United Nations
GENERAL ASSEMBLY
THIRTY-NINTH SESSION
Official Records*

SIXTH COMMITTEE
39th meeting
held on
Friday, 9 November 1984
at 10.30 a.m.
New York

SUMMARY RECORD OF THE 39th MEETING

Chairman: Mr. GOERNER (German Democratic Republic)

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84-57482 3711S (E)

Distr. GENERAL
A/C.6/39/SR.39
19 November 1984
ENGLISH
ORIGINAL: FRENCH

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

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

1. Mr. AL-DUWAIKH (Kuwait) congratulated the Commission on the good work it had done at its thirty-sixth session; that demonstrated its desire to meet the concerns of the modern world.

2. The significance of the notion of offences against the peace and security of mankind had increased more and more since the Nürnberg and Tokyo trials. The Commission had endeavored to meet the needs of the modern world by taking into account the fact that States and individuals must be protected from such violations of international law as colonialism, apartheid, the taking of hostages, mercenarism, arbitrary economic sanctions and pressures, serious damage to the environment, the use of nuclear weapons, as had been recognized by the international community since the adoption of the draft code prepared in 1954. He approved of the method adopted by the Special Rapporteur who had dealt with three fundamental questions (scope of the draft, methodology of the draft and implementation of the code) by endeavouring to highlight all the legal and political aspects of the topic. While it did not eliminate the notion of the criminal responsibility of the State his delegation realized that the introduction of concepts of criminal law into the field of the international responsibility of States greatly complicated the Commission's work. Accordingly, with respect to the content ratione personae of the draft code, it agreed with the Commission that at the present stage it was better to leave aside the question of the criminal responsibility of the State and to focus on the criminal responsibility of individuals [A/39/10, para. 65 (a)]. Eventually agreement would have to be reached on provisions that would establish the criminal responsibility of States that committed serious violations of international law; such as aggression, annexation of territories or apartheid, all of which could be committed only by States. Censure by the international community or economic sanctions were two examples of the type of sanction which could be adopted. With respect to the content ratione materiae, it was necessary to start from rational criteria so as to identify the most serious crimes and to determine their legal consequences. It was also necessary to look more closely at the legal qualification of those crimes and to study them in greater depth from the qualitative standpoint. Paragraphs 52 to 64 of the report were very interesting in that regard. However, those questions should also be considered from the point of view of the solidarity of the international community, which was bound to adopt sanctions against a State or States that committed offences against the peace and security of mankind. A cautious but rigorous approach must be adopted to draw up the list of those types of offence and the deductive method should be combined with the inductive method.

3. His delegation was particularly interested in the topic of international liability for injurious consequences arising out of acts not prohibited under international law, and it deeply deplored the death of Mr. Quentin-Baxter. It hoped that a new Special Rapporteur would be appointed as soon as possible and that the work, which had benefited considerably from the competence of

(Mr. Al-Duwaikh, Kuwait)

Mr. Quentin-Baxter, would continue without delay. It welcomed the exhaustive study prepared by the Secretariat on State practice regarding such liability and hoped that the document would soon be issued in the various working languages. While recognizing that the topic was a particularly difficult one, his delegation believed that, although some rules of customary law did exist, they were no longer sufficient given the consequences of the tremendous technical progress which had been made and which was the cause of some of the present-day problems. In order to deal with those problems it was necessary to establish a system of international measures of co-operation within the framework of a convention dealing with activities that resulted in transboundary injury. The issue must be dealt with realistically and provision must be made to repair the injury and loss suffered by neighbouring States as a consequence of the activities of a given State. The issue was of practical importance and was particularly urgent, for many States, including many developing States, had suffered and continued to suffer grave injury as a result of activities that were not forbidden under international law but that had transboundary consequences which could not be considered purely fortuitous. Such activities, whether in the public sector or in the private sector, should be carried out under the responsibility of the State, with all due prudence and in accordance with the rules established in that regard by a convention. Furthermore, States should be able to demand an inquiry into, or negotiations on the activities or technological innovations of neighbouring countries that might have injurious consequences for them. The Commission should define norms of international co-operation on the subject stipulating that States which did not abide by those norms would be held liable for repairing the damage they caused.

