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SUMMARY RECORD OF THE 43rd MEETING

Chairman: Mr. AZZAROUK (Libyan Arab Jamahiriya)

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The meeting was called to order at 3.05 p.m.

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

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. GOERNER (German Democratic Republic), referring to the law of the non-navigational uses of international watercourses, said that his delegation welcomed the visible progress made by the Commission at its thirty-ninth session, which was reflected in particular in the provisional adoption of six draft articles.

2. However, it was becoming increasingly obvious that the codification and development of the law involved a host of political, legal, economic, geographical and other factors, which called for a comprehensive approach while making it impossible to create a binding legal instrument applicable to all international watercourses. The question was whether it might not be more useful to elaborate guidelines than to prepare such an instrument, especially as there were still considerable difficulties with respect to the definition of the scope of the draft articles. Despite the fact that a number of States, including the German Democratic Republic, opposed the use of the "system" concept, the Drafting Committee had merely postponed a decision on that point while continuing work on the basis of the provisional working hypothesis of 1980. His delegation could not accept either the "system" concept or any variation thereof, since that concept was incompatible with the principle of the territorial sovereignty of watercourse States. Furthermore, the concept was neither substantiated by State practice nor precisely defined in scientific terms.

3. His delegation understood that the term "international watercourses" would be defined as rivers that crossed or formed the border between two or more States, and could in principle accept article 2 on that basis. It had no substantive objections to article 3, provided that the article applied only to border-crossing or border-forming watercourses. It wondered, however, whether for methodological reasons, it might not be more appropriate to incorporate the definition given in article 3 in the future article 1, which was intended to deal with the scope of the articles.

4. Article 4 should make it clear that the draft articles were without prejudice to any watercourse agreement in force, as the former Special Rapporteur had proposed in his second report, albeit on certain conditions. The draft articles could only have the function of a model or guidelines for new agreements. They must not cast doubt on many years of tested treaty practice.

5. The current wording of articles 4 and 5 was based on the concept of preparing a framework agreement containing general minimum standards which would be applicable if no specific agreement between riparian States of a given watercourse had been concluded. Such an approach was unrealistic because there were no general

(Mr. Goerner, German Democratic Republic)

rules that governed non-navigational uses and were applicable to all international watercourses. It must be left to the riparian States of an international watercourse to decide to what extent the guidelines to be elaborated by the Commission would be applicable in the preparation of specific watercourse agreements.

6. The German Democratic Republic endorsed the principle reflected in article 5, paragraph 1, that all riparian States should be entitled to become parties to watercourse agreements that applied to the entire international watercourse.

7. His delegation appreciated the fact that the concept of "shared natural resource" had been dropped from article 6, because that concept conflicted with the principle of the territorial sovereignty of States over the portion of an international watercourse situated in their territory, and with the principle of the permanent sovereignty of States over their natural resources. His delegation could not go along with the conclusion that the balance of interests between watercourse States was to be brought about on the basis of the doctrine of equitable utilization as a general rule of law. Rather, such balance of interests must be achieved on the basis of the principle of mutually advantageous co-operation. His delegation therefore agreed with those members of the Commission who regarded the principle of co-operation as a necessary element of the principle of the sovereign equality of States which enabled "the sovereignties involved to coexist positively while preventing possible abuses". Article 6 should reflect in paragraph 1, in accordance with the basic principles of international law, the sovereign right of each watercourse State to the utilization of the portion of a watercourse situated in its territory, along with the obligation to take care that those uses did not adversely affect to an appreciable extent the territories of other States or areas not subject to any sovereignty. Paragraph 2 of that article could embody the principle that the watercourse States, in the interest of the rational utilization and the protection of the waters, agreed, for their portion of the watercourse or jointly for the watercourse as a whole and on the basis of sovereign equality, equal rights and mutual advantage, to co-operate in preventing and controlling transboundary water pollution, providing protection against sudden and unforeseeable disasters, and safeguarding the agreed uses. That would take account of the close connection between sovereign equality and co-operation, and would do justice to the different positions of upstream and downstream States on international watercourses. Otherwise, there would be a risk, especially where border-crossing watercourses were concerned, of upstream States being unilaterally prompted into a certain line of action entailing a restriction of their right of utilization, which was incompatible with the basic principles of international law.

8. His delegation welcomed the fact that the Special Rapporteur and the members of the Commission were seeking to balance the rights and interests of the States concerned.

9. Formulated as recommendations or as part of the commentary, the factors listed in article 7 would be well-suited to provide guidance to States in concluding agreements on co-operation in the management of international watercourses.

(Mr. Goerner, German Democratic Republic)

10. Articles 11 to 15 were unbalanced in favour of the downstream States and were not covered by State practice. In that regard, his delegation supported the views expressed in the Commission and reflected in paragraph 100 of its report (A/42/10), as well as the views held by a number of representatives in the Sixth Committee. Without intending to anticipate the results of the Drafting Committee's work, his delegation supported the proposed changes to those articles, including the decision not to incorporate provisions on the settlement of disputes, to replace the earlier provision for third-party settlement with a general reference to the ways and means of peaceful settlement under Article 33 of the United Nations Charter, and to resolve the conflicts between article 9 and paragraph 3 of both article 14 and article 15, by deleting the corresponding passages.

11. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, there remained ambiguities and differences of view on a number of fundamental issues, which had been taken as warranting the conclusion that the draft articles should not be passed on to the Drafting Committee. Nevertheless, considering that the work on the codification of the subject had been going on for almost 10 years, it appeared justified to suspect that nothing much was likely to change for the better as long as the present approach was maintained. To avoid further stagnation, his delegation agreed with the call for a practicable working hypothesis relying on broadly accepted principles such as balance of interests or prevention of damage. In that regard, the view expressed by several members of the Commission, according to which the codification work, at least for the time being, should be restricted to accidents in connection with particularly dangerous activities, might be a good basis for a definition of the concept of liability. That would make it possible to avoid the inadmissible generalization of some legal principles, such as "strict liability", and to concentrate instead on determining the degree of risk and of liability, and the amount of compensation for damage suffered.

12. A number of basic provisions did, however, remain valid, but would require a more accurate definition. For example, prevention should be regarded as forming part of the draft. It would be essential, however, to clarify the relationship between prevention and compensation, since it was insufficient to proceed on the assumption that there was a logical connection between the two elements.

13. Moreover, international law offered no general or customary norm imposing the obligation of compensation for damage; that was why the principle of "strict liability" could be applicable only to a very much restricted and precisely defined scope. A formal agreement between States remained the only source substantiating such obligations.

14. With regard to the settlement of disputes, while the importance of a third party's role in the process of fact-finding and evaluating the damages was uncontested, it should be left to the States as a matter of principle to decide which means of peacefully settling any dispute they considered suitable.

