some members had favoured listing the activities to be covered under the topic. Other members had feared that any such list would rapidly become obsolete and that a more viable alternative would be to undertake a definition of the concept of "dangerous activities". The Special Rapporteur had agreed to develop a definition and to provide in the commentary a non-exhaustive list of the activities to be dealt with.

26. The Commission had also discussed the concepts of "territory", "control" and "jurisdiction". The Special Rapporteur had explained that the purpose of those concepts was to permit the identification of the entity which could be held liable for the occurrences covered by the topic. He had observed that an activity with injurious transboundary effects could take place: within the territory of a State; within a territory over which a State exercised de facto exclusive jurisdiction; in areas beyond the exclusive jurisdiction of a State, such as the high seas or outer space; and in areas such as the exclusive economic zone, where international law conferred certain rights and jurisdiction to one State without prejudice to the rights of other States. Reference should be made to paragraphs 163 to 166 of the report.

27. The Commission had also discussed the concepts of "risk" and "injury". It had generally been agreed that those concepts were too vague to circumscribe the field of application of the future instrument.

28. With regard to prevention and compensation, and their relative importance, some members had detected a shift, which they found inadvisable, from the basic concept of liability and compensation to the duty of care and to prevention, with emphasis on procedures, which would result in the topic losing its individuality, since damage would then be compensated not on the basis of mere causality, but because the State, in failing to fulfil its obligation of prevention, had committed

a wrongful act. Other members had found that any attempt to limit the topic to either prevention or reparation was unproductive, and had agreed with the Special Rapporteur that rules of prevention and reparation should be established with a reasonable and effective link between the two. They had observed that, while it would be unfair and illogical to deal with activities involving extraterritorial injurious consequences only after such consequences had occurred, any rule of prevention which did not entail some legal consequences would be ineffective. The Special Rapporteur had recommended that compliance with preventive rules should not be left to the discretion of States.

29. As to the question of strict liability, which the Special Rapporteur had suggested as the main underlying concept of the topic, some members had felt that it was a concept of domestic law, familiar only to "common law" systems, and that, therefore, it could not be the basis of a general rule of international law applicable to all transboundary injuries. Other members had observed, however, that the concept of strict liability was embodied in a number of multilateral treaties. The Special Rapporteur, for his part, had said that the concept of strict liability was known to most domestic legal systems, whether they belonged to the civil law or common law tradition, and that it was therefore a common legal concept whereby certain activities entailed liability if they caused an injury. He had added that strict liability had a deterrent effect and was therefore quite consonant with the concern for prevention.

30. He drew the Committee's attention to paragraph 194 of the report containing the conclusions drawn by the Special Rapporteur from the Commission's debate.

31. With regard to chapter V, he said that the Commission at its thirty-ninth session had considered the second part of the topic entitled "Relations between States and international organizations", for which purpose it had had before it the third report of the Special Rapporteur (A/CN.4/401). The report contained, inter alia, an outline of the subject-matter to be covered by future draft articles (see footnote 147 on page 123 of the Commission's report). The Commission had held an exchange of views on several aspects of the topic, such as the relevance of the outline submitted by the Special Rapporteur, the scope of the future draft and the methodology to be followed in the future. With respect to methodology, some members had favoured the codification or systematization of the existing rules and practices in the various areas indicated in the Special Rapporteur's outline. Others had found it preferable to identify in each of those areas existing normative lacunae or specific problems calling for legal regulation. The view had also been expressed that the two approaches were not really contradictory, but complementary.

32. Following the exchange of views, the Commission had requested the Special Rapporteur to pursue his study of the topic in accordance with the directives laid out in the outline contained in his third report, taking into account the views expressed at the Commission's thirty-ninth session. With regard to methodology, the Commission had left the Special Rapporteur free to follow a combination of the two previously mentioned approaches. Comments from members of the Sixth Committee

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on the outline and the various aspects of the topic would provide most useful guidance to the Special Rapporteur and to the Commission.

33. Chapter VI of the report, entitled "Other decisions and conclusions of the Commission", contained a reminder to Governments that they had been invited to submit by 1 January 1988 their comments and observations on the draft articles on jurisdictional immunities of States and their property and on the status of the diplomatic courier and diplomatic bag not accompanied by diplomatic courier. He stressed the importance of that deadline for the continuation of the Commission's work on those topics.

