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SUMMARY RECORD OF THE 42nd MEETING

Chairman: Mr. GOERNER (German Democratic Republic)

later: Mr. HAYASHI (Japan)

CONTENTS

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The meeting was called to order at 3.15 p.m.

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)

1. Mr. KOLOSOV (Union of Soviet Socialist Republics) said that the codification and progressive development of international law was an important means of strengthening peace and co-operation among peoples. The effectiveness of the International Law Commission should be increased, and its efforts should be concentrated on the most urgent topics, which currently included the draft Code of Offences against the Peace and Security of Mankind, the status of the diplomatic courier and diplomatic bag, and State responsibility.

2. The world community had long felt the need for a code of offences against the peace and security of mankind. Acts committed by some States aggravated the international situation and often brought the world to the brink of catastrophe. Those acts included aggression, colonialism, racism, apartheid and similar mass violations of human rights, the use or threat of use of force, and State terrorism. Recently, damage to the environment and, most important of all, the first use of nuclear weapons have been added to that list. Omnicide, the inevitable result of the first use of nuclear weapons, must be included in the Code as one of the most serious crimes against mankind. No distinction should be made between offences against peace and offences against the security of mankind. The legal consequences were the same, since all other States would be considered to be injured States. Furthermore, given the huge existing arsenals of nuclear weapons, an offence against the peace would inevitably threaten all mankind, while an offence against mankind would constitute a threat to peace.

3. The draft articles on State responsibility were important because an international convention on the subject would enhance the effect of the principle pacta sunt servanda, thus promoting peaceful relations among States. That was particularly important at a time when the international climate was deteriorating through the fault of the most reactionary imperialist circles. While the draft Code dealt with the criminal responsibility of individuals, the draft articles on State responsibility must embody in treaty form the particular responsibility of States for the commission of international crimes such as aggression, the maintenance of colonial domination by force, the policy of genocide and apartheid, and acts aimed at starting a nuclear conflict. The division of internationally wrongful acts into international crimes and international delicts was necessary because in practice the latter always involved bilateral relations and the responsibility of one subject of international law towards another, while the former involved acts which had an adverse effect on the entire international community and gave each State and all States collectively, the right to institute a claim and, if necessary, to take appropriate measures against the offender.

4. The approach in draft article 5 (d) (iv) was not in line with the erga omnes concept, which allowed the range of injured States to be extended only if the internationally wrongful act was classified as an international crime. Draft article 6, paragraph 1 (a), should be limited to the obligation of the offending State to "discontinue the wrongful act and to prevent continuing effects of such

(Mr. Kolosov, USSR)

act", the release and return of objects held being covered in a more general way under article 6, paragraph 1 (c). Article 6 did not provide for the remedies which the State committing the wrongful act should apply in the event of the death of individuals. In such cases, the payment of money and the provision of guarantees against repetition of the act were not enough; thought should be given to additional ways of satisfying the interests of the injured State, for example, special expressions of apology or the punishment of those responsible. Draft article 7 was hardly relevant to the topic; the matter had been considered in detail by the first Special Rapporteur, whose proposals had proved unacceptable. Draft article 10, paragraph 2, gave an unjustifiably large role to international judicial organs in cases where a State took interim measures of protection before it had exhausted the international procedures for peaceful settlement of the dispute available to it.

5. Turning to the topic entitled "International liability for injurious consequences arising out of acts not prohibited by international law", he said that, in practice, the likelihood of causing physical harm in the course of lawful activities generally existed when such activities involved sources of extreme danger. Since each source of danger had its own peculiarities, which could not be taken into account in a single convention, the liability of States for damage could be regulated only by specific agreements. An example of such an agreement was the Convention on International Liability for Damage Caused by Space Objects. The very title of the topic was not fully satisfactory; it would be more accurate to speak of international liability for injurious consequences arising out of acts that did not constitute international offences. Draft article 2 should speak of "the right of innocent passage" rather than of "continuous passage". In addition, there were currently no rules recognizing the right of innocent passage of space objects through the airspace of foreign States, contrary to what draft article 2 implied.

6. The question of the non-navigational uses of international watercourses was an extremely difficult area for codification in view of the great variety of uses and the unique character of every watercourse. Furthermore, many States had no international watercourses on their territory and could have no interest in participating in a universal convention on the subject. Clearly, the Commission should prepare only very general recommendations which States could, if they so wished, use as a guide for establishing legal régimes to govern specific watercourses. Such régimes could be established only by the riparian States themselves. The establishment of a single régime for all riparian States would constitute interference in the internal affairs of neighbouring States, affecting not only the general sovereignty of States but also their sovereignty over their natural resources, as well as the principle of good-neighbourly relations between States.

7. In conclusion, he said that his delegation could generally approve the Commission's report and wished its members success in their work.

8. Mr. ROSENSTOCK (United States of America) regretted that insufficient time had been allocated to the topic "State responsibility" to enable the Commission to adopt any articles at its thirty-sixth session. He would not comment on the new articles submitted by the Special Rapporteur, since even articles 5 and 6, the only ones referred to the Drafting Committee, were still open for comment by the

(Mr. Rosenstock, United States)

Commission as a whole. He did, however, wish to express several concerns relating to the general approach which the new articles reflected.

9. The definition of "injured State" in draft article 5 was crucial because it identified the States that could resort to the remedies contained in articles 6 to 9. The main question raised was the extent to which, where there was a directly injured State, a State which was not directly injured should be entitled to avail itself of those remedies, which would otherwise all constitute internationally wrongful acts. The draft articles proposed by the Special Rapporteur contained safeguards to prevent anarchic responses and to ensure consistency with the Charter. If those provisions were properly administered, the system would probably function smoothly and in a generally acceptable manner. It was, however, doubtful that they would be so administered and thus, unless a threat to international peace and security was involved, each individual State might unilaterally determine whether the obligation allegedly breached was "stipulated for the protection of collective interests" or whether the act in question amounted to a so-called international crime. It would hardly seem to accord with common sense to allow a State that was not directly affected by the act in question to have recourse to the same remedies as the victim State itself. That was especially true in the case of international crimes, since every member of the international community would be considered an injured State under paragraph 5 (e) and entitled to invoke the appropriate remedies under articles 6 to 9.

10. The novel notion of international criminal responsibility of a State, was one on which his delegation continued to have grave doubts. Those doubts were heightened by the provisions, in Part Two, on consequences, which appeared to be an invitation to chaos. Perhaps the "implementation", mechanisms which were to be contained in Part Three of the draft articles would alleviate that concern. The Commission and the Special Rapporteur should therefore clarify the circumstances under which States not directly affected by an internationally wrongful act could unilaterally take countermeasures against the author State.

11. Turning to the topic "International liability for injurious consequences arising out of acts not prohibited by international law", he said that his delegation agreed with those who had suggested that the title was not ideal. Its meaning was, however, understood and the question of the title could, if necessary, be taken up again at a later date.

