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Chairman: Mr. TUERK (Austria)

CONTENTS

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The meeting was called to order at 3.10 p.m.

AGENDA ITEM 145: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FIRST SESSION (continued) (A/44/10, A/44/475, A/44/409 and Corr.1 and 2)

AGENDA ITEM 142: DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (continued) (A/44/465; A/44/73-S/20381, A/44/75-S/20388, A/44/77-S/20389, A/44/123-S/20460)

1. Mr. CONDORELLI (Italy) said that his delegation's major concern with regard to the topic of jurisdictional immunities of States and their property in chapter VI of the Commission's report (A/44/10) was that the draft articles should be balanced and reasonably reflect, by means of judicious compromises, the main trends of State practice without, however, trying to halt that constantly developing practice. There seemed to be some ground for concern as to the effectiveness of the final result which the Commission hoped to reach. Without wishing to reopen the main general debate on the relative merits of absolute immunity and restrictive immunity - to which Italy was deeply attached and which it had been one of the very first States to proclaim in its jurisprudence - it might be useful to explain why the draft articles were creating so much confusion among the many States which had adopted approaches similar to those of Italy and in spite of the considerable effort made to identify a whole series of "limitations" - a term which, in Italy's opinion, was preferable to the word "exception" - to the principles of immunity set forth in draft articles 6 and 21. Furthermore, the supporters of absolute immunity declared themselves to be just as strongly dissatisfied with the general approach adopted which, in their opinion, was too favourable to the argument that immunity was restrictive owing to the wide range of exceptions retained.

2. The very wording of draft article 6 indisputably implied, for every State agreeing to subscribe thereto, allegiance to the argument that immunity was the rule and the cases of State submission to internal jurisdictions constituted exceptions, to be interpreted, therefore, in a restrictive manner. That was clearly contrary to the idea in the mind of those who, like Italy, considered the immunity rule to be applicable only to a certain type of State activities, namely, those whereby their sovereign power was expressed, whereas the rule of submission to jurisdiction governed all activities which States decided to carry out. The difficulty could certainly be avoided by referring to the phrase "relevant rules of general international law", bracketed in article 6, and should, in his view, be retained. Nevertheless, the supporters of broad immunity objected to that solution for reasons which, in their opinion, were understandable. The solution of the Special Rapporteur, who thought that he could reconcile the differences by means of an article 6 bis concerning an optional declaration on additional exceptions to State immunity, was difficult for his delegation to accept. In a case between a State wishing to apply an additional exception and a State opposed thereto, it was the latter which - under the proposed régime - would win and could impose its solution on the other State in their reciprocal relations. In a nutshell, it would be preferable by far for all States whose practices deviated, however slightly, from the solutions retained in the draft not to undertake to abide by the principles laid down in the draft.

(Mr. Condorelli, Italy)

3. There were similar points of more importance which must be addressed regarding immunity in respect of the measures of constraint referred to in draft articles 21 et seq. Those articles might make it practically impossible to execute in one State judicial decisions rendered against another State, except where the other State previously or subsequently agreed thereto. In those circumstances what good would it do to allow judicial decisions against a State to be rendered, if their execution could not be in any way guaranteed? It would at least be necessary to lay down, for States, the international obligation to respect internal judicial decisions unfavourable to them; that would make it possible for one State to entertain international proceedings against another State alleging the latter State's responsibility for a wrongful act.

4. In the absence of such an obligation, it must be stated that the proposed articles were unacceptable in so far as they provided that execution could be applied exclusively to State property that was successfully demonstrated to be "specifically in use or intended for use by the State for commercial purposes" [art. 21 (a)]; for the party concerned that would be a real probatio diabolica. On the other hand, that provision could be acceptable if the burden of proof concerning the non-commercial purpose of the property in question laid entirely with the State.

5. In that context the deletions proposed by the Special Rapporteur and specified in paragraph 573 of the Commission's report seemed reasonable and justified. Moreover, the excessively detailed list of categories of property automatically excluded from measures of constraint, which appeared in draft article 23, added still further to the misgivings of his delegation, particularly with regard to subparagraph (c) and to the fact that the non-official purpose of the property specified in subparagraph (e) also seemed virtually impossible to establish in the face of simple denials by the State concerned.

6. His delegation was convinced that for the draft to be acceptable the Commission must continue to seek the largest possible consensus with a view to determining the principles of limitations (exceptions) that might win general approval. But, once that was done, the Commission should consider the situation where a group of States might decide to retain or establish additional limitations to State immunities. It would then be necessary to lay down the rules of reciprocity clearly, especially in the relations of States of a given group with other States whose approach was different, and that should be done by means of a provision very much more developed and elaborated than the text in article 28. That was the only reasonable way of making the draft flexible enough to be widely accepted. That same draft would be rejected by States if it persistently sought to force very divergent and firmly established international practices into an impossible mould, thereby halting current developments. It would be more productive to offer States firm guidelines in the matter, by clearly emphasizing what the juridical consequences arising from its own practice would be where that practice departed from the prescribed model.

(Mr. Condorelli, Italy)

7. The above-mentioned suggestion seemed all the more justified, because the practices of States in favour of restrictive immunity had not so far led to real international disputes. It was therefore hard to see what interest or advantage States practising restrictive immunity could have in sacrificing their concept, even partly, by assuming international commitments heading too rigidly in a different direction.

8. Italy was also very sensitive to the fact that granting States excessively broad jurisdictional immunities implied, for the forum State, a corresponding sacrifice of the right of each to have its case equitably heard by a judge in order to arrive at a determination of its rights and obligations. In other words, there was a need to strike a proper balance between the requirements of sovereignty and those of individuals, while bearing in mind that, for the latter, it was the right of access to justice - one of the fundamental human rights - that was at stake.

