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SUMMARY RECORD OF THE 36th MEETING

Chairman: Mr. MIKULKA (Czechoslovakia)

later: 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), speaking on the question of jurisdictional immunities of States and their property, said he noted with satisfaction that in his preliminary report, the Special Rapporteur had taken into account all the observations made by Mexico and supported by other delegations, which had been meant to counteract the tendency of some States to move towards the concept of relative immunity. The second report of the Special Rapporteur also reflected some of the observations made by the Government of Mexico. His delegation particularly appreciated the fact that by reflecting more faithfully the positive practice of States, the report made a real contribution towards expediting preparation of the future instrument and its eventual adoption and, even more importantly, towards making it more universally applicable.

2. With respect to chapter VI of the Commission's report (A/44/10), he said that it had already been recognized, in draft article 15, that exceptions to immunity should apply only to the commercial use of patents or trade names in the State of the forum, and not in connection with the determination of the ownership of such rights if they had been validly obtained under the laws of the defendant State and were used publicly only in its territory. Article 19 implicitly incorporated the observation made by Mexico and other countries to the effect that when an arbitration agreement giving jurisdiction to a national court over a foreign State was set aside, the court should be prevented from continuing to deal with the matter, pending a determination as to whether it still had jurisdiction over the defendant State. Article 3 reflected the observation that the purpose of commercial contracts should be taken into account. Such a provision might be essential in order to prevent public services that appeared to be commercial, but in fact were not, from being the object of a lawsuit in a foreign country. Likewise, article 13 included the idea that the criterion of territoriality should be observed in respect of jurisdiction over a foreign State in cases of civil liability for a wrongful act. Article 18 took up the criterion of territoriality proposed by the delegations of Mexico and other States, whereby the fact that a court had assumed jurisdiction over a foreign State under one of the exceptions mentioned should not enable that court to deal with other matters on which its jurisdiction had not been invoked. Article 21, which dealt with the need for a connection to exist between the property to be executed and the object of the claim, used an alternative wording which basically reflected Mexico's concern. The other alternative formulation would be unacceptable in that it would allow for the application of measures of constraint against State property that had no connection

(Mr. Szekely, Mexico)

with the object of the claim and was not the property of the agency or instrumentality against which the proceedings had been initiated.

3. Nevertheless, some of the other observations made by Mexico had not yet been taken into account. For example, with regard to article 3, paragraph 1, the matter of political subdivisions had not been reviewed, nor had account been taken of State agencies or instrumentalities which were always an integral part of the State and should therefore enjoy immunity on the same terms as the State. The definition of the term "State" should include them even in cases in which they did not act in the exercise of the sovereign authority of the State. If the immunity of a State was recognized, that immunity should also extend to political subdivisions or agencies or instrumentalities of the State. If that was not the case, State agencies or instrumentalities should be granted the same privileges in legal proceedings that would be granted to the State, when jurisdiction was exercised over those agencies or instrumentalities. With regard to article 13, his delegation did not agree that a State should be subject to the jurisdiction of another State as a result of its having exercised the right of self-defence set forth in the Vienna Conventions on diplomatic and consular relations.

4. His delegation was not only concerned with substantiating arguments in order to support its position; it also wished to ensure that the draft articles on jurisdictional immunities of States and their property were as universally applicable as possible. That universality could not be achieved unless the provisions could be adhered to by the large number of countries which, not having adopted legislation on the matter, followed the same practice as Mexico did, the "passive practice of immunity". It was all too easy to determine the practice of States by analysing the tangible evidence obtained from the very few States which had enacted legislation on the subject and which happened to follow a very restrictive practice of jurisdictional immunity; but that could not be said to reflect accurately the general practice of States. The efforts of the International Law Commission and of the Sixth Committee would not be very fruitful if the draft failed to reflect the fact that most States followed a more absolute and passive practice of immunity. Very few States would accede to the instrument, because it would disregard the true international situation in the area of the sovereign immunities of States, with regard to codification and the progressive development of international law. His delegation therefore urged the Commission to make the necessary corrections, so as to ensure that the draft reflected the "passive practice of immunity" followed by the great majority of States.

5. It was unacceptable and contradictory that the draft should, in the early articles, establish the jurisdictional immunity of States as a general norm, and then later, in article 18, subject the foreign State to serious tests in order to justify invoking its immunity, thus placing the burden of proof on the defendant State. By the same token, it was not realistic to continue insisting, in article 2, on using only the criteria of the nature and purpose of commercial contracts, inasmuch as those criteria did not envisage clear cases of State activities, and thus created a grey area which the courts might easily interpret in a restrictive sense, going beyond the general principle of immunity. Article 6

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should establish with absolute clarity the right of States to resort to the pre-established practice of international law. It was difficult to understand why, in article 20, limitations should still be placed on the doctrine of the act of State, and why it should be envisaged that a State would not be immune from the jurisdiction of the courts of another State in respect of measures of nationalization taken by the former State with regard to industrial or intellectual property, even in the case of public acts of the State carried out in its own territory. In that regard, the doctrine of the act of State involved an essential principle of protection of State sovereignty, and its recognition therefore also implied safeguarding the principle of non-interference. That principle was fundamental to international relations, and was established in the Charter of the United Nations; hence it must be observed universally, without limitations. By the same token, the idea, in the current version of article 23, that States might waive their sovereign immunity in respect of measures of constraint against State property traditionally protected by international law was inadmissible. Such a provision called into question the principle of the legal equality of States, and violated the legal practice of the international community.

