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Chairman: Mr. TÜRK (Austria)

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The meeting was called to order at 10.05 a.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-S/20743 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. SZEKELY (Mexico) said, with reference to chapter VII of the International Law Commission's report (A/44/10) that his delegation found it difficult to respond to the Commission's invitation to Governments to state their views on draft articles 22 and 23 as proposed by the Special Rapporteur, inasmuch as his delegation's serious concerns, with regard to other articles had not been taken into account by the Special Rapporteur or the Commission. While not wishing to reiterate what had been said on previous occasions, he referred the members of the Committee to the comments made by his delegation on the topic in the previous three years.

2. The similar provisions in article 22, paragraph 3, and article 8 prompted his delegation to reiterate its position that the harm which might be caused to other watercourse States should not be qualified, least of all by a term as subjective and dangerous as "appreciable". Such a qualification would aggravate the real threat entailed by the cumulative effect of harm which, at a given moment, might not be regarded as appreciable, but which in the aggregate might result in serious losses. The term "harm" should be sufficient in itself, without any qualifications or restrictions.

3. If the future convention required harm to be "appreciable", it might become a breeding-ground for conflict. Furthermore, a State which was not appreciably harmed would still be affected by a harmful condition, and would have the additional burden of repairing the damage in order to return the situation to the status quo ante, since the State which had caused the damage would not be obligated to repair it if it was not "appreciable". So long as that qualification remained, the Commission would be making a poor contribution to the development of international environmental law. He pointed out, in connection with the reference in paragraph 640 of the report to article 194, paragraph 2, of the United Nations Convention on the Law of the Sea, that the paragraph in question prohibited States from causing damage by pollution to other States and their environment, but by no means stated that the prohibition applied only to "appreciable" damage.

4. With regard to article 23, paragraph 1, he believed that the reference to "toxic chemical spills" did not conform to the language currently used in legal instruments in the field of international environmental law. It would be preferable to refer to "dangerous wastes and substances".

(Mr. Szekely, Mexico)

5. With regard to paragraph 2, express mention should be made of one of the primary practical measures to be taken by a State to prevent, neutralise or mitigate the danger or damage to other watercourse States, namely, an immediate moratorium on the human activities which caused the danger or emergency situation.

6. In connection with paragraph 651 of the report, his delegation was of the view that the draft should contain secondary rules, specifying the consequences of the breach of certain obligations of watercourse States, and that those secondary rules should be motivated chiefly by environmental considerations of the highest order.

7. Mr. BADR (Qatar) drew the Committee's attention to a statement made by Mr. Njenga, Secretary-General of the Asian-African Legal Consultative Committee, at the most recent session of the International Law Commission. Mr. Njenga had repudiated the view that the States members of the Consultative Committee had subscribed to the restrictive theory of State immunity. In fact, however, the majority of those member States appeared to have accepted the distinction between public acts and private or "commercial" acts of a foreign State, and recently two member States, namely Pakistan and Singapore, had enacted statutes granting immunity only with regard to the public acts of foreign States. Once it was admitted that there was no blanket immunity covering all the acts of the State, and once the distinction was drawn between acts covered by immunity and those which were not so covered, the principle of absolute immunity must of necessity be abandoned.

8. He regretted that some jurists from the developing world continued to look upon State immunity as an ideological battlefield on which developing countries were pitted against industrialized countries. The latest manifestation of that attitude could be seen in paragraphs 409 and 410 of the Commission's report (A/44/10), where it was stated that some members were of the view that restrictive immunity was the practice of only "a limited number of countries in certain regions" - a euphemism for the industrialized countries of the West. Such a view, however, was untenable. Egypt, for example, had a solidly established case-law on restrictive immunity, which made it unnecessary for that country to enact a statute on State immunity. It should be obvious to all that the question of State immunity was not a political issue to be debated on ideological grounds, but rather a juridical issue to be examined and objectively resolved on the basis of established legal principles and proper analysis.

9. In striving to shield themselves from juducial action with an extensive, if not absolute, immunity, the developing countries were by the same token renouncing their own and their nationals' right to sue foreign States and their agencies in the furtherance of rightful claims they or their nationals might have against those entities.

10. If refusal to be subjected to the jurisdiction of foreign courts was a matter of pride in national sovereignty, that pride must be tempered when one of the three branches of government, the judiciary, was rendered impotent whenever the defendant was a foreign State or an agency of such a State in a case which otherwise fell

(Mr. Badr, Qatar)

within the jurisdiction of the courts under the rules of private international law. Any ruler who wished to place himself beyond the jurisdiction of the courts was in fact claiming to be above the law. The supremacy of the rule of law was a universally proclaimed principle, and was also central to the Islamic legal system.

11. For the sake of their economic development and the welfare of their peoples, the countries represented in the Asian-African Legal Consultative Committee needed to enter into all types of exchanges and transactions with the rest of the world. If the foreign parties to such transactions were convinced that they had no judicial remedies available to them in their contracts with the Governments concerned or their agencies, they would simply cease to engage in such transactions, and the economies of those countries would suffer. He hoped that such considerations, in addition to the intrinsic merits of the restrictive or functional approach to State immunity, would prove persuasive. The principle of absolute immunity served no purpose, and it was idle to pretend that it could be rehabilitated.

12. Turning to the revised version of paragraph 2 of article 3 as proposed by the Special Rapporteur in paragraph 421 of the Commission's report, he said that the provision dealt with the criterion for characterizing a contract as commercial or as governmental. His delegation had placed on record its preference for the objective criterion of the nature of the contract over the subjective criterion of the purpose of the contract. It opposed any intrusion of the purpose in determining whether a contract was commercial. At the same time, it recognized that there was a seemingly endless dispute among members of the Commission on that point, an example of the ideological approach he had earlier deplored. It thus appeared that the Special Rapporteur's latest proposal provided the only feasible way of reconciling the two opposing camps. Voluntary recognition in writing of the public governmental purpose of the contract would amount to express consent not to bring judicial proceedings against the governmental party to a transnational contract. Although he believed that few such contracts would contain that kind of stipulation, there was no harm in accepting the latest revised version of paragraph 2 of article 3 if it satisfied the proponents of the purpose criterion. The overall structure of the rules of State immunity as formulated by the Commission would not be thereby affected.

13. Mr. HAFNER (Austria), commenting on chapter VI of the Commission's report (A/44/10), said that his delegation welcomed the reformulation of draft article 2 as submitted by the Special Rapporteur. As currently worded, paragraph 3 of the new article provided a useful basis for discussion, although he continued to believe that the nature of the contract was decisive in determining whether a contract was commercial.

14. Article 6 bis as submitted by the Special Rapporteur presented difficulties for his delegation, which shared the doubts reflected in paragraph 461 of the report. In any case, the wording of the provision, especially the use of the word "exception", would have to be adapted to the final version of the title of part III.

