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at 3 p.m.
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SUMMARY RECORD OF THE 40th MEETING

Chairman: Mr. GOERNER (German Democratic Republic)

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The meeting was called to order at 3.25 p.m.

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

1. Mr. ROSENSTOCK (United States of America) said he was puzzled by accusations in the Committee that an approach to the jurisdictional immunities of States and their property which recognized the limited nature of sovereign immunity was aimed at maintaining the dominance of certain States. Such accusations were out of place unless they could be substantiated. The sovereign equality of States was not at issue. To suggest a greater or lesser degree of immunity was not to imply that States were not equal or that some enjoyed limited sovereignty, but simply to discuss at what level all equally sovereign States enjoyed immunity. The idea that not regarding States as immune in every respect amounted to support of colonialism was so bizarre as not to deserve comment.

2. He wondered whether those who favoured the broadest possible notions of sovereign immunity were seeking to give their State-owned multinational corporations a competitive advantage and still greater power in developing countries, but he doubted the utility of pursuing such issues. The question was the practical one of whether to exclude a particular type of activity by a State from the jurisdiction of the courts of another State.

3. An examination of actual State practice clearly evidenced the recognition that immunity was far from absolute. The operation of reciprocity was bound to lead to an increasingly clear record of State practice restricting jurisdictional immunities. For the International Law Commission to take anything but a functional approach to the problem would be both unrealistic and retrogressive.

4. Of the draft articles as provisionally adopted, article 12 tried to find a middle path between varying approaches and had much to commend it. However, for various reasons, it would be preferable if the article were drafted in terms of commercial activities rather than commercial contracts, since that might simplify or eliminate many other problems, such as those relating to contracts of employment in article 13, and might even make such a separate article completely unnecessary. If article 12 remained as it was, article 13 seemed about right, but it might not cover all the situations it should in all legal systems.

5. Article 14 also seemed about right, and the limitation of its applicability to torts occurring within the territory of the State of the forum should alleviate any concern about its reach. Since such an article was essential, he urged those who had expressed concern to reconsider their position in view of the fact that the requirement for the author of an act or omission to be present in the State of the forum at the time it occurred seemed to afford sufficient protection.

6. Article 16 would probably not be necessary if a more general approach were taken in article 12, but was otherwise crucial. There could be no justification for granting States freedom to violate the copyright and trade-mark laws of other

(Mr. Rosenstock, United States)

States with impunity. The issue was not one of intellectual property, but rather of recognizing that a State was not free to commit acts which would not be permitted of private or legal persons.

7. Article 17 was both self-evident and fine. Article 18, while acceptable, was another example of a provision which would be unnecessary if article 12 were more appropriately drafted. Although article 19 had not yet been adopted, such an article was essential to maintain equality between public and private shippers. It related not to North/South issues but to practical needs regarding salvage and rescue. Those who used State trading companies wanted preferential treatment but had produced no valid argument for their position, which was motivated by indefensible commercial greed.

8. Mr. SÜSS (German Democratic Republic) said that his country was interested in a codification of the jurisdictional immunities of States and their property which would serve the progressive development of international law. But it had felt compelled to criticize attempts to impose the existing practice of a few developed Western States on the entire international community, and could not agree with the Special Rapporteur's assumption that restrictive immunity was an irreversible trend. Statements by a majority of States evidenced their interest in strengthening the legal immunity of States in accordance with the principle of sovereign equality.

9. The Special Rapporteur's latest report showed that he had taken insufficient account of the positions of all groups of States and had consequently come to one-sided conclusions. If that process continued, it would result in draft articles regulating an essential limitation and even elimination of the jurisdictional immunities of States and their property.

10. Article 6 should simply declare the principle that a State was immune from the jurisdiction of another State. Article 12 was of particular importance since, in his country's view, a State which had enterprises working with funds clearly separated from those of the State could not be brought to justice for their liabilities in other States. He could not agree to any draft which did not definitively exclude such cases.

11. Serious objections had been raised regarding the proposed exceptions to the jurisdictional immunities of States and their property contained in part III of the draft submitted by the Special Rapporteur. The German Democratic Republic considered most of the exceptions to be unjustified and their inclusion potentially harmful. Since they had no chance of being generally accepted, the Special Rapporteur should adopt a new approach to the subject.

