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SUMMARY RECORD OF THE 37th MEETING

Chairman: Mr. GASTLI (Tunisia)

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The meeting was called to order at 3.30 p.m.

AGENDA ITEM 131: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS THIRTY-FIFTH SESSION (continued) (A/38/10, A/38/148)

1. The CHAIRMAN said that the Sixth Committee was falling well behind schedule. In view of its tradition of self-discipline, he was reluctant to invoke rule 114 of the rules of procedure and impose a time-limit on statements. He appealed to delegations to be as concise as possible.

2. He intended to start the Committee's meetings on time. All delegations, particularly those high on the list of speakers, were urged to be punctual.

3. Mr. SAINT-MARTIN (Canada) said that the report of the International Law Commission (A/38/10) attested to the significance of the Commission's work in the clarification, codification and progressive development of international law. That significance had been highlighted by the Secretary-General in his July 1983 visit to the Commission. Canada endorsed the Secretary-General's timely reminder that the Commission functioned against a background of interdependence and the search for common interests.

4. The new Special Rapporteur on the law of the non-navigational uses of international watercourses, Mr. Jens Evensen, had produced a commendable first report. Canada was particularly interested in that topic and was pleased that Mr. Evensen had closely followed the work of his predecessor as Special Rapporteur, Judge Schwebel, thus allowing continuity and facilitating early completion of the Commission's work on the topic.

5. In substance, his delegation agreed with the approach of the new Special Rapporteur, who had endorsed the fundamental principle of "equitable sharing" in the use of the waters of an international watercourse, a principle that was founded in State practice. Draft article 8 of the Special Rapporteur's outline listed factors to be taken into account in determining whether the waters were used in a reasonable and equitable manner. That sensible approach would ensure that all the interests of system States were properly taken into account.

6. His delegation had some problems with the application of draft articles 9 and 13, in which the Special Rapporteur had departed from the concept of "equitable sharing" and introduced notions that no longer represented State practice and were inconsistent with the fundamental principles in draft articles 6, 7 and 8. Canada supported the sic utere principle embodied in draft article 9 but had difficulty with the application of that principle to the problem of prior use. The article protected the State that was already using the resources of an international watercourse from appreciable harm, whether or not other system States had obtained an equitable share of the resource. That seemed incompatible with the objective of draft article 8, which made it clear that an "equitable share" for each of the system States was to be determined by a process that balanced interests. Prior established use and the harm that would result from a reduction in that use, while

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very important, were not the exclusive factor. His delegation therefore urged the Special Rapporteur and the Commission to consider including in draft article 9 words of qualification that would make the obligation to refrain from causing appreciable harm subject to the overriding obligation to share the resource equitably, bearing in mind the need to balance all relevant factors, including any applicable principles of international law. That would re-establish the balancing approach that the principle of "equitable sharing" required and would not give what in effect was veto power to the prior or more intensive user.

7. His delegation had similar difficulties with draft article 13, which, as it stood, allowed a system State that had been notified of a project involving the use of the waters of an international watercourse to cause the indefinite suspension of the project by objecting to it and refusing to adjudicate the dispute. To provide such veto power over the utilization of the waters of an international watercourse, in the absence of any prior agreement, was to revive the obsolete rule which required the consent of co-basin States before any work was undertaken. Such an approach was not consistent with State practice, and there again his delegation urged the Special Rapporteur and the Commission to reconsider the question.

8. In the past, Canada had questioned whether a broad interpretation must be given to the term "international watercourse". It believed, however, that the change from a "drainage basin" concept to the idea expressed in the Special Rapporteur's report of an "international watercourse system" would provide an appropriate basis for the development of a coherent and rational body of general principles dealing with international watercourses, without impinging upon those watercourses that were regulated by their own particular régimes. His delegation would support the expansion of the Special Rapporteur's task to the consideration of the legality of "inter-basin transfers". However, it endorsed the Special Rapporteur's view that the protection of installations in times of armed conflict should not be included in the scope of the topic.

9. Subject to the qualifications he had mentioned, his delegation supported the approach taken by the Special Rapporteur, who had made an auspicious start, although the articles produced so far would of course require considerable work by the Drafting Committee.

10. Several of the topics before the Commission were interrelated. For instance, the principle of good-neighbourliness that was essential for the operation of the rules relating to the use of the resources of international watercourses lay at the heart of the problem of transboundary harm, which had been ably dealt with in successive reports by the Special Rapporteur on international liability for injurious consequences arising out of acts not prohibited by international law. The latter topic was a priority subject-matter of particular relevance to Canada, which supported further efforts leading to the drafting and eventual adoption of legal rules. His delegation was therefore somewhat disappointed that the Commission had not been able to devote to the topic the time that it deserved, and it supported the Special Rapporteur's suggestion that the Commission should give it serious consideration at its 1984 session and reach conclusions about its continuance.

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11. The Special Rapporteur had already explored and refined the conceptual basis of the topic. The time had come to leave the realm of theory and move to the drafting of rules. The Special Rapporteur's revised schematic outline would be a useful basis for the formulation of draft articles. With regard to the value of utilizing national authorities and courts, a helpful example was found in the agreement among the Nordic countries to provide aggrieved individuals equal access to each other's courts. A similar proposal was being actively considered by Canada and the United States in relation to problems of transboundary pollution. The Special Rapporteur might take such an approach into account.

12. The Special Rapporteur on State responsibility had raised a number of queries in his fourth report, some of which would best be considered against the background of specific articles, rather than in an abstract debate. The Special Rapporteur should therefore proceed to formulate articles on which discussion could focus. Canada believed that the Commission's resources could be spent more profitably in areas other than the consequences of aggression as an international crime and the question of reprisals, and it would therefore encourage the Special Rapporteur to direct his attention to issues on which consensus was more likely.

