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Chairman: Mr. GOERNER (German Democratic Republic)

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The meeting was called to order at 10.50. a.m.

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

1. Mr. SUESS (German Democratic Republic), referring to chapter V of the ILC report (A/39/10), said that the fifth report, prepared by the late Professor Quentin-Baxter, on international liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/383 and Add.1) was a promising starting point for further discussion of the issue by ILC, which would also be provided with the Survey of State practice prepared by the Secretariat. He shared the view of many members of ILC that the draft articles proposed by Special Rapporteur (articles 1-5) should be discussed together with the substantive provisions which still had to be elaborated and which would be essential for the better definition of certain basic questions such as those concerning the basis and limits of the obligation to co-operate and the formulation of the balance of interests between the injuring and the affected State. At the present stage of the discussion, his delegation shared the doubts expressed with regard to the definitions of the pairs of terms "activities and situations", "territory and control" and "use and enjoyment".

2. His delegation could state with satisfaction that the Special Rapporteur's fifth report had been laid out more realistically than its predecessors, particularly since the development of appropriate procedures and modalities had replaced the search for legal regulations in the strict sense of the term. It remained undisputed that the main way of solving transboundary problems was the conclusion of intergovernmental agreements based on the interests of the States concerned and taking into account the full range of relations between those States.

3. With regard to the substantive provisions that remained to be elaborated, his delegation would like to underline that, in the case of injurious consequences arising out of acts not prohibited by international law, there was in current international law no general obligation to take preventive measures, no obligation for reparations and no obligation for the establishment of standards. It could not be the task of the Commission to create such general norms. However, it seemed to be possible and practicable to elaborate a "code of conduct" of which States would make use in order to negotiate the relevant agreements. Such a code of conduct would contain procedural provisions based on the principle of co-operation whose non-observance would not automatically be followed by responsibility for the violation of obligations.

4. On the law of the non-navigational uses of international watercourses, his delegation shared the view of the Special Rapporteur that one of the focal points of the codification of the law on the matter was to reach the right balance between the rights and duties of all riparian States. However, the work completed so far did not seem always to have succeeded in reaching that objective. In the understanding of his delegation and, apparently, that of the majority of representatives, the task of ILC was to elaborate a draft convention which could serve the riparian States of international watercourses as a framework for the

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elaboration of their specific agreements concerning watercourses. That view seemed to be shared by the majority of representatives in the Sixth Committee. His delegation supported the opinion voiced in the Commission that a framework agreement should be short and adaptable to the specific conditions of international watercourses, thereby enabling riparian States to elaborate watercourse agreements corresponding to the specific conditions of their respective watercourses.

5. His delegation would like to make a detailed analysis of the second report of the Special Rapporteur (A/CN.4/381 and Corr.1). On account of the negative attitude taken by the majority of States at the thirty-eighth session, the Special Rapporteur, in his second report, no longer used the term "international watercourse system". He had instead returned to the term "international watercourse" which had been used by Mr. Schwebel, the second Special Rapporteur. While welcoming that decision, his delegation nevertheless noted that the report continued to include elements of the "system" concept. The formulation "the relevant parts or components" contained in article 1, paragraph 1, could be interpreted in no other way. In a framework agreement, a definition such as "an 'international watercourse' is a watercourse - ordinarily consisting of fresh water - situated in two or more States" would be sufficient.

6. Moreover, article 4 should be adapted to the character of a framework agreement. From paragraph 1 of that article, in its present form, it must be concluded that only those watercourse agreements remained unaffected by the future convention which fulfilled the substantive criteria listed in that article. In the interest of the stability of existing treaty relations, it was sufficient to state that existing agreements regarding the use of water were not affected by the convention, without imposing restrictions on that rule.

7. His country appreciated that, in his second report, the Special Rapporteur had renounced the definition of international watercourses and their waters as "a shared natural resource", a concept that had been rejected by it and by a number of other delegations. The starting point for the provision of utilization rights could not be the statement that every riparian State had a "reasonable and just share" in the use of water of the international watercourse on its territory. The starting point must rather be the principle of the permanent sovereignty of States over their natural resources. That principle, repeatedly confirmed by the General Assembly, should be included in a framework agreement which would recommend to riparian States that they should seek agreement on the distribution of the uses in an equitable and reasonable manner. In principle, his delegation had no objection to the "equity" principle on which article 7 was based. Nevertheless, it considered it more favourable to regulate the allocation of possible forms of use among the riparian States of an international watercourse according to the principles laid down in article 59 of the United Nations Convention on the Law of the Sea and to leave it to the parties to bilateral and multilateral watercourse agreements to decide on the criteria for sharing in accordance with the principle of the sovereign equality of States.

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8. Chapter III of the draft articles was, for a framework agreement, too specific. The obligations regarding notification contained in articles 11-14 were formulated in such a way that the upper riparian States were disadvantaged compared with the lower riparian States, and that their sovereign right to use was conceived only as an exceptional right. His delegation held the view that Chapter III should be revised and simplified and the obligations for co-operation and information should be brought into line with those contained in the 1979 Convention on Long-Range Transboundary Air Pollution.