(Mr. Hafner, Austria)

15. Turning to the draft articles provisionally adopted by the Commission, he said that, with regard to article 8, his delegation did not agree to the inclusion of subparagraph (b), which would mean that a State could relinquish a right under international law by means of a contract under municipal law.

16. The addition in article 9, paragraph 1 (b), of the reference to "any other step relating to the merits" of a proceeding presented difficulties for his delegation, as it was imprecise and likely to give rise to differences of interpretation.

17. His country also had difficulty in accepting the formulation of article 11 bis as submitted by the Special Rapporteur, and shared the concerns expressed in paragraph 499 of the report. The proposed revision of article 11 bis in paragraph 501 could serve as an appropriate basis for further discussion.

18. Concerning the new formulation of article 27, paragraph 2, as submitted by the Special Rapporteur, his delegation could not agree that the immunities referred to in the paragraph should be restricted to the defendant State only. It would therefore prefer the formulation provisionally adopted by the Commission, subject to the reservation made by his country on previous occasions.

19. Turning to chapter VII of the report, he said that his delegation was satisfied in principle with the draft articles so far submitted. However, it was not clear whether the Commission intended to formulate draft rules on the basis of existing practice, or to go beyond them in a progressive spirit. While the latter approach would be welcome, its acceptability would be diminished. A reasonable compromise between conservative and progressive elements was needed in order to ensure wider acceptability.

20. With regard to article 22 as submitted by the Special Rapporteur, he said that the Special Rapporteur had deduced that co-operation "on an equitable basis" encompassed the duty of a potentially injured watercourse State to contribute financially to protective measures taken by other States. Such an idea, which was expressed in paragraph 638 of the report, would constitute an innovation, as it was not reflected either in international or in national legal systems. For his part, the Special Rapporteur had not been able to provide sufficient justification for such a rule. Therefore, further clarification was needed. It was not very realistic to expect that States would accept such a duty. That should not, however, preclude any prior agreement among several watercourse States on the common financing of measures taken in the territory of only one State. Accordingly, a duty to consider the possibility of such a financial contribution could be included in the article.

21. There was also the question whether article 22 referred to activities which had only an indirect connection with water uses. For instance, the current wording could be understood as relating to activities, such as road traffic, in the vicinity of a watercourse, which was certainly not the intention of the provision.

(Mr. Hafner, Austria)

22. Reference was made in paragraph 638 of the report to water-related diseases. If mention was made of such diseases in the articles, it would be necessary to indicate whether the duty to combat ailments of that type related to the duty to abate diseases caused by pollution by the upper riparian State, the duty to impede the transport of germs naturally existing in a certain part of a watercourse to other parts, or the duty to reduce the quantity of naturally existing germs. A duty in the latter sense would far exceed what was currently accepted by States, and was not within the scope of the topic under discussion.

23. With regard to article 23, paragraph 1, as submitted by the Special Rapporteur, he wondered whether it should be understood to mean that each State having knowledge of a hazard must inform various other States. Such an interpretation would certainly be too far-reaching. The provision would, however, be useful if it entailed only the duty of the upper riparian State to inform the lower riparian State. Thus, it should be formulated in such a way that only the State from whose territory or jurisdiction transboundary damage could emerge would have to inform any other State likely to be affected, regardless of whether the damage originated in the first State's territory.

24. In any case, the various expressions used in articles 22 and 23 as submitted by the Special Rapporteur, such as "water-related dangers and emergency situations" or "water-related hazards, harmful conditions and other adverse effects", required closer examination and specific definitions. As to the notification measures referred to in article 23, experience had shown that the communications which took place in the course of an emergency served different purposes, with the first communication having the function of an alarm and the second conveying more precise information. Accordingly, the first information given was not and could not be complete, whereas the main purpose of the second communication was to provide the potentially affected State with the fullest and most accurate information possible so that it could assess the possible danger and damage. Those two different purposes should be adequately reflected in the article.

25. Article 23 also raised the problem of the duties incumbent upon the potentially affected State. The idea expressed in paragraph 646 of the report that the potential victim should have to contribute to the protective measures did not seem appropriate. It would also be very difficult to measure the level of contribution, and to determine which State should be regarded as potentially affected before the damaging event occurred.

26. As to the reference in paragraph 647 of the report to the duty to accept assistance in case of emergency, experience in the negotiation of the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency had shown that such a duty would be unacceptable to most States. However, that consideration did not preclude international responsibility on the part of the State refusing to accept such assistance if damage could occur in a third State.

(Mr. Hafner, Austria)

27. His delegation shared the general philosophy underlying article 24 as submitted by the Special Rapporteur, which reflected a duty to conserve the water quality that would permit the widest possible use of the water, thus depriving navigation of its privileged position.

28. His delegation endorsed the wish expressed by the Special Rapporteur that the Commission would allocate sufficient time to further work on the topic, so that the first reading could be completed in the near future.

29. Mr. CALERO RODRIGUES (Brazil) said that he would refrain from extended comment on the draft articles on the jurisdictional immunities of States and their property, since his Government had already submitted its observations on the relevant articles during the first reading, and because the Special Rapporteur had suggested a considerable number of changes in the text.

30. In connection with article 6, his delegation queried whether the rules regarding immunity should be subject only to the exceptions set out in the articles, or whether other exceptions should be admitted. It believed that, if the latter view were accepted, the articles would become virtually meaningless. The Special Rapporteur had wisely taken the view that the bracketed part of article 6 should be deleted.

31. The Special Rapporteur had also presented two new proposals. The first was to add a preambular paragraph affirming that the rules of general international law continued to govern questions not expressly regulated in the convention. If the paragraph would make the deletion of the bracketed words in article 6 more acceptable, his delegation would not object to it.

32. The second proposal consisted of a new paragraph, provisionally numbered 6 bis. The provision would allow States, at any time, to make a declaration adding new exceptions to those contained in the articles. Such a provision would permit the creation of a multiplicity of régimes, which would defeat the purpose of codification behind the articles. The uncertainty regarding immunities would thus be maintained.

33. His delegation agreed with the Special Rapporteur that articles 2 and 3 should be combined. One of the provisions contained therein addressed the question of "nature" and "purpose" as criteria for determining the commercial character of a contract. The current text recognized that reference should be made primarily to the nature of the contract, but acknowledged that the purpose of the contract should also be taken into account if that criterion were relevant for the determination of the non-commercial character of a contract in the practice of the State concerned. The Special Rapporteur suggested that the criterion of purpose should be taken into account only if the States concerned had stipulated, in an international agreement or in a written contract, that the contract was for a public, meaning "governmental", purpose.

(Mr. Calero Rodrigues, Brazil)

34. His delegation attached considerable importance to the criterion of purpose, and was satisfied with the existing formulation. It did not, however, deny that the existing text gave rise to some uncertainty, since it was sometimes difficult to ascertain whether in the practice of a State the relevance of the purpose was accepted. While the Special Rapporteur's proposal narrowed the application of that criterion, it introduced an element of precision which did not exist in the current text.

