United Nations
GENERAL ASSEMBLY
FORTY-SECOND SESSION
Official Records*

SIXTH COMMITTEE
38th meeting
held on
Tuesday, 3 November 1987
at 3 p.m.
New York

SUMMARY RECORD OF THE 38th MEETING

Chairman: Mr. AZZAROUK (Libyan Arab Jamahiriya)

CONTENTS

87-56683 7276S (E)

21p.

Distr. GENERAL
A/C.6/42/SR.38
11 November 1987
ENGLISH
ORIGINAL: FRENCH

/...

The meeting was called to order at 3.10 p.m.

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

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

1. Mr. CORELL (Sweden), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that the Sixth Committee and the International Law Commission would benefit from a dialogue in which the Committee indicated general guidelines for the Commission's future work and working methods. That dialogue should also allow for general consideration of the work performed by the Committee and the Commission and of the distribution of topics between the two bodies and their ad hoc committees, in order to contribute more effectively to the progressive development of international law.

2. In general terms, the work of the Committee could be organized so as to make a more effective contribution to the work of the Commission. It might be wondered whether the Committee's time was used as efficiently as possible. For example, the Sub-Committee on Good-Neighbourliness had devoted an enormous amount of time to its topic. Many delegations thought that the contribution of that work to the codification of international law was rather modest. There was clearly a problem of proportion when such secondary matters were studied to the detriment of such important ones as 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. Would it not be better to consider those questions in greater detail in the Committee as well, or even in working groups set up during each session of the General Assembly? It would be interesting to hear the views of other delegations and of the Commission's members on that point.

3. As to the Commission's report itself, the Nordic countries were satisfied with the work of the Commission at its thirty-ninth session. At the appropriate time, Finland, Iceland and Norway would each make a statement on the law of the non-navigational uses of international watercourses, on international liability and on the draft Code of crimes, respectively.

4. In resolution 41/81 the General Assembly had requested the Commission to consider thoroughly the planning of its activities and its methods of work, in accordance with the wish of several delegations. That indicated the increasing awareness of the need to rationalize working methods. The Nordic countries welcomed the establishment in the Commission of a special Working Group on Methods of Work and its quick response to the General Assembly's request in resolution 41/81 for improvement in the means of communication with the General Assembly, more specifically with the Sixth Committee. It was very helpful that the Commission had invited delegations to comment on certain questions.

(Mr. Corell, Sweden)

5. With regard to the planning of the Commission's future activities, the Nordic countries thought that the guidelines for the present five-year period were realistic. However, it might perhaps be necessary to shift priorities in one case, for since the nuclear accident at Chernobyl countries were increasingly expecting the United Nations and other international bodies to respond to the environmental threats posed by the industrial era. Modern industrialization underlined the need to solve the legal problems connected with activities that were hazardous for man and the environment. That was why the question of international liability for injurious consequences arising out of acts not prohibited by international law was so important. The fact that the International Atomic Energy Agency was dealing with the question should not cause any fears of duplication of work. The Commission must endeavour to draft a convention providing general rules and guidance, and there was also a need for a more specific convention covering such matters as damage caused by nuclear accidents.

6. The Nordic countries welcomed the provisional adoption by the Commission of a set of articles on the law of the non-navigational uses of international watercourses.

7. Reverting to the organization of work, he noted that in paragraph 234 of its report the Commission referred to the possibility of staggering the consideration of some topics, as envisaged in General Assembly resolution 41/81. However, he wondered why the Commission had not seen fit to make a proposal in that respect, especially as its workload was already heavy and a decision on the question would immediately increase the efficiency of its work.

8. In paragraph 246 of its report the Commission also referred to the proposals about the format of its report to the General Assembly. Those proposals should be given further consideration. The report could be shortened by deleting, for instance, many of the historical reviews given in the introduction to each topic, which were justified only when the Commission was presenting a set of articles for first reading. After adoption in first reading of the draft articles on a topic as a whole, the Commission should compile a comprehensive document that would help Member States in the preparation of their submissions; such a document would cover not only the draft articles but also the explanatory comments thereon.

9. The Nordic delegations supported the proposal to transmit in advance the Chairman's introduction to the Commission's report, in order to help delegations to prepare their comments and statements on the different topics on the Commission's agenda, for the final report was not sent to them until the middle of October. That would also mean that the Commission's Chairman would be in a better position to highlight points of particular interest in the Committee.

10. Like other United Nations bodies, the Commission must of course take into account the Organization's present financial difficulties. But the General Assembly must not forget that the progressive development and codification of international law was an extremely important task which required rational working methods and all reasonable facilities. The Commission needed time and the support of the Codification Division for the performance of its work. The Nordic countries shared the Commission's views in that respect.

(Mr. Corell, Sweden)

11. Lastly, the Commission's work must result in codified international law based both on customary law and on the careful breaking of new ground. Such law, construed by independent and impartial organs, would provide a means of peaceful settlement of disputes between sovereign States. It was in that spirit that the Nordic countries viewed the work of the Committee and the Commission.

12. Mr. WATTS (United Kingdom), speaking on the topic of the law of the non-navigational uses of international watercourses, said that the direction in which the Commission's work on the topic was progressing was broadly acceptable.

13. In the first place, paragraph 2 of the commentary on draft article 2 indicated that the Commission intended to proceed on the basis of the working hypothesis as to the meaning of "international watercourse systems" adopted in 1981. That was an eminently satisfactory choice at the present stage. While it might not always be necessary or even possible to agree upon a formal definition, to have identified at an early stage the basic concept involved in the topic under discussion was a prerequisite for progress.