9. Articles 25-30 (Chapter IV of the draft) lacked the necessary conformity with State practice. In particular, articles 21-24 on environmental protection, which defined the objectives of environmental protection in the context of the draft, could not be accepted in the form suggested by the Special Rapporteur. The concern of the latter to protect, as far as possible, the natural resource represented by water against pollution was, without doubt, fully justified. However, it had to be taken into consideration that industrialization and urbanization as well as technical and technological developments would require considerable consumption of water, which would necessarily lead to pollution. The majority of bilateral as well as multilateral conventions adopted for the protection of the sea contained a relative prohibition of pollution and only prohibited the dumping of particularly dangerous substances. It seemed that the environmental protection obligations foreseen by the Special Rapporteur went beyond what the majority of States was at present prepared to adopt.

10. His delegation proposed to stipulate in article 23 the principle of the prohibition of pollution with transboundary effects of appreciable extent and to reserve its specification to the riparian States of international watercourses. A framework agreement on the law of the non-navigational uses of international watercourses would only be useful for the riparian States when it realistically reflected the status of State practice, left room for future developments and formulated the rights and duties of upper riparian States and lower riparian States in a balanced manner.

11. With regard to the question of State responsibility, the subject of chapter VII of the report under consideration, he welcomed Part Two of the draft articles on the topic, which made it possible to embark on substantive discussions. It was important that the draft should now proceed from the position of the injured State and not from the protection of the State violating international law against the claims of the injured State. The main weakness of the draft was that, although it made a formal distinction between the different régimes of international responsibilty, it did not deal in sufficient detail with the legal consequences of the various crimes and offences. In particular, in view of the dangers of the current international situation, it was very important to designate precisely the legal consequences of international crimes and the possible reactions of States and peoples.

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12. In that connection, the provisions of articles 14 and 15 were insufficient, and it should be explicitly underlined that the victim of an international crime was authorized to apply unilaterally and immediately the necessary sanctions which, in the case of an act of aggression, could culminate in the right to self-defence. In addition, mention should be made of the possibility of claiming reparations, the right to demand guarantees against the repetition of the crime and the criminal liability of individuals.

13. The definition of the term "injured State" contained in article 5 would benefit by further examinaton, taking into account the fact that the same offence could have different detrimental consequences for different States, which could lead to different claims and reactions; that was true of both bilateral and multilateral treaty relations. Account should also be taken of the degree of injury, and a distinction should be made between directly affected States and indirectly affected States. In any case, a more flexible formula would be desirable.

14. With regard to article 6, the Special Rapporteur had rightly chosen to deal only with the fundamental elements of the obligation to make reparations. However, it would be preferable to deal separately with claims concerning restitution and those concerning compensation; such a step would make redundant the separate provisions relating to breaches of international obligations concerning the treatment of aliens (art. 7) and would also make it possible to accentuate, in a different provision, the duty of restitution in case of the violation of an obligation arising out of a peremptory norm of general international law. On the other hand, it could be stated more clearly, that, in the case of impossibility and where the duty of restitution would represent an unreasonable interference with sovereign rights, that duty was replaced by a duty of compensation.

15. The provisions concerning the suspension of obligations on the basis of reciprocity and those concerning reprisals required further consideration. The limitations established in articles 10 to 13 with regard to the application of reprisals were indeed too restrictive. On the other hand, in view of the behaviour of some States, a definite regulation prohibiting armed reprisals was absolutely necessary.

16. As for the programme of work, his delegation would welcome the conclusion of the first reading of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, as well as of Parts Two and Three of the draft articles on State responsibility, by the Commission before the expiration of the current term of office of its membership. In view of the importance of a code of offences against the peace and security of mankind, it would be desirable for the Commision to submit the first draft articles by 1985.

17. Mr. NZAKUNDA (Rwanda) said, with regard to chapter II of the report of the Commission (A/39/10), that his country had no objections, of course, to the inclusion of a code of offences against the peace and security of mankind in the international legal order. His delegation felt that such a code should comprise two major parts: the first dealing with offences and the punishment of those offences in general, and the second with offences and their punishment in particular.

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18. In the first part, the Commission should give a definition of an international crime; that part would also contain a classification of penalties according to the various kinds of acts that were established as international offences against the peace and security of mankind. The Commission should provide for penalties against individuals or States found guilty of a particular international crime, because an international rule could be effective and respected only if it was matched by a sanction, and the code should play a preventive and deterrent role. His delegation remained convinced that the Commission should endorse the principles of nullum crimen sine lege and nulla poena sine lege.

19. The second part of the code should include the three categories of offences against the peace and security of mankind decided on by the Commission (A/39/10, para. 42, 43, 45 and 47) and the corresponding penalties. It was in that part that the penal sanctions corresponding to the categories of offences selected should be decreed. As for offences such as colonialism, apartheid, the use of atomic weapons, damage to the environment, mercenarism, the taking of hostages, piracy and the hijacking of aircraft - a list of which had been drawn up subsequently to the draft Code of 1954 - the Commission would have the task of classifying them, after a close examination of their characteristics, into the categories of offences which it had established.

