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Chairman: Mr. GASTLI (Tunisia)

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The meeting was called to order at 3.15 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. Mr. BERNAL (Mexico) noted that, in the summary of the International Law Commission's discussion of the topic of State responsibility on the basis of the Special Rapporteur's fourth report, contained in chapter IV of the Commission's report (A/38/10), reference was made to the concept of aggression and the corresponding notion of individual and collective self-defence and to four elements of legal consequences that were common to all international crimes. The last two elements, as set forth in paragraph 111 of the report, could in fact be merged; violation of the principle of non-intervention in matters within the domestic jurisdiction of another State could be combined with the duty of solidarity between all States other than the author State. He also noted that three types of new legal relationships were distinguished in paragraph 113 of the report. His delegation believed that, in addition to the suspension or termination of existing relationships on the international plane, account should be taken of the possibility of changes in existing relationships and the establishment of new relationships.

2. The topic of international liability for injurious consequences arising out of acts not prohibited by international law, dealt with in chapter VIII of the Commission's report, should continue to be studied. State liability involved not only a moral obligation but also such principles as justice and equity. His delegation did not endorse the view that the duty to make reparation for damage always had a contractual basis; account should also be taken of the underlying principle that it was incumbent upon a State to avoid, minimize and make reparation for damage suffered by another State. The 1971 Convention on International Liability for Damage Caused by Space Objects was a clear illustration of the extent to which permitted activities involved risks.

3. It would appear that some States had little enthusiasm for the idea that an activity that might be regarded as dangerous could entail liability for its consequences. The type of liability in question was not one that necessarily involved the assignment of blame to the source State or negligence on the part of that State; it was the activity per se that might cause damage. The affected State could not be expected to bear the consequences of activities entailing risks. His delegation was well aware that States took the necessary precautions when engaging in such activities, but it believed that, in the event of injurious consequences, reparation must be made. Consideration should be given to the possibility of including an article based on the concept of prior consultations in cases where the source State recognized that another State might suffer damage. In the course of such consultations, the source State could provide relevant information and consideration could be given to the types and extent of the potential damage and to appropriate measures that might be adopted. In other words, an attempt would be made to avoid and minimize any conflict that might arise from acts not regarded as illicit. Prevention of and reparation for transboundary effects would mark the dividing line between permitted and illicit acts.

(Mr. Bernal, Mexico)

4. He noted that article 2 (1) (g) and article 3 (2) of the draft on jurisdictional immunities of States and their property were closely linked. The current wording of article 3 (2) combined the two concepts of "nature of the contract" and "purpose of the contract". However, the use of the word "primarily" gave the latter concept a secondary status, particularly in view of the qualification at the end of article 3 (2). That interpretation was confirmed in paragraphs (1) and (2) of the commentary on that provision. His delegation continued to believe that it was essential to take account of the purpose of the contract. The court of the forum State should consider that matter and not wait to see whether its decision was contested or not. Both concepts could be included in the draft, as the commentary as a whole appeared to indicate, but the wording of the particular part of the commentary to which he had just referred might give rise to unnecessary controversy.

5. Mr. FERRARI BRAVO (Italy) said that the approach taken in article 10 of the draft on jurisdictional immunities of States and their property was in keeping with that taken by the Italian courts for many decades. Article 15 was also in keeping with Italian practice and contained useful specifications of the various situations that might arise within its scope. Article 12 was basically acceptable, but paragraph 1 should be reworded somewhat in second reading. It would be preferable to indicate, as in article 15, that a State could not invoke immunity in respect of the categories of contracts in question in that clause if another State claimed that its courts had jurisdiction. Furthermore, the reference to the applicable rules of private international law might be misleading, as what was actually involved in that context was, rather, rules relating to conflicts of jurisdiction. Such rules were normally separated from the rules of private international law and were often to be found in different legislation. The reference to private international law also obscured the fact that, in the case under consideration, the only relevant national system was the system of the state of the forum. A general reference to the applicable rules of private international law might lead to the temptation to bring into the picture other systems of rules on the conflict of laws and/or of jurisdiction, such as the national system of the defendant State or of other countries which, in theory, might have a say in the contract in question, such as the country where the contract was concluded or was to be performed or the country whose rules were designated as governing the contract. Such an eventuality could give rise to disputes, and it would therefore be preferable to use more precise terms.

6. His delegation endorsed the Special Rapporteur's view that the question of immunity in matters of employment was undergoing rapid evolution owing to the enormous number of local personnel not entrusted with official functions who were employed by foreign States. A line should be drawn between the area to which immunity from jurisdiction in matters of employment applied and the area in which it did not. It was also doubtful whether the jurisdiction of local courts, when recognized, should be justified by the concept of implicit consent, as suggested by the Special Rapporteur. It was even more doubtful whether the criterion of the placing of the employee under the local social security system was a workable one. In that connection, it should be noted that, independently of the question of State immunity, many Governments requested foreign States to submit to local social security systems when engaging local personnel.

(Mr. Ferrari Bravo, Italy)

7. In general, his delegation endorsed the programme of work outlined by the Special Rapporteur in his statement to the Committee. It wished merely to caution against an excessive use of presumptions of waiver of immunity. Furthermore, although some of his delegation's fears regarding article 6 had been dispelled, it continued to believe that the article should be redrafted. However, it was now more confident that a mutually acceptable solution could be found.

8. The existing international legislation was sufficient to solve the major problems relating to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. However, his delegation did not oppose the new endeavour being made in that connection, provided that the exercise resulted in a short and simple protocol that did not depart from the relevant conventions. Although it was somewhat concerned at the length of the draft prepared by the Special Rapporteur, it endorsed the articles adopted by the Commission so far. It could not have endorsed the extension of the scope of the future protocol to the correspondence of international organizations and therefore regarded the current wording of article 2 as balanced. Moreover, since the international legal status of national liberation movements were still unclear, the future protocol should not even refer to them.

