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Chairman: Mr. GASTLI (Tunisia)

CONTENTS

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The meeting was called to order at 3.35 p.m.

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

1. Mr. BOUONY (Tunisia) said that the preliminary report prepared by the Special Rapporteur for the topic was stimulating. The International Law Commission had long been hampered by the absence of a definition of aggression. At its last session, the General Assembly had decided that it was necessary and appropriate for the Commission to continue its consideration of the item before the Committee.

2. With regard to the methodology of codification, it would seem difficult to begin with a general definition. It would be better to adopt the inductive method and define the content of the subject matter of the topic by means of careful examination of international law and practice and of the development of international relations after the Second World War.

3. In its report, the Commission stated that it would like to have the views of the General Assembly on two points: first, which subjects of law could be punished for having committed a crime against the peace and security of mankind, bearing in mind what the Commission regarded as the "political nature of the problem", and, second, whether the Commission's mandate included, in addition to the elaboration of the norms constituting the "code" of offences against the peace and security of mankind, the preparation of the statute of an international criminal jurisdiction.

4. If the method suggested was adopted, there would be a risk of transferring a doctrinal question to a political forum whose task was not to settle doctrinal disputes; the question of the subjects of law (States or individuals) had traditionally been a matter of controversy in international law. Moreover, it was somewhat excessive to regard the question of the code of offences against the peace and security of mankind as being of a political nature. It was doubtful whether, among the wide range of questions dealt with by the United Nations, there were any which did not have political connotations, motives or consequences. The Commission was implicitly asking the Sixth Committee to endorse the theory that there were questions which were political per se, but it was difficult to reconcile the method suggested by the Commission with its attitude towards the identification of offences without taking account of their political or non-political nature.

5. As to whether the Commission's mandate included the preparation of the statute of an international criminal jurisdiction, he considered that the institution of an international criminal jurisdiction was absolutely necessary if the body of norms to be elaborated was to be effective. It was true that that would be difficult to achieve in the existing state of international society and would require the determined support of States. In any case, the ILC should phase its work, deferring until a later stage its consideration of the preparation of the statute of such a jurisdiction and concentrating for the time being on the identification and development of rules and norms on the subject.

(Mr. Bouony, Tunisia)

6. Referring to the identification of acts constituting offences against the peace and security of mankind, he said that, 38 years after Nürnberg, the forms taken by those offences had multiplied. The increasingly frequent resort to wars of aggression, the extermination of peoples fighting for national liberation, the elevation of apartheid into a State doctrine and the mass murder of innocent civilian populations constituting veritable acts of genocide had been added to other cases which undermined the basis of international relations. However, the various aspects of the question must be examined with prudence. In that connection, a systematic study of the various international conventions and instruments and the relevant resolutions of United Nations organs would facilitate the Commission's work.

7. The catalogue of offences to be examined should probably be limited to those described in paragraph 47 of the Commission's report as "the most serious of the most serious offences", in order to justify the special legal régime to be applied to them. However, although the establishment of a hierarchy of legal norms was acceptable and even desirable, the gradation of régimes of responsibility would give rise to numerous difficulties. The situation was further complicated by the fact that the Commission was not sure whether to proceed de lege data or de lege ferenda, since it referred, in support of its reasoning, to article 19 of the draft on the international responsibility of States. That draft, which did not yet form part of positive law, distinguished between norms the violation which was regarded as a crime and those the violation of which constituted a delict.

8. With respect to the question of the subjects to which the Code was to apply, he said that although it was tempting to opt for the incrimination of the States along with the individual, the structural reality of existing international society, with its pronounced inter-State character, counselled preference for governmental responsibility, since it was in fact Governments that committed or ordered the commission of the acts constituting the offences under consideration.

9. Mr. CALERO RODRIGUES (Brazil) said that at the thirty-fifth session of the General Assembly his delegation had expressed doubts about the suggestion that work should be resumed on the elaboration of a draft code of offences against the peace and security of mankind and had referred to the vast and delicate nature of the problems involved at the current stage of international life and of the process of codification of international law. Although it still held that pessimistic view, since the General Assembly had decided to renew the exercise suspended in 1954 and the International Law Commission had already embarked upon its work on the draft Code and had put some pertinent questions to the General Assembly, his delegation would participate constructively in the debate.