20. For example, no one would hesitate to classify apartheid in the category of crimes against humanity, as it was associated with offences such as the violation of the right to life, ill-treatment of political prisoners, detained persons and freedom-fighters, forced displacements of population and racial discrimination. Although some States were not parties to the International Convention on the Suppression and Punishment of the Crime of Apartheid, apartheid was none the less a crime against humanity. It could not be said that apartheid was not an "international crime" and therefore not punishable merely because it was practised by only one country.

21. Another question which arose in connection with the code was that of the creation of an international criminal jurisdiction competent to take cognizance of offences established as crimes by the draft code. It would have to be a tribunal empowered to pass judgement on the claims for reparations submitted by the victims of international crimes or their dependents and also on factors such as aggravating or mitigating circumstances accompanying an offence.

22. His delegation approved the Commission's decision to restrict itself, at least at the current stage, to the criminal liability of individuals (paras. 32 and 65 of the report). The draft code should not, however, omit to emphasize the personal character of the criminal liability of individuals; an express provision on that point was called for. Moreover, individuals were not the only ones that might be guilty of offences against the peace and security of mankind. The State, the subject of international law par excellence, should also assume criminal liability and make reparations for the injuries which it caused to victims; the Commission should take account of that in its draft code.

23. The international community needed a binding legal instrument. That was why the Commission should, in the light of the observations made in the Committee, make an effort to complete the work which it had begun 35 years earlier.

24. Mr. FREELAND (United Kingdom) said that chapter II of the report of the International Law Commission (A/39/10) gave rise to considerable reservations on the part of his delegation. With regard to the content ratione personae of the draft code, he noted with satisfaction that the Commission had decided to devote its efforts exclusively to the criminal responsibility of individuals, even though the qualification "at least at the present stage", in paragraph 32, was over-cautious. As for the content ratione materiae of the draft code, his delegation noted with regret that the fears which it had voiced at the time of the adoption of resolution 38/132 had been well founded.

25. On the question of methodology, his delegation believed that the Commission had been wrong to devote itself exclusively to the preparation of a list of offences instead of elaborating an introduction, as the General Assembly had invited it to do. If the work of the Commission was to have useful results, it must be determined what, in reality, constituted an "offence against the peace and security of mankind". The Commission would surely have been better advised to establish, even on a provisional basis, criteria to be used for the purpose of testing offences which had been or might be suggested for inclusion on the list called for in resolution 38/132. That procedure would have made it possible to refine the criteria while testing proposed offences against the criteria.

26. The elaboration of general criteria combined definition of particular offences, might have been more in keeping with the General Assembly's intentions. It was not entirely clear from the account of the debate on that subject in the Commission why ILC had deviated from the decision it had taken at its preceding session to combine the deductive method closely with the inductive method. The 1954 draft Code, notwithstanding the criticisms which had been levelled at it in the past, had at least contained elements of a general definition in articles 1, 3 and 4. According to those provisions, it had at least been established that offences against the peace and security of mankind were crimes under international law, that the responsible individuals should be punished, that if a person who had committed such an offence had acted as Head of State or as responsible Government official, that did not relieve him of responsibility for having committed the offence, and that if a person charged with such an offence had acted pursuant to an order of his Government or of a superior, that did not relieve him of responsibility in international law if it had been possible for him not to comply with that order.

27. The Commission might therefore have started with those elements as the first step towards the selection of criteria that would make it possible to determine what constituted an offence against the peace and security of mankind. Otherwise what ILC had called the study of the living tissue might degenerate into an exercise that was not only in abstracto but also in vacuo, and the subsequent preparation of an introduction would become mere self-validation.

28. Instead of following the combined inductive/deductive approach it had charted, the Commission had made use of an implicit criterion which consisted in including the offences appearing in the 1954 list and those mentioned in various recent, or comparatively recent, international documents. The documents listed in paragraph 50 of the Commission's report had widely differing legal status, as had

(Mr. Freeland, United Kingdom)

been pointed out during the debate. Some of those documents in fact contained no mention of criminal acts at all, let alone international crimes. The listing of offences without reference to carefully worked-out criteria based on established international law might result in a concept of offences against the peace and security of mankind as a further pejorative slogan with little specifically legal content.

29. The Commission should adopt another approach, taking as its starting point its decision to devote its efforts exclusively to the criminal responsibility of individuals. It would thus have to consider the feasibility of establishing an international criminal jurisdiction and defining the conditions under which such a jurisdiction would function; otherwise, the criminal responsibility of individuals would remain an abstract concept. In addition, if the Commission focused on the criminal responsibility of individuals, it would need to conduct a precise analysis leading to a precise definition. In dealing with the practical consequences of its decision, the Commission could no longer limit itself to conceptual generalities, since, without a precise definition of criminal conduct, the notion of pursuit and punishment became meaningless. Terms such as "colonialism", "serious damage to the environment" and "economic aggression" seemed unacceptably vague and ambiguous in such a context.