35. If agreement could be reached on the proposed formulation, his delegation would be prepared to accept it. That would be the case if a new idea suggested by the Special Rapporteur in the course of the debates in the International Law Commission was included. That idea, mentioned in paragraph 441 of the Commission's report, would consist in giving the court of the forum State the power to decide "in the case of unforeseen situations" that a contract had a "public purpose". His delegation welcomed that addition, which introduced some flexibility.

36. Article 13, on personal injuries and damage to property, had been controversial, and several members of the Commission had suggested that the provision it contained was unnecessary. The article would exclude the immunity of the State in proceedings related to compensation for death or injury to persons, or loss of or damage to property when: (a) the act or omission attributable to the State was committed in the territory of the State of the forum; and (b) the author of the act or omission was present in that territory at that time. The Special Rapporteur had suggested that the second condition should be omitted, a view with which Brazil could not concur. If the suggestion was accepted, it would have the consequence of transposing questions relating to transboundary harm from their proper context in the field of international responsibility into that of competence of national courts. He was therefore glad that the Special Rapporteur had indicated that he would not insist on the deletion he had proposed (A/44/10, para. 526).

37. His delegation did not agree with the Special Rapporteur's proposal to amend article 27, on procedural immunities. According to the proposal, the exemption from providing any security, bond or deposit to guarantee the payment of judicial costs or expenses would be accorded to a State only if it appeared as a defendant. His delegation saw no reason for that limitation, and believed that the exemption should be maintained for any appearance of a State before a foreign court, as provided for in the existing text.

38. Turning to the law of the non-navigational uses of international watercourses, he noted that the Special Rapporteur had submitted four new articles, but that the Commission had considered only two of them, articles 22 and 23, which would constitute a new chapter of the draft, entitled "Water-related hazards, dangers and emergency situations". The thrust of the articles seemed to have been well received by the Commission, and the Special Rapporteur had convincingly made the point that provisions might indeed be useful to indicate the conduct required from watercourse States in the event of dangerous situations, whether they were situations of impending danger or actual disasters, or were the result of natural

(Mr. Calero Rodrigues, Brasil)

causes or human activities. In such situations, States should co-operate, both in the exchange of information and in taking measures to prevent or mitigate the danger or harm. Under article 9, States already had a general obligation to co-operate, and under article 10, an obligation to exchange data and information. The issue was to determine how those obligations would come into play in the situations envisaged. It might be argued that specific provisions were not needed and that States, in the normal process of their relations with regard to watercourses, would themselves devise ways and means to act in accordance with their general obligations. It must, however, be admitted that specific provisions to be applied in situations of danger might be useful. The provisions should not, of course, go into too much detail, since they would have a very wide application.

39. In deciding to draft the two new articles, the Special Rapporteur had already indicated an initial distinction. While article 22 contemplated "water-related hazards, harmful conditions and other adverse effects", article 23 dealt with "water-related dangers and emergency situations". Such language did not bring out clearly enough the distinction between the two situations. The wording used in the title and in the text of the two new articles had been the subject of some criticism in the Commission. As indicated in paragraph 659 of the report, the Special Rapporteur had pointed out the difficulties of finding general terms to cover all the phenomena addressed in the articles; his observation that it was desirable to clarify the terminology should also apply to the distinction to be made between the situations to be covered by each article. As Brazil understood it from the report, article 22 would deal with situations in which there was an impending danger of a more or less continuing nature, whereas article 23 would address situations in which danger had materialized and harm had already occurred or was imminent. If that understanding was correct, language should be used that defined clearly the scope of each article and clearly distinguished each situation. The distinction would be justified by the consideration that the conduct required in cases of actual disaster was different from that required in the case of a situation of a "chronic or continuing nature", to use the words of the Special Rapporteur (A/44/10, para. 648).

40. The conduct required by the two articles was based on the duty of co-operation, and necessarily involved contacts and consultations. In his delegation's opinion, the texts suggested by the Special Rapporteur provided a good basis for further drafting by the Commission. Some restructuring seemed necessary in order to present as clearly as possible the obligations incumbent on States in the situations envisaged. The Commission should have two concerns in mind, namely, to refrain from establishing unnecessarily cumbersome procedural rules, and to make the provisions as specific as possible. His delegation was confident that a satisfactory text could be produced if those criteria were borne in mind.

41. Mr. MOMTAZ (Islamic Republic of Iran) said that the draft articles on the non-navigational uses of international watercourses should be regarded as non-binding guidelines designed to assist States in concluding agreements on particular watercourses in which they had an interest. It was therefore incumbent

(Mr. Momtaz, Islamic Republic of Iran)

on the Commission to formulate general principles applicable to the legal aspects of the use of watercourses in all regions of the world. In that connection, emphasis should be given in the first place to the general obligation of States towards their neighbours with regard to the use of their own natural resources. That obligation undoubtedly implied a limitation on the sovereignty of States and the need to impose some restrictions on the use of international watercourses. States should therefore negotiate in good faith in order to conclude agreements providing for the equitable and rational use of water resources.

42. With regard to article 2 as provisionally adopted by the Commission, he felt that the concept of watercourse systems might generate difficulties, and would therefore prefer the deletion of the word "systems", which appeared in brackets.

43. With regard to article 22 as submitted by the Special Rapporteur, he shared the view expressed by some members of the Commission concerning paragraph 2 (b), namely, that the words "structural and non-structural" should be replaced with "joint measures, whether or not involving the construction of works". His delegation agreed with the basic idea of paragraph 1, namely, the need for co-operation among States in order to prevent water-related damage. However, the reference to the notion of equity presented some difficulties by reason of its vagueness. Although the International Court of Justice had made numerous attempts over the years to establish criteria for determining whether a given delimitation was equitable, the notion remained imprecise. It might be asked whether it was sufficient for co-operation to be carried out in good faith in order to be equitable, or whether it must take into consideration the legitimate interests of the parties, as his delegation had emphasized. Another question was whether the steps to be taken by watercourse States in fulfilment of their obligations, as provided in paragraph 2, were intended to ensure co-operation on an equitable basis. Obviously, greater precision was necessary.

44. The reference in article 23, paragraph 1, to relevant intergovernmental organizations raised questions as to which organizations were contemplated. He also thought that the Commission should specify what was meant by emergency situations and contingency plans, as mentioned in article 23, paragraph 4. In so doing, the Commission should rely on bilateral treaty precedents, particularly the protocols concerning co-operation in combating pollution by oil and other harmful substances in cases of emergency.