9. His delegation fully supported the approach taken by the Special Rapporteur for the topic of the law of the non-navigational uses of international watercourses, which consisted in preparing, from the outset, a complete draft that was subsequently to be revised in the light of the comments made. The topic had importance as a first application to a specific problem of the idea of liability for non-wrongful acts, as recognized in paragraph 292 of the Commission's report. There must be close co-ordination of the work carried out on that topic and on the topic of international liability for injurious consequences arising out of acts not prohibited by international law.

10. His delegation was somewhat perplexed at the suggestion concerning a framework agreement containing residual rules, referred to in paragraph 216 of the report. The difficulty lay in the mere fact of drafting a convention containing only residual rules in the area under consideration. It was doubtful whether States that were already parties to an important system agreement would wish to be bound by a framework agreement. Moreover, States that had not yet concluded a system agreement might wish to become parties to a framework agreement only if all States sharing the same international watercourse system also became parties. It would therefore be preferable to draft model rules for adoption by the General Assembly not as a binding convention, but rather as a recommendation.

11. The draft should contain only a limited number of substantial rules and concentrate on procedures and the consequences of failure to observe them. He stressed the importance of mechanisms for the peaceful settlement of disputes, the details of which might be considered at a later stage in the light of future discussions in the Commission.

(Mr. Ferrari Bravo, Italy)

12. A definition of the expression "international watercourse system" might be a useful addition to the draft, although it need not necessarily be identical to the one prepared in 1980 and reproduced in paragraph 202 of the report. Such a definition was important in view of the essential statement, in the note describing the Commission's tentative understanding of what was meant by the term, that "any use affecting waters in one part of the system may affect waters in another part".

13. Article 6, concerning "shared national resources", did not appear to be particularly useful, since the draft contained no specific application of the concept of a shared natural resource which might differentiate it from the concept of an international watercourse system. In other words, no consequence was drawn from the qualification of an international watercourse system as a "shared natural resource". The Special Rapporteur might have meant to recall pre-existing general priciples on shared natural resources, but it was quite doubtful whether such principles did at present exist, as seemed to be borne out by the difficulties encountered by UNEP in dealing with that matter. It would therefore be wise to drop article 6 altogether. What was required for the purposes of the draft could be achieved more easily without such a clause and without pre-empting the future development of international law on more general problems which might be viewed from a different perspective, according to the field involved.

14. He agreed with the approach suggested by the Special Rapporteur regarding notification to other States participating in an international watercourse system. However, some element of flexibility should be inserted in the mechanism suggested by him. That might facilitate the acceptance of important development projects which could be obstructed by too rigid rules.

15. Chapter IV of the draft was the most felicitous one. However, it was important to co-ordinate its provisions with those contained in chapters II and III. In particular, article 23, paragraph 1, on the obligation to prevent pollution, should be co-ordinated with article 9, concerning prohibition against activities with regard to an international watercourse system causing appreciable harm to other system States.

16. Turning to chapter VIII of the Commission's report, he said that, the more the Commission was aware of what could reasonably be regulated under the topic entitled "International liability for injurious consequences arising out of acts not prohibited by international law", the more the gap between that topic and the item concerning State responsibility widened. His delegation supported that trend. It did not believe that general rules on strict liability existed in international law or that useful analogies could be drawn from municipal law. Many national systems practically ignored the idea of strict liability and tended to solve the important problems created by new technologies which might give rise to major damage or the problems of ultrahazardous but not illicit activities by recourse to other principles which focused on the idea of indemnization linked to what, in Italy, was called "enrichment without cause". More importantly, his Government believed that those problems should be approached separately, according to the field in which they arose.

(Mr. Ferrari Bravo, Italy)

17. A similar approach was also useful in international law. The idea of sic utere tuo ut alienum non laedas should only be the general background for the construction of a series of legal régimes, each one in keeping with the needs of the problem being regulated. Some of those régimes already existed, and the International Law Commission would be successful if it followed a selective approach like the one suggested by the Special Rapporteur when he had proposed to concentrate his efforts on problems created by physical transboundary harm resulting from physical activities within the territory or control of a State. The main task of the draft rules should be to sketch, first of all, a system for the prevention of harm, followed by a system of measures to avoid making it worse. Problems of reparation were only the third aspect, however important it might be. The draft should focus mainly on procedures, and substantive rules should be limited to what was strictly needed. He hoped that those rules would be tailored strictly to the scope of the draft and would not attempt to state broad and general principles which might prove to be inapplicable to other fields. The similar problems in different areas which might not be related to physical activites within the territory of a given State should be left aside for the time being.

18. The Commission appeared to have lost its way in its consideration of the problems of State responsibility, being divided between those who wished to start with the questions which might arise from the distinction between international crimes and international delicts introduced by article 19 of part one and those who would prefer to start with less controversial issues. Without expressing a preference for either approach, his delegation hoped that the Commission and the Special Rapporteur would emerge from the current uncertainty and stalemate. A codification endeavour which had already had an impact on international practice at the highest possible level should not be allowed to die. He therefore hoped that the Commission would make a clear choice as to methodology at its next session. Taken in isolation, the articles adopted at the thirty-fifth session appeared uncontroversial, but their real impact could only be understood in the light of what would follow.

