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THIRTY-NINTH SESSION
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SIXTH COMMITTEE
35th meeting
held on
Monday, 5 November 1984
at 10.30 a.m.
New York

SUMMARY RECORD OF THE 35th MEETING

Chairman: Mr. GOERNER (German Democratic Republic)

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The meeting was called to order at 10.55 a.m.

TRIBUTE TO THE MEMORY OF MR. CONSTANTIN A. STAVROPOULOS

1. The CHAIRMAN paid tribute to the memory of Mr. Constantin A. Stavropoulos, Legal Counsel of the United Nations from 1952 to 1973, Representative of the Secretary-General to the third United Nations Conference on the Law of the Sea and a member of the International Law Commission since 1982. Mr. Stavropoulos, whose personal and humanitarian qualities had impressed all who had known him, had devoted his considerable legal skills and unquestionable integrity to furthering the purposes and principles of the Charter and the rule of law in international relations. He requested the representative of Greece to transmit to the family of Mr. Stavropoulos the Committee's sincere condolences.

2. At the invitation of the Chairman, the members of the Committee observed a minute of silence in tribute to the memory of Mr. Constantin A. Stavropoulos.

3. Mr. YANKOV (Chairman, International Law Commission) said that Mr. Stavropoulos had been the quintessential example of a perfect gentleman. As a legal expert, he had taken part in the creation of the United Nations and the formulation of the rules of procedure of the General Assembly, ILC and the Conference on the Law of the Sea. His experience, which he had placed at the service of all the major codification conferences under United Nations auspices, had made him one of the pillars of ILC which was greatly impoverished by his death. He requested the Chairman of the Committee and the Greek delegation to transmit the condolences of ILC to the family of Mr. Stavropoulos and the Greek Government.

4. Mr. ECONOMIDES (Greece) thanked the Chairman of the Committee and the Chairman of ILC for their words of sympathy on the death of Mr. Stavropoulos. He would not fail to inform the family and the Greek Government of the tribute paid to his memory.

AGENDA ITEM 130: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS THIRTY-SIXTH SESSION (continued) (A/39/10, 412 and 306)

5. Mr. EVENSEN (Norway) said that the draft Code of Offences against the Peace and Security of Mankind raised difficult issues, both legal and political. A balanced approach was essential, since the issues touched the very core of the international legal system. It would be wise to keep in mind what ILC had recognized in 1954, namely, that offences against the peace and security of mankind must be understood as serious threats to the international community, and that the purpose of the Code was to give the community the means to defend itself against such threats. His delegation was convinced that the moral persuasive power of a suitable instrument which reflected a consensus view in ILC would have considerable value.

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6. His delegation endorsed the list of offences in paragraphs 42 to 65 of the report (A/39/10). The minimum content set out in paragraphs 52 to 62 served as a responsible and clear definition of essential offences which threatened the very foundation of modern civilization and its values. He had also noted with interest the maximum content in paragraph 63.

7. The Commission's work on those fundamental issues had been productive and encouraging, but further guidance by the General Assembly would be very useful, even essential.

8. With regard to the status of the diplomatic courier and the diplomatic bag not accompanied by the diplomatic courier, his delegation shared the view that the protection given to the diplomatic courier and diplomatic bag in the draft articles was perhaps more generous than was required by the actual need for unimpeded functioning of diplomatic communications. Norway believed, first of all, that it might be difficult to lay down general rules concerning the size, weight and shape of the diplomatic bag that were sufficiently flexible to allow for the smooth functioning of communications, while at the same time offering reasonable assurances to the receiving or transit States, and second, that the question of inviolability of the diplomatic bag merited further study. Inviolability must remain the governing principle, but it must also be recognized that unfortunate abuses had necessitated reinforcement of the regulations on the subject. His delegation believed that respect for those regulations would be heightened if a limited right of verification by transit and receiving States were recognized. There had been no difficulty in accepting the idea that the personal inviolability of diplomatic agents was in no way affected by pre-flight security procedures, and it was not inconceivable that a diplomatic bag could be subjected to the sensory devices required for security reasons. Further clarification might be needed in relation to certain types of electronic sensors, but on the whole, his delegation could see no serious obstacles to the use of some of those procedures. If, as a result of security screening, a question arose regarding the contents of the diplomatic bag, the problem should be solved bilaterally by the Governments concerned. Only in the most exceptional cases would the passage of the diplomatic bag be delayed. Obviously, the bag could be opened only with the express consent of the authorities of the sending State and, if no other solution were possible, it could be returned intact to that State and its inviolability would be maintained.

