United Nations
GENERAL ASSEMBLY
THIRTY-NINTH SESSION
Official Records*

SIXTH COMMITTEE
34th meeting
held on
Friday, 2 November 1984
at 3 p.m.
New York

SUMMARY RECORD OF THE 34th MEETING

Chairman: Mr. GOERNER (German Democratic Republic)

CONTENTS

84-57285 7556S (E)

Distr. GENERAL
A/C.6/39/SR.34
9 November 1984
ENGLISH
ORIGINAL: FRENCH

/...

The meeting was called to order at 3.20 p.m.

ORGANIZATION OF WORK

1. The CHAIRMAN, reporting on the informal consultations which he had held on the possibility of dividing the debate on the report of the International Law Commission (A/39/10) into several parts, as at the preceding sessions of the General Assembly, recalled that the Asian-African Legal Consultative Committee had proposed that the Sixth Committee should focus attention on those topics whose consideration would enable it to give directions to the Commission on its methods of work or to make more meaningful the final stage of its consideration of the topics. He proposed that out of a total of about 12 meetings, the Committee should devote 5 to consideration of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and the draft articles on the jurisdictional immunities of States and their property. Seven or eight meetings would then be devoted to consideration of the remaining topics, namely, State responsibility, the law of the non-navigational uses of international watercourses, international liability for injurious consequences arising out of acts not prohibited by international law and relations between States and international organizations (second part of the topic), as well as the programme, procedures and working methods of the Commission, and its documentation. The draft Code of Offences against the Peace and Security of Mankind would be considered on 14 and 15 November. Delegations wishing to make one statement on all aspects of the report would be free to do so and could take the floor first, before those which wished to follow the plan he had outlined.

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

2. Mr. SUCHARITKUL (Thailand) noted that international law, as developed and concocted in the past, had favoured the rich and mighty as against the poor and defenceless nations. A better balanced body of rules of international law required a more balanced approach as well and wider participation of the third world at every stage of the international law-making process, from codification of the practices of States and progressive development of law to its actual application in international adjudication and arbitration.

3. With regard to the draft Code of Offences against the Peace and Security of Mankind, his delegation approved the conclusion reached by the Commission, as contained in paragraph 65 of its report (A/39/10). He noted that piracy on the high seas, considered a crime under customary international law, was unlikely to constitute a threat to the peace and security of mankind if confined to a limited geographical area, and accordingly should not be included in the provisional list of offences to be prepared by the Commission.

4. Turning to the question of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, he said that the principal issue was the extent of the privileges and immunities to be accorded to the diplomatic courier. The latter's status as well as the privileges, immunities and

(Mr. Sucharitkul, Thailand)

facilities to be accorded appeared to be dictated by functional necessities, namely, the performance of the task of taking, carrying and delivering a bag to its destination. A courier who was not concurrently a diplomatic agent could therefore enjoy his privileged status, immunities and inviolability only ratione materiae, not ratione personae. Third-world States would have to decide with the greatest care the approximate extent of privileges and immunities to be accorded to couriers, which should reflect the practical need for the complete security of the carriage and delivery, as well as the confidential nature of the messages transmitted by couriers, without imposing unnecessary hardship or burden upon the receiving and transit States. A proper balance needed to be struck in that connection, and the views of the third world, however varied and unharmonized, needed to be taken more fully into consideration. His delegation was not in favour of granting excessive privileges, which tended to breed abuses, especially where a privileged status could be waived without prejudice to functional necessities. Draft articles 23 to 30 dealt specifically with that topic.

5. With respect to the jurisdictional immunities of States and their property, he noted that all States granted and enjoyed jurisdictional immunities. There must therefore be a continued search for a just and equitable solution to the problem of the allowable extent of jurisdictional immunity to be accorded in a given set of circumstances.

6. A sharp controversy continued to divide those who supported "absolute immunity" and those who supported "restrictive immunity". The first group did not advocate unqualified or strict immunity in every case, while the various theories of restrictive immunity sought to justify the inconsistencies in State practice by drawing distinctions between different types of State acts or State activities.

7. The Commission continued its search into the judicial and governmental practice of States in order to determine the limit of the immunity accorded to a foreign State in certain areas of State activities. The most significant area concerned commercial contracts (art. 12). Under private international law, the link with the territory of the State of the forum was a basic requirement. Another rule permitted the parties to the contract to choose the forum in spite of the apparent lack of a territorial or other legal connection. The additional requirement of a closer territorial connection might provide a more plausible solution. The existing draft article 12 would be re-examined in second reading.

