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Chairman: Mr. GOERNER (German Democratic Republic)

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The meeting was called to order at 3.20 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. HAYASHI (Japan) said, with regard to the organization of the Commission's work, that since time constraints made it impossible for the Commission to consider each of the topics in a comprehensive manner, it would be appropriate for it to give major consideration to the topics "State responsibility" and "Jurisdictional immunities of States and their property", which were areas in which early codification of international rules was desired.

2. Turning to the topic "Draft Code of Offences against the Peace and Security of Mankind", he said that if the international community was to punish directly an offender who committed an act of aggression or other acts which could be defined as constituting offences against the community itself, it was essential to establish a mechanism, such as an international criminal court, which would be capable of implementing the relevant law at the international level. Under existing circumstances, it was unlikely that such a mechanism would be established in the foreseeable future. Until it was, attempts to codify the law on the topic might well result in providing a spurious basis for the victors to impose justice unilaterally upon the vanquished, or for a group of States politically to condemn an individual or group of individuals without due process of law.

3. The draft Code as originally conceived reflected the unique circumstances prevailing at the end of the Second World War. Since then, the international situation had undergone tremendous changes, and his delegation did not discern any new developments that would necessitate the urgent resumption of deliberations on the topic. However, the Commission had continued its deliberations and had decided to draw up a provisional list of offences against the peace and security of mankind. His delegation wished to stress that the Commission should give careful consideration to each of the acts to be classified as such offences, including those enumerated in article 2 of the 1954 draft Code.

4. Although Japan's case-law regarding State immunity adhered to the doctrine of absolute immunity, his Government had been applying the restrictive doctrine of immunity in its treaty relations with other countries. Thus, Japan recognized that certain exceptional cases might arise where immunities should be denied to a State. At its thirty-sixth session, the Commission had continued its deliberations on jurisdictional immunities and had provisionally adopted draft articles 13, 14, 16, 17 and 18, which followed the restrictive doctrine with respect to actions in rem and in personam. Those draft articles reflected a realistic approach to the establishment of unified rules on State immunity. His delegation hoped that the Commission would expedite its deliberations on draft articles 19 and 20, submit the overall scheme of the draft articles on the topic as soon as possible, and try to complete a first reading of the draft articles as a whole before the end of the five-year term of its current membership.

(Mr. Hayashi, Japan)

5. With regard to the topic "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier", his Government continued to believe that the existing legal framework, as provided notably in the Vienna Convention on Diplomatic Relations, was not inadequate; there appeared to be no urgent need to draft a separate convention regulating the legal status of the diplomatic courier and unaccompanied bags. What was more important was that each State should increase its efforts to ensure the observance of existing rules. His delegation appreciated the efforts made by the Special Rapporteur to prepare additional draft articles on the topic, but was not convinced of the need for such detailed provisions regarding the status of the diplomatic courier and unaccompanied bags. What the Commission should do was to focus on specific problems, especially in guaranteeing the freedom of communications through diplomatic bags, which might arise under the existing régime of the Vienna Convention. Only with respect to such problem areas should the Commission consider preparing new rules, taking into account the need to provide better protection for diplomatic bags and to prevent their abuse.

6. His delegation welcomed the agreement that the Commission should continue its work on the topic "International liability for injurious consequences arising out of acts not prohibited by international law". The topic called for the development of a new legal theory. Therefore, before the Commission proceeded to a full examination of the draft articles on the scope of application, it would be desirable to have a picture of the draft articles as a whole.

7. Turning to the topic "The law of the non-navigational uses of international watercourses", he said that as a basic legal framework for non-navigational uses of international watercourses, the draft articles would play a major role in co-ordinating not only the varied uses of international watercourses, but also international co-operation in the development of rivers. His delegation hoped that the Commission would further clarify such concepts as the sharing of resources in an equitable and reasonable manner and the duty not to cause appreciable harm. Further consideration should also be given to the structure of the proposed convention, including the handling of chapter V on the peaceful settlement of disputes.

8. The set of draft articles submitted on State responsibility represented a substantial achievement in the work on part two of the draft. His delegation hoped that, at its next session, the Commission would further probe into such issues as the handling of the questions of jus cogens and international crime, the identification of an "injured State" and the rights of such a State. It also hoped that the Commission would ensure that the draft articles were coherent and consistent throughout parts one and two as well as part three.

9. Mr. GUNEY (Turkey) observed that, on the topic "The law of the non-navigational uses of international watercourses", the Commission had decided to prepare a draft "framework agreement". That draft resembled more a General Assembly resolution than a proper legal instrument. The question to be decided was whether it might not be better to slow down the process of codification until the

(Mr. Guney, Turkey)

law was sufficiently developed to be codified. In any case, such an important and complex topic could not form the subject of progressive development until the necessary and appropriate preparatory work had been done. Furthermore, the term "framework agreement" must be applied in a broad and flexible manner, and the framework agreement under consideration should be simpler and more restricted in its scope.