9. Turning to the law of the non-navigational uses of international watercourses, he said that, having been Special Rapporteur on that topic in 1982, he wished to pay a tribute to the two Special Rapporteurs who had preceded him and whose work had greatly facilitated his. The Second Special Rapporteur's third report, in particular, had been a very valuable source.

10. When starting his work, he had felt that at that advanced stage, he needed the guidance of the International Law Commission and the Sixth Committee on all of the main issues, because they were interdependent and legally and politically interrelated. That was why he had submitted a comprehensive and detailed draft. He had likewise felt that a comprehensive approach was essential in order to strike the right balance between the interdependence of riparian States in those matters and their sovereignty and independence.

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11. In his first report (A/CN.4/367 and Corr.1), he had submitted an outline consisting of 39 articles divided into six chapters (A/39/10, para. 275). In his second report (A/CN.4/381 and Corr.1 and 2), he had produced a revised version of the outline comprising 41 articles (A/39/10, para. 279) since the discussions in 1983 within the Commission and the Sixth Committee had indicated that the outline proposed in the first report was generally acceptable, he had made only minor changes and a few additions to the outline in his second report.

12. The framework agreement approach also seemed to have been broadly acceptable to the Commission and to the Sixth Committee, neither of which had contemplated alternatives such as a code of conduct, declaration or resolution. At the Commission's 1984 session one member had raised the question as to whether the formulation of model rules should not be contemplated. The proposal had made no headway, however, as general opinion, in both the Commission and the Committee, had always been that the Commission should focus on formulating a draft agreement. The discussions in the Commission seemed to indicate that, while no clear-cut definition existed with regard to the term, there seemed to be consensus as to its main elements. The framework agreement should contain basic legal principles generally accepted with regard to international watercourses but should also encourage the progressive development of international law and the conclusion of specific watercourse agreements dealing with unique problems arising with regard to specific watercourses or regions, and specific uses and constructions, installations or regulations concerning them. He had felt, therefore, that the framework agreement might also contain certain guidelines and recommendations that could be included in specific watercourse agreements, especially with regard to the necessary co-operation, joint management and administrative procedures to be followed in connection with specific watercourses. It had seemed to be generally recognized by the Commission that in a framework agreement it would be necessary to use - to a reasonable extent - general legal formulations, such as references to, "good neighbourly relations", "good faith", the sharing of resources "in an equitable and reasonable manner", and the duty not to cause "appreciable harm" to the rights and interests of others. Some members of the Commission had supported that fairly wide approach while others had held that the legal principles proposed were formulated in too general a manner. Opinions had also been divided as to whether recommendations or guidelines belonged in such a draft.

13. He had also felt that a differential approach was called for, in order to take into account the uniqueness of each international watercourse as well as the fact that they also had common features. Given the unique features of each watercourse, specific watercourse agreements would be necessary for the satisfactory administration and management of international watercourses.

14. On the question whether the term "non-navigational uses" should be taken in a narrow sense or be interpreted as covering also such questions as water-related hazards or desertification, the Commission had unanimously held that the wider approach was preferable, an approach that had also been chosen by the two previous Special Rapporteurs.

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15. He recalled that the concept of "international watercourse system", introduced by the second Special Rapporteur as a substitute for the "drainage basin" concept which had been discarded by the Commission during the discussion of his first report (A/CN.4/320), had been accepted as the provisional working hypothesis in 1980. He himself had therefore applied the concept in his own first report, in which he had emphasized that it was meant solely as a descriptive tool from which no legal principles could be distilled. The concept had, however, met with opposition both in the Commission and in the Committee, where concern had been expressed that it represented a doctrinal approach similar to "drainage basin", and that it was too vague, that it introduced a legal superstructure from which unforeseen principles might be inferred, and that it placed undue emphasis on land areas. In view of those reservations, he had suggested in his second report abandoning the "system" concept in favour of the simple notion of "international watercourse", making it clear that, in his opinion, it was merely a change in terminology which was not intended to cast doubt on the inherent unity of an international watercourse or on the interdependence of its various components, a unity which he had sought to emphasize throughout the draft articles. Some members of the Commission had endorsed the suggested new approach, expressing the view that abandoning the "system" concept removed a major stumbling block to the progress of the topic. They had emphasized the need to find a politically acceptable connotation. Certain members had believed the change to be one principally of terminology, that expressed more adequately the relativist approach taken by the Commission in its 1980 provisional working hypothesis (A/39/10, para. 295). Other members, while regretting the abandonment of the "system" concept, said that they had appreciated the reasons he had advanced for the suggested change. Still others had felt, for the reasons eloquently stated by the representative of Argentina at the previous meeting (A/C.6/39/SR.34, paras. 51 and 52), that the suggestion was a major departure from the approach adopted by the Commission in 1980. For himself, he had no preconceived opinion on that highly delicate issue and felt in need of guidance by the Sixth Committee in order to arrive at a viable compromise formulation.