14. Second, the draft articles provisionally adopted were regarded by the Commission as leading to a "framework agreement". In that way, general, residual rules applicable to all international watercourses would be adopted, but they would be designed so that the States concerned with any particular watercourse could complement those rules by separate agreements. International watercourses were so particular in their economic, political and environmental characteristics that such an approach was, in his view essential.

15. It might, however, be advisable to go further. He was inclined to question whether any binding general rules could be prescribed, even if only for residual purposes. It might be more realistic merely to indicate certain recommendations or guidelines on which States could draw when negotiating agreements for the particular watercourses which concerned them. At the least, the terms of draft article 4, paragraph 1, which allowed for the separate agreements only to "apply and adjust" the articles to be adopted, should be reconsidered. Read strictly, those words could be interpreted as only allowing the articles either to be applied as they stood or to be applied subject to agreed adjustments, a concept which could exclude the possibility of not applying the articles at all. In his delegation's view, that would unduly restrict the right of the watercourse States to reach whatever agreement seemed to them best suited to the particular circumstances with which they were faced, if necessary in disregard of whatever general rules might be set out in the articles.

16. Third, draft article 5 set forth the right of watercourse States to participate in consultations and negotiations on agreements affecting their interests. He wondered how that right was to be given practical effect. For example, if two watercourse States were having bilateral consultations about the operation of an agreement affecting the entire watercourse system, was a third watercourse State always entitled to participate in those consultations by virtue of paragraph 1 of draft article 5? It was true that the provision limited the

(Mr. Watts, United Kingdom)

right of participation to "relevant consultations"; the intention there might be to refer only to consultations about agreements being negotiated rather than to those about agreements already in force. If so, the provision should be made clearer. But even if the reference was limited to consultations on negotiations in progress, it still seemed unrealistic to try to exclude the possibility of bilateral consultations between States with particular common interests.

17. Under paragraph 2 of the draft article, a State's right to join in consultations depended upon its use of a watercourse being affected to an "appreciable" extent. While acknowledging the difficulty of finding precisely the right adjective, he felt that the Commission might usefully seek to replace the term "appreciable". There might be some inconsistency between different definitions of the term which the Commission itself gave in different parts of its report. In paragraphs 15 and 16 of the commentary on draft article 4 the Commission said that while "appreciable" meant that there "must be a real impairment of use", it was not used in the sense of "substantial". But elsewhere in the report (para. 130) it was stated that "appreciable" signified "of some magnitude", a definition which might be difficult to reconcile with not being "substantial". The Commission might perhaps look again at its use of the term in those two contexts.

18. With regard to draft article 10 on the general obligation to co-operate, discussed but not provisionally adopted by the Commission, his delegation, while not wishing to question the desirability of co-operation between States in connection with international watercourses as with all other aspects of international relations, failed to see the practical purpose of stating that proposition in the form of a general legal obligation, or the real meaning of such an obligation and how it could be enforced. In view of the problems to which the provision gave rise and its lack of practical value, it might be preferable to omit it. Noting that the Special Rapporteur believed that a revised and more specific formulation of the article could be achieved, he expressed the hope that the question of the practical operation of any article on the subject would not be overlooked in the pursuit of that aim.

19. Turning to the topic of relations between States and international organizations, he said that his delegation continued to have doubts as to the scope for useful work on that topic. With so many other important topics in its work programme, he did not believe that the Commission should give the item any priority. His delegation's scepticism was due primarily to the fact that an extensive network of treaties already existed in that field, e.g., the Convention on the Privileges and Immunities of the United Nations; the Convention on the Privileges and Immunities of the Specialized Agencies, with its many annexes adopting it to various agencies; and many other international agreements relating to the privileges and immunities of other international organizations, including the various headquarters agreements between organizations and the States concerned. It would obviously be unacceptable if the status or validity of those existing agreements were to be called into question in any way; the Commission's work on the topic must not have that effect. That being so, the practical result

(Mr. Watts, United Kingdom)

of its work on the topic could only be negligible, inasmuch as each international organization had its separate requirements. It was for the member States of each organization to decide for themselves what privileges and immunities were necessary for the organization in question. In doing so, they often drew on the experience of existing organizations. Accordingly, his delegation shared the view that the Commission should confine itself to providing guidelines and recommendations to be adopted by States and international organizations as they saw fit.

20. With regard to organizational matters, his delegation was disappointed that the Commission had not done quite as much as might have been expected. True, it had needed time to settle down in its reconstituted form and its session had lasted only 11 weeks, but the temporary removal of some items from its agenda had been fortuitous and could not be relied upon in the future. His delegation was concerned about the implications of personnel transfers in the Codification Division of the Office of Legal Affairs, but hoped that the Legal Counsel would do his utmost to maintain the highest standard of staffing in that Division as in the rest of the Office.

21. Turning to the Commission's future programme of work, he noted with interest that the Commission had considered the planning of its activities and had provided certain indications of the progress it expected to make over the next four years on the topics before it. It seemed to his delegation that the Commission might have been over-optimistic. That would be unfortunate, for his delegation hoped that the Commission would make maximum progress over the term of office of its current members.

22. The Sixth Committee had a responsibility to assist the Commission in making the progress desired by all. It did so on the basis of its consideration of the Commission's report. However, that report had been made available rather late; without sufficient time to study it delegations could not usefully contribute to an exchange of views on the Commission's work in progress. He hoped that in future the Committee would do all it could to submit its report in good time.

23. Mr. LUKJANOVICH (Union of Soviet Socialist Republics) drew attention to the memorandum on the development of international law (A/C.6/41/5) submitted by his country.

24. The draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, which had been adopted in first reading, could constitute a good basis for the preparation of a convention on the subject. That was a matter to which the Soviet Union attached the greatest importance.