13. The Special Rapporteur should deal first with the question of the consequences of State responsibility before attempting to deal with the problem of implementation. The importance of defining rules relating to those consequences, including the question of reparation, had been highlighted by recent events which suggested a decline in the rule of law internationally and demonstrated that the Commission's work did not take place in a vacuum. The consequences of State responsibility were a matter of immediate concern. The development and clarification of rules on that topic would make it clear to States that, if they failed to comply with internationally recognized standards of State behaviour, they would be brought to account and be required to provide compensation for the consequences of their unlawful conduct.

14. His delegation was gratified that the approach taken by the Special Rapporteur on the jurisdictional immunities of States and their property paralleled in many respects the approach taken by Canada in its domestic legislation. It should be noted, however, that the State Immunity Act adopted in Canada did not include a provision dealing with immunity in respect of contracts of employment, because of difficulties about the compatibility of such a provision with the general rule relating to restrictive immunity. The Special Rapporteur had alluded to the problem when observing that, in the examination of the extent of State immunity in any specified area of activities, the question of jurisdiction was not altogether irrelevant. The Special Rapporteur had added that, since jurisdiction of a court was a matter of local or national law, it was not for him to lay down a set of rules regarding the qualifications of jurisdiction of a court of law or a labour court in a given country. Canada questioned whether jurisdiction was solely a matter of domestic law. The Special Rapporteur had not confronted the issue directly in draft article 13, because the scope of that provision was limited to contracts for services to be performed in whole or in part in the territory of the State taking jurisdiction. The question was whether that implied that the forum

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State would not have jurisdiction over contracts to be performed outside its territory. Another question was whether there were generally accepted rules of private international law according to which a State could take jurisdiction. He was not sure that the Special Rapporteur's suggestion that the basis of jurisdiction must be territorial really solved the problem.

15. It was becoming apparent that it was very difficult to establish rules on the immunity of States from jurisdiction, under a régime of restrictive immunity, without resolving the prior question of when a State had jurisdiction. Unless the Commission examined that question in more detail, it might end up establishing general rules on the jurisdiction of States in civil matters indirectly, as a by-product of the rather different objective of creating uniform rules on State immunity.

16. His delegation noted the continuation of work on the status of the diplomatic courier and the diplomatic bag, and the commencement of work on two new topics. It agreed with the Special Rapporteur on the Draft Code of Offenses against the Peace and Security of Mankind that the draft should be limited to the most serious of offences. It also noted that the Special Rapporteur for the second part of the topic entitled "Relations between States and international organizations" intended to proceed with great prudence.

17. It was important to establish priorities within the work of the Commission. His delegation saw merit in the idea of staggering the major consideration of particular topics, so that they would be dealt with in depth every two years. Such an approach would enable the Special Rapporteurs and the Secretariat to plan their work more efficiently.

18. Another way in which the Commission might improve its methods of work was by looking beyond the traditional analytical sources and developing links with other bodies whose work was closely related to topics before it, such as the United Nations Environment Programme (UNEP). A regular report from UNEP on its relevant activities would facilitate the work of the Commission.

19. A further question was whether the Commission's task of codification and progressive development should be constrained within a single modus operandi. The process from initial reports through draft articles to a multilateral conference and the conclusion of a treaty was a valuable one, but its value was diminished if the treaty remained unratified and was unacceptable to a large number of States. While the Commission's work certainly was not completely wasted if it did not lead to a widely accepted treaty, formulating draft rules too early could rigidify practice that was still in the process of development. It might well be, therefore, that in some cases the drawing up of normative statements not in the form of treaties would perform a more valuable function than the drafting of articles.

20. That was not to deny that the Commission's objective at the outset should be to prepare draft articles. However, it might become clear during that process that

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the production of draft articles would not perform a useful function. At such a time, the Commission should have the flexibility to revise its objectives. Like all institutions, it should respond to particular needs, rather than adopt a uniform approach to all the topics before it. That would enhance its stature in the field of the codification and progressive development of international law.

21. Mr. MAHBOULI (Tunisia) said his delegation hoped that the current session of the General Assembly would see the convocation of an international conference on the law of treaties between States and international organizations or between international organizations. The adoption by such a conference of the draft articles to which the Commission had devoted 10 years of effort would be a further success and an encouragement for its future work. It must be pointed out, however, that the main failures with respect to conventions elaborated by the Commission often occurred at the ratification stage, when the ratifications on which the final success of such undertakings depended might be slow in coming or never materialize at all. The Commission's efforts should not end with the adoption of its draft convention by a conference but should continue with a view to obtaining the ratifications required, both numerically and from the standpoint of political representativeness, to ensure the success of the convention.

22. The visit paid by the Secretary-General to the Commission during its last session testified to its high standing in the United Nations system and the capital importance of its codification and progressive development of international law.

23. With regard to the Commission's programme and methods of work, the establishment of a Planning Group was proving to have been essential, since the increasing number and complexity of the topics considered made it necessary to find rational methods of work and constantly improve them. The concern shown by the Commission on the subject of documentation seemed justified and his delegation supported its request that basic documentation should reach it well in advance of its sessions. His delegation had greater reservations about the Planning Group's suggestion that the major consideration of topics on the Commission's agenda should be staggered from year to year; taking up an item at intervals of two years did not seem a particularly sound idea for practical reasons, especially for delegations to the Sixth Committee. The fact remained that the Commission was no longer able to consider all the questions before it, either because the Special Rapporteur was absent or for lack of time. It was, thus, becoming increasingly apparent that the seven topics currently on the Commission's agenda could not be dealt with all at once and that a decision would have to be taken on which subjects it was practical for the Commission to consider in depth.