10. The Special Rapporteur had been right to abandon the "system" concept. His delegation welcomed that positive change and believed that the definition of the term "international watercourse" given in draft article 1 was satisfactory.

11. The first part of paragraph 1 of draft article 4 was useful and should be maintained. However, it should be placed at the end of the draft, in a provision on relations between the future instrument and specific existing agreements. All the words after "agreements" in the second line of paragraph 1 should be deleted because they called in question the validity of watercourse agreements in a manner incompatible with the pertinent provisions of the Vienna Convention on the Law of Treaties. It was inadmissible to subordinate the validity of a special watercourse agreement to the condition that it should provide measures for the reasonable and equitable administration, management, conservation and use of the international watercourse. As currently worded, draft article 4 was given an indeterminate status which would place it above agreements already concluded. The draft article went very far in making provisions included in the framework agreement jus cogens norms from which watercourse States would be unable to derogate by means of agreement. His delegation had strong reservations about that.

12. Draft article 5 gave rise to problems of a practical and technical nature. It was an article which provided for a law which did not exist in the law of treaties, that of participation in the negotiation and conclusion of watercourse agreements binding only a few States. As currently worded, with the abandonment of the "system" concept, draft article 5 had lost its raison d'être and should be deleted.

13. The highly controversial concept of "shared natural resources" had given rise to political and juridical difficulties. The Special Rapporteur had therefore decided to delete the term "shared natural resource" from the body of draft article 6. That notion was a denial of the principle of permanent sovereignty of a State over its natural resources. In the subject under discussion, it placed obligations on upstream riparian States and granted all advantages to downstream riparian States. As redrafted, without the notion of a "shared natural resource", article 6 aimed at not weakening the protection afforded watercourse States to enjoy within their territories the benefits arising from uses of an international watercourse.

14. In the opinion of his delegation, the word "sharing" in draft article 7 was inappropriate and should be deleted. In practice, reasonable and equitable use by a State implied taking account of reasonable and equitable use by another State. Accordingly, there was no need to refer to the notion of "sharing". The term "optimum utilization", in draft article 7, was imprecise and superfluous and should

also be deleted. It was illusory to think that an international watercourse State could have the right to require optimum utilization of the watercourse. Moreover, "optimum utilization" might be made at the expense of conservation of the watercourse's resources as a whole.

15. With respect to draft article 8, the list, which was not exhaustive, of factors for determining "reasonable and equitable" use had no place in the text of the article. It could figure, by way of example and through selective enumeration, in the commentary to the article.

16. With respect to draft article 9, his delegation agreed with those delegations which had drawn attention to the difficulty of determining what constituted "appreciable harm". Perhaps the word "harm" could be replaced. In the French text, the word "atteinte" might be better. The downstream State could interpret the word "harm" as meaning that in case of harm resulting from use of the waters of the watercourse by the upstream State, the downstream State would have the right to call for elimination of the harm, despite any advantage it might derive from the use or activity.

17. Turning to the Commission's programme and methods of work, he said that his delegation shared the view expressed in paragraph 385 of the report (A/39/10) that in the light of priorities and other relevant factors, the Commission should give major consideration at an annual session only to some of the topics on its programme and postpone major consideration of the other topics to the next annual session. In the opinion of his delegation, for the years 1985 and 1986, the Commission should plan its work in such a way that major consideration would be given to the topics "State responsibility" and "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier".

18. Mr. STEPANOV (Ukrainian Soviet Socialist Republic) said that, at its thirty-sixth session, the Commission had achieved definite results in its consideration of certain issues. The codification and progressive development of international law constituted an essential part of United Nations activities aimed at maintaining international peace and security. The post-war years had shown that absolute respect by all States for the main principles of international law was a necessary condition for rechannelling international relations towards détente, averting the threat of nuclear war, and overcoming the current deterioration in the international climate, which had been caused by the policy of those countries which acted in gross violation of the generally accepted norms of international law and their international treaty obligations.

19. The primary task of the International Law Commission was to enhance the effectiveness of international law. The Commission must gear its activities to the current state of international relations, help extend the areas in which they were regulated by international law, consolidate the content of existing rules and clearly formulate new legal norms applicable to the requirements of the modern world. Noting that of six topics before the Commission at its thirty-sixth session, four had been the subject of only a general discussion, he saw that, while

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such a discussion might be necessary when the Commission took up a new topic or resumed work on an old one after a long interval, there were times when those debates were unjustifiably prolonged through the insistence on hopeless issues and by contrived questions, about the Commission's mandate, contrary to the General Assembly's clear recommendations. Such delays in the Commission's work naturally gave rise to concern.