12. The topic was clearly connected with, but distinct from, those of State responsibility and the non-navigational uses of international watercourses. Article 1, on the scope of the draft articles, gave rise to several questions. For example, it was not clear whether the phrase "use or enjoyment of areas within the territory or control of any other State" mean that personal injury was outside the scope of the topic. The Special Rapporteur had seemed to answer that question in the negative, but it might be useful to make that point explicit. Another point of potential concern was the extent to which industries which were "exported" from developed to developing countries satisfied the "transboundary element". It had seemed to be the Special Rapporteur's intent that the problem of the "exported industry" should not fall within the scope of the topic. However, the fact that article 1 provided that the topic covered activities which were "within the territory or control of a State" could leave room for confusion on that point. The

(Mr. Rosenstock, United States)

idea expressed in the last sentence of paragraph 248 of the Commission's report (A/39/10) gave rise to some difficulties. It should at least be qualified by providing that, in the case in question, the source country did not have, and should not have had, knowledge of the fact that the activity would produce adverse transboundary effects. After such effects had been produced and brought to the attention of the source country, it would seem that there would be an obligation on that country to mitigate such effects, whatever its stage of development. Although it might be advisable to provide protection for developing countries, it should be remembered that the victims would also be developing countries.

13. Article 2 was intended to cover the classical Trail Smelter situation of transboundary pollution but it was not clear whether it would also cover the creation of certain risks in frontier areas, such as the siting of certain operations in a border region.

14. Article 5 appeared to exclude international organizations from the scope of the topic. It should be noted, however, that some international organizations, such as INTELSAT, might have control over an activity which had transboundary consequences.

15. In the revised draft articles on "The law of the non-navigational uses of international watercourses", the use of the term "international watercourse" posed a conceptual problem in that there might be different systems, or régimes, with respect to different uses of the watercourse. Substitution of the rule of equitable sharing for the highly controversial "shared natural resource" concept was probably an improvement, if it was recognized that the notion of equity implied a response to an individual situation, not the application of a fixed rule. It was questionable whether the new article 28 bis (Status of international watercourses, their waters, constructions, etc. in armed conflicts) was within the scope of the topic. Various speakers had invoked the notion of permanent sovereignty over natural resources. His delegation suggested that lower riparian States think twice before they jumped to the support of an emotive slogan in that context.

16. Mr. MORENO-SALCEDO (Philippines) said that the inductive method adopted by the Commission in its endeavour to prepare a Draft Code of Offences against the Peace and Security of Mankind was appropriate. In the opinion of his delegation, no distinction should be made between offences against peace and offences against the security of mankind: peace and security had always gone hand in hand, as was acknowledged in the Charter of the United Nations. Some members of the Commission understood the term "mankind" to mean the whole of the human community, while others thought that it should be understood in the sense of humanism, as representing a set of moral values generally accepted by the human community. In the opinion of his delegation, once the human community was violated, the moral values for which it stood were also violated.

17. The opinions of members of the Commission still varied on the question of the content ratione personae of the draft code. His delegation believed that criminal responsibility should extend to States when individuals acted as organs or agents of States. Under the Judgment of the Nürnberg Tribunal, an individual could not escape punishment for crimes against international law by using his State as a

(Mr. Moreno-Salcedo, Philippines)

shield, for the true test was not the existence of State orders but whether or not moral choice had been possible.

18. As to the content ratione materiae of the draft code, in the view of his delegation the offences listed in the 1954 draft could be retained, with appropriate modifications. The draft should also refer to certain offences not covered by the 1954 draft code but described in other instruments such as those listed in paragraph 50 of the Commission's report. His delegation was in favour of the minimum content proposed for the draft code. It was opposed to including the maximum content, since it had been unanimously decided that the code should cover only the most serious international crimes. As to the inclusion of a prohibition of the use of atomic weapons, it was inconceivable that such a code should remain silent on the use of a weapon of mass destruction.

19. With regard to the topic "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier", the immunity of the diplomatic courier from jurisdiction was minimized by the provisions of article 23, paragraphs 5 and 6, as presented by the Special Rapporteur. It was important to specify cases in which the immunity of the courier was total and cases in which it was not. The diplomatic bag could not be placed on the same footing as the courier, who did not have immunity ad personam but enjoyed immunity only because of his function of delivering the bag.

20. His delegation realized the difficulty of maintaining a balance between the inviolability of the diplomatic bag and the security of a receiving or transit State. It was of the opinion, however, that the diplomatic bag should be subjected to electronic or mechanical examination only with the prior agreement of the sending State. If agreement could not be reached, the bag should be returned to the sending State. In that way, the inviolability of the bag and the security of the receiving State would be maintained.

21. With regard to the topic "Jurisdictional immunities of States and their property" he said that paragraph 2 (e) of draft article 13 might lead to confusion, as it seemed to conflict with the provision of paragraph 1 of the same draft article. Perhaps the wording of those paragraphs ought to be improved.

22. With respect to the topic "International liability for injurious consequences arising out of acts not prohibited by international law", he said that his delegation attached particular importance to resolving transboundary environmental problems. Account must be taken of modern technology which facilitated the spread of disaster. The five introductory draft articles proposed by the Special Rapporteur were acceptable and provided the basis for the elaboration of further articles.

23. His delegation welcomed the 12 new draft articles submitted by the Special Rapporteur on the topic "State responsibility". Referring to the link between Parts Two and Three of the draft articles, he said that Part Three, on the implementation of State responsibility, was unquestionably important because it would facilitate effective enforcement of the articles that would be contained in Part Two, on the legal consequences of State responsibility. For that reason, his

(Mr. Moreno-Salcedo, Philippines)

delegation endorsed the decision of the Commission to defer consideration of the question of implementation until it had dealt with Part Two as a whole.

24. Mr. HOQUOQ (Afghanistan), referring to the topic "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier", said that the deletions made from draft articles 20 and 21 as originally proposed by the Special Rapporteur (new draft articles 16 and 17) had reduced the courier's status to a minimum.

25. With respect to the courier's immunity from jurisdiction, since the courier was an official person it was essential that he be granted immunity from criminal jurisdiction. The wording of draft article 23 was therefore acceptable to his delegation.

26. The inviolability of a diplomatic bag was absolute and the contents of the bag must be exempt from examination by electronic or other mechanical devices. His delegation therefore supported adoption of draft article 36.

27. Turning to the topic "Jurisdictional immunities of States and their property", he said that the concept of restrictive immunity ran counter to the principle of the sovereign equality of States as set forth in the Charter of the United Nations. The principle of restrictive immunity was found in the State practice and the laws of only a few States and its imposition on the Commission's work would create complications. The majority of the exceptions to State immunity provided for in Part III of the draft articles were unjustified and would complicate acceptance of the draft articles as a whole. Exceptions to State immunity should be restricted to recognized and accepted international practice.

28. Turning to the topic "The law of the non-navigational uses of international watercourses", he said that the abandonment by the Special Rapporteur of the "system" concept in draft article 1 and deletion of the terminology "shared natural resource" from draft article 6 constituted major improvements. His delegation endorsed the framework agreement approach referred to in paragraph 285 of the Commission's report. The topic, although essentially of a legal nature, had certain economic and political overtones. It was important, therefore, that those aspects should be taken into account in the future instrument. In that connection, his delegation supported the views of the Special Rapporteur as set forth in paragraph 281 of the Commission's report.

29. The 12 new draft articles submitted on the topic "State responsibility" were generally acceptable to his delegation. The draft should, however, elaborate further on the legal consequences of international crimes. Also, a distinction should be made between a "directly injured State" and a State "indirectly" affected by an internationally wrongful act. His delegation hoped that the topic would be given priority by the Commission.

30. The draft code adopted by the Commission in 1954 provided a sound basis for further elaboration of the topic "Draft Code of Offences against the Peace and Security of Mankind". Offences such as colonialism, apartheid and the use of atomic weapons should be included in the list of such offences.