30. The Commission also showed a disturbing tendency to make indiscriminate use of expressions such as "offence against the peace and security of mankind", "crime against humanity" and "international crime", as if those expressions were synonymous, even though the Commission itself recognized that not every international crime was necessarily an offence against the peace and security of mankind. The technique of posing a choice between a "minimum content" and a "maximum content", to use the Commission's terminology, might imply that general agreement already existed on the crimes listed under the rubric "minimum content". It was questionable, to say the least, whether all the items listed under "minimum content" had a sufficient connection with criminal conduct under international law. The vague reference in paragraphs 54 to 57 to the use of atomic weapons clearly illustrated that problem since, as the Commission had pointed out, there was no treaty forbidding the use of atomic weapons. It was therefore understandable that ILC had decided to wait for more specific guidance on that subject, but in that case it was strange that the subject should be listed as part of the "minimum content" of the draft code. In any event, the Commission would be guilty of an error of judgement if it countenanced the proposition that the use, or even the first use, of atomic weapons was per se illegal.

31. The reference to "mercenarism" in paragraph 59 of the report led him to fear that a decision by the Commission in that connection might prejudice the outcome of the negotiations currently being undertaken in the Ad Hoc Committee on the Drafting of a Convention against the Recruitment, Use, Financing and Training of Mercenaries.

32. With regard to chapter VI of the report, his delegation was somewhat concerned to note that the Special Rapporteur had reworked some of the basic conceptual issues underlying the draft articles, including the concepts of "system" and "shared natural resource" and the definition of an international watercourse. The differences of opinion which continued to be expressed concerning those concepts

(Mr. Freeland, United Kingdom)

led his delegation to wonder whether that state of affairs was beneficial to the profitable continuation of the Commission's work. He pointed out once again that in 1980 the Commission had adopted a note of tentative understanding of what was meant by the term "international watercourse system"; that note still seemed to constitute a good working basis. He therefore urged the Commission and the new Special Rapporteur to return to the "system" approach and avoid an annual reconsideration of texts which had been provisionally adopted. Otherwise, the Commission would be forced to reconsider the entire question, in particular draft articles 4, 5 and 6, and that would delay its work considerably.

33. The new draft articles 1 to 9 included many clarifications, but there were still substantial difficulties. It might therefore be that the Drafting Committee was not the best place to resolve those difficulties and that the Commission should consider other possible methods.

34. Concerning chapter V of the Commission's report, he thought that, if the late Professor Quentin-Baxter had been able to advise the Special Rapporteur chosen to succeed him, he might have said that discussion of the item over the years seemed to be leading to the crystallization of a common view as to its proper scope, but that there might be a need for even further limitation of the scope before it became generally acceptable. He might well have warned that some members of the Commission still continued to regard the topic with reserve, although as a whole the members of the Commission had given their encouragement. Mr. Quentin-Baxter might also have alerted his successor to the continuing problem of the potential overlap between the topic and others under consideration by the Commission, such as the law of the non-navigational uses of international watercourses and State responsibility. He might even have advised his successor to pursue consideration of the topic, regarding the draft articles as a residual framework applicable to all activities having appreciable physical transboundary consequences which were not regulated by other international instruments.

35. Regarding State responsibility, he noted that the 12 new draft articles put forward in the Special Rapporteur's fifth report had greatly facilitated further work in the Commission on Part Two of the draft. Those articles were obviously not perfect, but it was not worthwhile at present to rehearse the particular problems raised notably by article 5 (d) and (e). Over the past 20 years, the Commission had achieved steady but disappointingly slow progress in that area. The fact that there was no clear assurance that the Commission was likely to complete the first reading of the entire set of draft articles within a reasonably short time did not reflect well on the codification process, particularly given the great importance of the subject of State responsibility in the international legal system.

36. With regard to the programme and methods of the International Law Commission, his delegation wondered whether the Commission should consider the feasibility of completing its work within the five-year term of office of its members. The Commission appeared to have reached the conclusion that either its productivity needed to be improved or else different arrangements should be made for the allocation of time available according to the relative importance of different topics on its work programme. A number of interesting suggestions had been made

(Mr. Freeland, United Kingdom)

during the Commission's discussion on the proposals of the Planning Group. One was the possibility of dividing the Commission's annual sessions in two, one to be held in Geneva and the other in New York; considering the disadvantages of that proposal, his delegation would prefer the current arrangement to be left as it stood. Nevertheless, when exceptional circumstances so required, there was the possibility of taking up the other suggestion of extending the length of the Commission's session and holding it in two places at different dates. The financial implications of such an arrangement would need proper examination, but there were precedents which could be borne in mind when the Commission came to the second reading of the draft articles on State responsibility.

37. His delegation also considered that there was a need for the Commission to be adequately staffed so that the research and studies necessary for its work could be completed, particularly for the purpose of providing assistance to the Special Rapporteurs. It was not a matter of providing new staff posts but rather of filling existing vacancies in the Codification Division. Proper staffing was a high priority and his delegation hoped that the necessary steps in that regard could be taken within the framework of existing arrangements for the recruitment of Professional staff.