34. Under the agenda item entitled "Programme, procedures and working methods of the Commission, and its documentation", the Commission had taken up the requests addressed to it in paragraph 5 of General Assembly resolution 41/81. In planning its activities for the current quinquennium, the Commission had taken into consideration the intentions of the Special Rapporteurs as recorded in the table annexed to the report, as well as the progress achieved or achievable on the topics in the current programme and the different degrees of complexity and delicacy of those topics. The Commission's conclusions in that respect were contained in paragraph 232 of the report.

35. The Commission had given serious attention to the request of the General Assembly that it should consider thoroughly its methods of work in all their aspects, and had focused its attention on ways of ensuring optimum conditions of work for the Drafting Committee (paras. 236 to 240 of the report). With regard to the General Assembly's request contained in paragraph 5 (b) of its resolution 41/81, he drew the attention of the Committee to paragraphs 241 and 242 of the report, and in that connection recalled that chapters II and III (paras. 67 and 118) indicated the points on which the Commission would welcome the views of Governments.

36. He stressed that the Commission considered it essential that its annual sessions should be of the usual 12-week duration, as it would otherwise find it impossible to abide by the work plan described in paragraph 232 of the report. He also conveyed to the Committee the Commission's concern over the serious understaffing of the Codification Division, which should be strengthened so that it could play an increased role, as consistently envisaged by the General Assembly.

37. Finally, he stressed the importance of communication and dialogue between the Commission and the General Assembly. In order for the Commission, as a body with specific characteristics, composed of experts elected in their individual capacity, to respond to the needs of the international community, it must be able to count on the support and guidance of the General Assembly from the initial stage of selection of agenda items to the concluding stage of review of the final drafts. He trusted that the Committee's debate would provide the Commission with the help and guidance it needed for its task of codification and progressive development of international law.

38. The CHAIRMAN said that in previous years, the Committee had agreed that those delegations which wished to speak on the draft Code of Offences against the Peace and Security of Mankind as a separate item should do so at the end of the period devoted to consideration of items 135 and 130. In that connection, he referred delegations to document A/C.6/40/SR.3, paragraph 1. He therefore suggested that delegations wishing to make separate statements regarding the various topics under consideration should, as far as possible, adhere to the following timetable: 30 October-3 November, the law of the non-navigational uses of international watercourses; 4-6 November, international liability for injurious consequences arising out of acts not prohibited by international law; and 9-11 November, the draft Code of Offences against the Peace and Security of Mankind. That timetable would be flexible, and delegations could, if they wished, make a single statement regarding all the topics.

39. Mr. KOROMA (Sierra Leone) said that the Sixth Committee had a pre-eminent role in the preservation of world peace. If Governments would try to conform their national policies to the minimum obligations of international law, there would be greater security for all. He recalled that the current year marked the fortieth anniversary of the International Law Commission, which had carried out remarkable work in the progressive development and codification of international law. In his view, the Commission had met the requirements of sound learning and knowledge of the realities of political life necessary for the drafting of legal rules to regulate differences between States. Although it was regrettable that those differences were still not always settled through legal means, the need to continue to draft a corpus of legal rules respected by all States on matters of potential international dispute would help in meeting the objective of preserving world peace.

40. At its thirty-ninth session, the Commission had considered a wide range of topics of tremendous interest to the international community. Among them was the draft Code of Offences against the Peace and Security of Mankind, which reaffirmed the international community's abhorrence of wars of aggression and war crimes, and implied a desire for some form of judicial mechanism to determine guilt for such wars and to satisfy a sense of justice. The draft Code also represented a warning that international action would be taken against war criminals and against those who planned and started wars. The Commission had also considered the law of the non-navigational uses of international watercourses and the issue of international liability for injurious consequences arising out of acts not prohibited by international law, both of which were concerned with the environment, its proper use and its conservation, as well as the topic of relations between States and international organizations, which responded to the need of the international community to deal with the aforementioned issues within an international institutional framework.

41. With regard to the draft Code of Offences against the Peace and Security of Mankind, his delegation was of the view that replacement of the term "offences" with the term "crimes" was not justified. According to common law, the term "offences" embraced both misdemeanours and felonies. "Offences" should, therefore, be interpreted as illegal acts.