25. With regard to article 18, his delegation wished to emphasize that the need for the diplomatic courier to enjoy immunity from the criminal jurisdiction of the receiving State or the transit State derived from the fact that the courier must be able to perform his functions without hindrance and was based on his status as an official used to maintain official relations with the representational entities. Only the sending State could waive the immunity of the diplomatic courier.

(Mr. Lukjanovich, USSR)

Moreover, the immunities accorded to the diplomatic courier should not be inferior to those accorded to administrative and technical personnel. Lastly, it must be remembered that the Commission had provided legal guarantees against abuse of the privileges and immunities of the diplomatic courier.

26. Article 28 should provide not only that the diplomatic bag must not be opened or detained, but also that it must be exempt from any examination either directly or through electronic or other technical devices. It was unacceptable to seek to extend to the diplomatic bag the régime of the Vienna Convention on Consular Relations, which provided that the bag could be opened and returned to its place of origin. The receiving State and the transit State had sufficient means at their disposal to prevent abuses and in case of a violation could in any event take the necessary retaliatory measures.

27. Despite the solid results achieved at the thirty-ninth session, the course chosen by the Commission with regard to the preparation of draft articles on the law of the non-navigational uses of international watercourses gave rise to some misgivings. The basic concepts should be clarified before new articles were prepared and the topic considered in greater depth. The term "international watercourses", for example, gave rise to confusion because of the analogy with international rivers, which brought to mind a régime in which the river could be used not only by the riparian States but also by third States. A term such as "plurinational watercourses" would make it possible to avoid that confusion.

28. Furthermore, the topic as a whole could not be developed nor the form of the future instrument selected until a choice had been made between the terms "international watercourse" and "international watercourse system". The latter concept was too vague and in the case of small or medium-sized States might lead to an absurd situation in which all the water resources of those States would be subject to international regulation.

29. It must also be specified whether the expression "non-navigational uses" was to be construed in a narrow or a broad sense. In the latter case, it would also be necessary to consider questions relating to the protection and rational utilization of the waters. In addition, it would be necessary to ensure that the provisions prepared created no right to interfere in the economic activity of the riparian State, particularly with regard to the distribution of the living resources of the watercourse which fell within the exclusive competence of that State.

30. It was also time to reach agreement on the form of the future instrument. His delegation considered that the Commission should prepare general principles having the character of a recommendation and leave it to States to choose between various options in the light of the conditions pertaining to each specific case.

31. In the context of the topic under consideration, the concept of a "shared natural resource" was incompatible with the principle of the permanent sovereignty of States over their natural resources. Equally unacceptable was the idea that only recourse to that concept would make it possible to prevent any infringement of the interests of the other riparian States. The key principle in that regard was that of co-operation among sovereign States.

(Mr. Lukjanovich, USSR)

32. The general obligation to co-operate set forth in article 10 was of the greatest importance, on the one hand, for preventing an activity from having negative consequences for the other riparian States, and on the other, for ensuring optimum utilization of the watercourse in the interests of all. The future instrument should make co-operation a general principle giving rise to general obligations, and preserve a fair balance between that principle and all the other principles of international law relating to the topic, some of which, particularly that of the permanent sovereignty of States over their natural resources, were not adequately reflected in the draft articles proposed thus far.

33. Mr. TREVES (Italy) observed that if, among the elements to be considered in developing articles on the law of the non-navigational uses of international watercourses, the sovereignty of the State in whose territory a given portion of an international watercourse lay should be considered of overwhelming importance, all problems could have been dealt with through the application of the rules on territorial sovereignty and on international responsibility, so that there would be no need for the Commission to study the topic. It had to be recognized that the interests of some of the States to which the waters of an international watercourse might be affected by the use of the waters of the same watercourse by other States, and the use of the watercourse by all the States of that watercourse taken together might even affect the interests of the international community as a whole. That situation required a careful balancing of various legal rules.

34. Even though there were differences of opinion as to how far customary international law already covered the subject, it seemed that some general principles, such as that of the equitable and reasonable utilization of the international watercourse, and their corollaries, such as obligations of consultation and co-operation, were already crystallized customary law or were in the process of becoming so. In any case, the intervention of the Commission was useful in order to consolidate, clarify and develop those principles. The fact that the general principles on the subject were necessarily based on imprecise concepts made it particularly important to adopt precise procedural rules to give those principles a practical content.

35. Although Italy had considered in the past that it would be sufficient for the Commission to prepare model rules, it supported the choice made in article 4, namely that the draft articles should contain binding obligations of a residual character.

36. His delegation saw the wisdom of the Commission's decision to leave aside article 1 on the use of terms and to utilize the working hypothesis adopted in 1980. It hoped, however, that when the Commission reverted to that point it would not have to agree on a less than comprehensive concept of an international watercourse.

37. In general, his delegation endorsed articles 4 and 5 on watercourse agreements. Particular attention should be paid to the position of States that were not parties to a limited watercourse agreement. Article 4, paragraph 2, which

(Mr. Treves, Italy)

laid down a basic principle, and article 5, paragraph 2, which laid down procedural rules, must be seen together. Those two paragraphs were also connected with the procedural rules on new uses laid down in articles 11 to 15. It should be made clear that those rules also applied to new uses resulting from a limited watercourse agreeement. Article 5, paragraph 2, was fully compatible with the procedures laid down in detail in articles 11 to 15, and those procedures should be used to achieve the specific purposes set forth in paragraph 2 for new uses emerging from limited watercourse agreements.

38. Article 6 was one of the key provisions of the draft, and his delegation agreed with its current formulation. The observations in the commentary clarifying the meaning of the term "optimum utilization" were particularly important, and a place should be found for them in the text of the draft articles itself.

39. In view of its non-exhuastive character, the list of factors set forth in article 7 seemed satisfactory, by and large.