6. Mr. JARES (Czechoslovakia), speaking on the jurisdictional immunities of States and their property, said that the draft articles should confirm the principle of State immunity, which was a corollary to that of the sovereign equality of States. All exceptions to such immunity should be specifically enumerated. If article 6 retained the reference to other exceptions under general international law, the scope of the objective pursued in the codification of the rules of jurisdictional immunities would be substantially reduced. Since the articles, once finalized, would be instrumental to the further development of economic relations among States, it was to be hoped that the practice of different groups of States would be duly taken into account. In that context, he wished to point out that in Czechoslovakia, commercial activity was not carried out by the State itself, but by foreign-trade corporations which were not State-run enterprises and which were legal entities separate from the State. Even State-owned enterprises were independent legal subjects that could not be identified with the State. The State bore no responsibility for their activities, and vice versa. His delegation trusted that the Commission would pay special attention to defining the notion of "State", which was one of the key provisions of the draft.

7. In view of his delegation's position on the general concept of State immunity, it felt that in the title of part III, it would be more appropriate to refer to "exceptions" to State immunity than to "limitations" on it. Moreover, his delegation could not support the inclusion of certain proposed exceptions, particularly those set forth in article 12, on contracts of employment, article 13, on personal injuries and damage to property, and article 20, on cases of nationalization. Rather than go into more detail on the issue, he wished to refer the Committee to the written observations by Czechoslovakia contained in document A/CN.4/410/Add.5.

(Mr. Jares, Czechoslovakia)

8. Turning to the question of the non-navigational uses of international watercourses, he said that Czechoslovakia, as a State which had three watercourse systems, was following with great interest the Commission's progress on the draft articles on that topic. He noted that there was an evident link between article 22, which dealt, in principle, with co-operation in preventing water-related hazards, harmful conditions and other adverse effects of a usual nature, and article 8, which envisaged the general obligation of watercourse States to utilize watercourses in such a way as not to cause appreciable harm to other watercourse States. A question arose as to the purpose of paragraph 3 of article 22, which was apparently intended to specify the obligation generally expressed in article 8. However, paragraph 3 did not, in substance, add anything new to the general obligation. Therefore it would be necessary either to express the specifics of paragraph 3 in more distinct terms, or to delete it. His delegation agreed with the basic thrust of article 23. None the less, in the final drafting of articles 22 and 23, greater attention should be paid to making a clear distinction as to the scope of their application, in order that it might be crystal-clear that article 23 provided for quite exceptional emergency situations caused either by natural circumstances or by human activity.

9. It had been suggested on several occasions that the draft articles might include secondary rules specifying the consequences of a violation of the primary obligations of watercourse States. His delegation was of the opinion that such an approach would interfere with the basic concept of the framework instrument. Those efforts should instead be developed within the context of the topic on international liability for injurious consequences arising out of acts not prohibited by international law.

10. In conclusion, he stressed that his delegation believed that the Commission would be able to complete its first reading of the draft by the end of 1991, the year of expiry of its mandate.

11. Mr. Türk (Austria) took the Chair.

12. Mr. GOERNER (German Democratic Republic), speaking on the jurisdictional immunities of States and their property, said that a balanced consideration of current practice and of the positions of all groups of States was a prerequisite for the successful completion of codification on the principles of State immunity. The objective of codification should be to confirm and reinforce the principle of immunity of States and their property. His delegation opposed the tendency to include in the legal instrument certain formulas about reservations (as in article 6 and others), since that would undermine the desired legal security and prevent the future legal instrument from fulfilling its role of stabilizing international relations. A key purpose of the future legal instrument was to guarantee the equality of States in law.

13. In that connection, however, a problem arose from the practice of several countries of dealing with State enterprises from other countries as instrumentalities of those States, and hence including the States' property in

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Democratic Republic)

liability proceedings connected with the obligations of such individual State enterprises, which were, in fact, legally independent from the States. It was incompatible with the principle of sovereign equality of States to rule out a State's invocation of immunity in cases of commercial transactions, while allowing for the liability of certain States for commercial transactions of their legally independent enterprises, disregarding the legal régimes of those States. Therefore, the legal instrument to be prepared should contain clear provisions on legally independent State enterprises whose property was segregated from State property. Regrettably, the proposed new article 11 bis had not yet sufficiently resolved those problems. In the view of his delegation, the question of segregated State property should be covered in part II rather than part III of the draft. He wished to reiterate his country's proposal to insert after paragraph 1 (b) of the new article 2 the following new paragraph: "The expression 'State' as used in the present articles does not comprehend instrumentalities established by the State to perform commercial transactions as defined in (the present) article, if they act on their own behalf and are liable with their own assets."

14. Part III of the draft should be given the heading "Exceptions to State Immunity". The International Law Commission should seriously endeavour to reduce considerably the envisaged exceptions. Articles 12, 13 and 20 should be deleted. Since the problem of segregated State property also occurred in article 18, it would be necessary either to specify that article 18 would not apply to segregated State property, or to refer in it only to the "operator" rather than the "owner" of the ship. The new paragraph 1 bis of article 18 as proposed by the Special Rapporteur could also be an appropriate basis for further deliberations on the issue.

15. His delegation noted with satisfaction that many members of the Commission had supported the proposal to define clearly as a rule in article 21 that States enjoyed immunity against execution. It agreed to the changes in articles 21 and 22 that had been submitted at the forty-first session of the Commission. It hoped that the Commission would be able to finish the work on the articles in the near future, and submit to the international community a well-balanced legal instrument which would be acceptable to all States.

16. Turning to the topic of the law of the non-navigational uses of international watercourses, he said that his delegation had noted with interest the four new draft articles and the constructive discussion of the topic at the Commission's most recent session.

17. His country's position on articles 22 to 25 was based on the fundamental viewpoint it had already expressed. It was convinced that, because of the specific characteristics of international watercourses, the overwhelming majority of riparian States would be able to reach a viable compromise only through a framework instrument. Such an instrument must not affect existing agreements, or unduly restrict the discretion of riparian States to conclude agreements. Accordingly, his delegation reiterated its disapproval of the inclusion of the "system concept"

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in whatever form. Proceeding from the principle of the sovereignty of States over their natural resources, his delegation believed the territorial scope of application of a framework instrument should be limited to border-intersecting or border-forming international watercourses.

