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Chairman: Mr. TURK (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. Mrs. MULINDWA-MATOVU (Uganda), commenting first on chapter IV of the report of the International Law Commission (A/44/10), said that with regard to the proposed structure of parts two and three of the draft articles concerning State responsibility, her delegation was in favour of separate treatment of the legal consequences of international delicts and international crimes. The concept of international crimes as committed by States was no longer a nebulous one and was now recognized in international law. The separation of the two parts would make the distinction clearer. Her delegation also supported the Special Rapporteur's proposal to move the procedural rules concerning implementation to part two and limit part three to the rules on the settlement of disputes (A/44/10, para. 248).

2. Referring to article 6 of part two, she said her delegation agreed that cessation had inherent properties of its own which distinguished it from reparation (A/44/10, para. 259). Cessation in the sense of the ceasing of a wrongful act either temporarily or finally could not be construed as being the same as reparation, which was the act of making amends for a wrong done. While her delegation was of the view that cessation belonged to "primary" rules, it also felt that determining remedies was more important than distinguishing the basis for them.

3. Concerning article 7, although it realized that restitution might not be physically or politically feasible in certain circumstances, her delegation agreed with the Special Rapporteur that restitution in kind came foremost before any other form of reparation (A/44/10, para. 277). The article did not indicate whether restitution should be the mere re-establishment of the status quo ante or whether it meant the re-establishment (or, perhaps more appropriately, "establishment") of the situation which would have existed if the wrongful act had not been committed (para. 280). The latter would be fairer but might prove more difficult to determine than the former. Restoration of the status quo ante, together with some additional pecuniary compensation to cover developments which might have occurred, could thus be more practical.

4. The provision contained in paragraph 1 (c) and further elaborated in paragraph 2 of article 7 seemed, as currently formulated, to favour the State which had committed the wrongful act. The mere fact that restitution in kind - the fairest kind of reparation - might be "excessively onerous" for the wrongdoer State would automatically deny the injured State that remedy. Perhaps an option could be created for the injured State to accept some other remedy. Her delegation had no objection to paragraph 3 of article 7, but regarding paragraph 4 it was of the view that the injured State should claim only reparation by equivalent - unless that

(Mrs. Mulindwa-Matovu, Uganda)

proved to be physically or politically unfeasible or unfairly insufficient to cover the damage suffered, as it could be with the mere re-establishment of the status quo ante, in which case pecuniary compensation might be claimed.

5. With regard to chapter V of the Commission's report, concerning international liability for injurious consequences arising out of acts not prohibited by international law, her delegation wished to reiterate its support for the inclusion of that topic in the Commission's agenda, particularly in view of present-day global environmental concerns. It agreed with the Chairman of the Commission that the subject must be approached with the utmost seriousness and care, on the basis of a comprehensive analysis of all its aspects and ramifications. Mankind must be aware of its global responsibility for protecting the environment against the effects of acid rain, nuclear fall-out, global warming, flooding, and the rise in sea levels. At the same time, it had to be recognized that the level of countries' economic and technological development determined their contribution to the degradation of the environment, as well as to the removal of harmful effects. In addition to those considerations, the draft articles, in encompassing liability in respect of activities causing harm to the "global commons" (para. 342), should furthermore be extended to cover States' activities on the high seas and in outer space. Article 1, as currently formulated, did not cover activities in such areas, as they were not within the territory, jurisdiction or control of any State. Similarly, in article 2, on the use of terms, reference was made to affected States, yet in fact no one State might be an evident victim.

6. Her delegation was gratified to note that some changes had been made in articles 1 to 10, especially regarding the balance between the concepts of harm and risk, and it remained convinced of the need to compensate innocent victims whether or not the acts were wrongful or risky in the first place. Regarding the new articles on notification, information and warning by the affected State (chap. III), the idea behind exchange of information was a good one, but the articles seemed to make a large number of assumptions as to the capability of a State to collect such information and to carry out the necessary review. The six-month period for reply to notification proposed in article 13 would be too long, especially in a case where the notifying State was already being affected. Her delegation supported the proposal for a general framework convention allowing for the elaboration of more specific agreements, without precluding the application of the framework convention in the absence of specific agreements regarding particular incidents.

7. Concerning the law of the non-navigational uses of international watercourses (A/44/10, chap. VII), her delegation would confine its remarks to draft articles 22 and 23. Firstly, she wished to draw attention to an apparent typographical error in the English version of paragraph 2 (a) of article 22, which should presumably read "assist in the prevention or mitigation of the problems referred to in paragraph 1". In paragraph 1 of article 22, the phrase "on an equitable basis", although explained by the Special Rapporteur (A/44/10, para. 638), might be unclear. Her delegation would therefore propose a definition that could perhaps be incorporated in the article on the use of terms.

(Mrs. Mulindwa-Matovu, Uganda)

8. Paragraph 3 of article 22 did not necessarily cover the same activities as might be covered under article 8. In that paragraph, reference was made to activities under the jurisdiction of watercourse States, whereas article 8 referred to utilization of watercourses. Her delegation supported the inclusion of the word "practical" before "measures" in paragraph 3. The phrase "and other adverse effects", envisaging that the articles would be embodied in a framework agreement, was not too general, and her delegation tended to agree with the Special Rapporteur that drawing up an exhaustive list would be inappropriate in a framework agreement.

9. Her delegation supported the general thrust of article 23, but felt that paragraph 2 would be further clarified if it could be indicated that it applied principally to dangers and situations that resulted from human activities, as envisaged by the Special Rapporteur (A/44/10, para. 644). On the proposal to include a provision requiring States to accept disaster relief, mere encouragement to accept, rather than the creation of an obligation to do so, would suffice. Her delegation opposed the proposal to envisage a degree of liability in cases of natural disasters. On the other hand, it should be made clear that States that were not parties were not bound by the provisions. In conclusion, she wished to re-emphasize her delegation's support for a framework agreement, and to express the hope that the Commission would be able to complete the first reading of the draft articles at its next session.

