United Nations
GENERAL ASSEMBLY
FORTY-THIRD SESSION
*Official Records**

SIXTH COMMITTEE
25th meeting
held *on*
Monday, 31 October 1988
et 3 p.m.
New York

SUMMARY RECORD OF THE 25th MEETING

Chairman: Mr, DENG (Sudan)

CONTENTS

Distr. GENERAL
A/C.6/43/SR.25
3 November 1988

ORIGINAL: ENGLISH

88-56752 05858 (E)

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

AGENDA ITEM 1341 REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTIETH SESSION (A/43/10, A/43/539)

AGENDA ITEM 130: DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (A/43/525 and Add.1, A/43/621-S/20195, A/43/666-S/20211, A/43/709, A/43/716-8/20231, A/43/744-8/20438)

1. Mr. DIAZ-GONZALEZ (Chairman of the International Law Commiaeion) said that he took great honour in introducing the report of the International Law Commission on the work of its fortieth session (A/43/10), just a few days before the fortieth anniversary of the General Assembly's election of the first members of the Commission,

2. The Commission had not confined itself to codification in the strict sense of the term, but had paid special attention to the progressive development of international law to keep pace with social changes and technological advances.

3. Anyone who said that the Commission progreased too slowly was apparently forgetting the very peculiar characteristics of the Commission and of its work. It met for only three months a year, and its members did not serve on the Commission alone, The topics that had been on its agenda for many years were of vital importance to States. Consideration of such topics had begun at a time when the membership of the United Nations had been only one third of the current membership. The new States did not want to be passive aubjecta of laws prepared by others, and had every right to demand an active role in the preparation of international legal norms. The Commission had therefore adjusted its pace of work to allow for the observations and contributions of the new States.

4. Topics on which progress had been made in its early years had had to be reconsidered in the light of the observations and opinions of those new States, It must not be forgotten that the membership of the Commission had grown from 15 in 1948 to 34 in 1988, precisely in order to have fairer and more equitable representation consistent with the membership of the United Nations and with the statute of the Commission, which stipulated that in the Commission, representation of the main forma of civilization and of the principal legal systems of the world should be assured.

5, The Commission must maintain a healthy balance, It should not move too quickly and produce, almost mechanically, norms which had not been properly thought through, were not ripe for formulation, and were doomed to obsolescence almost as soon as they were promulgated, or were doomed to become dead letters for lack of ratification by States. Nor should the Commission spend too much time analysing topics which urgently called for broadly acceptable international regulations, The Commission had always tried to move cautiously and on firm ground with the guidance of the General Assembly and Member States in the codification exercise, at the same time paying special attention to the progressive development of international law.

/...

(Mr. Diaz-Gonzalez)

6. In organising the work of its fortieth session, the Commission had been guided in particular by paragraphs 3 and 5 of General Assembly resolution 42/156. It had given in-depth consideration to the following topics: "International liability for injurious consequences arising out of actr not prohibited by international law", "The law of the non-navigational uses of international watercourses", "Draft Code of Crimes against thr Peace and Security of Mankind" and "Status of the diplomatic courier and thr diplomatic bag not accompanied by diplomatic courier". A significant number of draft articles on some of those topics had been provisionally adopted. The Special Rapporteurs for the topics "Jurisdictional immunities of States and their property" and "State responsibility" had presented their respective preliminary roportr in 1988.

7. Paying due regard to the request made by the General Assembly in paragraph 5 of resolution 421156, the Commission had drvotrd a number of plenary meetings and a number of meetings of the Planning Group of the Enlarged Bureau to the consideration of thr item entitled "Programme, procedures and working methods of the Commission, and its documentation",

8. In 1988 the Commission had begun its work with the consideration of the fourth report of the Special Rapportour on international liability for injurious consequences arising out of acts not prohibited by international law, Since 1978 the Commission had been working on the difficult topic of international liability, Virtually every year, there were roportr of catastrophic incidents with harmful transboundary effects, providing reminders of a vacuum in international law, both in terms of policy issues and in terms of operational ruler on procedural and substantive law pertaining to such situations.

9. Although the Commission had not yet reached the stage of presenting provisionally adopted draft articles to the General Assembly, it had referred to its Drafting Committee 10 draft articles contained in the Special Rapporteur's fourth report, which dealt with general provisions sad principles. Future consideration of the topic would therefore be focused on questions of specific interest.

10. As to the possibility of drawing up a list of activities which would be covered by the topic, he noted that the Special Rapporteur, after a thorough examination of the issue, had concluded that any attempt to draw up a list, and particularly an exhaustive list, of such activities would be fruitless and ineffective. Because of rapid technological developments, such a list would almost never be complete and would have to be modified periodically, The Special Rapporteur had recommended, on the other hand, some criteria by which such activities could be identified. Not all members of the Commission had agreed with that approach, but many had been persuaded by the Special Rapporteur's reasoning and had found it impractical in a convention of a general nature to list specific activities.

(Mr. Dias-Gonsales)

11. The Special Rapporteur had also *taken* thr view that the topic should include activities causing what was known a8 creeping pollution, whore cumulative, harmful effects became apparent only after a certain period of time.

12, Most activities contemplated under the topia were territorially baaed, in that they oaourred within the territory of one State, but *had* harmful conrequencer in the territory of another. *There* were also □♦≈ℳ□ ● otivitier with harmful transboundary effects which wore *not* territorially based, sinco they could occur outside the territory of *the* State of origin but within its jurirdiction *or* control, In the *opinion of* the Special Rapporteur, the rights and obligation8 *of* State8 in international law wore determined not only *in* relation to their territorial rights or sovereign rights, but also in relation to their competence to exercise jurisdiction. The requirements of *taking* measures to prevent injury to other States could only be expected from a State which, under international law, ● xercilred jurirdiction over an activity. The term "jurisdiction" overcame the limit8 inherent *in* the concept of territory and would include all activitier covered by the topic. However, the term "jurisdiction" by itself would be insufficient to describe all *the* activitier under the topic. There were situations where a State exercised de facto jurirdiction, jurirdiction not recognised under international law. Such de facto unlawful jurirdiction did not and should not exempt the State concorned from the liability for harmful consequences of activities carried out under that jurirdiction, since that State was actually ● ☒ℳ□℘♯□♯■℁ effectivecontrol,

13, Many members of thr Commission had agreed with the Special Rapporteur that even with the umbiguities inherent in the terms "jurisdiction" and "control", they introduced an improvement over the concept of "territory". Some members, however, had ● xpre88ed uncertainty about the meaning of those terms, particularly "control", and about whether it included economic, political or physical control. There *had* also been some discussion a8 to how the liability *of* the State could be determined in relation to a multinational corporation operating within several jurisdictions.

14, Another important issue raised in connection with the scope of the topic was the type of activitier covered. The Special Rapporteur had limited such activities to those creating an "appreciable risk" of causing transboundary injury; he had taken the view that the concept of appreciable *risk* better clarified the obligation of the State to take preventive measures to remove or reduce harm, Appreciable risk meant that the risk must be identifiable by virtue of the physical characteristics of the thing or activity; its appreciation must be related to the nature of the risk involved, rather than to a specific feature of the activity, and such a risk must be determined objectively and not be dependent on the point of view of one State.