18. The instrument should embody the objective of mutually advantageous co-operation on the basis of sovereign equality, without stipulating, in a binding form, that the respective riparian States should adopt concrete measures or methods.

19. With regard to the existing and new uses of international watercourses, it was crucial that the interests of both upstream and downstream States should be well balanced. In view of the diversity of natural conditions, socio-economic factors, technological possibilities and, not least, political circumstances affecting the relationship between the riparian States concerned, agreements between interested States had proved to be an effective form of State practice in working out specific ways and means of co-operation.

20. His delegation also wished to emphasize its objections to the use of the term "appreciable" to qualify unlawful encroachments on the rights and interests of riparian States. That view had been confirmed by the statements made by a number of representatives in the Sixth Committee in 1988 and also during the current session of the General Assembly. The generally recognized "Trail-Smelter rule" concerning good-neighbourly relations between States, State practice, judicial decisions, and the opinions of the most highly-qualified writers of various nations all confirmed the prohibition on causing "serious" or "substantial" damage. It was generally recognized that the economic use of a watercourse was not possible without an appreciable change in, and impairment of, water quality. The normative implementation of justified ecological demands was doomed to failure if economic realities were not taken into account. His delegation therefore believed that the term "appreciable" was inappropriate. According to a legal definition quoted by the former Special Rapporteur for the topic, the term served to highlight the fact that the damage was capable of being perceived or recognized by the senses, the term "perceptible" not being a synonym of "substantial". His delegation did not consider it appropriate to use the term "appreciable" in the draft differently from the way in which that term was generally used: instead it was in favour of replacing the term with either "serious" or "substantial", in order to formulate the prohibition more clearly and more realistically.

21. His delegation considered that the text proposed for articles 22 and 23 was unsatisfactory. In that respect, it was in agreement with a number of members of the Commission. With regard to hazardous conditions in watercourses, one former Special Rapporteur, Mr. Evensen, had proposed two draft articles, relating to substantial pollution, on the one hand, and to threatening natural conditions, on the other. The fact that three articles now dealt with those problems led to conceptual ambiguities and duplication. In its proposed wording, article 23, for instance, covered those dangers and emergency situations which were primarily of natural origin and which were already dealt with in article 22, while also

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including extraordinary pollution resulting from human activities, although such incidents were already sufficiently covered by article 18. He suggested that articles 22 and 23 should be combined. In his delegation's view, articles 10 and 8 would suffice to accomplish the purpose of paragraphs 2 (a) and 3 of article 22; at the same time, there should be an unambiguous regulation of the legal consequences of damages in article 8.

22. The terms "water-related hazards" and "water-related dangers", as used in articles 22 and 23, did not correspond to the scope of application of the future framework instrument. The text could be made more precise by using the term "watercourse-related". Since international watercourses were exclusively situated in the territories of States, his delegation did not see any necessity for the regulation of activities "under their jurisdiction or control", as stated in paragraph 3 of article 22.

23. With regard to paragraph 2 of article 23, his delegation thought it suitable to refer to the possibilities of preventing, neutralizing or mitigating the danger or damage which could arise under the given circumstances.

24. Paragraph 3 of article 23 should be revised on account of its extension to non-riparian States or international organizations. In addition, the States mentioned in paragraph 4 did not fully correspond to the States mentioned in paragraph 3, although paragraph 4 expressly referred to paragraph 3.

25. With regard to paragraph 2 of article 22 and paragraph 4 of article 23, his delegation wished to stress once again that it should be left to the riparian States concerned to choose the specific mode of co-operation.

26. Mr. NAGAI (Japan) said that, because the topic of the jurisdictional immunities of States and their property covered an important area of international law in which the early adoption of unified rules was desirable, his Government had followed the Commission's deliberations with great interest. It noted with appreciation that the Commission had begun substantive consideration of the draft articles for the second reading, based on the Special Rapporteur's second report, and that it had been able to refer articles 1 to 11 bis to the Drafting Committee. Japan was also pleased to note that the Commission had sought to achieve consensus on the question of what types of State activities should enjoy sovereign immunity, and had not gone too deeply into theoretical issues relating to the general principles. It hoped that the Commission would take a similarly realistic attitude in its efforts to reach agreement on the relevant provisions of part III.

27. With regard to paragraph 1 (b) of article 2 as submitted by the Special Rapporteur, his delegation felt that further consideration was necessary, taking into account the comments made by members of the Commission at its latest session. Careful consideration should also be given to the proposals on State enterprises made by the Special Rapporteur and some members of the Commission, in order to ensure that the future instrument could be accepted as a universal instrument.

(Mr. Nagai, Japan)

28. Article 6 stipulated that a State enjoyed jurisdictional immunity, subject not only to the provisions of the articles, but also to "the relevant rules of general international law". His delegation took the view that, since that phrase made the scope of immunity quite unclear, it should be deleted. Further consideration of article 12, concerning contracts of employment, was necessary in order to clarify the provision and to determine the appropriateness of using the term "recruit".

29. With regard to article 14, on ownership, possession and use of property, and article 21, on State immunity in respect of property from measures of constraint, it was desirable, in order to clarify the scope of the articles, either to delete or to replace terms such as "interest" that might lead to abuse in the application of the provisions. Article 20, on cases of nationalization, was unclear, required further examination, and might even be deleted. With those considerations in mind, he hoped that the Commission would make further steady progress towards a well-balanced draft.