8. The exception to the principle of immunity with regard to "commercial contracts" found sufficient support in case-law and in the treaty practice of States. Other exceptions closely akin to trading were dealt with in article 19 ("Ships employed in commercial service"), which was still under discussion by the Commission. The Special Rapporteur had already introduced a revised version of that article in the light of preliminary exchanges of views within the Commission, so as to cover the situation of shipping outside the common-law world, as envisaged in the Brussels Convention of 1926.

9. Other areas closely linked to "commercial contracts" were identified as patents, trade marks and intellectual or industrial property (draft art. 16,

(Mr. Sucharitkul, Thailand)

provisionally approved by the Commission) and participation in companies or other collective bodies (art. 18).

10. Draft article 13 ("Contracts of employment") covered an area distinct from that covered by article 12. State immunity was not wholly denied, but merely confined to areas where the exercise of local labour jurisdiction would constitute an infringement on the sovereign authority of another State. There appeared to have been an overlap or concurrence of jurisdiction, and the choice must be made between local labour law and jurisdiction and the administrative law and jurisdiction of the employer State. Draft articles 17 ("Fiscal matters"), 15 ("Ownership, possession and use of property"), 14 ("Personal injuries and damage to property") and 20 ("Arbitration") covered exceptional situations or specified areas where State immunity was subject to some qualifications or limitations.

11. Articles 19 and 20 were still under discussion by the Commission, which had however already adopted draft articles 12 to 18 with some reservations. The comments and views of Governments on the subject would be helpful to the Commission in improving the wording of the draft articles. The next report on the question would deal with State immunity State in respect of attachment and execution. The interests of developing countries would be better served if an adequate level of immunity from attachment and execution could be maintained. The current practice of States was far from uniform. The preliminary views of representatives in the Sixth Committee would be helpful to the Special Rapporteur and the Commission in their pursuit of a widely acceptable solution to the problem of jurisdictional immunities of States.

12. On the question of international liability for injurious consequences arising out of acts not prohibited by international law, his delegation mourned the untimely death of Mr. Quentin-Baxter, who had been the Special Rapporteur for the topic. The task already begun should be pursued with renewed vigour and without too long an interruption.

13. With respect to the law of the non-navigational uses of international watercourses, his delegation wished to point out that the manifold difficulties inherent in the study of the topic were due to differences in the size, length and geographical situation of international watercourses, to different usages and practices of riparian States and to varying notional concepts of international watercourses. In the opinion of his delegation, a wider concept was more practical and closer to living economic and social realities than an abstract view of the watercourse, considered as an autonomous entity, subject to the absolute sovereignty or exclusive control of riparian States. The approach was questionable inasmuch as it supposed that it was possible to isolate the running watercourse, which was a living being, from the time dimension.

14. Regulation of fishing was but an illustration of the overall necessity to regulate all non-navigational uses of international watercourses. Other uses, such as hydroelectric dams, irrigation dikes, thermohydraulic plants, timber floating, fish-culture and other agricultural uses should not be overlooked.

(Mr. Sucharitkul, Thailand)

15. The concept of shared natural resource was a fundamental principle to be discussed and adopted at the very beginning. To discard the restrictive concept of watercourses might lead to acceptance of the notion of an international watercourse as a living reality. But all the problems relating to the acceptable participation of each riparian State in the shared resource would not automatically be solved thereby. Details would have to be worked out at the time of the formulation of a general legal rule to be applied to specific areas, and criteria would have to be devised for the assessment of the equitable share of each riparian State.

16. Turning to the question of State responsibility, he said that since the draft articles were still before the Drafting Committee, it seemed premature to comment on that topic.

17. In conclusion, he wished to reiterate his deep gratitude for the valuable contribution made by the Commission to the codification and progressive development of current international law.

18. Mr. BOS (Netherlands) said that he wished, at the current stage, to comment on chapters II, IV , VI and VII of the Commission's report (A/39/10). His delegation reserved the right to make a second statement on the other chapters.

19. With respect to chapter II, he noted that it was stated, in paragraph 30 of the report, that the Special Rapporteur had wanted to limit himself to the less controversial questions, particularly those concerning identification of offences against the peace and security of mankind, and to deal at a later stage with the law applicable to such offences. That was an excellent starting-point, but perhaps matters ought to be taken further with respect to identification of offences. It should be possible to be more specific about the various forms of criminal behaviour covered by the Code, because in penal law, at both the national and international levels, it was important to be as precise as possible.

