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Chairman: Mr. **MIKULKA** (Czechoslovakia)

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The meeting was called to order at 10.15 a.m.

AGENDA ITEM 142: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SECOND SESSION (continued) (A/45/10, A/45/469)

AGENDA ITEM 140: DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (continued) (A/45/437)

1. Mr. CALERO RODRIGUES (Brazil), referring to the draft articles on the non-navigational uses of international watercourses, said that the articles on protection and preservation adopted by the Commission at its forty-second session were dispensable, since all the obligations set out in them were contained by implication in previous articles. Furthermore, it was doubtful that the protection of the marine environment, which was dealt with in other instruments, fell within the scope of the articles under consideration. Legal texts should be limited to the essentials, which should be expressed as clearly as possible. That notwithstanding, Brazil would not oppose the adoption of articles 22 to 25.

2. "Emergency situations" (art. 27) occurred suddenly and caused, or posed an imminent threat of causing, serious harm to other States. However, "Harmful conditions" (art. 26), although not arising as abruptly, could also be harmful to other States. Neither article expressly linked the situations or conditions in question to watercoursea, but such a link could be inferred from the examples of cauaea given in the two articles; moreover, there would be no justification for including in a set of articles on watercourses provisions on phenomena not linked to watercourses. However, Brazil would like the articles to be drafted with more precision.

3. Brazil was satisfied with tha drafting of the provisions on the obligations of States in the case of harmful conditions or emergency situations. In the case of harmful conditions, there was only an obligation to take all appropriate measures to prevent or mitigate them. In the case of emergency situations, there was in addition an obligation immediately to inform potentially affected States and competent international organiaationa. Reference was also made to the possibility of an obligation to develop joint plans for responding to emergencies, where appropriate. Such an obligation depended on whether States agreed on *the* need to develop such plans, but the text of article 27 was not explicit on that question.

4. Brazil hoped that the articles referred by the Commission to the Drafting Committee could be drafted in such a way as to avoid too many divisions. For example, it saw *no* reason *why* the articles *on* the regulation and management of international watercourses should be separate, since regulation was just one aspect of management. Nor did it see the difference between the provision stipulating thtt States should co-operate in identifying needs and opportunities for regulation and the provision stipulating that States should enter into consultations, at the request of any of them, concerning the establishment of joint organizations for management. The provisions in question could even be considered as unnecessary, in the light of article 4, paragraph 3. If the reference to management was

(Mr. Calero Rodrigues, Brazil)

maintained, the concept of management should not be defined in terms of "functions"; it should be defined expressly and should cover regulation,

5. Brazil agreed with the Commission members who felt that if the provisions on the protection of water resources and installations were needed they should refer only to the protection of installations, since the protection of water resources was indistinguishable from the protection of watercoursea, which was the object of the draft articles. It was doubtful that the inclusion of a provision on the protection of installations in time of armed conflict was either necessary or appropriate. It would be better to deal with that issue in the context of the rules governing the conduct of States in time of armed conflict. Such rules would apply to watercourse8 and to watercourse installations without any need for special provisions in the draft articles under consideration.

6. Brazil endorsed the concept embodied in article 24, namely, "the absence of priority among navigational and non-navigational uses of watercourses". But paragraph 2 of the article should be redrafted so as to indicate in a more straightforward manner that the relationship between different uses should be determined by the States concerned themselves.

7. With regard to the annex proposed by the Special Rapporteur on the implementation of the draft articles, Brazil was not at all sure that it had a proper place in a framework convention, In most instances the instrument under preparation would be implemented through separate agreements tailored to the needs of specific watetcouraea, and it would be implemented directly only residually. Moat of the proposed provisions seemed unnecessary, and rather cumbersome machinery was not needed in order to review implementation and to consider amendments. Amendments did not call for a special provision when the matter could be dealt with under the Convention on the Law of Treaties. Where other criticisms of the annex were concerned, Brazil agreed that it was somewhat lacking in consistency and that the only obligation laid down in articles 2 to 5 that embodied an acceptable principle was the one set out in article 3, which could be included in the section on general principlea. Brazil also agreed that article 7 was unhelpful, and that it was doubtful that the provision laid down in article 8 would be an improvement on the general procedure concerning amendments laid down in the Vienna Convention.

8. In connection with the comment that the annex raised a problem of far-reaching implicationa, the problem of civil liability, Brazil believed that no provisions concerning the legal consequences of harm were needed in the articles under consideration. However, if any such provisions were included, it would suffice to include a single provision stating the principles of non-discrimination and equal right of access, as laid down in article 3, paragraph 1, and in article 4. In referring the two provisions to the Drafting Committee, the Commission had thus chosen the proper way of dealing with the problem of civil liability.