12. Mr. VOLODIN (Union of Soviet Socialist Republics) said that his current statement would be limited to the jurisdictional immunities of States and their property. Appreciable progress had been achieved in dealing with an exceptionally complex subject and provisionally adopting the first two parts of the draft. However, substantial complications had arisen over part III.

(Mr. Volodin, USSR)

13. The legal nature of State immunity from the jurisdiction of foreign courts was based on the accepted principle of par in parem non habet imperium, on which part II of the draft articles was based. The attempt in part III to use the concept of restricted or functional immunity was, in effect, a violation of that principle and the main cause of the complications in the Commission's work. The concept contradicted the principles of sovereign equality of States and non-interference in internal affairs laid down in the Charter of the United Nations. The concept of limited sovereignty could not therefore be the basis for draft articles on the jurisdictional immunities of States and their property.

14. Supporters of the concept of restricted immunity sought to distinguish between the public and the private legal activities of States and contended that a State was comparable with a private individual when conducting commercial activities. However, there were no grounds for considering that a State acted in the economic field as a private and not as a sovereign person. A State preserved all the attributes of sovereignty, including immunity from the jurisdiction of other States and their courts, when performing all its functions, including economic ones. Cases where distraint was imposed upon the property of a foreign State and it was summoned to appear in property actions before a foreign court were violations of international law and could not serve as precedents for codification work. Problems of the jurisdictional immunities of States were a matter of public international law, while civil cases in national courts were a matter of private international law. The attempt to combine the principles of public and private international law in one convention could hardly be considered productive.

15. The draft articles in part III were unacceptable even from the point of view of private international law. For example, article 13 did not clarify the question of which State's law the court was to use, and it unjustifiably established dual standards for individuals performing exactly the same functions. Article 14 dealt with acts and omissions which could be attributed to a State, but that could only be done on the basis of international law. It was therefore a question of the international liability of the State, which was not subject to the jurisdiction of national courts. The current text of draft article 14 contradicted both international and national law and was legally invalid.

16. Article 16 (b) was directed essentially against developing countries, since the third persons which it protected were, for the most part, transnational corporations, while the States affected were primarily developing countries. Adopting such a principle would amount to legalizing the policy of neo-colonialism. As for article 17, it represented an attempt to undermine the principle of the jurisdictional immunity of States, since foreign States were normally exempt from the payments in question by virtue of international agreements or unilaterally granted exemptions.

17. The principle of sovereign equality of States, which ought to be the basis of the draft articles, offered broad possibilities of protecting the interests of different sides in an appropriate way. A State could be sued in a foreign court

(Mr. Volodin, USSR)

only if it gave its clearly expressed consent, as indicated in draft article 8. His delegation supported the statement in the report that relevant materials on State practice, including the practice of the socialist countries and developing countries, should be consulted as widely as possible (A/39/10, para. 197). Part III of the draft articles did not take that practice into account, but the fact that a large number of States based their development on the State sector of the economy could not be ignored. In view of what he had said, the conclusion in paragraph 387 of the report that the Commission might be in a position to complete a first reading of the draft articles under consideration before the conclusion of the present term of membership seemed premature.

18. Sir John FREELAND (United Kingdom) said that the Commission had made considerable progress in considering the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, a topic about which his delegation had previously expressed misgivings in view of the substantial existing body of legal principles and established practice. The Commission had shown an encouraging awareness of the growing problem of abuse and an appreciation of the danger that provisions which were too elaborate or which granted new immunities to the bag or the courier would not be acceptable to Governments. Such concerns should remain in the forefront of the Commission's thinking.

19. He welcomed the Special Rapporteur's intention to apply the functional approach, in line with which the Commission had significantly limited the privileges and immunities proposed in the earlier draft. The decision to delete unnecessary provisions in the original draft articles 9, 12, 20, 22, 26 and 27 brought the text on the status of the courier closer to what States were likely to accept as necessary for the security of the bag and what they could guarantee without the establishment of complex new administrative machinery. There should be no new immunities for the courier beyond those justified by the functional need to protect the bag. He welcomed the omission of the provision exempting the courier from search by electronic screening, a process to which those entitled to full inviolability generally submitted without question in the interest of aviation security. He also noted with satisfaction the final sentence of paragraph (5) of the commentary to draft article 16, which set forth an understanding that might require a wider application.