4. His delegation noted that ILC had made little progress on the question of State responsibility. However, it had no doubt that the Commission would be in a position to complete the elaboration of balanced draft articles on the consequences of internationally wrongful acts in the near future.

5. Finally, he approved the Commission's methods and programme of work as set forth in its report.

6. Mr. LAMAMRA (Algeria) said that far-reaching changes had had a profound impact on the environment in which legal standards were applied. The adoption of the Charter of the United Nations had upset many values of a permissive legal order and, although certain traditional circles were unwilling to accept the new realities, it was comforting to see that the Commission, in a participatory and innovative spirit would not a priori tolerate halting the exchange of ideas or resignation in the face of difficulties.

7. Progress had been made on most of the items on the agenda of the Commission at its thirty-sixth session, particularly on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. Although doubts had been expressed regarding the timeliness of the exercise, the issue related to a sphere of legal relations whose importance was such that it was not possible to make do with the relatively satisfactory state of established practice. Once diplomatic law had been organized and codified in four international conventions it became necessary to unify the rules governing practical questions which States faced on

(Mr. Lamamra, (Algeria)

the subject. At the initiative of its Special Rapporteur, the Commission had adopted a pragmatic and functional approach, specifically meeting the specific needs of the international community, as demonstrated by the extreme simplicity of the 19 draft articles that had been provisionally adopted.

8. With regard to the nature and scope of the privileges and immunities that the diplomatic courier should be ensured, while acknowledging that the courier's functions were justified by the diplomatic bag he believed that the courier's capacity as official agent of a Government must also be an important point of reference. He therefore believed that it was necessary to strive for a qualitative and quantitative balance between the two elements of the issue, namely, the diplomatic courier and the diplomatic bag, just as it was necessary to balance the interests of States in each of the three possible situations they might find themselves (that of sending State, transit State or receiving State).

9. Draft article 23, particularly paragraphs 1 and 4 seemed to raise particular difficulties undoubtedly because of the different concepts that existed regarding the diplomatic courier and the performance of his mission. If it was acknowledged that in many cases the courier's mission was not confined to one destination and that he had to provide communications in both directions, it was necessary to conclude that the grounds for protecting the diplomatic courier from arrest and detention, as provided for under article 16, were also grounds for granting him immunity from the criminal jurisdiction of the receiving State or the transit State and ensuring that he was not obliged to give evidence as witness. Without the provisions provided for in paragraphs 1 and 4 of draft article 23, the sending State would suffer considerable injury because its messenger would be forbidden to continue his mission so that he could be available to the courts of a transit State or a receiving State. Functional necessity required the inclusion of the provisons set forth in those two paragraphs and that, of course, implied that the sending State assumed responsibility for punishing its courier for any misdeed he might have committed in the territory of the transit State or the receiving State.

10. Justifiably called the "key provision", draft article 36, on the inviolability of the diplomatic bag, gave rise to a number of questions and conflicting concerns which could not be easily reconciled, as was evident from the drawbacks to the compromise formula presented in paragraph 142 of the report (A/39/10). The unification of the law applicable to all types of official bags implied a choice between the régime of inviolability as codified in the 1961 Vienna Convention on Diplomatic Relations and the régime of the 1963 Convention on Consular Relations. Not all States parties to the Vienna Convention on Diplomatic Relations were necessarily willing to have their official communications, which were protected by that instrument, treated with the uncertainty affecting their communications with their consular posts, the volume of which was generally less than that of diplomatic communications. Real or supposed abuses should not cast doubt on the principle of the inviolability of the diplomatic bag, on which protection of the confidentiality of official communications depended. Indeed, the validity of a principle could not be negated by the establishment of a violation of that principle. While it was true that a balance had to be struck between the inviolability of a sending State's bag and the security of any other State, the good faith of States would still seem to be the best means of establishing such a balance on a basis of equality.