10. By its resolution 36/106, the General Assembly had invited the Commission to resume its work with a view to elaborating the draft Code and had requested it to consider the possibility of presenting a preliminary report to the Assembly at its thirty-eighth session bearing on the scope and the structure of the draft Code. The report presented by the Commission in chapter II of its annual report was precise and concise and reflected the lucid approach of the Special Rapporteur, whose own report (A/CN.4/364) had the same qualities.

(Mr. Calero Rodrigues, Brazil)

11. The Commission's report addressed itself to the question of the scope of the draft ratione materiae (offences to which the Code would apply) and ratione personae (subjects of international law to which responsibility would be attributed in the Code). According to the report, the Code should cover ratione materiae the category of the most serious international crimes, namely, crimes against the peace and security of mankind. Those crimes, as explained in paragraph 69 (a) of the report, would be determined by reference to a general criterion and also to the relevant conventions and declarations pertaining to the subject.

12. The general concept of "international crime" had already been expressed in article 19 of the draft articles on State responsibility. A breach of an international obligation which constituted an internationally wrongful act entailed the international responsibility of the State. Such breaches were normally "international delicts". However, if the breach was of an obligation essential for the protection of fundamental interests of the international community, the community might consider the breach to be not an international delict but an international crime. The identification of an international crime therefore involved an objective element (the breach) and a subjective element (the recognition by the international community as a whole that the breach constituted a crime).

13. "International delicts" and "international crimes" entailed the responsibility of the State, and part two of the draft articles on State responsibility would set out their legal consequences, which would be different if the distinction made in article 19 was to have any meaning. In the case of crimes, the legal consequences would involve measures of a punitive character, sanctions. In paragraph (7) of its commentary to article 19, the International Law Commission had stated that the distinction between delicts and crimes was not purely descriptive, but normative, resulting in the application of different régimes of international responsibility.

14. With the drafting of the Code, a further distinction was made and a separate category of crimes - breaches of obligations related to the peace and security of mankind - was singled out to receive particular treatment. It was in that context that the question of the scope of the Code ratione personae arose. In paragraph (6) of its commentary to article 19, the Commission had accepted the view that general international law provided for two completely different régimes of responsibility, one applying in the case of a breach by a State of one of its obligations whose fulfilment was of fundamental importance to the international community as a whole, and the other applying in cases where the State had merely failed to fulfil an obligation of lesser importance. In paragraph 59 of its report the Commission, referring to crimes against the peace and security of mankind, asked whether, owing to their specific nature, such crimes were subject to a special régime with regard to both substantive and procedural rules. There was no doubt that an affirmative reply must be given to that question. The purpose of the elaboration of a code of offences could only be the establishment of such a special régime.

(Mr. Calero Rodrigues, Brazil)

15. "International responsibility" usually meant international responsibility of States. However, the draft Code of Offences against the Peace and Security of Mankind had from the very beginning been linked to the formulation of the Nürnberg principles, which meant that the draft Code should unquestionably establish individual responsibility, as suggested by the Commission in paragraph 60 of its report. The question remained whether, to use the language of paragraph 54 of the Commission's report, the criminal responsibility of the State must be recognized and set forth. In paragraph 69 of its report the Commission stated that, because of the political nature of the problem, it would like to have the views of the General Assembly on that point.

16. The acts listed in the 1954 version of the draft Code of Offences against the Peace and Security of Mankind were all referred to as acts of "the authorities of a State", and under the provisions of chapter II of part one of the draft articles on State responsibility they would constitute "acts of the State". As such, they would entail the international responsibility of the State.

17. The articles must necessarily define the legal consequences of international crimes. The fact that some of those crimes would be treated in a separate instrument, the Code of Offences, suggested two possibilities: either to deal in the Code with all the legal consequences of crimes against the peace and security of mankind, establishing besides sanctions against individuals sanctions against States, or to limit the scope of the Code sanctions against individuals, leaving the definition of sanctions against States to the draft articles on State responsibility. Either solution had its logic and each would be theoretically acceptable. However, the second would be preferable.