19. His delegation agreed that the question of the draft Code of Offences against the Peace and Security of Mankind was closely related to the topic of State responsibility. Consequently, in view of the difficulties the Commission was experiencing in agreeing on the consequences of international crimes referred to in article 19 of part one of the draft articles on State responsibility, it should take a cautious approach with regard to the draft Code in order to avoid further complications and delays in pursuing the work on State responsibility. At the current stage, his delegation felt that the Code should be limited to the international criminal responsibility of individuals, while international crimes committed by States would be better dealt with in the framework of the draft articles on State responsibility. His delegation firmly believed that the draft Code should include provisions on penalties and on an international criminal jurisdiction, the statute of which should form an integral and inseparable part of the Code. It could not accept that, in so delicate a matter, normative clauses could become binding unless accompanied by clauses on their judicial implementation.

(Mr. Ferrari Bravo, Italy)

20. In conclusion, he noted with appreciation that the Commission had resumed its consideration of the topic entitled "Relations between States and international organizations". He agreed with the conclusions in paragraph 277 of the report and was quite confident that the Special Rapporteur would soon start substantial work on the topic, bearing in mind the guidelines given by the Commission, in particular the recommendation that the work should proceed with great prudence.

21. Mr. AL-QAYSI (Iraq) said that, for obvious reasons, his country had vital interests in relation to the topic of the law of the non-navigational uses of international watercourses, which involved a unique physical phenomenon. The physical facts needed to be recognized in deciding upon the legal rules and scientific and technical advice should therefore be sought at an early stage of the the Commission's work in order to achieve practically oriented legal texts.

22. The complex and technical nature of the subject-matter, as well as its correlation to State interests, made solutions difficult. An aggregation of conflicting State interests should therefore be sought and solutions worked out which were capable of wide acceptance and which achieved a balance between the general and the specific.

23. A general criticism voiced in the Committee had been that the Commission should only seek to elaborate international norms which reflected the actual practice of States since only such norms would receive the widest possible acceptance. It was said that a convention could only be effective if all States, regardless of their geographical location with respect to one or more watercourse systems, were given the guarantee that their rights would be recognized. In his view, that position involved the rejection of any approach based on a balance of interests as a mode of progressive development. The critics therefore needed to show that the current practice of States contained all the necessary norms which guaranteed to all States recognition of their rights. Failure to do so would mean that the codification of State practice was insufficient to resolve the type of problems arising in connection with the topic. Such guarantees were clearly impossible. That fact was inherent in the approach adopted by the Commission. The latter should codify the existing law and develop it progressively to the appropriate extent which should indicate to States the further direction of development they might opt to take in their system agreements.

24. With respect to the salient provisions of the draft, he noted from paragraph 225 of the report that the purpose of article 1 was not to create a superstructure from which legal principles could be distilled but that the expressions "international watercourse system" and "system States" were convenient descriptive tools sufficiently comprehensive to provide the necessary guidance. That conception, which clearly avoided any concrete definition of concepts, tallied well with the understanding reached in the Commission in 1980. It was therefore simply a formulation which would help the work of the Commission to get under way. Its final form would depend to a large extent on the final shape which the other draft articles took as the work proceeded. With that in mind, he was prepared to express very tentative approval of the text as it stood.

(Mr. Al-Qaysi, Iraq)

25. Articles 2 and 3 reproduced, with minor changes, the texts of articles 1 and 2 provisionally adopted by the Commission in 1980. In connection with article 3, paragraph (2) of the commentary to the former article 2 had stated that the draft article laid down a requirement which was geographic. He wondered whether, in the light of article 4 - particularly paragraph 3 - article 3 meant that a system State contributing no more than ground water was being put on an equal footing with another which might have hundreds of miles of the river flowing within its territory. That was not a spurious problem.

26. Articles 4 and 5 reproduced verbatim the texts of articles 3 and 4 provisionally adopted by the Commission in 1980. With respect to article 5, paragraph 2, he wondered what would be the legal situation with regard to the problem of non-recognition. The article introduced the standard of "appreciable extent" in relation to the entitlement of a system State, whose use of the waters was affected adversely up to that standard, to participate in the negotiation of a proposed system agreement. That raised the significant issue of whether the rule should include qualification of the degree to which State interests must be affected in order to support their right to negotiate and become a party to a system agreement. It was noteworthy that the Commission had thought it far more useful to quantify any such effect, but had gone on to state that such quantification was not practical in the absence of technical advice. Because of the importance of the standard in question, and particularly in view of the criticisms raised in connection with it, such technical advice should be sought in order to introduce, at an appropriate place in the text, the necessary quantitative elements which eliminated any possible ambiguity surrounding the standard itself. Moreover, the Commission had envisaged in 1980 that the standard of "appreciable extent" was one which could be established by objective evidence, provided that such evidence could be secured, and that there must be a real impairment of use. There again, one was bound to ask at what point in time the criterion of impairment to an appreciable extent became operational. Could it be substantiated on the basis of objective scientific data at the stage of planning of a particular project, its execution, or only definitively after its operation? If it was to be at the latter stage, was it realistic to assume the possibility of amendment of the project, its readjustment or its abandonment?

27. Chapter II of the draft articles, dealing with the rights and duties of States, represented the heart of the draft. Article 6 introduced the concept of a "shared natural resource" to describe, for the purposes of the convention, the watercourse system and its waters in relation to "the extent" that the use of an international watercourse system and its waters in the territory of one system State affected the use of a watercourse system or its waters in the territory of another system State or other system States. Consequently, each system State was considered entitled to a reasonable and equitable participation within its territory in that shared resource. The word "participation" was meant to convey the dual aspect - namely, the right to use and the duty to contribute - of a system State's sharing in "the necessary management and conservation of a watercourse system for the optimal distribution in a reasonable and equitable manner of the benefits to be derived [therefrom]" (A/CN.4/367, para. 86).