9. As to the draft articles themselves, his delegation found it quite puzzling that the public governmental purpose was taken into account in defining the commercial character of a contract in article 2; in a spirit of compromise, however, his delegation might be able to accept the proposal made by the Special Rapporteur in paragraph 441 of the report. The idea of incorporating the wording proposed in paragraph 430 of the report in the definition of the term "State" was quite attractive. The new wording which had been proposed for article 9 also seemed deft and should be retained. In contrast, paragraph 4 of article 10, suggested by the Special Rapporteur, gave rise to some reservations in that the jurisdictional immunity invoked by a State against a counter-claim which sought relief in excess of that sought in the principal claim would have the unfair effect of preventing a judge from hearing the counter-claim even to dismiss the principal claim.

10. As for article 12 and subsequent articles, his delegation reserved the right to examine them more thoroughly once the Commission had completed its second reading of them. Nevertheless, he could say with regard to article 13 that, although his delegation fully accepted the Special Rapporteur's suggestion to delete the reference to the requirement that the author of the act which had caused the damage in the territory of the forum State must be present, it could not endorse the proposal contained in paragraph 518 of the report: international responsibility could not be invoked alone in relation to the narrow topic covered by article 13. In other words, the rules pertaining to internationally wrongful acts and responsibility had a far broader role to play, particularly as the jurisdictional immunity of States could be invoked in cases involving a miscarriage of justice or other violation of the rules pertaining to human rights or the treatment of foreigners. Finally, in answer to the question which the Commission had put to the General Assembly, his delegation believed it would currently be premature to take up the question of the settlement of disputes involving immunity.

11. With regard to chapter VII, on the law of the non-navigational uses of international watercourses, his delegation found the topic which the Commission had considered - water-related hazards, harmful conditions and other adverse effects -

(Mr. Condorelli, Italy)

highly interesting from a legal and practical standpoint. Draft articles 22 and 23, proposed by the Special Rapporteur, reflected positive international law and offered an appropriate response to dangerous and emergency situations. The drafting of those articles represented an important contribution from the Commission to the International Decade for Natural Disaster Reduction, which the United Nations had proclaimed for the 1990s.

12. In draft article 22, the phrase "co-operation on an equitable basis" should be explained in greater detail. The indications given by the Special Rapporteur, especially the notion of the duty of the injured State to provide appropriate compensation for protective measures taken by another State, were very interesting and ought to be included in the actual text of the article.

13. Finally, with regard to draft article 23, he noted with satisfaction that the obligation of any watercourse State to provide notification of water-related dangers or emergency situations applied not only to other watercourse States but to other potentially affected States as well. He welcomed the accommodation of the interests of that group of States, something his delegation had recommended in the case of other articles. Another interesting and positive development was the fact that paragraphs 3 and 4, though dealing with a non-maritime topic, had been based on wording contained in article 199 of the United Nations Convention on the Law of the Sea, thereby reflecting that Convention's influence - at least in so far as environmental law was concerned - on the development of customary law.

14. Mr. DJIENA (Cameroon), referring to chapter VI of the Commission's report, said that, generally speaking, his delegation approved of the Commission's approach to the topic; nevertheless, in reading the draft articles, his delegation had noted that the Commission had not always taken account of the relevant practice and legislation of all States. It was true that, as the Special Rapporteur had pointed out, any jurisprudential analysis of State immunity was faced with the difficulty of obtaining pertinent judicial or legislative material from States, yet it must be borne in mind that the topic was an extremely complex one and that many States were currently submitting written comments to the Commission, which must refrain from concluding its work on the topic prematurely.

15. The Convention which would be elaborated on the basis of the draft articles must enjoy wide support from the international community. To that end, the draft articles should be improved so as to take into account the practice of States with different political, socio-economic and legal systems or at different stages of development. The Commission should not draft a text that would leave some States unnecessarily exposed to foreign jurisdiction, a situation which might impede their economic development.

16. His delegation had expressed reservations to paragraph 2 of the former wording of draft article 3 because it was not sure whether the conditions specified there for determining whether a contract for the sale or purchase of goods or services was a commercial contract were cumulative or whether only one of them had to be met. The Special Rapporteur's recommendation to consolidate articles 2 and 3 under

(Mr. Djiena, Cameroon)

the title "Use of terms" solved the problem to his delegation's satisfaction. However, paragraph 3 of the new article 2 which the Special Rapporteur had proposed in paragraph 441 of the report should be improved in order to settle the question of the criteria to be applied in determining the commercial character of a contract.

17. His delegation agreed with the Special Rapporteur that the main problem with draft article 6, lay in deciding whether the phrase "and the relevant rules of general international law" should be retained or deleted; however, it could not support the Special Rapporteur's proposal to add a new article - 6 bis - containing an optional declaration on exceptions to State immunity. Such an addition would not solve the problem, for the reasons set out in paragraph 461 of the report: the phrase "and the relevant rules of general international law" should therefore be retained, unless the Drafting Committee found a generally acceptable compromise formula.

18. The text of draft article 19 was deficient in that it said almost nothing specific about the court before which a State party to an arbitration agreement with a foreign person forfeited the right to invoke immunity from jurisdiction. As a general rule and in practice, an arbitration agreement designated the competent court or provided readily identifiable information about it, such as its location or nationality. Under those circumstances, it would be desirable to word article 19 in such a way that the State party to an arbitration agreement retained the right to invoke its immunity before the court of a State not affected or not appointed by the agreement in question, unless the agreement specifically provided for that.