20. Noting that certain members of the Commission had wondered whether certain expressions were not too subjective, he for his part wondered whether the draft Code itself did not suffer from the same complaint: although its goal was to protect peace and security - to the extent that individuals could endanger them - it could be asked whether those two governing notions were not themselves stamped with subjectivity. Ought there to be a decision that a certain type of behaviour - very precisely defined - was always criminal and therefore punishable irrespective of the philosophy of the accused? It would then be for the Code to define the image of a peaceful and secure world. He was favourable to that precise approach, which ought perhaps to be reflected in the introduction referred to in paragraphs 34 et seq of the report.

21. Those paragraphs contained many other useful suggestions concerning an introduction, which seemed indispensable. It was in the introduction that the Commission would be able to clarify the interests it sought to defend, and that would provide it with a valuable tool in its efforts to analyse and classify the "material" referred to in paragraph 39 of the report. It sufficed to read paragraph 63 to see that the Commission was in fact endeavouring to protect the very foundations of modern civilization and the values it stood for.

(Mr. Bos, Netherlands)

22. With respect to definitions, he noted that the term "colonialism" seemed to elude a definition which would do justice to the many forms that phenomenon could assume. The Special Rapporteur had recognized the problem (para. 40), and it had been proposed that the expression "denial of the right of self-determination", which seemed slightly better, should be used.

23. Economic intervention, which was mentioned in paragraph 44, raised the question of retaliation. So far admissible, would it be condemned by the draft Code? His delegation was of the opinion that those questions were so closely linked to the new international economic order that it would be premature, before that order came into effect, to establish a category of economic crimes. In that connection, the Netherlands had on other occasions spoken against certin aspects of the new international economic order; its position had not changed.

24. Concluding his comments on chapter II, he drew attention to the fact that the sources listed in paragraph 50 did not all meet the criterion contained in the chapeau to the paragraph, according to which the instruments in question regarded certain acts as international crimes. Some of those sources could, therefore, scarcely be used to justify the theory that violation of their provisions would constitute a crime.

25. Turning to chapter IV of the report, he noted with satisfacton that among the material available to the Special Rapporteur was the European Convention on State Immunity, which had been concluded at Basel on 16 May 1972 and which, for the Netherlands, served as a model on that question. With respect to article 2, which had been provisionally adopted by the Commission, he pointed out that in subparagraph (g) the term to be defined - "commercial contract" - came up again in the definition (under subpara. (g) (i)) in both the English and French texts. That should be remedied. He pointed out, in that connection, that in the Netherlands a contract was a contract, whether or not concluded for commercial purposes, and that the same civil law was applicable in either case.

26. More serious was the problem posed by article 7, paragraph 2, whereby the judge of the State of the forum must declare that he had no jurisdiction, even where the foreign State was not party to the proceeding, in cases where a determination which might affect the rights, interest, properties or activities of that State was to be obtained. Netherlands jurisprudence took a different position, as could be seen from three decisions recently rendered by its Court of Cassation. That jurisprudence could no doubt be explained by a desire not to give the State of the act a monopoly over the determination on rights, interests or property which might belong not to it but to someone else, for example a national of the State of the forum, and by the fact that the judge of the individual's nationality was all too often the only one to whom he had access in practice. His delegation fully understood that article 7, paragraph 2 should be read in the light of the exceptions to the principle of State immunity set forth in part III of the draft articles (arts. 12 to 18), but wondered if those exceptions were capable of allaying the misgivings underlying that jurisprudence.

(Mr. Bos, Netherlands)

27. In article 13, paragraph 1, the fact that the employee must be covered by the social security provisions of the State of the forum hardly seemed justified, and paragraphs 5 to 7 of the commentary on that article did not prove the necessity of the provision. Paragraph 10 of the commentary on article 16 dealt with the extraterritorial effect of measures of nationalization; that question gave rise to reservations, and Netherlands judicial practice refused to recognize such an effect. For if article 11, paragraph 2, as set forth in note 182 reserved the substance - namely the question of ownership - was it logical to remove the procedural immunity of the State in article 16, which dealt with rights which the State might well claim to have, under a nationalization measure for example?