10. Mr. MAHNIČ (Yugoslavia) said that his country had always attached exceptional importance to the work of the International Law Commission, which had made a significant contribution to the codification and progressive development of international law over the decades. An important contribution to that process was also continuing to be made by the non-aligned countries, which at a ministerial meeting at The Hague in June 1989 had taken the initiative to call on the General Assembly to declare the 1990s as a decade of international law (see document A/44/191). That initiative had been strongly supported in the Declaration of the Ninth Conference of Heads of State or Government of Non-Aligned Countries, held in Belgrade in September 1989. His delegation believed that the change in the climate of international relations and the proposed declaration of a decade of international law provided the opportunity for a systematic review of the situation in the field of international law, where contemporary developments were increasing the tasks and responsibilities of the Commission, as well as of the General Assembly and the Sixth Committee.

11. His delegation welcomed the positive results of the Commission's work at its forty-first session, and in particular the completion of the second reading of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. The Commission deserved much credit for its efforts to establish comprehensive rules on that topic. His country had actively participated in those efforts, and was pleased to note that some of its written comments submitted after the completion of the first reading - for example, with regard to draft article 33 - had been taken into account. However, it regretted that the Commission had not acted on its comments regarding article 28 of the previous draft. In that regard, it had felt that the solution adopted in the 1963 Vienna Convention on Consular Relations (art. 35, para. 3) could also be applied in

(Mr. Mahnič, Yugoslavia)

respect of the diplomatic bag. His delegation supported the idea of the adoption of an appropriate instrument on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. As to the Commission's recommendation on convening a special diplomatic conference to adopt the articles in the form of a convention, Yugoslavia had an open mind, but felt that it would be useful to postpone a final decision on that matter in order to leave Governments sufficient time to study the articles.

12. On the topic of the draft Code of Crimes against the Peace and Security of Mankind, in principle his delegation welcomed the fact that articles 13, 14 and 15, as provisionally adopted by the Commission, were based on a number of General Assembly resolutions and declarations. However, since they were drafted in general terms, they would not meet the needs of a legal text designed to establish the criminal responsibility of individuals. Yugoslavia had noted that the Commission intended subsequently to draw up an appropriate general provision on the attribution of responsibility to individuals. Where the definition of war crimes was concerned, his delegation believed that the concept of gravity should be introduced. Only serious violations of the rules of war should be included in the draft Code, in keeping with the definition of crimes against the peace and security of mankind adopted by the Commission. The expression "the rules of international law applicable in armed conflicts" was more appropriate than the expression "the law or customs of war", since the former expression covered all types of armed conflicts to the extent that international law was applicable to them. Yugoslavia endorsed the Special Rapporteur's approach of treating crimes against humanity separately from war crimes. It welcomed the inclusion of genocide, apartheid and slavery among the crimes against humanity. Where the extension of slavery to cover "other forms of bondage" was concerned, Yugoslavia shared the general opinion expressed in the Commission that that term needed to be clarified, as did the term "forced labour". The Special Rapporteur's proposal to include ecological crimes and international traffic in narcotic drugs in the category of crimes against humanity should be given serious consideration. Yugoslavia wished to commend the Commission for its work on the topic, and trusted that it would accelerate the pace of its proceedings.

13. It was regrettable that the Commission's work on the topic of State responsibility was not proceeding rapidly enough. Yugoslavia hoped that at its next session the Commission would be able to achieve more tangible results on that topic. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, Yugoslavia was pleased to note that the idea of including the concept of "harm" in the scope of the topic had been accepted in principle, and that the concepts of "harm" and "risk" now played an equally important role in revised article 1. It also noted that significant progress had been made in the second reading of the draft on the jurisdictional immunities of States and their property, and hoped that consideration of that draft could be completed in 1990.

14. As to the Commission's programme of work, Yugoslavia supported the Commission's intention to complete the second or first reading of the draft articles on almost all topics on its current agenda during the current term of office of its members.

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15. Mr. GÜNEY (Turkey) said that chapter VI of the International Law Commission's report (A/44/10), concerning jurisdictional immunities of States and their property, showed that the Commission was still divided on doctrinal issues. Arriving at a consensus as to what kind of activities of the State should enjoy jurisdictional immunity, and what kind of activities should not was the only pragmatic way for the Commission to prepare the draft articles in a thorough manner without rushing to complete its work. The observations made in the Sixth Committee would be helpful in finding an appropriate and generally acceptable solution. It should not be forgotten, above all, that the law relating to jurisdictional immunities of States was still in the process of rapid evolution.

16. One of the ideas which emerged from State practice was that the State was absolutely exempt from foreign jurisdiction in virtually all cases, unless it had expressly agreed otherwise. In internal law and judicial practice, the principle of absolute immunity had given way to that of restrictive immunity. The Commission should codify the law in that area, taking account of the exceptions established by State practice and those necessitated by the conduct of international relations. Instead of setting uniform and rigid rules, the draft articles should be limited to providing guidelines and should contain a review clause indicating that the text could be modified or supplemented after a reasonable period of time.

17. Turning to chapter VII of the report, he said that his delegation, like some others, still believed that it would be premature to draw up rules concerning the non-navigational uses of international watercourses until the law relating to international watercourses had been further developed. Since the international instruments and national laws in that area were very fragmentary and their impact uncertain, rules could be drafted only to cover some harmful uses and effects of water use, such as pollution. Nevertheless chapter VII, which reproduced articles 22 and 23 as proposed by the Special Rapporteur, reflected the main lines of thought expressed during the Commission's discussion of the topic. Article 22 was concerned with the continuing nature of water-related phenomena, and article 23 with water-related dangers and emergency situations.

18. His delegation felt that caution was needed in considering treaties and case material as precedents. The bilateral treaties cited could not in themselves serve as the basis for customary norms, and merely illustrated the developing principles of international law. A great deal of circumspection was needed, therefore, in drawing conclusions about their role in the shaping of customary international law.