40. With regard to article 10, which was one of the most important provisions in the set of draft articles, in the light of current international practice it could be affirmed that the obligation to co-operate was supported by customary law.

41. Italy was not convinced that replacing, in article 11, the term "appreciable harm" by the term "adverse effect" would help to dispel the doubts referred to in paragraph 103 of the report concerning the "triggering mechanism" of the notification obligation provided for in the article. Such a change would not adequately stress the factual and non-legal nature of the criterion. The best way of achieving that result would be to indicate that all new uses called for notification. That would require insertion of a definition of new uses into the draft articles. The definition now in footnote 50 should be re-examined from that viewpoint.

42. Although the prevailing opinion in the Commission had been that article 14, paragraph 3, and article 15, paragraph 3, concerning questions relating to liability, should be deleted (see A/42/10, paras. 113 and 116), Italy believed that they should be simply set aside until such time as problems relating to liability under the draft articles were clarified. Moreover, contrary to the statement made in paragraph 116 of the report, the possible justification for the deletion of article 14, paragraph 3, did not apply to article 15, paragraph 3. The former provision provided for liability for harm caused after violation of the procedural rules. The situation envisaged was that of a wrongful act, to which general rules on responsibility would apply, even although the proposed provision linked responsibility for the violation of the procedural rules to harm that might be independent of such a violation. From that viewpoint, the idea of "harsh punishment" put forward in paragraph 113 seemed valid. However, a more thorough discussion of that point would have been desirable.

(Mr. Treves, Italy)

43. Article 15, paragraph 3, provided for liability in cases where harm was the consequence of an activity that was lawful under paragraphs 1 and 2 of the same article. Its deletion would result in the elimination of all liability in the cases in question. That was an issue that called for further discussion. In particular, it was necessary to clarify whether the "utmost urgency" dealt with in article 15, paragraph 1, amounted to the causes (force majeure or necessity) excluding wrongfulness. If that were to be the case, the whole article would be superfluous, unless paragraph 3 was retained. If that were not to be the case (or not completely the case), article 15 would be useful and the issue of the retention or deletion of paragraph 3 would be a substantive matter, because paragraph 3 laid down a principle that had a result that was opposite to that ensuing from the general principles on responsibility.

44. Mr. ROSENSTOCK (United States of America) said that the topic of the law of the non-navigational uses of international watercourses was an item that enabled the international community to give concrete meaning to genuinely progressive notions of interdependence. It was the approach taken towards such issues more than high-blown rhetoric about new collective security systems that fostered or hindered the interdependence of States in the last decades of the twentieth century. It was not of great moment whether the term "shared natural resource" was used, so long as it was recognized that water was a finite resource and that principles must be elaborated to maximize the benefits of it to all those who used it. However, States did not recognize interdependence by arguing that the topic applied only to the main channel of a watercourse crossing or forming a boundary; by defending the late nineteenth century Harmon doctrine - as one member of the Commission had; by citing the principle of sovereignty over natural resources, as an excuse for a beggar-thy-neighbour policy towards lower riparian States; or by trying first to narrow the scope of the topic and then saying that the international community should settle for recommendations rather than rules. Interdependence and security were recognized and fostered when it was recognized that the sovereign equality of States was made truly meaningful by recognition of the fact that rights to the use of an international watercourse were correlative. The right of one State to use a watercourse was correlative with the rights of the upstream and downstream States to do likewise.

45. In part, that correlative relationship was addressed by the duty to co-operate, so long as that duty was broadly perceived and well spelled out. It was important to comprehend that in the case of non-navigational uses the visible part of a watercourse was not the whole watercourse and that, for example, a watercourse was affected when groundwater that fed into it was diverted or polluted. His delegation was in complete agreement with the representative of Qatar on that.

46. It remained possible for States to conclude bilateral agreements, and if there was equality in terms of their bargaining positions, which was rarely the case, they could elaborate a plausible arrangement. The Commission should elaborate general principles based on a recognition of the fact that a watercourse must be regarded as an absolutely inseparable part of a drainage basin. The text prepared

(Mr. Rosenstock, United States)

by the Drafting Committee, including the working hypothesis provisionally adopted in 1980, seemed very conservative to his delegation. At the current stage, it was not possible to comment in anything but a preliminary and provisional manner on the text of articles 2 to 7. That having been said, the draft articles produced seemed broadly consistent with a sound perception of the scope of the topic and its relationship with navigational uses. His delegation presumed that the inconsistency between the text of article 3 and the commentary would be resolved in favour of the text.

47. The framework approach reflected by the general thrust of article 4 appropriately recognized, on the one hand, the diversity of watercourse systems and the consequent need to leave States enough freedom and, on the other hand, the widely perceived utility of a framework of residual general principles and rules, such principles being able to facilitate the conclusion of specific agreements among system States. The proviso in article 4, paragraph 2, went without saying, but it was perhaps just as well to include it. Where article 5 was concerned, common sense would seem to dictate that potential problems should be identified before rather than after a treaty was concluded. Moreover, the Commission should perhaps consider whether the requirement of "appreciable effect" was relevant to paragraph 1. His delegation wondered whether every upper riparian State was necessarily affected by even the most sweeping of agreements concluded between lower riparians. Presumably, the phrase "applies to the entire [system]" was thought to cover that point. Perhaps a more detailed commentary was needed on that point.

48. It was particularly difficult to comment on articles 6 and 7 without the benefit of the remainder of the articles of Part II. They seemed, however, to provide a sound foundation which was fully consistent with a sound approach to the problem as a whole. The concepts embodied in the articles, such as the obligation to co-operate, should be elaborated further. For instance, an article should be devoted to pollution which was one of the main problems affecting watercourses. In that connection the delegation of the Federal Republic of Germany had rightly stated that current concerns regarding transboundary pollution should be taken into account.