15. One member of the Commission had pointed out that activities involving risk meant an exceptional rick, one capable of producing harm or injury, The obligation under the draft would therefore be to co-operate with the States concerned in order to set up appropriate machinery to regulate matter8 pertaining to harm caused by the consequences of an exceptionally dangerour activity, For some members of the

(Mr. Dias-Gonzalez)

Commission, risk was a useful criterion; it made it possible to pin-point the topic and its limits, *and* gave *a* greater unity and coherence to the topic, It also provided a more logical basis for reparation.

16. Some other members, while not rejecting the introduction of the concept of risk, had argued that it should not be predominant, Although the concept could play an important role with regard to prevention, it should not bo extended to liability, because it would offer extremely limited possibilities for reparation. Hence, the principle of the protection of the innocent victim would be radically modified, since such victim8 could be compensated only for the loss caused by activities involving risk. For some members, the ambiguities inherent in the concept of risk had not been removed by the criteria introduced by the Special Rapportour. It had been suggested that the topic could take a different approach; it could focus, at its core, on activities Creating an appreciable risk Of transboundary harm, but could also deal separately with other activities causing transboundary harm.

17, The Commission had had ah extensive discussion on the place of the concept of "risk" and "harm" in the topic, It had concluded that it would be particularly useful to take into account the views of Governments on the issue, expressed either in the Sixth Committee or in written form. In *that* respect, he drew particular attention to paragraph 102 of the Commission's report (A/43/10),

18. With regard to the concept of "attribution" (draft article 3 presented by the Special Rapportour), he noted that two requirements arose for attribution to existI first, harm had to be caused by an activity taking place under the jurisdiction or control of a State (and in that connection, the establishment of a factual causal relationship between the activity and the harm would suffice); second, the State had to know or have means of knowing that such activity was being carried out under its jurisdiction and control. The Special Rapporteur had had in 'ind ths interests of some developing countries which might not have sufficient means of monitoring activities within their territories. In addition to a causal relationship between harm and the activity, the State must have *known* or had means of knowing of such activity inside its territory, The draft article nau been formulated on the understanding that there was a presumption in favour *of* the affected State that the State of origin knew or had means of knowing. That presumption could be rebutted by the State of origin if it showed evi·lence to the contrary.

19. Some members of the Commission, while agreeing with that approach, had taken the view that moat activities would occur within the territory *of* a State, and a State normally had knowledge of what was happening in its territory. In their opinion, the article should be drafted so as to indicate more clearly that the burden was shifted to the State of origin to prove that it *did* not know, or had no means of knowing.

20. The Special Rapporteur had raid that tho principle of freedom of action of States and the limits thereto (draft article 6) had been taken from principle 21 *of*

(Mr. Dias-Gonsales)

the Stockholm Declaration, and war intended to maintain a reasonable balance, rupportrd by jurisprudence and common sense, between the interests o f the State conducting activities and those of States which might be at rirk of ruffering injury as a result of those activities.

21. The Special Rapportour indicated that thr principle of co-oparation (draft article 7) was one of the mort important bases of the future provisions of the draft relating to notification, exchange of information and taking of *preventive* measures. The pattern of introduction of modern tech.ology to human civilization required that any meaningful prevention of harmful by-products of certain aativitier would have to be based on co-operation among all States.

22. He drew ettention to *paragraph8* 92 to 95 of *the* report, dealing with the question of prevention (draft article 9 proposed by the Special Rapporteur). Some members of the Commirrion believed that the obligation to prevent harm had procedural as well as rubrtantive arpectr, since the obligation *of* prevention included *a* number cd practical steps (assessment of the possible tranrboundary effects of the activity envisaged; prevention by the State of origin in *order* to avoid accidents; conrultationr with the States likely to be affected by the activity, and so on). The rubrtantive rspect of the obligation of prevention covered the obligation of the State, whether or not there was an agreement with other States, to take the necessary safety mearurer (adoption of lawn and regulation8 to prevent harmful consequences). Those two distinct aspects should be dealt with separately. It had been ruggerted that the violation of pruventive measures could be taken into account at the reparation stage, as an element which could lead to a higher measure of reparation. Lastly, mention should be made *of* the principle of rrparation proposed by the Special Rapporteur.

23, With regard to the topic of the law of the non-navigational uses of international watercourses, the Commirrion had had before it and had considered the fourth report of the Special Rapporteur for the topic. The Special Rapporteur had provided *a* tentative outline for the treatment *of the* topic as *a* whole. The report contained four draft articles proposed by the Special Rapporteur dealing with the regular exchange of data and information, the pollution of international watercourse [s][systems] , the protection of the anvironment of international watercourse[s] [systems], *and* pollution or environmental emergencies,

24, The substantial progress achieved by the Commission on that topic at its 1988 session was also marked by the *fact* that the Commission had been able to adopt provisionally 14 additional draft articles.

25. Draft article 8 ret forth *the* fundamental rule that a State utilizing an international watercourse [system] should do so in a manner that did not cause appreciable harm to other watercourse Staces. The rule reflected the well-established principle of international law expressed in the maxim sic utere tuo ut alienum non laedas. That obligation war complementary to the principle of equitable utilisation (draft article 6 provisionally adopted by the Commission at its 1987 session). The rule also imposed on watercourse States the obligation not

(Mr. Diaz-Gonzalez)

to allow private activities operating in their territories to utilize the watercourse "in such a way as to cause appreciable harm to other watercourse States".

26. The Commission stated in its commentary that the term "appreciable harm" embodied a factual standard. The harm must be capable of being established by objective evidence, there must be a real impairment of use, i.e. a detrimental impact of some consequence upon, for example, public health, industry, property, agriculture or the environment in the affected State. Appreciable harm was therefore that which was not insignificant or barely detectable, but was not necessarily "serious".

27, Article 9 laid down the general rule that watercourse States should co-operate with each other in order to fulfil the obligations and attain the objectives set forth in the draft articles. Such co-operation was important for the attainment and maintenance of an equitable allocation of the uses and benefits of the watercourse, and for the smooth functioning of the procedural rules contained in part III of the draft articles. The article indicated both the basis and the objectives of co-operation.

28. Article 10 set forth the general minimum requirements for the regular exchange between watercourse States of the data and information necessary to ensure the equitable and reasonable utilization of an international watercourse [system]. Watercourse States required data and information concerning the condition of the watercourse in order to apply article 7 (provisionally adopted at the 1987 session) which called upon watercourse States to take into account "all relevant factors and circumstances" in implementing the obligation of equitable utilisation laid down in article 6.

29. The requirement that data and information should be exchanged on a regular basis was designed to ensure that watercourse States would have the facts necessary to enable them to comply with their obligation of equitable and reasonable utilization under articles 6 and 7, and their obligation under article 8 not to cause appreciable harm to other watercourse States. The data and information could be transmitted directly or indirectly, for example, through joint bodies established by watercourse States and entrusted, among other things, with the collection, processing and dissemination of data and information of the kind referred to in paragraph 1. The Commission recognized that circumstances such as an armed conflict or absence of diplomatic relations might raise serious obstacles to the direct exchange of data and information, as well as to a number of the procedures provided for in articles 11 to 20. The Commission had decided that that problem would best be dealt with through a general saving clause, providing especially for indirect procedures, which had taken the form of article 21.

