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SUMMARY RECORD OF THE 42nd 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 (continued) (A/42/10, 179, 429)

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. KOZUBEK (Czechoslovakia), speaking on chapter III of the report of the International Law Commission (A/42/10), said that his delegation supported the Commission's efforts to elaborate general principles and rules for the non-navigational uses of international watercourses. Czechoslovakia shared the view that efforts should focus on working out a framework convention to serve as a basis for more detailed specific arrangements such as those envisaged in draft article 4. Draft article 5 was also acceptable: every watercourse State was entitled to participate in negotiations relating to agreements concerning the entire watercourse, as well as to become a party to such agreements.

2. Draft article 6 was very significant, especially with regard to the optimum utilization of the international watercourse, in view of the current problem of limited natural resources. Any problem which the interpretation of the general term "equitable and reasonable" utilization could be solved on the basis of the factors referred to in draft article 7. Moreover, in view of the framework nature of the future convention, the list of factors should not be described as exhaustive.

3. With regard to draft article 10, the formulation of the general obligation of States to co-operate in their relations concerning international watercourses was fully justified and advisable. The general principle of co-operation among States, as expressed in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, was a reliable normative basis which should be gradually developed.

4. With regard to chapter IV of the Commission's report, his delegation's doubts concerning the elaboration of universally binding rules in respect of international liability for injurious consequences arising out of acts not prohibited by international law had not been dispelled by the results of the Commission's most recent consideration of the topic. In draft article 1, the criterion of physical consequence had narrowed the subject of the regulation in comparison with the initial consideration. His delegation still had difficulties, however, with the broad scope of the definition, which included not only the activities of a State but also those of physical and legal persons within its territory causing damages within the territory of another State to such other State and also to its physical and legal persons. The State would be liable for all activities within its territory or under its control about which it knew or had means of knowing. Yet damage caused by the activities of individuals to other individuals was governed primarily by international private law. The conclusion of agreements on different kinds of activities with possible harmful effects, such as treaties concerning liability for damages caused by outer space activities, seemed to be the best solution.

(Mr. Kozubek, Czechoslovakia)

5. His delegation expressed satisfaction with t Commission's programme for its new term of office. In connection with the topic of State responsibility, it would be more suitable to continue work on the second and third parts of the draft articles and, only after their completion, to start he second reading of the first part of the draft, in order to permit consideration of the document in its entirety. His delegation was disappointed that the Codification Division of the Office o Legal Affairs had been thinned out to such an extent that work on background papers needed for the Commission could not be commenced; it should be possible to find a solution to that problem.

6. Mr. YIMER (Ethiopia) welcomed the provisional adoption of five draft articles of the draft Code of Offences against the Peace and Security of Mankind. Draft article 1 clearly brought out the seriousness of crimes against the peace and security of mankind. His delegation supported the view that the enumeration of such crimes would avoid the danger of a characterization by analogy. With regard to the inclusion of the element of "intent", although it was true that guilty intent was a condition for the crime and might not be presumed but must be established, his delegation found merit in the view that intent could be deduced from the massive and systematic nature of a crime. His delegation did not believe that the expression "under international law" might weaken the effect of the text and raise the question of the relationship bet een international law and internal law. However, it felt that the phrase was unnecessary, and that, in any case, the issue might be deferred until the provisional list of crimes had been completed. With regard to draft article 2, his delegation did not agree with the members of the Commission who found the second sentence unnecessary.

7. In draft article 3, the need for the specific reference to individual criminal responsibility in paragraph 1 was obvious, inasmuch as the Commission had rightly decided to confine its study, at the present stage, to the criminal liability of individuals. Nevertheless, paragraph 2 was essential, in order that the State might not try to free itself from responsibility by invoking the prosecution or punishment of the individual concerned. The phrase "irrespective of any motives invoked" made the wording of paragraph 1 as unequivocal as possible.

8. With regard to draft article 5, the considerations set forth in paragraph (4) of the Commentary were essential to the final formulation of the article. His delegation was not yet convinced that it was necessary to provide for statutory limitation with regard to war crimes, and it therefore felt that the present formulation should be maintained.

9. In draft article 7, the non bis in idem rule should not give rise to controversy, being a well-established principle of criminal law. As stated in paragraph 37 of the report, the inclusion of that rule appeared to be necessary in the case of universal jurisdiction in order to avoid subjecting the offender to several penalties. It might be possible to invoke the rule where the international criminal court had jurisdiction over the entire Code. His delegation therefore supported the second paragraph proposed by the Special Rapporteur in paragraph 39 of the report.

(Mr. Yimer, Ethiopia)

10. The law of the non-navigational uses of international watercourses was an important topic, and he commended the Commission for provisionally adopting six draft articles. He stressed the need for extreme caution in approaching the topic, however, in view of its implications for the sovereignty of States and their permanent sovereignty over their natural resources.

11. The word "system" in square brackets in article 2 and elsewhere in the draft articles was not acceptable to his delegation and might prevent their general acceptance. However, there should be very little controversy over the view that the term "international watercourse referred to both the channel and the waters contained therein.