38. Mr. ABDEL TARABE KHALEK (Egypt) emphasized the importance his country attached to the law of the non-navigational uses of international watercourses, which was treated in chapter VII of the Commission's report, and welcomed the considerable progress achieved in that area. His delegation endorsed the general approach adopted by the Special Rapporteur, who had sought to strike a balance between the rights of upper riparian States and those of lower riparian States, and between the principles of the interdependence of international watercourse States and their sovereign independence and right to benefit as they wished from the natural resources within their territories.

39. The framework agreement approach taken by the Commission was supported by his delegation because, as the Commission noted in paragraph 285 of its report, such agreement would, in combination with the specific watercourse agreements dealing with the uniqueness of specific watercourses and specific uses thereof, become a means of achieving a marriage of general principles and specific rules.

40. Concerning the formulation of the draft articles, Egypt supported the principle of absolute regional unity whereby any State whose territory was crossed by an international watercourse had the absolute right to ensure that the amount and quality of the water it received were not modified, given that a watercourse constituted a regional unit without political boundaries and that no State, therefore, had the right to exercise absolute sovereignty over the part of the watercourse which crossed its territory; the implication was that any State had the right to benefit as it wished from the part of an international watercourse which crossed its territory, on condition that no prejudice was caused to the other watercourse States. In addition, account should be taken of acquired rights, with regard to the amount of water to which States had access, and of the needs and interests of all the States concerned.

(Mr. Abdel Tarabe Khalek, Egypt)

41. With regard to article 1, for reasons that it had already explained, his delegation endorsed the substitution of the notion of international watercourse for the concept of international watercourse system. Use of the word "system" had been confusing and had a territorial connotation which had not been in keeping with the principle of State sovereignty. On the other hand, the reference to "relevant parts or components" contained in the first paragraph of that article was redundant, and could be criticized on the same grounds as the unitary notion of drainage basin or system. Those "relevant parts or components" must therefore be defined, indicating the criterion for their identification, or else the reference should be deleted.

42. Article 4, paragraph 1, should be reconsidered in the light of article 39, with which there was a degree of overlapping. There must be a general framework agreement whose provisions did not acquire the character of jus cogens. The paragraph should be reformulated to indicate clearly the enforceable nature and the validity of existing agreements without subordinating them to the existence of measures for the management, conservation and use of the international watercourse. The present wording cast doubt on the validity of existing agreements and prejudged the real desire of the parties to modify them along the lines of the provisions of the framework agreement.

43. The expression "to an appreciable extent" contained in article 4, paragraph 2, presented difficulties in the absence of clear criteria for determining the extent of the prejudice. The provision should therefore be changed. That also applied to article 5, where the same expression was used. How was it possible to establish whether the use of the waters was likely to be affected "to an appreciable extent" and, assuming a criterion could be defined, what would be the position of States whose use of the waters of the watercourse was likely to be affected, although not "to an appreciable extent"? Criteria should therefore be set down to clarify that expression.

44. Article 6 was more acceptable than the previous text, given that the notion of shared natural resource had been deleted. The essential point, in that regard, was not the sharing of the waters of the watercourse among riparian States, but the right of each State to use the waters of an international watercourse which crossed its territory on terms which it established in accordance with its sovereign power in a way that did not cause prejudice to other States. While such a principle might place some limitation on the territorial sovereignty of States, its application nevertheless enabled all the riparian States to benefit from the watercourse.

45. Articles 6 and 7 could, moreover, be combined if the following changes were made: first, at the beginning of article 6, paragraph 1, the words "Subject to the provisions of article 8" should be added, with the rest of the paragraph remaining as it stood. The point of that amendment was to stress the fact that what constituted reasonable and equitable use of the waters should be determined in accordance with the criteria set forth in article 8. Second, the beginning of paragraph 2 should be deleted up to the words "in a reasonable and equitable manner" and the remainder of paragraph 2 should be added at the end of the current article 7; and that composite text should become paragraph 2 of article 6. In

(Mr. Abdel Tarabe Khalek, Egypt)

addition, the word "relatively" should be inserted between the words "in a" and "reasonable" in article 7, in order to emphasize that what was reasonable and equitable must be interpreted in a relative manner, in accordance with the criteria set forth in article 8. At the same time, it should be understood that the sharing in question concerned what were known in the law as "residual rights", namely, the rights bearing on the additional amounts of water produced by the development of an international watercourse, without prejudice to long-standing acquired rights.

46. Article 9 was very important because it specified the arrangements for sharing the waters and for their reasonable and equitable use referred to in articles 6 and 7, but some of its wording was unclear. The meaning of the words "uses" and "activities" should be specified and the difference between the two notions should be indicated. In addition, for the same reasons that justified amending the term "to an appreciable extent" in articles 4 and 5, it would be better to replace the words "appreciable harm" by "material harm". Lastly, the words "or interests" should be deleted, because the term "interests" was too general and likely to be interpreted by each State according to its own interests.