(Mr. Goerner, German Democratic Republic)

15. Lastly, his delegation continued to advocate the preparation of a framework agreement which would provide guidance to States for the elaboration and conclusion of specific international agreements. That would be an appropriate way of resolving the question of liability without commiting the States to choosing a procedure that would not be consistent with the existing circumstances.

16. Mr. ORDZHONIKIDZE (Union of Soviet Socialist Republics) said that international liability for injurious consequences arising out of acts not prohibited by international law had become an increasingly important question as a result of scientific progress and the interdependence of States. Its regulation would make it possible to prevent certain dangerous situations. In that regard, two opposing views had been expressed. On the one hand, there were those who wished to regulate the question on a case-by-case basis, in a practical and timely manner, for example in the area of the conquest of space for peaceful uses, or in the chemical industry; on the other hand, there were those who advocated adopting general rules of liability which applied to all situations.

17. There was no general obligation to take preventive measures in the matter. The only existing obligations arose from express agreements.

18. The problem was not entirely new. The Conference on the Human Environment held at Stockholm in 1972 had already tackled the question from the point of view of the environment. Principle 21 adopted at that meeting, according to which States had the responsibility to ensure that activities within their jurisdiction or control did not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction, might be applicable; principle 22 might also be applicable, under which States had the obligation to co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction. Principle 22 was justified because there currently existed only a conventional liability in the matter. Material liability arose out of agreements signed by the parties, and hence there was a need to expand those agreements to codify the law of liability. The aim should therefore be to solve current problems in advance; otherwise, the elaboration of general rules would be further complicated.

19. The Soviet Union had proposed the establishment of a general régime of liability and a system for preventing nuclear disasters, a field in which the risks of damage were particularly serious. In that regard, the most responsible attitude would be to take into account the interests of all mankind. The Soviet programme covered State liability for material damages and for unjustified activities. It should be borne in mind, however, that law had a social function, that of providing security and protection, without obstructing progress by imposing unjustifiable sanctions in all circumstances. The two requirements must therefore be reconci

20. The Commission's work itself must be seen from the point of view of its contribution to the progressive development and codification of international law. In that connection, the United Nations comprehensive system of security, which ensured the primacy of international law, must function properly. States must

(Mr. Ordzhonikidze, USSR)

observe the rules so that international law could be developed and thereby ensure the security of mankind. The Commission should consider more carefully the question of the direction of its work and give priority, when setting its agenda, to the most timely topics. It could also establish drafting groups to help the special rapporteurs. Other methods could also be studied at the current or next session to make the Commission a more effective legal body.

21. Mrs. MOCHARY (United States of America) said that the Commission had made laudable efforts to adjust to the more limited resources available to it in recent years, in particular by reducing the length of its sessions and cutting back on conference services, which had not, however, prevented it from making commendable progress.

22. The current deliberate pace of the Commission, which had been criticized by some, was not simply a consequence of the limited resources available to it. It resulted mainly from the fact that most of the topics presently entrusted to the Commission were controversial and covered areas where the law was either very rudimentary or in the process of evolving in response to changing State practice, which was not the case for subjects such as diplomatic and consular relations or the law of treaties.

23. With regard to jurisdictional immunities of States and their property, the United States and a number of developed countries had begun, around the middle of the twentieth century, to make a distinction between the actions of a State in its sovereign capacity and in its capacity as an economic agent, restricting immunity in the latter case. Although some States still resisted that development, a growing number of States were adopting the distinction. The draft articles adopted in first reading (see A/41/10), although they went a long way towards recognizing that trend, continued, in certain important respects, to reflect the outmoded "absolute theory" of immunity. While vigorously supporting the Commission's efforts to codify the law in that area, her Government, in view of the continuing controversy generated by the draft articles, felt that the Commission should not rush to conclude its work on the topic; if it did, progress in reaching a consensus through an evolving practice might be retarded. The Commission might want to consider diverting its focus temporarily away from the details of the articles and towards a detailed analysis of the different practices of States - not just recording their statutes or agreements in that area - and the impact that those practices had had on the relations among the affected States. Such a study might help to foster consensus.

24. The United States was not convinced that draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier were either necessary or even desirable. The existing régime for the diplomatic bag laid down in article 27 of the 1961 Vienna Convention on Diplomatic Relations had been incorporated in the Convention on Special Missions and the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. Both the Commission itself and the diplomatic conference that had adopted the 1961 Vienna Convention had recognized that the régime did not address some of the details of the subject. However, they

(Mrs. Mochary, United States)

had decided to leave things as they were because draft solutions to several specific problems that they had considered had created more problems than they had purported to solve. While the United States commended the Commission for its subsequent work on the subject, it believed that both the draft articles (see A/41/10) and the controversy that they had generated revealed that the situation had not changed since 1961.

25. It was important not to overlook the value of the existing régime, which reflected a practice extending back for centuries. Moreover, that régime had been adapted by the international community and particular States as the circumstances had required. Attempting in the draft articles to deal with the features of the different adaptations merely complicated the law in the area and diminished the flexibility inherent in separate but parallel approaches to the régime for the pouch in different contexts. Moreover, although some of the problems that had arisen as a result of the use made of the diplomatic pouch, the number of the problems in question had been relatively small and both the Commission and the Committee should consider whether such problems were not better solved bilaterally, by the States concerned, within the current general framework.

26. The debate in the Commission on the draft Code of Offences against the Peace and Security of Mankind demonstrated that there was still no agreement on such fundamental questions as the subject of the Code, the crimes it would cover and the means of enforcing it.

27. The definition proposed in article 1 did not even purport to define an offence against the peace and security of mankind, since the Commission had opted for definition by enumeration. The Commission was thus simply putting off a task that was likely to prove very difficult. Moreover, the bracketed language "under international law" raised serious questions: whether and to what extent the Code had implications for States, as opposed to individuals, and whether the crimes to be enumerated, especially if viewed as extending to States, might be covered by rules of general international law, independent of the Code. It was difficult, if not impossible, to address those fundamental concerns in the abstract, without any enumeration of crimes to be addressed by the Code.

28. Article 3 was consistent with the United States Government's position that only individuals could be criminally liable. It specifically put to the side the question of State responsiblity for the same actions - responsibility that was determined under customary international law and that the Commission was addressing under another topic.

29. Article 5 on the non-applicability of statutory limitations raised questions concerning fairness to an individual who was charged with offences covered by the proposed Code that must be carefully studied to ensure that justice was done in each case. The purpose of statutes of limitations was to protect innocent people from a miscarriage of justice that might result from stale evidence or faded memories, and not to shield the guilty from prosecution and punishment. Article 5 must be considered along with the procedural guarantees set out in article 6, as well as the manner in which the Code was to be enforced.

(Mrs. Mochary, United States)

30. It remained unclear to the United States delegation how much practical progress could be achieved on the topic and whether, in the current era of limited resources, the Commission should attach any priority to consideration of it.