(Mr. Hoquoq (Afghanistan)

31. In conclusion, he suggested that the Commission should establish an order of priority for its work based on the state of preparedness of each topic, the number of draft articles submitted and the importance of the subject.

32. Mr. BAKER (Israel) said that the formulation of acceptable provisions concerning immunity from jurisdiction of the diplomatic courier and inviolability of the diplomatic baq required intense reflection on the priorities of the international community and the credibilty to be placed by every State in the intentions, motivation and activities of other States. The draft articles on that subject should not extend beyond the parameters of the 1961 Vienna Convention on Dilplomatic Relations and the 1963 Vienna Convention on Consular Relations. The Commission should not produce a new set of concepts which would serve only to open new multilateral spheres of discussion rather than to unify the elements which already constituted acceptable practice.

33. His delegation was of the view that commencement of the enjoyment of privileges and immunities upon entry into the territory of a receiving or transit State was not necessarily the commencement of the functions of the courier. On the question of the use of the captain of a commercial aircraft, or the master of a merchant ship, emphasis must be placed on ensuring direct and free access by an authorized member of the mission or consular post to the tarmac and aircraft or to the port and the ship, in order to take delivery of the baq in a free and unimpeded manner consonant with the nature of diplomatic or consular communications. As regards problems of non-recoqnition or absence of dipolomatic relations, dealt with in draft article 41, the element of protection of the bag and its movement should be extended to situations foreseen in article 40.

34. With respect to the methodoloqy used in the preparation of the section of the report dealing with the diplomatic courier and bag, his delegation had had some difficulty in efficiently following the proqression of the subject. It might facilitate study if each draft article were to be presented toqether with the consolidated proqression of discussion in the Commission in order to provide an uninterrupted and consistent review of the processinq of the article.

35. His deleqation considered that draft article 19 on jurisdictional immunities of States and their property was an improvement on the previous alternative A of article 19. The Israeli authorities were currently considering the draft and would comment subsequently in greater detail.

36. While his deleqation had had reservations as to the viability of the topic entitled "International liability for injurious consequences arising out of acts not prohibited by international law", the stabilization of the topic's scope in the form presented in draft articles 1 and 2 had enabled it to appreciate the utility of the exercise as well as the need for due consideration of transboundary physical consequences prior to the occurrence of a problem.

37. State responsibility was a topic of considerable importance to his delegation. The formulation of articles on the leqal consequences of international responsibility required a practical, legal definition of the term "injured States". His delegation had difficulty in understanding how the Commission would

(Mr. Baker, Israel)

be able to formulate a set of clear and viable legal consequences of international responsibility, if a "party" injured by an internationally wrongful act was defined in the all-embracing manner suggested in article 5, paragraphs (d) (iii) and (iv), as well as paragraph (e).

38. His delegation urged extreme caution as regards the attempt made, in article 19 of Part One of the draft articles on State responsibility, to define the concept of an international crime. There were inherent shortcomings in formulating as "legal concepts" a series of eventualities which inevitably arose from situations of serious breach of international obligations of varying kinds. The Charter of the United Nations itself, inasmuch as it comprised its own system for dealing with the consequences of breaches of international obligations, was inevitably exposed, in its application, to political manipulation. That was not altogether surprising, since the General Assembly and the Security Council were motivated primarily by consideration of political expediency. It would be regrettable if a document purporting to deal with the objective criteria of State responsibility were allowed to reflect the deficiencies of the United Nations system by permitting the injection of a political element into that concept of "international crime". Similar caution was advisable in dealing with the consequences of State responsibility, especially as regards the implications involved in paragraph (e) of article 5, as well as draft articles 14 and 15. The place held by article 14 in that respect was not clear.

39. His delegation questioned the separate treatment given in draft article 15 to the concept of aggression. Article 19 of Part One dealt with several other forms of international crime which merited equal particularity of treatment, especially crimes included in paragraph 3 (c) of that article such as slavery, genocide and apartheid, to which his delegation proposed to add crimes against humanity, violations of internationally protected human rights as well as terrorism and the seizure of hostages. Uncontrolled development of the topic might prejudice the purpose of the exercise and the vast amount of effort invested by the International Law Commission and by the Sixth Committee.

40. His delegation was satisfied with the new formulation on the law of the non-navigational uses of international watercourses, which appeared to have taken its views into consideration. Article 7 could justifiably be integrated with article 6, as suggested in paragraph 330. The solution to the problem of non-recognition when watercourse agreements were to be negotiated and concluded lay in the elements of good faith and good neighbourly relations formulated in article 7, which would be based on pragmatic, practical need and the common welfare of populations, not necessarily having a bearing on the political aspects inherent in non-recognition.

41. Mr. PAWLAK (Poland) said that the topic concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier was vital to the maintenance of free communication between the sending State and its missions. Recent events had demonstrated the urgent need for additional legal regulation in that field, based on an appropriate balance between the sending State's interest in maintaining confidentiality and speedy communications with its missions abroad and the receiving State's interest in preserving its security. The draft articles

(Mr. Pawlak, Poland)

should take the form of a binding legal regulation which would develop further rules on matters covered insufficiently or not at all by existing international law. In such rules, all the facilities, privileges and immunities of the diplomatic courier should be determined by functional necessity and a uniform and comprehensive approach should be adopted towards all types of couriers and bags used by States for official communications. For the sake of consistency, the terminology used in the draft articles should be brought as close as possible to the corresponding articles of the four existing codification Conventions.

42. There seemed to be certain discrepancies between article 8 and the definition of a "diplomatic courier" contained in article 3. Regarding article 11, he noted the absence of a parallel provision on the commencement of the diplomatic courier's functions. The word "he" in the second sentence of article 16 should be replaced by the expression "the diplomatic courier". With respect to article 23, functional necessity justified the granting of immunity from criminal jurisdiction to the diplomatic courier. In performing official tasks of a highly confidential nature, the courier should be free from the disturbances and pressure which could be created by criminal proceedings against him. The second sentence of article 29, paragraph 1, should be deleted for the sake of uniformity with other conventions and diplomatic law and also to avoid confusion.

43. A key provision of the draft articles was the inviolability of the diplomatic bag. Article 36 should therefore define a general standard of conduct of States and it should not be weakened by the clause "unless otherwise agreed by the States concerned". The clause in article 38 that made the entry, transit, exit or exemption of a diplomatic bag dependent on such laws and regulations as the receiving or transit State might adopt should be deleted, since it undermined the basic principle formulated in that article. The extremely important article 42 raised certain doubts in its current version and required further thorough examination, especially in the light of the Vienna Convention on the Law of Treaties.

44. It was unfortunate that the Commission still had not reached agreement on the conceptual approach to the topic entitled "Jurisdictional immunities of States and their property". The "restrictive" would not only deal a blow to the codification process, but would also undermine the sovereign equality of States. Professor Ushakov had rightly stated in his Memorandum (A/CN.4/371) that the question whether the granting of immunity to a foreign State led to the limitation of the sovereignty of the State granting such immunity could be raised only from the viewpoint of the concept of so-called "absolute sovereignty". Such a concept led to recognizing the sovereignty of the most powerful State and denying the sovereignty of all other States. But, in reality, State sovereignty was regarded as an inalienable attribute of every State. The voluntarily and mutually undertaken obligation of every State to respect the immunity of other States within the sphere of its jurisdiction was not a limitation of sovereignty but an affirmation of such sovereignty. He felt that the idea put forward in the Memorandum seemed to be important in the search for a basis for consensus on the concept. He added that the issue of "absolute" versus "restrictive" immunity had more theoretical than practical meaning since, in reality, absolute immunity did

(Mr. Pawlak, Poland)

not exist. Difficulties in finding a common conceptual approach resulted also from too broad a definition of the term "State".