20. The draft Code of Offences against the Peace and Security of Mankind was one of the most important topics and one that should be given priority. The adoption of a universal legal instrument which defined offences against the peace and security of mankind and affirmed the principles of the international responsibility of States and the individual criminal responsibility of persons guilty of such offences would be an essential contribution towards strengthening the legal guarantees for peace and international security.

21. He was concerned at the delays in the work on the important topic of State responsibility. Part two of the draft articles should contain separate sections on international crimes and international delicts, since both categories had their own specific characteristics. As a rule, international delicts occurred in a bilateral legal relationship and involved the responsibility of one subject of international law towards another, while the consequences of an international crime affected the interests of the entire international community, and all States were entitled, either individually or collectively, to take appropriate measures against the offender.

22. He noted the progress made by the Commission on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. His delegation did not agree that, in view of the existing conventions on diplomatic and consular law, there was no need for separate codification under the topic. Indeed, codification was one of the main means of ensuring respect for existing norms, since the relevant provisions in existing documents were very general, were dispersed over a number of conventions and needed to be given practical form, in view of the importance of the subject and the problems that had arisen in practice. It was essential to enhance the protection of the diplomatic courier and diplomatic bag, thus promoting the effective functioning of diplomatic relations and the strengthening of international co-operation. The completed draft articles should be adopted in the form of a convention and not as a protocol or other supplement to existing instruments.

23. There was a clear tendency in the Commission and the Committee to belittle to a certain extent the role and hence the legal status of the diplomatic courier. It had been said that his status should not be assimilated to that of diplomatic personnel, on the grounds that his mission was temporary, and that his personal inviolability should be based on the principle of functional need. What was objectionable was not the substance of such arguments but their use as a means of weakening the legal protection accorded to the diplomatic courier. The work on the draft articles must take account of the importance of the courier's functions and not lose sight of the fact that privileges and immunities were granted not for the

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benefit of those enjoying them, but for those persons to fulfil their official functions. The temporary nature of the courier's mission must not serve as a pretext for unjustifiably limiting his legal guarantees in the receiving and transit States. References to abuses of the inviolability of the diplomatic bag did not stand up as an argument for such restrictions. Indeed, such actions did not and could not call into question the need for diplomatic immunities.

24. The general approach of the Special Rapporteur and the draft articles provisionally adopted by the Commission struck a good balance between the interests of the sending, transit and receiving States and between the role and functions of the diplomatic courier and the extent of the immunities granted him as well as the safeguards provided for the protection of the inviolability of the diplomatic bag. His delegation found the draft articles provisionally adopted by the Commission at its thirty-sixth session, and the revised text of articles 1 to 8, fully acceptable. In view of the content of the remaining articles and the stage reached in the Commission's work, the General Assembly should recommend to the Commission to complete, at its thirty-seventh session, a first reading of the draft articles on the topic. His delegation did, however, feel that article 17, paragraph 3, which permitted inspection or search of the courier's temporary accommodation weakened the guarantee of immunity and made violations possible. It was also concerned that the Commission had been unable to adopt the draft article on immunity from jurisdiction. The need to grant the diplomatic courier such immunity, and to embody in the future convention a guarantee of the inviolability of the diplomatic bag, was quite obvious, especially in view of the frequent violations. The counter arguments were contrived, unfounded and designed to justify gross violations of the status of the diplomatic courier and diplomatic bag.

25. His delegation was seriously concerned at the continued use of the concept of "limited" or "functional" immunity as the basis for the draft articles on jurisdictional immunities of States and their property. The Special Rapporteur on the topic referred for the most part to the case-law of only some countries. Although, for historical reasons, there was a lack of relevant case-law in many countries, the study of State practice should not be limited to judicial proceedings, but should also include legislative practice. It was also quite wrong to link different approaches to the legal nature of the status of a State to ideological differences, as a careful study of the position of States on the question showed clearly that the groups of States supporting the two differing concepts of State immunity were not so divided on the basis of differences in ideology.

26. In view of the modern tendency for the State sector to occupy an important place in the economy of many countries, including the developing countries, attempts to view the different aspects of the economic functions of States as not relating to their public activities were increasingly futile. In international relations, a State always acted as the holder of governmental power regardless of the organ which acted in its name in pursuing economic activities. State immunity derived from the principle of sovereign equality of States; that must be the key factor in the approach towards codification and was the only correct way to

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formulate a generally acceptable convention. Given the two different concepts of State immunity, such a convention could be achieved only if the draft articles viewed State immunity from foreign jurisdiction as the general rule, with exceptions to immunity requiring the consent of the State in each case.