31. Mr. CALERO RODRIGUES (Brazil) said that his delegation was not yet convinced that the exercise of preparing a draft Code of crimes against the peace and security of mankind could produce worthwhile results. He wished to refer, in that connection, to the statement made by Brazil in the Committee at the fortieth session of the General Assembly (A/C.6/40/SR.35, para. 1). Brazil fully supported the Commission's recommendation that the title of the topic in English should be amended so that it read: "Draft Code of crimes against the peace and security of mankind". Indeed, there was no reason to use the generic word "offences", when the subject-matter was specifically "crimes".

32. Article 7 on the non bis in idem principle (A/42/10, 17) gave that rule the widest possible application. Were the text to be accepted, it would need to be changed in order to emphasize that the individual concerned had been acquitted or condemned by a court that derived its competence from the provisions of the Code. However, even thus worded, it would mean that once a trial had been regularly held for a crime against the peace and security of mankind no other trial for the same crime could take place. The laws of a number of countries did not entirely exclude the possibility of a second trial for the same offence. For example, in Brazil an individual who had been tried before a foreign court for acts that constituted crimes under Brazilian law could be tried once again. However, the penalty imposed by the foreign court was taken into account, so that the criminal was not in fact punished twice. The principle that no one should be punished twice for the same crime did not give rise to any problems and should be set forth in the general part of the Code. That notwithstanding the question of prohibiting second trials was not so simple. If a system of universal jurisdiction was adopted, and if provision was made for the exercise of competence by the courts of one State to preclude entirely any action by the courts of another State, there was a risk that a State would decide to put an individual on trial in order to prevent another trial from taking place in another State, in which a heavier penalty might be imposed. In order to avoid such a possibility, a collective decision-making system could be envisioned. If, despite the establishment of a system of priorities, the Code still left room for the exercise of more than one jurisdiction, the parties to the Code could be called upon to decide, either directly or through a specifically established organ, what jurisdiction could actually be empowered to hear the case. The question should be considered carefully by the Commission, and a solution should be included not in the general principles set forth in the first part of the Code but in the section devoted to the definition of jurisdiction and competence.

33. The Brazilian Government was not in favour of an international criminal court but also recognized the many difficulties inherent in the universal-jurisdiction system. In order to arrive at an adequate solution, it would be necessary to weigh all the advantages and disadvantages of the two systems carefully and to explore all possible alternative solutions. Preparation by the Commission of a statute for a competent international criminal court would be very useful for reaching a considered decision on the matter. The Commission could even draw up several

(Mr. Calero Rodrigues, Brazil)

statutes - covering, on the one hand, the hypothesis of the establishment of an international criminal court and, on the other hand, various types of machinery for applying the Code.

34. Noting that the Special Rapporteur believed that the general principles, apart from those set out in articles 3 to 6, should not be formulated before the remaining articles were drafted, he pointed out that it was currently impossible to be sure that those principles would be consistent with the specific provisions they were intended to govern. That problem pointed up the fact that the work done thus far was, by necessity, of a provisional nature; his delegation's comments on the articles adopted at the thirty-ninth session were likewise provisional.

35. His delegation had no objection to articles 1 and 2. As for the bracketed words "under international law" in article 1, his delegation was not convinced by the arguments in favour of their deletion, which were summarized in paragraph 5 of the commentary on that article. His delegation fully agreed with the Commission's decision not to try to include in the Code a conceptual definition of crimes against the peace and security of mankind. Even if certain criteria should be used to qualify them, a crime against the peace and security of mankind was, in the final analysis, any crime so considered by the Code.

36. He endorsed the principle of individual responsibility set out in paragraph 1 of article 3 as well as the idea contained in paragraph 2 that the responsibility of individuals did not affect the responsibility that might be attributed to States under international law. It might be useful to state in paragraph 2 that the responsibility of the State in question was the responsibility attributable to that State as a result of acts or omissions for which individuals were held responsible under the Code. The phrase "irrespective of any motives invoked by the accused that are not covered by the definition of the offence" in paragraph 1 should be deleted, since the question of "motives" lacked sufficient importance to justify its inclusion in an article setting out a far more fundamental principle. Furthermore, the Code would certainly include provisions indicating what defences would be accepted; if the "motive" was not listed as such, it would be clear that it could not be invoked to exclude responsibility. Thus there was no need even to address the question of motives in the Code.

37. The explanations given in the commentary on article 5 were entirely convincing, and his delegation endorsed that article fully.

38. He had no real objection to article 6. Nevertheless, it would have been sufficient to set out a general provision covering minimal legal guarantees without listing them, since such a list could only be illustrative.

39. Mr. MICKIEWICZ (Poland) reiterated his Government's support for the work being done to elaborate a draft Code of Crimes against the Peace and Security of Mankind and welcomed the general approach of relying on the Nürnberg Principles.

(Mr. Mickiewicz, Poland)

40. The utilization in the English version of the term "crimes" instead of "offences" was appropriate. That term was in fact consistent with the vocabulary of the Charters of the Nürnberg Tribunal and the International Military Tribunal for the Far East and in Protocol I to the Geneva Conventions.

41. For the time being, his delegation was prepared to accept the text of article 1 as a temporary solution. The words "under international law" should be maintained in view of the nature of the crimes in question. The future elaboration of a conceptual definition would strengthen the preventive value of the draft Code and would fill any gaps in the list of crimes against the peace and security of mankind. That definition should stipulate the essential criteria characterizing such crimes, e.g. their seriousness, the threat they posed to the vital interests of mankind, the fact that they violated the principles of jus cogens and the threat they posed to whole nations or ethnic groups as well as to the right to life. As exhaustible a list of crimes as possible should complement that definition, the elaboration of which ought to take due account of article 19 of the draft articles on State responsibility. Finally, the definition should not refer to the motives of the perpetrators. The relevant provisions of the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid might serve as a model.

42. Article 2, which acknowledged the primacy of international law, was satisfactory. His delegation was also satisfied with articles 3 and 5. In the case of the latter, statutory limitations would be inadmissible for moral as well as political reasons and would insult the memory of victims. He drew attention in that connection to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. Article 6 did not evoke any major reservations. A more concise provision setting out the general principle of legal guarantees would nevertheless have been preferable to the existing text. It seemed unnecessary to repeat the relevant provisions of the International Covenant on Civil and Political Rights.

43. Article 4 should reflect the well-established rule of contemporary international law that war criminals must be tried and punished in the country where they had committed their crimes. That approach was corroborated by such international instruments as the Moscow Declaration of 1943, the London Agreement of 1945 and the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, as well as by paragraph 5 of General Assembly resolution 3074 (XXVIII). Furthermore, extradition was justified for procedural reasons: it was usually much easier to gather evidence in the country where the offence had been committed. Besides, experience showed that States sometimes acted indulgently towards their nationals. Finally, the certainty that potential criminals would be unable to escape extradition would greatly increase the future Code's preventive value.