18. In chapter II, section 3 B, of the Commission's report, entitled "implementation", there was a reminder that a penal system generally consisted of a three-tiered structure constituted by three successive stages. The 1954 draft had covered only the first element. As stated in paragraph 69 of the report, some members of the Commission considered that a code unaccompanied by penalties would be ineffective. From the standpoint of legal technique, it would be difficult to arrive at any other conclusion. At the same time, the Commission's decision to ask the General Assembly to indicate whether its mandate extended to the preparation of the statute of a competent international criminal jurisdiction for individuals was entirely pertinent.

19. An attempt must be made to answer two questions. The first was whether the Code should stipulate the penalties to be applied to those who were guilty of offences against the peace and security of mankind, and the second was whether the Code should include provisions relating to the jurisdiction to be entrusted with its application and, in particular, whether an international criminal court should be created for that purpose.

20. The reply to the first question must be in the affirmative. The fact of having previously maintained that the Code should concern itself only with penalties to be applied to individuals made it somewhat easier to take the position

(Mr. Calero Rodrigues, Brazil)

that the Code should stipulate penalties. The situation would be more difficult if the decision were to be taken that the Code should contemplate penalties (sanctions) against States. As for the second question, any jurisdiction established to deal with individuals accused of committing crimes under international law could certainly be characterized as an international jurisdiction. In that respect, what came to mind naturally was the idea of an international criminal court. The Brazilian Government continued to oppose that concept.

21. The creation of an international criminal court was not the only way of solving the problem of international criminal jurisdiction. Such jurisdiction could conceivably be attributed to national courts. That was the system followed under two existing international instruments, the Convention on the Prevention and Punishment of the Crime of Genocide and the International Convention on the Suppression and Punishment of the Crime of Apartheid. Once the crimes had been defined and the penalties for them had been set, the international community could decide that application of the Code should be entrusted to national courts. That would be more realistic than the establishment of an international criminal court which would be doomed to failure from its very inception.

22. The report of the International Law Commission had provided an opportunity to take another look at the problems involved in the elaboration of the draft Code. The prospects of arriving at an effective instrument, capable of playing a useful role in international life, were rather dim. If the exercise was to be continued, the mandate of the Commission should be clarified. The Commission should define crimes against the peace and security of mankind by revising the list contained in the 1954 draft; it should establish a scale of the penalties to be applied; it should concern itself only with penalties to be applied to individuals and leave the question of sanctions against States to the draft articles on States responsibility; and it should not consider as part of its mandate the establishment of an international criminal court, but should envisage alternative means for the application of the Code.

23. If the General Assembly was not yet prepared to express itself on those points, it could decide to ask the Commission to continue its work on the first part of the Code, on the understanding that the Assembly would at a later stage indicate how the Commission should proceed on the question of scope ratione personae and the question of jurisdiction.

24. Mr. SICHAN (Democratic Kampuchea) pointed out that the General Assembly had decided to elaborate a code of offenses against the peace and security of mankind in 1947, in the aftermath of the Second World War. Some peoples, including the Khmer people, still lived the reality of an intense tragedy similar to the tragedy experienced at that time. Those peoples were awaiting the elaboration of a code so that attacks against the peace and security of mankind would no longer go unpunished. His country, the victim of aggression committed by the Socialist Republic of Viet Nam, was constantly being subjected to its criminal grip. Accordingly, he urged the Commission to finish its work quickly.

(Mr. Sichan, Democratic Kampuchea)

25. Taking into account its impatience, Democratic Kampuchea was satisfied with the specifications of article 2 of the 1954 draft, particularly with paragraphs 1, 8, 9, 10 and 11, which applied specifically to the crimes the Vietnamese leaders were committing against the Khmer people. His delegation firmly supported the enumeration of offenses against the peace and security of mankind contained in the 1954 draft and did not want the search for too general a formula to end up emptying the text of its precise content and excessively limiting its field of application. In addition, his delegation advocated the determination of the responsibility of States, and not just of individuals. Moveover, the effort of codification made sense only if it established a scale of penalties and a judicial organization to enforce them. Logically, both States and individuals must be subject to the judicial organization. Lastly, the International Law Commission should act with the necessary diligence in order to conclude the task undertaken, and its mandate should be renewed and expanded to include the study of the problem of sanctions and the establishment of an appropriate judicial organization.