49. It would be premature and possibly even presumptuous to comment on the remaining draft articles. But the exchanges to which they had given rise in the Commission had been illuminating. The modifications proposed by the Special Rapporteur represented a positive synthesis arising out of the discussion and were likely to contribute to progress in the work.

50. It might be prudent for the Commission to consider the question of dispute settlement again at an early stage. The very general nature of the residual rules, with their reliance on terms such as "co-operation", "good faith" and "equitable use", were likely to require detailed procedural provisions for the settlement of disputes. Statements made in the preceding two months suggested that one very important player on the world scene might have fundamentally changed its attitude towards third-party dispute settlement. If that change of attitude was as

(Mr. Rosenstock, United States)

fundamental as had been suggested, perhaps a more forthcoming approach than that suggested by paragraph 111 of the report was possible. His delegation had no quarrel with the suggestion of the Special Rapporteur that a decision by the Commission on the question should be postponed, but a number of Governments would be able to comment definitively on the draft articles only when they had some sense of the provisions on dispute settlement. The climate for integrating dispute settlement provisions into the overall scheme had improved.

51. There were some topics before the Commission which, while of importance, were so large that progress on them would inevitably be slow, and there were others which were so peripheral in character and dealt with matters of so little moment that the time spent on them was open to question. The privileges and immunities issues on which the Commission was working fell into that category. Also, there seemed no useful purpose in elaborating draft articles on the second part of the topic on relations between States and international organizations. Umbrella agreements existed and, where necessary, there were bilateral agreements.

52. The topic of the law of the non-navigational uses of international watercourses did not seem to fall into either of those two categories but to occupy a middle ground in which a major contribution was possible. It was a topic of sufficiently high priority for the Commission to be able to complete it in the course of the current quinquennium. His delegation urged the Special Rapporteur to maintain his pace of work and the Drafting Committee to devote more time to the topic so that it could catch up with the Special Rapporteur by the end of the Commission's fortieth session.

53. Mr. HAYASHI (Japan) said that his delegation was pleased to note the appointment by the Commission of two Special Rapporteurs on two topics of the highest priority, namely, State responsibility and jurisdictional immunities of States and their property.

54. The Commission had led the efforts of the international community in the codification and progressive development of international law because its members were all eminent jurists who had a deep insight into and rich experience of the realities of international affairs while also demonstrating independence vis-à-vis their home countries. The practice of decision by consensus was also extremely important because it was in that way that the Commission could effectively fulfil its mandate and establish a legal order for the entire international community.

55. It was not, however, possible for the Commission to consider adequately all the topics on its annual agenda; nor could it give in-depth consideration to any topic if it considered all of them at each session. The Commission should take up for second reading the draft articles it had completed at first reading, taking full account of the comments received from Governments. Apart from those two topics, the topic of State responsibility was the most important and the Commission should give it the attention it deserved.

(Mr. Hayashi, Japan)

56. In general the Commission members considered that work on the topic of the law of the non-navigational uses of international watercourses should aim at the preparation of a framework convention for use in co-ordinating the various non-navigational uses of international watercourses. He trusted that the Commission would continue to pursue that goal.

57. With regard to draft article 10 on the general obligation to co-operate, proposed by the Rapporteur, it was not possible, until the scope and purposes of the article had been made clear, to state that such general obligations existed in international law. He was gratified that the Special Rapporteur intended to improve the text by including a reference inter alia to the specific purposes and objectives of co-operation. Articles 11 to 15 were also important because they were intended to codify the procedural rules for ensuring the effective implementation of substantive rules which had already been referred to the Drafting Committee, but it was important to strike a reasonable and equitable balance between the interests of the State contemplating a new use of a watercourse and those of the State to be notified of such use. His delegation trusted that the Commission would bear that point in mind and would refine the various concepts embodied in the draft articles.

58. Mr. HAYES (Ireland) said that, despite the many years devoted to the topic, the preparation of a draft Code of Offences against the Peace and Security of Mankind was still far from complete. His delegation favoured the preparation and adoption of a Code: there was a need for an identifiable body of rules, endorsed by the international community, against which acts done and allegations that such acts were offences against the peace and security of mankind could be assessed. It naturally hoped for much more but that alone would justify adoption of a Code.

59. With regard to objectives, idealism had to be tempered by realism. Accordingly, without precluding future developments, the draft Code should not for the time being seek to deal with the criminal responsibility of States or to establish an international criminal jurisdiction. Those positions implied support for the first paragraph of articles 3 and 4, but did not imply that the second paragraph in either article should be omitted. In the mean time, provision should be made for a system of universal jurisdiction in respect of such offences.

60. A question of terminology arose in the English text of draft article 1 regarding the use of the word "crimes" as against "offences". Although the word "crime" might convey to the non-lawyer a connotation of greater seriousness, technically each of the two terms covered the whole range of infringements of criminal law. In the draft Code, the problem seemed to be one of presentation and language co-ordination, and in the circumstances his delegation would prefer "crimes" to "offences".

61. Ireland also favoured a conceptual definition of crimes against the peace and security of mankind, perhaps combined with a non-exhaustive list. Moreover, the words in square brackets in draft article 1 were at best superfluous and possibly confusing. While exception could not reasonably be taken to the content of draft

(Mr. Hayes, Ireland)

article 2, its sense might well be clearly implied in draft article 1. Draft article 2 should thus be retained for the moment but reviewed when draft article 1 was in final form.

62. It was important to include draft article 6 setting forth the entitlement of an accused to minimal judicial guarantees. Its redrafting was an improvement, and the text should adhere as closely as practicable to the relevant provisions of the International Covenant on Civil and Political Rights to avoid any implication of different meaning.