45. With regard to co-operation among States, greater attention should be given to the distinction between co-operation in exchanging information and co-operation in establishing effective notification procedures in the event of danger. The notification procedures established by certain treaties should serve as a basis for further study. On the question of assistance, he found it surprising that the Special Rapporteur was concerned that some States might regard proffered assistance as an interference in their internal affairs. His delegation was in favour of including a provision requiring States to assist, within the limits of their means, States which were in danger.

46. Mr. ZHOU Xiaolin (China) welcomed the further progress made by the Commission in its consideration of the jurisdictional immunities of States and their property, while noting that there were still unresolved issues of a substantive nature with regard to the articles provisionally adopted on first reading. Furthermore, new questions had emerged in recent years with respect to State practice, suggesting that renewed consideration of the existing draft articles was necessary.

47. In his delegation's opinion, the purpose of establishing a legal régime was to reaffirm and strengthen the principle of jurisdictional immunities of States, while laying down clear exceptions to its application. It was necessary to maintain a balance between reducing and preventing abuses of domestic judicial processes against sovereign States, and devising just and reasonable settlements to disputes, thus promoting the development of international co-operation. From that standpoint, the existing draft articles had obvious shortcomings.

48. With regard to the new formulation of article 2, as reproduced in paragraph 423 of the report (A/44/10), he believed that the definition of "State" was inappropriate in that it regarded State enterprises and corporations as agencies or instrumentalities of the State. Whether from the standpoint of judicial practice or policy, State corporations, enterprises and similar entities which had a distinct legal personality, which could sue and be sued, and which could independently assume civil liabilities should not in principle enjoy jurisdictional immunities. In most countries, whether developing or developed, state-owned or publicly owned corporations or enterprises were all independent legal entities. They neither represented a State nor exercised the functions of a State or Government, and therefore were not integral parts of State organs. In general, they did not enjoy jurisdictional immunities in domestic law. To confuse such independent legal entities with State agencies and include them within the scope of the principle of State immunity blurred the distinction between the responsibility of those entities and that of States. For those reasons, his delegation supported the view that the term "State" should be defined as not including entities established or owned by a State which could independently assume civil liability and were responsible for their assets.

49. With regard to paragraph 3 of the article, his delegation believed that in determining whether a contract was commercial, equal weight should be given to the nature and the purpose. In current international practice, developing countries in particular sometimes engaged in contractual transactions which were vital to the national economy or to disaster prevention and relief. Such activities were completely different from private commercial activities engaged in solely for the purpose of profit. If the nature of the contract was the sole criterion, it was likely that the activities of the State in the exercise of its governmental functions would be inappropriately deemed to be of a commercial nature and thus not entitled to jurisdictional immunity in foreign courts.

50. The nature and the purpose of a contract or a transaction were often inseparable. To exclude the "purpose" test was not conducive to the effective application of the principle of State immunity. Moreover, it would create difficulties for domestic courts in applying the principle, as shown in many cases

(Mr. Zhou Xiaolin, China)

of domestic litigation. His delegation had taken note of the alternative text of the paragraph drafted by the Special Rapporteur which would limit the application of the "purpose" test to situations in which it was expressly provided for in agreements between States or written contracts between parties. That new formulation was a step backward compared to the article provisionally adopted. Such a requirement was too restrictive and did not adequately provide for unforeseen situations.

51. His delegation also supported the suggestion that the provisions of articles 2 and 3 should be consolidated into a single article. It was in favour of the deletion of the bracketed words in article 6 and opposed to the addition of new article 6 bis proposed by the Special Rapporteur.

52. Turning to article 11 bis, he said that his delegation welcomed the attention given by the Commission to the problem of segregated State property. The differentiation between States and their entities within the context of the article was a matter of vital importance. Abuses of domestic judicial processes against foreign States had been on the increase in recent years owing to the failure of some countries' domestic legislation to differentiate between States and their entities. Some private claimants tended to include foreign States as defendants or co-defendants in legal proceedings in order to compel States to appear in court or risk a default judgement even where no relationship existed between the State and the commercial contract or transaction giving rise to the dispute, and where recourse was available against the independent State-owned entities responsible for the contract or transaction. Even if the court eventually decided that the defendant State was entitled to jurisdictional immunity, the cost to that State, including lawyers' fees, would often be considerable. That was clearly not in conformity with the principle of State immunity. A practical way of avoiding such a situation was to draw a distinction between States and their independent entities in terms both of amenability to jurisdiction and of the extent of liability.

53. His delegation could not agree with the view reflected in paragraph 499 of the report that differentiating between States and their independent entities might leave private persons without a sufficient remedy. State entities engaged in economic and trading activities, including corporations, enterprises or other entities having the capacity of independent juridical persons, did not in fact enjoy jurisdictional immunities under either domestic or international law. While engaging in commercial activities in the forum State, those entities were unquestionably subject to the same rules of liability in respect of commercial contracts and other civil matters as private individuals and juridical persons. When disputes arose out of commercial contracts or other civil matters between private individuals and those State entities, remedies could be sought through normal judicial channels. To allow the liability of those State-owned entities to be attributed to the State itself would be tantamount to making the State a guarantor having unlimited liability for the acts of its entities. That was obviously unnecessary and unfair, and would only encourage abuses of domestic judicial processes against foreign States, with very harmful consequences.

(Mr. Zhou Xiaolin, China)

54. The argument that the practice of separating the State from its entities was confined to the socialist countries was not in keeping with the facts. In most countries today, enterprises in many important industrial and economic sectors, such as railways, telecommunications and civil aviation, were owned partially or totally by the State. Entities such as airlines normally assumed civil liability for their operational activities, the States to which they belonged having no responsibility for them. It was difficult to imagine any Government being willing to become a defendant in a foreign court simply because one of its State-owned entities was involved in a commercial contractual dispute. The separation of States from their entities in terms of jurisdictional immunity thus clearly met the needs of all countries, and did not damage the interests of any. Of course, the formulation of specific articles reflecting that principle touched upon many complex legal questions, including the concept of segregated State property and its implications, the criteria for differentiating between States and their entities, the effect of the relevant rules of attribution, and the relationship between rules of domestic law applicable to the entities in question and rules of international law on representation. The purpose and thrust of the three texts of article 11 bis proposed by the Special Rapporteur and other members of the Commission were correct, but all three required further study and improvement by the Commission at its next session. In reserving the right to make further comments on other articles of the draft at a later stage, he stressed his delegation's view that appropriate treatment of the relationship between States and their entities in the matter of jurisdictional immunities would represent a positive contribution to the progressive development of the law of State immunity.