16. The concept that the international watercourse constituted a "shared natural resource", introduced in the draft article 5 provisionally adopted by the Commission in 1980, had also given rise to controversy. Although it was generally accepted that watercourse States were entitled to a reasonable and equitable share of the benefits arising from the utilization of an international watercourse, it had been objected that the term "shared natural resource" would establish a legal superstructure from which unforeseeable legal rules could be inferred, with the implicit risk of far-reaching allegations and claims being made in given situations (A/39/10, para. 315). Faced with that criticism, he had redrafted article 6, deleting the reference to "shared natural resource". In the new article 6 (A/39/10, note 276), he had tried to spell out more concretely the underlying principles hidden in the previously used concept "shared natural resource". He drew attention to three important elements of paragraph 1 of that article: (a) the notion of the sharing of the resource; (b) the notion that the sharing must be equitable and reasonable; (c) the fact that the sharing must take place within the territory of the watercourse State concerned, unless of course the States parties

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agreed otherwise. Those basic principles were elaborated further in paragraph 2 which emphasized the interdependence between watercourse States and the special agreements or arrangements entered into with regard to the management, administration or use of the international watercourse concerned. Some members of the Commission had regarded the new approach as an advance, while others had questioned the advisability of deleting the "shared natural resources" concept.

17. Article 1, paragraph 1, of the draft proposal (A/39/10, note 267) defined an international watercourse as a watercourse - ordinarily consisting of fresh water - the relevant parts or components of which were situated in two or more States. He had thought it advisable to refer to both parts and components so as to extend the scope of the explanation (definition) to springs, marsh areas, glaciers, mountains, groundwater and other types of aquifers that might not have been included in the term "parts". He had added the word "relevant" to emphasize that the importance of each part or component might vary according to its type and nature as well as from one watercourse to another. Some members of the Commission would have preferred paragraph 1 to include a non-exhaustive enumeration of the various parts or components. He had no preconceived ideas on that point and, although he felt that his approach had the merit of being more flexible, such an enumeration could easily be included in article 1.

18. A detailed account of the discussions on the first nine articles was given in paragraphs 291 to 343 of the Commission's report. In response to the comments of the representative of Argentina on article 8 at the previous meeting, he explained that the list of factors that could be relevant in determining whether the use of the waters by a watercourse State was being exercised in a reasonable and equitable manner was neither exhaustive nor indicated any priority among the various factors or gave any priority to the factors mentioned as compared to others which could be relevant in a specific situation. Its only purpose was to provide certain guidelines. The approach used in draft article 8 had its origin in article V of the Helsinki Rules of 1966.

19. In compliance with the request made during the discussions in the Sixth Committee in 1983, he had added to article 10, concerning general principles of co-operation and management, a new paragraph which provided that, in establishing their co-operation with regard to uses, projects, programmes, planning and development related to an international watercourse, the watercourse States "should obtain the appropriate assistance from the United Nations Organization and other relevant international agencies and supporting bodies at the request of the watercourse States concerned" (A/CN.4/381, p. 33).

20. Article 28 bis on the status of international watercourses, their waters, construction, etc. in armed conflicts provided that they "shall be used exclusively for peaceful purposes consonant with the principles embodied in the United Nations Charter and shall enjoy status of inviolability in international as well as in internal armed conflicts" (A/39/10, footnote 286). That article had also been included in the draft following the discussion in the Sixth Committee in 1983, and it seemed to have been favourably received by the few members of the Commission who had made their views known.