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42. Turning to the definition and characterization of offences, his delegation considered that, for an act to qualify as an offence against the peace and security of mankind, its essential feature had to be its serious and heinous nature. In addition to gravity, the definition must include intent, although the intent itself need not be proved, as the harmful consequences made such proof superfluous. General Assembly resolution 96 (I) of 11 December 1946 stated that no motive could justify genocide. The International Convention on the Suppression and Punishment of the Crime of Apartheid also excluded motives in the commission of the crime of apartheid. Article 1 of the draft Code seemed to address itself more to the scope than to the elements of the offence, when it should incorporate the main ingredients of the offence. Article 2, which recognized the independence of international law and internal law from each other, was appropriate. While its second half was not strictly necessary, it did however, make the article more precise.

43. With respect to article 6, on judicial guarantees, he said it was essential that individuals charged with offences against the peace and security of mankind should be entitled without discrimination to the minimum guarantees due to all human beings. The right to be presumed innocent until found guilty, to be informed promptly and in detail of the nature and cause of the charge, the right to a quick and fair trial, and the right not to be compelled to testify against oneself or to confess guilt were an integral part of most legal systems. Such guarantees had therefore assumed the nature of jus cogens, and the article was not superfluous.

44. With regard to implementation of the Code, historical antecedents showed that it was appropriate for the international community to establish sanctions to give force to the rules incorporated in the Code. His delegation urged the Commission to continue its useful work on the Code, which would undoubtedly contribute to the achievement of the principles of the United Nations Charter.

45. Turning to the law of the non-navigational uses of international watercourses, he stressed the need for rational management of the earth's water resources, considering the dimension of the problems related to the scarcity of fresh water. It was reckoned that one person out of two did not have a sufficient supply of clean water, and that 29 per cent of the world's population did not have easy access to drinking water. According to the World Health Organization, 80 per cent of diseases affecting the world's population were directly related to water.

46. While in principle watercourses were an integral part of the territories of the States through which they flowed, some watercourses ran through more than one State and affected the interests of those and other States. When there was a sovereignty dispute, the best way to accommodate those interests was through co-operation agreements. They could pave the way for and facilitate the solution of complex legal and economic problems relating to the watercourse. They could also decree mutually agreed or co-ordinated behaviour among riparian States.

47. The principle of co-operation had its legal basis in Article 1, paragraph 3, of the United Nations Charter. Similar provisions could be found in other

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international instruments, such as the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, the Charter of Economic Rights and Duties of States, and several articles of the United Nations Convention on the Law of the Sea regarding conservation and the prevention of pollution. A number of riparian or littoral African States had constructed legal régimes based on that principle. A case in point was the Niger River régime, consisting of two treaties: the Niamey Act and the Agreement concerning the Niger River Commission. In article 4 of the Naimey Act, the riparian States undertook to establish close co-operation on any project likely to have an appreciable effect on certain features of the régime of the river. Similar provisions existed in the statute relating to the development of the Chad Basin, particularly in its article 6. The principle was also reflected in other river agreements between African States, for example the African Convention on the Conservation of Nature and Natural Resources of 1968, and had been studied by the International Law Association and the Asian-African Legal Consultative Committee.

48. Article 10, on the duty to co-operate, was firmly rooted in international law. The Commission had rightly interpreted the duty to co-operate as an obligation of conduct which did not necessarily entail a duty to take part with other States in collective action, but rather a duty to work towards a common goal. Article 10, which could be incorporated in the general principles, could, if adopted, serve a useful purpose as a tool for working out a mode of conduct by States. The duty to co-operate should have as its objective equitable utilization, and should take on board with it the need to avoid or minimize pollution and prevent environmental degradation. The attempt by the Commission to develop that basic principle should meet with the approval of the Sixth Committee.

49. Articles 11 to 15, relating to procedural aspects, were very important, as they involved the question of whether States would be prepared to submit to some form of compulsory jurisdiction when they had not given their consent to be bound in a matter affecting their national sovereignty and territorial integrity. A State should not be forced to submit to arbitration without its consent. Also, the draft articles presented would, inter alia, facilitate the negotiation of co-operation agreements concerning any watercourse. His delegation reserved the right to comment on those articles.