19. Concerning chapter VII of the Commission's report, his delegation endorsed the thrust of draft articles 22 and 23 proposed by the Special Rapporteur. In article 22, the phrase "on an equitable basis" ought to be retained; it would not be desirable to replace it with the phrase "in accordance with the provisions of the present Convention", as some members of the Commission had suggested, as the Special Rapporteur had emphasized, the idea behind the original wording was that all relevant factors should be taken into account in determining the respective "contributions" of each watercourse State to the prevention or mitigation of water-related hazards and dangers. In addition, paragraph 1 of that article should be modified and broadened so that it covered different types of watercourses as well as the needs of States at different levels of development.

20. With regard to article 23, which contained some provisions on watercourse pollution, his delegation believed that all the provisions relating to pollution should be brought together in a single section of the draft articles; the Commission could consider doing that in the course of its second reading. There was also the problem that paragraph 3 of article 23 did not make it clear whether States not parties to the draft articles were bound by the obligations of co-operation incumbent upon States in the area affected by a water-related danger or emergency situation.

(Mr. Djiena, Cameroon)

21. Furthermore, the question of outside assistance in case of a disaster was important and should be given more thought by the Commission. The draft articles could define the modalities of such assistance without making it binding on States, and could provide for machinery for joint action by States parties to deal with common problems. In that regard, the experience of the kind of joint commissions that existed, for example, in Africa, could prove useful.

22. The development of emergency plans and their implementation presupposed a certain degree of concerted action and co-operation among the watercourse States and other potentially affected States. Accordingly, paragraph 4 of article 23 could not be applied unless some quasi-permanent consultation machinery had been set up. The emphasis should therefore be on the obligation to co-operate in case of dangers and emergency situations.

23. Mr. STEPANOV (Ukrainian Soviet Socialist Republic) joined in paying tribute to the Special Rapporteur for his work on the topic of international liability for injurious consequences arising out of acts not prohibited by international law. The revisions he had made and the new articles he had proposed showed his desire to move ahead with his work. However, no progress would be made in elaborating specific articles without agreement on the principles underlying the topic, and the Commission's report showed that such agreement did not yet exist, thus accounting for the difficulties encountered by the Special Rapporteur. His task and that of the Commission would be greatly facilitated if the key concepts were perfectly clear.

24. In resolution 32/151, the General Assembly had invited the Commission to work on international liability for the consequences arising out of the acts in question, namely, the harm caused, and not on responsibility for the acts themselves. The draft articles should contain a provision stipulating that reparation should be made on the basis of special international agreements. Indeed, there already existed specific international rules adopted by the International Maritime Organization (IMO), the International Civil Aviation Organization (ICAO) and other international agencies. Ideally, of course, such rules should be drawn up for all activities likely to cause transboundary harm, and common sense dictated that a single text should apply to the manifold processes at work.

25. Unfortunately, the work done had been purely on a legal plane without specific reference to the status of contemporary science and technology. For instance, draft article 1 referred to activities whose physical consequences caused transboundary harm, when such harm could just as easily result from chemical, biological or other consequences. Elsewhere, article 2 spoke of "appreciable risk", one that might be identified through a simple examination of the activity and the substances involved. The meaning of "simple examination" should be defined. It obviously included the use of special apparatus and instruments. Moreover, the "simple examination" could mean different things depending on the level of a country's development. It was evident that if the intention was to draft provisions that took into account the current state of knowledge, specialists who were not jurists must be called in.

(Mr. Stepanov, Ukrainian SSR)

26. The concept of "appreciable harm" also called for comment. The Special Rapporteur had used the term "appreciable" in relation to both harm and risk, recognizing that the terms "substantial", "considerable" or "significant" might be preferable. His delegation thought that the concept of "appreciable harm" and "appreciable risk" were not clear and it would prefer the use of the adjective "substantial".

27. As to the concept of "risk", in philosophy it represented only a possibility that had not yet materialized. That was why the State undertaking an activity involving risk could be considered bound only to prevent a potential substantial harm from occurring. What was at issue, then, was an internal, unilateral obligation, which became an obligation to co-operate with other States only when the State in question believed that individually it was not in a position to prevent a fault that might cause harm or, in the case of activities with injurious consequences, that it could not keep such consequences under the authorized threshold of substantial harm. The approach proposed must satisfy the interests of the States particularly concerned about causing transboundary harm, without imposing an excessive burden on those conducting pioneering activities that were important for all mankind.

28. The Special Rapporteur had introduced new elements, especially in the formulation of draft article 7 on co-operation, which referred to the assistance of international organizations. The terminology used raised certain questions: for instance, although the terms "State of origin" and "affected State" were clearly defined in article 2, that was not the case of "States" in article 7. From the legal standpoint, it was not clear which States were meant. Also, article 7 made a distinction between whether the harm was caused "by an accident" or not. If it was, the affected State was obligated to co-operate, if possible, with the State of origin, but the obligation of the State of origin was not clearly defined. The Commission should make the formulation more specific in view of the fact that the General Assembly had invited it to work on international liability for injurious consequences arising out of acts not prohibited by international law. As the Special Rapporteur had indicated, the co-operation referred to in article 7 must not be used as a way of obtaining a political advantage or bringing pressure to bear in the settlement of a dispute. That idea could be stated explicitly in article 7.

29. The revised articles 10 to 17 submitted by the Special Rapporteur seemed at first sight to be procedural. However, they touched on certain major questions of substance. For example, it was not clear how they were related to the provisions of article 7. One could ask what criteria had been used to establish the time period of six months within which to study and evaluate the potential effects of a planned activity. Article 16 should, in addition, be more realistically formulated. If there was a notable difference in the levels of development of the notifying State and the notified State, the phrase "with a view to establishing the fact with certainty" was meaningless: the notified State might not be in a position to establish a fact with certainty if it had no access to new data and

(Mr. Stepanov, Ukrainian SSR)

techniques. The Commission should also give thought to that problem in order to avoid having the doubts of a notified State act as a brake on the development of pioneering activities or impede scientific and technical progress.