(Mr. Al-Qaysi, Iraq)

28. That concept of a shared natural resource had been criticized for lack of clarity. It was obvious that, in the drafting of general principles on the topic, the existing rules of general customary international law applicable to the subject-matter must be borne in mind. The subject under study clearly involved limitations on the territorial sovereignty of States. Upstream riparian States had a right to use the waters in their territory, but they must not use them in such a way as to deny the rights of the downstream States to use the waters in their territory in a meaningful way. That was the raison d'être for the articulation of a concept to regulate the use of international watercourses for the benefit of all in an equitable manner. What was at stake was the achievement of distributive, not commutative, justice.

29. Analysis of the criticism voiced in that connection seemed to show that it stemmed from a rejection of the basic idea to which he had alluded. It should be remembered, however, that the criticism could also be criticized. For example, the term "riparian" had a geographical connotation, in that it referred to States situated on the banks of a river. In that sense, States along a frontier river shared the waters of the river as riparians, in which case the focal point was not the position of the frontier but the waters of the river as a resource. Consequently, and looking at the same resource, upstream and downstream States could just as well be riparian States for legal purposes in so far as the use of the resource was concerned. Again the idea of sharing emerged. It was one thing to advise the Commission to exercise caution and consider very carefully the terminological problem, but it was quite another to reject the basic substance of the concept.

30. In that connection, good faith required that attention should be concentrated on the central issues. There should be a clear understanding that when the Commission talked about a shared natural resource it did so in the absolute sense that, without water, life could not be maintained, as well as in the relative sense that had it not been for the transboundary character of the natural resource the Commission would not have encountered the type of problems it was setting out to regulate. Waters of an international watercourse system were evidently strongly connected with the sovereign territories of States, but they were not static natural resources. It was therefore absolutely necessary to acknowledge that, as a result of modern scientific knowledge and technology, the principle of the territorial sovereignty of States could not in that field be stretched to its ultimate limits. Particularly in the case of water, the international system of dividing the whole human environment into territories of separate sovereign States must be complemented by a system of co-operation among States.

31. The legal standards mentioned in article 7 were appropriate, but his delegation would wish to study the full implications of the reference to development. It would also wish to study article 8 in depth in order to assess the relevance of the various factors mentioned in it in connection with the determination of reasonable and equitable use. At present, the combination of paragraphs 1 and 2 of the article seemed felicitous, and the substance of article 9 seemed to be a necessary corollary to that of article 7.

(Mr. Al-Qaysi, Iraq)

32. With regard to the programme and methods of work of the Commission, his delegation firmly supported the views expressed by the representatives of New Zealand and the United Kingdom. As stated in paragraph 306 of the report, all the questions dealt with by the Commission were interrelated. In negotiating the draft resolution on the report of the Commission, the Committee should bear in mind that a question which merited wise and mature thought was that of priorities. If that question was cast in a rigid fashion regardless of the situation in which the Commission found itself, the political objective sought by assigning a certain degree of priority to a particular topic would not be achieved. In setting various priorities, therefore, the Committee should aim at achieving that objective within a given term of office of the Commission. The idea, referred to in paragraph 307 of the report, of staggering from year to year the major consideration of topics on the current programme of work merited approval. The Commission should try to convene the Planning Group of the Enlarged Bureau during the first week of its thirty-sixth session to implement that idea and set the priorities for consideration in a plan extending over the three remaining years of its tenure.

33. To a large extent, his delegation supported the New Zealand representative's proposals concerning the Drafting Committee. The backlog must be overcome and a better equilibrium re-established between the work of the Commission and that of its Drafting Committee.

34. For the reasons given by the representative of the United Kingdom, his delegation believed that the suggestion to hold the annual 12-week session of the Commission in two parts had considerable merit. It was to be hoped that the Commission would consider all aspects of that suggestion at its thirty-sixth session.

35. Mr. SAHOVIC (Yugoslavia) noted the relatively small number of draft articles submitted to the Sixth Committee by the International Law Commission and expressed the hope that the Commission would soon be able to overcome the obstacles which it and its Drafting Committee had encountered and present the General Assembly with complete sets of draft articles, so as to enable Member States to contribute more concretely to the codification and progressive development of contemporary international law, that being an invaluable tool for the promotion of political co-operation between States and the creation of an international law which would better meet the needs of the international community as a whole.

36. Emphasis had been placed on the codification and the progressive development of international law at the time of the drafting of the Charter and again during the period of decolonization in the late 1950s and early 1960s. International law was now a system of rules and principles which expressed, as a result of the work of the International Law Commission, the Sixth Committee and major diplomatic codification conferences, the intentions of a new international community founded on the success of decolonization. The authority of the Charter as the main source of international law had been secured and, through the adoption of universal international conventions, the conduct of international relations had ceased to be governed exclusively by customary law, the development of which had in the past

(Mr. Sahovic, Yugoslavia)

been the privilege of the big and powerful developed countries. New prospects for the further development of international law had appeared since then; in particular, mechanisms for its implementation and for an international jurisdiction had begun to take shape. In that connection, he shared the views expressed by the Secretary-General in his address to the thirty-fifth session of the Commission. In the current climate of international tension, the emphasis must, for the third time in the history of the United Nations, be placed on the role of its organs concerned with legal affairs.

37. At the same time, the Organization must continue to educate the public whose scepticism and ignorance of the great potential of international law for the settlement of international disputes was constantly being fuelled by the increasing use of force as an instrument of the foreign policy of States. The authority of international law was bound to be strengthened by successes achieved in its codification and progressive development.