26. Mr. FATHALLA (Egypt) said that his delegation was convinced that the draft Code of Offenses against the Peace and Security of Mankind should be given practical form. The international situation was deteriorating increasingly, and violence prevailed everywhere. An example of that state of affairs could be found in the massacres that had occurred in the Sabra and Shatila camps in Lebanon in 1982. Something must be done to establish the criminal reponsibility of the perpetrators and to eliminate that type of crime.

27. In resolution 37/102, the General Assembly had requested the International Law Commission to submit a preliminary report to the General Assembly at its thirty-eighth session bearing on the scope and the structure of the draft Code. Paragraph 45 to 68 of the Commission's report (A/38/10) dealt with those matters.

28. With regard to paragraph 69 of the report, his delegation agreed with the opinion expressed by the Commission in paragraph 47 to the effect that the draft Code should cover only the most serious international offenses. Moreover, although there was unanimous agreement that individuals had criminal responsibility, the same was not true about the criminal jurisdiction to which States should be subjected. His delegation believed that the latter responsibility must be codified, because crimes against the peace and security of mankind were generally committed by States, and a material or moral criminal régime reflecting the practice of States could also be envisaged.

29. As to the question of methodology, the best approach was that which combined inductive and deductive methods, such as those reflected in the existing international instruments, for example, the International Convention on the Elimination of All Forms of Racial Discrimination (General Assembly resolution 2106 A (XX)) of 1977, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (resolution 2625 (XXV)) of 1970, the International Convention on the Suppression and Punishment of the Crime of Apartheid (resolution 3068 (XXVIII)) of 1973, the Convention on the Prevention and Punishment of Crimes against

(Mr. Fathalla, Egypt)

Internationally Protected Persons including Diplomatic Agents (resolution 3166 (XXVIII)) of 1973, the Additional Protocols to the 1949 Geneva Conventions and the resolutions of the General Assembly and the Security Council on the progressive development of international law, for example the Definition of Aggression (resolution 3314 (XXIX)) of 1974 and the principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity (resolution 3074 (XXVIII)) of 1973.

30. With regard to paragraph 68 of the report, and specifically the establishment of an international criminal jurisdiction, his delegation would be satisfied if the Commission elaborated a draft Code and postponed the rest of the task until a later stage.

31. The resolution the General Assembly adopted at the current session should reflect the opinion expressed in paragraph 67 of the report. The Commission, for its part, should prepare the preamble of the draft, which would contain a list of the most serious international crimes, and should ask States to submit their observations in that regard.

32. Mr. LAMAMRA (Algeria) said that the International Law Commission's work on the elaboration of a code of offences against the peace and security of mankind was being resumed at a time when the system of international relations was displaying a chronic inability to promote genuine world peace. Neither preventive diplomacy nor the strength of the provisions of the United Nations Charter nor the deterrent effect of Chapter VII of the Charter had prevented the unleashing of violence or had brought about peace and justice. However, he welcomed the fact that both the Commission and the Committee were currently considering not only the timeliness and usefulness of elaborating such a code but also its scope, content and technical and institutional implications.

33. With regard to the scope ratione materiae of the draft, his delegation had always maintained that the instrument in question should not be viewed merely as another compilation of offences, and he endorsed the Commission's unanimous conclusion to the effect that the Code should cover only the most serious international offences. That selectiveness was based on article 19 of the draft on the international responsibility of States and was governed primarily by the criterion of seriousness.

34. As to the identification of the offences that should be contained in the draft Code, the Commission would no doubt carefully weigh the pros and cons of the method followed in preparing the draft Code before taking a decision. In that connection, article 19 of the draft on the international responsibility of States also offered a good basis of work, although other sources of guidance should not be excluded. After reviewing the relevant United Nations conventions and declarations and evaluating the acts which evoked horror in the universal conscience, perhaps the Commission would consider as international crimes not only all forms of aggression, colonial and foreign domination, slavery, genocide, apartheid and massive pollution of the atmosphere or of the seas but also the occupation and annexation of

(Mr. Lamamra, Algeria)

territories, serious offences against the permanent sovereignty of peoples and States over their natural resources and the use of mercenaries.