19. There was no apparent opposition among States to the idea that one State should be required under international law not to undertake activities which would cause floods and other similar damage or harmful effects in the territory of another State. Floods were covered in articles 22 and 23 because, while it was true that they created emergency situations, they could not be prevented or mitigated except through long-term efforts, which would require active co-operation between watercourse States. Such co-operation should be viewed not as the source of States' rights and duties, but in the context of States' duties founded on good-neighbourly relations, since the duty of co-operation was intrinsically limited. Whenever international law set forth an obligation to take specific

(Mr. Güney, Turkey)

measures, the duty to co-operate should be interpreted not as being an absolute one, but as one conditioned by its reasonableness.

20. On the question of liability, the Special Rapporteur appeared to eliminate any liability based on harm or damage, and to establish liability exclusively for risk. Yet risk could be the basic component of the draft only in respect of matters such as prevention. Compensation was not normally provided for an incident that had not yet occurred. Within its terms of reference to pursue the idea of a framework agreement, the Commission should confine itself to establishing a very general rule and guidelines, rather than an obligation in respect of liability. Implicit reference could then be made to the rules applied in the draft on international liability for injurious consequences arising out of acts not prohibited by international law.

21. Lastly, on the subject of methods of work, the Commission should focus in particular on topics on which it could achieve the most progress by the end of its current term of office. It might also wish to decide not to consider all the items included in its programme of work at the two forthcoming sessions, so as to be able to proceed rapidly on topics on which there was already a sufficient measure of agreement among States.

22. Mr. MICKIEWICZ (Poland) said that, during the general debate in the General Assembly, the Minister for Foreign Affairs of Poland had suggested that the Assembly should make much greater use of legal expertise, taking more advantage of the Commission. As to the choice of subjects, the Minister for Foreign Affairs had suggested that the Commission should not avoid major legal issues, that more imagination would enhance the process of law-making, and that the Commission should respond to the global challenges confronting the international community.

23. Poland was pleased to note that the Commission had established a working group to consider its long-term programme of work. The identification of possible future subjects for the progressive development and codification of international law should be a joint task to be carried out by the Commission and the Sixth Committee. Poland shared the view expressed by the representative of the United Kingdom at the Committee's 33rd meeting that the change from the old, classic subjects of international law to the new areas of international concern affected both the Commission's role and the Committee's role in relation to the Commission's work. The representative of the United Kingdom had rightly defined some factors that should be taken into account in considering what future topics should be put on the Commission's agenda. Those factors included: a broad measure of agreement as to underlying policies and objectives; the amount of time that any consideration of a topic was likely to take; whether a topic held out a reasonable prospect of a generally acceptable outcome being achieved; and whether a topic was one for which there was some genuine practical need on the part of the international community. The last factor was the most important one.

24. Poland noted with satisfaction that the Commission had completed its work on the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. It hoped that, with the necessary degree of

(Mr. Mickiewicz, Poland)

flexibility, the Commission would now concentrate on the topics of State responsibility and international liability for injurious consequences arising out of acts not prohibited by international law. It welcomed the Commission's intention to accord as much time as possible to the Drafting Committee during the remainder of the Commission members' current term of office.

25. Poland hoped that in 1990 the Commission would be able to give the topic of State responsibility suitable priority. It had no objection to the Special Rapporteur's proposal to deal separately with the legal consequences of "delicts" and the legal consequences of "crimes", provided that the issue was settled definitively at a later stage. With regard to draft article 6, on cessation of a wrongful act of a continuing character, it was clear that that consequence of State responsibility differed from other consequences, such as restitution and reparation. To some extent, the rule on cessation should be similar to the rule on the restoration of possession (not ownership) in civil law. A rule on cessation was desirable not only in the interest of the injured State, but also in the interest of the international community as a whole. Poland endorsed article 7 in general, but had some doubts about the concept of restitution as reflected in the draft. If a narrow concept of restitution was chosen, an exception based on "a burden out of proportion with the injury caused by the wrongful act" did not seem adequate.

26. Turning to chapter V of the Commission's report (A/44/10), he said that there was obviously a close link between the subject of the draft articles and protection of the environment. There was a growing international recognition of the need to preserve the "global commons", which could not be done by individual States alone. He was grateful to the Special Rapporteur for having raised two issues related to the scope of the draft articles, namely, the question of liability in respect of activities involving extended harm to many States, and liability in respect of activities causing harm in areas beyond the national jurisdiction of any State.

27. The second issue was of particular interest to his delegation, which had consistently been in favour of including it within the scope of the draft articles. However complicated those issues might be, they could not be avoided, because the environment was indivisible and its accelerating deterioration posed a threat to the international community as a whole.

28. While generally agreeing with the thrust of the articles proposed in the report, he believed that some of them required drafting changes. The new formulation of article 1, in which the two concepts of "harm" and "risk" played an equally important role, was welcome, as was the fact that the scope of the article was no longer limited to activities involving risk. He was not certain that the distinction between the terms "activities" and "acts" was clear, but even so, he wondered whether it was advisable to disregard harm resulting from "acts".

29. His delegation, while reserving its final position on article 4 until a later stage, felt that it was not entirely satisfactory and required additional reflection as to the advisability of subordinating the application of the articles

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to other international agreements. The topic warranted a more flexible approach, which might mean deleting the article entirely.

30. Article 8 required further work. The second sentence undermined the principle of the article by leaving preventive measures up to the discretion of the State of origin. His delegation was in favour of retaining only the first sentence, which clearly established the obligation to prevent or minimize harm.

31. Turning to article 12, he said that, while its purpose was clear, its wording, particularly the use of "warning", required further examination. As to article 16, he shared the view expressed by a member of the Commission that the alternatives submitted were not necessarily mutually exclusive.

32. With regard to chapter II of the report, he said that the draft articles created a comprehensive and uniform legal régime which consolidated and harmonized existing rules and regulated situations not fully covered by the four relevant Conventions.

33. Article 18, which dealt with the immunity from jurisdiction of the diplomatic courier, represented a compromise solution. Although some delegations, including his own, did not find it entirely satisfactory, it should be regarded as a common denominator for largely divergent positions. Article 19, relating to exemption from customs duties, dues and taxes of the diplomatic courier, was quite satisfactory.