12. Paragraph (2) of the Commentary to draft article 4 noted that the Commission had developed a promising solution to the problem of the diversity of international watercourses: that of a framework agreement. His delegation appreciated the difficulty of reaching agreements on specific international watercourses without the benefit of general legal principles on the uses of such watercourses. It was significant that the phrase "apply and adjust" in paragraph 1 of draft article 4 was intended to indicate that the draft articles were essentially residual in character. Accordingly, his delegation agreed with the proposition set forth in paragraph (5) of the Commentary that the States whose territories embraced a particular international watercourse would remain free not only to apply the provisions of the present articles, but to adjust them to the special characteristics and uses of that watercourse or of part thereof.

13. The proviso contained in paragraph 2 of draft article 4 was in order, since it was intended to prevent a situation in which a few States appropriated a disproportionate amount of the benefits of an international watercourse or unduly and adversely prejudiced the use of its waters by watercourse States not parties to the agreement in question. However, the proposition contained in paragraph (14) of the Commentary was not susceptible to easy interpretation or application and needed further thought on the part of the Commission. With regard to paragraph 3 of draft article 4, his delegation endorsed the view expressed in paragraph (18) of the Commentary that watercourse States were not under an obligation to conclude an agreement before using the waters of the international watercourse.

14. The thrust of paragraph 2 of draft article 5 was that, if the use of a watercourse by a State was not affected to an appreciable extent, that State did not have the right to participate in the negotiation and conclusion of an agreement on a part of an international watercourse. The rationale for that (para. (6) of the Commentary) was that the introduction of one or more watercourse States whose interests were not directly concerned in the matters under discussion would mean the introduction of unrelated interests into the process of consultation and negotiation. While that argument might hold true in theory, it could give rise in practice to difficulties between riparian States as to who would determine the "appreciable" extent of the damage, for instance. Furthermore, there appeared to be a contradiction between that argument and the statement in paragraph (9) of the Commentary that paragraph 2 should not be taken to suggest that an agreement dealing with an entire watercourse or with a part or aspect thereof should exclude

(Mr. Yimer, Ethiopia)

decision-making with regard to some or all aspects of the use of the watercourse through procedures in which all the watercourse States participated.

15. Draft article 6, which set forth the basic principle of equitable utilization, was one of the most important provisions. His delegation supported the view that "optimum utilization" did not mean achieving the "maximum" use, the most technologically efficient use or the most monetarily valuable use. Nor did it imply that the State capable of making the most efficient use of a watercourse should have a superior claim to the use thereof. It rather implied attaining maximum possible benefits for all watercourse States. In determining equitable utilization, it was important to bear in mind, firstly, that the list proposed in draft article 7 was indicative and not exhaustive. Secondly, no factor was to be accorded priority over other factors. Thirdly, there would inevitably be certain questions with regard to some of the factors on the list. For example, in subparagraph (d), it was not clear what was meant by "existing and potential uses". A better formulation was to be found in article V (2) (g) of the Helsinki Rules on the Uses of the Waters of International Rivers and in article 3 (a) of the revised draft propositions of the Asian-African Legal Consultative Committee, which referred to the comparative costs of alternative means of satisfying the economic and social needs of each State concerned.

16. Ethiopia noted with satisfaction the thorough discussion that had taken place in the Commission on draft articles 10 to 15. It shared the view expressed in the Commission that draft article 10 was by no means unproblematic, at least conceptually. Although there was merit in the view that in international law there existed a general legal principle that there was an obligation to co-operate, draft article 10 should be formulated in a more precise manner and should indicate the scope and main objective of such co-operation. If that gave rise to difficulties, a cautious invitation to States to engage in mutual relations in a spirit of co-operation would be preferable. Ethiopia endorsed the Special Rapporteur's view that the duty to co-operate was an obligation of conduct and that it did not involve a duty to take part in collective action but a duty to work towards a common goal (para. 98 of the report). It also endorsed the proposal that draft article 10 should be included in chapter II. His delegation shared the view that draft articles 11 to 15 were too narrowly drawn, that they favoured the notified State and that they placed an unduly heavy burden on the State contemplating the new use. The articles in question should be drafted more flexibly, perhaps in the form of a recommendation.

17. Some useful ideas had been expressed in the Commission on the relationship between draft article 9 and draft articles 11 to 15. Since causing appreciable harm could not always be wrongful, the draft articles should reflect the Special Rapporteur's view that, in the case of conflict of uses, the doctrine of equitable utilization could only minimize the harm to each State and not eliminate it entirely and that the harm would thus be wrongful only if it was not consistent with the equitable utilization of the watercourse by the watercourse States concerned. Although Ethiopia agreed that the term "appreciable harm" had given rise to some confusion, it was not sure that its replacement by the term "appreciable adverse effect" would actually help. It had an open mind on the matter.