27. The draft articles showed a clear trend towards the limitation of State immunity, and their wording permitted a broad interpretation which, in turn, artificially promoted the concept of "functional" or "limited" immunity. The same end was served by the unsubstantiated inclusion in some articles of a list of cases in which a State could not invoke immunity from the jurisdiction of the courts of another country. Thus, article 13 excluded the invocation of immunity in proceedings relating to contracts of employment, but did not indicate whether it was the law of the State of the forum or that of the employer State that was applicable in such proceedings. Article 14 lacked the necessary clarity and completely overlooked the obvious point that the nature of a State's conduct could be determined only on the basis of international law within the framework of the concept of the international responsibility of States, a matter which did not lie within the competence of national courts. Draft article 16 (b) would open the door to violations of the rights of developing countries to the advantage of transnational corporations, which were the most frequent "third person" in the situations covered by that article. Draft article 17 was unacceptable since it also offered a pretext for undermining the principle of jurisdictional immunity of States and their property and was superfluous. It was not clear which "companies or other collective bodies" were being referred to in draft article 18, an article which could be interpreted in completely opposite ways and, consequently, permitted abuses and opened loopholes for violations of State immunity.

28. The question of international liability for injurious consequences arising out of acts not prohibited by international law was a novel and difficult topic, which explained the divergences of views. There were currently no universal rules of international law obliging States to compensate for damage arising out of lawful activities. Such an obligation could derive only from appropriate international agreements on specific subjects. State practice was moving in precisely that direction, as could be seen, for example, from the 1972 Convention on International Liability for Damage Caused by Space Objects. The number of similar conventions would undoubtedly increase. They would, however, have an extremely narrow scope, dealing with specific forms of lawful activities. The Commission should aim at a draft which set forth the underlying principles to be applied, where possible, to all cases of damage arising out of such activities and to serve as a normative basis for the preparation of specific legal instruments. Therefore, there was no reason to include strict liability in the draft.

29. The particularities of each river and the ways in which it could be used meant that it would not be useful to prepare universal rules on the non-navigational uses of international watercourses, as it would not be possible to arrive at a generally acceptable convention which would be ratified by a significant number of States. Work on the topic would be meaningful only if the aim was to formulate general rules and recommendations which States might use as a guide in concluding bilateral

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or multilateral agreements on particular rivers and specific forms of non-navigational uses. Such provisions should define the general legal basis of the régime of non-navigational uses of international watercourses, formulate clearly the normative content of the generally acceptable principles and norms of international law applicable to the topic, and give a more precise practical form to those general principles, together with the corresponding obligations on which States should base their practical activities when determining in treaty form the legal status of each specific watercourse.

30. Mr. RAO (India) said that his delegation agreed with the Commission's pragmatic decision to limit the scope of the draft Code of Offences against the Peace and Security of Mankind to the criminal responsibility of the individual; to decline to apply the concept of the criminal responsibility of the State for various well-known political and practical reasons; to prepare a list of offences which constituted the most serious breaches of international law; to examine for that purpose a number of relevant international instruments, retaining the 1954 draft as a working hypothesis; to identify, for possible inclusion in a code, certain offences not covered by the 1954 draft, such as colonialism, apartheid, use of atomic weapons, acts against the environment, mercenarism and certain acts of terrorism and economic aggression.

31. The Commission was justified in its decision to consider carefully the alternatives involved, including the need to find generally acceptable legal formulations. It was also appropriate for the Commission to await the conclusion of the work of the Ad Hoc Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries before it proceeded to deal with the offence of mercenarism.

32. The use of atomic weapons should be included as an offence in the Code. A well-established principle of international law prohibiting the use of nuclear weapons had emerged. Such use was bound to result in wholesale damage to all forms of life, property and the environment.

33. With respect to the revised set of draft articles contained in the Special Rapporteur's second report on the law of the non-navigational uses of international watercourses, the international community of lawyers, in collaboration with scientists and engineers, had sought to clarify certain concepts and to crystallize some generally acceptable policies. It had thus been accepted that, at the international level, only general principles should be dealt with and the States concerned should be allowed to enter into specific agreements with respect to individual rivers; that each State was entitled to an equitable share of the waters of an international river and had the sovereign right to determine the manner in which it would use its share, with the obligation, however, to protect the quality of water and the environment and to avoid any appreciable and avoidable harm to other basin States; that no use by one State was entitled to a preference over another use by another basin State, nor could any State be denied a current reasonable use of waters belonging to its share in order to provide for a future use by another basin State; and that a basic objective of the framework containing

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general principles should be to promote co-operation by balancing relevant and legitimate interests of all the basin States.