34. The key provision governing the status of the diplomatic bag was article 28, which clearly established the inviolability of the diplomatic bag, while providing the option of opening the consular bag or returning it to its place of origin. Such a formula reconciled the different interests of States. He hoped that the draft articles on the topic which had been provisionally adopted by the Commission would find universal acceptance.

35. Mr. PEDAUYE (Spain) said that the preparation of a code of crimes against the peace and security of mankind was perhaps the most important task ever entrusted to the Commission. That task was also extremely complex because international institutions were not sufficiently developed, the international community did not have an entirely effective collective security system, and there was no international criminal court to ensure implementation of the draft Code. Moreover, the codification of crimes called for a high level of agreement among a majority of States, and preparation of the draft Code required the Commission to venture into the sphere of the development of international law. In view of all those difficulties, Spain wished to commend the Commission for its work.

36. Spain believed that in preparing the draft code the Commission's chief goal must be to draw up a list of international crimes, which must be generally accepted and be based on existing international instruments to the extent possible. If, by way of exception, the Commission should depart from the principles laid down in such instruments or in the applicable law, it should provide detailed explanations for having done so. That did not preclude the possibility of exploring new ground,

(Mr. Padauya, Spain)

such as crimes against the human environment and international trafficking in narcotic drugs. However, although such new subject-matter could now be discussed, it would perhaps be premature to include it in the list of crimes, unless it was included on a very provisional basis, subject to its deletion from the list at a later stage if there was no consensus among Governments on its inclusion.

37. Since the topic of the draft Code was closely linked to the topic of State responsibility and since the draft Code itself represented a way of implementing the provisions of article 19 of the draft on State responsibility, the draft Code should cover only the most serious offences against international peace and security.

38. The issue of the attribution of crimes to specific individuals and under what circumstances crimes could be imputed would be of enormous practical importance when the Commission made final comments on the draft. Spain hoped that the Commission would make such comments soon, and that it would consider the problem in greater depth than it had in the case of article 12, on aggression.

39. At a later stage the Commission should consider the question of the establishment of an international criminal court. It must be borne in mind that the preparation of a "code of crimes" involved the field of criminal law.

40. With regard to draft articles 13, 14 and 15, as provisionally adopted by the Commission, Spain took note of the fact that in those articles the Commission had for the time being confined itself to defining acts constituting crimes, and had not taken up the issue of the attribution of such crimes to individuals. It looked forward to the consideration by the Commission, at a later stage, of that matter in the context of a general provision. Where article 13 was concerned, since it was difficult to reach objective decisions on the existence of a threat, the Security Council should play a role in determining whether given acts constituted a genuine threat of aggression. In article 14, paragraph 1, the square brackets around the words "armed" and "seriously" should be removed. With regard to article 15, Spain had serious reservations as to the appropriateness of including the expression "any other form of alien domination".

41. The concept of "gravity" should be included in the definition of a war crime. Furthermore, for defining war crimes it would be preferable to use the wording proposed by the Special Rapporteur in paragraph (a) of the second alternative article 13.

42. Where crimes against humanity were concerned, Spain preferred the second alternative proposed by the Special Rapporteur for article 14, paragraph (2), subject to the deletion of the words within square brackets in the first sentence. The Special Rapporteur's suggestion that a formula such as "apartheid and other forms of racial discrimination" should be used was very interesting. On the other hand, Spain had reservations about the inclusion in article 14, paragraph (3), of the expression "other forms of bondage", since it was not precise enough.

(Mr. Pedauye, Spain)

43. Spain endorsed the approach taken by the Special Rapporteur in structuring part two of the draft articles on State responsibility. A final opinion could not be expressed in respect of any of the subjects dealt with in part two, particularly the way in which crimes were to be dealt with, until part three had been drafted. Although the concept of an international crime had positive aspects, it was potentially dangerous unless appropriate steps were taken to prevent it from being used as a political weapon. Progress in the development of the rules of international law would not be possible if the new institutions that were to be set up were not accompanied by a system for the peaceful settlement of disputes.

44. With regard to draft article 7 in part two, Spain believed that the basic form of reparation for a wrongful act should be restitution in kind. However, he wished to comment on the way in which exceptions were dealt with in that article. Firstly, he was puzzled by the possibility that reparation for a wrongful act in the form of restitution in kind could be regarded as involving a breach of an obligation arising from a peremptory norm of general international law. Secondly, the treatment of obstacles to restitution in kind deriving from internal law was too restrictive. Spain endorsed the principle that obstacles deriving from the internal law of a State should not preclude restitution in kind; however, cases in which restitution involved a manifest breach of an internal rule of a fundamental nature should be regarded as exceptions to that principle. It was a question of pecuniary compensation or reparation by equivalent that was acceptable to both the injured State and the wrongdoer State as a substitute for restitution in kind. The replacement of restitution in kind by reparation by equivalent must be by agreement between the two States concerned (which was not made clear in the current text of article 7, paragraph 4), provided that such agreement did not result in a breach of an obligation arising from a peremptory norm of general international law. However, one might ask whether it was realistic to refer to breaches of such norms in the context of offences, or whether such breaches should be referred to in the context of the legal consequences of crimes.

45. On the question of international liability for injurious consequences arising out of acts not prohibited by international law, he said that where the basis of the régime for such liability was concerned, one might ask whether the principle of sic utere tuo ut alienum non laedas was an operative and positive norm. Under international law, liability for such injurious consequences was based on conventions dealing with specific subjects and had no basis whatsoever in customary law. Since the conventions in question dealt mostly with exceptions, rather than with general rules, great caution was called for when it came to extending such liability to areas not dealt with by specific instruments. The inclusion of the concept of "appreciable harm" in draft article 2 therefore represented a step forward. However, the terms used in the draft were still not precise enough. For example, the concepts of "harm" and "risk" were nuanced by the word "appreciable". At least in the Spanish version, the word "apreciable" seemed somewhat ambiguous. It would have been more appropriate to use the word "sustancial". It was not clear what was meant by the term "appreciable risk" in article 2 (a), which needed to be redrafted. The concept of "activities involving risk" was not clear either. On the other hand, Spain would welcome the inclusion of the expressions "harm to many States" and "global commons".