55. Mr. ALEXANDROV (Bulgaria), referring to the topic of State responsibility, noted that, owing to lack of time, the Commission had been able to discuss only the preliminary report setting out the Special Rapporteur's approach to parts two and three of the draft and containing two new draft articles. So far as the approach was concerned, his delegation was in agreement with the proposals to deal separately with the legal consequences of delicts and of crimes respectively, and to limit part three of the draft to provisions on peaceful settlement of disputes. As for the proposed distinction between substantive consequences, such as cessation and reparation, and procedural ones, such as the right of the injured State to take measures designed to secure cessation or reparation or to apply individual or collective measures or sanctions, he remarked that the right to take countermeasures was a highly sensitive issue. The draft articles on that subject should, as far as possible, encompass all cases and situations, and the proposed distinction should not set unnecessary limits upon the scope of specific manifestations of State responsibility. The elaboration of specific texts would doubtless supply the right answers in that respect.

56. Commenting on the two new draft articles (articles 6 and 7) proposed by the Special Rapporteur, he said that his delegation supported the view that cessation deserved a place of its own in the future instrument. Moreover, as recent judgements of the International Court of Justice showed, cessation was not restricted to acts of a continuing character. The close relationship between cessation and reparation should also be reflected in the draft. So far as

(Mr. Alexandrov, Bulgaria)

restitution in kind (article 7) was concerned, his delegation preferred the latter of the two definitions referred to in paragraph 280 of the report (A/44/10), but wished to stress that, whichever interpretation was chosen, the term should be very clearly defined. The meaning of the words "excessively onerous" in paragraph 1 (c) of article 7 was not entirely clear. His delegation regretted that the Commission had been unable to consider the second report of the Special Rapporteur, and hoped that more time would be devoted to the topic at the Commission's next session.

57. Turning to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, he noted with satisfaction the progress achieved, and reiterated the view that the purpose of the draft in preparation was to create a legal mechanism for closer co-operation among States in the prevention of transboundary harm or the elimination of its effects. The future document should lay down general principles to be observed by States in that field, thus enabling them to define, by mutual agreement, legal régimes for specific spheres of activity. In dealing with the topic, it was important not to lose sight of the fact that the future document would deal with lawful acts or activities, and that in most cases the State of origin would also bear, sometimes more severely than any other State, the injurious consequences of such acts or activities. Emphasis should accordingly be placed upon prevention and upon co-operation among States in eliminating or minimizing the harmful effects.

58. In that context, his delegation considered that the procedures envisaged in draft articles 10 to 17 failed to reflect fully the diversity of the activities and situations encompassed by the topic, and that, in any event, such detailed provisions were unnecessary. As for the revised articles 1 to 10, now reduced to nine, his delegation shared the view that the shift from the concept of risk to that of harm and risk was aimed at achieving a proper balance between prevention and reparation. It also agreed that at a later stage it might be useful to draw up a list of activities to be covered by the articles. With regard to the changes introduced by the Special Rapporteur in article 3, his delegation saw no need to inject the concept of place into that of jurisdiction or control. His delegation viewed the principle of co-operation as the corner-stone of the future document, and welcomed the new wording of article 7, which covered both prevention of transboundary harm and minimization of its effects.

59. Notwithstanding the good progress made on the topic of jurisdictional immunities of States and their property, a number of substantive issues still remained unresolved. His delegation welcomed the Commission's wish to avoid a doctrinal debate and to seek consensus on the kinds of activities which should and should not enjoy immunity; that purpose might be served, _inter alia_, by the adoption of a more descriptive title for part III of the draft along the lines suggested in paragraph 488 of the Commission's report. Draft article 6 should be adopted without the text in square brackets, and various cases on which general agreement could be reached should be considered in part III, due account being taken of the need to establish a reasonable balance between different views and to reflect, as far as possible, the laws and practices of different legal systems and all groups of countries. In that connection, he referred to a government decree

(Mr. Alexandrov, Bulgaria)

adopted in his country in January 1989 putting an end to the State monopoly in foreign trade, and making the company the basic unit responsible for carrying out economic activities, including foreign trade.

60. With regard to the law of the non-navigational uses of international watercourses, his delegation considered the object of the Commission's work in that field to be the preparation of a framework document to enable interested States to conclude specific agreements on the uses of particular watercourses. There was thus no need to go into excessive detail, especially in regard to procedure. He noted that work on the topic was at a fairly advanced stage and that there were good prospects of a complete set of draft articles being adopted on first reading before the end of the Commission's present mandate.

61. As to the topic of relations between States and international organizations, his delegation supported the Special Rapporteur's planned outline. Referring to the question of the programme, procedure and working methods of the Commission, he expressed support for the conclusions appearing in paragraphs 732 and 733 of the report, adding that, in his delegation's view, the topics of the draft Code of Crimes against the Peace and Security of Mankind and State responsibility should, as far as possible, be given priority within the adopted programme of work. His delegation supported the Commission's efforts to allocate additional time to the Drafting Committee. So far as the long-term programme of work was concerned, it welcomed the establishment of a Working Group on the subject, and hoped that it would in due course produce recommendations on which the views of Governments would be requested. In conclusion, he said that the question of improving the relationship between the Commission and the Sixth Committee merited careful study. A positive step in that direction would be for the Commission to request Governments to comment on specific issues pertaining to topics under consideration.

62. Mr. LEE (Canada) said that the Commission's discussion on the topic of the law of the non-navigational uses of international watercourses had again reflected the growing global emphasis on the environment. His delegation was somewhat concerned by the view expressed by some of the Commission's members that bilateral treaties might not be a true expression of customary international law and that, consequently, the proposed articles were inadequately supported in existing international jurisprudence. While recognizing that caution had to be exercised in drawing inferences from bilateral treaties and decisions of the international tribunals, his delegation took a more positive view of the matter. The legal régime governing most international rivers was likely to be established by a bilateral treaty. What mattered was to recognize common threads of State practice running through the bilateral or multilateral conventions and the jurisprudence, and transpose them to a set of clearly defined draft articles. Since it was entirely within the Commission's mandate progressively to develop international law where some State practice supported it, it was not essential that State practice should actually reflect customary international law.

(Mr. Lee, Canada)

63. Turning to the Special Rapporteur's report and to the draft articles, he said that his delegation was generally satisfied with the progress achieved to date, and also wished to associate itself with many of the views on environmental aspects expressed earlier by the Mexican representative. Noting that article 22 dealt with situations which could be described as chronic or ongoing, while article 23 focused on certain calamities and emergencies, he commended the Special Rapporteur's wisdom in recognizing basic differences in the type of action to be taken in relation to each kind of problem. His delegation fully supported the general thrust of those articles, and welcomed the holistic approach of dealing with hazards which were both directly and indirectly water-related. It particularly commended the practical, concrete tenor of the articles and the pragmatism with which the Special Rapporteur had reconciled the different schools of thought based on the concepts of "harm", "risk", "strict liability" and "fault". It was, however, concerned about the possible ambiguity of certain terms such as "water-related hazards", "water-related dangers", "harmful conditions" and "adverse effects". Redundancies and extensive enumerations, which created confusion in interpreting the draft, should be eliminated; the Commission should strive for consistency in the use of terms, and should define the terms it adopted in the appropriate "use of terms" article. His delegation therefore concurred with the view that articles 22 and 23 should be referred to the Drafting Committee along with the comments of the members of the Commission and of delegations in the Sixth Committee. Consideration of articles 24 and 25 having been deferred until the Commission's next session, his delegation reserved its comments on them until a later date. In conclusion, he emphasized his delegation's overall satisfaction with the work done by the Commission on the topic.