20. On the other hand, his delegation had doubts about draft articles 17 and 20 as provisionally adopted and draft article 23 as presented by the Special Rapporteur, particularly paragraphs 1 and 4. There was merit in the argument in paragraph 190 of the report, while the counter-argument that respect for the sovereignty of the sending State required the grant of immunity was not persuasive. Of the two sovereignties involved, that of the receiving or transit State was more immediately affected. The qualification of territorial jurisdiction which the grant of immunity would entail had to be justified by functional need. He was unsure about what was meant by the reference in paragraph 191 of the report to the "over-dramatization of" and "over-reaction to" certain recent events. The Commission must, of course, be objective in its approach, but it was questionable

(Sir John Freeland, United Kingdom)

whether serenity was an appropriate state of mind when some recent events involving the abuse of immunity were under consideration.

21. The Commission's work on the identification of the bag seemed to be progressing along the right lines. It appeared to have correctly accepted that the essential purpose of the identifying marks was to indicate authenticity. There was little to be gained by requiring more information; the official seal and the label showing the origin and destination of the bag were the best proof that the sending State had discharged its responsibility. Limits on the weight or size would hardly deter abuse.

22. The Commission's debate on draft articles 36 to 42 showed that it was aware of the concern aroused by abuse of bag facilities and was willing to tackle the problem of balancing the legitimate rights and interests of the sending and receiving States. A number of ideas had been suggested which clearly deserved further study. The recent incidents in London had led to an acute consciousness of the realities and danger of abuse. His Government was studying the problem closely and felt that measures to prevent such abuses as the use of the bag for the illicit importation of guns, explosives and drugs should be considered at the international level. At the same time, there was a general need to protect communications between States and their diplomatic posts abroad and for Governments engaged in friendly relations to deal with one another on a basis of trust. The issues involved were extremely difficult, and his delegation tended to agree that article 36 was the key provision of the draft.

23. The sixth report on the jurisdictional immunities of States and their property and the provisional adoption of three of its five draft articles testified to the Special Rapporteur's skill and thoroughness. Draft article 13 was basically acceptable: the courts of the forum must exercise jurisdiction over matters affecting the local labour force, and the exceptions in paragraph 2 made it clear that that was the intention. Draft article 14, which was close to the 1972 European Convention on State Immunity, was also basically acceptable: a person who had suffered physical injury or damage to his property should be able to seek remedies in the State of the forum. Provisions of the kind contained in article 16 were necessary and reflected the position of the States parties to various international conventions. It was not clear that there were real grounds for the concerns expressed about its possible adverse effects on the developing countries, whose interests would hardly be served if, for example, foreign States could infringe patents applied for in those countries and then claim immunity in relation to proceedings before their courts. His delegation had no difficulties with draft articles 17 and 18 and continued to believe that State-owned ships in commercial service should not enjoy immunity. He hoped that the Commission, which had made useful progress on the topic in 1984, would complete its work on exceptions at its forthcoming session and move on to the question of immunity from execution.

24. Mr. IACIETA (Spain) said that the Commission, in its work on the topic entitled "Status of the diplomatic courier and the diplomatic bag not accompanied

(Mr. Iacieta, Spain)

by diplomatic courier", should pay special attention to the misuse of the diplomatic bag, which had caused problems in recent years, and to the question of the unaccompanied bag. The Commission's current draft ran the risk of being too broad in scope and too detailed, as was demonstrated by the sheer number of articles it contained, articles which, moreover, were similar to those in the 1961 and 1963 Vienna Conventions. The Commission should redouble its efforts to limit the scope of the draft.

25. Article 8 as provisionally adopted, especially when considered in relation to articles 11, 12 and 14, afforded a clear example of the problems caused by using the above-mentioned Conventions as a model. Those articles gave the impression that the diplomatic courier, once appointed, remained in his functions until the sending State declared them terminated or unless the receiving State declared the courier persona non grata; they also implied that the sending State communicated the name of the courier to the receiving and even the transit State. That was not the case in practice. The draft articles in question, especially article 11, did not adequately recognize the limited duration of the functions of the diplomatic courier, as defined in article 10.