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21. In addition, he had included in the draft a new article 31 bis dealing with obligations for the settlement of disputes under general, regional or bilateral agreements or arrangements (A/CN.4/381, p. 64), for which article 282 of the United Nations Convention on the Law of the Sea had been used as a paradigm. He had found it difficult to prescribe a general obligation of parties to settle their disputes through resort to adjudication entailing binding decisions, unless the parties by agreement had decided to submit their disputes to such adjudication procedures. On the other hand, he had felt that he should include in his draft a provision imposing upon States parties the obligation to submit their disputes to conciliation (art. 34). The conciliation procedure would result in recommendations by the Conciliation Commission which would not be binding on the parties (arts. 35 and 36).

22. On the question of international liability for injurious consequences arising out of acts not prohibited by international law, he emphasized the exceptional quality of the five reports submitted by Mr. Quentin-Baxter, whose demise had deprived the Commission of an extremely well-qualified Rapporteur. The continuation of work on that subject was of the utmost importance.

23. The 16 new draft articles on State responsibility marked a major breakthrough in work on the topic dealt with in chapter VII. In general, they struck a proper balance between the various interests concerned.

24. Concerning jurisdictional immunities of States and their property, it might be useful to specify in draft article 16 that the application of exceptions to the rule of immunity prescribed in that draft article would be limited to infringements of patents, industrial designs, etc., in the State of the forum. Both alternative A and alternative B to the originally proposed draft article 19 were too complicated. The revised version (A/39/10, footnote 185) was, however, satisfactory and broadly corresponded to established practice. It should nevertheless be borne in mind that the distinction between ships employed in commercial service and those employed by a State in governmental service did not always provide a realistic criterion, especially in the developing world.

25. Mr. ROBINSON (Jamaica) indicated that, with regard first of all to the draft code of offences against the peace and security of mankind, his delegation could support the Special Rapporteur's suggestion that the Commission should concentrate at the current stage on what were, in the circumstances, the less controversial issues. That was probably one of the reasons why the Commission had decided that its efforts at the present stage should be devoted exclusively to the criminal responsibility of individuals and that it would not consider the question of the international criminal responsibility of States (A/39/10, para. 32). It was certainly true that "the criminal responsibility of a State cannot be governed by the same régime as the criminal responsibility of individuals, if only from the point of view of penalties and procedural rules" (ibid.). He nevertheless cautioned that the Commission should not become locked into traditional and stereotypical models in its examination of penalties and punishment for crimes committed by a State. While it was not possible to incarcerate a State, it was

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certainly possible to envisage other sanctions. It might be that in some cases a mere determination that a State had committed an international crime could be a sufficient response if other States had, in those circumstances, the obligations set out in article 14, paragraph 2 (a), (b) and (c), of the draft articles on State responsibility (ibid., para. 350). The Commission, in elaborating the other draft articles on State responsibility, had dealt with important issues relating to the criminal responsibility of the State and would be bound to encounter that question again in considering the draft code of offences against the peace and security of mankind. He was surprised, therefore, to read in the report of the Commission that it intended, with regard to the content ratione personae of the draft code, that that content should be limited at the current stage to the criminal liability of individuals, "without prejudice to subsequent consideration of the possible application to States of the notion of international criminal responsibility, in the light of the opinions expressed by Governments" (ibid., para. 65 (a)). If the international criminal responsibility of States was an integral part of the topic under consideration, then the question of an earlier consideration of another issue prejudicing the later consideration of that issue did not arise. The formulation "without prejudice" suggested that the Commission could later decide not to deal with the question of the international criminal responsibility of States. In his view, the Commission ought to have taken an unequivocal decision to address that question at a later stage.

26. He noted that some members of the Commission hesitated to accept article 2 (9) of the Commission's 1954 draft, which included among the crimes against the peace and security of mankind "the intervention ... in the internal or external affairs of another State, by means of coercive measures of an economic or political character". However, he did not share the view that that phrase left much to be desired because it could not be clearly determined at what moment the economic measures became coercive (ibid., para. 44). In his view, such measures became obviously coercive when they provided the sole explanation for a course of conduct adopted by a State against its will. Article 32 of the 1974 Charter of Economic Rights and Duties of States formulated that same idea in the following way: "No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights". Notwithstanding that provision in the 1974 Charter, the definition of aggression adopted by the General Assembly in the same year did not include economic coercion as a form of aggression, again for the reason that it could not be clearly determined at what moment that means of economic coercion became an aggression; the definition of aggression was confined to the use of armed force. However, he believed that the present context was quite different, since economic coercion was seen, not as an act of aggression but, in certain circumstances, as an offence against the peace and security of mankind.