(Mr. Pedauye, Spain)

46. Articles 10 to 17 were too detailed, especially as international practice provided no clear guidelines in that area. It was necessary to formulate a few clear principles from which the obligations of States could be derived.

47. Turning to chapter VI of the report, he supported the statement in paragraph 3 of the new version of draft article 2, as submitted by the Special Rapporteur, that reference should be made primarily to the nature of the contract in determining whether it was commercial. In the case of contracts concluded for a public governmental purpose, he felt that the term "written agreement" should be used rather than "written contract", so as to avoid confusion with a commercial contract.

48. The current formulation of article 4 as provisionally adopted by the Commission was unsatisfactory. The existing conventions on diplomatic missions, consular posts, special missions and missions to international organizations did not deal with the question of their jurisdictional immunity because it was indistinguishable from that of States. Article 4 dealt only with the jurisdictional immunities of States and did not cover that gap. The question of diplomatic immunity, however, was altogether different, as it was aimed at facilitating the exercise of the functions of the diplomat. Accordingly, it was acceptable for the provisions covering diplomatic immunity to be broader than those relating to the jurisdictional immunity of diplomatic missions.

49. With regard to paragraph 2, he felt that the immunities accorded to heads of State should be extended to heads of Government and Ministers for Foreign Affairs.

50. Concerning article 6 as provisionally adopted by the Commission, he thought that the words in brackets should be deleted or transferred to the preamble, as was the general practice in codification conventions.

51. It should be made clear that in cases in which a State invoked immunity in a proceeding before a court of another State, if a disagreement arose as to the existence of immunity, the court of the forum State could not take a unilateral decision. Such conflicts must be resolved in accordance with the provisions on the settlement of disputes.

52. The current formulation of article 11 bis as submitted by the Special Rapporteur did not deal with what it was primarily intended to regulate, namely, the status of State enterprises which entered into commercial contracts; rather, it dealt only with the immunity of the State to which the enterprise belonged. Accordingly, a formulation similar to the one proposed in paragraph 502 of the report (A/44/10) should be adopted.

53. With regard to chapter VII of the report, he emphasized the need to focus on the concept "international watercourses", which would avoid any territorial implication entailed by the term "watercourse systems". He expressed reservations concerning the term "appreciable harm" in article 8 as provisionally adopted by the Commission.

(Mr. Pedauye, Spain)

54. As to article 22, paragraph 1, as submitted by the Special Rapporteur, he agreed that the translation of the term "hazard" was problematic, and did not think that the Spanish equivalent should be "riesgos". He also agreed that the expression "other adverse effects" was too general.

55. In paragraph 2 (b), the phrase "structural and non-structural" was unclear and should be replaced, as proposed by the Special Rapporteur, by "... joint measures, whether or not involving the construction of works". He also shared the view that paragraph 3 was unnecessary, as the problem was adequately covered by article 8. If, however, the paragraph was retained, the term "practical" should be inserted before the word "measures"; the term "territory" was preferable to "jurisdiction or control"; and the term "appreciable harm" could be replaced by "substantial harm".

56. As to article 23 as submitted by the Special Rapporteur, he supported the idea of defining "emergency situations". He also supported the inclusion of the term "on an equitable basis" in paragraph 3, as referred to in paragraph 661 of the report.

57. With regard to the Commission's future programme of work, he felt that greater priority should be given to the subject of State responsibility for wrongful acts, and that the problems which it had raised should be resolved before the other topics were considered.

58. Mr. VOICU (Romania), referring to the jurisdictional immunities of States and their property, said his delegation hoped that in 1990 the Committee would have the opportunity to consider a completely revised draft, and that his delegation's comments would be taken into account during the second reading of the draft articles on the topic. The importance of providing guidelines in the area of jurisdictional immunities was highlighted by the growing links between States and the development of international co-operation involving the direct participation of States. In order to make the draft articles widely acceptable to the international community, the Commission's text must be improved, taking into account the practice of States which had different political, socio-economic and legal systems and which were at different stages of development.

59. However, despite the Commission's efforts, the draft articles did not achieve a balance between the two categories of interests (those of the foreign State, which hoped to enjoy the broadest possible protection in other States, and those of the State in whose territory the question of immunity arose, which wished to ensure for itself wide and comprehensive jurisdiction). The draft articles reflected the evident concern to restrict the principle of jurisdictional immunity, and took into account the practice of a limited number of States. The aim of drafting an international legal instrument in that field was not to favour one legal system over others, but rather to find generally acceptable solutions based on the practice of all States.

60. When acting in the capacity of a sovereign State, as a subject of international law, the State must enjoy jurisdictional immunity, by virtue of the fundamental principles of sovereignty, equality of rights and non-interference in

(Mr. Voicu, Romania)

internal affairs - principles on which the very concept of the jurisdictional immunities of States and their property was based.

61. In the case of draft articles 2 and 3, his delegation hoped that the need to refine certain concepts for the purposes of the draft did not imply that the two articles could not be merged. Similar provisions in other codification conventions had been combined.

62. In many of the articles there were specific references to the States' right of ownership of certain property. In his delegation's view, a definition of that notion would be of especial importance in the context of a possible convention.

63. In article 6, his delegation once again proposed that the words between brackets "and the relevant rules of general international law" should be deleted. The inclusion of such a reference would create a possibility that the principle of immunity might be called in question, under the pretext that there were applicable rules in addition to those in the convention. It was in the interests of States that the principle should be defined as clearly as possible and without recourse to concepts whose scope was evolving and on whose meaning there was no unanimity of views.

64. With regard to the title of part III, his delegation would prefer to use the term "exceptions to" rather than "limitations on", since it seemed more in keeping with the general principle of immunity enunciated in article 6.

65. In article 11, his delegation suggested the deletion of the words "the State is considered to have consented to the exercise of that jurisdiction in a proceeding arising out of that commercial contract, and accordingly". That wording tended to lend support to the exception to immunity based on the presumption of the consent of a State to a foreign jurisdiction, whereas the basis for that exception was to be found in the actual conclusion of the contract, without presumption of the State's consent.