50. The Commission had again considered the topic of international liability for injurious consequences arising out of acts not prohibited by international law, with a twofold objective: first, to provide States with a procedure for the establishment of a régime to regulate activities which, though not unlawful or prohibited, nevertheless gave rise to transboundary harm; secondly, to make provision for situations where such harm occurred prior to the establishment of the régime. The autonomy of the topic had been challenged on the grounds that there was no general rule of liability in customary international law for injurious consequences brought about by lawful activities. That, coupled with the similarities of the topic with State responsibility, had tended to stunt its development. A distinction did, however, exist. State responsibility imposed duties or standards in performing an act, whereas liability for acts that were not

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prohibited designated the consequence of failure to perform those duties or meet the general standards. Moreover, the absence of customary rules did not release a State or any enterprise which had caused damage or injury from its obligation to indemnify the injured State, nor did it deprive the latter of the right to obtain satisfaction from the State or enterprise that had caused the harm or injury. Thus, liability for injurious consequences arising out of acts not prohibited by international law flowed from the fact that the norms of that liability were the consequences of failure to perform a duty or meet a general standard. That criterion had also been used in treaties on the subject, as shown by article 2 of the Convention on International Liability for Damage Caused by Space Objects.

51. The only basis for exculpation was the negligence of the claimant. Hence, strict liability could be understood as an attempt to prevent harm, but when such harm did occur, compensation must be paid. On the other hand, if the introduction of strict liability posed problems for many Member States, the topic could be approached in terms of prevention and reparation, which would not only make it acceptable, but would preserve unity and enhance its usefulness. The Commission should continue its analysis of the topic, and recognition should be given to reparation for transboundary harm. The topic should also be viewed as an attempt to preserve the sovereignty of all States and to improve the environment.

52. Referring to the topic of relations between States and international organizations, he said that there were currently more than 200 international organizations throughout the world. The topic was therefore not only important but also full of complexity. His delegation was of the view that no useful purpose would be served by embarking on a new definition of an international organization, since the definition contained in the 1975 Convention was still adequate. The Commission should, however, consider the question of the international personality of organizations. Although it was appropriate for the Commission to concentrate on universal organizations, that should not be to the exclusion of regional organizations, some of which attempted to implement the objectives of universal organizations at a regional level; hence the need for privileges and immunities for the officials of those organizations. The objective should be to protect and defend organizations of all kinds and their officials so that they were able to function without let or hindrance. Although the immunities they enjoyed might vary, a comparative study on the subject would be very useful. The obligations of host States with regard to the officials of organizations should also be spelt out. His delegation was of the view that the schematic outline submitted by the Commission was broad enough to have to begin on the preparation of draft articles.

53. In the course of the year the Commission had undertaken a review of its programme, procedures, work methods and documentation. The recommendations that the main legal systems should be represented on the Drafting Committee and that reports should be submitted sufficiently in advance should lead to more balanced and acceptable documents. His delegation also considered that the Commission's annual sessions should run for a full 12 weeks. It welcomed the fact that the Commission had co-operated with other legal bodies such as the European Committee on Legal Co-operation, the Inter-American Juridical Committee and the Asian-African

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Legal Consultative Committee since that would help it to keep abreast of legal developments in their respective regions.

54. It also welcomed the holding of the International Law Seminar and expressed appreciation to the Governments of Argentina, Austria, Cyprus, Denmark, the Federal Republic of Germany, Finland, the Netherlands, New Zealand and Sweden for the fellowships they had made available to participants. The Seminar continued to attract much interest, and his delegation therefore appealed for more voluntary contributions to enable it to continue.

55. The Commission, which had also observed the centenary of the eminent Brazilian jurist, Gilberto Amado, had achieved considerable results in the codification and progressive development of international law. With a view to the achievement of that objective, his delegation called upon States which had not yet done so to ratify and respect the various conventions prepared by the Commission and also the Geneva Conventions applicable to armed conflicts. Lastly, he expressed appreciation to the Legal Counsel and called for the strengthening of the Office of Legal Affairs.

56. Mr. BADR (Qatar), referring to the draft Code of Offences against the Peace and Security of Mankind, said that, while his delegation was in broad agreement with draft articles 1, 2, 3, 5 and 6, those articles called for certain remarks. With regard to article 1, his delegation favoured the retention of the words "under international law", which appeared between square brackets. Also, it would be preferable if those words were placed at the end of the article. Article 3 did not make it clear whether an individual charged with one of the offences covered by the Code should be an agent of a State. His delegation had already expressed the view at the fortieth session of the General Assembly that such crimes, given their special nature and magnitude, could only be committed by individuals who abused the authority of a State.