24. On the subject of the draft Code of Offences Against the Peace and Security of Mankind, he said that the principle of codification of the subject-matter appeared to be no longer in dispute. The importance of the topic had been recognized by the General Assembly when it had instructed the Commission to identify and codify the principles which had guided the Nürnberg and Tokyo Tribunals; yet crimes against peace and against humanity such as those enumerated in the Charter of the Nürnberg

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Tribunal were still being committed 38 years later. The proliferation of such premeditated violations required that their perpetrators should be called to account.

25. However, it was desirable for the Commission to adopt a much more cautious and realistic approach in its future work on the subject than it had at its last session. The members of the Commission had agreed unanimously that the offences to be covered by the Code were the most serious of the most serious offences and would thus be at the top of the scale of international crimes. But the Commission should have regard for the risks which might result from over-classifying legal norms. Article 53 of the Vienna Convention on the Law of Treaties had already established the primacy of the peremptory norms of jus cogens over other ordinary norms, and the Commission's draft article 19 on international responsibility distinguished between those norms whose violation constituted a crime and those whose violation constituted a delict. The Commission was proposing to introduce a further categorization of norms by distinguishing between different crimes and their degree of seriousness, the latter being measured by the extent or the horrific character of the calamities caused, or by both at once.

26. His delegation was not opposed to the Commission's efforts to categorize the norms of international law but wondered if it was reasonable to establish three distinct régimes of responsibility with different régimes for their application and different penalties. The pyramid of norms and violations elaborated by the Commission was very interesting, provided that its foundations were not unsound. But the difficulties involved called for further reflection. International law and international morality might eventually be reconciled and the concept of an international public order imposed as a result of the categorization of norms to which the Commission had given a decisive impetus, but that would have to be done by stages, starting from assured positions.

27. A similar observation should be made concerning the subjects of law capable of incurring responsibility for offences against the peace and security of mankind. Incrimination of the State on a level with the individual presented some problems and did not seem to be realistic, in view of the structure of international society and the characteristics of international law. Efforts should be directed instead towards effective implementation of the responsibility of the rulers or, in other words, of those who had carried out or given orders to carry out criminal acts. Even establishing such responsibility required an international society much more strongly organized than it was at present. Much more uncertain was the idea of incriminating the State itself, which implied complicity by the mass of the people in the actions of their rulers. His delegation shared the doubts already expressed as to the reality of joint responsibility in that respect between the nation and the State and the possible complicity of the mass of individuals, particularly in starting a war. There was too fragile a foundation for such criminal responsibility of the State.

28. The final question for the Commission was implementation of the new régime of responsibility, and in particular, the possible establishment of a jurisdiction for

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competent to deal with offences against peace and security. An international criminal jurisdiction would seem to be essential if the rules established were to be at all effective. However his delegation believed that the Commission should leave the question of the status of that jurisdiction until later.

29. Turning to the subject of jurisdictional immunities of States and their property, which was one of the most important topics being considered by the Commission, he expressed appreciation for the work of the Special Rapporteur but thought that his presentation of the fifth report marked a turning-point, since the three new exceptions to State immunity proposed in draft articles 13 to 15 dealt not with certainties but with much vaguer matters. Although practice in most countries showed that concern to respect the sovereignty of others was being coloured more and more by apprehension about the invasive nature of certain activities of foreign States, it also showed that only the denial of immunity in litigation arising out of commercial activities had been clearly accepted so far. The Special Rapporteur and the Commission were encountering very serious difficulties because the codification was based on the restricted concept of State immunity, whereas many States continued to reject that concept. The memorandum submitted by Professor Ushakov summed up perfectly the argument of those who opposed any restriction of the jurisdictional immunity of States.

30. His delegation supported the Commission's efforts but stressed that objective examination of political, economic and ideological realities did not allow restriction of the immunity of foreign States to go beyond exceptions arising from commercial activities. It could not accept the new exceptions arising out of work contracts or civil liability without a number of reservations. Similarly, the traditional distinction between acts of public authority and acts performed by a State jure gestionis, under the same conditions as an individual and by procedures of private law, was quite inadequate as the criterion for immunity and the legal basis for exceptions. The demarcation line between State and private activities was becoming harder to draw, and the Special Rapporteur needed urgently to find more precise criteria which were better suited to current situations.

31. The fourth report on State responsibility was important for the Commission's future work even though it did not contain any new articles, because it was aimed at defining the main questions to be dealt with in the parts two and three of the draft articles, such as the specific legal consequences of aggression, the consequences of crimes other than aggression and measures of self-defence. But there seemed to be a risk that the draft articles on international responsibility would infringe on other instruments which already existed or were being drawn up, such as the draft Code of Offences. The inclusion of aggression and its specific consequences should therefore be carefully weighed and, so far as possible, other questions which did not fall within the Commission's mandate, such as the law of war or the system of the Charter of the United Nations in maintaining peace and international security, should be avoided. The Commission should be just as careful in dealing with the delicate question of reprisals as a response to an internationally wrongful act. The idea of reprisals as conservatory measures mentioned in paragraph 128 of the report indicated the dangers of allowing recourse

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to such procedures. As for the existence of internationally wrongful facts erga omnes, the existence of the "objective régimes" referred to in paragraph 119 of the report would assert itself as soon as the idea of an "international crime" was definitively accepted. The existence of such a régime had been recognized by the International Court of Justice in the Barcelona Traction case, a decision which had marked a complete change of direction in the Court's rulings by comparison with its decision in the South-West Africa case.