45. His delegation reiterated that the draft articles should reflect "State immunity" as a well established principle of international law based on the sovereign equality of States enshrined in the Charter of the United Nations, and as upheld by Polish law and judicial practice. The premise on which the draft articles were based, namely, that there was a prevailing adherence to a functional or restrictive concept of State immunity, did not correctly reflect the existing situation. The concept of the "functional immunity" of the State was based on the premise that a State could act in two different capacities, performing acts which were manifestations of State power, jure imperii, and of a private or commerical nature, jure gestionis. His delegation still had basic doubts as to whether that concept was practicable and sound, and whether a distinction could be made between the sovereign and the non-sovereign acts of a State.

46. The concept of "functional immunity" was even less justified in countries with centrally-planned economies, where foreign trade activities were carried out not by the State itself but by State enterprises completely separated from State juridical entities under national law and, as such, enjoying no immunity from foreign jurisdiction. Court practice in those States which attempted to apply the concept of functional immunity was variable and inconsistent and could not be accepted as conclusive evidence. It was not true that the concept of functional immunity provided two-way advantages. In reality, it worked to the advantage of the stronger, developed States and against the weaker States, since most commercial transactions were concluded in developed countries and most proceedings were initiated there, whereas the States involved in those proceedings were often developing countries. The Commission should continue to search for a solution which would promote international co-operation without undermining the principle of the sovereign equality of all States.

47. Commenting on individual draft articles, he said that article 3, paragraph 2, had been improved by the addition of a reference to the purpose of the contract, but the text would require further redrafting in line with the provisions of article 2, paragraph 1 (g); there was, for example, no reference to "transaction" in article 3. The inclusion of the concept of implied consent in article 12, paragraph 2 (a), was not acceptable to his delegation. Moreover, there was no clear distinction between a "contract concluded between States" and a contract concluded "on a government-to-government basis". He still doubted the justification for draft articles 13 and 14, and felt that the Commission's comments on some draft articles could have been more substantial.

48. His delegation had endorsed the continuation of the Commission's work on the topic entitled "International liability for injurious consequences arising out of acts not prohibited by international law" had been endorsed by his delegation, but still had doubts regarding the limitation of the topic to areas within a State's jurisdiction or control, overlooking areas constituting the common heritage of mankind. He shared the Commission's view, expressed in paragraph 233 of the report, that environmental problems could not be reduced to simple equations. Article 19 of the draft articles on State responsibility stated that massive

(Mr. Pawlak, Poland)

pollution of the environment arising out of wrongful acts of a State constituted a serious breach of an international obligation. It specified no limitation whatsoever as to the areas affected by such acts. How then could limitations be applied in connection with the same kind of pollution arising out of acts not prohibited by international law? The development of the legal aspects of injurious consequences affecting areas beyond States' jurisdiction would make a complex task more difficult but it was a challenge that should be met.

49. The topic entitled "The law of the non-navigational uses of international watercourses" was a priority task for the Commission. He reiterated that the framework agreement approach was acceptable to his delegation. The general rules could be supplemented, where necessary, by agreements between States concerned, but should be precise and detailed enough to safeguard the rights of interested parties, in the absence of specific agreements. While the revised version of draft article 1 constituted an improvement, the effects of abandoning the notion of "system" in the remaining articles of the draft would require further careful study. Work on the topic should not be held up by disputes over definitions and the Commission's customary practice of deferring adoption of definitions pending the development of substantive provisions should be followed.

50. The revised text of draft article 4 was not an improvement. Paragraph 1, in particular, left room for doubts concerning its interpretation. What, for example, was the status of the draft articles vis-à-vis existing agreements and what was its relationship to draft article 39? His delegation also had doubts as to the meaning of "A watercourse State ... is entitled to participate in the negotiation of such an agreement" in article 5, paragraph 2, in the light of paragraph 1 of that article and provisions of the Vienna Convention on the Law of Treaties. In the revised version of article 6, there might be a lack of balance between the generally recognized principle of the permanent sovereignty of States over their natural resources and the "sharing" concept provided for in that article. The reference in draft article 7 to "optimum utilization" could be a source of confusion and should be deleted. He wondered whether it was necessary to enumerate in draft article 8 all the factors to be taken into account in determining the reasonable and equitable use of the water of an international watercourse. Only those fundamental criteria which would apply in virtually all situations should be included. The close relationship between the provisions of draft article 9 and the topic of "International liability for injurious consequences arising out of acts not prohibited by international law" had been rightly stressed in the Commission. New article 28 bis enriched the draft.

51. Mr. ŠAHOVIĆ (Yugoslavia) said that the Commission should strive to finish the study of the topics on its current agenda as soon as possible and, in order to avoid taking hasty decisions, should perhaps already be looking for new topics.

52. The fact that the Commission had worked uninterruptedly on the draft Code of Offences against the Peace and Security of Mankind was a source of satisfaction. Negative developments in international relations, characterized by violations of the Charter and of international law highlighted the importance of completing that task. The problems that had been encountered at the last two sessions of the Commission with regard to the topic were difficult but not insurmountable, and with

(Mr. Šahović, Yugoslavia)

a little more boldness, the Commission could prepare a draft which would respond to contemporary needs. He made that point because he felt the Commission was not addressing the fundamental problems involved in preparing the Code: with regard to the content ratione personae, it had decided not to concern itself with the criminal responsiblity of States; with regard to the content ratione materiae, it was not specifying criteria nor formulating a definition of crimes. It had opted for the inductive method as a basis for preparing the list of crimes and the debate on the contents of the list would inevitably be drawn out as a result. If the Commission had available more precise legal criteria, the problem of the length of the list and the nature of individual crimes would not pose a major problem. The Commission had already indicated the path that should be followed in listing the crimes, and article 19 in part one of the draft articles on State responsibility with regard to internationally wrongful acts was a good model. On the other hand, in order to identify the most serious crimes against the peace and security of mankind, the current interpretation of "the peace and security of mankind" should be examined. The great interdependence of States and the institutionalization of the international community should be taken into account. In that context, the use of nuclear weapons could be considered only as an international crime against mankind of the first order.

53. The work on State responsibility was not advancing quickly enough. While recognizing the difficulties involved in considering Part Two of the draft, his delegation was convinced that, if more time was allotted to it, much more practical results could be achieved. The scepticism and opposition of a minority towards certain aspects of Part One should not be allowed to hinder the completion of work on a structure which had already begun to exert a major influence on the development of international law.

54. The topic entitled "International liability for injurious consequences arising out of acts not prohibited by international law" was of particular relevance to the international community, and the Commission should stress its importance. In view of the current scientific and technological revolution, the problems of liability for the injurious consequences of legal activities were worthy of systematic study.