30. Paragraph 1 of article 10 required that watercourse States should exchange data and information that was "reasonably available", Paragraph 2 concerned requests for data and information that was not reasonably available to the watercourse State from which it was sought. In such cases, the State in question

(Mr. Diaz-Gonzalez)

was to apply its "best efforts" to comply with *the* request, i.e., it war to act in good faith and in a spirit of ao-operation in endeavouring to provide tho data and information sought by the requesting watercourse State, For data and information to be of praotiual value to watercourse States, it must be in a form which permitted them to use it, Paragraph 3 therefore required watercourse States to employ their "best efforts to collect and, where appropriate, to process data and information in a manner whiah facilitates its utilisation".

31. Article 11, dealing with information aonaerning planned measures, introduced the articles contained in part I"I *and* provided a bridge between part II, which concluded with article 10 on the regular exchange of data and information, and part III, which dealt with the provision of information concerning planned measures. Article 11 laid down a general obligation of watercourse States to provide each other with information concerning the possible effects of measures they might plan to take upon the condition of the international watercourse [system]. It also required watercourse States to consult with each other *on* the effects of such measures. Article 11 thus went beyond article 12 and the following articles, whiah concerned planned measurer that might have an appreciable adverse effect on other watercourse States. By requiring tho exchange of information and consultation with regard to all possible effects, it avoided problems inherent in unilateral assessments of the actual nature of such effects,

32. Article 12 dealt with notification concerning planned measures with possible adverse ● ffeota, The procedures provided for in articles 12 to 20 were triggered by the criterion that the measures planned by a watercourse State might have "an appreciable adverse effect" upon other watercourse States. The threshold established by that standard was intended to be lower than that of "appreciable harm" under article 8. Thus, *an* "appreciable adverse effect" might not rise to the level of "appreciable harm" within the meaning of article 8. "Appreciable harm" war not an appropriate standard for the setting in motion of the proceduroa under that series of articles, because it would mean that the procedures would be engaged only where implementation of the new measures might result in a violation of article 8, so that any watercourse State which notified planned measures would be placed in the position of admitting that those measures might cause appreciable harm to othrr watercourse States in violation of article 8. The standard of "appreciable adverse ef fect" was employed to avoid such a situation.

33. Article 13 afforded the notified State or States a period *of* six months for study and evaluation of the possible effects of the planned measures. Article 14 required that during that period, the notifying State, *among* other things, should not proceed with the implementation of its plans without the consent of the notified State. If the latter State wished the implementation of the plans to be suspended further, it must reply during the six-month period and request such a fi rther suspension as provided in article 17, paragraph 3.

34. The Commission had concluded that a fixed period, while necessarily somewhat arbitrary, would be more in the interest of both the notifying and the notified State *than* "a reasonable period of time". A general standard would be more

flexible end adaptable to different situations, but its inherent uncertainty could at the same time lead to disputes between the States concerned.

35. Article 14 laid down thr two obligations of the notifying State during thr period for reply specified in article 13 to a notification made pursuant to article 121 tha obligation of co-operation, which took the specific form of a duty to provide the notified State or States, on their request, "with any additional data and information that *is* available *and* necessary for an accurate evaluation" of the possible effects of the planned measures, and the obliqation of the notifying State not to "implement, or permit thr implementation of, the planned measures without the consent of the notified States". The duty not to proceed with implementation was thus intended to assist watercourse States *in* ensuring that any measures that they planned would not be inconsistent with their obligation8 under articles 6 and 8.

36, Article 15, dealing with reply to notification, contained two obligations. Paragraph 1 provided that findings concerning possible effects *of* tho planned measures should be communicated to the notifying State "as early as possible". The communication must be made within the rix-month period provided for in article 13 in order that the notified State might have the right to request a further suspension of implementation under article 17, paragraph 3. A finding that the planned measures would be conrirtent with articles 6 and 8 would conclude the procedures under part III, and the notifying State could proceed without delay to implement its plans. Paragraph 2 dealt with thr second obligation of notified States, which arose only in respect of a notified State which found that "implementation of the planned measures would be inconsistent with the provisions *of* articles 6 or 8". The obligation was triggered by a finding that implementation of the plans would result in a breach of the obligation of equitable and reasonable utilization under article 6, or of the duty not to cause appreciable harm under article 8. The notified State which had made such a finding must provide the notifying State, within the nix-month period specified in article 13, with a "documented" explanation of the finding,

37. Article 16 related to cases in which the notifying State, during the six-month po.iod provided for in article 13, received no communication under article 14, paragraph 2. In such a case, the notifying State might implement or permit the implementation of tho planned measures, subject to the condition that the plans were implemented "in accordance with the notification and any other data and information provided to the notified States" under articles 12 and 14, and that implementation of the planned measures would be conrirtent with the obligations *of* the notifying State undor articles 6 and 8. The idea underlying article 16 was thnt if a notified State did not provide a response under article lb, paragraph 2, within t.he required period, it was precluded from claiming the benefits of the protective régime contained in part III,

38. Article 17 dealt with consultations and negotiations concerning planned measures and concerned cases in which there had been a communication under article 15, paragraph 2, Paragraph 1 of article 17 called for the notifying State

(Mr. Diaz-Gonzalez)

to enter into consultations and negotiations with a State making a communication under article 15, paragraph 2, "with a view to arriving at an equitable resolution of the situation". Paragraph 2 concerned the manner in which the consultations and negotiations provided for in paragraph 1 were to be conducted. Paragraph 3 required the notifying State to suspend implementation of the planned measures for a further six months, but only if requested to do so by the notified State when the latter made a communication under article 15, paragraph 2.

39. Article 18 addressed the situation in which a watercourse State was aware that measures were being planned by another State (or by private parties in that State) and believed that they might have an appreciable adverse effect upon it, but had received no notification thereof. In such a case, the first State could seek the benefits of the protective régime provided for under articles 12 and following. Paragraph 1 allowed "a watercourse State" in the position just described to request the State planning the measures in question "to apply the provisions of article 12". A watercourse State could request that the State planning measures should take a "second look" at its assessment and conclusion. The question as to whether the planning State had initially complied with its obligations under article 12 was not prejudged. In order for such a request to be made, two conditions had to be met: the requesting State must have "serious reason to believe*' that measures were being planned which had an appreciable adverse effect upon it, and it must provide "a documented explanation setting forth the reasons for such belief".

40. The first sentence of paragraph 2 dealt with the case in which the planning State concluded, after taking a "second look", that it was not under an obligation to provide a notification under article 12. The second sentence of paragraph 2 dealt with the case in which the finding of the planning State did not satisfy the requesting State. It required that, in such a situation, the planning State should promptly enter into consultations and negotiations with the other State (or States) at the request of the latter.

41. Paragraph 3 required the planning State to refrain from implementing the planned measures for a period of six months, in order to allow consultations and negotiations, if it was requested to do so by the other State at the time it requested consultations and negotiations under paragraph 2.

42. Article 19 dealt with measures whose implementation was of the utmust urgency "in order to protect public health, public safety or other equally important interests". Paragraph 1 referred to the kinds of interests that must be involved in order for a State to be entitled to proceed to implementation under article 19 (for example, protecting the population from the danger of flooding). Paragraph 2 required a State proceeding to immediate implementation under article 19 to provide the "other watercourse States referred to in article 12" with a formal declaration of the urgency of the measures, together with the relevant data and information. Paragraph 3 required that the State proceeding to immediate implementation should enter promptly into consultations and negotiations with the other States, if and when requested to do so by those States.