(Mr. Lamamra, Algeria)

11. With regard to jurisdictional immunities of States and their property, in addition to problems arising from the existence of two schools of thought, one of which believed in absolute immunity and the other in restricted immunity, it was undoubtedly the inadequacy of States practice and the insufficiently representative character of existing legislation that created the greatest obstacles for the ILC.

12. The Special Rapporteur and the ILC had been right in establishing the principle of immunity before attempting to identify possible exceptions, thus resisting those who would have preferred all immunity from jurisdiction to be based of necessity on the consent of the foreign State. The ILC must be given credit for having sought to reconcile the principles of sovereignty and territoriality without giving precedence to either of them; paragraph 2 of draft article 11, concerning the question of extraterritorial effects of measures of nationalization, reflected that balanced approach.

13. His delegation had already voiced doubts during the thirty-eighth session with regard to the exceptions provided for in draft articles 13, 14 and 15. Draft articles 16, 17 and 18 included among the exceptions activities which were not clearly attributable to a State as such. One might question, for example, whether a State's involvement through a public enterprise, in activities giving rise to fiscal obligations justified the approach whereby those activities were directly attributed to the State and an exception to its sovereign immunity was thus established (art. 17). The same observation applied to participation in companies or other collective bodies (art. 18). In the case of draft article 19, although its revised version (A/39/10, note 185) was intended as a supplementary provision, and despite the safety clause in paragraph 2, the ILC seemed to have acted prematurely in an extremely complex and vast area; a more thorough consideration of the draft article by the ILC and Governments, of the developing countries in particular, was called for. It was to be hoped that part IV would help to enhance the balance of the draft articles as a whole.

14. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, his delegation fervently hoped that the ILC would continue to study that subject, following the course outlined by Mr. Quentin-Baxter.

15. With regard to the law of the non-navigational uses of international watercourses, he was glad that the "system" concept, which could have many undesirable consequences for the balance of different interests involved, had been abandoned. The notion of "international watercourse" which had replaced it, objectively more descriptive and more neutral, should provide a more solid foundation for the draft articles as a whole. Likewise, the components of the notion of "international watercourse" should be spelled out in greater detail. In that connection, his delegation thought that the distinction which the Special Representative had made in paragraphs 26 to 30 of his second report (A/CN.4/381 and Corr.1) between groundwater that was related to a specific surface watercourse, which was covered by the draft articles and groundwater which was independent from them had merit.

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16. He doubted whether the adjective "reasonable" in articles 6 and 7 could adequately replace the idea of fair distribution conveyed by the notion of "shared natural resource". Draft article 8 contained a list of parameters which was defective because it was not exhaustive and it failed to indicate the importance of certain priority uses, such as drinking-water supply. What was even more serious, article 8 omitted certain inviolable principles which should take precedence in cases where, for various reasons, the obligation to negotiate provided for in paragraph 2 could not be invoked.

17. Draft article 28 bis was appropriate in principle: it specifically extended the protective measures provided for in the two Additional Protocols to the Geneva Conventions of 1949.

18. With regard to State responsibility, he believed that the study of that question would benefit from new impetus, which would enable it to take its rightful place in the Commission's programme of work, thanks to the activities of the Special Rapporteur. The work of the ILC in that field would make it possible to formulate rules for the international conduct of States in a world in which continuing violations of the primary rules and responsibility were to some extent encouraged by the absence of secondary rules that would spell out all the legal consequences of those violations.

19. The drawing up of provisions relating to the content, forms and degrees of responsibility should not be limited to traditional rules but should also address the questions raised by international crimes, including aggression, and questions pertaining to jus cogens. In addition, the arrangement of the draft articles should be reviewed, and a specific chapter should be devoted to international crimes which, logically, had more serious consequences than other internationally wrongful acts. The fundamental notion of the "injured State" should, in the case of international crimes, be extended to cover not only "all other States" (paragraph (e) of draft article 5) but also the international community as a whole, and even mankind. In that way, the set of obligations outlined in paragraph 2 of draft article 14 would become the responsibility of the international community, which should collectively censure and react in a concerted manner to the perpetration of any international crime.