47. With regard to article 12, concerning time-limits for reply to notifications, his delegation noted that the article made no provision for a situation in which the parties could not agree on a reasonable time-limit, and feared that the States receiving the notification would use the time to prevent the notifying State from undertaking a project or a programme. The receiving States could, by virtue of paragraph 2 of article 12, request a reasonable extension of the time-limit in order to evaluate the issues involved, but no specific criterion was given to determine which situations justified such an extension.

48. Article 13 was also open to criticism because it did not maintain the proper balance among the interests of the States whose territory was crossed by an international watercourse. Paragraph 3, specifically, would authorize an upper riparian State which had been unable to reach an agreement with the lower riparian States to undertake a project or a programme without the consent of those States. Such a provision seriously undermined the principle of the sovereign equality of riparian States on the same international watercourse. Egypt believed that it should be stipulated that an upper riparian State might not undertake a project without having previously reached an accord through the settlement procedures provided for in the draft articles. Similarly, it should be stated specifically that upper riparian States had the right to compensation from lower riparian States for any delays in the execution of a project caused by the latter without justification or through bad faith.

49. Article 23 regarding the obligation to prevent pollution should be more restrictive: in paragraph 1, States should be "obliged" not to pollute the waters of an international watercourse; and in paragraph 2, the State where such pollution originated should be "obliged" to take reasonable measures to abate or minimize it.

(Mr. Abdel Tarabe Khalek, Egypt)

50. With regard to article 28 bis, the Commission should try to find a more suitable formulation regarding the peaceful uses of international watercourses that would take into account the right of States at war to use the part of an international watercourse lying within their territories to transport war matériel, because waterways were of logistical importance. It should, therefore, be specified that the notion of peaceful use applied solely to installations and constructions situated on the shores of the watercourses.

51. Lastly, his delegation drew the attention of both the Commission and the Committee to the need to include in the draft articles a text prohibiting the destruction of drinking water installations and irrigation works, in accordance with article 54, paragraph 2, of the First Geneva Protocol of 1977. A paragraph on that question could be added to article 28, so that the draft would be complete from the legal, political and humanitarian viewpoints.

52. Mr. SANGSOMSAK (Lao People's Democratic Republic) observed that a reading of the Commission's report (A/39/10) indicated that, despite the difficulties encountered and the problems left unresolved, the Commission had made appreciable progress on a certain number of questions, notably on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, on the law of the non-navigational uses of international watercourses, and on the draft Code of Offences against the Peace and Security of Mankind. His delegation would make detailed comments on that last question when the Committee considered it under agenda item 125.

53. Regarding the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, the undeniable importance of the question was a direct consequence of the rapid evolution of the diplomatic function, which had always been considered as a means of harmonious communication among States that was intended to reinforce mutual trust and foster the peaceful settlement of disputes. All States, regardless of their political and social systems, had therefore taken particular care to protect the diplomatic function, especially since relations between States were currently gaining in scope and taking forms as diversified as they were complex. As a result, the diplomatic courier's role was reinforced and his status required a more specific and more complete legal protection. Should there be a case in which the courier was not sufficiently protected, his very mission would be impeded, and that would seriously affect the proper functioning of diplomatic and consular missions. Consequently, the diplomatic courier became an indispensable factor in the exercise of the diplomatic and consular function.

54. It was apparent from a consideration of the 11 draft articles provisionally adopted by the Commission at its thirty-sixth session and the 8 other draft articles adopted at its preceding session that the granting of privileges and immunities was intended to facilitate the performance of the official functions of the diplomatic courier and not to accord him advantages of any sort. Moreover, the temporary character of his functions, which was only apparent, should not stand in the way of his being granted protection.

(Mr. Sangsomsak, Lao People's Democratic Republic)

55. Consequently, his delegation believed that the courier needed absolute protection in order to be able properly to carry out his mission; and the sole object of draft article 23 was to codify the practice of States and to strengthen the legal authority of the provisions governing the diplomatic courier contained in the four Vienna Conventions of 1961, 1963, 1969 and 1975. Moreover, draft article 23, which granted the courier immunity from arrest, detention and criminal proceedings in no way duplicated draft article 16, but instead completed it.

56. Draft article 36 only confirmed the régime of absolute inviolability of the official correspondence and documents of diplomatic missions, established by the Vienna Conventions of 1961, 1969 and 1975. Article 36, paragraph 1, properly addressed the legimate interests of the developing countries, which were not in a position to acquire sophisticated electronic devices, and in so doing it established the principle of the equality of relations between States.

57. His delegation hoped that the Commission would, after extending the scope of the draft articles to include national liberation movements recognized by the United Nations, complete the examination of the topic at its next session and that the draft articles would be adopted as soon as possible in the form of a universal instrument.

58. Regarding chapter IV of the report, his delegation recalled that the jurisdictional immunity of States and their property had always been recognized as a firmly established rule of international law. Yet the principle had not enabled the Commission to make progress in its consideration of the matter, despite the provisional adoption of six additional draft articles at its thirty-sixth session. The adoption of the articles, before article 6 had clearly and definitively stated the fundamental rule of State immunity, simply exacerbated the already serious differences of opinion among various delegations on the subject. Many of them had proferred constructive criticism and suggestions concerning the current wording of article 6, and the Commission had decided to reconsider the article at its subsequent sessions. Yet it should be acknowledged that the article, which had been termed the key to the draft articles as a whole, had not been properly considered at the Commission's last session.