38. On the subject of the jurisdictional immunities of States, he noted that, with the increasing interdependence of States, the scope of the topic had expanded beyond its traditional framework. The Commission and the Special Rapporteur should be given every assistance to enable them to respond to the new conditions in which problems concerning jurisdictional immunities now arose.

39. He regretted that no agreement had been reached on the content of article 6, which should define the principle of jurisdictional immunities. The article should be drafted in such a way as to indicate the framework for regulation of the subject-matter in relation to the draft articles and should not necessarily attempt a general definition of the principle. In seeking to resolve problems of a universal nature, the Commission should be well aware of its limits. The elaboration of the draft should not be reduced to the level of similar exercises aimed at regulating the question of jurisdictional immunities in relations between States with more or less the same legal systems.

40. In its commentaries on the articles that had been adopted, the Commission had in fact sought, as far as possible, to present national legislation, and the judicial and treaty-making practice of States with different political and legal systems. The Commission should continue to request Member States to provide the necessary material to make its work on the draft articles less difficult. Although in the codification and progressive development of international law draft articles should not, in principle, be necessarily based on national sources, the subject of jurisdictional immunities, more than other subjects, did require that it should be so based. It was an area in which the relationship between municipal law and international law was directly relevant. The provisions of the articles should therefore contribute to the solution of practical problems without calling in question respect for the sovereign rights of States, which were the very basis of jurisdictional immunities. There was perhaps a need for a more specific formulation of the reciprocal rights and duties of States in that connection. He had been unable to find in the report the Commission's reaction to the suggestion of the Special Rapporteur that the title of part two of the draft should be changed

(Mr. Sahovic, Yugoslavia)

from "General principles" to "General provisions" so that the title of part three (Exceptions to State immunity) could be replaced by a reference to the specific topics to be dealt with in the draft. Such a change would serve to simplify the study and its objectives.

41. The subject of State responsibility deserved to be given priority in the Committee's programme of work. An exercise which had taken a full decade and had resulted in the adoption in first reading of part one of the draft articles should not be allowed gradually to sink into oblivion. The ultimate responsibility for carrying on the work lay with the Commission as a whole, and the fact that it was still discussing preliminary questions was to be regretted. Part two of the draft articles, on the effects of responsibility, should logically be elaborated before part three, which concerned implementation, even though part three might seem to be the easier of the two. Moreover, legal logic should guide the Commission in its consideration of the order in which the articles in part two should be examined. The nature of the subject-matter, the content of the rules in question and their interrelationship must form the basis of decisions on those questions. However, the Sixth Committee did not have to take a position on those aspects of the question at the present stage.

42. The Commission had made marked progress in adopting eight articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. Subject to a more thorough study of their content, his delegation believed that those articles fufilled their purpose. It was not necessary to draft a lengthy set of articles on a subject of such restricted scope. He hoped that the study would be completed and the draft articles submitted to the Sixth Committee as soon as possible.

43. He emphasized the importance of the codification and progressive development of the rules concerning the non-navigational uses of international watercourses. The Special Rapporteur's recommendation that a framework agreement should be formulated was an attractive idea, but the Commission should nevertheless apply itself to a prior study of the solutions already established in positive international law and expressed in the obligations of riparian States in different parts of the world. Formulation of the rules relating to the law of the non-navigational uses and its protection of international watercourses was not an academic exercise; the fact that the vital interests of riparian States were involved meant that there must be strict respect, in all situations, for the principle of the sovereignty of States, particularly, their permanent sovereignty over natural resources, and for the principle of good-neighbourly relations as the basis for solutions to practical problems arising from co-operation between States. The new concept of a shared natural resource was in keeping with current development trends, but it could not be applied unless account was also taken of the need to reconcile the rights and interests of all system States, whose inherent sovereignty over the parts of the waters belonging to them must in no way be called in question. Consequently, the formulation of rules concerning the mechanisms for co-operation and the rights and duties of the States concerned must be preceded by a precise indication of the respective sovereign rights of the riparian States.

(Mr. Sahovic, Yugoslavia)

Along with the principles of good faith and good-neighbourly relations, chapter II of the Special Rapporteur's preliminary draft should include the basic principles of international law relating to sovereign equality, renunciation of the threat or use of force and non-interference in the internal affairs of States, and such other principles as might appear necessary. Furthermore, the use of the term "international watercourse system" should be reconsidered, since the legal content of the concept was still in dispute.

44. The United Nations had been dealing with the subject of the non-navigational uses of international watercourses since the 1960s, but the discussion really involved the basic rules relating to the status of international rivers, which dated from the time of the Congress of Vienna. With the introduction of modern means of exploitation of international watercourses, however, new problems had arisen. Unless account was taken of both the historical aspects and the future needs, little progress would be made on that subject. In a way, it was a subject which belonged to the twenty-first century, and a start must be made now on trying to combine the traditional types of regulation with ones that would suit the future.

45. The same applied to the topic of liability for injurious consequences arising out of acts not prohibited by international law. That was one of the most important subjects in the present stage of development of inter-State relations and of international law, and Yugoslavia regretted the limited results achieved by the Commission. The solutions adopted in existing conventions and other international instruments on the use of various scientific and technological advances for peaceful or military purposes could form the basis for at least progress in that area.

46. Before beginning its study on relations between States and international organizations, the Commission should very seriously consider whether it was worth while taking up that topic immediately.

47. With respect to the Commission's work programme and methodology, he said that the Commission should concentrate on one or two priority topics. Its reports could then present draft articles and commentaries, rather than the views of Special Rapporteurs, thus enabling the Sixth Committee to follow the work of the Commission as a whole on a topic, there being no need for the Committee to comment on the views of individual Rapporteurs.