20. Draft articles 6, 7, 8 and 9, which identified the measures the injured State was legally entitled to take against the author of an internationally wrongful act, should be accompanied by much stronger safeguards than those contained in draft articles 10 to 13. The notion of reprisal should be used only with the utmost circumspection which paragraph 2 of draft article 9, based on the notion of proportionality, did not take fully into account. Likewise, while his delegation welcomed the fact that paragraph (b) of draft article 12 excluded from the list of obligations which could be suspended those "of any State by virtue of a peremptory norm of general international law", it believed that, in addition to that general formula, a specific reference to the cardinal principle of the non-use of force or of the threat of force was definitely called for. Draft article 6, on the other hand, should be more general, and the reference to the release and return of the persons and objects held should be deleted; according to the same logic, draft article 7 should be deleted, since its provisions were already completely covered by the preceding text.

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21. With regard to draft article 14, he thought that the "obligations not to act" in paragraph 2 of that article should perhaps be supplemented by "obligations to act". When the ILC considered paragraph 3 of that article, it should reflect on the scope of the subordination of the rights and obligations set forth under that article in the "procedures embodied in the United Nations Charter with respect to the maintenance of international peace and security" and also contemplate other ways of reflecting the erga omnes effect of various international crimes.

22. Lastly, the reference in draft article 16 to the notion of "belligerent reprisals" did not seem particularly clear, and doubts could legitimately be entertained with regard to the exclusion of that matter from the scope of the topic, since it was generally known that humanitarian law applicable to armed conflicts called for the prohibition of reprisals against the civilian population, and that the party on behalf of which reprisals were carried out bore international responsibility. Articles 51 (para. 6) and 91 of Additional Protocol I to the 1949 Geneva Conventions should be able to facilitate the task of the International Law Commission on at least one aspect of that question.

23. As a result of the increase in its membership, the Commission should be more sensitive to the concerns of the third world and, at the beginning of the next five-year term of its members, it should arrange to study topics which presented a new interest for the international community, such as "development law". The Commission would thus not only have contributed to extracting international law from the impasse which had persisted so long because certain parties wished to perpetuate relationships of domination and conquest, but it would also have attempted with some success to reflect the contemporary world.

24. Mr. HUANG Jiahua (China) considered that the results of the thirty-sixth session of the Commission were very encouraging.

25. He underlined the importance of the draft Code of Offences against the Peace and Security of Mankind, particularly for small and medium-sized countries, commended the two reports (A/CN.4/364 and A/CN.4/377) submitted by the Special Rapporteur since the Commission had resumed consideration of the topic, and said he agreed with the proposed programme of work (A/39/10, para. 65 (b)). With regard to the content ratione materiae of the draft code, since not all international crimes were crimes against the peace and security of mankind, only the most serious crimes should be included in the future code. If those crimes were treated differently from other international crimes - which could be covered by régimes established under other international instruments - the objective of the draft Code would be clarified and the purpose of the drafting work would be better served. Regarding the content ratione personae, it was true that many crimes against the peace and security of mankind could only be committed by States, or with their blessing, and that it would be difficult to prevent such crimes without clear provisions on State responsibility; however, the notion of the criminal responsibility of States and the implementation of enforcement measures gave rise to actual problems and required further study. The Commission should therefore proceed with great care. Of course, that did not preclude international responsibility of States for such crimes, and in that connection article 19 of Part One of the draft articles on

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State responsibility might serve as a guide for future work. At the current stage, however, the Commission was right to propose limiting the content ratione personae to the criminal liability of individuals, without prejudice to subsequent consideration of the possible application to States of the notion of international criminal responsibility in the light of the opinions expressed by Governments (A/39/10, para. 65 (a)).