63. Similarly, a non bis in idem rule was an essential protection of an accused. As formulated in draft article 7, it would be appropriate to a scheme of universal jurisdiction. If and when an international jurisdiction was established, it would be necessary to consider whether the rule should be retained. If so, care should be taken not to disturb the logical primacy of international criminal law and of the international criminal court.

64. As concerned the law of the non-navigational uses of international watercourses, his delegation believed that the approach taken had been the most sensible one, for the proposed draft framework agreement comprising general residual rules should include a general obligation to co-operate. On that point, his delegation agreed with the delegation of Qatar: if such an obligation did not exist in international law, it was an eminently suitable subject for progressive development. Concepts such as optimum utilization, equitable and reasonable utilization, protection of a watercourse State, from appreciable harm resulting from an agreement between other watercourse States were also key elements for elaboration on the topic.

65. The question of international liability for injurious consequences arising out of acts not prohibited by international law was becoming increasingly relevant to an international community seeking to protect itself against some of the less than beneficial effects of technological advances. His delegation fully supported the conclusions drawn by the Special Rapporteur, as set out in paragraph 194 of the Commission's report. It seemed necessary to elaborate a draft convention on the topic in the light of modern-day realities. The Special Rapporteur had recognized in his three reports that there were two confl cting principles inherent in the topic. First, a State had the right to engage in lawful activities, particularly in its own territory, without being answerable to another State. Secondly and conversely, a State had the right to enjoy the benefits of its own facilities and assets, without interference from the activities of another State. Those could not both be absolute rights, if for no other reason than that they would conflict. Those two principles cohabited within the concept of sic utere tuo ut alienum non laedas, which the Special Rapporteur accepted as the theoretical basis for the progressive development of the law on that topic. That was also his delegation's view.

(Mr. Hayes, Ireland)

66. The rules of prevention and of reparation should be combined. To provide for reparation alone would be unfair and illogical. Yet a rule of prevention without sanction for its breech would be ineffective. The combination of the two therefore followed logically from the principle of sic utere and also met the requirements of justice and effectiveness. Thus a linkage between them was justified, and led inevitably to the incorporation in the topic of the notion of strict liability which existed in both common law and civil law.

67. "Strict" liability, even as exemplified in the famous Rylands v. Fletcher case, was not the same as "absolute" liability. Rather, it meant liability deriving from a causal relationship between activity and injury. In the topic in question, it would apply only in the absence of agreement between the States concerned on hazardous activities. Its application would be settled through negotiations that would take account of factors modifying the strictness of liability. Strict liability would have a deterrent effect and would thus be an ingredient of prevention as well as of reparation. Furthermore, although a much more stringent rule of strict liability had been adopted in many legal systems, there was no convincing evidence that it had discouraged the development of science and technology in the countries concerned.

68. With regard to relations between States and international organizations, work on the topic should proceed on the basis of the outline presented by the Special Rapporteur. It was to be hoped that he would use the freedom given him by the Commission to combine the codification of the existing rules and practice with the identification of lacunae. Both were useful undertakings which should be seen as complementary rather than mutually exclusive. However, his delegation agreed with Brazil that it was a topic that should rank in priority after the targets set in paragraph 232 of the Commission's report.

69. In connection with chapter VI, section D, on the programme, procedures and working methods of the Commission, and its documentation, his delegation was pleased that the Commission had responded to General Assembly resolution 41/81 by considering all the suggestions made in paragraph 5. It also welcomed the efforts made to facilitate the expression of views by delegations during the annual debate in the Sixth Committee; in that context, paragraphs 67 and 115 of the Commission's report had been of particular assistance to his delegation. The Commission had done well to plan its activities for its full five-year term.

70. Noting what had been said in paragraph 234 about the possibility of staggering consideration of some topics, his delegation thought that would make it easier for the Special Rapporteurs to prepare their reports, would allow members to study them in advance and would facilitate more extensive debates during the sessions of the Commission. It seemed, to begin with, that current circumstances lent themselves to staggering. Secondly, staggering would be most unlikely to prevent completion of a first reading of two topics within the five-year term as planned, or to hold back progress in other fields. Thirdly, the question of staggering should be examined by the Commission at the end of each session as well as at the beginning. Lastly, the staggering of substantial consideration of topics should not entail a corresponding staggering of the work of the Drafting Committee.

(Mr. Hayes, Ireland)

71. His delegation had noted with interest the Commission's plans for facilitating the work of the Drafting Committee, as set out in paragraphs 237 to 240 of its report, and hoped that the possibility of flexible composition according to topic would be re-examined. The Commission must be given the necessary resources to carry out its tasks, its reports must be discussed yearly, and Governments should provide detailed and timely responses to requests for written observations.

72. He announced that his Government had decided to make a contribution to the funding of the forthcoming International Law Seminar to be held during the fortieth session of the Commission.

73. Mr. OMAR (Libyan Arab Jamahiriya) said, with reference to the draft Code of crimes against the peace and security of mankind, that his delegation supported the approach adopted by the Commission in defining such crimes on the basis of a list of crimes and a precise description of each of them. That was in accordance with the principles of criminal law and preferable to definitions which only identified the basic elements of the acts condemned. The definition had to embrace criminal intent, which was one of the fundamental elements of a crime. The court must prove criminal intent in every case and it could not simply be deduced from the massive and systematic nature of the crime.

74. As for the expression "under international law" included in draft article 1 in square brackets, his delegation, while understanding the reasons of those who objected to it, thought that it should be retained provisionally. That was because the Commission, as indicated in paragraph 17 of its report, intended to limit the scope of the draft Code to the criminal responsibility of individuals, without prejudice to subsequent consideration of the possible application to States of the notion of international criminal responsibility. Moreover, it would be best to wait until consideration of the list of offences was completed.