66. Articles 12, 13 and 16 should be deleted, since they considerably, and unjustifiably, extended the scope of application of exceptions to the rule of State immunity. Article 17 should take account of the profit-making character of the companies and collective bodies in which a State might participate, and should confine the exception regarding immunity to cases in which the company or body concerned did have profit-making as its aim.

67. In article 18, the term "non-governmental" should be deleted, since the word "commercial" gave a clearer idea of the kind of situations envisaged in the article. In article 19, his delegation would favour using the expression "a commercial contract" rather than "a civil or commercial matter"; the latter term could lead to a restrictive interpretation of the principle of immunity.

68. With regard to article 21, it would be better to delete the last part of paragraph 1 (a), which read "[Unless the property] ... has a connection with the

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object of the claim, or with the agency or instrumentality against which the proceeding was directed". However, the bracketed phrase "or property in which it has a legally protected interest" should be retained.

69. In the context of article 22, the fact that a State renounced its immunity in respect of certain measures of constraint was of particular political significance, and could give rise to serious practical consequences. For that reason, it would be appropriate to make provision for certain conditions which must be complied with in the event of such a renunciation, such as the requirement that the renunciation should be in written form, express and unequivocal.

70. With regard to paragraph 1 of article 24, he said that in subparagraph (d) (ii) the unconditional opportunity of effecting service of process "by any other means" was tantamount to a renunciation of all procedural requirements. In view of the importance for the competent body of the State of prior notice of such steps, it would be appropriate not to go beyond the procedures set forth in subparagraphs (a), (b) and (c).

71. Turning to the articles currently at the drafting stage, his delegation wished to point out that, while it agreed with the substance of article 11 bis, it considered that the term "segregated State property" was inadequate, although used in a number of States. In other States, property continued to belong to the State although administered by State enterprises or institutions; such property was not segregated from the State. A State enterprise or institution was not liable in respect of the property it administered when State debts, or, the debts of other State enterprises or institutions, were involved. His delegation expressed the hope that, during the second reading of the draft articles, the Commission would take due account of the situations to which it had drawn attention.

72. Romania had serious doubts with regard to article 6 bis. To introduce the idea of optional declarations would be to introduce an element of chaos, in that each State would be able to establish exceptions to immunity on a unilateral basis. He wished to stress that his delegation's comments were of a preliminary nature. In choosing between absolute and functional immunity, the essential principle to preserve was respect for the immunity of every State when it was exercising jus imperium.

73. The ultimate aim of a multilateral legal instrument on State responsibility should be the strengthening of international law, peace and security. With that aim in view, his delegation favoured the wording of draft article 5 as adopted earlier by the Commission, which defined the "injured State" and which was of particular importance. On the other hand, his delegation had reservations regarding the attempts to amend part one of the draft. It agreed with the view of some members of the Commission that the concept of international crimes of States could not be supported by existing international law; it did not feel that draft article 19 as adopted by the Commission on first reading should be called into question.

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74. In more general terms, his delegation recommended that the Special Rapporteur should ensure that parts two and three of the draft were compatible with the part adopted in 1980. That part had proved very useful. There was a disproportion between the consequences of an international delict in chapter II and the consequences of an international crime in chapter III. Part two of the draft should not ignore the issue of "reprisals" and "retaliation". It was essential to have a text which made armed reprisals illegal. It seemed from draft article 7 that the Special Rapporteur was more concerned to protect the interests of the author State than those of the injured State, and it was for that reason that the article should be amended.

75. With regard to chapter V of the Commission's report (A/44/10), on international liability for injurious consequences arising out of acts not prohibited by international law, he said that the question whether the future instrument would apply to cases of harm caused in the territory of a single State or in the territory of several States was not of great importance. Admittedly, if the harm affected a number of States, there should be appropriate rules to deal with the situation, but if the activity of a State caused harm to the "global commons", such a situation would be beyond the scope of application of the draft articles.

76. His delegation was unable to ignore the questionable theory which exonerated the industrial States from any liability for transboundary harm. It was in favour of regulations which would make the transnational companies operating in the territory of the developing countries directly liable for transboundary harm resulting from their activities. Such harm should not be attributed to the developing countries concerned.

77. Turning to the law of the non-navigational uses of international watercourses, he welcomed the Commission's intention to complete the first reading of the complete set of draft articles by the end of its current term of office in 1991. His delegation shared the view that provisions relating to environmental protection and pollution-control should form the subject of a separate document, the draft under consideration being reserved exclusively for matters pertaining to international watercourses.

78. Stressing the great legal and practical value of articles 22 and 23 proposed by the Special Rapporteur, and the useful contribution they represented to the International Decade for Natural Disaster Reduction, he said that the comments he had made on the drafting of certain articles at the previous session were still valid. His delegation supported the concept underlying article 9 as provisionally adopted by the Commission, which set forth in clear terms the general obligation of watercourse States to co-operate with one another.

79. So far as article 22 was concerned, its subject-matter would appear to be adequately covered by article 8; a framework agreement designed to serve as a guide did not need to go into too much detail. If, however, the Commission decided to maintain article 22, his delegation would recommend the deletion of the words "on

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an equitable basis"; moreover, the article should be based on the idea of "appreciable harm", using article IV of the Helsinki Rules as a model.

80. The term "watercourse system" should not be used in any article, as it was likely to create obstacles to the acceptance of the draft by a large number of States. Furthermore, the present structure of the draft should be re-examined with a view to devoting a larger number of articles to general principles and basic rules. Generally speaking, the use of abstract concepts, such as that of appreciable harm to the ecology of a watercourse, should be avoided; harmful effects occurred in a specific country, not in relation to the ecology in general.

81. In conclusion, he again stressed his delegation's appreciation of the work done by the International Law Commission in 1989.

82. Mr. TÊTU (Canada) said his delegation noted that the International Law Commission had been able to complete its second reading of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. The topic was an important one, and ways must be found to reconcile the proposed régime with the Conventions already in force. For that reason, his delegation thought that it would be useful to give Governments the opportunity to examine the draft articles in the Sixth Committee during a subsequent session of the General Assembly.