9. Where the other provisions suggested in the annex were concerned, the Special Rapporteur had himself acknowledged that the time had not yet come for action on the text and had recommended that only two provisions should be referred to the

(Mr. Calero Rodrigues, Brazil)

Drafting Committtte, reserving the possibility of submitting new proposals at the following session. In that connection, Brazil urged the Special Rapporteur not to insist on submitting the proposals set out in the annex once again, which would only hinder progress on consideration of the topic.

10. Mt. (Islamic Republic of Iran), referring to the draft articles on the non-navigational uses of international watercourses, said that articles 25 and 26 actually dealt with the same subject, namely, the joint exploitation of watercourses by ripax ian States. In that connection, he wished to stress the general obligation to co-operate laid down in article 9. He noted that article 25 did not define the term "regulation". The definition adopted by the International Law Association in 1980 was aatiafaotory, in his view. Once again in connection with article 25, he wished to draw the Committee's attention to the negative impact that regulation of a watercourse could have on the territory of States situated downstream. Article 25 should deal with such a situation, since in many cases the construction of regulation works upstream had been a source of conflict between States. Naturally, such a provision would have to reconcile the traditional concept of the use of international watercourses, baaed on the assumption that the principle of State sovereignty should prevail, with the current evolution in the rights and obligations of States in exercising their territorial competence. Unquestionably, neighbouring States had to meet requirements that limited the freedom of action that States normally had in governing their territories.

11, The fundamental principle to bear in mind was that all riparian States could undertake the construction of works on an international watercourse, provided that such construction did not cause appreciable harm outside their territory. The purpose of that principle was to guarantee equitable and rational use of the water, and was in keeping with the obligation of watercourse States not to cause appreciable harm, as indicated in draft article 8. That was a principle of customary law solemnly reaffirmed in Principle 21 of the 1972 Stockholm Declaration on the Human Environment. All States thus had the sovereign right to exploit their resources pursuant to their own environmental policies, provided that they ensured that activities within their jurisdiction did not cause serious harm to the environment of other States. It would be wrong to conclude that that principle entitled a State to pronounce on the economic policy *of* another State and to obstruct its economic development plans.

12, With regard to article 26, in his country's view, the term "management" included the functions listed in paragraph 2, but also, first and foremost, the regulation of watercourses. For that reason, that function should occupy a prominent place among the duties of the organiaationa responsible for managing an international watercourse. Although organiaationa of that type catered to a practical need, his delegation did not share the view that their establishment should be obligatory, In that connection, it was necessary to avoid the errors which might arise from the current wording, which need not be interpreted as implying that the obligation to enter into consultations involved the obligation to achieve some result. Nor did his delegation take the view that those organisations must of necessity include all the watercourse States, since a number of river

(Mr. Montaz, Iran)

commissions currently functioned effeatively without numbering all the riparian States among their members.

13. His delegation aupported unreservedly the view that article 28 should prohibit not only the contamination of watercourses, but also any aativity designed to cut off an enemy's water supply. The result would be that not only contamination, but also drying up and diverting watercourses would be prohibited. All those activities were both war crimes and crimes against humanity. The provisions were designed to protect the oivilian popul~tion against the harm occasioned by armed conflicts, and were concordant with Additional Protoaol I to the 1949 Geneva Conventions, and in partiaular with the provisions therein regarding protection of objects indiapensable to the survival of the civilian population, such as drinking-water supplies and irrigation works. The concept of inviolability of watercourses and their associated installation8 reflected humanitarian considerations. The question was whether that immunity should be waived when those objects served directly to support a military operation. His Government advocated the absolute immunity of watercourses, in view of the extreme difficulty of distinguishing between oivilian and military use. That was still truer of dikes and dams; even when they served to support military operations, they must be protected as structures and installations whose purpose was to contain dangerous forces, in view of the pernicious effects of their destruction on the civilian population.

14. With regard to annex I, his delegation strongly favoured the idea of enabling private enterprises to obtain compensation for any harm that had been suffered, without involving the watercourse States in the dispute. It seemed sensible to ensure access by those enterprises to the courts of all the watercourse States, thereby avoiding the necessity for small enterprises to have recourse to diplomatic procedures. Nevertheless, it should be borne in mind that in some cases that solution would involve a reform of the judicial systems, which would not be readily acceptable. His delegation wished to put on record its serious reservations as to whether the ordinary courts were in a position to apply international law on liability in settling such disputes, Consequently, it would be desirable to continue to study the potential effects of application of suah a criterion on the functioning of States' jurisdictional systems, partiaularly where States did not have a sufficient number of suitable officials. In order to avoid those difficulties, his delegation suggested that the articles in question should be included in an optional protocol to the future framework convention on the law of the non-navigational uses of international watercourses.