57. With regard to draft article 7, his delegation considered that the non bis in idem rule was a fundamental norm of criminal justice and that its application should not be limited to national courts but should extend to such international tribunals as might be established. It therefore had difficulty with the paragraph proposed by the Special Rapporteur as set forth in paragraph 39 of the Commission's report. That provision could only be founded on an implicit suspicion regarding the integrity of the court which had tried the individual the first time. No such provision would meet with the general approval of the community of nations. It should also be remembered that protection of the rights of an accused against whom popular sentiment ran high was just as important as protection of the rights of an accused whose alleged offence aroused no such reaction among the public. Furthermore, his delegation had already declared itself in favour of the establishment of an international tribunal and of the inclusion in the Commission's mandate of the task of preparing a statute for such a tribunal (A/CN.4/407).

58. Turning to the topic of the law of the non-navigational uses of international watercourses, and specifically to draft article 10, he said that there was no point

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in discussing whether or not there was a general obligation in international law for States to co-operate since the Commission's mandate was not restricted to codifying existing law but extended to its progressive development. His delegation had, however, taken note of the Special Rapporteur's intention to refine the formulation of draft article 10 and to include references to the specific purposes and objectives of co-operation between States sharing the same watercourse.

59. Referring to draft articles 2 to 7, he said that his delegation had taken note of the Commission's renewed decision to postpone consideration of the definition of the term "international watercourses" and thus of the use of the term "system". Inasmuch as that would indicate that there was a division of opinion on the matter, his delegation continued to believe that it would be highly desirable for the members of the Commission to reach a consensus on that point. In general the substance of draft articles 2 to 7 met with his delegation's approval. The doctrine of equitable and reasonable utilization and participation, embodied in draft article 6, was a rule of general international law and was reflected in numerous international instruments such as, for example, the Helsinki Rules adopted by the International Law Association in 1966. His delegation trusted that, after 16 years' work on the topic, the Commission would proceed with due despatch to formulate definitive draft articles.

60. On the topic of international liability for injurious consequences arising out of acts not prohibited by international law, his delegation considered that draft article 4 as worded was somewhat ambiguous since it was not clear whether the requirement that the State of origin should know that the activity in question created an appreciable risk was part of the knowledge which that State should have regarding the activity or whether it constituted a separate requirement. In the light of the understanding reflected in paragraph 129 of the Commission's report, his delegation preferred to regard it as a separate requirement. To express that concept clearly, the words "provided further" should be added in the penultimate line of draft article 4 after the word "and" and before the word "that".

61. With regard to the questions posed in paragraph 132 of the report, his delegation was of the opinion that they should all be answered in the affirmative. It also agreed with those members of the Commission who were reported in paragraph 140 of the report as being in favour of drafting a general treaty on the subject, and with those who considered it preferable to define the concept of "dangerous activities" rather than establish a list of such activities. It further believed that a balance should be struck between procedural rules dealing with the duty of care and prevention, on the one hand, and the substantive rules of liability on the other, without undue emphasis on one of those aspects at the expense of the other. With regard to the concept of strict liability mentioned in paragraph 183 of the Commission's report, it was not restricted to common law systems. In fact, many modern civil codes dealt with the strict liability of operators of machinery and those involved in other hazardous activities. In that respect, his delegation fully agreed with the Special Rapporteur's remark. As for the general principles spelt out in paragraph 194 (d) of the report, his delegation believed that the first of them, which established respect for the sovereignty of

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other States as the outer limit of each State's maximum freedom of action within its territory, should also refer to the need to minimize the potential transboundary injury resulting from any activity undertaken within the State's territory or control.

62. Lastly, his delegation noted with satisfaction that in planning its future programme, procedures and working methods, the Commission had complied with the directives contained in General Assembly resolution 41/81 and hoped that it would make the maximum possible progress during the five-year term of its current membership.

63. Mr. SZEKELY (Mexico) said that his delegation wished to reiterate its position on the jurisdictional immunities of States and their property, the topic that had most concerned the Commission in recent years. During the four previous sessions, his delegation had consistently maintained that the artificial reversal of the current rules and practices of international law that was becoming apparent, under which the claim was being made that the minimal exceptions or limitations to the enjoyment of sovereign immunity generally accepted hitherto should become the general rule, while acknowledgement and recognition of sovereign immunity as the norm should become exceptional, was continuing to prove unacceptable.