83. His delegation noted with satisfaction that the Commission had given priority to environmental issues, recognizing that they had become increasingly pressing in recent years. While it was important to elaborate instruments of international law aimed at harmonizing the relations between individuals or nations, it was no less essential to elaborate rules to regulate human activities in so far as they affected the environment. In that respect, existing international instruments were often inadequate, and his delegation therefore believed that the Commission should stress the need to make progress on environmental issues, and more specifically the question of the law of the non-navigational uses of international watercourses, international liability for injurious consequences arising out of acts not prohibited by international law and, to some extent, the draft Code of Crimes against the Peace and Security of Mankind.

84. Turning to the Commission's long-term programme of work, he said his delegation felt that it would be opportune to delete from the Commission's agenda a number of items which were of little interest to Governments, including the topic of most-favoured-nation clauses. The Commission should focus on a small number of topics which were of genuine and practical interest and were reasonably likely to lead to satisfactory results. In order to achieve such goals, the Commission must be able to rely on well-tested procedures and working methods, although it should not reject innovation. The staggered consideration of different topics had enhanced the Commission's efficiency, particularly with regard to the law of the non-navigational uses of international watercourses and international liability for injurious consequences arising out of acts not prohibited by international law.

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85. One suggestion which should be taken into account was that the Commission should hold two sessions annually, although the total number of weeks involved should remain the same. His delegation was not making a formal proposal in that respect, but was merely seeking an exchange of views regarding possible modifications in the Commission's working methods.

86. In conclusion, he said it was important to ensure that the work of the United Nations in the field of the progressive development and codification of international law was better known and appreciated. Canada therefore welcomed the efforts in that direction by the United Nations Office at Geneva. As certain delegations had suggested, it would be timely to reconsider the links between the International Law Commission, the Sixth Committee and the General Assembly, while bearing in mind the Commission's continuing responsibility in the field of the progressive development of international law, a function which should not be confined to the codification of law in relatively minor and non-controversial matters.

87. Mr. CRAWFORD (Australia) said that his delegation had made detailed comments in writing on the draft articles on the jurisdictional immunities of States and their property, and its general position on that subject was well known. In general terms, he wished to point out that any text emerging from the Commission, and any subsequent convention on the topic, must be acceptable to all States. Due account must be taken of the position of States in whose courts cases involving foreign States and their property most frequently arose. The essential criteria were that of practicality and respect for the legitimate interests of host States.

88. Practicality should also be the predominant concern in considering the working methods of the Commission. His delegation welcomed its response to the suggestions emanating from the Working Group set up in 1988 by the Sixth Committee. In particular, the emphasis on improving the efficiency of the Drafting Committee was a welcome development. In that respect, there was room for further improvement and experimentation: for example, where the Commission had before it a large number of draft articles, it might be useful to consider establishing either two drafting committees, or two subgroups within an enlarged drafting committee, in order to prepare preliminary versions of the texts.

89. It was his delegation's view that the Commission could benefit from computerised assistance, as was suggested in paragraph 746 of its report (A/44/10). Australia supported most of the suggestions made recently in the Committee by the representative of the United Kingdom in connection with the organisation of the Commission's work. In particular, it would be a useful innovation to entrust the Commission with the preparation of short protocols or amendments to existing conventions which had been shown to be in need of amendment, or with the task of providing technical guidance to the United Nations in formulating an agreed approach to specific topics. Once such topic might be the establishment of an international court for drug traffickers: the Commission's contribution could take the form of an options paper, which would help to ensure that the subsequent debate at the policy level was well informed. Another

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possibility would be to involve the Commission in the planning, and indeed the implementation, of programmes for the proposed decade of international law.

90. The representative of the United Kingdom had suggested that the Sixth Committee should refrain from giving detailed advice on legal issues to the Commission. While delegations should not indeed seek to do the Commission's work for it, the distinction between policy and technique in legal matters and international relations was not clear and self-evident, and the Sixth Committee undoubtedly had a legitimate role in commenting on draft articles, since the purpose of those articles was to arrive at an acceptable international text. To achieve that end, the Commission was entitled to know the provisional views of Governments, without, of course, being bound by them. That was particularly the case with long-term projects, such as the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law, in which perceptions of the topic, and also the members of the Commission responsible for the topic, might change.

91. Mr. DEL POZO (Bolivia), commenting on chapter VII of the Commission's report (A/44/10), said that while his delegation was generally satisfied with draft article 22 as submitted by the Special Rapporteur, it was concerned at the lack of clarity of some expressions, specifically "on an equitable basis". It suggested that, following those words, the phrase "in accordance with the provisions of the present Convention" should be added. Similarly, it shared the view of some members of the Commission that the phrase "both structural and non-structural" in paragraph 2 (b) should be clarified, and that the expression "other adverse effects" in paragraph 3 was too general. Lastly, it was in favour of expanding the list of water-related hazards in paragraph 1.

92. With regard to draft article 23 as submitted by the Special Rapporteur, while supporting its general thrust, his delegation felt that greater emphasis should be placed on prevention, possibly by referring to it in paragraph 1 or dealing with it in a separate paragraph. In connection with paragraph 3, he drew attention to the comments made by some members of the Commission in paragraph 669 of the report. His delegation was in favour of encouraging those States which possessed certain types of technology to provide assistance to potentially affected States. It also attached importance to paragraph 4, relating to the preparation and implementation of contingency plans.

93. Mr. LLEWELLYN (United Kingdom), referring to relations between States and international organizations, said that careful study of the Special Rapporteur's fourth report had failed to dispel the doubts expressed by his delegation in previous years about the value of the Commission's work on that subject. The reasons for those doubts were twofold. The first concerned the relationship between the Commission's work and the extensive network of treaties already in existence in the same field. It would be unacceptable for the status or validity of those treaties to be called into question in any way. The second point was that each international organization had its own individual requirements which had to be decided upon by its member States. New organizations frequently drew upon the

(Mr. Llewellyn, United Kingdom)

experience of existing ones, adapting precedents to their special needs. The Commission's aim should be to provide guidelines and recommendations to be used by States and international organizations as they saw fit. In view of the many important subjects on the Commission's programme of work, the topic should not be given priority.