64. Mr. SCHARIOTH (Federal Republic of Germany), referring to the topic of jurisdictional immunities of States and their property, said that the Special Rapporteur had carefully analysed both responses from Government and State practice, and the Commission's discussion of the Special Rapporteur's proposals had shed more light on many aspects of the area of law in question.

65. The Federal Republic of Germany welcomed the decision to combine previous articles 2 and 3 in a new article 2. The definition of a "State" envisaged in the draft seemed acceptable, except for the fact that there was still no mention of federal States. It was unnecessary to supplement the definition contained in new article 2, paragraph 1 (b), with wording that would exclude State enterprises in principle. It was crucial to distinguish between State activity, for which immunity was granted under international law, and activities in respect of which a State was answerable to a foreign jurisdiction, as a private enterprise was. The Special Rapporteur felt that the scope of the latter could be extended by replacing "commercial contract" with "commercial transaction" or "commercial activity". The Federal Republic of Germany had made a similar proposal on a previous occasion in connection with article 11. If the term "activity" was used in article 2, which would accommodate his delegation's views, the whole draft would have to be modified accordingly. He wished to stress the importance of the nature of a transaction as a criterion for its classification as a "commercial contract" (or "activity"). The Special Rapporteur had again widened the possibility of taking the purpose of a

(Mr. Scharioth, Federal Republic of Germany)

transaction into account. The Federal Republic of Germany opposed such tendencies, since the sole criterion in its practice was the nature of the legal transaction. It wished to suggest a compromise to the effect that, while the criterion for determining immunity should be the nature of the contract, the court of the forum State should be free to take a governmental purpose into account also, in the case of a commercial contract.

66. The Federal Republic of Germany had always been in favour of retaining the bracketed phrase "and the relevant rules of general international law" in draft article 6. New article 6 bis, as proposed by the Special Rapporteur to replace the bracketed phrase in article 6, was not satisfactory. It made the forum State dependent upon the approval of other States even where that State was making legitimate allowance for modern developments. That would lead to a complex juxtaposition of different treaty régimes. Moreover, the possibility of a State being unwittingly tied to restrictions of immunity by not responding to a declaration of exception would be contrary to international practice. The words "unless otherwise agreed between the States concerned" introducing many articles left open the possibility of bilateral agreements.

67. The Commission's discussion of article 11 bis had done much to clarify the fundamental issue. The problem to be settled by that article basically did not concern immunity and therefore did not fall within the purview of the future instrument. The purpose of the article was to establish the liability of a State where a State enterprise had entered into a commercial contract on behalf of the State. The question of which party was liable in such cases concerned both procedural law and the substantive law to be applied by the courts of the State of the forum. States that tended increasingly to transfer economic activities to segregated State enterprises on grounds of economic necessity might require clarification of the question as to which party was the contracting party and which party could be held liable in a foreign court. If a State enterprise had sufficient equity, there was no reason why it should not enter into contracts in its own name and be subject to the jurisdiction of a court. The question of immunity arose only where a State either entered into a contract on its own account or was held liable for activities carried out independently by a State enterprise. The future instrument would not be the right framework for settling the question of State liability. At best, one could envisage a provision to the effect that a State would still not be able to invoke immunity if, in spite of the fact that a segregated State enterprise had entered into a commercial contract in its own name, claims were made on the State itself on account of the inadequacy of the enterprise's equity. The question of segregated State property, including the question of whether there should be special rules for a certain group of States, required further clarification.

68. The wording proposed by the Special Rapporteur for article 13 should be retained. With regard to the danger of an unjustified reverse decision, he wished to refer to the comments submitted by his delegation in March 1988.

(Mr. Scharioth, Federal Republic of Germany)

69. His delegation welcomed the Special Rapporteur's suggestion that article 19 should be supplemented by a new subparagraph (d). Where article 21 was concerned, he wished to refer to the comments already submitted by his Government on the wording of the draft. The proposal that article 21 should be completely redrafted was much too restrictive. His delegation welcomed the fact that the Special Rapporteur considered that the phrase "and serves monetary purposes" could usefully be added to article 23, paragraph 1, as suggested by the Federal Republic of Germany. The same applied to the proposed restriction of the exception provided for in article 27, paragraph 2, to cases where the State was acting as a defendant. With regard to article 25, his delegation wished to reiterate its proposal that paragraph 1 should be supplemented by the phrase "and if the court has jurisdiction".

70. Turning to the law of the non-navigational uses of international watercourses, he said that the Federal Republic of Germany, as a country sharing four major watercourses, was directly and substantially affected by the development of international law in that area. There was an obvious need to clarify existing principles and to monitor newly emerging rules. Effective environmental protection relied to a large extent on the existence of generally accepted activities of States. Thus, in the specific context of non-navigational uses of international watercourses, the Commission should aim to establish a viable framework of rules setting standards for peaceful development and co-operation in the area in question, while providing incentives for specific agreements to be concluded as the need arose. The Federal Republic of Germany noted that the Commission had already made impressive progress in its work on the topic.

71. In general, his delegation supported draft articles 2 to 21. It also agreed with the thrust and general concept of new articles 16, 17 and 18, as introduced by the Special Rapporteur at the Commission's fortieth session under part V, although it believed that that part of the draft should be made more precise.

72. On the issue of the use of the term "appreciable harm", in article 8 and other provisions of the draft, the Federal Republic of Germany believed that the degree of harm must be significant. Consideration should therefore be given to the possibility of using the more stringent term "substantial harm".

73. Articles 22 and 23, as introduced by the Special Rapporteur at the Commission's forty-first session, afforded a balanced solution. It would therefore be inappropriate to attempt to draw up an exhaustive list of problems in article 22, paragraph 1, or of steps to be taken by watercourse States in fulfilment of their obligations, as stipulated in article 22, paragraph 2. The term "and other adverse effects" should be maintained in article 22, paragraph 1.

74. As to whether to refer to "international watercourses" or "international watercourse systems" in article 1, the Federal Republic of Germany believed that, in general, stringent and effective environmental protection necessitated a broad and, in many cases, global approach. That also applied to the protection of

(Mr. Scharioth, Federal Republic of Germany)

watercourses. If the articles were to be based on too narrow a definition of the geographical areas concerned, they would run the risk of lacking effectiveness.