55. The approach adopted by the Special Rapporteur on the topic entitled "The law of the non-navigational uses of international watercourses" was a realistic one and opened the way for constructive work on an extremely difficult subject. He agreed with the comments made on the need to arrive at a viable instrument of international law and to strike the right balance between the various principles and interests involved (A/39/10, paras. 281-282). The Special Rapporteur had been right to abandon the "system" concept and the term "shared natural resource", while at the same time advocating respect for the principle of good-neighbourliness as one of the main elements in the development, utilization and sharing of watercourses. Thus, the search for legal solutions had become much clearer and more in line with the basic principles of international law and the interests of riparian countries, whose sovereign rights should not be jeopardized by the progressive development of appropriate rules of international law which would otherwise be based exclusively on technical considerations.

(Mr. Šahović, Yugoslavia)

56. The problem with the draft articles on jurisdictional immunities lay in the impossibility of taking into account the range of solutions adopted by all existing national legal systems. Since it was almost impossible to find universally acceptable common denominators, and the Commission had to choose between two different concepts, questions might be asked about the fate of the draft after it was adopted. A less ambitious draft, which attempted to set forth more general principles and rules, would perhaps have been more useful. Yugoslavia did, however, intend to examine the complete draft articles very closely.

57. The legal aspect of the status of the diplomatic courier and the diplomatic bag had basically been regulated by the major codification conventions on diplomatic and consular law. While new regulations were probably required for some specific questions, he wondered whether it was necessary to draft such detailed legal rules. Indeed, the desire to go into details seemed to make the consideration and final adoption of the draft more difficult. The length of the text militated against its practical implementation. However, his Government would examine the final text of the draft very carefully, since it dealt with an important matter for the smooth conduct of diplomatic relations between States, and would be open-minded in attempting to find improvements, taking into account the views of the majority of States.

58. Mr. KEBRETH (Ethiopia), referring to the draft Code of Offences against the Peace and Security of Mankind, said that Ethiopia favoured the "minimum content" approach and welcomed the general trend in the Commission's report towards the inclusion of colonialism, apartheid, damage to the environment and economic aggression.

59. With regard to the criminal responsibility of States, his delegation agreed that the Commission should focus its attention on individual responsibility. Concepts applicable to individuals could not be grafted on States. None the less, that was a matter which should lend itself to scrutiny and codification. The representative of Jamaica had aptly spoken of the creeping neglect about that aspect of State responsibility for crime.

60. Although the Commission had made encouraging progress in its consideration of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, two vital provisions in the draft had eluded solution: the question of the courier's immunity from criminal jurisdiction and the inviolability of the bag. The status of the courier should not be assimilated to that of a diplomatic staff member, and to grant him immunity from criminal jurisdiction would go beyond what the discharge of his duties would warrant. The courier would be adequately protected with his personal inviolability as set out in draft article 20. Regarding the statement to the effect that the courier's personal inviolability would be invoked to frustrate his arrest or detention even if he were to be denied immunity from jurisdiction, he assumed that in such a situation there would be an obligation on the part of the courier not to resist arrest, or on the part of the sending State to waive the immunity of the courier. If the courier insisted on his inviolability or the sending State decided not to waive his immunity, and if he had to submit manu militari to jurisdiction, there should at least be certain safeguards designed to protect the courier against abuse which

(Mr. Kebreth, Ethiopia)

would interfere with his duties. The solution might be to accord him jurisdictional immunity while he was in possession of the bag and had not delivered it to its addressee.

61. Regarding the inviolability of the diplomatic bag, the overriding interest should be that of protecting the confidentiality of the communication carried in the bag. If a receiving or a transit State had reasonable grounds to suspect that the bag carried illicit material, the bag should be examined, provided that there were certain appropriate safeguards against abuse.

62. With regard to the jurisdictional immunities of States and their property, the text of draft articles 13 to 18 established a régime of exceptions to State immunity and related to a wide range of subjects on which there were divergent attitudes and practices. However, draft article 6, on the basis of which that régime had been established, did not state jurisdictional immunity of States as a general rule or principle. Given the existence of wide-ranging exceptions, there should be a clear and unambiguous statement of the main principle.

63. The interpretative provisions contained language that did not allay his delegation's concern. In particular, article 3, paragraph 2, provided that, in determining the non-commercial character of a contract for the sale or purchase of goods or the supply of services, "the purpose of the contract should also be taken into account if in the practice of that State that purpose is relevant". Thus, the point of reference became State practice. In a field so vital to developing States as that of commercial relations, there seemed to be a possibility of dangerous confusion. If the exceptions to State immunity were to be considered as derogation from the principle of immunity, it went without saying that they would be interpreted restrictively and that, in case of doubt, interpretation should favour State immunity.

64. The first draft of the law of the non-navigational uses of international watercourses had suffered mainly from the use of terms and concepts such as "watercourse system" and the notion of "shared natural resources". The effect of those terms, combined with the requirement of prior notification of projects, had been to internationalize the territory of other States and introduce the notion of a veto power over the use of water. The Commission had rightly recognized the adverse effect that ill-defined concepts could have on the fundamental right of permanent sovereignty over natural resources and on the new international economic order. Ethiopia therefore welcomed the use of the term "international watercourse" and the abandonment of the term "shared natural resources" in the Special Rapporteur's second draft. Every river had its particular setting - political, climatic and hydrologic - as well as competing different uses, and an appropriate umbrella agreement had to be found. Ethiopia had favoured a framework agreement containing general rules which could be applied world wide, and supported the view contained in the Commission's report to the effect that in a framework text it would be necessary or useful to use general legal formulations.

65. The explanation or definition of the term "international watercourse" as set out in draft article 1 should be made clearer so that it would not invite a

(Mr. Kebreth, Ethiopia)

reintroduction of the concept of "drainage basin" or "rivercourse system". Article 39 provided that the provisions of the Convention did not affect other international agreements relating to the watercourse or to any of its parts. It was understood that such international agreements bound only the States parties to them and not other watercourse States. In that connection, Ethiopia was satisfied with paragraph 1 of draft article 5.

66. Mr. NOLAN (Australia) said that the draft Code of Offences against the Peace and Security of Mankind should be limited to offences which were barbarous or threatened the very foundations of modern civilization and the values it embodied. Offences such as piracy, the taking of hostages, and acts of violence against diplomats, although international crimes and serious offences in themselves, should not be considered as offences against the peace and security of mankind.

67. All the offences in the 1954 draft Code should be retained in the draft Code under consideration. In addition, Australia could accept the inclusion of colonialism as an offence in the terms discussed in paragraph 52 of the report of the Commission, namely, as a "denial of the right of self-determination". Apartheid should also be included in the list of offences. Acts causing particularly serious damage to the environment might be considered for inclusion in the draft Code, depending on appropriate legal formulations. Consideration of the inclusion of economic aggression should be postponed until more detailed guidance was provided by the General Assembly.

68. The Sixth Committee should consider removing from its already overcrowded agenda the separate item on the draft Code of Offences. Member States would continue to have the opportunity of commenting of the draft Code when the report of the International Law Commission was discussed in the Committee.

69. Australia had reservations about the usefulness of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier as a subject for the codification and development of international law, since the question was already covered by treaty law in all significant respects. The draft articles were a good deal more comprehensive than Australia had expected, and they came close to substituting for the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations. In that context, he seriously questioned the wisdom of attempting to negotiate a convention enhancing or expanding the scope of immunities. His delegation had expected a consolidation of rules rather than a codification and progressive development of the law.