(Mr. Yimer, Ethiopia)

18. If draft article 12 had the effect of giving a veto to the notified State, it was unlikely that the formulation in question would meet with general approval. Furthermore, draft article 13 did not place enough emphasis on the obligations of the notified State. Ethiopia therefore endorsed the suggestion that the notified State should be required to indicate the reasons for which it considered that the proposed new use would result in the notifying State's exceeding its equitable share. Where draft article 13, paragraph 5, was concerned, it believed that the provisions on dispute settlement should not be included in the draft articles. The question whether dispute settlement procedures might be dealt with in an annex to the draft articles could be considered at a later stage. A time-limit for consultations and negotiations would be a safeguard against possible procrastination by the notified State. Ethiopia shared the view of Commission members reflected in paragraph 113 of the report that draft article 14 was unbalanced. However, draft article 15 could serve a useful purpose, provided that it was formulated with caution and precision and did not place an undue burden on the notifying State. At the same time, Ethiopia wondered whether it would in fact be possible for a State to comply with the requirements of articles 11 and 13 in cases of emergency. Lastly, he wished to express his delegation's full agreement with the views set forth in the last sentence of paragraph 94 of the report.

19. The Commission had made further satisfactory progress in its study of the topic of international liability for injurious consequences arising out of acts not prohibited by international law. Regarding the implications of the draft articles for the development of science and technology, it must be stressed both that the application of science and technology presented a certain degree of serious risk to man and the environment and that, in the formulation of international rules, further scientific development should not be discouraged. The Commission's task on the topic in question was largely to make proposals for the progressive development of international law. It would be improper to wait for more accidents to occur before customary norms were developed in the relevant area of international law.

20. Ethiopia endorsed the Special Rapporteur's view that there were practical policy reasons, as well as objective criteria, for distinguishing the topic of international liability from the topic of State responsibility. There was no justification for combining the topics of international liability, State responsibility and the law of the non-navigational uses of international watercourses, since careful formulation would avoid incompatibility.

21. In connection with the protection of the interests of the State of origin, it was quite properly stressed that developing countries lacked the expertise for appreciating the extent of the risks posed by the work of foreign corporations operating in their territory. The criterion of "physical consequences" adequately covered the danger posed by transboundary effects of certain activities. The important factor in the establishment of liability under the topic was proof of the cause-and-effect relationship between the activity and the injury. The Commission might need to reflect further on the argument that economic and social consequences should not be excluded from the scope of the topic, since such consequences were by no means infrequent. Ethiopia was in favour of the formulation of a general

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definition of "dangerous activities". Identifying a non-exhaustive list of dangerous activities in the commentary might constitute a solution in that connection.

22. Use of the somewhat ambiguous terms "territory", "control" and "jurisdiction" was essential. A State should clearly be liable for extra-territorial consequences emanating from territory under its control in cases where it did not have recognized sovereignty, while the term "jurisdiction" covered its liability in other areas such as exclusive economic zones and the high seas.

23. With regard to the equally difficult concepts of "risk" and "injury", they did not in themselves include criteria for determining their degree. The argument questioning the requirement that the injury should be foreseeable was forceful. Moreover, the magnitude or seriousness of the injury was not affected by the fact that it was not foreseen. The requirement that the State of origin knew or had the means of knowing that the activity in question was carried out within its territory or control was an important one, particularly from the point of view of developing countries, and his delegation welcomed the proposal that the question of liability should be subject to special review in the case of developing countries lacking the means for effective monitoring of the areas under their jurisdiction.

24. On the subject of prevention and reparation, some had argued that the Commission had moved away from the basic concept of liability and compensation. His delegation took the view that, while it might be advisable to deal with prevention, that should not be done at the expense of substantive rules of liability, lest the concept of liability fade away. Although the topic was primarily concerned with liability, not prevention, there should be an effective link between prevention and reparation. Once prevention was introduced, some legal consequence should attach to failure to observe the rules, otherwise there would be no incentive for States to respect them.

25. His delegation agreed with the Special Rapporteur's view of the ineffectiveness of private law remedies. It also agreed with the Special Rapporteur that the establishment of a causal relationship between activities and injuries was important for establishing liability. However, it was not persuaded by the argument that there was no contradiction between the principle of strict liability and prevention. Paragraph 194 of the report indicated that the Special Rapporteur had drawn the correct conclusion from the Commission's debate on the topic and his delegation looked forward to the draft articles to be presented at the next session.

26. With regard to relations between States and international organizations (second part of the topic), the Special Rapporteur's outline of the subject-matter to be covered by the draft articles was a good beginning which appeared to take care of its various features. The topic should not prove as difficult as others studied by the Commission and his delegation agreed with its decision on the methodology to be followed by the Special Rapporteur. It looked forward to more substantive reports on the topic in the future.

27. Mr. BENNOUNA (Morocco) said that his delegation was pleased to note that considerable progress had been made on the draft Code of Offences against the Peace and Security of Mankind. In connection with draft article 1, the Special Rapporteur had rightly excluded the idea of drawing up a general, exhaustive definition of the crimes concerned. The reference to international law should be retained, particularly in order to draw attention to the seriousness and importance of the crimes. However, at the current stage there was no need to consider whether the rules governing a given crime were of a customary nature and what their place was in the legal hierarchy, or what relationship there was between international law and domestic law. It would be sufficient to indicate that the rules in question originated in an international context and that their purpose was to govern offences against the interests and values of the comity of nations. Morocco therefore believed that the square brackets should be removed from draft article 1.