35. With regard to the scope ratione personae, there was unanimous agreement about the criminal responsibility of individuals, as established by the jurisprudence of the international Nürnberg and Tokyo Tribunals and by that of national tribunals, but the criminal responsibility of States had given rise to differences of opinion in the Commission. The objections were based on the practical impossibility of instituting criminal proceedings against States, on the fact that criminal responsibility did not exist in current international law and on the view that the internationally wrongful acts of States should be dealt with in the context of the international responsibility of States. His delegation felt that the Commission should clarify the legal aspects of that matter. It would be inadmissible for persons acting as a head of State or as authority of the State to be excluded from the scope of the draft Code as a result of the exemption of States, which would inevitably be implicated when crimes were committed officially on their behalf or when the perpetrators of such crimes had not been the subject of appropriate constitutional and criminal sanctions at the national level.

36. If the Commission opted for the course of recognizing the criminal responsibility of States, it would have to differentiate between the individual criminal régime and the value of an appropriate relationship with the régime of sanctions under Chapter VII of the United Nations Charter. To deny States the status of subjects of international criminal law would amount to agreeing that war was the only "sanction" for crimes attributed to States.

37. As to the implementation of a code of offences against the peace and security of mankind, his delegation supported the Commission's view that the determination of a scale of penalties would be a natural extension and essential supplement to the draft code. An appropriate judicial organization would be needed, but questions relating to the implementation of the code would have to be considered by the Commission, the General Assembly and Governments once the draft had been completed.

38. Mrs. BROWN-HAMMOND (Liberia) said that the codification of offences against the peace and security of mankind was of the utmost importance, taking into consideration the horrors and inhumane acts which had occurred in the world during recent years. The elaboration of the code would help strengthen and ensure international peace and security, and its implementation would serve as a deterrent and an additional warning to those who might be tempted to violate it.

39. As to the points made in the first report of the Special Rapporteur, her delegation supported the view that international crimes considered in their entirety were the most serious international offences. The draft code should include the offences which had been defined in United Nations resolutions approved since the draft code had been drawn up in 1954, and in relevant international instruments such as the International Convention on the Suppression and Punishment of the Crime of Apartheid (General Assembly resolution 3068 (XXVIII)), the

(Mrs. Brown-Hammond, Liberia)

additional Protocols to the Geneva Conventions, the principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity (General Assembly resolution 3074 (XXVIII)) and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV)).

40. The method to be followed by the Commission of examining the seriousness and consequences of the acts committed rather than confining its study to a list of offences seemed appropriate. It would make it possible to establish various penalties in accordance with the gravity of the acts.

41. The draft code of 1954 recognized the principle of individual criminal responsibility for war crimes and crimes against the peace and security of mankind. His delegation fully agreed that the code should continue to deal with crimes of individuals and the penalties to be applied to them. As to the criminal responsibility of States, it would be preferable to defer the study of that question to accommodate developments in international criminal law in relation to international organizations and other entities.

42. The draft code was to some extent related to the text on State responsibility. There should be no contradiction between them since the draft code dealt only with crimes against the peace and security of mankind while the text relating to State responsibility covered the much broader field of international crimes in general as defined in article 19.

43. For the implementation of the code, the various penalties that would be applied under different circumstances must be determined. In that respect, the Commission should explore all the possibilities of establishing a competent judicial organ. Since the establishment of such a body would depend on the express consent of States, States should be urged to establish the necessary jurisdiction at the national and international levels to punish those who committed offences against the peace and security of mankind.

44. Her delegation recognized that the Commission had a difficult task before it, but believed that it could surmount the difficulties and draw up an appropriate text on crimes against the peace and security of mankind. It therefore recommended that the draft code should continue to be dealt with as a separate item of the agenda of the General Assembly at its thirty-ninth session.

45. Mr. KAHALEL (Syrian Arab Republic) said that his delegation had already referred to the question of the formulation of a code of offences against the peace and security of mankind in the context of the consideration of the report of the International Law Commission, although it had confined itself at that time to commenting on the questions raised in paragraph 69 of the report.

46. The topic of the formulation of a code of offences against the peace and security of mankind was of particular importance in the current situation in which

(Mr. Kahalel, Syrian Arab Republic)

the leaders of the major countries were deploying naval squadrons and air fleets to threaten small countries and were launching air, sea and land attacks to suppress the peoples struggling for their liberation, sovereignty and independence. Those circumstances demonstrated the need for carefully reconsidering the question before the Commission and listing the offences against the peace and security of mankind, as in article 2 of the 1954 draft code reproduced in paragraph 33 of the Commission's report. His delegation was referring in particular to crimes of armed aggression, annexation of territories, the establishment of settlements in those territories, forced immigration, the fomenting of civil wars, internal disturbances and terrorist activities in the territories of other States, genocide, apartheid, interference in the internal affairs of other States by means of coercive measures of an economic or political character, and the acquisition of privileges through agreements imposed by force under military occupation and the application of coercive pressure.