26. Although further adjustments and new consultations might still be necessary, there was no doubt that the draft prepared by the Special Rapporteur for the topic of the law of the non-navigational uses of international watercourses provided a good basis for future work on that topic. Even if the topic was essentially of a legal nature, it also had political and economic overtones, and it was therefore of the utmost importance that the future instrument should take all those into account. His delegation noted that different points of view had been expressed on the form that the instrument should take. His delegation was of the view that it should be fair, pragmatic and reasonable; if those conditions were met, the same result would be achieved no matter what form was adopted.

27. The content of the draft should be based on a comprehensive study of international practices. In particular, chapter II, on the rights and duties of watercourse States, should fully reflect the established principles regarding permanent sovereignty of States over their natural resources, equitable sharing of the use of the waters, equality and mutual benefit, good-neighbourliness and the obligation not to cause harm to the rights and interests of other States, and should strike a balance between the rights and interests of the upper and lower riparian States. To avoid any conflict between specific existing or future watercourse agreements and the proposed instrument, and to win general acceptance for the latter, the draft should avoid entering into superfluous detail. For instance, chapter III, dealing with co-operation and management in regard to international watercourses, could probably be consolidated and simplified, or its subject matter could be left to specific agreements.

28. Although the jurisdictional immunities of States and their property was one of the topics on which the Commission had made the most progress, thanks to the diligence of the Special Rapporteur for that topic, it should be borne in mind that many difficulties had been encountered, and that many problems had not yet been, solved: article 6, which contained the key provision of the draft, was still pending; opinion was still divided on article 12, on commercial contracts, and even some of the articles provisionally adopted still gave rise to reservations on the part of members of the Commission. Therefore, in order to arrive at results that were acceptable to the great majority of the members of the international community, the codification guidelines should be further improved by the incorporation of the following ideas in the draft articles: (a) explicit recognition of the principle of sovereign equality of States; (b) full reflection of international practices, taking into account the interests of all parties; and (c) the promotion of exchanges and co-operation between all States.

29. With regard to the first idea, it was quite obvious that two different doctrines currently existed on the subject of the jurisdictional immunity of States, but it was also obvious that the principle of immunity was still widely

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respected by the majority of States and that its validity was generally recognized even by States advocating limited immunity in their legislation and judicial practice. Although article 6 ("State immunity") had yet to appear in its final form the Commission was already flooded with exception clauses whose scope sometimes went beyond the present practice of States advocating limited immunity and which threatened to overshadow the key article. Such a situation, if left uncorrected, would render the important principle of jurisdictional immunity meaningless. His delegation did not object to inclusion in the draft of certain reasonable exception clauses, for circumstances which were genuinely exceptional, such as counter-claims, ownership, possession and use of property, and ships employed in commercial service, on the understanding that such exceptions would complement and not negate the principle of jurisdictional immunity of States.

30. With regard to the second idea, the extensive documentation provided by the Special Rapporteur had been mainly drawn from certain countries advocating limited immunity, while the practices of other countries, in particular developing countries, were poorly represented. It would be difficult for any study based on that information to give a full picture of current international practice. It was a fact that a considerable number of countries which were not in favour of limited immunity, as practiced by certain Western countries, had neither legislation nor practice in that field, or had only limited legislation and practice. However, when a foreign court sought to impose compulsory jurisdiction on them, they had to object by various ways and means, including diplomatic negotiations. Great importance should be attached to practices of that nature in the codification process. Any legal instrument that was to be generally acceptable to the international community must be based on a wide range of practices of the majority of the members of the community and take into account the interests of all sides. That was the essence of induction, whose importance in the codification of international law was self-evident.