26. Draft article 28 as presented by the Special Rapporteur ("Duration of privileges and immunities") did not take into account the ad hoc courier, who would normally take charge of the bag while already in the territory of the receiving State. With regard to immunity from jurisdiction, the privilege of personal inviolability accorded to the diplomatic courier under draft article 16 as provisionally adopted appeared to be sufficient to protect him in the exercise of his functions. However, his delegation had no objection to the further extension of immunity from jurisdiction to the courier in the exercise of his functions. That would guarantee that he would not be prosecuted in the future in the receiving State for acts committed in the exercise of those functions. Paragraph 1 of draft article 23 as presented by the Special Rapporteur could be amended to limit the immunity of the courier from criminal jurisdiction to immunity for acts committed in the performance of his functions, as was the case for civil and administrative jurisdiction. His delegation saw no good reason to dispense the courier totally from giving evidence as a witness, but agreed with the comments contained in paragraph 84 of the Commission's report and the suggestion contained in paragraph 122 that exemption should be limited to evidence on questions relating to the exercise of his functions and that, in requesting him to give evidence, the competent authorities should avoid interfering with the exercise of those functions.

27. His delegation's position on the difficult question of the inviolability of the diplomatic bag was determined by the need to balance the interests of the sending State and the receiving State in the light of misuse of the diplomatic bag to violate State security. The use of mechanical means to screen the contents of the bag might infringe confidentiality. His delegation therefore felt that the Commission should include a provision whereby, in suspicious cases, the receiving State could ask the sending State to permit the bag to be opened in the presence of an authorized representative of the sending State; if that request was refused, the receiving State could refuse entry of the bag.

(Mr. Iacieta, Spain)

35. The 12 draft articles presented by the Special Rapporteur on the topic entitled "State responsibility" offered a sound basis for discussion, although they posed a series of problems which the Commission would have to tackle in the near future. The Spanish text presented serious terminological difficulties. The terminological and conceptual difference between "delito" and "crimen" was not adequately reflected in Spanish. More important was the fact that the Special Rapporteur had devoted specific articles (5, 14 and 15) to the category of internationally wrongful acts. His delegation wished to reiterate that the acceptance of the notion of internationally wrongful acts and the responsibility erga omnes of the State responsible for an act qualifying as such necessitated the establishment of a procedure to determine whether such an act had been committed and whether it could be imputed to the State in question. The articles raised a series of questions of great interest, starting with the definition of "injured State" in article 5, on which his delegation shared the concern expressed by previous speakers regarding the effects of paragraph (d) (iii) of that article on the implementation of the provisions of article 6. He also felt that it was necessary to study carefully the consequences of article 8 regarding reciprocity and, especially, to study the regulation of reprisals in articles 9 to 13.

36. Mr. TREVES (Italy) said that the three elements contained in article 1 of the draft articles on injurious consequences arising out of acts not prohibited by international law seemed to identify with sufficient clarity the scope of the work on the topic by excluding, inter alia, questions such as that of industries exported from one country to another in order to take advantage of lower environmental standards. It would, however, be necessary to see those three elements applied in the various provisions of the draft articles to give a definitive opinion on their real effect. The form and language of the definition of the term "territory or control" gave rise to some difficulties. Some elements of the definition, in particular the third paragraph, strayed too far from the common use of the words and thus jeopardized the comprehensibility of the articles and the clarity of the proposed rules. A formulation closer to the common meaning of the words could be found. Some difficulties might also arise with the inclusion of "situations" within the scope of the draft articles. Mere situations such as floods or earthquakes might imply only minimal duties or no duties at all for repairing damages, even though the obligations of all the States involved for preventing and reducing the consequences of natural phenomena should remain.

37. The main difficulty with the subject was that of avoiding an overlap with the topics on State responsibility and the law of the non-navigational uses of international watercourses. Transboundary harm might be the consequence of a breach of an international obligation of treaty or customary origin, increasingly so as general international law developed and new treaties were concluded. It was therefore necessary to co-ordinate work on the two topics. While draft article 4 seemed to have that objective in mind, the question needed further study; it was, in particular, necessary to decide whether the study of the consequences in terms of reparation should be limited to acts not prohibited by international law or whether all aspects of transboundary harm should be considered. There was also a

(Mr. Treves, Italy)

clear overlap with the draft on international watercourses, which included, albeit only with respect to the specific subject-matter, the element of transboundary harm.