47. In formulating the draft code, the Commission should bear in mind the international instruments elaborated after the original project had been drawn up, such as the Definition of Aggression (General Assembly resolution 3314 (XXIX)), the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV)), the Prohibition of the development and manufacture of new types of weapons of mass destruction and new systems of such weapons (General Assembly resolution 37/77), the Declaration on the Prevention of Nuclear Catastrophe (General Assembly resolution 36/100), the convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (General Assembly resolution 2391 (XXIII)), the additional Protocols to the Geneva Conventions of 1949 and other international instruments.

48. His delegation supported the idea of establishing a competent international jurisdiction to consider violations of the code and drew attention to the need to draw up a procedure for the acceptance and evaluation of evidence. It was also important to identify the legal consequences of offences committed, whether their perpetrators were individuals, legal entities or States. Moreover, the legal consequences of violations committed should be differentiated, depending on their nature.

49. His delegation stressed the need to bear in mind the rights of peoples to legitimate defence, self-determination and sovereignty, for which a distinction must be made between acts committed by fedayin, acts of resistence to foreign occupation, and acts of pure terrorism.

50. The question of offences against the peace and security of mankind should not be separated artificially from the question of State responsibility. It would be better to prepare one draft code covering all international crimes, ranging from the most serious to the least serious, in order to avoid duplication of effort and the proliferation of legal norms and to prevent any separation of individual and international criminal responsibility. That applied particularly to cases of violation where no distinction could be drawn between the two kinds of

(Mr. Kahalel, Syrian Arab Republic)

responsibility, such as annexation of territory, establishment of settlements on annexed territory, or apartheid. It would then be possible to take into account all international violations, namely, international crimes, international delicts and international wrongful acts, including violation of bilateral agreements.

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

51. Mr. AL-KHASAWNEH (Jordan) said that his comments would be confined to chapter VI of the report, dealing with the law of the non-navigational uses of international watercourses, and would therefore necessarily be tentative and preliminary, since any evaluation of the issues pertaining to that topic had to take into account a number of technical and scientific points of view.

52. It could be said that the codification and progressive development of the law of the non-navigational uses of international watercourses consisted essentially in the application of a number of legal concepts to a physical phenomenon, namely the passage of watercourses through the territories of two or more States. There was a great diversity of watercourse systems, but certain common watercourse characteristics existed (A/38/10, para. 206); in view of the dual nature of the problem, the Commission had suggested that a framework agreement be prepared containing general principles and guidelines, supplemented by system agreements on particular watercourse systems to be concluded between the States of those systems.

53. In his delegation's opinion, the diversity of the characteristics of international watercourse systems, would not prevent uniform treatment. States members of an international watercourse system could be grouped into upper riparian States, lower riparian States and contiguous States, and it should not be difficult to find formulas that struck the appropriate balance between the interests of such States.

54. In that connection, the experience of the United Nations Convention on the Law of the Sea was relevant, since the subject matter of that Convention was likewise a physical phenomenon subject to variations. The Conference on the Law of the Sea had nevertheless identified groupings of States with similar interests, with the aim of finding a balance between those interests and the interests of other groups of States. The same could be done in respect of the interests of States in relation to international watercourse systems. If, therefore, the Commission had based its decision on methodology solely on the diversity of the physical and geographical characteristics of watercourse systems, its decision was perhaps not totally justified.

55. There was another feature of international watercourses which had never been brought to the forefront, namely the fact that the relationships between States members of an international watercourse varied greatly from one situation to another. The question that arose was what legal rules should govern those relationships between States, taking into account the fact that they shared a common watercourse system. The problem was not made any easier by the lack of general agreement on it.