94. Mr. THEUAMBOUNMY (Lao People's Democratic Republic), speaking on the law of the non-navigational uses of international watercourses, said that his delegation, like many others, found it difficult to understand why, at so advanced a stage of the Commission's work on that topic, it had not yet proved possible to adopt certain fundamental concepts. The term "international watercourse" itself was open to several different interpretations. His delegation was concerned that the expression "international watercourse system" still appeared in the draft articles provisionally adopted by the Commission, even if the word "system" was placed in square brackets. Use of the concept could have major legal implications, such as that of making all the water resources of watercourse States subject to international regulation. Moreover, it could constitute an infringement of the principle of sovereignty of States over their natural resources. The concept of "shared natural resource" also infringed the sovereignty of watercourse States having, as their natural frontier, a river whose waters were shared with other countries on the basis of bilateral agreements. Generally speaking, his delegation believed that a legal régime relating to an international watercourse could be established only on the basis of agreements concluded between watercourse States in the light of their respective histories and other intrinsic features. The Commission should therefore aim at producing a framework agreement containing generally acceptable rules to serve as a model for watercourse States in concluding specific agreements.

95. His delegation was broadly in agreement with draft articles 22 and 23 which the Commission had decided to refer to the Drafting Committee. However, it endorsed the view that the concept of co-operation "on an equitable basis" (art. 22, para. 1) appeared unrealistic. In paragraph 2 of article 22, his delegation was in favour of maintaining the word "notamment" in the French version, the list of steps to be taken by watercourse States in fulfilment of their obligations under paragraph 1 being non-exhaustive.

96. Mr. PARSHIKOV (Union of Soviet Socialist Republics), also speaking on the law of the non-navigational uses of international watercourses, stressed the importance which his Government attached to the Commission's work on the topic. Referring more specifically to article 22 proposed by the Special Rapporteur, he said that while co-operation among States was essential to the prevention or mitigation of all water-related hazards, harmful conditions and other adverse effects, the nature and scale of co-operation could vary depending on the nature of the particular phenomenon concerned. In his delegation's view, a distinction should be drawn between the planned, long-term co-operation required, for example, in the case of erosion or desertification, and the immediate co-operation called for in the event of sudden, dramatic emergencies, such as floods. Moreover, account should be taken not only of characteristics common to all watercourses, but also of those specific

(Mr. Parshikov, USSR)

to each watercourse. In that connection, the suggestion of one member of the Commission that the phrase "as the circumstances of the particular international watercourse system warrant" should be added to paragraph 1 seemed well-founded.

97. As to paragraph 2 (b) of the same article, he associated himself with those members of the Commission and previous speakers in the Committee who had requested clarification as to the meaning of the words "structural and non-structural". In paragraph 3, it would be appropriate to refer to measures taken individually or jointly by watercourse States, and to replace the words "under their jurisdictional control" with "in their territory". He fully agreed with the remarks made on that score by the Spanish representative. The reference to the United Nations Convention on the Law of the Sea made by the Special Rapporteur in his comments on the paragraph was hardly relevant. The drafting of article 22 as a whole needed to be tightened up and improved, and its structure made more logical and elegant.

98. His delegation had no objections of principle to the substance of article 23 but, there again, felt the need for greater clarity. The second sentence of paragraph 1, explaining the expression "water-related danger or emergency situation", read like a commentary rather than the actual text of a legal norm, and the use of words such as "primarily" or "principally" in the paragraph and in the commentary to paragraph 2 was undesirable in the context. Lastly, he wondered whether the term "international watercourses" itself might not be replaced by another term such as "plurinational watercourses", to be appropriately defined in article 1, in order to avoid confusion with the narrower concept of "international rivers" or rivers crossing the territories of several States and open to the commercial shipping of all States.

99. Ms. KEHRER (Austria), referring to relations between States and international organizations, stressed the interest which Austria, as a host country of the United Nations and other major international organizations, had consistently taken on that topic. In her delegation's view, the need for the provisions contained in part II of the draft was open to question. So far as article 6 was concerned, harmonization with the provisions of the Convention on the Law of Treaties between States and International Organizations or between International Organizations had to be constantly borne in mind. With regard to article 7, her delegation took the view that the principle "ne impediatur officia" did not necessarily imply that international organizations had, in every case, to be granted complete immunity from legal process. Taking into account the practice followed by host countries with regard to that aspect of their relations with international organizations, her delegation considered that further consideration of possible exceptions to immunity was necessary, particularly in respect of actions against an international organization brought by a third party for damages resulting from an accident caused by a motor vehicle belonging to or operated on behalf of the organization. The foregoing comments notwithstanding, Austria noted with pleasure that the item was receiving serious attention in the Commission.

100. Commenting on chapter IX of the Commission's report (A/44/10), she said that the system of topic-by-topic discussion of the report in the Sixth Committee had greatly enhanced the constructive and fruitful nature of the dialogue between the

(Ms. Kehrer, Austria)

two bodies, and should therefore be maintained. Consideration of the report by the Committee would be facilitated if the report were further streamlined and reduced to more manageable proportions. While noting the Commission's efforts in that direction, her delegation believed that the commentaries reproduced in the report could be further summarized and shortened. It also hoped that the Commission would in future pay increased attention to the recommendation contained in General Assembly resolution 43/169, and indicate in its annual report, for each topic, those specific issues on which expressions of views by Governments would be of particular interest for the continuation of its work. With regard to the proposal in paragraph 742 of the report, she hoped that the current session's resolution on the report would contain a provision inviting the Commission to consider, when appropriate, asking a Special Rapporteur to attend the session of the General Assembly during the discussion of the topic for which he was responsible. In her delegation's view, such participation would make a valuable contribution towards intensifying the dialogue between the two bodies, thus ensuring the achievement of speedy and generally acceptable results in the field of progressive development of international law and its codification.

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

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

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

102. The CHAIRMAN announced that Cape Verde had joined the sponsors of draft resolution A/C.6/44/L.7.

The meeting rose at 12.50 p.m.