34. The International Law Commission had responded well to several of those principles and had recognized the need to devise general rules designed to promote the adoption of special régimes suitable to individual rivers.

35. His delegation regretted the dropping of the word "system" from "international watercourse system" and the elimination of the concept of "shared natural resource" in the Special Rapporteur's second report. The resulting loss of clarity in the definition was unacceptable.

36. The criteria used to define the international watercourse in terms of "cause and effect" needed to be carefully considered to avoid controversies among neighbours. Similarly, the right to participate in the negotiation of a régime concerning an individual river should not be open to all "watercourse States", but only to those affected by a particular scheme.

37. Article 8 should be so drafted as to promote co-operation rather than conflict among watercourse States. It should also protect the basic autonomy of each State to determine its share of "reasonable and equitable use" and the manner in which it wished to utilize that share. His delegation welcomed the factor noted in article 8, paragraph 1 (c), which emphasized the basic principle of balancing the rights and interests of all.

38. Paragraph 1 of article 1 used the term "States" or "watercourse States" while paragraph 2 used only the term "State". The appropriate term alone should be used in various contexts. Article 3 did not provide any criteria to determine the "relevant components or parts". Devoid of proper clarification, that article could lead to disputes in interpretation and implementation. Article 4 must be drafted to mean that special watercourse agreements could be concluded so as to adjust the framework agreement to the particular characteristics and uses of individual watercourses. Further, it must be made clear that the framework agreement did not take precedence over any of the provisions agreed upon among watercourse States with respect to a watercourse or parts thereof.

39. With regard to article 5, only those States substantially affected by a project should participate in the negotiation of a watercourse agreement and were entitled to become parties to it.

40. While article 6 was a positive improvement, the important concept of "beneficial uses" was missing. His delegation recommended that a more appropriate expression was "reasonable and equitable share in the beneficial uses of waters".

41. Article 7 should be drafted in recommendatory rather than mandatory language. It must be left to the watercourse States concerned to determine what constituted "optimum utilization". That concept was essentially in opposition to "maximum use or yield" and encompassed all beneficial uses, the minimization of all adverse effects and the conservation of resources.

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42. Article 8, paragraph 1, should indicate the factors in an illustrative way, and the term "inter alia", common to such lists, should be used in the chapeau.

43. Article 29 (15 ter) might be placed after the current article 8 in chapter II. Further, the scope of the use of the term "equitable participation", as distinct from "equitable sharing" needed to be clarified, if those concepts were intended to be different.

44. It was not advisable to impose any system of settlement of disputes without consideration of the type of friendly relations existing among the States concerned or the complexity of the particular case. A more recommendatory language would be in order, in conformity with the basic principle of free choice of means.

45. Article 9 was broadly acceptable, but must reflect the reality that, despite its best intentions and efforts, a State might sometimes be unable to prevent "harm" to another State. It was better to draft the article to suggest more clearly that a State should do everything in its power to avoid harm to another State.

46. Articles 10 to 19 were desirable, progressive formulations, and did not appear to be based on any existing principles of law. They appeared to be more appropriate for inclusion in particular watercourse agreements and deserved to be mentioned briefly in a framework convention. Articles 15 to 19 could be reduced to a single article.

47. The central aspect of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier was to ensure freedom of communication between States and diplomatic missions, as well as inviolability of the diplomatic bag. An article should be included on the duties of the sending States. In order to avoid abuses, it was also important to emphasize the right of the receiving State to prescribe the maximum size of a diplomatic bag, and to apply the regulation in a non-discriminatory manner.

48. Mr. BERNAL (Mexico) said that a convention on jurisidictional immunities of States and their property, based on State practice, was urgently needed. While an inductive method should be used in the drafting of such an instrument, the Commission could not ignore existing principles of international law from which rules might be derived.

49. In the absence of a body of treaty norms, some States had begun to adopt internal legislation which could have the effect of precluding States from flexibly negotiating and accepting a multilateral instrument in the future. Some of those laws, which were based on the theory of relative immunity, contained many norms that greatly diluted the right of States to jurisdictional immunity. Using the argument of the independence of the executive and judicial branches, some States of the forum were refusing to intervene in their own courts on important matters when so requested by foreign States. A State, however, could be held directly responsible for the acts or omissions of any of its organs which violated the

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rights of another State. Without necessarily violating the principle of the division of powers provided for in its constitutional system, the executive branch of a State had an influential role to play in that field.