70. The international community should be concerned not with the inadequacies in the existing law but with failure to observe the existing laws, which sometimes amounted to flagrant breaches of international law. All States must adhere faithfully to that law, in particular the provisions requiring that diplomatic bags carry only diplomatic documents and articles intended for official use. With respect to the discussion of draft article 36 on the inviolability of the diplomatic bag, Australia agreed with the draft in so far as it sought to prohibit any electronic examination of the bag or other examination which was tantamount to an opening of the bag, but it rejected other aspects of the draft which derogated,

(Mr. Nolan, Australia)

or threatened derogations from, the basic existing rule in article 27 of the Vienna Convention on Diplomatic Relations.

71. With regard to jurisdictional immunities of States and their property, Australia agreed that the subjects covered in part III of the draft articles should be considered as exceptions to State immunity. The articles were limited in scope and did not adversely affect the sovereignty of a State claiming immunity. Article 13, on contracts of employment, was one of the more difficult provisions, since it reflected the endeavour to maintain a delicate balance between the competing interests of the employer State with regard to the application of its administrative law and the overriding interests of the State of the forum for the application of its labour law and, in certain exceptional cases, also in retaining exclusive jurisdiction over the subject matter of a proceeding. In general, article 13 succeeded in achieving that end. However, paragraph 2 (a) could be applied to a wide variety of employees, who would have the most tenuous contract of employment to perform services associated with the exercise of government authority.

72. Australia was pleased that there was almost unanimous agreement within the Commission that its work on international liability for injurious consequences arising out of acts not prohibited by international law should continue. The topic appeared to be correctly centred on the need to avoid - and, if necessary, repair - transboundary loss or injury arising as a physical consequence of an activity within the territory or control of another State. Draft article 1 should be confined to a physical consequence which adversely affected the use or enjoyment of areas within the territory or control of any other State. Australia was also unsure about the meaning of the word "situations" in draft article 1, and would prefer to have it either deleted or replaced by another term that would supplement the term "activities", should that term be considered too narrow.

73. With respect to the law of the non-navigational uses of international watercourses, Australia urged the Commission to proceed expeditiously with that important topic.

74. With regard to state responsibility, there was a pressing need for a clearer articulation of the consequences of the violation of international standards. The definition of "injured State" in draft article 5 was useful, although there was bound to be disagreement on whether it covered the whole range of internationally wrongful acts. Australia also questioned the assumption in paragraph 5 (e) that all States were "injured" if the internationally wrongful act constituted an "international crime". A distinction should be made between directly affected States and other States, particularly in view of the entitlement of those States individually to invoke the legal consequences indicated in subsequent articles. With regard to articles 14 and 15, Australia found the separate treatment of international crimes and the international crime of aggression to be odd; the two should be dealt with in draft article 14. More specifically, Australia retained its reservations on paragraph 2 (c) of draft article 14, which stated that an international crime committed by a State entailed an obligation for every other State "to join other States in affording mutual assistance in carrying out the obligations under subparagraphs (a) and (b)". Apart from being vague, such an

(Mr. Nolan, Australia)

obligation went well beyond the customary international legal rules on State responsibility.

75. It was clearly not realistic to expect the Commission to work simultaneously on six or more complex topics, and priorities should be set for each session of the Commission. The Commission should devote more time to the topics of jurisdictional immunities of States and their property, to State responsibility and to international liability for injurious consequences arising out of acts not prohibited by international law.

76. Mr. TUERK (Austria) welcomed the important progress made with respect to the draft Code of Offences against the Peace and Security of Mankind and recalled his delegation's view, endorsed by the Commission, that the Code should be limited to the criminal responsibility of individuals. Only the inductive method for establishing a list of offences would achieve the desired goal. The introduction summarizing general principles, requested by the General Assembly in resolution 38/132, should not be elaborated until at least a provisional list of offences had been drawn up. That approach had been followed in the 1954 draft, article 2 of which constituted a good basis for the Commission's work.

77. His delegation had no objection to the categorization given in paragraph 42 of the Commission's report of the offences listed in the 1954 draft. If the categories were not to appear in the text of the Code itself, they might be incorporated in the introduction or a preamble on the understanding that further categories might have to be introduced. His delegation endorsed the Commission's provisional decision that the new draft Code should cover only the most serious international offences. That raised the question of how to distinguish between more serious and less serious offences and might require subdividing the three existing categories. As a first stage, an exhaustive list should be established of all offences which might be relevant, and a decision taken later as to the nature of each offence.

78. In chapter II of the report, he noted certain divergencies between the French and English texts, particularly as regards the use of the terms "offences" and "crimes", and the expressions "humanité", "mankind" and "humanity". His delegation looked forward to further clarification in that respect as the work of the Commission progressed.

79. Regarding the list of offences that was to be drawn up, the Commission would obviously have to take into account developments since 1954, including the definition of aggression contained in General Assembly resolution 3314 (XXIX). The reference to "national or collective self-defence" in article 2, paragraphs (1) and (3), of the 1954 draft Code should be maintained in that connection. He stressed his delegation's agreement with the Commission's view that, while not every violation of human rights was an offence against the peace and security of mankind, serious systematic or repeated violations of human rights could be assimilated to offences in that category. It also noted the general trend in the Commission in favour of including colonialism and apartheid in the list of offences. While "serious damage to the environment" might well be included in the list, if appropriate legal formulations could be found, it had certain doubts

(Mr. Tuerk, Austria)

respecting "economic aggression", which would seem to be adequately covered already by the provisions of the 1954 draft Code. His delegation cautioned against dealing with the question of nuclear weapons: the whole range of problems connected therewith would be more appropriately treated in other forums.

80. He concurred fully with the comments of previous speakers on the structure and presentation of the section of the Commission's report dealing with the topic "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier" and the suggestion that a different approach should be taken in future. On the substance of the topic, his delegation felt that the Commission should aim chiefly at consolidating in a single instrument existing rules of international law regarding the diplomatic courier and the diplomatic bag, where necessary making them more precise. The focus of attention should therefore be the bag, since the courier was only the means employed by Governments for the delivery of the bag. The courier should not be assimilated to the members of the staff of diplomatic missions but rather his status should be defined exclusively in the light of functional necessity. The Austrian delegation therefore agreed with the view expressed in paragraph 113 of the report. The question of possible abuses of the privileges and immunities of the courier should not be in the forefront of consideration. What was more important was that some Governments were not in favour of any further extension of privileges and immunities, or anything that might be perceived as such. The Commission should therefore not attempt to elaborate a draft convention equal to or rivaling the Vienna Conventions on Diplomatic and Consular Relations, but should adopt a more prudent approach and shorten the draft articles considerably, thus perhaps enhancing their chances of acceptance.

81. The inviolability of the diplomatic bag seemed to be an essential, if not the most essential, provision. His delegation had previously indicated its preference for the solution in article 35, paragraph 3, of the Vienna Convention on Consular Relations, which provided for opening of the bag under certain circumstances, rather than the absolute prohibition in article 27, paragraph 3, of the Vienna Convention on Diplomatic Relations. A compromise solution might be found in certain bilateral consular conventions, such as the Consular Convention between Austria and Bulgaria, signed in 1975, which provided that, if there was serious reason to believe that a consignment contained something other than the official correspondence, documents or articles for official use, it could be returned to its place of origin. Reciprocity would probably prevent a State from making undue use of such a provision.