75. Mr. CRUZ (Chile) said that the principle of international liability for injurious consequences arising out of acts not prohibited by international law had not been readily accepted. However, nowadays direct claims by one State against another chiefly concerned environmental pollution, the use of rivers, and nuclear tests. A prerequisite for international liability in all such instances was that account should be taken not of due diligence, but of the objective existence of harm outside the area under the jurisdiction of the State of origin. The drafting of norms in that area was an arduous task, since the kind of liability under consideration fell basically within the sphere of the law of treaties. The Commission was thus dealing with a new area of the development of international law, which had so far been governed by specific instruments dealing with exceptions rather than laying down general rules.

76. Chile had always been particularly concerned about international liability for harm arising from nuclear activities, and it had recently ratified the 1963 Vienna Convention on Civil Liability for Nuclear Damages and the protocol thereto. It saw a need for agreement on an "umbrella" convention containing provisions on the liability of States arising from nuclear activities. It therefore wished to reaffirm the importance that it attached to principles 20 to 26 of the 1972 Declaration on the Human Environment, particularly principle 26. It was extremely important to guard against use by a State of part of its territory for dumping nuclear waste, which could lead to transboundary harm. No harm with transboundary effects arising from the dumping of nuclear waste was insignificant, and the principles of interdependence and good-neighbourliness called for an extremely cautious approach in that area. Since it was possible that harm caused by dumped nuclear waste would become apparent only after a considerable period of time, Chile endorsed the text of draft article 1. Furthermore, it believed that article 2 (a) should read:

> "'Risk' means the risk occasioned by the use, purpose or location of things or elements whose physical properties, considered either intrinsically or in relation to the place, environment or way in which they are used, make them highly likely to cause transboundary harm throughout the process."

77. There were major differences between articles 10 to 17 of chapter III of the draft and the articles in part III of the draft on the non-navigational uses of international watercourses. Article 10 (b) should read:

> "Notify the affected State or States and the other States parties to the Convention, as well as the relevant international agencies, rapidly and in a timely manner of the conclusions of the aforesaid review".

(Mr. Cruz, Chile)

It must be emphasized that the acts in question were not unlawful. Moreover, the procedures laid down must be comprehensive enough to be applied to many different types of activities and situations. Chile endorsed the Special Rapporteur's view that there could not be a complete separation between procedural articles for activities involving risk of harm and those causing harm. Accordingly, some procedures should be applied in both cases, and in other situations - such as the situation envisaged in articles 6 to 9 - there should be an appropriate separation.

78. With regard to the topic of the jurisdictional immunities of States and their property, he said that the principle of State immunity was fully established as a rule of customary law. The draft should therefore be based on the principle that States enjoyed immunity from the jurisdiction of other States' courts. Chile endorsed the Special Rapporteur's view that the concepts of acts jure imperii and acts jure gestionis needed to be clarified and defined in objective legal terms.

79. Article 6 must be drafted in such a way as to make it clear that States were entitled to immunity from jurisdiction. Although his delegation had endorsed the wording of article 6 as proposed by the Special Rapporteur, it did not accept the phrase "and the relevant rules of general international law".

80. Where article 7 and the following articles were concerned, Chile reaffirmed its comments submitted in document A/CN.4/410/Add.2. It believed that the rules on settlement of disputes should be included in the articles and not be set out in an optional protocol. The final adoption of the articles should take place at a diplomatic conference.

81. Mr. AL-BAHARNA (Bahrain), referring to chapter VI of the report of the International Law Commission (A/44/10), concerning jurisdictional immunities of States and their property, said that his delegation welcomed the progress achieved by the Commission on that topic, and particularly appreciated the work of the Special Rapporteur. Chapter VI showed that the Commission was still divided on the question of whether customary international law recognized an absolute or restrictive theory of State immunity. In that regard, he agreed with the Special Rapporteur's view that the Commission's work during the second reading of the draft articles should be focused on reaching agreement on the areas in which State activities should be excluded from the application of jurisdictional immunity, rather than engaging in theoretical discussion about State immunities.

82. Commenting on specific draft articles, he said that one difficulty facing the Commission concerned the definition of the term "commercial contract" in article 3, paragraph 2. The Special Rapporteur was right to disagree with States that had opposed the "purpose", test on the ground that in contracts governing development aid and famine relief the purpose criterion could be helpful in determining the character of a contract. However, the revised version of paragraph 2 of article 3, as set out in the Commission's report (A/44/10, para. 421), complicated the earlier text by requiring an international agreement or a written contract to establish that the purpose of a contract was governmental. Aside from the fact that parties to a contract for the purchase or sale of goods seldom included such clauses, the

(Mr. Al-Baharna, Bahrain)

formula suggested by the Special Rapporteur was too rigid and did not provide for unforeseen situations which could not be stipulated in advance. His delegation much preferred the text adopted on first reading but wished, however, to suggest a modified version of it, which would read: "In determining whether a contract for the sale or purchase of goods or the supply of services is commercial, reference should be made primarily to the nature of the contract, but the purpose of the contract could also be taken into account in determining the non-commercial character of the contract". That would remove the qualifications imposed on the purpose test by the present wording "if in the practice of that State that purpose is relevant", and would also avoid the criticism that the words "practice of that State" were subjective and ambiguous.

83. Of the two options put forward in successive reports by the Special Rapporteur with regard to the bracketed portion of article 6, namely either to delete that portion, transfer the idea to the preamble and add a new article 28 or, alternatively, to introduce an article 6 bis providing for a régime of optional declarations, his delegation preferred the first proposal, which was simpler and more straightforward. The second, amended, proposal was open to the objection that the régime of optional declarations, by introducing the notion of reservations, defeated one of the essential purposes of codification, that of promoting a uniform law on the topic. As to the title of part III, the Special Rapporteur's suggestion that discussion of the matter should be deferred until substantive issues had been resolved was no doubt a practical approach. However, if the Commission decided to delete the bracketed portion of article 6, it would then be reasonable to adopt the title "Exceptions to State immunity".

84. While approving in principle article 11, on commercial contracts, his delegation wished to express its reservations about the phrase "by virtue of the applicable rules of private international law" in paragraph 1. Since the rules of private international law lacked precision and were not uniform, it would be preferable to refer to a rule pertaining to the jurisdictional link between the commercial contract and the forum State. Also, while his delegation appreciated the Special Rapporteur's initiative in proposing a new article 11 bis (A/44/10, para. 498), it would like the Commission to examine in greater depth the implications of such an article on the operations of State enterprises with a distinct legal personality, and on the rights and obligations of the State vis-à-vis its State enterprises. In its present version, the article was much too complex and vague, and the Commission should define the rule governing the operations of State enterprises so far as State immunity was concerned. It was not enough, though, to introduce such a rule by excluding from the definition of "State" the operations of State enterprises.

85. His delegation would support article 13, subject to the addition of a second paragraph (A/44/10, para. 518) to the effect that paragraph 1 did not affect any rules concerning State responsibility under international law, and also subject to the understanding that the article applied only to private as distinguished from sovereign acts.