31. Concerning the third idea, it should be asked whether recognition of the jurisdictional immunity of States might affect international economic exchanges by putting States in which trade relations were State-run above the law when business disputes arose. In that regard, it should be pointed out that the jurisdictional immunity of States had never been a truly absolute rule, because States could always accept the jurisdiction of a foreign court on a voluntary basis or agree on dispute settlement procedures other than judicial settlement. Even more important in that respect was the fact that many States, including those mentioned above, carried out their commercial and other activities mainly through corporations which had legal personality; when those activities gave rise to a dispute, they would not invoke jurisdictional immunity. That was true, for example, in the case of China, whose courts had never heard arbitrary cases against another State. The principle of jurisdictional immunity did not, therefore, imply the relief of responsibilities incumbent upon a State, but merely required the court of one State not to impose its jurisdiction on another sovereign State at will. As to disputes arising out of international exchanges, especially economic exchanges, after summing up all the practices in that field it should be possible to elaborate practical provisions to complement and develop the principle of jurisdictional immunity of States. China sincerely wished to maintain friendly relations and enter into economic exchanges

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with all countries on the basis of equality and mutual benefit; his delegation therefore supported the codification work on the topic and hoped that it would lead to an equitable and reasonable legal instrument with universal applicability. Despite the remaining difficulties, his delegation was convinced that, if it studied seriously all suggestions and bore in mind the common interest of the international community, the International Law Commission would steer that codification work into a new phase.

32. His delegation welcomed the progress achieved at the 1984 session on the topics dealt with in chapters III and V of the Commission's report. It would comment on those topics when the work had proceeded further.

33. The Commission had gained 36 years of experience, and it was time for it to make greater headway in its work and adapt itself to the requirements of the present-day world by laying more emphasis on questions such as the maintenance of peace, the development of friendly relations among States and the establishment of equitable and reasonable international economic relations, so that every aspect of international relations had a solid legal basis. In 1949 and 1971, the Secretary-General of the United Nations had carried out surveys of international law which had proved to be extremely useful in helping the Commission to understand the needs of the time and give the appropriate direction to its work. On the eve of the fortieth anniversary of the United Nations, his delegation proposed to invite the Secretary-General to update those surveys so that the Commission would be correctly guided and able to realize its full potential.

34. It would also be desirable for the Commission to improve its working methods. The observations to which those methods had given rise in recent years within the Planning Group of the Enlarged Bureau of the Commission had been useful and it was now important for the Commission to establish a carefully considered short-term, medium-term and long-term work plan. Thus far, the results of the Commission's work had been largely confined to conventions, and his delegation did not dispute the merit of that approach. However, given the complexity of some of the topics studied by the Commission and the differences of opinion in that regard which had prevented the adoption of conventions, it might at times be useful to consider other types of instrument: model law, body of principles, declaration, handbook, etc. Such instruments would be immediately useful and would not prevent the subsequent adoption of conventions once conditions were sufficiently ripe. Moreover, the Commission might also consider staggering its consideration of major topics from year to year.

35. Since its composition had been enlarged in 1982 the Commission had become a much more representative body and was in a better position to accomplish its task in the interests of the international community as a whole. It was to be hoped that it would play a more positive role in the struggle for peace and development. China was ready to make its contribution in that regard.

36. Mr. NGUYEN QUY BINH (Viet Nam) said that the Commission had achieved substantial progress in preparing the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

(Mr. Nguyen Quy Binh, Viet Nam)

His delegation believed that, despite the short duration of his function or stay in the receiving State, the diplomatic courier should enjoy appropriate protection and immunities ratione personae. The diplomatic courier performing an official function could be granted treatment similar to that given to technical staff of a delegation or mission, even though his task was often more delicate. Such treatment would entail neither burden nor advantage for one State over the others since each State could be at the same time the sending, receiving and transit State. Account should be taken in that respect not only of the existing diplomatic conventions but also of current State practice, which attached importance to the principles of respect of the State, reciprocity and non-discrimination. His delegation therefore supported in particular draft article 23 as presently drafted, and agreed that a proper balance should be struck between protection of the confidential nature of the diplomatic bag and the prevention of abuses, whose seriousness was sometimes exaggerated. The Commission should take care to apply in that regard the procedures for opening the diplomatic bag contained in the 1963 Vienna Convention on Consular Relations. The inviolability of the diplomatic bag was an absolute principle and it should be stated that the contents of the bag were exempt from censorship by electronic media.