44. Article 7 required further consideration. It should not be possible to invoke the principle of non bis in idem against an international criminal court. Moreover, even if an accused person was acquitted in one State for lack of sufficient evidence, that should not preclude the possibility of a second trial being held in another State which possessed the necessary evidence, or if new evidence was discovered.

(Mr. Mickiewicz, Poland)

45. The principle of nulla paena sine lege reflected in article 8 should not constitute an obstacle to punishment for an action or omission generally recognized by international law as a war crime or a crime against the peace and security of mankind. Paragraph 2 of that article must therefore be retained.

46. Article 9 gave rise to serious reservations, if only because the order of a Government or a hierarchical superior could not be considered to constitute an exception to the principles of responsibility, but was merely a possible attenuating circumstance. In that connection, he drew attention to article 8 of the Charter of the Nürnberg Tribunal.

47. His delegation endorsed the existing text of article 10, which was consistent with the Nürnberg Principles and with article 86, paragraph 2, of Protocol I to the Geneva Conventions; his delegation also supported the wording of article 11.

48. As to the last question mentioned in paragraph 67 of the Commission's report (A/42/10), further work should rely on the principle of universal jurisdiction while keeping open the possibility of the establishment of an international criminal court. The drafting of the Code did not necessarily depend on resolving that problem and a decision could be taken at a later stage.

49. In spite of the complicated issues still to be resolved, the elaboration of the draft Code was a task of high political, moral and legal importance. Work on the topic should therefore be considered a priority matter.

50. Mr. KIRSCH (Canada) said that the topic of the draft Code of Offences against the Peace and Security of Mankind comprised two central elements: the identification of the crimes themselves and the question of jurisdiction. With regard to the former issue, the draft articles provisionally adopted by the Commission represented some progress, but much still remained to be done.

51. Thus, his delegation did not consider that the language used in draft article 3 on the subject of "motive" was very clear. The question of motive did not arise if a person accused of a crime against the peace and security of mankind was found to have guilty intent. Instead of the mention of motive, what might be required was a reference to article 9, for example in the form of a new sentence in article 3 providing that the only exceptions to the principle of criminal responsibility were those set out in article 9. Furthermore, his delegation felt that the differences of view over the requirement of proving intent as an integral element of a crime against the peace and security of mankind, referred to in the commentary to draft article 1, deserved further consideration. It was true that in many cases intent to commit a crime within the meaning of the draft Code could easily be presumed from the nature of the act committed. The crime of apartheid provided an example. In such a case, requirement of proof of intent would be a requirement of form only. But that might not necessarily be the case with other crimes. Hence his delegation did not consider that intent should be eliminated as an ingredient in a crime contrary to the Code or that the requirement of proof of intent should be treated as a procedural issue. The Commission should therefore address the question whether intent was to be presumed in all cases of crimes

(Mr. Kirsch, Canada)

against the peace and security of mankind, or whether in certain circumstances intent would have to be proved. In other words, the Commission should decide whether responsibility should attach automatically once a crime was alleged to have been committed or whether guilty intent had to be shown. The Special Rapporteur and the Commission should look more closely at that aspect of the question.

52. With regard to the second central element, that of jurisdiction, his delegation had noted a tendency for debates in the Commission to return to the issue whether there should be universal jurisdiction in respect of crimes against peace and security of mankind and whether an international criminal court should be established. At the Commission's thirty-ninth session, some imaginative solutions had been proposed, in particular that made during the debate on the aut dedere aut punire principle in draft article 4 to the effect that national courts might include judges from the State of the accused and from selected third States when dealing with a crime against peace and security of mankind. Incidentally, his delegation agreed with the delegation of the Bahamas that the formula "aut dedere aut judicare" should be used as being more appropriate.

53. The question of jurisdiction was one that the Commission would ultimately have to resolve because it permeated the whole of the draft articles and was central to the operation of the non bis in idem rule in draft article 7, which would preclude an individual who had already been tried from being prosecuted for the same acts before another international or national tribunal. Some questions arose in that connection. One related to the possibility that persecution in national courts accompanied by lenient penalties or partial interpretations could defeat the objectives of the Code. That issue would no doubt be addressed in the context of an article dealing specifically with penalties. Another question was whether, if an international criminal jurisdiction were to be established, it should be given primacy. It would then be necessary to consider a number of related issues, including the relationship between an international criminal court and the jurisdiction of the national courts of States which might not be parties to its statute even if they accepted the Code itself. Thus the question of an international criminal jurisdiction raised a series of complex issues which the Commission should perhaps try to resolve before taking a final decision. Some delegations were opposed to international criminal jurisdiction, and the Commission should therefore also look at alternatives including the possibility, mentioned earlier, of using national courts on which judges of other nationalities would be invited to sit.

54. The Commission's debates still reflected a concern with the question of the criminal responsibility of States notwithstanding the view expressed by numerous delegations in the Sixth Committee, including his own, that discussion should focus on individual responsibility. It had been pointed out in the past that an approach focusing on individual responsibility was without prejudice to any subsequent consideration of the question of State responsibility, and that principle was now reflected in draft article 3. In any event, State responsibility was inconsistent with the use of national courts to try crimes under the draft Code, as was at present contemplated by the Commission. A realistic approach should be adopted

(Mr. Kirsch, Canada)

which recognized that progress would depend on the extent to which the Commission proved able to concentrate on matters on which common ground was achievable and to avoid areas where ideologies clashed and emotions ran high.

55. His delegation supported the proposal to change the title of the topic from "Draft Code of Offences" to "Draft Code of Crimes" if that would facilitate translation needs, and considered that the words "under international law" appearing in square brackets in draft article 1 might not be necessary. If, as draft article 1 provided, the crimes dealt with were those defined in the draft Code, there was no need to characterize them as crimes under international law; that went without saying. However, if it was felt necessary to emphasize that the crimes dealt with in the Code were contrary to international law, draft article 1 would more logically read as follows: "The crimes defined in this draft Code constitute crimes under international law against the peace and security of mankind".

56. Turning to the question of working methods, he remarked that the fact that the Commission still awaited comments from Governments on two of the items on its agenda and that a new Special Rapporteur had been appointed for a third item had provided it with the opportunity to make progress on a few items rather than trying to concentrate on many. His delegation noted with appreciation the steps taken by the Commission to plan its work over the following five years, and hoped that it would adopt the new approach as a routine practice along the lines indicated in the annex to the report.