30. Turning to chapter VII of the report (A/44/10), which dealt with the topic of the law of the non-navigational uses of international watercourses, he said that the Special Rapporteur's fifth report contained helpful insights into various questions, based on an extensive examination of many bilateral agreements currently in force and of State practice. During the Commission's most recent session, useful discussions had been held on article 22, relating to situations which were predictable to a certain degree, and article 23, relating to emergency situations. He hoped that the Commission would complete its first reading of the complete draft by the end of its current term of office, expediting its consideration of the remaining articles, neither of which it had had the opportunity to discuss at its latest session. The topic was closely related to the environmental problems associated with global warming, a matter of increasing concern to the international community, which must make the co-operative approach the basis of its efforts to tackle the issue of environmental protection. Co-operation among States in the field of the non-navigational uses of international watercourses was also becoming increasingly important.

31. At the same time, in establishing the legal obligations of States, it was necessary to clarify the content of those obligations and to ensure that it was feasible to comply with them. Accordingly, he hoped that the Drafting Committee would give further careful consideration, on the basis of the comments made by members of the Commission at its latest session, to the two articles referred to it in 1989.

32. It was also essential to avoid duplicating the work carried out on the topics of State responsibility and international liability for injurious consequences arising out of acts not prohibited by international law, both of which were closely related to the question of watercourses.

33. With regard to relations between States and international organizations, which was dealt with in chapter VIII of the report, he noted that the Special Rapporteur

(Mr. Nagai, Japan)

had proposed four articles to comprise part I of the draft, but that, unfortunately, time had not permitted the Commission to consider the report at its latest session. In view of the fact that international organizations were playing an ever increasing role in the international community, it would be appropriate for the Commission to intensify its deliberations on that topic. He hoped that some measure of progress would be made in that regard at its next session.

34. Miss RODRIGUEZ (Chile), after briefly reviewing the background to the current discussion, said that there was a paucity of general rules governing the non-navigational uses of international watercourses, which was the reason for her country's strong support for the conclusion of a framework convention on the subject. Such a convention should embody basic legal principles intended to supplement specific agreements to be concluded between various States. The unique characteristics and varied uses of watercourses pointed to the need for a legal régime of that type. In that connection, she emphasized that the use of shared water resources should be based on equity.

35. The question of whether the term "watercourses" or "watercourse systems" should be used in the draft articles was of particular interest to her delegation. Chile felt that the first term was more appropriate, as the second term was broader and included tributaries located within the territory of a single State. While recognizing the right of riparian States to share in the use of a watercourse, her delegation felt that it would be a bit excessive to extend that right to the use of tributaries.

36. With regard to articles 22 and 23 as submitted by the Special Rapporteur, her delegation believed that the Commission should seek to reduce as much as possible the burden on developing countries, without endangering the balance between the rights and the obligations of States. It shared the views expressed by other delegations in that regard.

37. It would be preferable to use the term "watercourses" in the titles of the two articles, not merely "water"; the use of the latter term might convey the idea of watercourse systems.

38. Article 22, paragraph 1, could include a reference to damage caused to any species of aquatic life. With regard to paragraph 2, she agreed with the comments made by the Special Rapporteur that the use of the word "include" indicated that the list of steps specified was not an exhaustive one. She also suggested that in subparagraph (a), the words "regular and timely" should be replaced by the word "continual", since that term reaffirmed the idea of international co-operation.

39. In connection with article 23, paragraph 1, she hoped that watercourse States would be required to notify not only the other States parties to the framework convention, but all those potentially affected by any danger or emergency situation, in line with the principle of co-operation. She also thought that the expression "water-related danger or emergency situation" should include radioactive contamination, and that the term "dangerous incidents" should be further clarified.

(Miss Rodriguez, Chile)

40. With regard to paragraph 2, she thought that a watercourse State within whose territory a water-related danger or emergency situation originated should also be required to make timely assessments of the potential environmental impact of such situations.

41. Mr. HANAFI (Egypt) said that his delegation shared the hope, as expressed by the Special Rapporteur in his fifth report on the law of the non-navigational uses of international watercourses, that the Commission would be in a position to complete the first reading of the complete set of draft articles by the end of its current term of office in 1991.

42. Paragraph 1 of article 22 laid down a general obligation of co-operation in regard to water-related hazards, harmful conditions and other adverse effects. Such co-operation was essential in defining the rights and obligations of watercourse States and for the prevention of water-related hazards, and must take into account the circumstances of the particular international watercourse system involved. His delegation was in agreement with the general thrust of the article and with the idea of an indicative list of steps to be taken by watercourse States in fulfilment of their obligations under paragraph 1, as contained in paragraph 2. It might be necessary in some instances for measures other than those stipulated in paragraph 2 to be taken. The obligation laid down in paragraph 3 was nothing more than one of the consequences of that contained in article 8, as provisionally adopted at the Commission's fortieth session, on the obligation not to cause appreciable harm.

43. It was clear from paragraph 1 of article 23, on water-related dangers and emergency situations, that it was intended to apply both to natural situations and to those resulting from human activities, where the situation or danger would normally take the form of a sudden incident or event. Paragraph 1 required that immediate notification should be given to potentially affected States, and the States to be notified were not limited to watercourse States.

44. The thrust of article 22 was directed towards measures of a preventive nature, while article 23 required watercourse States within whose territory a danger or emergency situation originated to take all practical measures to prevent, neutralize or mitigate the danger or damage to other watercourse States. In that connection, account should be taken of cases in which assistance might be required from States outside the region, to be provided at the request of those States within whose territories the danger originated. The development, promotion and implementation of contingency plans, as required by paragraph 4, might take place in the framework of the establishment of an authority to be entrusted with the responsibility of managing the watercourse, disseminating information, ensuring an appropriate climate for consultations and negotiations among watercourse States, preparing contingency plans and co-operating in devising the measures necessary for the elimination of dangers. There were many precedents for such a proposal, some of which had been cited by members of the Commission in their comments on the draft articles provisionally adopted.