37. Concerning chapter IV of the Commission's report, he said that the question whether the immunity of States was "restricted" lay at the basis of the difficulties involved in the study of the subject. It was regrettable that the so-called "compromise" text affirming that a foreign State engaging in commercial activities could not invoke jurisdictional immunity accommodated only one viewpoint. Several States had recently embodied in their legislation the concept of restricted immunity but the great majority of States, and particularly the developing and socialist countries, did not share that viewpoint. The concept of restricted immunity ran counter to the principle of sovereign equality of States and imposing it on the Commission's work on the subject would only give rise to complications and reservations. That approach, whose results were apparent in articles 12 to 14, article 15, paragraph 2, and articles 16 and 18, was lopsided and thus unacceptable. It was difficult to imagine that many States would be able to support a trend in which States were assimilated to private individuals for the conclusion of commercial contracts and would be bound to submit progressively, exception by exception, to the jurisdiction of a foreign court. The exception to the principle of the immunity of States as formulated in article 16, for example, might hinder the economic and industrial development of the developing countries and, furthermore, might have the effect of permanently legitimizing colonialism, despite the safeguard clause contained in article 11, paragraph 2 (A/39/10, footnote 182). Exceptions to the principle of State immunity should be elaborated on the basis of State consent by means of agreements entered into when the proposed contracts were signed. His delegation believed that it was essential to undertake a substantial revision of the second part of the draft articles in order to take full account of the practice of States with different social and economic systems. Otherwise, it would not be possible to adopt a universal convention on the subject.

38. Turning to chapter VI of the Commission's report, he said that the abandonment by the Special Rapporteur of the "system" notion and of the term "shared natural

(Mr. Nguyen Quy Binh, Viet Nam)

resources" constituted a major improvement. The use of such imprecise terms could have had an adverse impact on the fundamental right of permanent sovereignty over natural resources and the right of each State to decide on the use of the watercourses on its own territory. The new language used by the Special Rapporteur in his second report provided a more acceptable basis for further discussion. The difficulties inherent in the elaboration of draft articles on the subject derived not solely from the variety of watercourses and of their uses, but primarily from the effort involved in harmonizing the rights and interests of all States to which international watercourses belonged.

39. His delegation supported the "framework agreement" approach applied to the draft and the adoption of a broader term than "non-navigational uses". It still doubted the merits of the idea of the right to "a reasonable and equitable share" contained in article 6, paragraph 1; it wondered whether the phrase had any precise meaning, whether it sufficed to recognize the right of States to utilize their water resources within the limits of their respective territories pursuant to their own policies, provided that they did not thereby damage other States, and finally, whether it meant that States were entitled, in addition to their own shares, to enjoy equal benefits from the use of a watercourse as a whole. His delegation wished the draft of the text to be improved in that regard.

40. On the topic of State responsibility, he noted with satisfaction that new draft articles had replaced the ones submitted earlier on the content, form and degree of international responsibility. It had been rightly said that the new set of draft articles marked a major breakthrough in the consideration of the second part of the topic by the International Law Commission, which would be able to make progress in the work it had begun more than ten years previously. Although the 12 proposed articles were generally acceptable, his delegation hoped that the final draft would elaborate more on the legal consequences of international crimes, especially acts of aggression. A distinction should also be made between a "directly injured State" and a State which was "indirectly injured" by an internationally wrongful act.

41. His delegation believed that the International Law Commission should draw up its work programme according to an order of priorities determined by two criteria, namely, the state of progress of the work on each topic and the number of draft articles submitted, due account being taken of the importance of the subject involved.