57. In its resolution 41/81, the General Assembly had requested the Commission "to consider thoroughly ... its methods of work in all their aspects, bearing in mind the possibility of staggering the consideration of some topics". During debates in the Sixth Committee several States had expressed their concern over delays in the treatment of particular topics. It had been hoped that changes in methods of work might improve the process of codification and progressive development of international law by the Commission. His delegation was not, however, convinced that all avenues had been exhausted in the search for improved working methods. While sharing the Planning Group's concern that the Drafting Committee should be able to work in optimum conditions, it would have liked some clearer indication of how that was to be achieved. Equally, while recognizing that the Commission's work was impeded if States did not respond to requests for comments, it would also have liked to see some discussion of other matters, such as the length and efficiency of debates within the Commission on each item and measures to improve the work of the Drafting Committee, e.g. by setting up sub-committees or separate drafting committees with a continuing core group for different topics. The Commission should give serious thought to such alternative working methods and consider, for example, the approaches of other law-making bodies as set out in the 1980 Secretariat study of multilateral treaty-making. The review of the Commission's methods of work might therefore be continued at its next session with a view to achieving concrete results.

(Mr. Kirsch, Canada)

58. His delegation wished to draw attention to one factor which might have an impact on the Commission's working methods - its disposition to reopen discussion of issues that had been fully canvassed in earlier sessions. That was an important impediment to efficient functioning and expeditious work. Such a disposition might be due to changes in the Commission's composition, for it enabled new members to familiarize themselves with the work; but the persons elected to the Commission by the General Assembly hardly needed "orientation debates", and the backtracking was due more to the fact that the reopened issues had been resolved in a way unsatisfactory to some members. Codification had nothing to gain from such a process.

59. It was because his Government supported the Commission's work without question that it felt compelled to indicate its concern about the Commission's inability to move expeditiously towards the conclusion of some of the topics on its agenda. Unless the Commission could find working methods that enabled it to respond with the necessary speed to the demands made upon it, States would be increasingly reluctant to turn to the Commission for codification and progressive development of the law. In recent years there had been increasingly frequent use of diplomatic conferences which had adopted texts on urgent and vital issues without the benefit of the preparatory work of the Commission. The Montreal Conference on the ozone layer was probably the most recent example. That trend was of course understandable. However, it was a challenge to the members of the Commission which should prompt them to improve the effectiveness and utility of their work.

60. His delegation wished to make a specific proposal on a related aspect of the Commission's working methods. The results of the work of other law-making bodies might have important implications for the Commission's work and provide guidance on contemporary State practice in some of the difficult areas currently before it. Up to now it had been the responsibility of each member to obtain the necessary information individually and independently. Given the diversity of their fields of interest and their other responsibilities, and the fact that they did not always have access to major libraries, that process was not always effective. His delegation therefore proposed that the Secretariat should provide members in advance of each session with a summary of important international law-making activities which had taken place within and outside the United Nations during the preceding year. That would ensure that all members had equal information about such activities and would be able to take them into account in their own work. The proposal would simply require the implementation of General Assembly resolution 39/90 which invited the specialized agencies and other international organizations in consultative status with the United Nations to communicate annually to the Secretary-General information about their treaty-making activities. It ought to be possible to do that at low cost. For the moment, his delegation was simply proposing that the Secretariat should make a study of the feasibility and the costs involved, a study which would not be expensive. It appreciated the implications of the proposal for the Secretariat's work-load and it supported in that regard the recommendation made by the Commission in paragraph 248 of its report that, in view of the negative effects on the Commission's work of the understaffing of the Codification Division, steps should be taken to ensure that the Division was able to perform its functions properly. The Commission needed the experience of those

(Mr. Kirsch, Canada)

who had established working relationships with its members and who knew the subjects well. In that connection, his delegation paid a tribute to the extremely effective work of the members of the Codification Division, who had to operate in difficult conditions owing to the United Nations budgetary restrictions.

61. Mr. VOICU (Romania) said that, in connection with international liability for injurious consequences arising out of acts not prohibited by international law, his delegation's attention had been caught by the conclusions drawn by the Special Rapporteur about the mandate given to the Commission by the General Assembly, which had prompted it to deal with activities which might have transboundary physical consequences which adversely affected persons or things. It was necessary to emphasize in that connection the need to respect the sovereignty and equality of rights of all States. That meant that in its own territory each State should enjoy the maximum freedom of action compatible with respect for the sovereignty of other States. The obligation of each State to respect the sovereignty of other States entailed the conclusion that the cost of the loss suffered by an innocent victim of adverse transboundary effects should not be borne by him.

62. Furthermore, as the Special Rapporteur had pointed out, the draft articles should not discourage scientific and technological progress, which was of decisive importance for the progress and prosperity of peoples. However, such progress must take place within a framework of strict respect for the sovereignty and territorial integrity of States.

63. As to the final form and eventual nature of the draft articles, his delegation thought that the emphasis should be on the substantive rules, for if they were not adequate the procedural rules might not have the necessary binding effect. The Special Rapporteur had said that the Commission should try to draft coherent, reasonable, practical and politically acceptable articles. The factors to be taken into consideration and the criteria of the international responsibility must be scientific, identifiable and logical, with the aim of improving international law and inter-State relations.

64. The Special Rapporteur's third report on the question of relations between States and international organizations (second part of the topic) provided a schematic outline of the ground which should be covered by the various articles to be drafted.

65. The Romanian delegation thought that the Commission's conclusions about working methods warranted close attention; the work should converge towards the codification or systematization of existing norms and practices or of specific problems which required suitable legal regulation.

66. It had noted with interest the annex to the report containing a table prepared on the basis of indications provided by the Special Rapporteurs. It shared the opinion that it was desirable to make as much progress as possible on the preparation of draft articles on specific topics. In view of the complexity and difficulty of each topic, the analysis given in paragraph 232 seemed realistic. It

(Mr. Voicu, Romania)

also thought, with respect to working methods, that consideration should be given to every possibility of facilitating the work of the Drafting Committee, which should be given more time in view of the programme drawn up by the Commission.

67. His delegation was generally in favour of speeding up the codification process, while respecting the Commission's opinion that its present working methods and organization were appropriate and remained the most effective ones for the performance of the tasks entrusted to it by the General Assembly under Article 13 of the Charter, and that there was thus no reason to change its Statute, working methods or organization.

68. Romania supported the proposals about the prompt and regular publication of the Commission's Yearbook. It also hoped that the fourth edition of the booklet entitled "The International Law Commission and its work" would be published without delay, and it reiterated that it would be useful for the booklet to contain a subject index.

69. Mr. VAN WULFFTEN PALTHE (Netherlands) said that his delegation supported the suggestion put forward by the Swedish delegation on behalf of the Nordic countries that the Chairman's introduction to the Commission's report should be transmitted to countries in advance of the meetings devoted to the report, so that delegations would have more time to prepare their statements. The United Kingdom suggestion that the Committee should decide, when it adopted its agenda, the dates on which it would take up the various topics dealt with by the Commission, merited serious consideration.