45. Mr. LESSEUR (Venezuela), referring to chapter VII of the Commission's report (A/44/10), drew attention to the importance of draft articles 22 and 23 as submitted by the Special Rapporteur. While article 22 was generally well crafted, he felt that in paragraph 2 (b), the meaning and scope of the phrase "both structural and non-structural" should be clarified. Furthermore, although the substantive points of paragraph 3 were included in article 8 as provisionally adopted by the Commission, it might be useful to retain the paragraph if it provided further clarification.

46. With regard to article 23, his delegation considered that the phrase "emergency situation" could be replaced or deleted. In paragraph 2, the phrase "practical measures" required clarification. Similarly, in paragraph 3, it would be useful to explain the phrase "States in the area affected". Greater emphasis should be given to the prevention of damage, or perhaps it should be covered by a separate article.

47. His delegation was in favour of the suggestion that article 23 should include a provision "requiring a State affected by a disaster to accept profferred assistance and not to regard offers thereof as an interference in its internal affairs" (A/44/10, para. 647). However, the suggestion should be studied more carefully.

48. The draft should contain secondary rules specifying the consequences of the breach of certain obligations of watercourse States. Although he understood that the issue was complex, he felt that it might be useful for the Special Rapporteur, in his consideration of the question, to follow the general outlines of the draft articles on State responsibility and international liability for injurious consequences arising out of acts not prohibited by international law.

49. On the question of environmental protection, his delegation believed that the Special Rapporteur should draft stricter rules on State responsibility, as well as provisions relating to education and technology transfers in that area. It hoped that the Commission would give priority to the topic with a view to concluding the first reading of the draft articles.

50. Mr. KIPNGETICH (Kenya) said that his delegation recognized the difficulties facing the Special Rapporteur on the topic of the jurisdictional immunities of States and their property in trying to produce draft articles acceptable to all States on a subject on which States had divergent views and on which any discussion tended to generate controversy. His delegation would confine itself to commenting on some of the draft articles provisionally adopted by the International Law Commission.

51. While it was true that sovereign immunity in its classical sense was no longer the rule, that should not be understood to mean that the doctrine had been abandoned in favour of the emerging concept of restrictive immunity. In fact the position with regard to the application of the jurisdictional immunities of States was unclear, and it was therefore important that the future instrument should clearly set out exceptions to the rules of jurisdictional immunities of States and

(Mr. Kipngetich, Kenya)

their property, and ensure that there were no gaps which might expose States to excessive and unjustified foreign jurisdiction. The instrument emerging from the draft articles should not leave any room for unilateral interpretation by States, if it was to be uniformly applied. It should take into account diverse State practice in different political, socio-economic and legal systems.

52. Although his delegation did not have any problems with the meaning of the phrase "judicial functions" as used in paragraph 1 (a) of article 2 in its ordinary sense, it felt that the phrase should be further clarified in order to avoid the possibility of discrepant interpretations by States. He agreed with the Special Rapporteur's comment that, while it might be difficult to define the term "judicial functions", there should be some guidelines regarding the scope of the phrase.

53. His delegation was disappointed that paragraph 3 of article 2 as it stood had not accorded equal status to the nature and purpose criteria, and that primacy had been given to the nature criterion. Paragraph 3 was very restrictive in the application of the purpose criterion, and the alternative wording suggested in paragraph 441 of the report (A/44/10) might with some reformulation be acceptable to his delegation. As to article 6, he supported the deletion of the bracketed words "and the relevant rules of general international law". Deletion of that general phrase would have the effect of eliminating unilateral interpretation, the consequences of which would be to negate the purposes of the draft. Article 6 bis should be dropped altogether on the grounds of its obscurity. Declarations of exceptions to State immunity would serve merely to complicate that area of law. It was his view that, if there were to be exceptions to State immunity, they should be clearly stated in the articles. Clauses that might give States the opportunity to come up with other exceptions must be avoided.

54. The title of part III should use the phrase "exceptions to", it being understood that immunity was the rule. His delegation favoured a further rewording of article 11 if the general phrase "applicable rules of private international law" was to be retained in paragraph 1. The reformulated article should highlight the jurisdictional link between the commercial contract and the forum State in order to avoid unilateral interpretations, which would lead inevitably to uncertainty in the law.

55. Mr. AL-BAHARNA (Bahrain) said that his delegation had noted with satisfaction the progress made by the Commission in its consideration of the law of the non-navigational uses of international watercourses. He urged the Commission to give priority to the topic at its next session so that the first reading of the draft articles could be completed by the end of its current term of office in 1991.

56. He expressed appreciation to the Special Rapporteur for having submitted a comprehensive and informative report on the topic (A/CN.4/421 and Add.1 and 2). His delegation had found the description of State practice and the scientific and hydrological information to be particularly useful.

(Mr. Al-Baharna, Bahrain)

57. Water-related hazards might be caused either by human activities or by natural phenomena. In either case, they could entail disastrous consequences, but a distinction should be made between the causative factors from the standpoint of the obligations of States. He agreed with the Special Rapporteur that the obligations of watercourse States should increase with the degree of human involvement, but the question of how to translate that notion into practice remained a difficult one.

58. As noted by the Special Rapporteur, floods constituted one of the most serious water-related hazards. A wide range of international agreements containing similar provisions concerning floods had been concluded by watercourse States. The conclusion of similar agreements undoubtedly signified, in a general sense, the existence of customary rules of international law on the subject, as indicated by the Special Rapporteur, but care would have to be exercised in inferring the precise nature of the customary rules. International agreements of that kind were likely to contain legal norms which derived their force from a conventional provision rather than a customary rule. In the North Sea Continental Shelf cases, the International Court of Justice had pointed out that not all rules embodied in a treaty or treaties were accepted as customary rules by the opinio juris so as to become binding in international law.