42. Mr. AL-KHASAWNEH (Jordan) noted with satisfaction that the Commission had made progress in its consideration of the six topics on its agenda despite their complex and delicate nature. Turning to chapter VI of the Commission's report (A/39/10) concerning international watercourses, he paid tribute to the efforts of the Special Rapporteur in submitting a set of revised draft articles which took into consideration the views expressed in the Committee and in the International Law Commission. The formula of a framework agreement supplemented by specific watercourse agreements was preferable, despite its shortcomings, to all other possible alternatives. That dual approach was justifiable not because each watercourse had individual characteristics but because the political relationships

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and disposition to co-operate among riparian States varied greatly. It was therefore neither politically realistic nor legally justified to presume, generally, that States would co-operate in the management and utilization of watercourses since, in the last analysis, such a postulate rested on the elusive concept of good-neighbourly relations.

43. He noted with interest, in paragraph 286 of the Commission's report, the Special Rapporteur's view that the framework agreement should contain basic legal principles generally accepted with regard to international watercourses but might also contain certain guidelines and recommendations which might be adaptable to specific watercourse agreements. In that way, when riparian States were disposed to act in co-operation, the guidelines contained in the framework agreement would make it possible to define the modalities for such co-operation, and when the riparian States were unable to agree, the framework agreement would delineate their rights and duties as clearly as possible and serve as a yardstick for appraising the activities of such States.

44. The distinction between what was mandatory and what recommendatory in the draft provisions should be brought out clearly. Thus, in article 4, paragraph 3, it was stated that watercourse States "shall negotiate in good faith" for the purpose of concluding one or more watercourse agreements or arrangements. It would in fact be preferable to use the formula "should negotiate in good faith" to take account of the recommendatory nature of that provision. The Special Rapporteur and members of the International Law Commission would have no difficulty in identifying other cases where a nuance of that kind was desirable.

45. His delegation was of the opinion that chapter II of the draft articles, dealing with general principles and the rights and duties of watercourse States, was of prime importance, particularly article 9, upon which the whole draft could be built. As stated in paragraph 336 of the Commission's report, the maxim sic utere tuo ut alienum non laedas should occupy a proper place in the draft. In that regard, there was a potential conflict between the determination of equitable and reasonable use of the watercourses, on the one hand, and the prohibition against activities causing appreciable harm, on the other. It was on the latter principle that the emphasis should be put, because the notion of reasonable and equitable use lacked the necessary precision and lent itself to subjective interpretations, as was confirmed by the long, though non-exhaustive list of relevant factors enumerated in article 8. Moreover, articles 7 and 8 should be read together with article 9.

46. His delegation could see no self-evident reason why the Special Rapporteur's decision to discard the concept of "international watercourse system" in favour of the simpler notion of "international watercourse" should be destructive of the inherent unity of international watercourses. However, it still remained to determine the exact consequences of the decision. It was rightly suggested (A/39/10, para. 296) that scientific and technical advice was needed with a view to amplifying the definition of international watercourses. In order to remove divergences of view and other points of disagreement, it would be worthwhile to establish an ad hoc working group, as proposed in a general way in paragraph 389 of the Commission's report, to consider the topic of the law of the non-navigational uses of international watercourses.

(Mr. Al-Khasawneh, Jordan)

47. The Special Rapporteur had rightly decided, in his second report, to replace the concept of "shared natural resources" by that of the "right to a reasonable and equitable share", because the latter expression resulted in provisions which were more specific and which defined the rights and obligations of riparian States more clearly than the previous formulation had allowed. That topic too might be referred to any ad hoc working group set up to deal with the subject.

48. The topic of the law of the non-navigational uses of international watercourses had been under consideration by the Commission since 1971 and the valuable contributions made by three Special Rapporteurs in succession had made it possible to gather a wealth of useful material. It therefore appeared that, despite the disagreements which seemed to remain within the International Law Commission, the draft articles had already reached an advanced stage. His delegation hoped that, at its next session, the Commission would be able to complete its consideration of the draft articles which had been referred to the Drafting Committee and take up consideration of the remaining articles with a view to an early conclusion of its work on the subject.

The meeting rose at 1.05 p.m.