28. With regard to the characterization of an act as a crime against the peace and security of mankind, although draft article 2 constituted implicit recognition of the supremacy of international law, at a later stage it would be necessary to deal with questions relating to competence and procedure. In fact, it might be said in general that the Commission was handicapped in its work by the continuing uncertainty about the implementation of the future Code. At the current stage, it would be more realistic to work on the assumption that domestic courts would be responsible for seeing that the draft Code was implemented. It would be necessary to review the entire text of the draft articles if the establishment of an international jurisdiction was deemed feasible. Morocco believed, in the light of draft article 3, that the scope of the draft Code should be restricted to crimes committed by individuals, without prejudice to the responsibility of States under general international law. Moreover, Morocco noted the reference in the commentary on draft article 5 to the possibility of re-examining the issue of the non-applicability of statutory limitations in the light of the offences enumerated as crimes against the peace and security of mankind. The text of draft article 6 seemed to be in keeping with contemporary international law, as reflected in the major international conventions.

29. The non bis in idem rule was essential. However, although its application would give rise to no problems in the case of an international court, it must be recognized that there would be conflicts between the different legal systems if there were to be universal jurisdiction. In the event of the establishment of such a jurisdiction, there would be a need for flexible machinery for consultations between States parties, to which all domestic judgements delivered in implementation of the draft Code would be submitted, for an opinion on the extent to which they were in compliance with the provisions of the draft Code. On the issue of the Commission's mandate, once the substantive provisions had been prepared, the Commission should draw up the statute of a competent international criminal jurisdiction for individuals, for consideration by the General Assembly.

30. On the topic of the law of the non-navigational uses of international watercourses, it would seem that article 1, paragraph 2, considerably extended the draft's scope and that it was therefore necessary to make its wording more precise. Article 5, paragraph 1, gave the impression that some States could consider concluding an agreement on the whole of a watercourse, without

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participation in the negotiations by all the other States concerned. Once again, more precise drafting was called for. Furthermore, where paragraph 2 of that article was concerned, an explanation must be given of what was meant by use that might be affected to an appreciable extent or monitoring machinery must be provided for under the treaty. Morocco took note of the remark concerning the term "appreciable extent" in paragraph (15) of the commentary on draft article 4, but believed that it would none the less be necessary to establish who was to collect the evidence and on the basis of what criteria. Moreover, it wondered what relationship there was between the term in question and the equitable and reasonable utilization defined in draft articles 6 and 7.

31. The draft articles submitted by the Special Rapporteur on the topic of international liability for injurious consequences arising out of acts not prohibited by international law were of fundamental importance. Unfortunately, in practice the distinction drawn between the general régime governing responsibility, which was based on the wrongful act, and liability for transboundary injury arising from acts not prohibited by international law could prove to be inapplicable, particularly if the essential component of prevention was included in the draft. The drafting of general rules governing objective liability was particularly complex, since in the field in question there were so far only special conventions dealing with specific activities. The purpose of such conventions was above all to harmonize domestic law in the area of civil liability. The Convention of 1971 on International Liability for Damage Caused by Space Objects was the only multilateral legal instrument dealing with the objective responsibility of States. It was thus obvious that the Commission would have considerable difficulty in drawing up a general régime governing liability for injurious consequences arising out of acts not prohibited by international law. It would be necessary to consider a list of dangerous or risky activities to be covered by the future Convention, and such a list would have to be reviewed periodically. The essence of the topic lay not in the wrongfulness or otherwise of an activity but in the danger that it represented and the risks it entailed. A new approach must therefore be taken to the topic, taking account of the in-depth analysis that had been carried out by the Commission's successive special rapporteurs. The draft would thus deal with dangerous activities having harmful transboundary physical consequences, and emphasis would be placed on the risks run by States as a result of scientific and technological progress. It would, in fact, be a question of providing sanctions for indirect violations of territorial sovereignty.

32. The second part of the topic of relations between States and international organizations should be restricted to universal organizations, which could be dealt with in a general convention on privileges and immunities. Regional organizations should not be dealt with until a later stage. The Secretariat could supplement the available documentation by collecting information on recent developments in the area of relations between international organizations and host countries.

33. The proposed draft should not be confined to the existing legal régime and should endeavour to remedy the shortcomings of that régime, thus providing a better basis for the privileges and immunities of international organizations and the guarantees given to their officials. The outline provided by the Special

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Rapporteur should be expanded so as to include the capacity of and means at the disposal of international organizations for defending their officials' immunities, in accordance with the relevant jurisprudence of the International Court of Justice. Morocco urged the Special Rapporteur to elaborate on his outline and to propose appropriate substantive provisions.