38. Considerable progress had been made on the law of the non-navigational uses of international watercourses. The elimination of the concepts of "international watercourse system" and "shared natural resource" was important for terminological clarity and did not change the purport of the articles. His delegation still had some doubts about the framework agreement approach, since it failed to see the cases in which all the States sharing the same watercourse would become parties to the framework agreement and not conclude a specific watercourse agreement. The idea of shaping the draft articles as a set of model rules still had some appeal. However, whatever their final form, the draft articles could serve as a guide for the conclusion of watercourse agreements and for crystallizing the few substantive rules on the subject. Those rules should be general and somewhat vague, based on reasonableness, equity and the duty not to affect the other watercourse States' interest to an appreciable extent. The set of institutional and procedural provisions, including those on the settlement of disputes, in the framework of the Special Rapporteur's draft was therefore all the more important. The general concepts must be complemented by precise mechanisms that could give them specific content and avoid conflict in actual cases.

39. He welcomed the definition of the "international watercourse", which had been considerably simplified by the elimination of the term "system". The general character of the draft seemed to justify omitting from article 1 any indication of which particular hydrographic elements of the international watercourse had to be considered as relevant parts or components for the purposes of that article. Draft article 4 could be improved if the agreements were called "watercourse agreements" and not "special watercourse agreements". Article 4, paragraph 1, should be revised as it would give the framework agreement a higher status; the relevant provisions of the Vienna Convention on the Law of Treaties seemed adequate to cope with the issue of compatibility. Draft article 5 should make it clear that whenever a watercourse agreement might affect a watercourse State to an appreciable extent, that State had the right to become a party to the agreement, and not only to participate in negotiations. He generally agreed with the contents of draft articles 6 and 7, which might be improved by eliminating certain overlapping elements. If it seemed that the long list of criteria in draft article 8 could create more difficulties than it solved, it could be moved to the commentary. Article 8, paragraph 2, was, however, very important and should be retained.

40. The fifth report of the Special Rapporteur on State responsibility was an important step towards giving proper shape to part two of the draft articles. He stressed that the observations he would make were of a preliminary nature and should not be seen as detracting from his delegation's appreciation of the high quality of the Special Rapporteur's proposals. He wondered why paragraph (a) of article 5 spoke of the infringement of a right, while paragraphs (b) to (d) spoke of the "breach of an obligation", the formulation used in part one of the draft articles. Paragraph (d) should specify that "injured State" could also mean a State party to a multilateral treaty indicated by the treaty itself. It should

(Mr. Treves, Italy)

also be made clear that, in the case of international crimes, the right provided for in article 6, paragraph 2, belonged only to the directly injured State, and not to all States. The relationship between article 6 and article 7 should be clarified, since it was unclear whether article 7 allowed the State which had committed the wrongful act to resort to pecuniary reparation even when the re-establishment of the situation was still possible. If it did, article 7 would not be appropriate for cases of breaches of international obligations concerning the treatment of aliens, especially when the rights in question were not economic.

41. Article 9 seemed to imply a rather restrictive notion of reprisals, the traditional concept of which referred to the violation, rather than the suspension of the performance, of an obligation. The prohibition of the use of force might also be mentioned. The general principle in article 10 was acceptable but was too broadly formulated, since it could be interpreted as covering non-binding procedures or even binding procedures for which there was no institutional framework ensuring some degree of enforcement. He preferred a more restrictive approach. In Article 12, the rules of general international law relating to the protection of the human person should be added to those whose performance could not be suspended by the injured State.

42. With regard to the provisions on international crime, articles 5 (e) and 14, while complementing article 19 of part one, needed to be supplemented by appropriate provisions in part three. International crimes could not be identified and determined in specific cases without third-party compulsory means of settling disputes. Those means should develop as uniform a case-law as possible, and the International Court of Justice should play an important role in that respect. The specific provisions proposed by the Special Rapporteur were a good starting-point, but he had some doubts as to the appropriateness of the positive obligation contained in article 14, paragraph 2 (c). The rule on aggression in article 15 seemed superfluous, as it was fully covered by article 4 and by article 14, paragraph 4.