48. He noted that, in paragraphs 313 and 314 of the report, the Commission did not present a specific programme of work for its next session. That was a departure from a long-standing practice which had symbolized the links between the Commission and the Sixth Committee in connection with the codification and progressive development of international law, and the links between the experts serving on the Commission and Member States. Isolating the Commission could adversely affect the performance of its work. The former practice of reporting more specifically to the Assembly on its future programme of work should be resumed at the next session of the Commission.

49. Mr. YAKOVLEV (Union of Soviet Socialist Republics) said that the International Law Commission had done some extremely useful work at its thirty-fifth session. The current discussion in the Sixth Committee concerned the enhancing of the Commission's role in the consolidation and development of contemporary international law as an important instrument for peace and co-operation among States. It was a question of improving the effectiveness of the Commission's work and focusing its main efforts on the most important and urgent aspects of the codification and progressive development of international law. His delegation attached great importance to that work and stressed the need to give priority to the draft Code of Offences against the Peace and Security of Mankind and the question of State responsibility for such crimes. The formulation by the Commission of draft instruments on the status of the diplomatic courier, the jurisdictional immunities of States and other matters before it could also play a useful role in strengthening co-operation among States on the basis of equality under the law.

50. His delegation would comment on the substance of the question of the draft Code of Offences against the Peace and Security of Mankind under agenda item 125. For the time being, he would simply stress that the United Nations expected the Commission to complete its work on the draft Code as soon as possible and that no further delay or complication of that work should therefore be permitted.

51. The special attention accorded to the question of State responsibility in the Sixth Committee arose out of the objective need to strengthen international legal means of combating the most dangerous and flagrant violations of the United Nations Charter and contemporary international law. The principles and norms of the institution of State responsibility in international law were more important than ever, as that institution was one of the essential legal means of promoting the purposes and principles of the United Nations Charter, ensuring respect for international legality and consolidating the principles of peace and equality in international relations.

52. The main elements of the modern institution of State responsibility were the principles and norms relating to responsibility for the preparation and commission of the mosst serious crimes against peace and security. A State incurred the gravest responsibility under modern international law for preparing, advocating and unleashing nuclear war. That important principle was bound up with the very existence of mankind and of international law as such, and the Commission should study and develop, as a matter of priority, a detailed formulation of it.

53. The United Nations Charter and modern international law prohibited aggression and provided for responsibility for the commission of acts of aggression. The recent invasion and military occupation of Grenada showed how important it was to strengthen the principles of State responsibility for armed invasion and aggression. Neither the pretexts advanced to justify that particular military invasion - defending the citizens of a State, protecting human rights, combating an imaginary threat from the socialist States, and so forth - nor any other excuse could justify aggression and armed suppression of the freedom and sovereignty of another State. They were simply evidence of attempts to substitute for

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international law the policies of imperialist coercion and arbitrary rule. Regardless of the excuses advanced, a State incurred responsibility in international law for acts of aggression against another State.

54. In considering the question of State responsibility, the Commission should also devote much attention to the principles of responsibility for policies of genocide, colonialism and apartheid, for the training and use of mercenaries and for other criminal violations of the United Nations Charter and modern international law.

55. Noting the slow progress made on the draft articles on States responsibility, he said that the fourth report of the Special Rapporteur on the contents, forms and degrees of State responsibility had proceeded along the wrong lines and attempted essentially to revise the work on the subject that had been done in the Commission over a period of 20 years. The Special Rapporteur had tried to cast doubt on the feasibility of establishing international responsibility for aggression and other international crimes, using unfounded arguments which, incidentally, had been repeated by a number of Western delegations in the Sixth Committee. Those delegations proposed curtailing work on the draft articles on the ground that the subject was covered by the provisions of the United Nations Charter and other instruments - their usual approach whenever they objected to the codification of an important branch of contemporary international law and needed a pretext to curtail the work on it. Their line of argument was baseless, because the United Nations Charter and international law would be strengthened rather than weakened as a result of the codification exercise. The Special Rapporteur must not limit or change the essential substance of the institution of State responsibility. He should consider it mainly in relation to international crimes and other gross violations of the United Nations Charter and contemporary international law. The draft articles emerging from that work could become part of a detailed international legal instrument reflecting the basic elements of State responsibility in accordance with contemporary international law. That was the main task before the Commission.

56. The topic entitled "Status of the diplomatic courier and diplomatic bag not accompanied by diplomatic courier" was of practical interest to all States. The Commission had made substantial progress in preparing the draft articles on the subject. The Special Rapporteur had done a great service by submitting a complete set of draft articles, the first reading of which might be concluded at the Commission's thirty-sixth session. The adoption of an international convention on the subject would be an important step forward and would help to ensure smooth communications between States and their diplomatic representatives abroad.

57. Substantial complications had been introduced into the Commission's work on jurisdictional immunities of States and their property, because of the fact that the Special Rapporteur and certain Western members were endeavouring to base the draft articles on the concept of "restricted" or "functional" immunities. That concept ran counter to the principle of the sovereign equality of States laid down in the United Nations Charter. Its proponents claimed that a State could act in

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various capacities, depending on the functions being performed. They wanted to establish a distinction between the public and private activities of a State. In their opinion, States were assimilated to private individuals when they concluded commercial transactions and, on that basis, should be deprived of immunity. That idea had been convincingly refuted by the majority of the speakers in the Sixth Committee. There was absolutely no justification for considering that, when carrying on economic activities, the State was acting not as a sovereign but as a private individual. States were single entities and could not be broken up into parts. The economic functions of a State were no less important than its other functions, and States carried on economic activities as the holders of public power. In doing so, they possessed all the attributes of sovereignty, including immunity from the jurisdiction of another State and its courts. A court could consider an action against a foreign State only when that State had given its express consent in an international agreement, at the time when the contract was concluded or in some other way. In the absence of such consent, disputes could be settled only through negotiations or in whatever way the parties might agree. An injured party could bring action against a foreign State in the court of that State in accordance with its legislation. Thus, in practice, the principle of State immunity based on the sovereign equality of States adequately provided for the protection of the interests of the parties concerned.