32. On the subject of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, he said that the Commission was now in a position to take an overall look at draft articles covering the whole question. Although codification of the topic was not a matter of top priority, it could be of considerable practical interest for the development of modern official communications. Draft articles 15 to 23 seemed quite acceptable and presented no difficulties. The comments made on them by members of the Commission had related mainly to their form, and it did seem that several of them could be amalgamated and shortened.

33. His delegation hoped that it would be possible to make more rapid progress on the topic of the law of the non-navigational uses of international watercourses. The tentative draft convention submitted by the Special Rapporteur seemed to be an acceptable basis for the Commission's future work. The draft could certainly serve as a framework agreement establishing a basis for subsequent agreements applying specifically to different watercourses, but it should also contain principles that were precise and detailed enough to demand recognition and to safeguard the rights of interested parties in the absence of specific agreements which States might not wish to conclude. Similarly, the obligation to join in managing and administering international watercourses should be formulated more subtly, taking into account international situations in which States might refuse to accept an obligation to co-operate in a joint management that they did not want. The draft convention should therefore contain enough mandatory provisions defining the mutual rights and obligations of States parties, without necessarily obliging them to conclude specific agreements on co-operation or joint management.

34. It was unfortunate that the Commission had only been able to devote two meetings to the report delineating the question of international liability for injurious consequences arising out of acts not prohibited by international law. Some members of the Commission were still challenging the very principle of such liability, and his delegation was well aware of the difficulty of accepting the existence in customary law of liability for acts which were not prohibited by international law. However, the quest for greater solidarity among States fully justified efforts to repair the harm caused even by lawful acts. In his delegation's opinion, that was why the Special Rapporteur had not tackled the question of deciding whether a State's behaviour was lawful or unlawful, so that he could concentrate on seeking an obligation to make good any losses or harm which had been caused. It seemed wholly regrettable that the Special Rapporteur and the Commission were restricting the field of application of international liability solely to reparation for transboundary material damage resulting from physical

(Mr. Mahbouli, Tunisia)

activities. His delegation found it hard to accept that the principle requiring reparation in case of harm caused by physical activities ceased to apply when the harmful activities were other than physical.

35. In conclusion, his delegation very much hoped that the Commission's intention, as stated in the report on its thirty-third session (A/36/10), of concentrating its attention on a smaller number of topics at any one session could soon be put into effect because, apart from easing the Commission's task, it would allow representatives in the Sixth Committee to comment in greater depth on the Commission's work.

36. Mr. HUANG Jiahua (China) said that legal instruments prepared by the International Law Commission had always been generally accepted, especially by small and medium-sized countries, so long as they were in full compliance with the purposes and principles of the Charter, were useful in promoting co-operation among States and were conducive to international peace and security. However, the Commission was facing difficult questions, including that of the jurisdictional immunities of States and their property, on which he proposed to focus his attention.

37. Despite the tireless work of the Special Rapporteur, the Commissions's discussions on the topic gave little cause for optimism and no agreement had been reached on certain important articles of the draft. Article 6, dealing with State immunity as a principle, had not been revised and there was still a serious divergence of views on article 12, dealing with commercial contracts. The reasons for the absence of agreement deserved to be analysed in depth.

38. The subject was one of the most important and complicated questions in contemporary international law, involving not only the sovereign equality of States but also their immediate interests and the direction of the development of international law. In theory, there were two schools of thought, one insisting on absolute State immunity and the other on restricted immunity. Some countries, mainly Western ones, had adopted the restrictive doctrine in their judicial decisions and a very small number had even enacted national legislation to that effect. Accordingly, anybody could initiate court proceedings in those countries against foreign States or their Governments for their non-sovereign acts, mainly commercial activities. Although the distinction between sovereign and non-sovereign acts was unscientific and had been the subject of serious international disputes, courts in those countries took it as their legal right to impose compulsory jurisdiction on foreign States or their Governments. As a result, there had been a great increase in the misuse of such proceedings which had aroused the concern of many States and caused tension in inter-State relations. The Commission should therefore exercise special caution in dealing with the subject, since otherwise it would have difficulty in finding widespread acceptance for any articles or legal instrument it succeeded in formulating and the whole exercise would lose any practical significance.

(Mr. Huang Jiahua, China)

39. Whether State immunity was a principle of international law or an exception to territorial jurisdiction was a question that involved the direction of codification and therefore had to be clarified first. A vast majority of States recognized State immunity as a well-established principle of international law. Even those which had gone over to the restrictive doctrine could not totally deny the principle, since it was based on the sovereign equality of States, which had been enshrined in the Charter of the United Nations as a peremptory norm constituting the corner-stone of contemporary international law. There could therefore be no denying that State immunity was an important principle of international law.

40. At the thirty-fourth session of the Commission, it had been agreed that State immunity was an independent principle and not an exception and the Commission had been requested to revise the text of draft article 6 accordingly. But it had been unable to do so at that session, and at the following session attention had shifted to exceptions to State immunity, on which so many proposals had been received that, in the end, the concept of State immunity had been left with only a nominal existence and little significance. In his delegation's view, it must be made clear that the purpose of codification was first first of all to recognize State immunity as an independent and important principle of international law and then to consider existing problems, to sum up the positions and practices of States and to seek solutions to contradictions and conflicts so as to formulate uniform rules acceptable to the international community.

41. On the question of exceptions to the principle of State immunity, the key factor was that, without the consent of the sovereign State concerned, no foreign court had a right to exercise jurisdiction over it. Consent implied that there could be exceptions, but they must be based on the consent or volition of the State concerned, which could be acknowledged either expressly or by implication in treaties or commercial contracts. However, for the court of one State to deny jurisdictional immunity to another State or its Government without its consent, on the basis of its own internal law, would appear to violate the principle of the sovereign equality of States. It was inconceivable that such jurisdiction was in keeping with the principle of respect for, and did no harm to, the sovereignty of the other State.