28. With regard to article 18, he wondered if paragraph 1 dealt only with a proceeding instituted for the purpose of obtaining a declaratory judgement. Paragraphs 5, 8 and 10 of the commentary threw no light on the question; as currently worded, the article seemed to indicate that the proceeding should be aimed at the determination of a relationship by the judge, but that the judge could not draw any condemnatory consequences from it. Was that the intention of the Special Rapporteur? If not, the text should be amended. Moreover, in light of paragraph 7 of the same commentary, should it be deduced from article 18, paragraph 1 (b), that the immunity of the State, in the circumstances envisaged in the article, could give rise to as many different interpretations? In other words, could not the immunity function differently in different cases? Paragraph 9 of the commentary did not solve the problem.

29. Chapter VI was naturally of the greatest interest to the Netherlands, a country traversed by a large number of watercourses. With regard to the general approach to the question, he regretted that the Special Rapporteur had sought to abandon the "system" concept provisionally (A/39/10) because he considered that the natural connection between various elements - namely that they formed a system - could not be overlooked. Thus, in article 1, paragraph 1, the deletion of the term "system" was said to be due to the opposition to that concept voiced in the International Law Commission and the Sixth Committee (A/39/10, para. 293). Although he had explained that that change in terminology was not intended to put in doubt the idea of unity and interdependence, the Special Rapporteur had been criticized by other members of the Commission, in whose view the deletion of the word "system" deprived the draft convention of an absolutely essential pillar.

30. His delegation was decidedly in favour of the system concept, because of its geographical situation. It considered that that idea should be understood to mean that watercourses that were tributaries of a river should be considered to form an integral part of the system. It might also be asked if the term "system", although acceptable in itself, adequately brought out the fact that in reality there could be more than one system of networks. In that connection, his delegation approved of the suggestion made in paragraph 296 of the report that a scientific and technical study of the question was needed . Hydrographers and hydrologists could demonstrate the advantages and disadvantages of the various existing systems, assuming that watercourse systems varied from one territory or one continent to another - and the Special Rapporteur would then study their replies. If two

(Mr. Bos, Netherlands)

principal systems existed, the States concerned with the first of those systems would readily understand that they had nothing to fear from the principles emerging from the study of the second sytem; their possible objections to the expression "system" might then disappear.

31. A terminological question to be clarified in that connecion was whether or not the expression "watercourse" covered tributary watercourses. Lastly, he noted the lack of precision in the definition of the term "international watercourse". What in fact was a watercourse "ordinarily consisting of fresh water" and what were the "relevant components" referred to in that paragraph and in article 3?

32. In his delegation's opinion it would be preferable to amend the wording of article 1, paragraph 2, slightly and to indicate that components or parts of the watercourse which "could not be affected by" or "could not affect" its uses in another State were excluded. The fact of not being affected or not affecting seemed too closely linked to the situation existing at a given time to serve as a basis for a normative legal provision. In either case, the problem of proof remained.

33. In article 4, paragraph 1, the words "reasonable" and "equitable" posed a problem of status, as indicated in paragraph 305 of the report. Was it really intended that the future convention should have a higher status than agreements such as the London and Mannheim treaties concerning the Schelede and the Rhine? His delegation found it difficult to believe that in the future, those two treaties would be interpreted in the light of what would be reasonable and equitable within the meaning of the convention.

34. In paragraph 312 of the report, the system concept was raised again. It appeared in fact that participation in the negotiations referred to in article 5, paragraph 1, of the draft convention would be illusory for a riparian State incapable of proving that it belonged to the system. What in fact was the system? Whether it was given that name or not, it needed to be defined, particularly as article 5 made it perfectly clear that what was envisaged in those draft articles was a special legal community. From what else could the right to participate in negotiations between other riparian States and the right to become party to a treaty derive? From the physical point of view, that community could be identified with some members of the Commission called a "shared natural resource" (paras. 315 to 325). Water, like air, moved, and the water which a State upstream used one day was used the next day by a State downstream. To reject the expression "shared natural resource" was tantamount to denying the evidence. The Special Rapporteur rightly stated in paragraph 316 that the water did not belong to the riparian State but that the latter had sovereign powers to use that water provided that no injury was done to other riparian States. It was precisely because of that special legal community that each riparian State should be able, in his delegation's opinion, to claim the right of participation mentioned in article 5, whether it was a riparian of the main watercourse or of a river that was a tributary thereof.

(Mr. Bos, Netherlands)

35. His delegation agreed that the words "reasonable" and "equitable" in article 6, paragraph 1, should be maintained. "Reasonable" described a method of procedure which would enable the watercourse, or rather the system, to continue to function, whereas "equitable" meant that account must be taken of the legitimate interests of all the riparian States. For example, in the case of water pollution, the essential criterion was the quality of the water in the territory of the State the furthest downstream (the Netherlands, in the case of the Rhine).