59. The Commission should therefore use extreme caution in inferring customary rules from international agreements on watercourses. The provision on floods should be formulated in the broadest possible terms so as to enable the watercourse States to adapt it to their specific requirements. The proposed norm should, to the extent possible, correspond to a rule on the topic which was accepted by States as binding on them.

60. Turning to articles 22 and 23 as submitted by the Special Rapporteur, he said that the formulation of article 22 was too general, particularly in paragraph 3. He also thought that paragraph 3 might be redundant, since article 8 as provisionally adopted by the Commission would also apply to water-related hazards, a point acknowledged by the Special Rapporteur in paragraph 640 of the Commission's report (A/44/10).

61. In article 22, paragraph 1, the inclusion of the phrase "on an equitable basis" made the principle of co-operation too vague. He suggested that the paragraph should begin with the words "Watercourse States shall co-operate in accordance with the provisions of the present Convention". Paragraph 2 of the article was too stringent. The "steps" referred to in subparagraphs (a), (b) and (c) appeared to suggest that the obligations were cumulative and applied equally to all situations mentioned in paragraph 1. In fact, however, each type of situation might require a different response. Accordingly, he suggested that paragraph 2 should be drafted so as to indicate what kind of response was required to prevent or mitigate the danger. For instance, "steps" could be replaced by "measures" and "problems" by "hazards".

62. Article 23 was not adequately distinguished from article 22 and did not sufficiently distinguish emergency situations arising from human activities from

(Mr. Al-Baharna, Bahrain)

those caused by natural phenomena. He suggested that article 23 should be confined to emergency situations, and that the different legal consequences of the two kinds of emergencies should be specified.

63. He also shared the view expressed by some members of the Commission in paragraphs 669 and 670 of the report that article 23, paragraph 3, went beyond the principles of international law in seeking to impose obligations on third States, and therefore required redrafting. He also agreed with the proposal to replace the word "shall" with "should".

64. Mr. ROUCOUNAS (Greece), referring to the topic of State responsibility, stressed the crucial nature of that issue for the system of international law as a whole. His delegation considered that the Special Rapporteur's idea of dealing separately with the legal consequences of delicts and crimes, respectively, was acceptable, subject to thorough analysis. The idea appeared to be a logical consequence of the fundamental choice made by the Commission in connection with part one of the draft in adopting a concept which emphasized the wrongful act itself rather than the harm caused. That approach was corroborated by the position of the International Court of Justice on the question of obligations erga omnes, a legal category whose parameters still remained to be fully defined. In view of developments taking place in international thinking in that field, the legal consequences of a wrongful act had to be considered in terms of the degree of contempt of international law which that act represented. The results of such consideration could not, of course, be prejudged, but to attempt it would be consonant with the distinction suggested by article 19 of part one of the draft.

65. The question of reparation comprised two elements, the first being restitution by more or less traditional methods, the other relating to the re-establishment of legality following a wrongful act. In that connection, his delegation took a favourable view of the Special Rapporteur's intention to adopt a flexible approach in the matter of different forms of reparation. As for cessation, which, notwithstanding the divergent views on that point, represented a substitute form of "primary" obligation and, for that reason, was not necessarily connected with reparation, it was appropriate that it should be considered separately in relation to delicts and to crimes. It was to be hoped that at its next session the Commission would be in a position to consider the question of forms of reparation in a less fragmentary manner.

66. Turning to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, he said that his delegation generally approved the changes made by the Special Rapporteur in revising the articles of chapter I (general provisions) of the draft, namely, the inclusion of the concepts of harm and risk in the scope of the topic, and the extension of the scope to cover harm caused to the environment as a whole, in areas beyond the national jurisdiction of any State. The use of the adjective "appreciable" to qualify the concept of "risk" was, in his view, questionable; the difficulties encountered in that connection in the context of the international watercourses topic should not be overlooked. It was important to avoid ambiguous

(Mr. Roucounas, Greece)

language when dealing with such matters. Generally speaking, articles 1 to 9 contained several terms which appeared inappropriate (e.g. "places", "things", and "areas"); those terms should be replaced by terms to be found in existing international instruments on related issues.

67. While generally in agreement with the substance of the new proposals by the Special Rapporteur, especially in regard to prevention and reparation of harm to the environment, he wished to recall the suggestion he had made at the forty-third session of the General Assembly to the effect that the Commission should draw upon the international conventions and agreements which were gradually building up a body of international environmental law. Besides the work of the United Nations Economic Commission for Europe, the Organisation for Economic Co-operation and Development and the United Nations Environment Programme, the 1989 Basel Convention also deserved to be mentioned in that connection. A thorough understanding of solutions adopted under various domestic laws was also indispensable if confusion was to be avoided concerning, inter alia, the concepts of "absolute", "strict" and "objective" liability. Neither should it be forgotten that the item was supposed to cover harm arising out of lawful activities. In that respect, the Commission's work could hardly be said to have advanced to the point of establishing a legal link between risk and reparation; indeed, the Commission sometimes appeared to be working on two separate sets of draft articles rather than one. The relationship between the present draft and other régimes of international co-operation for the prevention and reparation of transboundary harm was another problem which called for the Special Rapporteur's and the Commission's attention. His delegation was satisfied, however, with that part of the draft which was devoted to the operational aspects of international co-operation.