50. With respect to chapter IV of the Commission's report (A/39/10), his delegation was concerned at the vagueness of the terminology used in article 3, paragraph 2, which did not make it clear which entity was competent to determine whether a contract was commercial or not. If such determination by the judicial organ were exclusively unilateral, the foreign State would be placed in a disadvantageous position and that would give rise to constant disputes.

51. Article 6, paragraph 1, was incorrect since it stipulated that a State enjoyed immunity from the jurisdiction of another State in conformity with "the present articles", when in reality it enjoyed such immunity under international law. It would be advisable to combine the two paragraphs into a single provision stipulating that a State enjoyed immunity from the jurisdiction of another State under international law, and that such immunity would be enjoyed in accordance with the provisions of the present articles.

52. With respect to draft article 7, paragraph 2, it was not sufficient that a State should have been the object of the proceeding against it, but also that the result indicated was produced. Paragraph 3 should include the concept that the State itself had the right to determine, in conformity with its national legislation, which should be considered its organs, agencies or instrumentalities. Further, it would be more appropriate to refer to "functionaries with respect to an act performed in that capacity", since "representatives" might be confused with diplomatic and consular agents, who had a different legal status in international law.

53. Two paragraphs should be added to article 7, the first requiring States to enact legislation on State immunity from the jurisdiction of the courts of other States and the second establishing the duty of the State to take the necessary measures to prevent physical or legal persons of the nationality of the State of the forum from abusing the procedures under their national legislation to the detriment of other States.

54. A second paragraph, strengthening the provisions of draft article 9, paragraph 2, should be added to draft article 8. Such a paragraph would provide that the entering of an appearance by a State in a proceeding before the court of another State should in no way be interpreted as proof of express consent. It should be made clear, in the present article 8, subparagraph (c), that the declaration before the court in a specific case, whereby the State consented to the exercise of jurisdiction by a foreign court, must also be express and in writing.

55. While correct, draft article 9, paragraph 3, was insufficient. The provision should be added that failure to appear in court would not result in the State losing the immunity which it enjoyed under international law. His delegation had serious doubts with respect to the contents of draft articles 13 to 18, which

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tended to increase the number of exceptions to the principle of State immunity. Those articles should be carefully revised so as to prevent such exceptions from becoming the general rule. That tendency would make it very difficult for his delegation to accept the draft articles. It objected, in particular, to any notion that draft article 14 could be considered a reflection of international practice.

56. With respect to the law of the non-navigational uses of international watercourses, Mexico had institutionalized its practice through the establishment of effective mechanisms such as bilateral boundary and water commissions, which covered some aspects of the uses of international watercourses. Other aspects, however, such as underground watercourses, required a general, multilateral agreement.

57. His delegation was satisfied with the Commission's general approach to that topic, particularly its use of the expression "international watercourse", which was more precise and therefore more acceptable than the geographical concept of "drainage basin". His delegation was pleased that the Commission had practically abandoned the concept of "shared natural resource", which infringed the sovereign rights of States over their permanent resources. The term "shared natural resource" implied, wrongly, that it was the ownership of the resource that was shared. His delegation favoured the use of terms such as "transboundary natural resource" which would refer to geographical location. The language of draft article 6 still presented certain difficulties, in particular the notion that States should "share in the use of the waters". That notion could also dilute the nature of the sovereign rights of a State over its natural resources, since it could be interpreted as meaning that the waters on that State's side of the frontier could be used by a neighbouring State. The principle that, once a State had received its equitable share of transboundary waters, it had the sovereign right to use them exclusively, provided that it did not cause damage to others, should be respected. Any reference, therefore, to dividing or sharing a transboundary resource, or even to its use, should be rejected. The concept that States should "regulate the use of the waters" should be established. Any concept that would diminish the States' ownership of their natural resources, including those in their portion of a transboundary location, would, in his delegation's view, be contrary to resolutions adopted by the General Assembly since 1962 on permanent sovereignty over natural resources. The Constitution of Mexico established that natural resources were the property of the nation and as such inalienable. Any concept of shared natural resources was therefore unacceptable to his delegation.

58. Mr. BHINDER (Pakistan) noted that the stage reached in the work on each of the seven topics which the Commission was studying indicated that they might not be finalized during its current term. Long delays in finalizing draft articles either resulted in a dilution of the importance of the topics or meant that work on them became partially outdated through rapid changes in the international situation. That situation could be rectified by restricting the number of topics allocated to the Commission at any given time and by requesting the Commission to finalize draft articles on at least some of its topics during each of its terms. His delegation was not, however, in favour of extending the length of the Commission's session or of holding biannual sessions.