30. Mr. VILLAGRAN KRAMER (Guatemala) said, with regard to international liability for injurious consequences arising out of acts not prohibited by international law, that it was important to draft articles that would reflect denominators common to all States. It was obvious in advance that the drafting of a text covering legal or other procedures for the settlement of disputes would by its very nature require a vigorous effort to find solutions taking account of the legitimate interest of States. His delegation believed that the Commission should not focus on procedural rules, because it had not been given a mandate to formulate a negotiating text in that particular area.

31. With regard to the question of jurisdictional immunities of States and their property, he said that the notion of immunity did not have an unlimited basis or scope, while recognizing that it was still the most important rule, even if there could be exceptions to it; such exceptions constituted an area which the Commission could help to define, with, of course, much caution and good sense. None the less, the nature of the contract was an insufficient criterion, because it limited the courts' freedom of action and did not allow States to explain, when they wished to do so, why they could not execute the contract. In any case, those were questions which should be examined more closely by the Special Rapporteur. Moreover, the legitimate interests of States in contractual matters could not be separated from their fundamental interests. The criteria in that area were gradually becoming clearer. Thus, the industrialized countries were right to emphasize what in their view constituted the ideal model of economic, financial and commercial relations between highly developed countries, but his delegation's point of view, which was that of a developing country, did not coincide with theirs, for one basic and simple reason: the developed and developing countries were not on an equal footing so far as contracts were concerned. It was not advisable to move towards legal confrontation; the Commission would surely realize that, in all contractual relations between large and small countries, one side was strong and the other was weak, as was obvious in international trade and finance. A large number of developing countries were in difficult financial circumstances, and it was important to them that loan contracts concluded with multilateral financial institutions should be distinguished from contracts with private banks.

32. On the subject of commercial contracts relating to financial relations, specifically the external debt, two major points should be made. First, the choice of a contractual law implied the acceptance of that law for the purposes of interpreting the contract, but did not imply the acceptance of the forum. Hence, if the contract stipulated only the choice of the law, that did not imply the acceptance of the forum. Secondly, the acceptance of the forum must be explicit, but a State which accepted the forum did not thereby agree to waive the jurisdictional immunity of State property. In the case of State enterprises, it was clear that a contractual relationship existed under which the jurisdiction of the court was accepted together with the legal consequences which it entailed.

(Mr. Villagran Kramer, Guatemala)

However, that did not mean that State property could serve as collateral or be subject to attachment. The exceptions being considered by the Commission should include those stipulations.

33. It was frequently observed that the current system made it difficult to determine whether there had been a substantial change in circumstances since the signing of the contract, which would make it possible to invoke the theory of lack of foresight. Moreover, the possibility for the debtor State to invoke the situation of loss of property was not provided for. In that regard, it was conceivable that a State might be able to go to the forum of a developed country in order to benefit from the rules established by that country for its enterprises concerning the loss of property and agreements moderating the payment terms in favour of the debtor.

34. He pointed out that new techniques, such as computerized banking transactions, were being used to an ever greater extent in international trade, and that the Commission's work should take into account those new phenomena and the new situations which they created, particularly in the developing countries, which were not yet sufficiently equipped in that regard.

35. Mr. BEN ABDALLAH (Tunisia) said that his delegation fully endorsed the goals which the Commission intended to attain by the end of its current term of office, as stated in paragraph 733 of the report (A/44/10). However, he drew attention to the need for a genuine long-term programme of work for the Commission, particularly in view of the new topics which might be included in the future programme. He was looking forward to the suggestions of the Working Group established for that purpose. He also emphasized the importance which his delegation attached to the regular holding of the International Law Seminar, in view of its positive effects on the training of young professionals from the developing countries, and expressed his gratitude to the countries which took part in the financing of the Seminar. Moreover, owing to the importance of the interaction between the Committee and the Commission, it would be desirable for the Commission's report to be distributed within a reasonable time before the opening of the General Assembly's session; given the volume of work required for preparing the report, a slight adjustment in the dates of the Commission's session might remedy the situation.

36. With regard to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, his delegation welcomed the adoption by the Commission on second reading of the draft articles and the two draft Optional Protocols. The main purpose of the draft, which was to establish a coherent and uniform régime, had made necessary a comprehensive approach in which the practical and functional aspects of communications between States had been taken into account. The draft articles, which thus emerged as the result of a difficult compromise, had largely succeeded in establishing a proper balance between the rights and duties of the sending State, the receiving State and the transit State, based on the four conventions governing the status of all kinds of couriers and bags, and taking into account the developments in the means of communication and State practice over many years.

(Mr. Ben Abdallah, Tunisia)

37. While not questioning the usefulness of the draft articles from the practical standpoint, his delegation none the less believed that existing conventions contained all the international rules necessary to govern the status of all kinds of diplomatic couriers. As the Special Rapporteur had noted, there was an identity of treatment between diplomatic couriers and consular couriers. The same did not apply to the régime governing bags, which provided for differences of treatment according to the type of bag, particularly with regard to the question of inviolability. Accordingly, it would have been preferable for the draft articles to concentrate on the question of unaccompanied bags, in order to co-ordinate various régimes and thus provide a better legal basis for all aspects relating to the routing of bags. However, he had no objection in principle to the approach adopted, which made acceptance of the new instrument easier since it embodied recognized and confirmed principles and practices.