36. Concerning article 8, paragraph 1, the question arose once again of what was reasonable and equitable. The hydrographic and hydrological study he had mentioned earlier in connection with article 1 might indicate which were the stable and the variable factors in the different systems; that would facilitate the conclusion of specific agreements. Needless to say his delegation fully shared the opinion of other members of the Commission who wished to accord a privileged place to the principle expressed in the maxim sic utere tuo ut alienum non laedas (para. 336), on which the Rotterdam Court of First Instance had relied in its recent judgement in the case of the pollution of the Rhine.

37. Concerning chapter VII of the Commission's report, he noted that the set of articles on State responsibility before the Sixth Committee dealt with acts "perpetrated" in violation of international law and States which had "committed" them. In that connection two questions arose. The first related to terminology: why did article 10, paragraph 2 (b) refer, exceptionally, to a State "alleged to have committed the internationally wrongful act"? Was the divergence in terminology intentional?

38. The second question related to the court determining whether an act violating international law had actually been committed. As several members of the Commission had noted, the States involved might not agree on the matter; indeed, it was quite probable that they would disagree (para. 365). While noting that the Commission intended to supplement the draft with provisions relating to the settlement of disputes, he felt that the compulsory settlement of disputes by a third party was a sine qua non for the application of articles 2 (e) and 9 in particular. Such a condition was essential if the application of the articles was not to lead to intolerable situations involving the use of reprisals, which, to date, had been inadmissible.

39. In the same context, his delegation wished to draw attention to the absence, in article 5 (e), of any differentiation among international offences according to their seriousness, and of any indication as to the States which could view themselves as injured. Article 5 should thus be reviewed in the light of those two points. In conclusion, his delegation emphasized that a classification of international offences was necessary and should be undertaken even if it meant abandoning the distinction between primary and secondary rules established by the Commission for the draft.

40. Mr. BARBOZA (Argentina) said that in the view of his delegation the draft Code of offences against the peace and security of mankind should be formulated on the

(Mr. Barboza, Argentina)

basis of the draft Code prepared by the Commission in 1954, taking account of the concepts included in the definition of aggression adopted by the General Assembly in resolution 3314 (XXIX) and the conventions defining international crimes. The introduction, containing a number of applicable general principles, would have to be drafted when the elements provided by the texts in question had been classified. It was not possible to deduce a priori the principles that were applicable to legal situations defined on the basis of the classification, since they should be deduced from the situations themselves. The Commission had thus selected an acceptable pragmatic criterion for the content ratione materiae of the draft.

41. His delegation believed that offences against peace and security and international offences in general should not be confused. It therefore supported the minimum content of the draft which covered only situations specifically linked to peace and security and major offences.

42. In the interests of clarity, the Commission might further develop the actual concept of "mankind" and the factors specifically affecting peace and security. In the opinion of some members of the Commission, the taking of hostages, violence against persons enjoying diplomatic privileges and immunities or the hijacking of aircraft should, rather, be considered as international terrorism. Other crimes, such as piracy, might also come under a separate heading of international criminal law. Mercenarism directed against the sovereignty or stability of States or against national liberation movements should also be dealt with in the draft Code, as should the use of atomic weapons.

43. With regard to the content ratione personae of the draft Code, his delegation supported the Commission's decision to devote its efforts for the time being to the criminal responsibility of individuals, to avoid the difficulties involved in consideration of the problem of the criminal responsibility of States.

44. He noted with satisfaction the progress that had been made in considering the question of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. He commended the pragmatism of the Special Rapporteur, who had taken careful note of the remarks and criticisms made in the Commission and the Committee. In the view of his delegation the facilities to be accorded to the diplomatic courier should be considered case by case. There was no reason to systematically equate the diplomatic courier with a diplomat or member of the administrative and technical staff of a diplomatic mission in order to deduce certain rules.

45. Concerning article 23, particularly paragraph 1, under which the diplomatic courier enjoyed complete immunity from criminal jurisdiction, his delegation thought that such immunity should at least be limited to the performance of the courier's duties.