27. Some offences not covered by the Commission's 1954 draft should be taken into consideration in the current draft, particularly apartheid as a form of racial discrimination, by reason of its unique character as a constitutional system. However, he did not accept the idea formulated by some members of the Commission for whom "the fact that some States have not acceded to the Convention on Apartheid

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did not deprive it of its force as jus cogens" (ibid., para. 53), since, if that was the case, a test of jus cogens must be satisfied before an offence could be placed on the list. Probably any offence committed in breach of jus cogens, where that was relevant to the question of peace and security, should qualify for a place on the list, but jus cogens could only serve as a guide; it should not be employed inflexibly as a test, if only because it was notoriously difficult to determine whether a rule constituted jus cogens in the sense of the peremptory norm of general international law under article 53 of the Vienna Convention on the Law of Treaties.

28. Secondly, he took up the question of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. He pointed out that, in the Commission's report (A/39/10), the reader would have found the issue easier to study if it had been presented not in the chronological order in which the consideration of the question had taken place in the Commission itself, but rather article by article, in relation, first, to the Special Rapporteur's presentation of his report; secondly, to the Commission's comments on that presentation; thirdly, to the Special Rapporteur's reaction to those comments; fourthly, to the Drafting Committee's report; and, finally, to the text of the articles provisionally adopted, together with commentaries.

29. Nevertheless, all the groundwork on the topic had been done, and only policy and philosophical differences stood in the way of consensus.

30. Although the Special Rapporteur had told the Commission that he had used the test of functional necessity in determining what exemptions should be granted to the diplomatic courier, it was felt by some members that those exemptions went too far and did not maintain the balance between the interest of the sending State in communicating with its missions and the interest of the receiving State in preserving its national security. Of course, recent events explained why there was a great deal of concern over national security, more especially as such events might recur. There was still a need, however, as always, to assess in a reasonable manner the proposals with a view to determining whether they represented custom in the form of State practice or the direction in which international law should be progressively developed.

31. The Special Rapporteur had used the privileges and immunities granted to the administrative and technical staff of a diplomatic mission under article 37 (2) of the 1961 Vienna Convention on Diplomatic Relations as a model in determining the privileges and immunities of the diplomatic courier. Indeed, there appeared to be a logical necessity in doing so, in view of the fact that the administrative and technical staff sometimes spent less time in the host country than the diplomatic courier. Some, however, viewed the privileges referred to in that article of the 1961 Convention as wholly "diplomatic", and as not warranting being granted to a person performing the functions of a courier. In any case, in Jamaica's view, if a model was set up, it should be strictly followed. Now, under article 37 (2) of the 1961 Convention, the administrative and technical staff of the mission enjoyed the privileges and immunities specified in articles 29 to 35 and article 36 (1) of that

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Convention, while the exemption of personal baggage from any inspection, covered in article 36 (2) of the 1961 Convention, was granted to the diplomatic courier and not to the administrative and technical staff of a mission. None the less, that exemption appeared to be granted to the diplomatic courier under article 19 (3) of the draft articles. Apart from the question of whether that privilege was justified on the basis of functional necessity, it deviated from the established model.

32. He supported the deletion in draft article 19 (1) of the phrase "including examination carried out at a distance by means of electronic or other mechanical devices". If diplomats were exempt from personal examination for customs purposes, that privilege was breached when an electronic device was used to carry out such an examination without the consent of the diplomat. For that reason, he did not wish to see provided in express terms for the courier an exemption which, in his view, was implicitly and not explicitly granted to the diplomat in the 1961 Convention, with the result that an express provision in that sense for the benefit of the courier would seem to question its existence in relation to the diplomat.

33. He followed the same reasoning with regard to the statement in draft article 19 (1), which provided explicitly that the "courier shall be exempt from personal examination". The exemption was said to derive from the right to personal inviolability of the diplomatic agent specified in article 27 (5) of the 1961 Convention and, even more specifically, in article 29 thereof. But the Convention did not expressly state that the diplomatic agent was exempt from personal examination. Even if only for formal reasons, provisions concerning the diplomatic courier should be exactly the same as those concerning the diplomatic agent, and the right to exemption from personal examination should simply be inferred from the context.