75. Furthermore, there could be a connection between the words "under international law" and article 2, which supposed that certain acts might not be characterized as crimes against the peace and security of mankind in the legislation of certain States. That was why the words "under international law" should be retained provisionally, at least until work on the draft Code was completed. As for the second sentence of article 2, it should be kept because it was more precise than the first.

76. Article 3 caused no difficulties so far as the responsibility of the individual or of the State was concerned, although the expression "irrespective of any motives invoked by the accused that are not covered by the definition of the offence" was superfluous because the motives were among the objective aspects brought to light by the acts committed. Article 5 also raised no problems.

77. His delegation supported article 6 dealing with the minimum judicial guarantees due to any individual charged. There was no harm in reaffirming them in the draft Code, even though they constituted one of the principles recognized in every nation's criminal legislation. With reference to article 7, his delegation

(Mr. Omar, Libyan Arab Jamahiriya)

thought that it required more thorough consideration in view of the difficulties that it had raised. The article appeared to deal with the applicability of the non bis in idem rule in every case, whether there was a simple conflict of competences or a similar conflict between a State and the international criminal court, if such was established. There would be an exception to the rule if new evidence was discovered that had not been known at the time of a first trial. The question of the order of court, should be dealt with in the appropriate place. It apppeared that the proposal in paragraph 39 of the Commission's report concerning the addition of a second paragraph to article 7 did not completely solve the difficulties that had become evident in the Drafting Committee. The new paragraph would prevent the rule being pleaded before an international criminal court and there seemed to be no reasonable justification for such a provision. It was therefore desirable that it be reconsidered.

78. So far as the drafting of the statute of an international criminal court for individuals was concerned, his delegation had no objection to the task being entrusted to the Commission. Nevertheless, it considered that that should depend on completion of the draft Code. The Commission must take account of systems of priority when there was a conflict of jurisdictions. In that connection, his delegation supported the proposal aimed at establishing an order of priorities for extradition: first would come the State in the territory of which the crime had been committed, second the State whose interests or those of its nationals had been jeopardized, and third the State where the perpetrator had been apprehended.

79. Drawing the Committee's attention to the question of the publication of the judgements and advisory opinions of the International Court of Justice in other official languages of the United Nations, he said that his delegation had raised the matter at the fortieth session with the aim of widening the ranks of those who could thus learn about the activities of the Court, especially in developing countries. His delegation pointed out that JIU had indicated in its report (A/42/34) the desirability of those publications reaching a wider public and the possibility of achieving that aim within the limits of available financial resources.

80. Mr. KEKOMÄKI (Finland), speaking also on behalf of the delegations of Denmark, Iceland, Norway and Sweden, recalled that the Commission had considered the topic of the law of the non-navigational uses of international watercourses over the past 13 years and studied a multitude of both legal and technical issues involved in it. Despite those efforts, the work was still far from completion.

81. During the 1987 session, some members of the Commission had continued to question whether State practice or arbitral decisions could provide a sufficient basis for the elaboration of binding rules of international law applicable to all international watercourses. To a certain extent, such doubts might be justified. On the other hand, the law of international watercourses had a long history and its sources were not limited to recent State practice and modern arbitral jurisdiction. Moreover, the mandate of the Commission relating to the topic, contained in General Assembly resolution 2669 (XXV) was wide enough to cover not

(Mr. Kekomäki, Finland)

only the recent application in State practice and international adjudication of the law of international watercourses, but also intergovernmental and non-governmental studies of that matter.

82. In fact, a number of studies and drafts relating to the law of international watercourses had existed as early as the late 1960s, the most important being the Helsinki Rules on the Uses of the Waters of International Rivers. The purpose of the initiative that had resulted in the adoption of the General Assembly resolution had been to apply primarily those studies and drafts as nationals for the codification of the law on the subject. Important work had been done by non-governmental bodies such as the International Law Association and the Institute of International Law, which had been studying the international law of watercourses for a long time. Work on the same topic had also been done by FAO, ECE, the Asian-African Legal Consultative Committee and other international organizations. The value of those studies derived from the fact that they had been prepared by experts on the international law of waters and were based upon thorough research of all relevant materials.

33. The annual reports of the Commission indicated that it had paid attention to the recommendations of the General Assembly and there was no doubt that the basic principles and related provisions of the Helsinki Rules and other studies and drafts had decisively influenced its work. That was particularly true with respect to the doctrine of equitable utilization, which the Commission had adopted as the basis for its drafting. The Nordic delegations welcomed that decision, although some of the draft articles might need reformulation.

84. Some members of the Commission had expressed doubts about the possibility of drafting general principles that would apply universally to all watercourses. To solve the problem emanating from the diversity of watercourses, the Commission had developed the idea of a framework agreement. That approach meant that watercourse States might, by a watercourse agreement, apply and adjust the general provisions of the articles of the draft convention to the characteristics and uses of a particular international watercourse. The Commission's report explained that the material provisions of the draft articles were essentially residual in character. That secondary nature of the general rules and principles was also manifested in the structure of the draft convention, one of whose first provisions dealt with watercourse agreements (art. 4).

85. In the view of the Nordic delegations, the dualistic system of a framework agreement appeared somewhat ambiguous. Furthermore, they had difficulties in agreeing with the classification of the general rules and principles as only residual in character. A future convention could certainly contain provisions which entitled watercourse States to arrange their mutual relations with regard to the uses of the watercourse by agreement in a way that differed from the rules and principles governing those uses in general, but only provided that their agreement did not infringe the rights and interests of third States. However, the Nordic delegations would not like to support a framework agreement system which overshadowed the codification of the law of international watercourses by putting the general rules and principles, some of which were well established as part of customary international law, into a secondary position.