68. Noting that satisfactory progress had been achieved in the Commission's work on the law of the non-navigational uses of international watercourses, he said that his delegation agreed with the inclusion of an indicative list of water-related hazards, harmful conditions and other adverse effects in paragraph 1 of article 22, but questioned the apppropriateness of a reference, in that context, to watercourse States co-operating "on an equitable basis". The analytical enumeration, in paragraph 2, of possible steps to be undertaken by watercourse States undoubtedly contributed towards a broad interpretation of the concept of co-operation. As for article 23, he welcomed the provision in its paragraph 1 that notification of danger should be given without delay, time being of the essence in dealing with water-related emergencies. In his delegation's view, the possibility of floods resulting from human activities should also be provided for. The reference in paragraph 3 to "the area" affected by a water-related danger or emergency situation would appear to be superfluous as the provision surely covered cases where only one State was so affected.

69. Mr. Mikulka (Czechoslovakia) resumed the Chair.

70. Mr. GHAREKHAN (India) said that the Commission deserved to be commended upon completing its task in connection with the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. Except for

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some minor drafting points, the draft articles adopted on second reading reflected the consensus reached on first reading. His delegation would have no objection to approving the Commission's recommendation for the convening of an international conference of plenipotentiaries to study the articles and the optional protocols, and to conclude a convention on the subject.

71. With regard to the draft Code of Crimes against the Peace and Security of Mankind, he said that his country was a party to most of the international instruments relevant to the subject-matter of the draft Code, and participated actively in regional efforts in that field. His delegation favoured the replacement of the term "war crime" with a reference to violation of the rules of armed conflict. With regard to both terminology and substantive content, the draft Code should be based on the 1949 Geneva Conventions and the Additional Protocols thereto, a general definition of war crimes being followed by an indicative list including the use of weapons of mass destruction, such as nuclear or chemical weapons. As for crimes against humanity, his delegation took the view that the category should be maintained and should include crimes such as genocide, apartheid and slavery. It welcomed the provisional adoption by the Commission of articles 13, 14 and 15, and favoured the deletion of the words "armed" and "seriously" appearing in square brackets in paragraph 1 of article 14. Threat of aggression (art. 13) should, in his delegation's view, be understood more widely to cover all stages of aggression short of actual military intervention, and all manifestations and consequences of aggression, including annexation, should be included for purposes of establishing individual criminal responsibility under the draft Code.

72. India noted with appreciation the progress made by the Commission on the topic of the law of the non-navigational uses of international watercourses. The specific principles set forth in draft articles 22 and 23 required careful analysis. In recommending a régime for matters relating to floods and water-related emergencies, the Commission should emphasize co-operation among all the States concerned. Furthermore, there was a need for: collection and wide dissemination of relevant scientific data and information on weather and other conditions; assistance to and infrastructure for countries where problems recurred frequently, in order to ensure that the necessary steps were taken in terms of national legislation, and to promote alternative forms of human habitation and ways of life consistent with the development and conservation of natural resources; establishment of international institutions for training and assistance to deal with the hazards and dangers in question; and adequate international funding for various purposes, including assistance in the event of large-scale disasters. A comprehensive strategy was called for to deal with the problems of water-related hazards and dangers.

73. Various instruments, including the draft articles developed by the International Law Association on the question of floods, did not project an absolutist or rigid régime as had been attempted in draft articles 22 and 23 before the Commission. The only obligation that the draft articles prepared by the Association projected was the obligation to co-operate and to ensure that priority

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was given to the communication of flood warnings in emergency cases. Those articles also specified that a whole range of costs should be borne jointly by the States co-operating in the matters in question. Furthermore, the cost of special works undertaken by agreement in the territory of one basin State was to be borne by the requesting State, unless the cost was distributed otherwise under the agreement. On the crucial question of liability, the Association's draft articles provided that a State was not liable to pay compensation for damage caused to another basin State by floods originating in the former State unless the damage caused was substantial. India had serious reservations about the use of terminology in articles 22 and 23 before the Commission. The criteria for engaging any liability should be related to substantial damage, rather than to any adverse effects. In that connection, India noted that the Special Rapporteur appeared to acknowledge that the situations addressed in articles 22 and 23 could be subject to a number of principles already considered by the Commission. Articles 22 and 23 should therefore be suitably reformulated in the light of those principles.

74. On the issue of the Commission's working methods and procedures, India wished to make the following comments: the Commission's report should deal only with the topics on which the Commission held substantive discussions; the report should be transmitted directly to States, preferably at United Nations Headquarters, before the beginning of the General Assembly's annual session; India supported the increased co-operation between the Commission and other legal bodies, such as the Asian-African Legal Consultative Committee; summaries of developments on topics under which articles had been drawn up should be sent directly to Governments immediately after the Commission's session, so that Governments were not obliged to await completion of the lengthy process of finalizing the report on the whole session; and a computerized data-base of texts of bilateral and multilateral instruments on the subjects under consideration by the Commission should be developed and be made available regularly to the Commission.

75. India noted with appreciation the Commission's efforts to review and revise its methods and procedures. The Commission could achieve better results if it focused primarily on subjects whose consideration could in fact be completed, and it should continue to endeavour to be non-doctrinal and methodical in its approach to the various items before it. It was to be commended for the progress already made.

76. India appreciated the Commission's effort to propagate international law through the International Law Seminar, whose twenty-fifth session had been held in Geneva in June 1989. It looked forward to the continuation of the Seminar, and hoped that the conditions for participants' eligibility would be relaxed, particularly where the developing countries were concerned. India also wished to express its appreciation to the Government of Brazil for its generous contribution to the Gilberto Amado Memorial Lecture held by the Legal Counsel of the United Nations.