34. The Commission should focus on topics that could be finalized, in the form of draft conventions, in the course of the current five-year period covered by the Commission's mandate. For the time being, the drafts that should be selected were those of the law of the non-navigational uses of international watercourses and the general régime governing liability. However, particular attention should be devoted to the Draft Code of Offences against the Peace and Security of Mankind. Of course, in the five-year period in question the Commission should proceed with the second reading of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and the second draft on the jurisdictional immunities of States and their property. Morocco fully endorsed the suggestion put forward in paragraph 239 of the Commission's report with a view to strengthening co-ordination of the work carried out in the plenary meeting and that of the Drafting Committee. It was essential that the Codification Division should have the necessary human and material resources at its disposal, and it was important that the Division should periodically issue information on the stage reached in the process of the codification of international law and on topics that could be dealt with in general multilateral conventions in the future. Furthermore, it was important to keep alive the interest of young people - particularly those in the developing countries - in the codification and progressive development of international law, through the International Law Seminar and information addressed to universities and training and research institutions.

35. Mr. STEPANOV (Ukrainian Soviet Socialist Republic) said that it was extremely important to use the full potential of international law to affirm genuinely democratic standards in international relations. The only acceptable pattern of behaviour for every State was strict observance of the generally recognized principles and norms. The further development of international law was essential to establish the right to comprehensive security as a reliable foundation for a non-nuclear, non-violent, demilitarized world.

36. The work of the Commission should reflect that need and take much greater account of the tasks and priorities set by contemporary international life. The most important subject with which the Commission and the Committee were currently concerned was the draft Code of Offences against the Peace and Security of Mankind, on which his delegation would comment when it was considered as a separate agenda item.

37. With regard to the law of the non-navigational uses of international watercourses, the Commission had so far been unable to solve terminological problems which were very closely connected with the content of the document being formulated, its form, its purpose and its scope of application. The fact that the Drafting Committee had again deferred consideration of draft article 1 was complicating further work. The very words "international watercourses" did not

(Mr. Stepanov, Ukrainian SSR)

reflect the real content of the topic because they implied the existence of a régime under which third parties as well as riparian States could make use of a given watercourse. The lack of clarity also gave rise to important disagreements over such basic terms as "watercourse system" and "watercourse". The decision as to which expression would be used was of fundamental significance; his delegation favoured the term "watercourse".

38. The Commission had so far failed to decide on the form of the draft document. His delegation took the view that, since the legal régime for any given watercourse should be established by agreement between the States through whose territory it ran, the Commission should formulate general principles intended as guidelines. A document embodying a collection of such principles would be important, because the current legal practice regulating such matters was very varied, and would guide States in concluding special agreements. Paragraphs 93 and 94 of the Commission's report showed that some members of the Commission saw an agreement on general principles as a means of formulating "residual" norms possessing binding force. That was a mistaken approach. His delegation continued to uphold the need to prepare a collection of rules and principles that could be of much greater practical value.

39. The general obligation to co-operate, set out in draft article 10, was a principle of contemporary international law that was becoming exceptionally important. His delegation could not therefore agree with the opinion reflected in paragraph 96 of the report that no general obligation on States to co-operate existed under international law, and fully supported the view that the principle of co-operation was of prime importance in the use of water resources. Many of the specific proposals made on that subject were justified and deserved to be approved. It was important that the Special Rapporteur should recognize the need to refine article 10, taking into account the comments made. The article should indicate the aim and object of co-operation, which was the optimum use of watercourses, and should include references to both good-neighbourliness and good faith.

40. The consideration of draft articles 11 to 15 had also given rise to quite substantial observations, with many of which the Special Rapporteur had agreed. Evidently, there was still some very serious work for the Commission to do on the topic.

41. The topic of international liability for injurious consequences arising out of acts not prohibited by international law, would become increasingly important and the need for its legal regulation would grow accordingly. During the Commission's work on the topic, it had become evident that the preparation of draft articles was being complicated by the lack of practice and normative material in that field. Account had to be taken of the fact that many aspects of the topic involved important State interests and that abuses might occur in practice on the pretext of countering the injurious consequences of an activity that was legal from the point of view of international law. It was not surprising that the Special Rapporteur's report had been extensively criticized and that he had recognized the need for

(Mr. Stepanov, Ukrainian SSR)

further study of many questions. The formulation of the future norms must not become an obstacle to scientific and technical progress.

42. The consideration at the Commission's thirty-ninth session of the topic of relations between States and international organizations had produced no tangible results and there was no doubt that the Commission would soon have to examine the fundamental problems in order to make recommendations to the Committee about its further work on the subject.

43. On the other decisions and conclusions of the Commission, his delegation pointed out that work on the important topic of State responsibility had been unjustifiably protracted and hoped that the new Special Rapporteur would bear that in mind. The final stage of work on the draft articles on the jurisdictional immunities of States and their property also awaited the Commission. The new Special Rapporteur on that topic should carefully analyse the many comments made in discussions and received from Governments in order to make the necessary amendments to the draft.

44. His delegation welcomed the adoption on first reading of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. The draft could be a basis for a future convention, provided that appropriate amendments were made to articles 18 and 28. To a considerable extent, the attainment of the main goal of such a convention depended on a proper solution of those questions. His delegation would make detailed observations on the subject during consideration of the topic in 1988.