15. Mr. YEPEZ (Venezuela) began by stressing the substantial progress achieved on the topic "Draft Code of Crimes against the Peace and Security of Mankind" and the work accomplished by the Working Group that had studied the question of the establishment of an international criminal jurisdiction.

16. Turning to the topic "Jurisdictional immunities of States and their property'*, he said that it had been a logical decision to postpone the final adoption of the articles revised by the Drafting Committee until the Commission had completed its

(Mr. Yepez, Venezuela)

second reading and consideration of the remaining articles at its forty-third session. With regard to the title of part III of the draft articles, his delegation would have preferred the term "Exceptions to State immunity", but it did not oppose some other formulation such as "Cases in which the immunity of one State oannot be invoked before the courts of another State".

17. Draft artiole 12, on contract8 of employment, must be retained, as safeguarding the possibility for employees of a foreign State to have recourse to the national courts in the defence of their rights. The wording of paragraph 1 of that article was confused, and his delegation supported the proposal to delete the reference to "social security". The exceptions provided under paragraph 2 should also be limited, by deleting subparagraphs (a) and (b).

18, Article 13, which set out to regulate the extraaontraotual liability of the 8tate in respect of non-conuneraial aots, should be deleted, basically because exceptions to State immunity must be reduced to a minimum. Alternatively, the provision should be olarified and made more specific, particularly with regard to the phrase "the act or omission which is alleged to be attributable to the State", and with regard to the connection between the author of the act or omission and the defendant State.

19. With regard to article 14, dealing with ownership, possession and use of property, his delegation favoured the deletion of subparagraphs (o), (d) and (e) of paragraph 1, the introduction into subparagraph (b) of the concept of property situated in the forum State, and the deletion of paragraph 2.

20. Article 15, on patents, trade marks and intellectual or industrial property, oould be deleted, since its provisions wore subsumed in other provisions of the draft articles, or because it could be covered in the international legislation regulating the question.

21. His delegation supported the deletion of article 16, on fiscal matters, having regard to the criterion that exceptions to State immunity must be reduced to the indispensable and relevant minimum.

22. With regard to article 19, "Effect of an arbitration agreement", it would be preferable not to include subparagraph (d) on the recognition of the award; it would be useful for the provision to specify that the act of concluding the arbitration agreement to which the article referred did not imply subjeation to the jurisdiction of the forum State, so as to avoid confusing the arbitration agreement with the waiver of immunity.

23. On the understanding that the measures of nationalization were sovereign acts of the State, his delegation agreed with the majority of member8 of the Commission that article 20 should be deleted.

24. One question of particular importance was that concerning State immunities in respect of property from measures of constraint, to be regulated in part IV by

(Mr. Yepez, Venezuela)

artialer 21, 22 and 23. His delegation considered that the draft articles must come closer to a broad and non-restrictive concept of immunity from execution or from measures of constraint on the property of a State. The draft artioles must clearly set forth the principle of non-execution on the property of a foreign State in the territory of the forum State. It would be possible to work on the text of artialer 21 and 22 of the second alternative submitted by the Special Rapporteur, with the proviso that the words "and has a connection with the object of the claim, or with tho agency or instrumentality against which the proceeding was directed", in paragraph 1 (a) of article 21, must be retained, and that, in paragraph 1 (c) of artiole 22, the words "and used for monetary purposes" must not be included. The wording of paragraph 2 of the new article 22 should refleot the idea that the property referred to in paragraph 1 of that artiole would be protected against any form of measures of constraint. In principle, the new article 23 was unnecessary.

25. Turning to the topic of the law of the non-navigational uses of international watercourses, he said that artiole 24 required olarifioation, The parties to the "agreement to the contrary" referred to in paragraph 1 should be specified. Various factors must be taken into aooount in that article, including the need to secure or maintain a high level of water quality for the health of the population, and domestic and agrioultural uses, as well as the use of water with adverse effeota on the environment. It was also important to clarify and develop the provisions of article 25. In paragraph 1, the obligation for international watercourse States to co-operate when one of them so requeated, with a view to regulating international watercourses, rhould be directly established, and the purpose of such regulation specified. Paragraph 2 might stipulate only the obligation for the wateroourre States to reach an agreement on the construction and maintenance of workr relating to the watercourse.