34. According to some members of the Commission, the courier should not be granted immunity from the criminal jurisdiction of the receiving State, particularly if he had committed a serious offence after delivery of the bag and while returning from the receiving State. Those who held that view felt that the privileges granted should be attached to the bag rather than to the courier; but it was important to note that denial of immunity from jurisdiction would seem to run counter to the personal inviolability which the courier enjoyed under article 27 (5) of the 1961 Convention, which also specified that the diplomatic courier was not liable to any form of arrest or detention. Since the new draft articles were to be complementary to the four Conventions already adopted, including the 1961 Convention, it would therefore be logical to grant to the courier not only personal inviolability, but also immunity from criminal jurisdiction. However, the latter immunity had not been expressly mentioned in the 1961 Convention; it was the 1963 Convention on Consular Relations which explicitly granted consular officers immunity except in respect of serious offences. Strictly speaking, formulations which would withdraw the courier's immunities in the case of "serious offences" or confine it to "acts within the performance of his functions" would appear to be inconsistent with article 27 (5) of the 1961 Convention. Perhaps a compromise formulation would be for the new draft article to provide expressly for personal inviolability, while remaining silent on the question of immunity from criminal jurisdiction.

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35. Indeed, the controversy could really only deal with exemptions which were not covered by the 1961 Convention and which could not readily be derived from it. There again, the Commission, in order to determine the acceptability of proposals, should find out whether they represented custom in the form of State practice or the direction in which the law should be progressively developed. It was in that flexible and pragmatic spirit that the question of privileges relating, for instance, to temporary accommodation and means of transporation of the courier should be approached. Care should also be taken in dealing with cases where a diplomatic agent performed the functions of a courier and was thus granted a status different from that of a diplomatic agent, since he would enjoy greater or lesser privileges according to the function he was performing. In Jamaica's view, it should be clearly laid down that, in cases where a diplomatic agent performed the functions of a courier, he had the privileges and immunities which attached to him in his capacity as a diplomatic agent.

36. Thirdly, with regard to the question of jurisdictional immunities of States and their property, he drew attention to a difficulty faced by newly independent countries, in that their experience, particularly their judicial experience, in relation to the topic was relatively limited. Indeed, in most of the cases involving them, they had participated not as the forum State but more often as the defendant or potential defendant State. That did not necessarily mean that those countries had no law on the subject, since, for example, developing Commonwealth countries followed the common law in that situation. But few of those countries had yet codified their domestic law on the subject.

37. The essential point was, therefore, that in determining a policy approach on the question, developing countries had to see themselves both as a forum State and as a defendant in another forum. They must therefore survey the whole spectrum of political, legal and economic considerations involved in the subject, taking into account that the interests of a developing country were, in some important respects, different from those of a developed country. In that context, his delegation was slightly hesitant about some of the proposals provisionally adopted by the Commission; it was necessary to provide more evidence of State practice in respect of certain articles, such as article 16 on patents, trade marks and intellectual or industrial property.

38. Fourthly, he referred to the question of international liability for injurious consequences arising out of acts not prohibited by international law. His delegation had not come to a conclusion about the kind of international instrument, if any, in which the Commission's draft articles should be embodied. It might be appropriate to consider the formulation of a multilateral convention, since it should be possible to give the duty to co-operate a fairly precise legal character. It need not be merely "a procedural obligation without any marked legal character" (ibid., para. 224). The legal practice of States already recognized the positive legal content of a corresponding duty, namely the duty to negotiate. His delegation agreed that the articles should preserve a balance between the freedom to act and the freedom from harm. Developing countries needed that balance so that their industrialization would not be unduly constrained.

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39. According to article 1, a transboundary matter must involve an activity within the territory or control of a State which gave rise to a physical consequence affecting the use or enjoyment of areas within the territory or control of another State. The report acknowledged that the wording of the definition "territory or control" raised considerable drafting difficulties and must be regarded as unsettled. However, he wished to make four general comments concerning the first draft articles.