42. With specific reference to draft article 12, he noted that the Commission's report described paragraph 1 as a compromise, but the text showed that unfortunately it accommodated only one viewpoint, since it affirmed that a foreign State engaging in commercial activities did not enjoy jurisdictional immunity. Moreover, it took the applicable rules of private international law as its basis for jurisdiction, which was unreasonable. Whether a foreign State or its Government was entitled to jurisdictional immunity should be decided by reference to international law. Only afterwards could it be decided which court should take up the case. The draft article presupposed the existence of jurisdiction of the court by applying the applicable rules of the State of the forum and so presumed that the defendant State accepted that jurisdiction. It thus reversed the order of the primary and secondary rules. To presume that a State's action in signing a commercial contract with a natural or juridical person of another State meant that

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it was also signing away its immunity was arbitrary and without reasonable justification. As it stood, article 12 authorized a court where proceedings had been initiated to impose compulsory jurisdiction on a foreign State or its Government at will. His delegation found that difficult to accept and therefore proposed that the article should be revised.

43. In its commentary to article 12, the Commission had also provided a considerable number of cases supporting the argument that there was a trend towards the restrictive view of State immunity. But everyone knew that the examples came mainly from the national legislation and judicial decisions of certain Western countries and from regional conventions concluded among them. The numerous developing countries were not in favour of the practices of restricted immunity, nor were they willing to adopt them. The idea of restricted immunity had emerged long after the principle of State immunity had been established and had acquired its current binding force. Restricted immunity could therefore only be a special rule for States that had agreed to its use among themselves and could not be imposed upon the rest of the international community.

44. It had been said that the principle of restricted immunity provided a two-way street, but that was not a justified agreement, since most commercial transactions were carried out in developed industrial States and most proceedings were initiated there, whereas the States involved in those proceedings were often developing countries. In reality, the latter could only be defendants in the courts of those developed countries which had adopted restricted immunity. They were thus threatened with compulsory jurisdiction and even compulsory execution, with or without their consent - an unjust situation which could only cause tension and undermine normal State relations. The secretariat of the Asian-African Legal Consultative Commission had issued a memorandum during the thirty-seventh session of the General Assembly, pointing out that it was extremely doubtful whether the trend towards the restrictive doctrine of State immunity was in the interest of developing countries and whether it should be reflected in the codification being carried out by the International Law Commission. The same organization had issued a similar memorandum at the beginning of the thirty-eighth session. His delegation therefore hoped that the Commission, in its codification of the subject, would pay serious attention to the opinions and recommendations of the many developing countries, so that the draft articles presented would truly be in the interests of the general membership of the international community.

45. Commenting on the question of State responsibility, he said that his delegation took note of paragraphs 100 and 108 of the report. It should not be too difficult to establish a close link between parts two and three of the draft articles, provided that part two was formulated on the basis of the Charter of the United Nations and other relevant international instruments giving a clear and reasonable statement of the consequences of internationally wrongful acts.

46. Since the consequences of such acts, which were common in bilateral relations, had already been covered in general customary law and existing international legal instruments, the codification exercise should be focused on international crimes,

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particularly crimes of aggression. In fact, article 19 of part one of the draft articles made it clear that the concept of international crimes primarily covered crimes of aggression, and it would therefore be logical to include provisions on the consequences of aggression in part two.

47. Questions relating to "responses" or "reprisals" should be handled with extra care. His delegation noted that the Commission had not yet touched on the substance of the matter. It reserved the right to comment at an appropriate time on the question of individual and collective self-defence, which involved the implementation of Chapter VII of the Charter.

48. With regard to the question of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, the granting of privileges, immunities and facilities to diplomatic couriers was the central point of the general framework of the legal status of diplomatic couriers. An appropriate balance must be maintained in the draft articles between the sending State's request for confidentiality and the receiving and transit State's need for an assurance of safety. There must also be a balance between ensuring safe and speedy delivery of diplomatic bags and guaranteeing compliance with the receiving State's laws and regulations. Moreover, possible abuses of rights by either the sending or the receiving State must be prevented. His delegation noted that several representatives were in favour of expanding the scope of the draft articles to include the couriers of international organizations and national liberation movements. Such practices already existed, and it was to be hoped that the Commission would consider the question seriously.

49. Mr. AL-QAYSI (Iraq) said that annual consideration by the committee of the report of the International Law Commission was an important phase of the process of codification and progressive development of international law. Member States had undertaken a commitment under the Charter to co-operate in that process, and clearly all States should participate in the drafting and adoption of any instrument intended to govern international relations. The international community's attention should always be focused on building a system of law based on the principle of collective interest.

50. Leaving aside for a moment the International Law Commission, in view of its special characteristics, he wished to point out that over the past few years the collective efforts made in the various legal organs of the General Assembly had not produced encouraging results. Member States should join together in analysing the reasons for that situation and considering ways of reforming the organs concerned, if necessary. They should look into the Sixth Committee's agenda, the quality of its debates, the objectives they were trying to achieve in the committee and the results attained each year. He wondered how much evidence there was of constructive dialogue and consultation, for example. The Committee was a political body intrusted with the consideration of legal questions, which was a task requiring flexibility and tolerance. He wished to emphasize that the International Law Commission had, on the whole, focused on the collective interest of the international community.