26. With regard to artiole 26, the obligation outlined in paragraph 1 ehould be extended to include not only "consultations" but also "negotiations" and "institutionalization" of the appropriate management mechanism. *The* term "organization" might be replaced by "commission" or another more appropriate term. Similarly, the function8 outlined in paragraph 2 might be spelled out even *more* olearly. Subparagraph (b) of paragraph 2 might state what type of information and data should be exchanged among States; subparagraph (d) should be clarified, particularly the term "multi-purpose"; the reference in subparagraph (e) to "proposing ... decisions of the watercourse States" should be clarified; subparagraph (f) could envisage clean-up and environmental protection measures and human health.

27. In article 27, paragraph 1, the words "shall employ their best efforts" could be replaced by some more specific wording, paragraph 2 might also provide for the obligation to negotiate "agreements" or "arrangements"; the reference to "international watercourses" in paragraph 2 (b), could be deleted. Article 28 could be divided into two parts, one dealing with peaceful uses, the other dealing with armed conflict. However, the word "inviolable" should be replaced by a *more* appropriate*word.*

(Mr. Yepes, Venezuela)

28. Annex I entitled "Implementation of the draft articles" required further study and thought. In light of tha proposal contained *in paragraph* 313 of the Commission's report, tha annex should be substantially amended. Since the question dealt with in article 6 was being dealt with in another draft the artiala should be deleted. Articles 7 and 8 could be moved to tha part dealing with final provisions. Moreover, the annex could be part of an optional document oa tha civil liability régime in order to make redress for injury availabla to individuals.

29. His delegation was graatly pleased by tha Commission's provisional adoption of tha text of articles 22 to 27 whiah comprised parts IV and V of the draft artioles and whiah referred to protection and preservation and to harmful conditions and emergenay situations.

30. Mr. HANAFI (Egypt) said *that* his country had always attached particular importance to tha law of tha non-navigational uses of international watercourses, since that affeotad good-neighbourly relations between tha States in the Nile basin. For *that* reason, the efforts being made to ensure *that* the first reading of the draft articles on the topic was completed during tha current term of office of members of the Commission ware laudable.

31. Although the text of draft article 24 was balanced, paragraph 2 should make reference to the obligation not to cause appreciable harm whiah was the subjeat of article 8 of the draft articles.

32. The term "regulation" in the title of draft article 25 did not rafleot either the essence or the purpose of the article. At first glance it would seem that the article really set forth principles whioh were regulated in other provisions of the draft articles. However, no final judgement aould be made on the articla until the Commission defined the term "regulation".

33. In the view of his delegation draft articla 26 was of vital importance since it contemplated the possibility that wateroourse States might establish a joint organisation for the management of a watercourse. That provision was indispensable in order to protect international watercourses and to ensure that they were put to the best possible use.

34. lie agreed with the general thrust of draft article 27, which focused on the protection of water resources and installations.

35. It would be a *good* idea, when preparing a new version of draft article 28, to refer to the rules of international law applicable in cases of armed conflict, since by doing so any possible omissions would be filled.

36. With respect to the text of annex I proposed by the Special Rapporteur and contained in chapter IV of the Commission's report, he pointed out that the title did not clearly reflect the content *of* the annex. Furthermore, a detailed analysis should be made of tha relationship between claims for compensation made by individuals and those made by States. Furthermore, it would be well to delete or

(Mr. Hanafi, Egypt)

amend artiala 3, paragraph 2, of tha annex, since it contained a clause which had nothing to do with the draft articles, namely, the invitation to States to ao-oparata in tha development of international law relating to responsibility and liability. Likewise, articles 7 and 8 of the annex served no real purpose within tha draft artialas.

37. As some delegations had pointed out, each wataroursa was a world unto itself and had its own charaataristics. Adoption of ths draft articlas would make it possible for countries which belonged to each of thosa worlds to apply directly in their own territory a sat of rules which were in the nature of a framework instrument.

38. Mr. YAMADA (Japan), referring to the programme of work outlined in paragraph 538 of tha Commission's raport (A/45/10), said that the Commission should make every effort to aonaluda the second reading of the draft artioles on jurisdictional immunities of States and their property during the current term of office of its members. In that connection substantial progress had been made thanks to the efforts of tha Special Rapporteur.