(Mr. Diaz-Gonzalez)

43. Article 20, which dealt with data and information vital to national defence or security, created a very narrow exception to the requirements of articles 10 to 19. The article required a State withholding information to "co-operate in good faith with the other watercourse States with a view to providing as much information as possible under the circumstances". It was thus intended to achieve a balance between the legitimate needs of the States concerned: the need for the confidentiality of sensitive information, on the one hand, and the need for information pertaining to possible adverse effects of planned measures, on the other.

44. Article 21 addressed the exceptional case in which direct contact could not be established between the watercourse States concerned, in such circumstances as an armed conflict or absence of diplomatic relations. In such situations, States could still convey communications to each other through indirect procedures (through third countries, armistice commissions, and the good offices of international organizations).

45. In paragraph 191 of its report the Commission indicated that, pursuant to General Assembly resolution 42/156, paragraph 5 (c), it would welcome the views of Governments either in the Sixth Committee or in written form on the following points: (1) the degree of elaboration with which the draft articles on the topic under consideration should deal with problems of pollution and environmental protection and (2) the concept of "appreciable harm" in the context of article 16, paragraph 2.

46. It was gratifying that substantive progress had been achieved on the topic entitled "Draft Code of Crimes against the Peace and Security of Mankind".

47. In his sixth report, the Special Rapporteur had recast draft article 11, on crimes against peace, as proposed in his fourth report. In so doing, he had taken account of the discussion held at the Commission's thirty-eighth session and of the opinions expressed in the Sixth Committee at the forty-first session of the General Assembly. In part I, he had sought to revise and supplement the part of the 1954 draft Code relating to crimes against peace. He had dealt with the problems raised by preparation of aggression and annexation, the sending of armed bands into the territory of another State and intervention in the internal and external affairs of a State. In part II of his report, the Special Rapporteur had considered new characterizations of acts as crimes against peace, particularly colonial domination and mercenarism.

48. Furthermore, paragraphs 275 and 276 of the Commissions's report referred to additional crimes against peace suggested by some members of the Commission in the course of the debate (the transfer of populations or the expulsion by force of the population of a territory or of an area of settlement, as well as the implanting of settlers in an occupied territory and the changing of the demography of a foreign territory).

(Mr. Diaz Gonsales)

49. He would *now* refer to the six draft articlrr on the topic under consideration adopted by thr Commission at its mort recent session. Five of the draft articles dralt with general principles: *thr* obligation to try or extradite (art, 4), the non bis in idem principle (art, 7), the principle of non-retroactivity (art. 8), the responsibility of the superior (art, 10) and the official position of the individual committing a crime and him criminal responsibility (art, 11). The provisional adoption of those five draft articles, in addition to draft articles 3, 5 and 6 dealing, respectively, with responsibility and punishment, non-applicability of statutory limitations and judicial guarantees, which the Commirrion hrd provisionally adopted th previous year, had brought part II of the draft, on general principles, vary clost to completion. Furthermore, the Commission had also provisionally adopted article 12 (aggression, a8 a Crime gainrt peace), which constituted thr first provision of the draft dealing with a specific crime within the draft Code.

50. Article 4, paragraph 1, 8tabli8hed the general principle that any State in whore territory an individual alleged to have committed a crime against the peace and security of mankind was present was bound either to try or to extradite him. Paragraph 2 dealt with thr case where the State in whore territory an individual alleged to have committed a crime was present received several requests for extradition, The paragraph constituted a aompromire rolution between members who had been in favour of and member8 who had been against giving preference for extradition to the State where the crime had been committed. It provided that special aonrideration (rather than preference) should be given to the request of the State in whose territory the crime had been committed. Paragraph 3 of the draft article showed that the jurisdictional rolution adopted in draft article 4 would not prevent the Commirrion from dealing, in due course, with the formulation of a statute of an international criminal court,

51, Article 7 referred to thr non bis in idem principle both before an interational criminal court and before national criminal courts, Paragraph 1 provided that that principle should apply without exception to the decisions of an international criminal court, The bracket8 did not question the consensus on the paragraph) they pointed only to the eventual character of thu establishment of such a court. Paragraph8 2, *3 and 4 referred* to the application of the non bis in idem principle and the exception8 to it when several national courts from different States were involved and provided that, in the event of conviction, tho punishment had been enforced or was in the process of being enforced. Those paragraphs were compromise solutions. In accordance with those provisions and notwithstanding the non bis in idem principle, further proceeding8 might be instituted (a) when an act which had been tried in one State a8 an ordinary crime corresponded to one of the crimes characterized in the draft Code *and* (b) when the judgement had been handed down by a court other than that of the State in which the crime had been committed or that of the State which had been the main victim if, for example, those States considered that the decision did not correspond to a proper appraisal of the acts or to their seriousness. Paragraph 5 mitigated the effect of the exceptions to the principle by making it clear that in the case of a subsequent conviction the court, in passing sentence, should deduct any penalty imposed and implemented as a result of a previous conviction for the same act.

(Mr. Dias-Gonzalez)

52. Article 8 dealt with the principle of non-retroactivity, which was clearly enunciated in paragraph 1. It laid down that no one should be convicted under the Code for acts committed before its entry in force. That was an important principle of criminal law, which was in fact an application of the principle "nullum crimen sine lege". Paragraph 2 of the article safeguarded, in the case of acts committed before the Code's entry into force, the porribility of prosecution on different legal grounds, for example a pro-existing convention to which a State was a party, customary international law or also domestic law, provided that such law was applicable in conformity with international law,

53. Article 10, which dealt with the responsibility of the superior, war formulated on the basis of article 86, paragraph 2, of the 1977 Additional Protocol I to the 1949 Geneva Conventionr on humanitarian law. The article laid down two conditions for the responsibility of a ruperior to arise: (a) the superior had known or had had information enabling him to conclude, in the circumstances at the time, that a crime had been committed or was going to be committed by a subordinate and (b) he had not taken all feasible measures within his power to prevent or repress the crime. It was important to note that, under certain circumstancea, the superior was presumed to know and he incurred criminal responsibility even if he had not examined the information sufficiently or, having examined it, had not drawn the obvious conclusions.

54. Article 11, provisionally adopted by the Commission, laid down the principle that the official porition of the individual who committed a crime against the peace and security of mankind, and particularly the fact that he acted as Head of State or Government, did not relieve him of criminal responsibility. The formulation of that principle contained elements which might be traced to the provirions of the charters of the International Military Tribunals established after the Second World War, and to the two document8 adopted by the Commission in 1950 and 1954 respectively, namely "The Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal" and the "Draft Code of Offences against the Peace and Security of Mankind", The real effect of the principle was that the official position of an individual who committed a crime against peace and security could never be invoked as a circumstance absolving him from responsibility or conferring any immunity upon him, even if the official claimed that the acts constituting the crime had been performed in the exercise of his functions.