45. In conclusion, his delegation believed that the Commission should devote very serious attention to analysing the way it operated. Many comments and proposals concerning important aspects of the Commission's activity had been made. Furthermore, the Commission had made practically no use of its right to select topics whose codification and progressive development were becoming particularly timely. There was also the need to make consideration of the Commission's reports more specific and effective, giving the Commission a clear picture of the position of States on the most important and controversial questions. Knowledge of the positions of States was absolutely essential to the Commission and could help it not only to speed up its work but also to prepare better draft articles. His delegation therefore supported the appeal by the Chairman of the Commission for a constructive dialogue between it and the General Assembly in order to promote the codification and progressive development of international law.

46. Shortening the time required to formulate draft articles by improving the procedures and working methods of the Commission was an important means of increasing its effectiveness. Another means was more effective discussion of its report by the Committee; it was therefore very important that States should have sufficient time for a thorough study of the Commission's materials. Improving the Commission's working methods should be a constant subject of attention. But it was most important that the Commission and the Committee should aim at considerably more productive activity and concentrate on subjects which had particular topicality and practical significance.

47. Mr. HUANG Jiahua (China), stressing the importance of establishing a legal régime to safeguard international peace and security, said that the Commission was to be congratulated on having provisionally adopted draft articles 1 to 3 and 5 to 6 of the draft Code of Offences against the Peace and Security of Mankind and having paved the way for further work in that connection.

48. His delegation found draft article 1 (Definition) acceptable in principle, but welcomed the Commission's decision to have an enumerative definition which would clarify the scope of the draft Code and facilitate its implementation. A conceptual definition as laid down in draft article 1 would, however, contribute to a clearer understanding of the special nature of the draft Code which was designed to eliminate crimes having certain characteristics in common: they were of an international nature, were extremely serious, and violated international law. Those elements could perhaps be incorporated in a future version of draft article 1.

49. Draft article 2 (Characterization) reaffirmed one of the most important principles of international law as recognized in the Charter and Judgment of the Nürnberg Tribunal. Its inclusion in the draft Code would ensure that, wherever internal law conflicted with international law, criteria generally recognized by the international community would take precedence. Also, given the emphasis which the draft Code placed on universal jurisdiction, it was necessary to make the relationship between international and internal law in that respect quite clear, and, in so far as possible, to harmonize the relevant legal rules. From the procedural standpoint, since the various national courts often followed the procedures laid down under their own domestic systems of law, consideration should perhaps be given to the inclusion of a provision in the draft Code requesting States parties to adopt the necessary legislative measures to co-ordinate their internal law with the Code, thereby providing a built-in guarantee for the implementation of the principle laid down in draft article 2. Such a provision would also be important for the establishment of a future international criminal court.

50. With regard to draft article 3 (Responsibility and punishment), the Commission had rightly decided to confine its work at that stage to the international criminal responsibility of the individual, so that it could continue its work on the topic without becoming bogged down by controversial issues. The criminal responsibility of States was a thorny question and one on which an early consensus could not be expected; but that did not mean that States could be relieved of their responsibility and, indeed, many States were arguing in favour of it. Acts against the peace and security of mankind were, for the most part, committed by State entities and were often inseparable from the acts of the individuals in charge of State affairs. Consequently, although the Commission was not for the time being in a position to elaborate rules on the criminal responsibility of States, that should not prevent States themselves from exploring the matter further. On that understanding, his delegation could agree in principle to draft article 3 as worded. In addition, the Commission might wish to include in the draft Code provision for the punishment of non-State organizations which committed crimes against the peace and security of mankind.

(Mr. Huang Jiahua, China)

51. Draft article 4 (Aut dedere aut punire), which had not been adopted by the Commission, dealt with the jurisdiction to which the perpetrator of a crime against the peace and security of mankind would be subject. His delegation agreed in principle with the general structure of the article which, by affirming the international obligation of a State to try or extradite the perpetrator, would contribute to the prevention and punishment of crimes against the peace and security of mankind and facilitate the general acceptance of the Code by States. It considered, however, in view of the complex nature of extradition and its close connection with jurisdiction, that the provision to be incorporated in the draft Code in that respect should be more specific. In seeking an appropriate formulation, the Commission might therefore wish to refer to the relevant provisions of several existing international conventions which provided for universal jurisdiction.

52. Draft article 5 (Non-applicability of statutory limitations) was an extremely important provision. Although, with the passing of time, it might prove somewhat difficult to secure evidence and locate witnesses, crimes against the peace and security of mankind were of such gravity that the guilty parties should not be allowed to evade criminal justice. As to draft article 6 (Judicial guarantees), his delegation could agree to its inclusion since it was a procedural provision common to the criminal law of most States but did not think that it was necessary to list all the various guarantees in the draft Code. That could perhaps be done in any statute for an international criminal court which the General Assembly might request the Commission to prepare.

53. His delegation shared the concern expressed by some members of the Commission regarding the non bis in idem rule as stated in draft article 7. In its view, the question of how to uphold that principle without prejudice to the guarantee that States could punish persons who committed criminal acts listed in the Code deserved careful consideration, particularly since the possibility of an international criminal court had not been ruled out in the draft Code. In that connection, the second paragraph proposed by the Special Rapporteur (A/42/10, para. 39) could serve as a basis for further discussion.