64. There had been a serious defect in the methodology used to date in the Commission, due to a surprising failure to recognize the existence of a majority practice among States. The Commission's work had been based on the minority practice of certain common law States which had legislated on the subject while deliberately ignoring the majority practice. It was of the greatest importance that the widespread practice of States should be recognized, because otherwise international law was infringed. In order to tackle the problem actively and put itself in a better position to defend the multiplicity of cases being brought against Mexico in the courts of the minority of States, his country was going to begin an intense legislative process on the subject, so as to gather together majority practice on the generally recognized aspects of the sovereign immunities of States.

65. Mr. MAYNARD (The Bahamas), referring first to the draft Code of Offences against the Peace and Security of Mankind, said that in the fifth report on the topic that had been before the Commission, the Special Rapporteur had recast some of the draft articles which he had proposed at the thirty-eighth session, of which the Commission had provisionally adopted articles 1, 2, 3, 5 and 6.

66. With regard to draft article 4 on the aut dedere aut punire principle, the many proposals for the establishment of an international criminal jurisdiction had not yielded any results. The word "punire" should be replaced by the word "judicare" so that the expression accurately reflected the correct meaning of "prosecute or extradite", as the Code dealt with criminal matters.

67. The text of draft article 7 on the non bis in idem rule was adequate. Inclusion of the rule was necessary in the case of universal jurisdiction, since

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intervention by several courts might make an offender liable to several penalties. But the principle should be made subject to conditions intended to prevent its abuse. Although the Latin terms should be used in the main body of the relevant provisions, the titles themselves should be in the language of the text. His delegation supported the extension of the Commission's mandate to the preparation of the statute of a competent international criminal jurisdiction for individuals.

68. His delegation considered the topic of the non-navigational uses of international watercourses to be of considerable importance, both for promoting the formulation of rules aimed at the establishment of balanced and effective régimes for international watercourses, and in terms of its broader implications for co-operation among riparian States and for the rules governing international conduct generally. It took particular interest in the relatively novel concepts that had arisen, such as shared natural resources, reasonable and equitable use, the principle of equitable utilization and the obligation to refrain from causing appreciable harm to other States.

69. With regard to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, his delegation expressed its appreciation to the Special Rapporteur for his second and third reports and took note of his conclusions in paragraph 194 of the report (A/42/10).

70. As for relations between States and international organizations, his delegation approved of the Commission's request that the Special Rapporteur continue his study of the topic in accordance with the guidelines laid out in the schematic outline contained in his third report and in the light of the exchange of views in the Commission. The outline, by concentrating on the non-fiscal, financial and fiscal privileges and immunities of the organization, and of officials and experts on mission for and persons having official business with the organization, provided a useful framework for the further development of the topic.

71. With regard to State responsibility, a topic that his delegation regarded as being of considerable practical value, aspects worthy of examination had arisen in the area of illegal narcotics trafficking. Although The Bahamas was neither a producer nor a major consumer of narcotics, it was used as a transit point for drug traffickers moving their shipments from the southern hemisphere to the markets of the northern hemisphere. The international drug trade was a matter of grave concern and a heavy burden for the law enforcement agencies, and the coverage of the draft articles should be broad enough to include it. His delegation urged the Commission to continue to give State responsibility great priority within its programme of work.

72. With regard to the topics of the jurisdictional immunities of States and their property and the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, his delegation had noted the Commission's request for comments and observations on the draft articles by 1 January 1988. His delegation believed that it would be beneficial to establish a single convention on the status of the diplomatic courier and the diplomatic bag, which lent itself to

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the systematization and consolidation of norms that were currently widely dispersed. Particular attention should be paid to the status of the diplomatic bag not accompanied by diplomatic courier.

73. His delegation had closely examined the part of the report dealing with the programme, procedures and working methods of the Commission, and its documentation, including the table of work contained in the annex to the report, and urged the Commission to bring the topics on its agenda to an expeditious conclusion since some of them had been there for an extraordinarily long time. His delegation also enthusiastically supported the continuation of the International Law Seminar and was pleased that the Commission was fully cognizant of the need to provide fellowships to bring participants from far-flung geographical regions. In addition, it was pleased that the eighth Gilberto Amado Memorial Lecture, which had taken place on 16 June 1987, had been a resounding success, and hoped that the Government of Brazil and other sources would continue to make contributions in order to continue the memorial lectures.

The meeting rose at 1.10 p.m.