38. On the other hand, the relationship between the draft articles and other instruments remained to be defined, and draft article 32 offered a flexible formula to the extent that it stipulated that the draft articles were intended to supplement the codification conventions. That was another case of a difficult compromise which did not settle all the problems that might arise as to the applicability of certain provisions, particularly with regard to bags. Mindful of those difficulties, the Commission proposed to refer, if necessary, to the rules of the Vienna Convention on the Law of Treaties of 1969 regarding the application of successive treaties relative to the same subject-matter. That solution gave each State sufficient leeway for making an assessment, but the draft articles would benefit from redrafting in a way that would give the new instrument a truly universal character.

39. The question of the diplomatic bag was of particular importance. While the principle of the inviolability of the bag was fundamental, some countries had rightly raised the question of abuse; nevertheless, the abuses recorded should not justify calling that essential principle in communications between States into question. His delegation, which had expressed reservations about the possibility of examining the bag directly or through electronic or other technical devices, was satisfied with the text of draft article 28, which endorsed the rule of the inviolability of the bag without opposing external examination of the bag and its marks, commonly admitted by all States. Lastly, the adoption of a convention on the matter should take place in optimum conditions likely to promote the large-scale accession of States; his delegation therefore supported the Commission's recommendation concerning the holding of a conference of plenipotentiaries to consider the draft articles with a view to concluding a convention.

40. The pragmatic approach adopted by the Commission in examining the question of the jurisdictional immunities of States and their property had made it possible to circumvent in some way a doctrinal debate on the general principle of State immunity, and, in that connection, his delegation recalled its position of principle, namely, that the jurisdictional immunity of States and their property was a universally recognized principle of international law that was based on the

(Mr. Ben Abdallah, Tunisia)

sovereign equality of States. That principle admitted of exceptions, taking into account the reality of trade and changes in economic systems and national legislation, but such exceptions should be explicitly defined in order not to affect the principle of immunity itself. Account should be taken of the specific characteristics of developing countries where the public sector continued to play a predominant role, particularly in the strategic areas of energy, mining and international transport. The functional approach consisting in the imposition of several restrictions on the principle of the immunity of States and their property might hamper the economic development of those countries and give rise to an endless dispute concerning trade and its relevant contracts.

41. Several attempts had been made to strike a balance between the different points of view. He thought that a solution had been found to resolve the difficulties inherent in the distinction between jure imperii acts and jure gestionis acts through the use of criteria concerning the nature and purpose of the act in question. His delegation shared the view of the Special Rapporteur, who considered that the differentiation between those two types of acts should be made on an objective legal basis, in other words, by a precise delimitation of acts not covered by State immunity. It considered that those different views could be reconciled, for example under draft articles 11 and 11 bis which provided for a judicious compromise with regard to commercial contracts and the concept of segregated State property, a concept which seemed quite important and deserved to be studied in detail. In fact, its use served to limit abusive recourse to judicial proceedings brought against the State on the subject of commercial contracts concluded by its public enterprises.

42. Draft article 6, which set forth the very principle of State immunity, did not yet seem to enjoy general support. Draft article 6 bis was based on the praiseworthy desire of the Special Rapporteur to reach a compromise acceptable to the advocates of the restrictive immunity doctrine and to those who supported broad immunity for the State. Draft article 6 could be reworded to take account of the different opinions and the suggestion in paragraph 456 of the report might help to overcome the differences. Indeed, the explicit reference to the rules of general international law for goods not expressly governed by the draft convention was likely to give rise to reservations on the part of States which did not favour the deletion of the words "and the relevant rules of general international law" in brackets at the end of draft article 6. It therefore seemed appropriate to delete draft article 6 bis, which wandered from the very subject of the draft articles and might be a source of legal and practical complications because of the system of declaration regarding additional exceptions which each State would wish to make in addition to those provided for in draft articles 11 to 19.

43. Mr. UDDIN (Bangladesh) said that his delegation attached considerable importance to the question of the law of the non-navigational uses of international watercourses, because his country was critically dependent on water resources for the development of its economy. He therefore regretted in particular the fact that an unduly high number of changes of Special Rapporteurs on the question had caused some delay in the Commission's work on the topic. He stressed his delegation's

(Mr. Uddin, Bangladesh)

concern over that loss of momentum, but had the impression that a sense of urgency prevailed concerning the topic.

44. Physical interdependence of riparian States in the use of an international watercourse was beyond question. However, out of some 200 international river basins, only one third were governed by agreements among riparian States. In the case of the others, problems concerning the sharing of water resources remained a constant source of tension and even of serious conflicts. Therefore, the elaboration of a set of legal principles on the question could only contribute to the preservation and promotion of harmonious relations among riparian States. The Commission had recognized such a need and a consensus had been reached on the necessity of codifying those principles into a framework convention.

45. The draft articles proposed by the various Special Rapporteurs on the question provided a legal basis for international co-operation which alone would make possible the rational and equitable exploitation of their resources, including fresh water, the shortage of which would soon be felt. Rational management of those resources was of increasing significance at the world level.

46. His delegation attached particular importance to the definition of "international watercourse" (draft article 1). The first essential was to recognize the unity of a watercourse, in terms of the interdependence of its component parts. Its water resources should by definition constitute the total quantity of water that flowed into and through it. The definition of a watercourse derived essentially from the unity of the hydrological cycle, a fact confirmed by the study of any hydrographic map.