82. Regarding the screening of diplomatic bags by electronic and mechanical devices, the Austrian Government was of the opinion that security checks were admissible in the case of diplomats and couriers, in the light of the provisions of the Vienna Convention on Diplomatic Relations, provided that they were carried out within the limits determined by the Convention. Electronic screening of diplomatic bags marked as such was therefore admissible. Persons unwilling to agree to the screening of their person or baggage, including diplomatic bags, as demanded by the airlines, risked being denied transportation.

(Mr. Tuerk, Austria)

83. Given the personal inviolability of the courier and the inviolability of the bag, there seemed to be no real need for draft article 17. Regarding draft article 19, paragraph 1, providing for exemption of the diplomatic courier from personal examination, he agreed with other speakers that there should be no provision of that kind, since there was no such express stipulation in the Vienna Convention on Diplomatic Relations. Subject to voluntary compliance with technical security procedures adopted in the interest of the safety of civil aviation, the courier's personal inviolability seemed adequate to cover the case. His delegation also had doubts as to the need for the provisions in paragraphs 2 and 3 of that article and those in draft article 20. In draft article 23, as presented by the Special Rapporteur, his delegation felt that the inviolability provided for in article 16 would be sufficient and therefore did not favour an additional provision regarding immunity from criminal jurisdiction. To clarify article 16 further, however, the phrase "or any other form of restriction on his personal freedom" could be added at the end of the paragraph.

84. The law of the non-navigational uses of international watercourses was a topic of special interest to Austria. Its basic position in that regard was well expressed in paragraph 282 of the report. Austria was both an upstream State and a downstream State, and thus well aware of the problems involved, which went beyond the purely legal field to encompass important political and economic questions. His delegation had noted with satisfaction that some of its concerns had been shared by members of the Commission and had already been taken into account by the Special Rapporteur. It was convinced that the framework agreement approach was the only method which could lead eventually to rules having universal effect. Such an agreement, containing generally accepted basic legal principles, would need to be flexible enough to permit the conclusion of specific watercourse agreements, since each watercourse was in many respects unique. An effective solution of specific problems could be achieved only on the basis of international agreements with a limited number of participants. The views expressed by the Special Rapporteur in that connection, in paragraph 286, were endorsed by the Austrian delegation.

85. Austria welcomed the elimination of the concept of "international watercourse system" and its replacement by the notion of "international watercourse". The abandonment of the system concept had removed a major stumbling-block, avoiding the territorial connotations that the concept had implied. His delegation also concurred with the statement made on that subject in paragraph 294 of the report. Given Austria's geographical location, maintaining the "watercourse system" concept would have subjected practically all of its waters to the rules laid down in any such agreement.

86. Regarding the possible hydrographic components of an international watercourse, a reference to "relevant" parts or components, as in draft article 1, was sufficient. A restrictive interpretation should be applied to such components, however, with the examples given in the Special Rapporteur's report being mentioned only in the commentary. The Austrian delegation could not accept the general inclusion of groundwater in the international watercourse concept, since there were hardly any groundwater resources in Austria which would not be connected with an "international watercourse" as defined by the Special Rapporteur. The geographically unlimited inclusion of groundwater would amount to a de facto

(Mr. Tuerk, Austria)

extension of the watercourse concept to a concept encompassing all waters, which would seem to remove any prospect for agreement on the draft articles within the foreseeable future. The Commission should confine its deliberations for the time being to surface waters.

87. The text of draft article 1 was broadly acceptable. While not overlooking the difficulties which might result from the definition of an "international watercourse", the Austrian delegation felt that it was the best that could be achieved in the circumstances. The precise consequences that would result from it remained to be seen, and his delegation reserved final judgement on draft article 1 until the whole framework agreement had been elaborated. Tributaries should be included in the notion of "international watercourse" only in so far as their use concerned other States as well.

88. His delegation did not interpret draft article 4 as casting doubt on the continuing validity of certain agreements relating to international watercourses, but it would recommend a reformulation to make that quite clear. Every possible encouragement should be given to the States of a watercourse to conclude agreements governing its uses. Austria also shared the view that the provisions in the framework agreement were not intended to constitute norms of jus cogens. It looked forward to further clarification of the expression affected "to an appreciable extent". It considered the revised version of draft article 6 as a major improvement and agreed with the current formulation. It was very pleased that the notion of "shared natural resource" had been replaced by the concept of sharing by watercourse States in the uses of the waters of an international watercourse in a "reasonable and equitable" manner. The legal implications of the former term might indeed have been unforeseeable and given rise to far-reaching allegations and claims. It also concurred with the opinion in paragraph 317 that an additional provision relating to the employment of the concept of shared natural resources was unnecessary. The fact that waters flowed through more than one State did not automatically turn them into a "shared natural resource". How to use the waters within its territory was a matter within the sovereignty of the State concerned. However, the principle of good neighbourliness, and the maxim sic utere tuo ut alienum non laedas, was designed to prevent abuses. It was difficult to understand why that principle was regarded by some members as irrelevant. It might be said that the terms "reasonable and equitable" were vague, but justice must be found for each individual case. The criterion of an "equitable" share of the uses had undoubtedly already become the object of international customary law in the process of formation, even if the specific application of equity in an individual case could not be generally determined. The Convention on the Law of the Sea was a good example of the increasing importance and acceptance of that criterion. In any case, the term "sharing" did not mean that sharing must be equal and that only distributive justice was possible, because States shared their rights and obligations equitably according to their location.

89. A reading of draft article 7 in conjunction with draft article 6 would dispel the doubts that had been expressed regarding the inclusion of the reference to "optimum utilization". The discussion in the Commission on draft article 8, concerning the list of factors to be taken into account in determining the reasonable and equitable utilization of the waters of an international watercourse,

(Mr. Tuerk, Austria)

had clearly shown the impossibility of an exhaustive enumeration of such criteria and of a determination of priorities.

90. Draft article 9 was one of the core provisions of the draft articles. In his delegation's opinion, the determination of "appreciable harm" was a central question in the non-navigational uses of international watercourses. As for the view expressed in the Commission that an additional article should be added to chapter II expressly prohibiting the diversion of waters, it should be noted that certain diversions of limited extent constituted normal practice for many States. An express prohibition would therefore not seem realistic or conducive to "optimum utilization" of the waters concerned. The rules laid down in draft articles 6 to 9 seemed sufficient to prevent any detrimental consequences.

91. With regard to the jurisdictional immunities of States and their property, his delegation had already stated its fundamental position on State immunity and its adherence to the principle of relative immunity as expressed in judicial decisions.

92. In regard to draft article 3, paragraph 2, it was the view of his delegation that the nature of the contract should be the sole criterion for determining its public or private character. An additional reference to the purpose of the contract might, in the final analysis, make it possible to exclude virtually everything from the jurisdiction of the court of another State and would thus constitute a regressive step. His delegation therefore had reservations regarding the current formulation of that provision.

93. With respect to draft article 13, the reference to social security provisions should not lead to the consequence that a foreign State would be free to determine whether to place its employees under the local social security system and would thus be able to avoid the jurisdiction of the forum State entirely. Austria was not in favour of the exemption from local jurisdiction stipulated in paragraph 2 (a) relating to the performance of services associated with the exercise of governmental authority. The extensive interpretation of that provision in paragraph 11 of the commentary tended to confirm his delegation's reservations. Austria was in favour of draft article 18 as such but would prefer the deletion of the expression "or is controlled from" in paragraph 1 (b). References to the place of incorporation of a company and its principal place of business would be sufficient; the place of control did not offer the same kind of clear-cut criterion.