46. In formulating article 36, the Special Rapporteur had been of the view that the existing instruments on the matter, in particular the Vienna Convention on

(Mr. Barboza, Argentina)

Diplomatic Relations, established the principle of absolute inviolability of the diplomatic bag. His delegation felt that it was essential to maintain a balance between the protection of the diplomatic bag, in the interests of the sending State, and prevention of the regrettable abuses which had become common in recent years. It would also be appropriate to take account of the purpose of protection of the diplomatic bag and to analyse the meaning of the concept itself. It was clear, in particular, from article 1 and article 3, paragraph 2, that protection of the diplomatic bag was intended solely to ensure freedom of communication between the sending State and its missions abroad or between those missions.

47. Furthermore, under article 32, the contents of the diplomatic bag were limited to official correspondence of the sending State and to "articles intended exclusively for official use". In the view of his delegation, the latter expression should be interpreted restrictively, since freedom of communication and freedom of transport should not be confused. The diplomatic bag should contain only those articles serving to maintain freedom of communication, since a broader definition would distort the very meaning of the diplomatic bag.

48. Irrespective of the problems raised by the use, by certain States, of electronic devices whereby the opening of the diplomatic bag could be avoided, his delegation would support a provision similar to that of article 35 of the Vienna Convention on Consular Relations, under which the diplomatic bag could not be opened without the consent of the sending State, or if the latter refused, could be returned to its place of origin. States tempted to abuse that prerogative would be deterred by the effectiveness of the rule of reciprocity. His delegation thought it pointless to propose the institution of two kinds of diplomatic bag, one of which would enjoy absolute inviolability, since that would enable the same abuses to be committed.

49. In connection with chapter V, he wished to pay a tribute to the imagination and persistence which the lamented Special Rapporteur, Mr. Robert Quentin-Baxter, had always demonstrated. Some delegations, both in the Commission and in the Sixth Committee, had wondered with good reason whether the flexibility with which the Special Rapporteur had approached that question had not led him considerably beyond the limits of the mandate initially given by the General Assembly. The reaction in the Sixth Committee to the submission of the schematic outline of the topic eliminated any doubt that the major principles as well as the contents and scope of the outline were considered satisfactory. There was reason to hope that in future the Commission would be able to make progress in the consideration of the draft articles, since the general approach had been approved.

50. His delegation shared the view of the Special Rapporteur that the traditional rules of international responsibility for wrongful acts were no longer responsive to all of the international community's needs. Developing countries would be the first to benefit from the establishment of a legal norm in that field, because that would protect them against damage caused by technological progress without unnecessarily limiting activities which were generally of benefit to mankind. His delegation felt that the new Special Rapporteur would pursue the course set by his

(Mr. Barboza, Argentina)

predecessor and would focus his attention on activities carried out in the territory, and possibly under the control, of a State which caused transboundary harm.

51. With regard to the law of the non-navigational uses of international watercourses, it was regrettable that the Special Rapporteur had found it necessary to change two of the basic concepts contained in the first report, which he had submitted at the previous session. In article 1, the Special Rapporteur had abandoned the concept of "international watercourse systems" for the concept of "international watercourses". The Drafting Committee should consider that proposal very carefully in order to ensure that it involved only a terminological change and not a substantive change because the inherent unity of an international watercourse and the interdependence of its various components could not be questioned.

52. Certain terms, such as "watercourse State" or "watercourse agreement" were at times somewhat surprising. The use of the term "watercourse system" had the advantage of introducing a certain relativism in so far as different systems could coexist for the same international watercourse, since a system relative to pollution did not necessarily include the same States as a system relative to irrigation. It was also regrettable that the concept of "shared natural resource" had been eliminated from article 6, even if that concept had given rise to objections. That term had apparently been deleted because it might establish a superstructure from which legal rules could be inferred which would not necessarily be accepted a priori by some countries. His delegation would prefer the use of a formula which defined very clearly the legal nature of the waters of an international watercourse. The elimination of those two concepts had cumulative effects because it tended to call in question the arguments underlying some of the draft articles.

53. On the other hand, the introduction of the concept of "good-neighbourly relations" in article 7 unnecessarily created a new superstructure. Of course, his delegation generally favoured the principle of good-neighbourliness, but felt that the use of that expression was inappropriate in that instance and did not reflect the reality of the situation. Article 7 also introduced another unsuitable concept, that of "optimum utilization", because a riparian State which was technologically more developed than its neighbours could abuse that criterion.

54. Article 8 had the advantage of laying down different norms for determining whether waters were used in a reasonable and equitable manner. Those norms were clearly not binding and should serve only as reference points. His delegation reserved its position for the time being on the provisions of article 8.

55. With regard to the documentation, he requested that the important survey prepared by the Secretariat, entitled "Survey of State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law" be translated into Spanish.