47. Apart from its geographical and hydrological reality, the national character of a watercourse should be determined by the fact that it crossed several States, and not merely by the use of its water. His delegation could not accept the notion of relativity in defining the international character of a watercourse. That concept was not legally valid because it lacked precision, it was prejudicial to the interests of downstream riparian States, given the technical feasibility of controlling the flow of water and, lastly, it wrongly assumed that it was possible for one State to use part of the waters without affecting use by another State. It would therefore be logical to consider an international watercourse as a shared resource subject to equitable distribution.

48. His delegation was also concerned about the enumeration of "factors relevant to equitable and reasonable utilization" (draft article 7). That enumeration should take into account factors such as geographical features, climate and environment, demography and the economic condition of the hinterland States, in order to co-ordinate the needs of all parties with the overall availability of water resources.

49. The logical consequence of the principle of equitable sharing would be to prohibit not only the uses that might cause "appreciable harm" to the rights or interests of another riparian State, but also those that might have adverse effects

(Mr. Uddin, Bangladesh)

on another riparian State. The notion of "appreciable harm" had been criticized as being too vague. To meet that criticism, an enumeration of the factors determining appreciable harm and the adverse effects on riparian States must be part of any agreement on the uses of international watercourses. The siting of works on watercourses would be an extremely important factor, because, in general, the lower down the site, the more serious the effects were likely to be, particularly in densely populated delta flood-plains, such as those in Bangladesh. In that context, the Commission should explore the possibility of establishing an international flood-related relief agency along the lines of the International Committee of the Red Cross or the International Red Crescent.

50. With regard to the question whether the draft should include rules on the breach of obligations of watercourse States (A/44/10, para. 651), the omission of such an important matter would create a legal vacuum, and the Special Rapporteur should therefore reconsider his proposal.

51. In draft article 22, paragraph 1, the phrase "on an equitable basis", which lacked a clear legal definition, might lead to controversies. The Commission might consider establishing machinery through which disputes on the interpretation of that phrase could be settled. The words "structural and non-structural" in draft article 22, paragraph 2 (b), should be replaced by a clearer formulation.

52. As to draft article 23, it would be advisable to harmonize, in paragraphs 1 and 3, the words "intergovernmental organizations" and "international organizations". The scope of paragraph 2 could also be broadened by replacing the phrase "other watercourse States" by "other potentially affected States".

53. Draft article 2? proposed that a watercourse State should "without delay and by the most expeditious means available notify" other potentially affected States. But not all States had remote-sensing capabilities to detect water-related dangers or hazards in advance. For that reason, it was desirable in the long run to consider establishing an international agency endowed with the necessary remote-sensing capability or which would act as the channel for sharing and transmitting data to all potentially affected States.

54. With regard to other issues being considered by the Commission, the topic of State responsibility should be given priority. As to the question of jurisdictional immunities of States and their property, economic and commercial functions were no less important than the sovereign functions of the State, and jurisdictional immunity should be awarded on the basis of the purpose of the contract rather than its nature (A/44/10, para. 434).

55. The draft articles on the status of the diplomatic courier were coherent and reflected a good balance between the interests of the sending, the receiving and the transit States. His delegation also supported the Commission's recommendation that an international conference should be convened to adopt the draft articles in the form of an international convention. Lastly, it was to be hoped that at its next session the Commission would be able to resume consideration of the important question of relations between States and international organizations.

56. Mrs. GOLAN (Israel), referring to the question of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, said that her delegation favoured the changes and principles embodied in the draft articles, in particular the principle that the draft should be confined to couriers and bags sent by States to their diplomatic missions, consular posts or delegations to international organizations of a universal character within the meaning of the Vienna Convention of 1975. It also approved the idea of adopting separate optional protocols with regard to the régime of the courier and bags employed for official communications with special missions or international organizations, because many States were not parties to the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. Her delegation also approved the idea of placing the status of the ad hoc courier on the same footing as that of the diplomatic courier.

57. With regard to the inviolability of the diplomatic and consular bag, her delegation was in favour of the régime established by the Vienna Conventions on Diplomatic and Consular Relations of 1961 and 1963 and reflected in draft article 28. She hoped that measures to prevent abuse of the diplomatic bag, would be fully consistent with the principle of the inviolability of the bag. Concerning the new elements considered for introduction into the draft articles, in particular, the inviolability of the temporary accommodation of the diplomatic courier and his immunity from jurisdiction (draft articles 17 and 18), which were not covered by the four conventions in question or by customary international law, a thorough study of the proposals as to their implications at the national level would be necessary before Israel could state its position. With regard to the proposal by the Commission to convene an international diplomatic conference, further study was needed on the subject before such a conference was convened.

58. With regard to the draft Code of crimes against the peace and security of mankind, her delegation noted that the phrase "crimes against humanity", which was new in international law, had been invented in 1954 to designate the most barbarous international crimes and the most revolting international behaviour. The phrase "crimes against humanity" had been trivialized over the years, and it was currently used in international forums to stigmatize the behaviour of a political opponent. The Sixth Committee should not make that mistake. It must differentiate between international crimes and crimes against humanity. An action might be considered an international crime, might be condemned in international forums and might be banned by international treaties without being a crime against humanity. Her delegation did not see the need to divide the crimes against the peace and security of mankind to be included in the draft Code into the categories of crimes against the peace, war crimes and crimes against humanity. If, however, that distinction was maintained, the expression "crimes against humanity" should only be used for the most heinous of international crime, namely genocide.

59. As to the definition of war crimes, her delegation supported the second alternative of draft article 13 (A/44/20, note 72, p. 142) proposed by the Special Rapporteur in his seventh report. Lastly, any attempt to draw up a list of acts

(Mrs. Golan, Israel)

constituting war crimes, whether exhaustive or simply indicative, would be counterproductive and might hamper the development of international law in that field.

60. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, her delegation recognized the need for a general legal régime to regulate such activities and to serve States as guiding principles for concluding agreements on such activities. It was, however, a subject which required much prudence, because, in elaborating such rules, the Commission was pioneering a new field in international law. Indeed, there were almost no rules in conventional or judicial international law that could provide a clear picture of what State liability actually entailed. The delegations participating in the second session of the Working Group on Liability for Nuclear Damage convened by IAEA in Vienna the previous week had found that it was difficult to specify what form that liability should take. The complexity of the subject therefore dictated a cautious approach.

61. With regard to the question of jurisdictional immunities of States and property, her delegation agreed with the position taken by the Special Rapporteur in his preliminary report (A/CN.4/415), and shared by the International Law Commission, that the Commission should concentrate its discussion on individual articles in order to arrive at a consensus as to the kind of activities which should not enjoy immunity from the jurisdiction of another State (A/44/10, para. 406). It also approved the idea of combining draft articles 2 and 3 into a single article entitled "Use of terms". She considered, also, that in determining whether a contract was commercial, the criterion should be primarily its "nature" and that of its "purpose" should be applicable only in specified cases (A/44/10, para. 435).

62. With regard to draft article 4, entitled "Privileges and immunities not affected by the present articles", her delegation favoured the addition of the words "under international law", which showed clearly that the privileges and immunities referred to those conferred on a State by international law.

63. With regard to draft article 6, if the expression "and the relevant rules of general international law" were deleted, her delegation would be ready to consider favourably any other wording which would promote the future development of international law on the subject. Concerning draft article 6 bis, her delegation did not favour the adoption of the prpoosed procedure. On the other hand, it agreed to the principles embodied in the modified draft articles 7 to 9, but considered that draft article 10.4 was unnecessary as the issue should be left to the determination of the competent court.

64. Mr. GARRO (Peru) said that, with regard to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, his delegation approved the goal of the ILC, which was to establish a coherent and, as much as possible, uniform régime applicable to all kinds of couriers and bags and based on the Vienna Conventions on Diplomatic Relations, on Consular Relations, on

(Mr. Garro, Peru)

the Representation of States in their Relations with International Organizations of a Universal Character, and on the Convention on Special Missions. It also approved of the approach of basing the legal protection extended to the courier and the bag on practical needs. With regard to the form of the future legal instrument, the solution adopted, which was to work out two optional protocols dealing respectively with the status of couriers and bags of special missions and that of couriers and bags of international organizations of a universal character, might be of practical value at the current stage of negotiations on those questions. The draft article adopted on the second reading was satisfactory on the whole. Given the remaining differences of view on some points, it would, however, still be necessary to strike a balance between the various positions, and it would therefore be very useful to convene an international conference of plenipotentiaries as the ILC had recommended.

65. With regard to the draft Code of crimes against the peace and security of mankind - the preparation of which should be completed quickly - his delegation appreciated the efforts being made to rethink the question of war crimes in the light of the current international situation. With regard to the specific problems pointed out by the Special Rapporteur, it considered that the idea of gravity should be introduced into the definition of a war crime, since the draft Code should deal only with the most serious international crimes. On the terminological level, the reference to "rules of international law applicable in armed conflict" (second variant of article 13, A/44/10, 67/) should be adopted. Lastly, the crimes punishable under the Code should be clearly specified in the Code itself and it was important not to rely for their definition on possible interpretations of generic definitions. The formula of laying down a general definition followed by an indicative list of crimes seemed to have the advantage of avoiding both legal imprecision and the practical impossibility of establishing an exhaustive list.

66. It was important also to include a provision relating to crimes against humanity: genocide, apartheid, slavery and crimes against a vital interest of humanity, for example, were odious crimes which deserved to be punishable under the Code. With regard to the crime of apartheid, geographical considerations should be omitted in order to concentrate on the essential aspects.

67. With regard to illicit drug traffic, his delegation fully shared the opinion of the Special Rapporteur as set out in paragraph 209 of the report, and found acceptable the inclusion of two provisions on the question, one under the heading of crimes against peace, because of the destabilizing effects of such traffic on some States, which was detrimental to the proper conduct of international relations, and the other under the heading of crimes against humanity, because of the injury done to the health and well-being of mankind as a whole.

68. Lastly, it was important for the Commission to continue the preparation of the list of crimes against peace, after provisionally adopting the articles dealing with the threat of aggression, intervention and colonial domination and other forms of alien domination, as well as the discussion on the draft article concerning serious breach of an obligation of essential importance for the maintenance of international peace and security, with a view to its inclusion in the draft Code.

69. Mr. AZZAROUK (Libyan Arab Jamahiriya), speaking of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, said that it was unjustified to point to some legal lacunae, as a small number of delegations had done, as a reason to reject the recommendation made by the International Law Commission during the adoption of the draft articles on the subject. The draft articles in fact took into account the provisions of texts adopted by Governments in different regions, the national interests of all countries and the practice of States, and it could not be argued that because the four codification conventions on diplomatic law had been tested by experience the international community had no need to clarify and complete the provisions governing official communications between States. On the contrary, that work of clarification was all the more necessary because it advanced the codification and progressive development of international law and it was inconceivable to rely on the good faith of States in the interpretation of legal lacunae, an interpretation which might be dictated by narrow nationalist interests.

70. Although the reservations expressed regarding the provisions of article 28, paragraph 2 concerning the protection of the diplomatic bag were easy to understand, it must be remembered that it was essential to fill certain gaps apparent in other relevant instruments, and more particularly in article 35, paragraph 3 of the Convention on Consular Relations, on the basis of the established practice of States. In that respect, his delegation hoped that no party would come to the conference proposed by the Commission with the feeling that it had been forced to do so by the majority because of the adoption on second reading on the draft articles. It also considered that the statement made on that subject by the Austrian representative indicated the road to be followed.