(Mr. Kekomäki, Finland)

86. According to its mandate, the Commission had to study the law of international watercourses with a view to its progressive development and codification. Since the Middle Ages, many treaties had been signed between neighbouring States in that field. In the course of time, customary legal rules had emerged and currently served as a basis for codification. However, if too much emphasis was placed on the legal consequences of the diversity of watercourses, that might be contrary to the aims of codification.

87. At its thirty-ninth session, the Commission had essentially considered the question on the basis of the third report of the current Special Rapporteur. The latter explained that water resources management required effective planning not only for the optimal utilization of water resources, but also for resolving conflicts concerning their use. All of that was important, not only from an economic or administrative point of view, but also because the law of international watercourses must be developed realistically and with a view to promoting co-operation among watercourse States and offering them means to avoid and settle conflicts. On the other hand, the optimal utilization of the resources of an international watercourse was, in the first place, a matter of economic planning and had no direct bearing on the doctrine of equitable utilization. There was, nevertheless, a link between the application of that doctrine and integrated water resources management; and that link was constituted by the proposed procedural rules concerning co-operation between watercourse States.

88. The doctrine of equitable utilization, referred to by the Special Rapporteur as the cornerstone of modern international watercourse law, still lacked well-defined machinery for its implementation in concrete cases. That was also true of the Helsinki Rules, which contained only recommendations on information and notification with regard to the prevention of disputes between basin States.

89. The Special Rapporteur had also referred to the same problem and had observed that the doctrine of equitable utilization set no a priori standards that were universally applicable to the uses of international watercourses, but was based on the balancing of factors relevant to each individual case. Since that doctrine operated only as a post hoc means for verifying the use of a given international watercourse, the Special Rapporteur noted that the very generality and elasticity of the equitable utilization principle required that it should be complemented by a set of procedural rules for its implementation.

90. The proposed draft articles on co-operation and notification were not as such, innovations, they covered the same subjects as the corresponding articles proposed by the previous Special Rapporteur in that field. Draft article 10 on the general obligation to co-operate could, of course, be based on numerous international documents and studies which underlined the importance of the general obligation to co-operate. During the debate on that question at the thirty-ninth session of the Commission, several of its members had considered that such an obligation existed in international law. Others, however, had been of the view that co-operation was a vague and all-encompassing concept and had claimed that under international law there was no general obligation of States to co-operate. Summing up the debate,

(Mr. Kekomäki, Finland)

the Special Rapporteur had stated that, although there was a difference of views on the existence of a duty to co-operate under general international law, there had been no objection to the idea of including a draft article on co-operation, provided that it was appropriately formulated. Although the Nordic delegations shared that view, they felt that in that case a distinction should be made between general international law and the particular law of international watercourses. With regard to the latter, it did not seem necessary to explain the existence of a duty to co-operate by referring to the general principles of international law. Such a duty might as well be regarded, in accordance with the doctrine of equitable utilization, as a legal consequence of the hydrologic unity and coherence of an international watercourse basin.

91. The draft articles on the notification procedure (arts. 11 to 15) were also supported by various international instruments as well as State practice. The reports of the Special Rapporteur contained numerous examples of relevant documents, starting with the 1923 Geneva Convention relating to the Development of Hydraulic Power affecting more than one State, the recommendations on notification contained in the Helsinki Rules and the resolutions of the Institute of International Law. That was an essential procedural complement needed to make the legal régime based on the doctrine of equitable utilization applicable in State practice. Nevertheless, since the draft articles were still being considered by the Drafting Committee, the Nordic delegations did not wish to comment on them in detail and moreover felt that the texts should be revised in order to make them less complex and more readable. The rules on notification adopted in 1986 by the International Law Association might serve as an example in that regard.

92. In order to avoid problems of interpretation concerning the draft articles on notification, draft article 11, which dealt with the duty to notify, should be adapted to draft article 9, which prohibited activities causing appreciable harm to other watercourse States. Furthermore, although the word "contemplate", used in those articles, had the same meaning as the word "intend", it did not really define the situation in which the duty to notify existed. The Nordic delegations would prefer another wording which would indicate more exactly that the intention had already taken form in a concrete project.

93. With regard to draft article 15, the Nordic delegations shared the view of the members of the Commission that the text required careful consideration because it could provide a convenient way to evade the obligation set out in the preceding draft articles, to say nothing of the difficulties caused by its interpretation and application. In the view of the Nordic delegations, that draft article should be deleted.

94. Referring to draft articles 2 to 7, which the Commission had provisionally adopted at its thirty-ninth session, he said that those draft articles were based on the corresponding provisions which the Commission had already adopted provisionally in 1980. The Commission had stated in its report that it would welcome the views of Governments on the draft articles provisionally adopted. Some of those articles, particularly those relating to the role of watercourse

(Mr. Kekomäki, Finland)

agreements and the content and application of the principle of equitable utilization, were the most essential parts of the future convention and so closely related to some of its basic provisions that they could not be commented on before the revised text of the whole draft convention was available for consideration. With regard to details, some of those articles should be redrafted, particularly draft articles 6 and 9, which should be reworded to correspond to each other. The list of factors relevant to equitable and reasonable utilization (draft article 7) was not supposed to be exhaustive and might be as good as any similar list prepared by an international organization.

95. The Commission's work on the non-navigational uses of international watercourses perhaps had not progressed during the 1987 session as quickly as expected because, as often before, the Commission and its Drafting Committee had not had enough time to deal with the complex issues involved. Nevertheless, the third report of the Special Rapporteur had once again made it possible to take a considerable step forward in the work in that field.

The meeting rose at 6 p.m.