55, Article 12, provisionally adopted by the Commission, dealt with the crime of aggression as a crime against peace and was the first provision dealing with a specific crime, Paragraph 1 of the draft article reflected the Commission's concern to establish a link between the act of aggression, which could only be committed by a State, and the individual6 who were subject to criminal prosecution and punishment for acts of aggression under draft article 3, The other paragraphs of draft article 12 were largely taken from the Definition of Aggression adopted by the General Assembly in resolution 3314 (XXIX) of 14 December 1974, That definition, however, was not expressly mentioned in the draft article in order to take account of the position of certain members of the Commission who had felt that

(Mr. Dias-Gonsales)

a resolution intended to servo as a guide for a political organ such as the Seaurity Council could not be used as a basis for criminal prosecution before a judicial body, That school of thought had advocated a definition of aggression independent of that in resolution 3314 (XXIX) or, in *any* event, one which did not reproduce all the elements of that definition. While that school of thought had agreed that the enumeration of acts of aggression contained in the resolution could be reproduaed in the penal definition of aggression, it had not agreed that the list should be exhaustive for the judge, who should remain free to characterise other acts as constituting aggression, by referring to the general definition contained in article 12, paragraph 2, Other members of the Commission had, instead, been of the view that the whole of the Definition of Aggression contained in resolution 3314 (XXIX) rhould be reproduced in the Code and that the resolutions of the judicial organ should be aubordinated to those of the Security Council in regard to resolutions determining the ● xirtrnoe or non-existonce of aggression. The text of draft article 12 therefore reflected the trends to which he had referred and left some questions in abeyance, as was shown by the words and phrases in square brackets,

56. Turning to the topio of the status of the diplomatic courier and the diplomatic bag, not accompanied by diplomatic courier, he announced that the Commission had taken an important step towards the finalisation of the topic in the near future, On the basis of the replier submitted by Governments, the Special Rapporteur had presented his eighth report on the topic. In his report, the Special Rapporteur had examined the written comments *and* obaervationa submitted. In connection with each draft article, the Special Rapporteur had summarised the main trends and proposals made by Governments in their written comments and observations and had proposed either to revise the text of the draft article *concerned,* to merge it with some other draft articlea, to maintain the draft article as adopted on first reading or to delete the draft article.

57. He confined himself to underscoring the main iaauea touched upon in the Commission's debate on the eighth report of the Special Rapporteur, in particular those points or areas of the draft around which aome divergent trends appeared to concentrate and on which it might be specially important to have the guidance of the Sixth Committee for the Commission's future work on the topic.

58. With regard to the scope of the draft articles, one issue at stake was its possible extension to couriers and the bag of international organizations. Some members, including the Special Rapporteur, favoured an extension of the scope to international organizations of a universal character. Other members who had been opposed to such an extension had feared. inter alia, that the carefully achieved balance of the draft might be altered by it and its acceptability jeopardized.

59. Moat members of the Commission thought that the extension of the scope of the draft articles to the couriers and bags of national liberation movements would be inadvisable and greatly detract from the acceptability of the draft article, National liberation movements, they had stressed, were essentially temporary in nature and, in their view, the matter should be left for special agreements between

(Mr. Diaz-Gonzalez)

States *and* the movements *concerned.* Some other members, instead, had been in favour of such an extension of the scope which, in their view, could be done by means of an additional optional protocol,

60. Another important area of the draft articles, where disagreements still existed, concerned article 17 on the inviolability of the temporary accommodation of the courier, Some members strongly supported that inviolability as an extension of the courier's own personal inviolability as well as a means to facilitate protection of the bag. Other members aonaidered that the draft article would place an undue burden on States with a large traffic of couriers and bags, In their view, article 17 was not needed as no practical problems had arisen with the trmporary accommodation of the courier.

61. Article 28 on protection of the diplomatic bag had been called thr key provision of the draft articles, It had also perhapa been the one giving rise to moat conflicting views. The comments and observations from Governments as well as those made by members of the Commiaaion showed that the main issues involved with regard to that draft article were the following: (a) the concept of inviolability of the diplomatic bag and its relevance to draft article 28; (b) the admiaaibility of scanning of the bag; (c) whether a comprehensive and uniform approach would be applicable to all categories of bags or there should be a differentiated treatment of thr bags in strict compliance with the relevant proviaiona, on the one hand, of the 1961 Vienna Convention *on* Diplomatic Relations, the 1969 Convention on Special Miaaiona and the 1975 Vienna Convention on the Representation of States and, on the other hand, of the 1963 Vienna Convention on Consular Relations) (d) if a comprehensive and uniform approach was followed, whether the treatment of all kinds of bags should be governed by article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations, or by article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations; and (e) whether the transit State rhould have the same rights as the receiving State with regard to the treatment of the bag, especially if the option to request the opening of the bag would be provided. The Special Rapporteur, some Governments and *several members* of the Commission had suggested some alternative formulationa to article 20, which addressed one or more of the above-mentioned important issues.

62. He encouraged members of the Committee to examine in detail all those comments and proposals so that they might be in a position to give the Commission a definitive orientation on the important and difficult issues just mentioned which arose in connection with article 28 and protection of the diplomatic bag.

63. With regard to draft article 33 on optional declaration specifying to which category of courier and bag the State concerned would not apply the draft articles, he recalled that the Special Rapportrur had proposed in his eighth report to delete the draft article in view of the little support it had received in the written comments and observations by Governments, Conflicting views had been expressed in the Commisaion with regard to the poaaible deletion of that draft article. Some members had supported the deletion purely and simply because they had felt that the provision ran directly against onr of the main purposes of the draft articles,

(Mr. Dias-Gonsales)

namely the establishment of a uniform régime for all couriers and bags. Other members, instead, had been in favour of retaining thr draft article as a price to be paid in order to ensure a wider acceptability of the draft articles, particularly in view of the fact that many States not having become parties to the 1969 Convention on Special Miaaiona and the 1975 Vienna Convention on Representation of States made a diatinotion between different categories of bags. In their view, it was essential to offer those States the poaaibility to opt out of draft article 28. Other members had felt that the objective of draft article 33 could be attained by providing for optional protoaola dealing with couriers and bags under the 1969 Convention on Special Miaaiona or the 1975 Vienna Convention on the Representation of States.

64. He then referred to an iaaue not yet covered by the draft articles, Written aommenta and obaorvationa by Governments as well as members of the Commiaaion had suggested the poaaibility that the future instrument on the topic should contain proviaiona on the peaceful aettlement of disputes arising as a consequence of the application or interpretation of the instrument, perhaps in an optional additional protocol. In that connection the Commiaaion hoped to count on the guidance and advice of the Sixth Committee,

65. The Commission, for lack of time, had been unable to consider the report of the Special Rapporteur for the topic entitled "Jurisdictional immunities of States and their property". The Special Rapporteur had submitted an extensive preliminary report and had taken note of Governments' written comments and observations so far received, to be considered when recommendations for poaaible redrafting of some of the articles were made.

66. The Special Rapporteur for State rraponaibility had submitted his preliminary report : an extensive and well-documented analytical examination on an overall approach to Parts II and III of State Responsbility. In that report, the Special Rapporteur had presented to the Commiaaion his own approach to the remaining Parts II and III of the topic as well as a re-examination of articles 6 and 7 on restitution of Part II that were currently before the Drafting Committee, The Commission had requested the Special Rapporteur only to introduce his report at ths current session and had hoped to begin its consideration at its next session,

67. With regard to the other deciaiona and conclusions of the Commission, he pointed out that, in its report on the work of its thirty-ninth session, the Commission had concluded that it would endeavour to complete, in the course of the five-year term, the second reading of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, in 1980, and the second reading of the draft articles on jurisdictional immunities of States and their property, in 1989, provided, in both cases, that the requested written comments and obaervationa from Governments were available on time. As the result of late receipt of comments submitted by Governments, those topics could not be taken up on time at the current session. It had therefore been impossible to complete the second reading of the corresponding drafts in 1988 and 1989, respectively, The Commission had decided to concentrate in 1989 and 1990,

respectively, on the second reading of those two topics, The Commiaaion would accordingly endeavour to complete by 1991 the first reading of the draft articles on the Draft Code of crimes against the peace and security of mankind and the first reading of draft articles on the]' of non-navigational uses of international watercourses.