54. His delegation accepted the principle laid down in draft article 8 (Non-retroactivity) but considered that it should be couched in more precise terms. It was not opposed to draft article 9 (Exceptions to the principle of responsibility) but considered that it should be supported by adequate reasons and that the exceptions should be listed in logical order. Whether or not some of the exceptions given in draft article 9 were exceptions in the strict sense of the term or merely mitigating factors remained to be decided.

55. At that stage, the draft Code should serve primarily as a body of legal principles on the basis of which specific legal instruments could be elaborated or a statute for an international criminal court prepared.

56. Turning to the topic of the law of the non-navigational uses of international watercourses, he agreed that the main object should be to formulate a framework agreement to lay down general principles and rules, for application in the absence

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of specific agreements by the States concerned, and to provide guidelines for the negotiation of future agreements. His delegation also agreed with the practical approach adopted by the Commission with regard to certain critical definitions and, specifically, to the definitions of the terms "system" and "international watercourse", which were to be settled together at a later date. However, in view of the diversity of international watercourses, the Commission should base its work on the permanent sovereignty of States over their natural resources, seeking to resolve the question of shared optimum use of the resources of the watercourse by international watercourse States in the light of the special characteristics of the watercourse concerned.

57. While the application of the principle of equitable and reasonable utilization was basically acceptable, the criteria for its implementation were not easy to determine. His delegation agreed with the Commission's approach of preparing a list of indicative factors and considered that the essence of the relationship between that principle and the obligation to refrain from causing appreciable harm lay in a proper balance of interests among watercourse States. In that connection, the Special Rapporteur, in his second report, had suggested the following wording: "In its use of an international watercourse, a watercourse State shall not cause appreciable harm to another watercourse State, except as might be allowable within the context of the first State's equitable utilization of that international watercourse" (A/CN.4/399/Add.2, para. 184). The issue required further consideration.

58. With regard to the principle of co-operation, in his delegation's view, draft article 10 on the general obligation to co-operate should not only stipulate that States had an obligation to co-operate in good faith, but should also specify the purpose of such co-operation and its relationship with other relevant principles of general international law and, in particular, with the sovereign right of a State over that part of an international watercourse which formed part of its territory. Only on the basis of respect for the sovereignty and territorial integrity of all watercourse States, and of equality and mutual benefit, would it be possible to achieve the optimum utilization of international watercourses.

59. His delegation believed that draft articles 11 to 15, relating to notification procedures, should be strengthened so as to provide in particular for the obligation of the notifying State to notify and the obligation of the notified State to respond, with a view to striking a balance between the rights and duties of both sides. It trusted that the Commission would take due account of that point, in view of its importance for friendly co-operation among watercourse States.

60. On the question of settlement of disputes, the procedures envisaged could be adopted by States without difficulty since similar procedures had already been widely accepted.

61. Referring, lastly, to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, he said that the establishment of an adequate legal régime would make it easier to deal with the many problems that had arisen as a result of the rapid pace of scientific and

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technological development. Specifically, his delegation believed that the three principles suggested by the previous Special Rapporteur and included by the present Special Rapporteur could serve as the basis for a working hypothesis. That should not, however, be construed as acceptance of the concepts of strict liability or of including prevention as part of liability, on which opinions were divided. In preparing the draft articles, the Commission should take into account the needs of all States and the feasibility and acceptability of the proposed rules. It should also give serious consideration to the scope of application of the draft articles and the need to achieve a balance between the interests of States of origin, on the one hand, and of affected States, on the other.

62. The Commission, which was approaching its fortieth anniversary, had in the past done much to further the codification and progressive development of international law. His delegation trusted that it would in its future work make an even greater contribution to a just and equitable international legal order.

63. Mr. SOBOLEV (Byelorussian Soviet Socialist Republic) said that the Commission had done useful work at its thirty-ninth session. The collective efforts of States to strengthen the international legal order were vital for the maintenance of international peace and security, and an interdependent world demanded the strict observance by all States of international legal principles and the further development of inte national law.

64. His delegation would like to see the Commission enhance its work by concentrating on the most urgent issues. Priority should be given to completion of the work on the draft Code of Offences against the Peace and Security of Mankind, a topic to which his delegation would return at a later meeting.

65. His delegation welcomed the completion in first reading of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, which could serve as the basis for an international legal document. It had always responded to requests for comments in the past and it would do so in writing with respect to the Secretary-General's letter of 13 February 1987. For the moment, it stressed that the diplomatic courier should have full immunity from the criminal jurisdiction of the receiving and transit States, and that only the sending State could decide to waive that immunity. The interests of the receiving and transit States were already protected in draft articles 5 and 12. Moreover, the diplomatic bag should not be subject to any kind of examination, either direct or indirect, for that would infringe the principle of inviolability. The concerns about misuse of the diplomatic bag were exaggerated, for they were already met in other draft articles.