58. The faulty approach of Special Rapporteur and his attempt to impose the concept of restricted immunity could be seen in articles 12, 13 and 14 and in article 15, paragraph 2, which were unacceptable and required substantial revision. The prevailing trend was reflected in the position and practice of many developing countries and socialist countries, which relied in their development on the State sector of the economy and the immunity of State property. That trend refuted the concept of "restricted immunity", and the Special Rapporteur should take it into account.

59. His delegation had noted with interest the first report of the new Special Rapporteur on the law of the non-navigational uses of international watercourses. The preliminary exchange of views in the Sixth Committee would help him to avoid pitfalls and continue his work of drafting recommendations for possible inclusion in actual agreements by riparian States on the legal régime for particular international rivers. It must be clearly stated that the term "international watercourses" meant international rivers, in the sense of rivers flowing through the territory of two or more States.

60. He welcomed the resumption of work in the Commission on relations between States and international organizations. The Commission should focus attention on the status, privileges and immunities of such organizations, their officers, experts and other persons engaged in their activities, not being representatives of States. It was important to take a pragmatic and restrained approach and not be distracted by questions of a debatable or theoretical nature.

61. Sir Ian SINCLAIR (United Kingdom), commenting on the topic of the law of the non-navigational uses of international watercourses, recalled that the Special Rapporteur, in his statement to the Committee, had acknowledged that the discussion in the Commission had seemed to imply that he had not been entirely successful in the task he had set himself of trying to strike the delicate balance between the conflicting and competing interests at stake. The Special Rapporteur should not be disheartened; he would certainly have the support of the United Kingdom delegation in continuing to work for solutions which would sufficiently reconcile those conflicting interests but would, at the same time, accord with overriding considerations of equity, fair dealing and reasonableness.

62. The Special Rapporteur had asked whether it would be useful at the current stage to attempt to give a definition of the term "international watercourse system". In that connection, his delegation wished to recall that the Commission had already, in 1980, adopted a note of tentative understanding of what was meant by that term (A/38/10, para 202). At some point, that would probably have to be converted into a definition properly so called. For the time being, however, it should continue to be accepted for the purpose of elaborating the draft. His delegation firmly believed in building upon the progress already achieved in the Commission and favoured the notion of putting articles already adopted by the Commission on first reading aside, to be looked at again only towards the end of the first reading of the draft as a whole. It seemed thoroughly unwise to reopen texts already agreed upon, even if only provisionally.

63. The Special Rapporteur had asked whether reference should be made in article 6 of his draft to the concept that, in certain circumstances, the international watercourse system constituted a shared natural resource. The phrase "shared natural resource" seemed to have acquired overtones not necessarily conveyed by its ordinary meaning. Prima facie, his delegation had no difficulty with the phrase when it was used to designate a resource which by its very nature could not be made subject to the sole sovereignty and control of a single State. Such must be the case with the waters of an international watercourse system, where the use of the waters in one system State affected the use of the waters in another system State. In that context, his delegation agreed with some of the comments made earlier in the meeting by the representative of Iraq. There was no derogation from the principle of permanent sovereignty over natural resources involved in recognition of the notion that the waters of an international watercourse system might, in certain carefully circumscribed conditions, constitute a shared natural resource.

64. However that might be, the Commission had already provisionally adopted article 5, which embodied a reference to the notion of shared natural resource. In the view of his delegation, it would be highly damaging to future progress on the topic as a whole if the Commission were at the current stage to engage in lengthy semantic argument about the appropriateness or otherwise of including a reference to that phrase in the draft. His delegation believed that it would be helpful to a resolution of that disputed point if the Commission were to examine the corollaries to the notion of shared natural resource in the particular context of the law relating to the non-navigational uses of international watercourses. Those corollaries were set out in articles 7 and 8 and, to a lesser extent, article 16 of

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the Special Rapporteur's draft. It would be useful for the Commission to have a thorough examination of the extent to which those corollaries were acceptable before reaching a final conclusion on the text of article 6 of the Special Rapporteur's draft, corresponding to article 5 of the draft provisionally adopted by the Commission in 1980.

65. It was to be hoped, therefore, that the Special Rapporteur and the Commission as a whole would seek to concentrate attention in 1984 on the content of articles 7 to 19 of the draft presented by the Special Rapporteur, on the understanding that the Commission would revert at a later stage to the introductory articles already provisionally adopted in 1980. In that context, the Special Rapporteur might well wish to revise some of his proposals, particularly those embodied in articles 11 to 14, in the light of the discussion at the thirty-fifth session of the Commission and of the current debates in the Sixth Committee.

66. His delegation firmly believed that the proposals contained in chapter V of the draft articles, relating to the peaceful settlement of disputes, must be strengthened. In his statement to the Sixth Committee, the Special Rapporteur had said that perhaps compulsory resort to fact-finding or expert bodies should be provided for as well as compulsory conciliation. His delegation was puzzled by the reference to compulsory conciliation, because it could not read the text of draft article 34 as amounting to compulsory conciliation. If a system State refused to conclude a system agreement and there was no other regional or international agreement making provision for conciliation at the instance of one of the parties to the dispute, conciliation could be resorted to, on the basis of draft article 34 as it stood, only if both parties to the dispute agreed.