(Mr. Bhinder, Pakistan)

59. Commenting on the content ratione personae of the draft Code of Offences against the Peace and Security of Mankind, he said that, in international law, the State was liable for an individual's misdeeds. The individual could be held responsible in certain cases, but it would be extremely difficult to delineate individual and collective responsibilities in such cases as crimes against peace, crimes against humanity or economic aggression. The question of individual State responsibility in respect of the perpetration of the offences listed would require to be studied in depth.

60. With regard to the content ratione materiae, his delegation understood that the topic was limited to those offences which by their gravity and volume, could endanger international peace and security. The Commission should confine itself to universally recognized offences, for the prevention or punishment of which there was a general demand. With regard to implementation of the Code, an international forum for the attribution of guilt and the machinery effectively to execute a judgement were necessary. The inappropriateness of States passing judgement on themselves, clearly indicated that it was necessary to strengthen the role of the United Nations in that regard.

61. Although the increasing intensity of diplomatic activity had increased the need to codify the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, his delegation felt that the topic had been accorded undue urgency and importance. Other topics, which endangered international peace and security, were of far greater significance and should be accorded priority. The draft articles on the topic should be based on the relevant provisions of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations which tried to strike a balance between the interests of both the sending State and the receiving State. The draft articles so far gave the impression that that balance had been upset, to the advantage of the sending State. Since each State was both a sending State and a receiving State a genuine working balance was the desired goal. It had been pointed out that the sovereignty and equality of States were the guiding principles in relation to the privileges and immunities of the courier and the bag. Absolute immunity was not consistent with the principle of the equality of States. The privileges and immunities of the courier and the bag had to be balanced with the interests of the receiving State.

62. The basic element of the topic was the diplomatic bag. Its inviolability was not an end in itself but a means to ensure the secrecy of official communications, the protection of which was an important derivative of the sovereignty of States. The increasing misuse of the diplomatic bag was generating scepticism regarding the principle of the inviolability of the diplomatic bag: the draft articles should adequately cater for the prevention of such incidents, if the Commission's work on the topic was not to be merely an academic exercise. The draft articles on the diplomatic courier were so elaborate and extensive that they conveyed the impression that every bag was accompanied and that couriers stayed at places for long periods. Those draft articles did not reflect existing practice and went beyond the régimes established by the two Vienna Conventions. They needed to be adapted in that light, as well as in order to balance the interests of all States concerned.

(Mr. Bhinder, Pakistan)

63. Work on the topic entitled "Jurisdictional immunities of States and their property" should be completed as soon as possible, in view of the increasing number of States that were granting restrictive immunity. The absence of clear rules, the variety of national legislation and conflicting judgements of different national courts had made the codification of the topic all the more important. His delegation felt that a balance had to be achieved between total State immunity on the one hand and reducing immunity to the point where a State was inhibited from undertaking desirable activities, on the other.

64. Draft article 1, on the scope of the articles, could be interpreted as asserting the basic principle of the immunity of a State. However, since the bulk of the draft articles dealt with exceptions to a rule, specific and prominent mention of such a rule in article 1 would be desirable. In the penultimate line of draft article 3, it was not clear to which State the words "that State" referred. In draft article 13 ("Contract of employment"), his delegation felt that employees of dual nationality, i.e. the nationality of the employer State and of the State of the forum, should be included in paragraph 2 (d), relating to a national of the employer State. Draft article 14 clearly implied that a State had to submit to jurisdiction, regardless of the fact that death or injury to the person or damage to or loss of tangible property had occurred as a result of an activity which was immune from jurisdiction or subject to exceptions. The matter required clarification. The article was only applicable if the author of the act or omission was present in the territory at the time of the act or omission. However, it might happen that a commodity might cause death or injury to the person or damage to or loss of tangible property while the author of the act or omission was not present in the State or forum. He concluded his observations on that topic by stating that the exceptions were so extensive that they left very little room for State immunity to operate.

65. The topic entitled "The law of the non-navigational uses of international watercourses" was of great importance in view of mankind's dependence on and increasing demand for fresh water resources. His delegation therefore urged the Sixth Committee to request the Commission to accord priority to the topic. He could not overemphasize the importance of water to Pakistan, where the increasing population and industrial expansion were drawing heavily on shrinking water resources.

66. In his delegation's view, the draft articles should be based on the following principles: (i) the waters of an international river should be equitably apportioned among riparian States, having due regard to special circumstances, such as dependence on or traditional use of water by a particular State; (ii) the exercise of rights within its territory by a riparian State should not affect the flow of water, which might result in harmful ecological and physical changes in the territory of other riparian States; (iii) the utmost care should be taken to prevent the pollution of waters; (iv) where the utilization of water was likely to cause damage or hardship to another riparian State, the prior consent of that State should be required; (v) a right which could be exercised in more than one way should be exercised in such a manner as not to cause damage to another riparian

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State; (vi) a riparian State should be compensated adequately for the loss suffered or the damage caused by the misuse by another riparian State of its rights; (vii) riparian States should be under legal obligation to settle their disputes peacefully, either bilaterally or in international forums.