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86. With regard to article 14, his delegation would go along with the view expressed in the Commission that subparagraphs (c) to (e) of paragraph 1 were not appropriate for a universal convention, as they were based on the legal practice in common-law countries. It also favoured the deletion of subparagraph (b), because the matters covered by that exception to immunity seemed to go beyond the purview of the topic. Concerning the bracketed word "non-governmental" in paragraphs 1 and 4 of article 18, his delegation had an open mind, but would support the view that its retention was more likely to promote general acceptance of the article in question. The topic of "nationalization", on the other hand, was much too complex to be dealt with in a cursory manner, as it was in article 20, whose retention might be an obstacle to ratification and which should therefore be deleted.

87. Article 21 seemed too restrictive, and his delegation welcomed the reformulation proposed by one member of the Commission (A/44/10, para. 578) as a simple and straightforward statement of the well-recognized principle to be embodied in that article. If the proposed text was adopted by the Commission, it would be reasonable to modify article 22, as suggested by a member of the Commission (ibid., para. 582).

88. In conclusion, he appealed to the Commission to avoid making too many changes in the draft articles and, if possible, to complete their second reading at its next session.

89. Mr. KOSKENNIEMI (Finland), speaking on behalf of the five Nordic countries on the topic of the law of the non-navigational uses of international watercourses, said that he wished first of all to commend the excellent reports by the Commission's Special Rapporteur. As the Nordic countries had several times outlined their views on the topic, he would comment only on draft articles 22 to 24.

90. Concerning articles 22 and 23, the Nordic countries had no difficulty in accepting the suggestion made by the Commission at its forty-first session that a more comprehensive article was needed to address both man-made and natural emergencies through a unified approach. It was reasonable to argue, as had the Special Rapporteur, that the relevant States' obligations increased with the degree of human involvement. To a large extent, however, that was a matter which concerned the rules specifying the consequences of different types of human action. The Nordic countries agreed with the Special Rapporteur and the Commission that that matter fell under the topic of State responsibility and should not be treated separately in the draft on watercourses.

91. However, while they recognized in principle the advisability of introducing two articles on the question of emergencies, and while it seemed reasonable to assume that normal hazards and harmful conditions required different treatment from hazards of a sudden or exceptional character, they felt that the analytical distinction made between those situations in articles 22 and 23 was perhaps not sufficiently clear. Both seemed to involve a system of notification, some mechanism for mutual consultation and advance contingency-planning. The terminology used was also unclear, and the titles of the two articles did not give

(Mr. Koskenniemi, Finland)

an adequate indication of the differences in the subject-matter covered. If the idea of two separate articles were to be retained, article 22 could be entitled "Co-operation to prevent harmful events and other adverse effects" and article 23 "Co-operation in emergency situations". Aside from the question of titles and terminology, the Nordic countries agreed with those members of the Commission who had advocated the deletion of paragraph 3 of article 22, since it merely reproduced what was already contained in article 8.

92. The reference to equity in present paragraph 1 of article 22 seemed to add little to the principle of equitable use, which was already applicable throughout the draft. The basis on which co-operation was to be conducted was naturally a matter to be decided by the system States themselves, and the aim of the proposed instrument should be to indicate what legally binding considerations they must take into account. When there was agreement for all practical purposes, there was also equity.

93. The list of adverse effects in article 22 could not be exhaustive, of course, but it was wide enough to indicate what types of situations were meant. It was, however, important to add the word "pollution" in accordance with the decision to address both natural and man-made incidents in part VI. As to paragraph 2 of article 22, it seemed reasonable to lay down for the system States an obligation to exchange pertinent information, to consult on possible problems and to establish and review joint measures for the prevention of incidents.

94. In article 23, which the Nordic countries regarded as of great importance, there was a need to specify the duties of system States in the case of an actual emergency. The Nordic countries were therefore pleased to note that the views they had expressed the previous year on article 18 had been taken into account. Following most recent instruments, paragraphs 1, 2 and 3 established the need for immediate notification and broad and rapid co-operation as a combined obligation of all interested States. In that regard, he wished to make only two minor comments: first, the definition in paragraph 1 would probably be better placed in a separate article on definitions; and, second, the paragraph regarding contingency-planning might be more appropriate in article 22, since the formulation and review of the effectiveness of contingency plans were matters of normal co-operation. A new article 23 bis, as suggested by some members of the Commission, did not seem to be a necessary addition, in view of the hortatory character of such an article and the difficulty of laying down any modalities in a general instrument of the kind envisaged.

95. Concerning article 24, he said that the Special Rapporteur had started from the principle that no use of an international watercourse had an inherent priority over another when a determination as to equitable utilization was made in accordance with articles 6 and 7. While that view perhaps reflected the state of existing law on the matter, the Nordic countries urged the Commission to lay down some general principles on which distinctions could be made between uses of varying degrees of importance. In discussions of equitable resource use, attention could easily be focused simply on optimal economic results over the short term, without

(Mr. Koskenniemi, Finland)

regard for the long-term negative consequences for the rights or interests of future generations. For that reason, the Nordic countries suggested that those uses which maintained the quality of the watercourse system should be accorded an inherent - even if by no means absolute - priority over other uses. Since present concerns and interests might be very weighty, however, perhaps the best solution would be to include in article 24 a general principle to the effect that any use which was not detrimental to the long-term usefulness of the waters of an international watercourse should have priority over a use which entailed adverse effects on future uses of those waters.

96. Mr. CORELL (Sweden), speaking on behalf of the Nordic countries on the question of the jurisdictional immunities of States and their property, said that he wished to refer to article 6 (A/44/10, paras. 453 to 463), and in particular to the phrase in square brackets. The Nordic countries had already urged that the proposed instrument should be drafted so as not to hinder a development towards a more restrictive immunity. That position had been reiterated in their written comments to the Secretary-General. The Commission, in their view, should continue its work on the basis of the original text as reproduced in paragraph 453 of its report. They, like earlier speakers, were convinced that there was a distinct trend towards restrictive immunity and believed that the draft should reflect, or at least not be phrased in such a way as to counteract, that well-prepared and considered legal development.

AGENDA ITEM 140: PROGRESSIVE DEVELOPMENT OF THE PRINCIPLES AND NORMS OF INTERNATIONAL LAW RELATING TO THE NEW INTERNATIONAL ECONOMIC ORDER (continued)

97. The CHAIRMAN announced that Pakistan had joined the sponsors of draft resolution A/C.6/44/L.6.

AGENDA ITEM 141: PEACEFUL SETTLEMENT OF DISPUTES BETWEEN STATES (continued)

98. The CHAIRMAN announced that Albania and Myanmar had become sponsors of draft resolution A/C.6/44/L.7.

The meeting rose at 1 p.m.