67. His delegation did not regard that as a satisfactory solution. What was needed was a residual mechanism for the settlement of disputes in the event that there was no system agreement or that the system agreement made insufficient provision for the matter. At the very least, it seemed that a system State, or any other State party to the eventual convention that might be able to demonstrate that its interests were adversely affected by a proposed development, should be able to invoke unilaterally the proposed conciliation machinery. He had deliberately used the phrase "residual mechanism", since he fully accepted that certain types of dispute arising on the interpretation or application of the draft articles might be wholly technical in nature, requiring the assessment of a single neutral technical expert. But that in no way detracted from the need to have a fall-back mechanism which could be activated by a State that considered itself to be adversely affected by a new project.

68. His delegation therefore trusted that the Special Rapporteur would review the whole of chapter V of the draft with a view to strengthening the provisions relating to conciliation and embodying additional provisions concerning compulsory resort to fact-finding and other expert bodies. In the mean time, his delegation would reserve its position on whether, in addition, provision should be made for compulsory arbitration on certain issues involving the interpretation or application of particular articles.

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69. With regard to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, his delegation had serious reservations about the need for a new international instrument on the matter, given that most of the salient points concerning the status of the diplomatic courier and the unaccompanied diplomatic bag were already covered by existing codification conventions, notably the Vienna Conventions on diplomatic and consular relations. Attention should be concentrated on filling the gaps in the existing conventions. Moreover, care should be taken not to equate the status of the diplomatic courier with the status of a permanent, semi-permanent or even temporary diplomatic agent. What was required in the way of privileges and immunities for the latter was not necessarily required for the former.

70. At its thirty-fifth session, the Commission had debated articles 15 to 19 of the Special Rapporteur's draft and begun its debate on articles 20 to 23. His delegation shared the view recorded in paragraphs 167 and 169 of the Commission's report (A/38/10), that articles 18 and 19 could be dispensed with, provided that some additional language was incorporated in the commentary to article 15. It also supported the criticism of the concluding phrase of paragraph 2 of article 20 voiced in paragraph 179, and it agreed with the suggestion in paragraph 180 that articles 21 and 22 could be omitted. It equally had doubts about the need for article 23. There could be few if any cases in which a diplomatic courier might be subjected to the jurisdiction of the courts of the receiving or transit State. If functional necessity was the criterion for the grant of privileges and immunities, there must at least be a question as to the need for article 23.

71. His Government would wish to study the texts of articles 1 to 8 as provisionally adopted by the Commission on first reading and he would therefore refrain from commenting on them at the current stage. He must, however, express a view on the point raised at paragraphs 146 to 149 of the Commission's report and reiterated in the commentary to article 2. The issue was whether the scope of the draft should be expanded to include couriers and bags used for official purposes by international organizations or by other entities such as recognized national liberation movements. His delegation had grave reservations about expanding the scope of the draft in that way. To do so would seriously limit its possible acceptability to many States. It would also result in considerable delay in completing the project. At the very least, the Commission should complete its first reading of the draft as a whole on the basis of the scope indicated in article 1. The Commission and the Sixth Committee could then review the position, so that a final decision could be reached.

72. Mr. ROSENSTOCK (United States of America), speaking in exercise of the right of reply, said that his delegation had noted the bad taste of the representative of the Soviet Union in introducing his tired agitation propaganda into the discussion of the report of the International Law Commission. Perhaps that revelation of the level of the Soviet Union's interest in the law would be educational for some; his delegation had suspected it for a long time.

73. Mr. YAKOVLEV (Union of Soviet Socialist Republics), speaking in exercise of the right of reply, said that the representative of the United States had obviously been driven to make his comments because he had interpreted the Soviet delegation's statement concerning aggression in Grenada as referring to the United States. His delegation had not intended to give any lessons, but merely to speak on a topic under discussion in the Committee. In material recently published in the United States, an American jurist had said that there could be no doubt that what had occurred in Grenada was aggression and a violation of international law. That matter was directly related to the work of the Sixth Committee, which was discussing, inter alia, responsibility for acts of aggression.

AGENDA ITEM 125: DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND (A/38/10, chap. II, A/38/325-S/15905, A/38/356, A/38/371-S/15944)

74. Mr. FLEISCHHAUER (Under-Secretary-General, The Legal Counsel) said that the basic text for the consideration of item 125 was chapter II of the report of the International Law Commission (A/38/10), which had already been introduced by the Chairman of the Commission. In addition, there was the report of the Secretary-General (A/38/356) reproducing, for the convenience of the General Assembly, the comments and observations of Member States in response to resolution 37/102, previously circulated to the members of the International Law Commission in document A/CN.4/369 and Add.1 and 2. Comments received in 1982 had been reproduced in the report submitted to the Assembly at its thirty-seventh session (A/37/352).

ORGANIZATION OF WORK

75. The CHAIRMAN reminded the Committee that several of the items on its agenda, such as items 121, 126 and 129, would probably be the subject of draft resolutions having financial implications. No draft resolutions on the items in question had yet been submitted. Under the terms of paragraph 13 (a) of General Assembly decision 34/401, draft resolutions with financial implications must be submitted to the Fifth Committee not later than 1 December, which meant that the Secretariat must have them in hand at least a week before that deadline to allow time for processing by the Department of Conference Services and the Office of Financial Services. Moreover, a last-minute file-up of draft resolutions placed undue pressure not only on the Secretariat and the Fifth Committee, but also on the plenary Assembly. He therefore urged the sponsors of draft resolutions with financial implications to submit them as soon as possible.

76. He also reminded the Committee of its formal decision to complete its work by 9 December 1983. Arrangements for the session had been made on that basis, and it would not be possible for the Committee to continue its work beyond 9 December.

The meeting rose at 6.05 p.m.