43. With regard to the programme and methods of work of the Commission, he agreed that priority should be given, at each session, only to some of the topics under consideration. That should not, however, preclude the consideration of other topics. The current practice of holding the whole session in Geneva should be maintained: the holding of the sessions in two parts, in New York and Geneva, would disturb the atmosphere of scholarly concentration that was necessary for the work of the Commission and might lead, in practice, to two different Commissions, as some members would concentrate on one site or the other. In conclusion, he said that the preparation of a new "Survey of international law" would be useful and would prepare the ground for the future consideration of the Commission's long-term programme of work.

44. Mr. MANNER (Finland), speaking in connection with chapter VI of the report of the International Law Commission on the work of its thirty-sixth session (A/39/10), stressed the legal and practical importance of the development and codification of the law of international watercourses and said that some of the modifications incorporated in the revised draft convention on the law of the non-navigational

(Mr. Manner, Finland)

uses of international watercourses in paragraph 279 of the report referred to essential issues and needed further consideration. The first involved the replacement of the term "international watercourse system" with the terms "international watercourse" and "watercourse States". Some members of the Commission had regarded that as a step towards a politically acceptable and flexible solution, but others had felt that the rejection of the "system approach" removed one of the cornerstones of the draft convention. His own delegation agreed with the Special Rapporteur's conclusion that the deletion of the word "system" was not intended to put in doubt the inherent unity of an international watercourse or the interdependence of the various parts and components thereof. However, the Special Rapporteur had implied that the proposed change was entirely terminological, which would presuppose that the definition of the concept remained unchanged; yet the change of terms appeared also in the definitions. There were different interpretations of the word "system", and a certain relativity was connected with the concept of "international watercourse system". Although the physical consequences of the various uses and other activities might differ from each other in different parts of a watercourse, that did not mean that there would be different systems with respect to different uses of the same watercourse at the same time. Therefore, although the concept of "watercourse system" was not inapplicable, his delegation preferred the term proposed by the Special Rapporteur.

45. The definition of the term "international watercourse" in article 1, paragraph 1, of the present text was unsatisfactory. It was uncertain whether there really was a need to distinguish between relevant and not relevant parts or components of an international watercourse and, if there was, whether the distinction should be made on the basis of legal or hydrological considerations. The second paragraph of that article, which contained one of the basic rules of the draft convention, was obviously based on the principle of hydrological coherence of an international watercourse and should be read together with draft articles 6, 7 and 8, which prescribed the rules on equitable sharing in the uses of the waters of an international watercourse. Those rules were conclusions drawn from the principle of coherence and were in conformity with the existing law of international watercourses. Article 8 of the present draft contained, inter alia, provisions which were the only guidelines to be applied in case a watercourse State intended to refer to its right to use the waters of the watercourse in a reasonable and equitable manner, and he therefore proposed that those provisions should be included in a separate article.

46. His delegation supported the changes in draft article 6 described in paragraph 315 of the report because they cleared up previous ambiguity, and agreed that, although the expression "shared natural resources" was a modern expression used in many international contexts, its meaning and content were not yet established and a reference to it in the draft convention might lead to controversial interpretations.

47. In draft article 9, the prohibition in question was an application of generally accepted principles of international law and reflected modern trends by excluding from the scope of the prohibition injurious effects which did not exceed

(Mr. Manner, Finland)

the threshold of "appreciable harm". That limitation created a link between the article and the topic treated in chapter V of the report. Draft article 9 also raised the question whether an agreed or otherwise arranged justification for causing injury actually was an exception to the prohibition, because the prohibition did not refer to harmful activities that were permitted by the suffering State. The relationship between that article and articles 6 to 8 was also problematic, because the latter did not deal with possible injurious effects caused by their application. In many cases, the equitable sharing in the uses concerned would not be possible without some transboundary consequences, and that problem therefore had to be examined in all its aspects.