56. His delegation expressed satisfaction at the Commission's continued co-operation with other international legal bodies and the organization of the

(Mr. Barboza, Argentina)

twentieth session of the International Law Seminar. It was also gratifying to note that the Drafting Committee had begun its meetings at the start of the session, thereby considerably reducing the Commission's work-load and it was to be hoped that the same course would be followed at the next session; in that regard, he suggested that the Drafting Committee should be divided into different groups in order to further enhance its effectiveness.

57. Mr. BADR (Qatar) expressed satisfaction at the progress made by the Commission and the Special Rapporteur with regard to the draft Code of Offences against the Peace and Security of Mankind. The draft correctly limited international criminal responsibility to individuals without extending it to States; indeed, the penalties which that responsibility entailed were such that they could be imposed only on individuals, and not on States. Furthermore, States did not act directly themselves, but only through individuals; and criminal intent, which was necessarily a constituent element of those serious offences against the peace and security of mankind, could be attributed only to individuals and not to States, which were sovereign entities.

58. With regard to another question on which there had been divergent opinions in the Commission, namely the use of atomic weapons, his delegation thought that the Commission should express its position on the legality or illegality of the use, at least in the case of a first strike, of such weapons of mass destruction, which would cause incalculable long-term harm to the Earth and its inhabitants.

59. In connection with the inclusion of mercenarism in a code of offences against the peace and security of mankind, he supported the view that the Commission should await the outcome of the work of the Ad Hoc Committee of the General Assembly which was studying that question.

60. The inclusion in a code of offences against the peace and security of mankind of acts of terrorism, including the taking of hostages, acts of violence against internationally protected persons and piracy, raised the question of the necessary distinction between international crimes - which such acts undoubtedly were - and offences against the peace and security of mankind. His delegation agreed that the Code should deal only with the more serious offences having a widespread impact and that expanding the list of offences would lessen the importance of the Code and run counter to its main purpose.

61. With regard to the inclusion of "economic aggression" he felt that that concept did not lend itself to a precise legal definition. Furthermore, the 1954 draft already prohibited the use of economic measures as a means of intervention in the affairs of another State. More serious acts, such as taking possession of another State's natural resources by force, were included in the Definition of Aggression already adopted. His delegation looked forward to the next stage in the Commission's work on that topic, namely the drawing up of a provisional list of offences and the drafting of an introduction summarizing the general principles of international criminal law as they related to offences against the peace and security of mankind.

(Mr. Badr, Qatar)

62. With regard to the topic of the jurisdictional immunities of States and their property, his delegation regretted that the work of the Commission was still being hampered by the inflexibility with which proponents of absolute immunity and proponents of restrictive immunity adhered to their respective positions. The partisans of absolute immunity seemed to overlook the fact that they did not hold that a State could ever be cited as defendant before the courts of another State, but merely that it could not be so cited without its consent. In practice, most States proclaiming their theoretical adherence to absolute immunity had entered into a considerable number of bilateral agreements which made their actual position with regard to immunity indistinguishable from that of States which followed the restrictive doctrine of immunity. That being the case, there was no reason why the Commission should not be permitted to elaborate a draft multilateral instrument or a set of draft articles based on the restrictive doctrine which could only bind those States that chose to sign and ratify it.

63. The debate on draft article 19, as summarized in paragraph 210 of the Commission's report, revealed a basic misunderstanding as to the meaning of the term "commercial activities" in the terminology of the law of State immunity. Those members of the Commission trained in the civil law tradition, where a distinction between civil law and commercial law was made, tended to carry over to the law of State immunity the civil law concept according to which commercial activities, governed in their system by the commercial code, were by definition those which were motivated by profit making. In the area of State immunity, however, "commercial activities" did not carry that connotation and need not be motivated by profit making.

64. The English term "commercial activities" was not the equivalent of the French term "actes de commerce". The "commercial activities" of a State were simply non-public or non-governmental activities, i.e. activities which were not carried out in the exercise of public authority. Those included all kinds of contracts and other transactions to which private individuals or entities might be party, regardless of any profit motive.

65. It would be noted that draft article 2, provisionally adopted by the Commission, did not mention profit seeking in its definition of a "commercial contract" in paragraph 1 (g), and rightly so. Unfortunately, the false criterion of profit making appeared to have influenced the language of draft article 3 where, contrary to the observable current tendency in the development of the law in that area, the purpose of the contract was to be taken into account for determining its non-commercial character. That implied that if profit making was not the motive behind the contract, the latter would not be a commercial activity.