59. His delegation shared the view expressed in the Sixth Committee that draft articles 12, 13, 14 and 15 did not take full account of the current practice of all States. In fact, it was apparent from the articles that their wording, instead of offering a compromise formula to reconcile different views and doctrines, reflected only the practice and legislation of certain States, and efforts were being made to set them up as the prevailing criterion to the detriment of the practice and legislation of other States. Furthermore, articles 12 to 15 did not seem to correspond to the Commission's goal, namely the formulation of a universal instrument on the immunity of States. On the contrary, they gave the impression of enumerating exceptions to the principle of State immunity with a view to emphasizing the concept of limited immunity. That approach could seriously undermine the well-established concept of the jurisdictional immunities of States and their property.

(Mr. Sangsomsak, Lao People's Democratic Republic)

60. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, he said that the question was of particular importance for the future, since it would offer a means of remedying all the injurious consequences arising from the applications of science and technology. The general rules which the Commission would be called upon to elaborate would cover new phenomena which would certainly become more extensive as progress continued. Thus, the Commission's efforts to establish international no-fault liability would contribute to the codification and development of international law in that new field.

61. His delegation did not think that consideration of the question should lead, for the time being, to the formulation of legal obligations, still less of rules making State activities in the field illegal, since that would limit the free exercise of national sovereignty. It would be preferable to stress ways of adapting and reconciling the interests of all parties so as to maintain a balance between freedom to act and the right not to suffer injury. Such an approach should take account of the principles of good-neighbourliness, solidarity and international co-operation, and should provide a firm foundation on which States could conclude, as necessary, agreements on the prevention and reparation of transboundary injury. Considerable progress would be achieved if the Commission succeeded in making the reparation of transboundary loss or injury an international moral duty, without, however, placing responsibility on the originating State. His delegation endorsed the contents of paragraph 236 of the report, and would comment on the five draft articles when the Commission had developed a more specific approach to the question under consideration.

62. With regard to State responsibility, his delegation welcomed the 12 new draft articles of Part Two, the overall structure of which was generally considered acceptable (A/39/10, para. 364). The new initiative reflected a concern to improve the current international situation, characterized by confrontation, aggression and the risk of nuclear war, and rekindled the hope that it would be possible to adopt an international instrument which could influence the behaviour of States. The progress made on the matter bore witness to the international community's increasing awareness of the importance of universal conventions in promoting the purposes and principles of the Charter of the United Nations and guaranteeing respect for the principles of peace and equality in international relations.

63. His delegation thought that it would be useful to expand the scope of Part Two so that the draft articles dealt more fully with the legal consequences of international crimes, particularly, aggression, genocide, apartheid and mercenarism. If that approach was adopted, the end product of the work on the subject would be genuinely universal in scope, His delegation welcomed the Commission's decision not to take up Part Three until it had completed consideration of Part Two as a whole (A/39/10, para. 366).

(Mr. Sangsomsak, Lao People's Democratic Republic)

64. With regard to the question of the law of the non-navigational uses of international watercourses, his delegation commended the wisdom of the Special Rapporteur, who, by making amendments to the more controversial points, had been able to satisfy the majority of delegations, thus enabling considerable progress to be made. The explanation no doubt lay in the fact that an appropriate balance had been struck between the sovereign independence of riparian States and their interdependence. The dropping of the concept of a "system" was more in keeping with the Commission's initial objectives, which had been to draft a descriptive instrument, devoid of any doctrinal concepts and legal superstructure. The draft articles tended to provide a purely geographical, flexible and politically acceptable definition, excluding all territorial connotations and avoiding any disruption of the current régime of international watercourses adopted by a number of States.

65. It was clear that the new wording had no legal implications; still less would it impose mandatory legal conditions since it was limited exclusively to the element of "water", thus excluding any possible claims by a riparian State to natural resources situated in the part of the watercourse coming under the sovereignty of another riparian State. Furthermore, the new approach accorded a central place to the sovereign independence of riparian States and maintained the international character of watercourses by leaving riparian States free to define the concept of international watercourse in the bilateral or regional agreements they concluded. Article 1, as amended, therefore provides a sound basis for further work.

66. His delegation was not entirely happy with the new wording of article 6, as it still hoped that the word "sharing", which gave rise to confusion and controversy, would be deleted. It would be preferable if article 6 simply stipulated that "each State has the right and duty to use, within its territory, the waters of an international watercourse in a reasonable and equitable manner". However, his delegation agreed that the revised formulation, namely "the watercourse States concerned shall share in the use of the waters of the watercourse in a reasonable and equitable manner" was clearer than the concept of "shared natural resource".

67. It was clear that the latter tended to cast doubt on the right of States to and their sovereignty over natural resources and to imply consequent limitations on their territorial sovereignty. Furthermore, viewed from the legal angle, the concept would lead to rules of law with ill-defined legal consequences, and such rules of law might be ill-interpreted or misinterpreted by States which could then put forward claims and demands that might well cause disputes and conflicts of unforeseeable scope.