40. First, the definition did not provide the tools to determine which of two claims was valid: the claim of a coastal State that an activity affecting the freedom of navigation of a foreign ship was not a transboundary problem since the activity was taking place in an area within its jurisdiction, or the claim of the flag State of the ship that the activity was internationalized and was a transboundary problem because the ship was exercising a right of continuous passage through the zone in question. Second, the definition could not provide the tools for the resolution of such claims when the Convention on the Law of the Sea itself found it difficult to decide whether the economic zone was a zone of national jurisdiction or a part of the high seas; in fact, the zone was best seen as being sui generis. Third, it should be remembered that the Convention on the Law of the Sea provided machinery for the settlement of disputes; it was therefore necessary to ensure that the new draft articles did not conflict with the régime established by the Convention, and to give careful consideration to draft article 3 on the relationship between the draft articles and other international agreements. Fourth, it was to be hoped that it would not become necessary, as had been suggested by one member of the Commission, to exclude certain matters treated in the Convention on the Law of the Sea, if only because many of the problems dealt with in connection with the subject were likely to arise in maritime areas.

41. Some members of the Commission had quite rightly expressed doubts as to whether the time-honoured formula contained in article 3 of the 1969 Vienna Convention on the Law of Treaties, which was reflected in draft article 5 and which excluded international organizations from the scope of the articles but preserved the application of general international law to such organizations, was adequate in the present context. With regard to the Convention on the Law of the Sea, there was doubt whether the exclusion of international organizations was appropriate, since they were an integral part of the régime created by the Convention by reason of their right, in certain circumstances, to become parties to that Convention, so that their exclusion could prejudice the interests of sovereign States which were parties to the Convention but which were not members of those organizations. Moreover, under the Convention on the Law of the Sea, it was an international organization, namely the International Sea Bed Authority, which would have to play the leading role in the area of the sea-bed beyond national jurisdiction.

42. His delegation would transmit its other comments on the draft articles to the Secretariat.

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43. Fifthly, with regard to the law of the non-navigational uses of international watercourses, he noted that the Special Rapporteur had revised the text of the draft articles in an obvious effort to resolve the principal question, which was how to reconcile individual, sovereign interests with wider community claims. In particular, the Special Rapporteur had eliminated from the draft articles the concept of the "shared natural resource" in favour of the provision that "the watercourse States concerned shall share in the use of the waters of the watercourse in a reasonable and equitable manner". That represented a good compromise, even if the word "share" still gave rise to some objections. Similarly, the Special Rapporteur had been right to abandon the concept of "international watercourse system" and replace it by the term "international watercourse".

44. He supported the proposal to move articles 11 to 14 regarding notification and procedures from chapter III which concerned co-operation and management, to chapter II, which concerned general principles, rights and duties of watercourse States. There, too, the duty to co-operation should be given a positive legal content in so far as it was consistent with legitimate national interests.

45. Finally, with regard to State responsibility, he would welcome clarification regarding the cases, referred to in draft article 2, which would allow a deviation from the provisions of the articles where the legal consequences of an internationally wrongful act was determined by "other rules of international law" relating "specifically" to the internationally wrongful act. In particular, it would be useful to include an example of the "other rules of international law" in the commentary.

46. He supported the view of some members of the Commission that article 7, which dealt with the breach of an international obligation concerning the treatment accorded by a State to aliens, should be deleted. It would seem inappropriate to deal with a particular type of internationally wrongful act to the exclusion of other such acts, and the substance of the provision was already covered in article 6, paragraph 2, of the draft articles. Moreover, the provision came very close to treating a primary rule of State responsibility, with which the draft articles were not concerned and the question of a State's responsibility for the treatment of aliens within its territory was very controversial.

47. Articles 8 and 9 provided for the right of an injured State to suspend the performance of its obligation towards a State which had committed an internationally wrongful act, by way of reciprocity or reprisal. Article 12, paragraph (a), however, stipulated that such suspension might not take place in relation to the obligations of a receiving State towards diplomatic and consular missions and staff. He wished to know whether that provision represented the only case in which, apart from the provision in article 12, paragraph (b), relating to peremptory norms of general international law, an injured State might not suspend its obligations to an offending State, and whether the basis of the provision was State practice or the progressive development of international law. The introductory phrase of article 12 would be clearer if it read: "... the suspension of the performance of obligations".

(Mr. Robinson, Jamaica)

48. Article 14, paragraph 1, referred to the applicable rules "accepted by the international community as a whole". Since the latter phrase was open to various interpretations, it would be better to say that an international crime entailed all the legal consequences of an internationally wrongful act and, in addition, all the rights and obligations determined by the "applicable rules of international law".

The meeting rose at 12.55 p.m.