70. With regard to paragraph 234 of the report, his delegation strongly supported the idea of staggering the consideration of the topics before the Commission. While it understood the Commission's view on the subject, it regretted that the report contained no suggestion in that respect. It welcomed the establishment of the Working Group on Methods of Work referred to in paragraph 235 of the report and it hoped that the Group would look at the possibility of staggering some topics, with a view to including some proposals in the 1988 report. It also welcomed the Commission's intention to start at its fortieth session a second reading of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. It strongly urged States which had not yet done so to submit their comments on the topic by 1 January 1988.

71. The Commission indicated in paragraph 232 of the report that it wished to take up the second reading of the draft articles on jurisdictional immunities of States and their property during its 1989 session. Paragraph 222 recalled that Governments had been invited to submit their comments on the draft articles by 1 January 1988. His delegation hoped that the time-limit for submission of comments would be extended to 1 January 1989, in order to give States more time to study the two sets of draft articles. Lastly, it shared the concern expressed in paragraph 248 of the report about the understaffing of the Codification Division, and it noted that the problem was common to the whole Office of Legal Affairs. However, that was a matter for the Fifth Committee.

(Mr. Van Wulfften Palthe, Netherlands)

72. The law of the non-navigational uses of international watercourses was one of the most important items on the Commission's agenda. In connection with draft articles 2 to 7 provisionally adopted by the Commission at its thirty-ninth session (A/42/10, para. 117), his delegation fully supported the text of draft article 2, paragraph 2, because it agreed that navigational uses which affected or were affected by non-navigational uses were to that limited extent within the scope of the draft articles.

73. In article 4, paragraph 1, the term "adjust" was somewhat ambiguous and his delegation assumed that it did not imply a further refinement of the draft articles but might also, where necessary, cover a deviation or derogation from them.

74. The word "appreciable" used in article 4, paragraph 2, did not mean "substantial" but rather "capable of being established by objective evidence" (see in that regard paragraph 15 of document A/CN.4/L.415/Add.2). While it was true that a watercourse agreement concluded between two or more watercourse States could not affect the rights of other watercourse States - by virtue of the well-known rule of treaty law that a treaty did not create either obligations or rights for a third State without its concent (confirmed by article 34 of the 1969 Vienna Convention on the Law of Treaties) - it did not however follow that every use by a watercourse State or by two or more watercourse States, as agreed by them in a watercourse agreement, that would adversely affect a use by one or more other watercourse States was necessarily unlawful. It would be unlawful only if it were inconsistent with the equitable and reasonable utilization of the watercourse by the watercourse States concerned. It therefore did not seem justified to require, as did paragraph 2 of draft article 4, that a watercourse agreement between two or more watercourse States should never adversely affect to an appreciable extent the use by another watercourse State.

75. In that connection, one might wonder what was the precise link between paragraph 2 of draft article 4 and paragraph 2 of draft article 5, since the former prohibited two or more watercourse States from entering into a watercourse agreement which adversely affected the use by one or more other watercourse States, while paragraph 2 of draft article 5 provided that a watercourse State whose use might be adversely affected to an appreciable extent by a proposed watercourse agreement was entitled to become a party thereto. That presupposed that in the first case the watercourse States were in principle permitted to enter in the mentioned watercourse agreement. Furthermore, if the watercourse agreement did not adversely affect the use of another watercourse State to such an extent that it was inconsistent with the equitable and reasonable utilization of the watercourse by the contracting parties, the question might be raised why the affected watercourse State should have a right to become a party to the watercourse agreement.

76. His delegation had also taken note of draft articles 6 and 7 and was in full agreement with the approach followed in those articles, which in its view not only constituted core articles in the text but might also be considered as well-established principles of general international law.

(Mr. Van Wulfften Palthe, Netherlands)

77. At its thirty-ninth session, the Commission had also considered draft articles 10 to 15 proposed by the Special Rapporteur on that subject. The Netherlands delegation fully supported the inclusion in the draft articles of a general obligation of watercourse States to co-operate in good faith in the fulfilment of the specific obligations under the draft articles. That obligation could already be considered as a generally recognized principle of international watercourse law. His delegation agreed with the Special Rapporteur that the general obligation to co-operate could best be included in chapter II of the draft articles dealing with general principles. It further believed that the general obligation for watercourse States to co-operate should be phrased in a simple and concise manner and that the article therefore did not need to refer to such bases for co-operation as equality, sovereignty or territorial integrity.

78. With regard to draft articles 11 to 15, his delegation attached great importance to the procedural rules stated therein, since they were essential in order to give full effect to the substantive provisions of the draft articles. It basically agreed with the text of the articles proposed by the Special Rapporteur (A/42/10, pp. 41 and 44 et seq.). However, in connection with draft article 11, it wished to stress that a watercourse State which contemplated a new use of an international watercourse that might cause appreciable harm to other watercourse States was obliged to obtain the necessary data, even if they were not yet available, in order to permit itself and the watercourse State to be notified to properly determine the potentially adverse effects of the new use. It would therefore prefer to delete the term "available" from the text proposed by the Special Rapporteur. Furthermore, while it agreed that the negotiations referred to in paragraph 3 of article 12 should not unduly delay the initiation of the contemplated use, it wondered how and by whom such a possible undue delay would be established and what the consequences thereof would be. The draft articles were not clear on that point, and it might be possible to provide for a minimum period, such as that proposed in alternative B for paragraph 1 of draft article 12, or a maximum period for study and evaluation of the potential harm. However, the fixing of such a maximum period naturally carried with it the danger that in certain cases too little time would be left to the notified State for study and evaluation. A possibility should therefore be created for the notified State to ask under certain conditions for an extension of the period.

79. In connection with paragraph 2 of draft article 12, he asked under what conditions the notifying State might proceed with the proposed new use after the period of time for study and evaluation had elapsed and after the notified State had raised objections against the new use and the subsequent consultations or negotiations envisaged in paragraphs 2 and 3 of draft article 13 had not led to an equitable resolution of the situation. More particularly, the question arose whether the possibility to initiate the new use existed only in the case envisaged in draft article 15 dealing with contemplated new uses of utmost urgency, or whether it also existed in other cases and, if so, under what conditions. In any event, his delegation believed that further clarification was required of the concept of "similar considerations" which might render a proposed new use a matter of "utmost urgency". It might also be asked in that connection whether and to what extent a suspension of a new use would be required in the case of disagreement

(Mr. Van Wulfften Palthe, Netherlands)

between watercourse States as to whether a proposed new use might or might not cause appreciable harm to other watercourse States within the meaning of draft article 11.

80. Paragraph 5 of draft article 13 expressly referred to the dispute settlement provisions of the draft articles. The Special Rapporteur had not yet proposed any such provisions and the report on the discussion of article 13 by the Commission (see A/CN.4/L.415/Add.1, para. 28) indicated that, pending a subsequent decision on the need for such provisions, the Special Rapporteur had recommended that the phrase "the dispute settlement provisions of these draft articles" in paragraph 5 of draft article 13 should be replaced by a reference to the other means for the peaceful settlement of disputes provided for in Article 33 of the Charter of the United Nations. The same could be said of paragraph 1 of draft article 14.