77. Mr. PATEL (Pakistan), referring to the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, said that on the whole the Commission had struck a good balance in its endeavour to ensure that the objectives of the draft articles in question were attained. In article 5, as suggested by Jamaica, it should be made clear that the courier must not interfere in the internal affairs of the receiving and transit States. Where article 17 was concerned, the words "in principle" should be deleted from the first sentence of paragraph 1, and the words "where serious grounds exist" in paragraph 1 (b) should be replaced by the words "where reasonable grounds exist". Subject to acceptance of those two proposals, Pakistan supported article 17. However, it would have no objection if the article was deleted in order to achieve a consensus. The immunities conferred in article 18 were not unreasonable. With regard to article 28, his delegation considered that there were ways of preserving the confidentiality of the contents of the diplomatic bag and at the same time preventing any abuse of the privilege given to the bag. For example, Italy had referred to the use of sniffing dogs, and Thailand had referred to electronic devices used at airports, which made it possible to ascertain that no prohibited articles were in the bag without enabling anyone to read the documents in the bag. Since countries were unlikely to object to such limited inspections, the first clause of the article should be amended to permit inspection along the lines suggested. If the sending State did not permit such limited inspection, the bag should be returned to it.

78. Turning to the draft Code of Crimes against the Peace and Security of Mankind, he said that the concept of gravity was essential to the definition of such crimes. Pakistan preferred the second alternative proposed by the Special Rapporteur for the definition of a war crime, namely, that a war crime was a serious violation of the rules of international law applicable in armed conflict. It agreed that apartheid and genocide should be included under crimes against humanity. It preferred the second alternative proposed by the Special Rapporteur for the definition of apartheid, but the words "as practised in southern Africa" should be deleted for the reasons stated by the representative of Ghana. The definition of genocide should be amended to cover all reasonable possibilities, and the relevant part of the definition should therefore read: "national, ethnic, racial, religious or other group" instead of "national, ethnic, racial or religious group". Pakistan also supported the inclusion in the draft Code of "colonial domination" and forced massive expulsion of a population from an occupied territory aimed at changing the demographic character of that territory. It also agreed with the view that the use of arms should not be included in the definition of intervention and that the word "armed" in square brackets in the relevant article should be deleted. Pakistan also endorsed the proposal that there should be general definitions of crimes, followed by a non-exhaustive list of examples of concrete acts constituting crimes and of concrete acts that did not constitute crimes. It further agreed with the view that the use of nuclear weapons should be included as a crime against humanity. It understood the Commission's view that it was not possible to prosecute States that committed crimes, and noted that the Special Rapporteur did not exclude the possibility of setting up an international court system for the prosecution of offenders. That meant that for the time being individuals accused under the articles would be tried either by the courts of the

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countries in which they resided or in the courts of the country in which the alleged crimes had been committed.

79. One aspect of the draft that disturbed his delegation was that no punishment had been described for any crime. Another disturbing aspect was that the "intention to act" was not included in the definition of aggression, which left excessive discretion to the courts. There could also be conflicting interpretations of an alleged act of aggression if individuals from the country alleged to have committed aggression were tried in different courts. That had led Trinidad and Tobago to advocate the establishment of an international criminal court. However, that proposal required extensive examination by the international community since it had many far-reaching implications.

80. None of the crimes set forth in article 14, paragraph 3, as submitted by the Special Rapporteur, had been defined, but the Commission's report referred to previous definitions of slavery that had been found satisfactory. The definition of slavery in previous conventions that was found to be most suitable should be expressly incorporated into article 14. The expression "forced labour" was very vague. Pakistan was still governed by the 1860 Penal Code, which was a humane code that prescribed two types of imprisonment: simple and rigorous. Individuals sentenced to rigorous imprisonment had to do compulsory work in gaol factories. When prisoners completed their sentence, they were able to find employment in the industries for which they had been trained. Pakistan did not believe that such compulsory labour could be equated with a crime against humanity. It therefore suggested reconsideration of the definition of forced labour on the basis of intention.

81. The kind of bondage to which the Special Rapporteur referred existed in many third world countries. Such bondage was an illegal practice resulting from extreme poverty, and could be eliminated only by the elimination of poverty. The draft Code should take account of local conditions, and it should be borne in mind that it was not desirable to extend the scope of crimes against humanity to grey areas.

82. With regard to the Special Rapporteur's proposal that the concept of serious and intentional harm to a vital human asset should be included in article 14, paragraph 6, as a crime against humanity, Pakistan shared the view that the definition of the concept was too vague.

83. Pakistan supported the Special Rapporteur's proposal that drug trafficking should be included as a crime. However, the crime must be defined with precision, and aiding and abetting must also be included. As examples of aiding and abetting, he referred to the industries that sold chemicals, knowing that they would be used in the manufacture of cocaine or heroin, and to the merchants who sold ammunition to the drug mafia for their mercenaries. The individuals who sold chemicals and ammunition to drug dealers were essential links in the chain that had led to drug trafficking. The definition of the crime of drug trafficking must therefore be comprehensive enough to include all the links in the chain.

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84. On the topic of the jurisdictional immunities of States and their property, Pakistan welcomed the proposals reflected in draft articles 2 and 11. It also supported the proposals about the waiver of immunity by States and the effect of participation by States in proceedings before courts, as reflected in articles 8, 9 and 10. In fact, chapter VI of the Commission's report made a notable contribution to the growth of international law.

85. Pakistan had noted with great interest the draft articles on the law of the non-navigational uses of international watercourses. The phrase "shall co-operate on an equitable basis" in article 22, paragraph 1, needed to be clarified; a balance must be struck between the rights of lower and upper riparian States, and liability for pollution must be a strict liability so that the States responsible for polluting a watercourse were made liable for the consequent damage, except in cases of force majeure.

86. Pakistan hoped that funds would be available in 1990 for fellowships for participants in the International Law Seminar. It was pleased to note that the Commission was fully cognizant of the need to provide fellowships to bring together participants from all over the world. It joined in the appeal for increased contributions to enable junior professors, government officials and students of international law to participate in the sessions of the Seminar in the future.

87. Lastly, his delegation wished to stress that co-operation between the Commission and other intergovernmental legal bodies engaged in similar work would be extremely helpful.

The meeting rose at 12.50 p.m.