66. The intrusion of the purpose of the contract into its characterization as a public act entitled to immunity was contrary to the unmistakeable trend in recent years, when more and more States, whether the members of the Council of Europe in the 1972 Convention or Canada in its 1982 statute, had opted for the nature of the act as the sole criterion of its public or private character. That trend was likely to continue and objectively represented the progressive development of the

(Mr. Badr, Qatar)

law in that area. It was reflected in the work of learned bodies such as the International Law Association and in the recent literature on the subject. Any return to the criterion of the purpose of the act would be a regressive development and would indeed lack the acceptability which was the only measure of the success of any new formulation of legal norms by the Commission. That was why draft article 3 deserved a further hard look with a view to ruling out the purpose of the act as a measure of its public nature, thus bringing the draft article into line with the spontaneous progressive development of the law on that point.

67. Draft article 13, on contracts of employment, as provisionally adopted, used the applicability to the employee of the social security provisions of the State of the forum as a test for lack of immunity. His delegation believed that the wider test of the applicability of the whole body of labour law should be used. Not all States had social security provisions in the narrow sense of the term and, furthermore, the State of the forum had a legitimate interest in other areas of employment relations, such as those mentioned in paragraph (5) of the commentary to draft article 13. The overriding interest of the State of the forum did not stop at the enforcement of its social security provisions but extended to "the application of its labour law" in general, as indicated in paragraph (6) of the commentary. The wording of draft article 13 should be amended accordingly.

68. The other draft articles provisionally approved by the Commission were acceptable and provided a sound basis for continued work on the topic. In that connection, the Special Rapporteur, a leading expert in that area of the law, deserved thanks for his unflinching efforts in the face of considerable difficulties. If a final draft on State immunity was adopted by the Commission it would be a monument to both his scholarship and his perseverance.

69. The work of the Commission on the topic of international liability for injurious consequences arising out of acts not prohibited by international law had been dealt a severe blow by the death of Professor Quentin-Baxter, the Special Rapporteur, and his delegation hoped that the Commission would quickly designate a new Special Rapporteur so that progress on that important topic could continue to be made. With regard to the five draft articles proposed by the Special Rapporteur in his fifth report, his delegation concurred with the Commission's assessment that they were acceptable and provided a basis for the elaboration of further draft articles. It supported the Commission's request that the very useful Survey of State practice relevant to the topic, which had been prepared by the Secretariat and which currently existed only in English, should be translated into the other official languages before the Commission's thirty-seventh session.

70. With regard to State responsibility, his delegation was of the view that paragraph 2 of draft article 6 reflected a widely accepted position with regard to the assessment of damages. In particular, it did not endorse the imposition of so-called "exemplary damages", a concept which not all legal systems shared. With regard to draft articles 8, 9 and 12, the view that it was difficult to distinguish between measures by way of reciprocity and measures by way of reprisal did not appear to be well founded.

(Mr. Badr, Qatar)

71. As draft article 8 clearly indicated, reciprocity concerned only obligations of the injured State corresponding to, or directly connected with, the obligation breached by the other State. Thus, reprisal could only relate to other obligations of the injured State unconnected with the obligation breached. In that light, there were no grounds for depriving the injured State of its right to reciprocal treatment with regard to matters mentioned in draft article 12. Reciprocity was a pillar of international law and international relations and an expression of the sovereign equality of States. The fact that the conduct of one State towards another also constituted an internationally wrongful act should constitute a further justification of reciprocal treatment, rather than being a bar to such treatment. Otherwise, a State which had committed a wrongful act would be placed in a more favourable position than a State which had not. Commission of a wrongful act should not be rewarded by shielding its author from reciprocal treatment. His delegation therefore suggested that the wording of draft article 12 should be reconsidered with a view to deleting mention of draft article 8 (on reciprocity) so that the exclusions in draft article 12 would apply only to reprisal, dealt with in draft article 9.

72. With regard to the Commission's decisions on its programme and methods of work, his delegation believed that the idea of staggering major consideration of topics from year to year was a good one because it would enable the Commission to make more progress on topics which were already in an advanced stage of preparation. In that connection, the choice of the two topics, namely "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier" and "Jurisdictional immunities of States and their property" was appropriate. His delegation also agreed with the Commission's conclusion with regard to maintaining the present practice of one annual session and with its decision to continue its practice of establishing and convening the Drafting Committee as early as possible in the Commission's future sessions.

The meeting rose at 6 p.m.