67. His delegation would prefer to wait before offering specific comments on the draft articles until a new Special Rapporteur had submitted his report.

68. The annual International Law Seminar was a positive contribution to the cause of international law. The majority of participants came from developing countries. They were able to avail themselves of that opportunity through fellowships. He thanked those States which had contributed to the fellowships fund and urged them to increase their contributions and other States to join them.

69. Mr. ENKHSAIKHAN (Mongolia) said that he hoped the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier could be finalized before the expiration of the present mandate of the Commission. The diplomatic courier and the diplomatic bag played an essential part in ensuring vital communications between State organs conducting foreign policy and those implementing it. Because of the sensitive nature of diplomatic correspondence, any infringement of secrecy could have an adverse impact on international relations, as recent events had shown. His delegation therefore believed that a universal legal instrument on that important question should be worked out as soon as possible. With regard to draft article 23, dealing with immunity from jurisdiction, his delegation believed that the diplomatic courier should be entitled to full immunity from criminal jurisdiction because of his position and functions, and in that respect it fully shared the views expressed in paragraph 191 of the report. That draft article could be adopted after some minor drafting changes that had already been proposed in the Committee. Article 36, on the inviolability of the diplomatic bag was one of the most important articles of the draft. The diplomatic bag, in view of its inviolability, should be exempt from any kind of examination, including through the use of electronic or any other devices. It therefore fully supported the Special Rapporteur's formulation of that draft article.

70. Chapter III of the draft articles on the jurisdictional immunities of States and their property was a very important one. The articles in that chapter should not only conform to the provisions of the previous two chapters, but should fully reflect existing State practice. He regretted that the sixth report of the Special Rapporteur on the topic did not take into account the State practice of States having different social systems. The material used was based on the practice of a few developed capitalist countries and reflected the concept of "restrictive", "functional" immunity. However, in many States, especially socialist States, the State itself, through its appropriate organs, could perform economic functions. Since those functions were attributed to the State itself, the organs concerned should enjoy jurisdictional immunity from foreign courts. His delegation therefore believed that the draft articles presented by the Special Rapporteur should be redrafted to reflect fully existing State practice and the positions of States having different social systems.

(Mr. Enkhsaikhan, Mongolia)

71. The topic of international liability for injurious consequences arising out of acts not prohibited by international law was growing in importance. The number of legally permissible activities with potentially injurious consequences was increasing. It would be wrong to allow such activities to proceed without regard to their effect upon conditions of life in other countries. With regard to the first five draft articles on the topic, his delegation supported the approach taken by the Special Rapporteur that the scope of the study should be limited to physical activities within the territory or control of the State giving rise to physical transboundary effects, rather than referring in general to any transboundary effects. It also shared the view that the scope of the topic should be confined to the duties of States to avoid, minimize and repair physical transboundary harm resulting from physical activities within the territory or control of a State.

72. His delegation believed that the correct approach in the formulation of principles was to emphasize the avoidance or the minimizing of injury, rather than reparation for injury caused.

73. That topic had some links with that of State responsibility, since both dealt with actions and omissions of States that infringed the sovereign rights of other States and thus entailed international responsibility or liability. The difference was that the topic on injurious consequences dealt with acts that were not prohibited by international law. He noted that draft article 1 on State responsibility implied that acts other than internationally wrongful ones could involve international responsibility. The aim of the work on both topics was to elaborate norms that would enhance the responsibility and liability of States with regard to other States.

74. The link between the two topics should be further explored. In some cases, physical activities within the territory of a State might cause some harmful transboundary effects that could be considered a real threat to the national security interests of a neighbouring State. He cited the dumping of toxic chemicals or nuclear wastes, which posed long-term environmental hazards. The problem was not a hypothetical one: the piles of nuclear waste were growing. In such cases, the physical consequences of States' activities not prohibited by international law might, by their total effect, amount to a crime as defined in article 19, paragraph 3 (d) of the draft articles on State responsibility.

75. The question of States' duty to avoid causing transboundary harm, including the duty to co-operate and consult with neighbouring States, and the rights of the potential victim State should be further elaborated. In his delegation's view, in cases where a State had reason to believe that its activities might have transboundary effects, it was duty-bound to consult the State that might be affected, and every effort should be made to strike a balance between freedom of action and freedom from transboundary loss or injuries.

The meeting rose at 6 p.m.