94. The topic of international liability for injurious consequences arising out of acts not prohibited by international law was of the greatest interest to Austria. His delegation noted with satisfaction the general agreement in the Commission to concentrate on questions relating to transboundary loss or injury arising as a physical consequence of an activity within the territory or control of another State and to emphasize the procedural obligations of States. His delegation hoped that it would not be several years, as had been indicated in paragraph 257 of the report, before the Commission returned to certain questions which would require consideration in connection with that topic.

(Mr. Tuerk, Austria)

95. The question of State responsibility was undoubtedly one of the most important issues awaiting further elaboration and his delegation therefore welcomed the progress achieved by the Special Rapporteur; the submission of the new set of draft articles constituted a major step forward. His delegation would refrain from commenting on any specific draft article during the current debate and would prefer to await the results of the Commission's continuing work.

96. The International Law Commission should give major consideration at its annual sessions to only some of the topics on its programme. Such a procedure might enhance prospects for substantial progress on certain items within the remaining two years of the current term of membership of the Commission. In that connection, the practice of establishing the Drafting Committee as early as possible should be continued.

97. Mr. ABDEL KHALEK (Egypt) said that his delegation reserved its right to comment at a later stage on the draft Code of Offences against the Peace and Security of Mankind as well as on the law of the non-navigational uses of internatonal watercourses.

98. The role and functions of the diplomatic courier and the inviolability of the diplomatic bag itself, covered by chapter III of the report, were two issues which must be treated in such a way as to strengthen peaceful and friendly relations between the sending State and, the receiving State and to avoid abuses of privileges and immunities. The thrust must therefore be to achieve a balance which would take into account the temporary nature of the functions of the diplomatic courier, whose stays in the receiving or transit States were brief; he must not therefore be given privileges and immunities identical with those of representatives accredited to Governments, who required such privileges and immunities for longer periods.

99. With regard to article 23, paragraph 1, his delegation had no objection to diplomatic couriers being granted immunity by the receiving State or the transit State. Difficulties might possibly arise if the courier was a diplomat of the sending State, but in such circumstances the 1969 Convention on Special Missions would apply. To make the courier falling subject to the criminal jurisdiction of the receiving State or the transit State which might jeopardize the principle of smooth communications, where the diplomatic courier was required to carry out a number of successive missions, as had been the practice in many States in recent times. The protection and immunity enjoyed by the courier were a natural extension of the protection and immunity enjoyed by the diplomatic bag, which meant that he could not be separated from it, without the consent of the dispatching State. It was very important to link paragraph 1 with the principle of reciprocity, without prejudice to the provisions of draft article 6.

100. His delegation agreed with draft article 4, which, however, should not provide that the receiving State should ensure the freedom of the official communications of the sending State; such freedom derived from the general principles found in conventions governing relations between States, such as the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the

(Mr. Abdel Khalek, Egypt)

1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character. The article should be limited to the protection of such official communications, without touching on their freedom.

101. The wording at the end of draft article 9, paragraph 2, was very elastic and might give rise to abuses of the right provided for in that paragraph. His delegation therefore hoped that the paragraph would be reworded in a more precise manner. The phrase "upon request" in draft article 13, paragraph 2, was somewhat obscure in that it did not specify whether the request should come from the dispatching State or from the courier. Traditionally, the diplomatic courier was expected to resolve himself any problems he might encounter during his travels. In some cases, however, the problem might be so difficult that he could not resolve it himself, as, for example, in cases of changes in his original itinerary, requiring him to stop somewhere not provided for in the original programme. The article should confine itself to cases where the courier was constrained to stop in a transit State not included in the original schedule. There must be an element of constraint for that provision to apply, but, if it became necessary to find the courier somewhere to stay or to make contacts for him, the role of the diplomatic or consular mission of the sending State in the transit State or, the receiving State would come into play. The article should therefore make it clear that it would apply only where a sending State had no mission in the State where the courier was obliged to make a stop.

102. In draft article 17, a distinction should be drawn between the transit State and the receiving State. The diplomatic bag was normally kept within the facilities of the mission and, without prejudice to draft article 23, accreditation was not generally required for such temporary stays. As regards the transit State, it should be made clear whether there was a mission on its territory or not. If there was, the same rules should apply as in the case of the receiving State, and provision must be made for the inviolability of the place where the courier was staying.

103. In draft article 19 there was a clear contradiction between paragraphs 2 and 3. Paragraph 2 permitted entry of articles for the personal use of the diplomatic courier imported in his personal baggage whereas paragraph 3 stipulated that the personal baggage of the diplomatic courier should be exempt from inspection. Under paragraph 2, the authorities could decide which articles were for the personal use of the courier and would therefore be entitled to search the contents of the diplomatic bag. Such action would be tantamount to searching his personal effects, which was prohibited by paragraph 3.

104. He agreed with the Special Rapporteur that there was a need to introduce a special provision in draft article 20 to cover the cases of diplomatic couriers who might be nationals of the receiving State or the transit State.

105. On the issue of jurisdictional immunities of States and their property, his delegation had noted that reservations had been made by some members of the International Law Commission on the basis of ideological and conceptual

(Mr. Abdel Khalek, Egypt)

differences, and, in that respect, his country's position was based on Islamic law. Article 13, paragraph 1, should be clarified. Distinctions should be drawn depending on whether an individual was employed for a general or a specific task; immunity should only apply in the former case. The criterion should be the nature of the work done and the services performed. As it stood, the article used the object of the work as its criterion; that was not inappropriate. With regard to article 14, the law of the State in which the damaging act or omission occurred, should clearly apply. There were, however, some types of damage which could be inflicted without the person concerned being in the territory itself when the damage was caused. He hoped that the Commission would find a formulation which would cover that aspect adequately.

106. The text of article 16 was acceptable at the current stage of the work. It would, however, be desirable to add the word "legally" before the word "protected" in subparagraph (b).

107. In paragraph 257 of its report, the International Law Commission had found no major fault in the five draft articles on international liability for injurious conseqeunces arising out of acts not prohibited by international law and had agreed that, on the basis of those articles, the elaboration of further articles should proceed. His delegation believed that further improvement was possible and that more precision was needed. In draft article 1 the word "enjoyment" might be replaced by "right to enjoy". Draft article 3 might be taken to imply that the draft articles would have more binding force than any other international agreement. The imbalance should be remedied, although that did not mean that his delegatio had underestimated the importance of articles 3 and 4.

108. Some members of the Commission had shown a particular interest in the problem of industries which were exported from developed to developing countries, partly to take advantage of lower environmental standards and less capacity to enforce such standards. Developing countries could not undertake to protect neighbouring countries from the adverse transboundary effects of polluting industries that were tolerated because they contributed to the economy but which could not be efficiently regulated or even monitored within the technical, administrative and budgetary capabilities of the receiving State. The cost of arrangements to address that problem might be met through cost sharing on the basis of ability to pay. The principle of absolute equality among States should not however be applied in such cost sharing, because the parties were unequal in economic, financial, technological and industrial terms. His delegation therefore expressed the hope that the Special Rapporteur would take that consideration into account.

The meeting rose at 7.50 p.m.