68. He expressed the appreciation of the Commission that, notwithstanding the financial criaia, the normal arrangements for a 12-week aeaaion had been restored, and reiterated the Commission's view, as endorsed by the General Assembly in paragraph 7 of resolution 42/156, that the requirements of the work for the progressive development of international law and its codification and the magnitude and complexity of the aubjrcta on the agenda made it desirable that the usual duration of the aeaaion should be maintained.

69. So far as its future programme of work was concerned, the Commission had noted that attainment of the goals, as he had indicated earlier, of completing the second reading of two topics and the first reading of two additional topics would result in a reduction of the number of topics on its agenda, The streamlining of thr agenda would be conducive to higher productivity of the Commission's work. The Commiaaion also deemed it necessary to identify possible topics which could be included in a long-term programme of its future work. For that purpose, the Commission intended to eatabliah a small working group which would be entrusted at the next two aeaaiona with the task of formulating appropriate proposals,

70. The Commiaaion had also taken note of paragraph 5 (c) where the Assembly had requested that the Commission in its annual report, *for* each topic, should indicato those specific iaauea on which expreaaiona of views *by* Governments, either in the Sixth Committee or in written form, would be of particular interest for the continuation of its work.

71, He emphaaiaed the importance of effective communication and dialogue between the Commiasion and the General Assembly. The Commiaaion, as a body composed of experts elected in their individual capacities, had specific and perhaps unique characteristics, If it was to be responsive to the needs of the international community, it must be able to count on the aupport and guidance of its parent body at all stages, from the initial stage of selection of the topics to be included in its agenda to the concluding stage of the reviewing of its drafts. Such communication and dialogue would enable the Commission to continue its work with the full benefit of the views of the *General* Assembly.

72. Mr. CALERO RODRIGUES (Braail), referring to the report of the International Law Commission on the work of its fortieth seaaion (A/43/10) observed, with regard to the topic "International liability for injurious conaequencra arising out of acts not prohibited by law", that article 1, au proposed by the Special Rapporteur, limited the application of the articles on the topic to activities which created an appreciable risk of causing transboundary injury. The Special Rapporteur had explained in that connection that ho had introduced the concept of "risk" as a criterion limiting the types of activities covered under tho topic and that any

(Mr. Calero Rodrigues, Brasil)

activity aauaing tranrboundary harm had to have an ● lrmont of appreciable risk associated *with* it if it was to lie within the scope of the topia, The Brasilian delegation noted thr statement in paragraph 49 of the report that some members of the Commiaaion had praferrrd to limit the topia to activities involving appreciable risk but that many others had felt that the criterion of risk should be limited to the obligation of prevention and that the articles should deal with all activities causing transboundary harm. One member had gone so far as to express thu view that the concept of "risk" should not be introduaed into the topia in any Corm *and* had preferred the concepts of "injury" or "harm". If *the* artialea were *to* be drafted exclusively to deal with reparation, i.e. with the concept embodied in the current title of the topic, that extreme view would be acceptable. However the prevailing idea rammed to be that the articles should also deal with prevention, a view which his delegation accepted.

73. If the artialea were to cover both prevention and reparation, then both the concept of "harm" and that of "risk" might have *a* place in them. However, "risk" should not become the predominant concept. If that approach prevailed, reparation for harm actually caused woula be conditional on the determination that the activity aauaing the harm involved risk, i.e. in the words of article 2, that it was an activity "highly likely" to cause harm. If harm had been produced, it was immaterial to try to ● aaortain whether the activity had created risk, It might even be said that in every case in whioh harm occurred, there was a risk of it occurring. The demonstration was made by the very fact that harm war produced. However, that amounted to admitting that tho basis for roparation was "harm", not "risk". The introduction of the *aonaept* of "risk" was unneceaaary and might be a source of confusion. If an activity was not considered highly likely, or even simply likely, to caure harm and yet harm was caused, should the victim then be left to bear his loss or injury? That would contravene one of the principlea quoted in paragraph 82 of the report, on which there had been general agreement in the Commiaaion,

74. His delegation agreed with the Special *Rapporteur* that a diacuasion on whether the topic was baaed on progreaaivo development or codification of international law was unnecessary, It also agreed that there was a gap in international law with regard to the principles governing the relations between States concerning activities involving risk. It also believed, however, that the gap was *even* wider and extended to all activities which, while *not* being wrongful, caused transboundary harm. In its view, the time had come to draw *up* a general instrument *to* cover situations which were becoming increasingly frequent as technological progress gave rise to more and more activities which, with or without apparent risk, might caure tranrboundary harm,

75. He agreed that Staten should accept the obligation to minimise as far as possible any risk that their activities might create for other States, However, they should also be bound to make reparation when harm occurred, The rules of reparation should be flexiblea they should not sot a strict obligation of reparation for all harm, in all circumstances. Thero had been examples in the past of compensation being given ex gratia for harm caused by lawful activities. That

/...

(Mr. Calero Rodrigues, Brazil)

had boon *done* on thr basis of a rort of moral obligation; it was now a matter of making that obligation, in such cases, a legal obligation,

76. Summing up his delegation'8 position on the question raised *in* paragraph 102 of the report, ho raid that "harm" rhould be *the* paramount consideration in matters of reparation *rnd* "risk" should be the basis for the rules of prevention.

77, Commenting on the articles presented to the Commission and on some of the issues they raised, he recalled hi8 delegation'8 view, with regard to the proposed article 1, that activities which caused ● ppreciahlo tranrboundary harm would fall within the scope of that article, whether or not an appreciable risk of harm being caused was involved. Xi8 delegation appreciated the careful *and* comprehensive manner in which the article indicated that the activities to be considered were those carried out under the "jurisdiction" of a Stat8 or under it8 "effective control" and *agreed* that *a reference* to "territory" would be insuf f icient. Howrve*r*, since most of the activities would take place in the territory of a State, it wondered whether a reference to territory would not be justified, provided *that* the mention of jurisdiction *and* control was maintained.