48. Turning to chapter V of the report and the draft articles in paragraph 237, he said that draft article 1 contained the elements necessary for the examination of the relevant questions. The phrase "territory or control" reflected a practical approach recognizing the full spectrum of relevant activities and situations, but the present wording was somewhat vague. It would be logical and useful to speak from the beginning of activities and situations which actually resulted in adverse effects. If in a specific case it was considered that no adverse effects had occurred, there would be no need to apply the envisaged articles; and the very title of the topic referred explicitly to injurious consequences. Draft article 2 should be drafted more precisely. Instead of the phrase "continuous passage", a reference simply to passage, which would include all the applicable rights of passage in the Convention on the Law of the Sea, would be sufficient. In connection with draft article 5, he tended to agree with the observations in paragraph 256 of the report. As the Commission's deliberations on the topic moved to a more concrete stage, careful thought should be given to determining its priorities.

49. Turning to chapter II of the report, he said he agreed with the Commission that its efforts should be devoted exclusively to the criminal responsibility of individuals, and specifically with paragraph 32 of the report. He also agreed with the Commission that the effect of the draft code would be weakened if its scope were extended beyond its original purpose; to be meaningful, it must be confined to the most serious international offences, of the kind referred to in paragraph 63 of the report. As for the difficult task of identifying the relevant offences, the Commission's use of the inductive method was practical, but due attention should also be paid to the establishment of general criteria for identifying the relevant offences. Some guidance was already implied in the Commission's conclusion that the offences in question should be particularly serious. Some of the instruments listed in paragraph 50 also referred to crimes which were not necessarily offences against the peace and security of mankind.

50. Although the list of instruments in paragraph 50 was not intended to be exhaustive with respect to offences not covered by the 1954 draft code, it did include the most important instruments; but not all the conventions mentioned had secured universal adherence or even entered into force, and that must be taken into account when preparing the draft code if the result was to be an instrument which could be effectively implemented.

(Mr. Manner, Finland)

51. Other offences as envisaged by the Commission should be included in the new text. He agreed with the conclusions in paragraph 65 of the report, but felt that subparagraph (c) (v) required further elaboration and that careful consideration should also be given to the relevance of environmental issues, keeping in mind that many activities which had adverse environmental effects did not affect the peace and security of mankind.

52. Mr. TEPAVICHAROV (Bulgaria), referring to chapter VI of the report of the International Law Commission on the work of its thirty-sixth session (A/39/10), and the draft articles in paragraphs 291 to 343, said that they were welcome improvements because they established a more acceptable balance between the rights and obligations of States as a function of their geographical situation, but noted that some of the proposed changes were merely terminological and did not affect the substance of the draft provisions. The substitution of the concept of "watercourse" for the concept of "system" did not clarify the exact meaning of the term, which was still too broad. The same applied to the substitution of "watercourse States" for "system States". Also, the notion "reasonable and equitable share" in draft article 6 did not remove the ambiguities and the difficulties arising from the interpretation of the notion "shared resources". The concept of "equitable and reasonable share" did not have a clear juridical content, scope and meaning, and would create serious problems in the practical application of the provisions. He endorsed the idea of drafting a framework convention as a source of provisions for the conclusion of bilateral or regional treaties regulating the use of specific watercourses while taking into account the peculiarities of each case.

53. The topic dealt with in chapter VI was extremely important and complex and required reasonable compromise decisions based on the recognized principles of international law, particularly the principle of sovereign equality of States, the sovereignty of each State over its own natural resources and the principle of co-operation among States. More attention should be paid to the role of specific geographical, political and economic conditions in the elaboration of legal norms regulating the use of international watercourses.

54. Turning to chapter VII of the report, he welcomed the 16 draft articles submitted by the Special Rapporteur and reasserted his conviction that the codification should be aimed at elaborating a general and comprehensive convention on State responsibility which regulated the legal consequences of all breaches of international law, including aggression. The 12 new draft articles were welcome, but he wished to see all the draft articles before making more substantive and detailed comments: an in-depth analysis was possible only when the legal consequences of breaches of international law were clearly defined. For the problem of reprisals, a formulation should be elaborated which did not legalize so-called "defensive" measures, because reprisals had been widely used to cover up aggressive actions and had contributed to the exacerbation of conflicts. The topic of State responsibility should be given priority by the International Law Commission.

(Mr. Tepavicharov, Bulgaria)

55. Turning to chapter VIII of the report, he said he supported the decisions and the recommendations in paragraphs 385 to 388, particularly the one in paragraph 385, which would facilitate the achievement of concrete results. The main role in identifying the topics to be given priority must be played by the Sixth Committee.

The meeting rose at 6.05 p.m.