71. Regarding the draft Code of crimes against the peace and security of mankind, he recalled that his country's position had been stated in the report of the Secretary-General (A/44/465). His delegation was in favour of drawing up a non-exhaustive list of war crimes to supplement the list of crimes mentioned in the legal instruments adopted since the end of the Second World War. In that connection, the second alternative of draft article 13 better reflected the evolution of international relations and would thus contribute to the codification and progressive development of international law. That being the case, it should be noted that subparagraph (a) of the second alternative of draft article 13 did not mention attacks against the civilian population and that it was therefore necessary in that regard to follow the provisions of article 85, paragraph 3 (a), of Additional Protocol I to the Geneva Conventions. His delegation noted with satisfaction that, in paragraph 131 of its report, the Commission had included in the list of war crimes the use of weapons prohibited by the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.

72. With respect to draft article 14 on crimes against humanity, a distinction should be made between inhuman acts and the crime of genocide. There was no reason not to use the wording of the 1948 Convention, giving due consideration to present and future requirements. In that connection, his delegation noted with satisfaction the links established between the crime of genocide and the crimes of

(Mr. Azzarouk, Libyan Arab Jamahiriya)

deportation, expulsion of populations from their territory or forcible transfer of populations, since such acts constituted either the means or the object of genocide.

73. Despite the fact that certain countries were not parties to the 1973 International Convention for the Suppression and Punishment of the Crime of Apartheid, apartheid was none the less a crime against humanity. The international traffic in narcotic drugs was a crime against peace inasmuch as it had a destabilizing effect on certain countries, especially the smaller ones, and as such, adversely affected harmonious international relations. Furthermore, such traffic had links with local and international terrorism and impaired the health and well-being of mankind as a whole.

74. His delegation reserved the right to revert to articles 13 and 14 on aggression and intervention respectively. Regarding article 15, it did not share the optimism of certain delegations that colonial domination was becoming extinct as a phenomenon. He regretted that no legal instrument had been adopted to make the colonial countries pay up and make reparations to the colonized countries.

75. Regarding jurisdictional immunities of States and their property, his delegation hoped that the Commission would concentrate its discussion on individual articles, so as to arrive at a consensus as to what kind of activities of the State should enjoy immunity and what kind of activities should not enjoy immunity from the jurisdiction of another State. His delegation found it difficult to agree with the conclusion of the Special Rapporteur that the doctrine of absolute immunity had gradually given way to a restrictive theory, according to which there were no universally binding norms in customary international law which obliged a State spontaneously to grant jurisdictional immunity of a general nature to other States. Although certain industrialized countries might have made changes in that field, the vast majority of countries, including developed countries, remained attached to the doctrine of absolute immunity. In any case, the Commission should elaborate an instrument which covered all aspects of activities of the State so as to provide a uniform set of rules. In conclusion, his delegation would deal with chapters IV, V, VII and VIII of the report of the International Law Commission on another occasion.

76. Mr. WATTS (United Kingdom) said that his Government's view on the doctrinal and legal bases for jurisdictional immunities of States and their property was clear: international law had developed in such a way that the old rule of absolute immunity was now obsolete; those who found themselves involved in a dispute with the Government of a foreign State, acting in a non-sovereign capacity, should be able to have that dispute determined by the ordinary process of law.

77. Regarding article 2, paragraph 3 (A/44/10, para. 423), his delegation felt that one should refrain from introducing subjective factors such as the "purpose" of a transaction in determining whether immunity might be claimed. There would be a need to look very carefully at the text which the Commission would eventually produce on that important point. The discussion on draft article 6 should also be followed closely. His delegation doubted whether article 6 bis (ibid., para. 457)

(Mr. Watts, United Kingdom)

as proposed by the Special Rapporteur would provide a solution. Finally, it shared the views of those members of the Commission who considered that the concept of segregated State property (art. 11 bis and 18 (1) bis) required further clarification. His delegation remained to be convinced that it was necessary to have a special provision in the draft articles on that subject.

78. In general, work on the law of the non-navigational uses of international watercourses was progressing in a broadly acceptable direction. His delegation continued to support the "framework" approach of the draft articles. Given the great diversity of international watercourse systems, it might prove better to adopt a set of guidelines or recommendations rather than a convention containing binding rules.

79. His delegation was still not convinced that article 22, paragraph 3 (ibid., para. 637) added anything to article 8, which had already been provisionally adopted. If, however, the majority felt that it should remain, it might be better, for reasons which his delegation had put forward at the previous session (A/C.6/43/SR.27), to replace the word "appreciable" with the word "significant". For very much the same sort of reason, in order for article 22, paragraph 2 (a), not to appear superfluous, that article should not be limited to stipulating an exchange of data and information, already stipulated in article 10, but required something more, perhaps in terms of the frequency of exchanges.

80. The provisions of article 23, paragraphs 3 and 4 (ibid., para. 641) were broadly acceptable. They were, however, framed in terms of obligations upon non-watercourse as well as watercourse States, which could pose a problem, especially if the draft articles were finally to take the shape of a convention, in that it would not seem appropriate to impose obligations upon States not party to a particular agreement, at least in the absence of their consent. The International Law Commission might give thought to finding a method of encouraging non-watercourse States to co-operate, while avoiding the suggestion that they were legally bound to do so.

81. Detailed observations of his delegation on jurisdictional immunities, as well as observations on non-navigational uses of international watercourses would be set forth in two annexes to his statement, which would be available in due course.

The meeting rose at 5.55 p.m.