(Mr. Al-Khasawneh, Jordan)

56. He suspected that the problem went beyond the scope of differences among jurists. Basically, it was the result of the way in which States perceived their own interests vis-à-vis those of other States with which they shared a common watercourse; it was, perhaps, the result of the particular political relationships existing among riparian States. Differences of a political nature had a greater bearing on attempts to find ways of regulating the non-navigational uses of international watercourses than the geographical and physical peculiarities of particular watercourses. It was in that area that the Commission's dual approach was more justified.

57. The draft articles were based on the assumption that States members of an international watercourse system were ready to co-operate for the better utilization of their common watercourse. But it was difficult to pursue that approach in situations where such co-operation could not be presumed. The notion of "good-neighbourly relations" was of little use in such cases, nor could the Charter provide a firm legal basis for imposing positive and specific obligations on States for co-operation in the management, utilization and administration of common watercourse systems. In that connection, codification would provide a binding legal instrument against which the activities of riparian States in respect of the common watercourse system could be measured.

58. It was significant that there seemed to be general agreement both in the Commission and in the Sixth Committee on the relevance of the legal principle according to which States had the right to utilize the waters in their respective territories for their own benefit, provided of course that in so doing they did not cause appreciable harm to the interests of other States. That principle should constitute the natural starting point in any attempt at the codification and progressive development of international law in that field.

59. In cases where the political will for co-operation existed the role of the Commission as the provider of general guidelines, open to amendment to suit a particular situation, was undoubtedly a useful one. In cases where the existence of the political will which was the basis for co-operation could not be taken for granted, the role of the Commission would be to delineate the rights and duties of States as clearly as possible and in so doing to minimize the possibilities of disputes between States.

60. With regard to the draft articles, although the Special Rapporteur had pointed out that suggested new article 1 was not intended to create a superstructure from which legal principles could be distilled, the definition of the term "international watercourse system" would necessarily lead to the inclusion in the draft articles of a number of legal concepts and rules, such as the concept of a shared natural resource, the requirement that negotiations be held, and equitable sharing. All those points needed further study by the Commission and by Governments, and it was to be hoped that their final form and place in the draft convention would not be prejudiced by the definition in article 1.

61. Article 1, paragraph 2, excluded parts of a State's watercourse system from

(Mr. Al-Khasawneh, Jordan)

the international watercourse system, and thus emphasized the importance of strengthening the fact-finding machinery envisaged in the draft.

62. With regard to article 4, paragraph 3, he reiterated that it was not always politically feasible or legally sound to impose an obligation on States to conclude system agreements. In any case, it might be useful to insert the words "or arrangements" after "agreements", as had been done in other articles.

63. Chapter II of the draft convention was perhaps the most important of all. The meaning of the term "shared natural resource", as used in article 6, was sufficiently clear. On the other hand, the consequences of using that term with regard, for example, to the concept of equitable sharing, still had to be determined with precision.

64. Articles 6, 7 and 8 should be read together with article 9, which contained the prohibition against activities causing appreciable harm. In that connection, he agreed completely with the view expressed in paragraph 246 of the report to the effect that reasonable and equitable use must not cause appreciable harm.

65. In that connection, the Commission should not, in its endeavours to give prominence to the concept of equitable use or optimum utilization, lose sight of, or unduly restrict, the principle according to which the right of States to utilize their water resources beneficially should not be at the expense of causing serious harm to the interests of other States. Such a possibility was implicit in the draft of article 8 proposed by the former Special Rapporteur. The current draft article 9, which omitted any exception to the duty not to cause serious harm save in cases where there was prior agreement to the contrary, was more in keeping with the letter and spirit of the maxim sic utere tuo ut alienum non laedas.

66. The use of the world "appreciable" was useful for describing types of damage and could not be regarded as lacking in objectivity. Nor could it be argued that "appreciable" damage could be measured only in relation to the extent to which prohibited activities caused an impairment in the use of waters; certain activities could cause appreciable harm in areas other than water use; agricultural utilization and development would be a prime example. Due regard should be given to whether the effects of the activity in question would alter irreversibly the watercourse system and the environment thereof. If they did, the degree of damage would be most serious and should give the State whose interest were injured a suspensive right with regard to such activities.

67. There was a logical link between such situations and the duty to give the injured State reasonable satisfaction (art. 13, para. 1). Where irreversible alteration occurred, it might be impossible to give satisfaction. The duty of the injured States to enter into negotiations should therefore be re-evaluated, because when a particular activity caused irreversible damage, the reason for negotiations was negated.