78. With regard to article 2 (c), his delegation agreed with tho idea that tranrboundary injury referred to the physical consequences of an activity. A8 a question of terminology, he would *prefer to* use "harm" rather than "injury". Notwithrtanding the title of the topic, hi8 delegation believed that throughout the articles, as well as in article8 on *other* topics, "injury" rhould be ured in referring to legal *damage* and "harm" in referring to factual damage,

79, As to article 3, his delegation *did not* consider the first question raised concerning "attribution" to be a major problem. With regard to tho second question, however, hi8 delegation thought that to admit *that a* State *war* accountable for all activitier which took place in it8 territory, under it8 jurisdiction *or* under it8 control only if it "know or had means of knowing" that the activity war being or was about to be carried *out* was *a* considerable deviation from the basic principle, He agreed that cases might exist in which a State, particularly a developing State, was unaware that certain activities wer. taking place in its territory, If an exception to accountability war admitted, it rhould be carefully drawn, The Special Rapporteur indicated that there would be a presumption that the State was accountable *for* all activities in it8 territory. It was up to that State to prove that it did not know and had no means of knowing that a given activity was taking place, That war a useful qualification, which rhould be adequately reflected in the text,

80. Article8 4 and 5 were raving clauses and rhould not raise any difficulties.

81. With regard to article 6, anyone's rights, or freedoms, were limited by the right8 of others. However, hi8 delegation had doubt8 concerning the formulation of the article and wondered why it was only with *regard* to "activities involving risk" chat the freedom of a State must be compatible with protection of the right8 of other States, If the principle had to be included in the articles, it should be drafted in broader terms.

/...

(Mr. Calero Rodrigues, Brazil)

82. The principle of co-operation in article 7 was useful and would find its application mainly *in* the provirionr relating to prevention, although it might be applied if harm had occurred.

83. His delegation had doubts about the content of article 8 which, owing to its laok of precision, might create problems if it was maintained. *In* his delegation's opinion, it dealt only with a specific aspect of co-operation and oould be dropped without loss.

84. With regard to ● ttiola8 9 and 10, his delegation thought that the prinaiple of preventionrhouldbe● ☒□❒□♋♋□♎ inbroaderterms: States should take all reasonable measures, individually, or, when necessary, in co-operation with othrr States, to prevent or minimise rho possibility of harm being caused to other States by ● ativitior under their jurisdiction or control. His delegation saw *no* need to make the distinction implied in artiolr 9 between a general duty of prevention *and* duties of prevention under an ● 8tabliOhOd "régime". hoarding to thr article as currently formulated, the duty of prevention war only recognised if no "régime" had been ● Ot8bliOhOd,

85. Article 10 ● mbodiod thr fundamental principle of *reparation,* which was the ❖♏□♒ ● 88enoo of liability, While thr article seemed to have been carefully draftrd, it aould be improved, In line with its ● pproaoh to *the* scope of the artioler, his delegation believed that all appreciable harm had ♦□ be compensated. It war not certain of the need to qualify the principle by raying that reparation rhould apply "to the extent compatible with *the* provirionr of tho prrrent articles". A principle was a principle; other provirionr would, of course, develop the consequences of the principle, but thrre seemed to be *no* nred to give the impression of imposing limitation8 *on* the principle at the very outset of its formulation. His delegation aould agree to the two rub-principle8 inaluded in the article, namely that the question of reparation rhould be settled by negotiation between the parties and that it rhould be settled *in* accordance *with* criteria laid down in the articles. Those *two* concepts seemed to be beyond reproach, but at some pornt it had to be decided what would happen if the qurrtion was not settled by negotiation.

86. Mr. KOROMA (Sierra Leone) observed that it was the pre-eminent role of *the* International Law Commission and, indeed, of international law to promote and rtrengthen international peace and security and to enhance political, social, economic and cultural co-operation among nations. That war all the more necessary when force continued to be used in international relations and prohibited weapons continued to be employed in some conflicta, thereby violating international law, and weakening confidence in its effectiveness, as well as in the United Nations itself, whose oontinued relevance and indispensability to world peace had recently been reaffirmed.

87. His Government had always firmly abided by the norms governing the Organisation and contemporary international relationa. As recently as September 1908, Sierra Leone had reiterated its oommitment not to resort to the

threat or use of force against thr territorial integrity or political independence of other States or to behave in any manner contrary to thr Chartrr of thr United Nations.

88. In considering tho topics "International liability for injurious consequences arising out of acts not prohibited by intrrnrtionrl law" and "The law of the non-navigational uses of international watercourses", thr Intornrtionrl Law Commission was responding positively to thr challenges of thr international community. The work of thr Commission also constituted a response to the fact that international law war bring rapidly outdistanced by the accelerating pace and expanding scale of impacts on the ● cologiarl basis of development.

89. By preparing a draft Code of Crimes against the Peace and Security of Mankind, thr Commission aontinurd to provide hope that Article 2, paragraph 4, of thr Charter, on the non-use of force in international relations, was very much alive and that the United Nrtlor.8 might ● vontually give moaning and force to it and provide at least • modicum of respect for tho territorial intrgrity and political independence of all States.

90. With regard to the topic "International liability for injurious consequences arising out of acts not prohibited by international law", which complemented the efforts being made by States to prevent the increasing pollution of thr atmosphere *rnd* the deposit of industrial and toxic wastes, ho was pleased that the Commirrion had finally been able to concretise the subject in tho form of draft articles. However, hi8 delegation, like others, had a conceptual reservation regarding the title. It continued to believe that harm caused to a party •◌□ • violation of the rights *of* that party and gave rise to liability, It also continued to consider that liability was a direct consequence arising from that violation and that therefore the injured party should *bo* entitled to compensation. In the light of such reservations, it behoved the Commission to continue to update it8 materiel,

91, His delegation agreed with the statement *in* the report thrt the topic murt not discourage the development *of* science and technology necessary for the improvsmrnt of the conditions of life. However, with regard to the objective of the draft articles which, it was raid, war to obligate States involved in the conduct of activities involving risk of extraterritorial harm to inform States which might be affected and to take tho necessary preventive measures, hi8 delegation thought that such a formulation war both onerous and too elastic. All activities involved risk to some extent. As formulated, the relevant article could be construed to mean that a source State whore activities caused harm to en injured State would have failed in its duty just by not informing all States that were potentially likely to be affected that it had embarked on such an activity, Secondly, *it wondered* what would be the position if et the time when the activity was initiated, it *war* not deemed risky, but a fault developed later, causing harm *to* another State. Would that situation be a defence by the source State? Thirdly, hi8 delegation wondered what *the* position would be if the injured State, following the inform&ion about a risky enterprise, took *no* action end suffered injury, Would the • ourco State have claim to the defence of contributory negligence because the injured State hrd taken no precautionary measures? In his delegation's view, the primary rule remained

(Mr. Koroma, Sierra Leone)

valid, namely, that a State which caused harm to another State incurred liability vis-à-vis the injured State, which was entitled to compensation or reparation by the source State. Liability was not a consequence of the risky nature of the enterprise, but flowed from the fact that harm had been caused to the injured State. That was a more solid foundation and should be the basis of the topic. Risk was a matter of fact and not of law and, therefore, could not be the main criterion for liability.

92. His delegation believed that the issue of pollution fell within the scope of the topic. It was, of course, impossible to eliminate all forms of pollution but where it caused appreciable harm, it followed that the source State would have violated not only the rights of the injured State but also its duty not to cause such harm in the use of its territory. Some of the leading cases in that area arose as a result of transboundary pollution which caused harm to other States. Difficulty in identifying the defaulting State need not act as a bar to liability. His delegation was of the view that that would be a matter of evidence and, in any case, measures such as prevention could be undertaken to eliminate pollution.