68. The new wording seemed to take greater account of reality and offered a better approach to the development of an equitable régime for international watercourses. Unlike the concept of "shared natural resources", the revised formula sought to strengthen the right of every State to the exclusive use of that part of the watercourse coming under its sovereignty; the result would be to relieve the serious anxieties of riparian States for which the international watercourse was a natural frontier and whose sharing of the waters had been clearly defined in treaties signed for that purpose.

(Mr. Sangsomsak, Lao People's Democratic Republic)

69. In any case, the shared use of the waters of an international watercourse was above all subject to political factors notwithstanding its economic and social aspects. That was particularly true when the international watercourse constituted a natural frontier between States. Experience showed that conflicts which had arisen in the past between riparian States had been man-made or caused by groups whose motives were selfish and unlawful. The use of the waters of an international watercourse could bring substantial advantages to the riparian States and also promote fruitful co-operation in the economic and social as well as in the cultural field if an atmosphere of confidence, good faith and friendship prevailed in relations between the riparian States and if those States scrupulously applied the principles of good-neighbourliness, mutual advantage and respect for each other's sovereign rights.

70. Mr. SOBOLEV (Byelorussian Soviet Socialist Republic) said it was clear from the ILC's report that the Commission had performed useful work at its last session. He thought that the ILC's activities were extremely important, as the progressive codification of international law made a substantial contribution, to the strengthening of peaceful co-operation between States with different social systems. He hoped that ILC's effectiveness would be enhanced and that the Commission would concentrate its efforts on the most important and topical issues.

71. He would make a separate statement on the draft code of offences against the peace and security of mankind when the Sixth Committee took up that question. In the meantime, he thought that it was urgently necessary to complete the work on the draft code in view of the immediacy and importance of the issue.

72. Another important issue was that of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. Consideration of that topic had progressed beyond the theoretical stage as the ILC now had a practical basis on which to conclude its work thanks to articles 9 to 42 prepared by the Special Rappporteur. The ILC had already adopted articles 1 to 8 and had referred articles 9 to 35 to the Drafting Committee; articles 36 to 42 could be considered at the ILC's next session. He therefore agreed with the conclusion of the ILC that it should be in a position to complete the study of the topic before the current term of its members expired.

73. The draft articles seemed acceptable on the whole. While he supported the proposal of the Drafting Committee regarding the deletion of several articles on the grounds that they were not of great practical value, he nevertheless opposed the deletion of articles 23 and 36 because, in his view, they constituted the very essence of the principle based on the sovereignty and independence of States. The provisions of those articles were essential to exemption of the courier from criminal jurisdiction and for the protection of the bag. He considered that article 21, paragraph 3, concerning the inviolability of temporary accommodation contradicted articles 23 and 36 and was in violation of the very principle of the inviolability of temporary accommodation as it would permit searches on the pretext that it might contain articles the import or export of which was prohibited by the legislation of the receiving or the transit State.

(Mr. Sobolev, Byelorussian SSR)

74. With regard to the jurisdictional immunities of States and their property, he said that the concept of functional or limited immunity was erroneous and contrary to the principle of the equality of States and non-interference in their internal affairs. He considered articles 13, 14 and 17 unacceptable; the provisions of article 17, in particular, could serve as a pretext for violating the principle of the jurisdictional immunity of States. Those three articles did not take into account the practice of many developing and socialist States. Article 16 (b) represented a direct threat to developing countries and favoured so-called third parties, namely transnational corporations and capitalist monopolies. It was clear that, in the current situation, Part III of the draft would only complicate consideration of an already difficult topic and it was doubtful whether it would be possible to conclude the study of that topic in the near future.

75. On the question of international liability for injurious consequences arising out of acts not prohibited by international law, he considered that the issue was academic and that its consideration would place an unnecessary burden on the resources of the ILC secretariat particularly as there was no general approach to the question. The question could very well be resolved by agreements concluded between interested States on particular aspects.

76. The same considerations applied to the topic of the law of the non-navigational uses of international watercourses. In fact, only specific agreements between States could govern many specific aspects of the shared use of a watercourse.

77. On the topic of State responsibility, it was important to arrive at a generally acceptable solution. Great importance should be attached to the issue because of the basic role of existing rules on the matter with regard to the implementation of the principles of the Charter, the strengthening of security and co-operation between States. At the same time the focus should be on international crimes and other flagrant violations of the Charter and of international law. It was his view that the preparation of a draft on State responsibility should be accelerated.

78. The ILC had done useful work and had made progress in preparing the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. He considered that the methods of work of the ILC needed to be improved in order to concentrate ILC's resources on the most important issues, such as State responsibility, the status of the diplomatic courier, and the draft code of offences against the peace and security of mankind. Thought should also be given to the long-term programme of work of the ILC and to the inclusion of important new topics in order to promote the development of international co-operation among States and the strengthening of international peace and security.

The meeting rose at 1 p.m.