(Mr. Al-Khasawneh, Jordan)

68. Articles 11 to 14 in chapter III belonged more appropriately in chapter II. The remaining articles in chapter III contained general guidelines rather than binding rules; the drafting should make that distinction clearer.

69. The provisions of chapter IV dealt with an important issue relating to international watercourses. In that connection, it was necessary to make a distinction between mere guidelines and binding rules, the imposition of which on States was necessitated by the need to protect the environment.

70. His delegation did not necessarily favour the reference to the law of armed conflict but thought the possibility of treating that subject should not be foreclosed.

71. Lastly, the reference to the requirement of good faith in article 27 seemed somewhat superfluous, while the reference in that article to the concept of good-neighbourly relations was not as vague as had been alleged.

AGENDA ITEM 122: UNITED NATIONS PROGRAMME OF ASSISTANCE IN THE TEACHING, STUDY, DISSEMINATION AND WIDER APPRECIATION OF INTERNATIONAL LAW: REPORT OF THE SECRETARY-GENERAL (A/38/546 and A/C.6/38/5)

72. Mr. FLEISCHAUER (Under-Secretary-General, The Legal Counsel) said that on behalf of the Secretary-General, he wished to submit to the General Assembly, through the Sixth Committee, the report of the Secretary-General on the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law (A/38/546). The Committee would recall that the Programme had been established by General Assembly resolution 2099 (XX) and had been in successful operation since that time.

73. Section II of the report gave an account of the activities carried out in 1982 and 1983 by the United Nations, UNITAR and UNESCO. The principal activities which involved direct expenditures from the United Nations regular budget and voluntary contributions from Member States and private foundations were the United Nations-UNITAR fellowship programme in international law, the International Law Seminar in Geneva and two regional training and refresher courses in international law. UNESCO's contribution to the Programme also included the holding of seminars and meeting of experts devoted to questions of international law, as well as the holding of consultations on the teaching of international law in Africa.

74. Voluntary contributions for the realization of those programmes had been received from Argentina, Austria, Bahamas, Cyprus, Iran, Kuwait, Norway, the Philippines and Trinidad and Tobago, and voluntary contributions specifically directed to the seminars had been made by Australia, Denmark, Finland, the Federal Republic of Germany, Jamaica, the Netherlands and Spain.

75. The Secretary-General wished to thank UNESCO and UNITAR for their continued valuable contributions and joined the Executive Director of UNITAR in expressing appreciation to the Governments of South Korea and Argentina for their generous

(Mr. Fleischauer)

hosting of the regional refresher courses. He also wished to thank those Governments which had made voluntary contributions.

76. Section III of the report contained the recommendations of the Secretary-General regarding execution of the Programme in the biennium 1984-1985. As indicated in paragraph 64 of the report, the Secretary-General had recommended that activities should be continued along the same lines as in the past.

77. In paragraphs 25-28 and 66 of the report, concerning activities of the Office of the Special Representative of the Secretary-General for the Law of the Sea regarding the Hamilton Shirley Amerasinghe Fellowship, it was expected that that Office, in co-operation with the United Nations Office of Legal Affairs, would take appropriate steps towards the launching of the Memorial Fellowship during the 1984-1985 biennium. In that connection, he had been advised by the Office of the Special Representative of the Secretary-General for the Law of the Sea that the Third World Foundation for Social and Economic Studies had decided to make a substantial contribution to the Fellowship. It was expected that that donation would give further impetus to the voluntary contributions intended to strengthen the Fellowship.

78. Section IV of the report described the administrative and financial implications of United Nations participation in the Programme; donor Governments and institutions were listed in paragraphs 74-76.

79. Lastly, section V gave an account of the meetings of the Advisory Committee on the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law, held during the biennium 1982-1983. The Secretary-General was most grateful to the Advisory Committee for its assistance and advice in connection with the execution of the programme.

ORGANIZATION OF WORK

80. The CHAIRMAN announced that Tunisia and Venezuela had become sponsors of draft resolution A/C.6/38/L.6 on agenda item 121. Kenya had joined the sponsors of draft resolution A/C.6/38/L.5 on agenda item 129.

The meeting rose at 6 p.m.