93. One of the provisions submitted for consideration was the duty to co-operate as it applied to the source State in relation to affected States and vice versa. While the duty to co-operate had a solid basis in international law, its objective must be defined clearly. According to the article, the duty to co-operate was to notify, inform and prevent. In his view, however, the source State and the injured State should not be placed on the same footing for the purpose of liability. While States might be required to co-operate, for example, in the prevention of pollution, his delegation was of the view that in the case of transboundary harm, justice and equity demanded reparation, even though co-operation might be found necessary in the form of assistance to the State of origin in mitigating the harmful effects. His delegation therefore believed that the emphasis must be on liability and prevention.

94. In elaborating the principles on the topic and in attempting to establish the standard of liability, methods of both codification and progressive development should be employed. It was known that judicial and arbitration tribunals had applied different standards of liability. In some cases, the test of strict liability had been applied, while in others the negligence test or that of the balance of interests had been invoked. On the other hand, some States had voluntarily admitted liability in cases of transboundary harm brought about by failure to prevent an accident as a result of the inadequacy of the measures taken. In his delegation's view, different standards would apply in determining liability, depending on the type of activities undertaken. However, whatever the test of liability, justice would require that an injured party should not be left to bear the costs of the injury alone.

95. With regard to the law of the non-navigational uses of international watercourses, he noted that only one fourth of the rural population of Africa had a reliable water supply, and that some 300 million people remained unserved. Moreover, in the developing countries perenially afflicted by either drought or

(Mr. Koroma, Sierra Leone)

flood conditions, tne misuse of water could result in climatic changes, aridity and desertification. The development of watercourses, on the other hand, could act as a vehicle for socio-economic development. Co-operation between States in the use of watercourses was essential in order to avoid piecemeal development and consequent lost opportunities to optimise economic benefits. Likewise, there was a need for an exchange of data and information about watercourses in order to predict their ebb and flow, control vector-borne diseases and prevent or mitigate natural disasters.

96. Pollution was also a major problem. It was estimated that 80 per cent of sea pollution originated from land-based sources, especially rivers. The obligation of States not to pollute a watercourse should have a place among the draft articles. A number of international instruments, such as the United Nations Convention on the Law of the Sea, in particular in its article 207, had given due consideration to the question of pollution.

97. The concept of "appreciable harm" as a basis for liability seemed to be objective and reasonable, if based on scientific evidence. Care must be taken, however, to ensure that the provision was worded in such a way that it did not establish a veto by one watercourse State over another. Although draft article 16, paragraph 3, as proposed by the Special Rapporteur referred to preparing lists of substances or species, the introduction of which into the waters of the international watercourse was to be prohibited, limited, investigated or monitored, that method had not succeeded thus far in preventing the pollution of watercourses in regions where it had been employed. The need to invite expert opinion on the matter should be examined.

98. Where an environmental emergency arose, the source State was obligated to warn other watercourse States of the danger in a timely fashion and to take immediate action to prevent, neutralise or mitigate the danger or damage to other watercourse States resulting therefrom. The draft article should also include the provision that, where the source State failed to take such measures, it should be liable for the harm caused to other watercourse States.

99. Turning to the draft Code of Crimes against the Peace and Security of Mankind, he noted that, if successfully drawn up, the Code could act as a deterrent and help to eliminate violence in international relations. Co-operation between States was necessary *for* the prevention of crimes which threatened mankind. In elaborating a list of crimes against peace, every offence should be spelt out separately. Furthermore, although States remained the conceptual subjects of contemporary international law, it was in terms of individuals – government officials who implemented the acts which were tantamount to the crimes – that the articles should be drawn up. Holding individuals directly responsible for such offences would deprive them of the defence of sovereignty, independence, sovereign equality and domestic jurisdiction.

100. Aggression, threat of force, annexation and the sending of armed bands to a foreign State should constitute separate offences. The Code should also include

(Mr. Koroma, Sierra Leone)

the planning and preparation of aggression as crimes againrt the peace, for aggression oould not be carried out wi.iout planning, Intervention, whiah could takr various formr, represented an encroachment on the independence of a foreign State and a violation of it8 sovereignty and politiaal independence. A provision against intervention rhould therefore be included *in* the draft Code. Only those forma of intervention whiah undermined the sovereignty of a State or constituted a prelude to aggression should be considered a crime against peace.

101, The existence of colonialism represented a threat to international *peace,* involving both the use *of* force and the denial of the right of self-determination. It was therefore necessary to include it in the Code. Mercenarism, which the General Assembly had aallrd a thrrat to international peace and security, ahould be considered a8 a crime against peace, although it could also fall under the aatogory of crimes against humanity.

102. With regard to thr status of th8 diplomatic courier and th8 diplomatic bag not accompanied by diplomatia courier, any definition of the diplomatic bag proposed by thr Commission must meet the balance-of-interests test by ensuring that the important functions of conununiaation by the sending State wore *not* impaired, and that the interests of the receiving or transit State were *not* compromised by the abuse of the bag. The status of thr courier rhould also be respected.

103, Tha comprehensive and funational approaah adopted a8 a basis for the elaboration of the draft ● rtiol.8 was valid; not only should the inviolability of the courier and the bag be guaranteed, but the courier rhould be *on* notice to respect the law8 and regulation8 of the receiving and transit States. The scope of the article8 rhould be confined to States for the present. To extend it to international organisation8 might unduly complicate matters, as international organizations differed from one another and were not in a position to *enter* into a reciprocal relationship with States. *On* the other hand, the régime rhould be extended to recognized liberation movements, a8 some of them carried out State functions.

104. Draft article *10* represented a middle ground between full immunity for the courier and the interests of the receiving or transit State. Given the sending State's obligation to respect the law8 and regulations *of* the transit and receiving States, it was inappropriate to define further the permissible contents of the bag. The problem of drug trafficking could be addressed by insisting on *the* observance of the laws and regulation8 of the receiving or transit State, Moreover, subjecting the bag to electronic scanning would introduce an element of inequality among State8 and would defeat the purpose *of* the bag.

105, With regard to jurisdictional immunities of States and their property, hi8 delegation felt that the Special Rapporteur's approach to the topic would lead to an acceptable compromise between the two schools of thought of acta jure imperii and acta jure gestionis. No useful purpose would be served by maintaining rigid positions *on* those issues. It would be more productive to reaffirm the concept of jurisdictional immunities of States with clearly stated exceptions, using the consensus formula envisaged by thr Special Rapporteur.

(Mr. Koroma, Sierra Leone)

106. The recent criticisms of the Commission's work on the topic of State responsibility could not all be raid to be unwarranted. The inordinately long time which the Commission had taken to elaborate the topic had been said to have damaged international law, His delegation expressed the hope that the Special Rapporteur would bring hi8 usual perspicacity to bear on the topic ♋■♎ ● neblo the Commission to meet the high expectation8 of Member States.

107. His delegation welcomed the streamlining of the Commission's agenda *and* the Commission's intention to complete by 1991 the first reading of the draft articles on the law of thr non-navigational uses of international watercourses and of the draft Code of Crime8 against the Peace *and* Security of Mankind. The rigorous examination of the topic8 on the Commission's agenda would attenuate some of the criticism of the Commission, such as *the* accusation that the Commission was bureaucratising international law.

108, Lartly, hi8 delegation war pleased that the post-graduate International Law Seminar had again been held during the most recent session of the Commission. He expressed gratitude to the Governments of Argentina, Austria, Denmark, the Federal Republic of Germany, Finland and Sweden for their voluntary contributions, which had provided fellowships to participants.

The meeting rose at 6.20 p.m.