(Mr. Al-Qaysi, Iraq)

51. The Commission seemed to have made an auspicious start with its resumed consideration of the topic of the draft Code of Offences against the Peace and Security of Mankind. He would like to comment on the first major question raised by the Special Rapporteur, namely, the scope of the draft Code. Firstly, with regard to the contents of the draft ratione materiae, his delegation fully supported the unanimous view of the members of the Commission that the draft should cover only the most serious international offences, as indicated in paragraphs 48 and 69 (a) of the report. When determining the offences, the Commission should take into consideration such instruments as those relating to genocide, racial discrimination, apartheid, slavery, torture, terrorism and humanitarian law. Moreover, the draft should contain a separate section dealing with the question of such exceptions as self-defence and actions taken in pursuance of decisions under Chapter VII of the Charter of the United Nations. His delegation also welcomed the agreement reached by the Commission that, in the definition of offences, the political elements should be discarded.

52. With regard to the content of the draft ratione personae - in other words, the subject of law to which international responsibility could be attributed - he noted from paragraph 51 of the report that the Commission unanimously accepted the proposition of the international criminal responsibility of individuals. Taking account of article 19 of the draft articles on State responsibility, concerning international crimes and international delicts, and the actual text of the 1954 draft Code, his delegation felt that it was not possible to leave aside crimes committed by States. Acts committed by individuals were attributable to the State, as was clear from part one of the draft articles. The counter-arguments reproduced in paragraph 55 of the report were more akin to the question of implementation than to the question of the attribution of international criminal responsibility to States, and his delegation therefore believed that the views reflected in paragraphs 56, 59 and 60 merited closer attention. Lastly, since there was no disagreement on the attribution of international criminal responsibility to individuals, paragraph 69 (b) of the report should have been drafted more precisely. It should relate solely to soliciting the General Assembly's views on the attribution of international criminal responsibility to States and other entities.

53. His delegation welcomed the Commission's intended approach to the question of methodology (paras. 62-67), which was the second major issue raised by the Special Rapporteur.

54. The third major issue was the sensitive question of the implementation of the Code. Although certain penalties, such as imprisonment, could not be applied to States, it was the nature of the act rather than the penalty that made it criminal. The penalties to be imposed must take account of the special nature of States. His delegation shared the prevailing opinion in the Commission regarding the need to establish an international criminal jurisdiction (para. 68). There did not appear to be any real difficulty in subjecting crimes committed by individuals to such a jurisdiction, and a realistic approach must be taken to the question whether the same competence could be exercised in respect of States. At the

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current stage, a decision should be adopted to extend the Commission's mandate to include the preparation of a draft statute for an international criminal jurisdiction, a task that it could perform at a later stage. The Commission would then be in a better position to tackle the question of jurisdiction in a manner that would balance the need for effectiveness with the need for political realism.

55. With regard to jurisdictional immunities of States and their property, his delegation had noted with considerable interest the views reflected in paragraphs 79 to 91 of the report relating to draft articles 13 and 14 and believed that the revised texts of those two articles, as proposed by the Special Rapporteur, represented a considerable improvement. Article 10 was also a great improvement over the original text submitted in the Special Rapporteur's fourth report and considered by the Commission at its thirty-fourth session. It was, like articles 8 and 9, a logical progression from the combined effects of articles 6 and 7 and was adequate on the whole.

56. Article 12 was the single most important article prepared so far. Although the basic principle remained the same, the current drafting of the article was appreciably different from that originally proposed by the Special Rapporteur. It now spoke of commercial contracts rather than trading or commercial activity. Moreover, it eliminated the territorial link as a basis for jurisdiction and made a simple reference to the State. It would seem that the most important point stressed in the new text was that, as far as the territorial link was concerned, the applicable rules of private international law determined whether differences relating to commercial contracts fell within the jurisdiction of a court of the other State. It was clear from the commentary to the article that the text was a consensus formula. His delegation was particularly gratified at the way in which the Commission had sought to reconcile views and theories prevalent in various legal systems, including those of the developing countries. However, it had certain misgivings with regard to the introduction in paragraph 1 of the neutral expression "applicable rules of private international law" to replace the concept of the territorial link. Although the Commission was not concerned with harmonizing jurisdictional rules, the notion of implied consent embedded in the text was too important to be invoked on the basis of a tenuous relationship between the commercial contract and the State of the forum. If that relationship was seen in terms of an objective concept, namely, "a significant territorial connection", his delegation's misgivings would disappear. The foreign defendant State would thus not be left in the virtually hopeless situations that would result from a long-arm jurisdictional rule of the State of the forum. The Special Rapporteur had in fact proposed an additional formula designed to deal with such situations, but the Commission had been unable to consider it for lack of time. His delegation hoped that the Commission would consider the wording proposed by the Special Rapporteur at a later date.

57. Following the change of focus from "trading or commercial activities" to "commercial contract" in the text of article 12, it would be logical to revise the texts of articles 2 (1) (g) and 3 (2). His delegation welcomed the dual criterion in article 3 (2), which was designed to provide adequate safeguards for developing

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countries. Moreover, while it was clear that the text of article 3 (2) was not coextensive with that of article 2 (1) (g), paragraph (4) of the commentary made the contrary intention obvious. It would be preferable to reword the beginning of article 3 (2) to read: "In determining the commercial character of a contract as defined in article 2, (1) (g) above". The need for paragraph (4) of the commentary would thus be eliminated.