66. In addition to the other problems arising from scientific and technological progress, mankind was now faced with the global problem of ecological security. The issue of international liability for injurious consequences arising out of acts not prohibited by international law was therefore gaining in importance and must be resolved in a way that prevented injurious consequences without obstructing natural progress. Account must be taken in particular of the possibility of damage

(Mr. Sobolev, Byelorussian SSR)

inflicted on a State under the pretext of protection against the injurious consequences of legitimate activities. The Commission should take into consideration existing examples of the handling of such problems in international conventions and bilateral agreements. It could also be guided by the work of the International Atomic Energy Agency in strengthening international co-operation for safer use of nuclear energy.

67. On the question of the law of the non-navigational uses of international watercourses, his delegation reiterated its position that legal provisions must take carefully into account the specific nature of each watercourse. As the Commission had again deferred the definition of the term "international watercourse", it was not clear what it was trying to regulate. However, the issues involved were usually settled by means of treaties concluded directly between the States concerned. The end result of the harmonization of national interests with those of other riparian States must be the adoption of principles of a recommendatory nature. The draft articles should recognize more clearly the right of territorial sovereignty over water resources without excluding mutually advantageous co-operation among States.

68 Where its programme, procedures and working methods were concerned, the Commission must constantly strive to speed up and improve its work. His delegation welcomed the adoption of the five-year work programme, and the Commission should now establish a schedule for each topic, with a view to concluding it within the five-year period. That meant an increasing role for the Drafting Committee, but his delegation endorsed the reference in the report to the counter-productive effects of premature referral of draft articles to the Drafting Committee.

69. Attention must be focused on the drafting of new international legal commitments designed to build a nuclear-free and non-violent world. The Byelorussian delegation believed that the further progressive development of international law must promote international co-operation among States and peoples throughout the planet.

70. Mr. MICKIEWICZ (Poland) noted that the Foreign Minister of Poland had referred in plenary to the contribution to the strengthening of the role of the United Nations made by the codification and progressive development of international law, in particular the work of the International Law Commission. In the debate on the Commission's report in 1986 his delegation had said that the United Nations system should be more receptive to new challenges and priorities. That would require a new method of identifying the needs of the international community in the development of international law, enhancement of the law-making process in the United Nations system, computerized data handling, and better co-ordination among legal bodies.

71. His delegation welcomed the Commission's plans to speed up the consideration of some topics. Priority should be given to the draft Code of Offences against the Peace and Security of Mankind, the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, and international liability for injurious consequences arising out of acts not prohibited by international

(Mr. Mickiewicz, Poland)

law. His delegation agreed that the composition of the Drafting Committee should reflect the principal legal systems and the various languages, and it favoured the restoration of the full 12-week session and continuation of the present system of summary records.

72. As a country with few fresh-water resources, Poland attached great importance to the law of the non-navigational uses of international watercourses. It supported the Commission's approach of preparing a "framework agreement" of general principles and rules. However, it had reservations about the way in which the general obligation of watercourse States to co-operate was reflected in the draft articles. In particular, article 10 should indicate more precisely the objective of such co-operation. His delegation supported the Special Rapporteur's suggested new formulation of the co-operation provision contained in paragraph 98 of the report. It also shared the view that every State, while having sovereign rights over its own water resources, must take account of the rights of other watercourse States. His delegation agreed with the Special Rapporteur that in the case of a "conflict of uses", the doctrine of equitable utilization could only minimize the harm to each State and not eliminate it entirely. It would therefore be better to refer to activities which "might have an appreciable adverse effect upon other watercourse States", instead of using the term "appreciable harm".

73. Pollution of national or international watercourses was one of the most important sources of marine pollution. When entering into agreements, watercourse States must therefore take into account their obligations with respect to protection of the marine environment, even if such obligations were binding on only some of the States concerned. With that in mind his delegation proposed the inclusion, in the indicative list given in article 7, of a reference to the particular obligations and duties of watercourse States with respect to the protection of the marine environment.

74. The new challenges presented in the report of the World Commission on Environment and Development underlined the importance of the question of international liability for injurious consequences arising out of acts not prohibited by international law. Those challenges required a prompt response, in particular by acceleration of the Commission's work on the topic. His delegation shared the Special Rapporteur's view that there was already sufficient international and State practice to justify a general treaty. However, the scope should be limited to activities with adverse physical consequences giving grounds for establishment of liability. Activities which did not necessarily produce physical consequences were also important, but their inclusion would create additional difficulties. His delegation shared the view that the basis of the strict liability should be transboundary injury, a concept particularly relevant to acts not prohibited by international law, since it offered the possibility of preventing harm and repairing injury without reducing activities.

ORGANIZATION OF WORK

75. The CHAIRMAN observed that he had not yet received any comments about the letter which he had mentioned at the thirty-second meeting from the Chairman of the Fifth Committee concerning agenda item 116, entitled "Programme planning". In view of the time limit, he asked whether he might be authorized to inform the Chairman of the Fifth Committee that the Sixth Committee would not be expressing any views.

76. Ms. WILSON (United States of America), speaking as co-ordinator for the Group of Western European and Other States, said that her delegation had brought the letter to the attention of the members of the group and would communicate their comments to the Chairman.

77. The CHAIRMAN said that he would take it that the Committee wished to postpone a decision.

78. It was so decided.

The meeting rose at 1.05 p.m.