81. However, his delegation wished to stress that some form of binding third-party settlement procedure was greatly preferable in order to settle disputes which might arise out of the application of the draft articles. It was to be feared that a simple reference to the methods of peaceful settlement mentioned in the Charter would not lead to a final and fair settlement of disputes. A provision such as those included in the 1976 Convention for the Protection of the Rhine against Chemical Pollution and in the 1976 Convention for the Protection of the Rhine against Chlorides could appear either in the main text or in an annex to the draft articles.

82. The liability imposed by paragraph 3 of draft article 14 on a watercourse State which failed to comply with the notification duties laid down in draft articles 11 to 13 was not necessarily identical to the liability provided for under general international law in the case of non-compliance with those articles. Indeed, the liability envisaged in paragraph 3 of draft article 14 for "any harm caused to other States by the new use, whether or not such harm is in violation of article 9" appeared to be much more stringent than the harm which might be deemed to have been caused because of the non-observance of the obligations laid down in draft articles 11 to 13. His delegation none the less shared the opinion of the Special Rapporteur that paragraph 3 of draft article 14 could be eliminated without loss to the system of procedural rules as a whole.

83. At the thirty-ninth session, the Commission had also dealt with the topic draft Code of Offences against the Peace and Security of Mankind. His delegation remained sceptical about the usefulness of such a draft Code and considered that the task of determining when individual responsibility under international law arose would be very difficult but that it was essential if the future Code was to be used for purposes of criminal proceedings. The provisionally adopted draft articles did not take away that scepsis, and the important question of an implementation mechanism had yet to be solved. In his delegation's view, the topic did not merit a high priority in the planning of the Commission's work.

84. Likewise, the question of relations between States and international organizations should not be given any priority, as earlier stated by some delegations. The question was already dealt with in a number of treaties and in

(Mr. Van Wulfften Palthe, Netherlands)

the headquarters agreements between international organizations and their host countries. His delegation wondered what useful contribution could be made to the topic by the Commission, which should perhaps devote its time to more important topics.

85. With respect to the topic international liability for injurious consequences arising out of acts not prohibited by international law, his delegation welcomed the Commission's consideration of that important subject and thought that various current international negotiations might benefit therefrom.

86. Regarding the legal nature of the Sixth Committee's work, he observed that agenda item 135, on the report of the International Law Commission, was unfortunately one of the very few truly legal items on the Committee's agenda. Most of the other items either were political in nature or, if of a legal nature, were apt to give rise to deliberations hampered by political controversies, which tended to overshadow the real issues and make progress impossible. In view of that unsatisfactory situation, the Netherlands would like to see the Sixth Committee recover its legal nature and resume its original functions as a body which monitored developments in the legal field within the United Nations system and formulated policy thereon. It had been suggested that the Sixth Committee should function as a clearing-house for the many legislative activities undertaken within the United Nations (by, for instance, the Commission and UNCITRAL), the specialized organizations and the expert non-governmental organizations such as the International Law Association or the Institut de droit international. The Sixth Committee could, every year, review those activities, indicating appropriate tasks for the General Assembly. His delegation intended to undertake consultations on that idea, with a possible view to proposing that a new agenda item for the Sixth Committee should be included in the agenda of the forty-third session of the General Assembly the title of which might be: "Review and co-ordination of multilateral legislative activities". It would welcome any suggestion which could contribute to that undertaking.

87. Mr. CULLEN (Argentina), referring to the law of the non-navigational uses of international watercourses, said that his delegation preferred the use of the word "system" in draft article 2 and throughout the text. It approved the remainder of the article and the text of draft article 3. It had no objection to draft articles 4, 5 and 6. It found draft article 7 acceptable but would have preferred the wording which appeared in the Special Rapporteur's report. It would comment in that regard that the concept of "equitable and reasonable utilization" was very broad and would suggest that less general factors should be listed.

88. The Drafting Committee, even though the time allotted to it had been considerably extended, had not been able to consider draft article 9. That Committee was an essential element in the Commission's functioning and any delay in its activities impeded progress. It therefore seemed opportune to urge the members of the Commission to display a spirit of compromise with a view to settling the problem.

(Mr. Cullen, Argentina)

89. Draft article 10 should be part of the general principles of chapter II. The Special Rapporteur's conclusions, reproduced in paragraph 98 of the report (A/42/10), were correct: the obligation to co-operate denoted an obligation to act in good faith and was necessary to the fulfilment of certain specific obligations. In that regard, his delegation did not think that the obligation to co-operate was the sole source of specific obligations. One should not overlook the role played by the sovereign equality of States, without which the territorial sovereignty of one State could prevail over that of another.

90. With regard to the views referred to in paragraph 93 of the report (A/42/10), his delegation favoured the conclusion of a framework agreement setting out specific obligations. It believed that such an approach would in no way impair permanent sovereignty over natural resources, since the latter were shared and the utilization by other watercourse States should be regulated a priori in order to avert any harm that might be caused to them. It therefore preferred ar express mention in the draft of the character of shared natural resource attaching to watercourses. It wished to recall formally the agreement in the Commission whereby deletion of the wording would not denote elimination of the concept.

91. His delegation agreed with the Special Rapporteur that the notification and consultation obligations existed in general international law, that they were vital to the operation of the draft articles and that they should therefore be set out in those articles.

92. Draft articles 11 to 15 concerned procedure and were necessary for the effective application of the substantive provisions. The wording proposed was balanced and any changes that might be made should be left to the Drafting Committee.

93. In draft article 11, the words "appreciable harm" could be replaced by the words "appreciable adverse effect". With regard to the "stand-still" provided for in draft article 12, his delegation considered that the applicable principles should ensure that throughout the period concerned the notified State neither suffered appreciable harm nor had the veto. For reasons already advanced, it would like to delete the word "co-operate" in paragraph 2 and to retain merely the reference to the provision of data and information by the notifying State.

94. Concerning article 13, it agreed with the Special Rapporteur that the words "equitable share of the uses and benefits of the international watercourse" should be retained in paragraph 1. It also believed that the notified State should specify the potential causes of appreciable harm, provided that there was adequate information from the notifying State. It considered that draft article 14 would be improved by the proposals of the Special Rapporteur in paragraph 114 of the report (A/42/10). It shared the reservations expressed concerning draft article 15. If that article was to be maintained, broader safeguards should be provided, perhaps by specifying in what situations initiation of the new use would be authorized.

95. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, his delegation noted that the general

(Mr. Cullen, Argentina)

considerations outlined by the Special Rapporteur confirmed the urgency and importance of the subject in view of the accidents and risks inherent in the use of modern technology. In that area the endeavour must be to equip the international community with the necessary legal concepts without just abjectly copying similar concepts of domestic law. Furthermore, the topic had already been considered in international law and the applicable principles had been recognized in such cases as Trail Smelter, Corfu Channel and Lake Lanoux, as well as in various multilateral and bilateral conventions and declarations of international meetings. The principles were based on the fundamental premise of the sovereign equality of States, and the problem was to prepare a draft general convention which covered all dangerous activities.

96. The Commission was concerned with the progressive development of international law. Several members had said that they favoured the establishment of a list of activities which might be covered by the draft articles in order to avoid any lack of clarity which might result from a definition of dangerous activities. For his delegation, such a solution would be unacceptable and harmful, for technological progress would quickly make it impossible to carry out the mandate given by the General Assembly, which was to create a régime of liability for all dangerous activities. Furthermore, it would not be right to merge the topic with the topic of States responsibility. In essence, liability was the counterpart of the exclusive sovereignty of a State over its own territory.

97. With regard to "knowledge or means of knowing", his delegation thought that the draft should protect the interests of the developing countries. It also thought it desirable to retain appropriate rules with regard to prevention. It would also be useful for the Committee to give its opinion on whether the principles referred to in paragraph 174 of the report should appear in a future convention. It was pointless to ask whether they existed in international law, for if they were suited to the desired purpose, they could be applied effectively.

98. His delegation thought that the Commission need not worry about a draft article's nature, which could not affect the method of work. If the texts drafted were reasonable, they would obtain the necessary support regardless of their form. In view of the mandate given by the General Assembly, the Commission should formally examine at its fortieth session concrete draft articles on the topic, with a view to their subsequent submission to the Committee.

99. With regard to chapter VI of the report, the Argentine delegation welcomed the appointment of the new Special Rapporteurs and it hoped that the Commission would receive the comments it needed if it was to make progress in its consideration of the topics of jurisdictional immunities of States and their property and the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. It also noted with satisfaction the activities of the Planning Group. It was essential that the duration of the Commission's sessions should be maintained at 12 weeks, in order to facilitate the implementation of the schedule outlined in paragraph 232 of the report. It shared the concern expressed in paragraph 248 about the understaffing of the Codification Division.

(Mr. Cullen, Argentina)

100. His delegation warmly supported the comments made by other delegations on the report of the Joint Inspection Unit (A/42/34) to the effect that it would be extremely useful for the decisions and advisory opinions of the International Court of Justice to be published in all the official languages of the United Nations, so that they could be used in the study of law throughout the world without the current difficulties resulting from the lack of translations.

101. Ms. HIGGIE (New Zealand) recalled, in connection with the draft Code of Offences against the Peace and Security of Mankind, that her delegation had already stated its support of the method adopted by the Commission with respect to the definition in article 1. The ambit of the Code must be confined to precisely defined offences which were unequivocally seen as very serious crimes by the international community at large. She noted that the Commission had decided to return at a later stage to the question of a conceptual definition.

102. Her delegation supported the retention of the words "under international law" which appeared in square brackets in article 1. Usage supported their inclusion and they formed a link with article 2. It supported the exclusion from article 3 of any defence based on motive and it endorsed the conclusion that no motive of any kind could justify a crime against the peace and security of mankind. It was also in favour of the approach reflected in article 3, paragraph 1, of limiting the Code to the criminal liability of individuals. Article 3, paragraph 2, appropriately left intact the responsibility of a State under international law for any act or omission attributable to it.

103. Her delegation supported draft article 6 as currently worded and the Commission's decision to rely on article 14 of the International Covenant on Civil and Political Rights. New Zealand had always supported the inclusion of appropriate enforcement mechanisms in the future Code and it therefore thought that the Commission's mandate extended to that aspect. There was a difference of opinion as to the scope and conditions of application of the non bis in idem rule, but the question might prove merely academic. Lastly, it was ready to accept the change of title proposed in paragraphs 64 and 65 of the report if it received wide support in the Committee.

104. Her delegation generally supported the draft articles on the law of the non-navigaional uses of international watercourses adopted provisionally by the Commission at its thirty-ninth session. It noted the intention stated by the Special Rapporteur in paragraph 98 of the report to improve draft article 10 and to include in it a reference to the purposes and objectives of co-operation. It supported the opinion expressed in paragraph 100 that co-operation between watercourse States should be encouraged and the position taken in paragraph 101 in favour of the drafting of specific rules for implementation of the general rule of co-operation.

105. It also supported the formulation in draft article 6 of the fundamental principles of equitable utilization and equitable participation in the use, development and protection of an international watercourse. It noted the Special Rapporteur's survey of legal materials on the topic and it thought that the list

(Ms. Higgie, New Zealand)

given in draft article 7 would be a useful guide to States in their application of draft article 6.

106. The New Zealand delegation regretted that the Commission had not been able to give more time to the topic of international liability for injurious consequences arising out of acts not prohibited by international law. It was also disappointed that some members, as it appeared from the report, were more preoccupied with bewailing difficulties than with exploring solutions. The Commission must not forget its mandate to promote "the progressive development of international law". In that regard New Zealand endorsed the comment made in paragraph 140 of the report that it would be an exaggeration to say that there was no basis on which to begin building norms of law on the topic. With regard to the Special Rapporteur's conclusions set out in paragraph 194, her delegation continued to support the limitation of the topic to transboundary physical consequences. As for subparagraph (b), there should certainly be no impediment to scientific and technological progress. It also thought that the draft articles should deal both with prevention and reparation and it did not regard the topic as unduly adventurous. The proposed rules did not limit the choices available to States but merely stated that territorial sovereignty carried with it an obligation to take into account the equal rights of other States to save their territory and citizens from harm. New Zealand therefore supported the general principles enunciated by the Special Rapporteur in paragraph 194 (d). The object of a régime should be to preserve a State's freedom of action within its territory under conditions which minimized the risks to other States and their citizens.

107. With regard to the Commission's programme, procedures and methods of work, her delegation welcomed the Commission's response to the General Assembly's 1986 request that it consider thoroughly its methods of work. It continued to attach great importance to that aspect of the Commission's work. It welcomed the establishment of a Working Group on Methods of Work and what was said in paragraph 242 of the report about the work of the Drafting Committee. However, it regretted that the Commission had not been able to respond to the General Assembly's invitation in resolution 41/81 to make proposals on the staggering of the consideration of some of its topics. Such a device might improve the Commission's procedures and enhance the quality and usefulness of the debate in both the Commission and the Committee.

108. Her delegation endorsed the proposal made by the representative of Sweden on behalf of the Nordic countries that the Chairman's introduction to the report should be communicated to Governments shortly after the conclusion of the annual session, so that delegations would be able to respond more fully to the Commission's needs in their statements in the General Assembly.

The meeting rose at 6.10 p.m.