58. There remained to be discussed only article 15, which his delegation considered appropriate on the whole.

59. The topic of State responsibility was of vital importance to all States, as it formed the core of international law and encompassed all its aspects. His delegation agreed with the Commission that, at least for the time being, it should work from the perspective of drafting articles which would ultimately be embodied in a general convention covering every aspect of the topic and, in particular, dealing with the legal consequences of aggression, of other international crimes, as well as of simple breaches of bilateral obligations. His delegation also felt that, unless sufficient progress was made in elaborating part two of the draft, a definite opinion on the possible contents of part three would not be possible. Obviously, part three, which would deal with the question of implementation was interlinked with part two; but the mechanisms of implementation, which were variable, surely depended in large measure upon the different cases which would be dealt with in part two. In addition, in tackling the question of reprisals, an appropriate balance had to be struck between the necessity for the establishment of law and order and the need of the injured State to take appropriate measures for self-preservation. Moreover, any possible connection between the work of the Commission on that topic and on the draft Code of Offences Against the Peace and Security of Mankind should not obstruct the independent elaboration of draft articles in those two fields, as any possible overlap could be eliminated at a later stage.

60. As stated in paragraph 105 of its report, the Commission had provisionally adopted the text of four draft articles, elaborated on the basis of the draft articles proposed by the Special Rapporteur in his second and third reports. Article one would seem to correspond substantially to draft article 1 proposed by the Special Rapporteur in his third report, with the marked difference that, instead of placing the emphasis on the internationally wrongful act and the rights and obligations arising therefrom, a reference had been made to "legal consequences", which was intended to avoid any problems of interpretation that might arise in connection with the original emphasis. That seemed to be quite appropriate, since the sole object of the article was to mark a link between parts one and two of the draft. Article 2, which was clearly residual in character, set out to determine the legal consequences of an internationally wrongful act by rules of international law other than those contemplated in part two. Obviously, the saving clause at the beginning of the article was quite appropriate, since it was intended to preserve the application, where necessary, of the provisions yet to be elaborated, of article 4 on jus cogens, and article 5 on the provisions and procedures of the Charter of the United Nations, both of which permeated the

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application of the whole corpus of contemporary international law. Article 3 dealt with the parameters of the application of rules of customary international law in regard to legal consequences of an internationally wrongful act not set out in part two, subject to the two limitations envisaged in articles 4 and 5. The need for such an article was obvious, since part two might not be exhaustive as to legal consequences. The addition of the clause "the maintenance of international peace and security" in article 5 was felicitous, since it made the reference to the supremacy of the provisions and procedures of the Charter of the United Nations more precise. Paragraph (2) of the commentary was apt in that connection. Furthermore, an article in the nature of a framework provision, along the lines of article 6 proposed by the Special Rapporteur in his third report, was necessary for the completion of the overall provisions of a general character in part two of the draft articles.

61. His delegation wished to express its approval of the comprehensive manner in which the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier had been dealt with by the Special Rapporteur. This approach constituted a sound legal basis for a uniform régime governing the status of the courier and the bag. The discussion on the topic in the Commission had revealed that the draft articles, once completed, would have some practical utility in clarifying a number of points for the benefit of all concerned, provided that proper safeguards were not overlooked.

62. He hoped that the Commission would be able to proceed with its work on the topic on relations between States and international organizations in accordance with the conclusions listed in paragraph 277 of its report.

63. His delegation attached great importance to the topic of international liability for injurious consequences arising out of acts not prohibited by international law and hoped that adequate time would be allowed at the Commission's thirty-sixth session for an assessment in practical terms of the steps to be followed in the elaboration of that topic. His delegation did not agree that the subject-matter was artificial and had no foundation in law. It shared the views expressed in paragraph 297 of the report, particularly the point that the issue was not one of wrongfulness or of strict liability but simply one of equity or fairness. That opinion assumed greater importance for a large majority of States, since it was usually the poorer and less developed States which sustained physical transboundary harm. His delegation felt that there was much truth in the statement of the Special Rapporteur as summarized in paragraph 298 of the Commission's report. It also shared his views set out in paragraph 302 of the report. It was to be hoped, therefore, that the singular opposition in the Commission to that topic would collapse. The incisive legal analysis and the profound sense of fairness which the Special Rapporteur had brought to his task were such that he should be rendered all possible assistance to enable him to begin the process of elaborating draft articles.

64. Mr. ECONOMIDES (Greece), referring to the draft Code of Offences against the Peace and Security of Mankind and to the points raised by the Commission in its conclusion on the topic (A/38/10, para. 69), said that his delegation could support the Commission's decision that the codification should cover the most serious international crimes. Thus, aggression, the most serious of all international crimes, should constitute the main feature of the future Code.

65. At the current stage, his delegation was in favour of the Commission's drafting the statute of an international criminal jurisdiction for individuals. Persons committing international crimes punishable by the Code would thus be treated as direct subjects of the international juridical order. Naturally, international jurisdiction presupposed the establishment of a scale of penalties for each international crime covered by the Code and the settlement of other questions connected with criminal responsibility, such as preparation, complicity and fraud.

66. With respect to the third point raised by the Commission, it should be noted that international responsibility was not criminal responsibility because it did not entail penalties. However, there were in international law institutions having penal elements, namely reprisals and the collective security arrangements under Chapter VII of the Charter. Bearing in mind the shortcomings of the collective security system, his delegation could agree that the international jurisdiction should also be competent with respect to States.

67. Turning to the question of the law of the non-navigational uses of international watercourses, he said that he wished to make two general comments on the Special Rapporteur's report. First, in trying to reconcile the rights of upstream and downstream countries, the Special Rapporteur was going in the right direction, but he had not yet succeeded in achieving an exact balance between those rights. His second general comment related to the final result of the work being done on the topic. His delegation was of the opinion that the work should result in the preparation of a general international convention which would codify existing law on international watercourses - with the exception of navigational uses - and ensure its progressive development in accordance with Article 13 of the Charter. The codification and progressive development of the law on the subject had been facilitated by the draft principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States approved by the Governing Council of UNEP.

68. His delegation could accept as a working hypothesis the classical notion of an international waterway as a contiguous waterway if it separated two States or a successive waterway if it traversed territories of two or more States. However, it would have preferred the more modern notion of "international drainage basin", which scientifically was more comprehensive and sounder. It could also accept the notion of an international watercourse system as defined in draft article 1. For the sake of greater clarity, however, article 1 should be linked to article 6, because any international watercourse system was automatically a shared natural resource within the meaning of article 6. Also for greater clarity, the necessary elements of any international watercourse system, such as tributaries, glaciers and ground water should be specified in article 1.

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69. His delegation supported article 6, which was the core of the draft articles. The modern notion of a shared natural resource was both flexible and sound. It emphasized the necessary interrelationship between the rights of co-riparian States and constituted the basis for certain essential obligations, such as the obligation of co-riparian States to co-operate in their mutual interest. The consequence of the existence of a shared natural resource was that each system State was entitled to use it reasonably and equitably. In that context, equity was not a concept extraneous to the law but an eminently juridical rule imposed by customary international law. Equity was therefore a manageable concept subject to specific criteria which were enumerated in draft article 8.

70. Articles 7 and 8 were on the whole constructive. They contained the general principles and particular criteria on the basis of which the content of the respective rights of States sharing the same international watercourse system would be determined. However, in article 8, the criterion governing the existing situation with respect to the sharing and use of waters should be more clearly stated.

71. His delegation was not satisfied with article 9. It was unthinkable that the limit of responsibility should be that of "appreciable harm". That provision went much too far. Principle 21 of the 1972 Declaration of the United Nations Conference on the Human Environment spoke of damage to the environment with no qualifying adjective, and the 1978 Nairobi draft principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States used the term "affect significantly" and explained that the term referred to any appreciable effects on a shared natural resource and excluded "de minimis" effects. Thus, it could be said that existing international law accepted restricted or minimal harm. If it was necessary to use an adjective in article 9, the French word should be "sensible", which appeared in articles 4 and 5 of the draft already considered by the Commission. Moreover, article 9 should provide that any re-routing or diversion of the waters of an international watercourse system outside that system would automatically constitute harm prohibited under article 9. Such a provision would be justified by the exceptional gravity of acts affecting the very integrity of international watercourses. It should also be expressly provided that any harm within the meaning of article 9 would be assessed not in isolation but on a cumulative, global basis which would take account of harm done earlier. Naturally, the first harm could only be assessed individually, but the third harm - harm C - should be measured in conjunction with former harms A and B. That comment, and his comments on the use of the adjective "appréciable" in the French text, were also applicable to water quality and therefore concerned draft article 23 on the obligation to prevent pollution.

72. Article 10, concerning the obligation to co-operate, was in conformity with existing practice. In the opinion of his delegation, the words "to the extent practicable" should be deleted from paragraph 1.

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73. Articles 11 and 12 were, juridically, the logical consequence of articles 6, 9 and 10. However, the period of six months provided in article 12 was too short for the translation and study of complicated documents. Provision should be made for a period of at least one year. Otherwise, because they lacked time to make a proper assessment of possible damage, States would tend to oppose any projects notified to them.

74. Article 13, paragraph 3, which allowed the notifying State to act unilaterally in cases of the utmost urgency, upset the balance of the draft and irreparably undermined the safeguard system, which was based on articles 11 and 12. Legally and logically, that paragraph was acceptable only where the State notified refused to settle its dispute with the notifying State by a binding procedure, in which case the notifying State would have no other means at its disposal than unilateral action. That provision, which merely envisaged ex post facto responsibility, should be very carefully reconsidered.

75. Article 14, paragraph 2, stipulating that a State which did not comply with the provisions of articles 11 to 13 would incur liability not only for appreciable harm but for any harm resulting from its action, should also be very carefully reviewed. That provision, which seemed to constitute a deterrent, was far from sufficient to ensure respect for the treaty. In the opinion of his delegation, it encouraged non-respect of the treaty. In such cases also, there should be binding procedures for the settlement of disputes and provision should perhaps be made for repair in case of appreciable harm.

76. Articles 15 to 30 constituted a good working basis.

77. On the question of the settlement of disputes, he observed that, if ever there was a convention under which, in addition to consultations, negotiations, commissions of inquiry and conciliation, there was a real need for binding settlement procedures, it was the draft convention under consideration. His delegation was therefore definitely in favour of arbitration and judicial settlement. It was not convinced that the arrangements relating to the settlement of disputes provided for in the Convention on the Law of the Sea were also relevant to international watercourses. For the latter, it was certainly necessary to go further than compulsory conciliation.

78. Turning to the question of jurisdictional immunities of States and their property, he said that the draft articles, which took account of the modern trends of international law on the subject and, in particular, of the fundamental difference between acta jure imperi and acta jure gestionis, were well conceived. His delegation wondered whether the phrase "commercial contracts concluded between States or on a government-to-government basis" in article 12, paragraph 2 (a) was really necessary, since such contracts came within the wider category of contracts concluded between States, which was expressly covered by article 12.

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79. On the question of international liability for injurious consequences arising out of acts not prohibited by international law, he said that his delegation agreed that the scope of the topic should be confined to the duty to avoid, minimize and repair physical transboundary harm which, when it became persistent, ran counter to good-neighbourly relations and international law in general. His delegation attached particular importance to the preventive aspect of the topic and hoped that the first tangible results of the work on it would be available at the next session of the General Assembly.

The meeting rose at 6.20 p.m.