39. With regard to chapter III of the report, he was pleased to learn that draft artioles 12 to 28 had been refarred to the Drafting Committee and that the latter had raachad agreement to provisionally adopt draft articlas 1 to 16, with the exception of paragraph 1 (b) (iii) bis of articlas 2 and 11.

40. The international community did not have a unified position regarding State immunity. While some States were in favour of absolute immunity, others wora inclined to favour limited immunity. Under the circumstances, it would be wise to establish rules concerning the extent to which State immunity could or should be limited. According to the text of tha draft artiolas prepared by tha Commission, there were two types of provisions, Tha first type, which would include thosa in parts I and II, ● stablished that States aould, in principle, enjoy immunities with certain limitations. The second type ● laboratad tha soope and extent of tha limits on State immunities. He commended the Commission for its ● fforts to seek a consensus regarding what types of State activity should enjoy immunity. The Commission was acting in a realistio manner, without going too deeply into theoretical matters concerning general principles of the jurisdictional immunities of States. He hoped that an equally realistlo approaoh would be adopted in efforts to complete the second reading of the draft articles.

41. He recalled the proposal by the Special Rapporteur concerning paragraph 3 of the newly combined article 2, which stated that one of the criteria for determining immunity should be whether or not a given operation corresponded to "commercial transaction". The purpose of that proposal was to win broad acceptance, taking into account tha faat that some States attached importance to government purpose while othars supported the primacy of the nature of a transaction as tha tart for determining whether or not a transaction was commercial.

(Mr. Yamada, Japan)

42. The expression "the relevant rulas of general international law" in articla 5 (original art. 6) should be deleted since, otherwise, tha saopo of tha immunity would be unclear. However, taking into account the fact that article 5 was related to tha othar articles, it might be better to wait until consideration of tha remaining articlas had been completed before considering whether or not the bracketed phrase should be rataiaed.

43. His delegation was pleased to see that articla 11 (bis) was more acceptable as ourrently reformulated. In that respect ho praised tha afforts made by the Special Rapporteur to clarify thosa cases in which a State ● ntarprisa was considered independent of the State and subject to the same ● las with regard to responsibility as natural or juridicial persons,

44. With regard to State immunity from measures *of* constraint (arts. 21 *and* 22), in view of tha difference of opinion surrounding that issue, the Commission should consider tha issue in depth with a view to achieving a proper balance of the various criteria applicable to each articla.

45. With regard to chapter IV of tha Commission's raport *on* tha law of the non-navigational uses of international watercourses, his delegation noted that the fifth and sixth reports of the Special Rapporteur had given rise to useful discussions. The second part of tha fifth report (A/CN.221/Add.2) included articles 24 and 25, and tha first part of the sixth report (A/CN.4/427 and Corr.1 and Add.1) contained thrae new articlas 26 to 28 and a new annex I. It was gratifying to note that the Commission had concluded its consideration of articles 24 to 28, together with articla 3, paragraph 1, and article 4 of annex I, and had then referred them to tha Drafting Committee. It also noted that, atter examining the report of the Drafting Committee, the Commission had adopted draft articles 22 to 27 provisionally. Tha purpose of the work on that topia was to draw up a basic framework convention, an approach towards completion of tha first reading during the currant terms of office of its members.

46. Turning to article 25, he welcomed the Special Rapporteur's efforts to reach a balanced solution to the complex question of uses of international watercourses. While recognising in general the necessity to regulate international watercourses, Japan expected the Commission to undertake exhaustive discussions so as to clarify the content of the legal obligations of each State, the modalities of participation of each State in those rogulations, and of the burdon-sharing that aooompanied regulation.

47. Japan agreed with the idea of joint management *of* international watercourses as one of tho important modalities *of* Sntornational co-operatioa, for which the Commission must consider tha issue further. Given tho framework nature of the Convention, draft articles should be described in general term and the specific contents and management functions of such organisations should be dealt with in future bilateral or rogional watercourse agreements.

(Mr. Yamada, Japan)

48, It was necessary for tha Commission to undertake a furthar examination of tho contents of the obligations of ● ♋♍♒ State in respect of the draft articles, proposed in annex I• for relief to individuals who suffered damage. Only aftar such as examination should the Commission start to consider the artiolas in specif ic terms, 1.0. whether they should be incorporated into tha body of the draft articles or attached tharoto as an optional protocol.

49. Mr. CRAWFORD (Australia) said that, despite the remark made in paragraph 243 of tha Commission's report, he had some brief comments to make on the issues, as yet unresolved by the Commission, concerning the jurisdictional immunities of States and their property. Thosa issues were of importance if the draft artiolas, and any oonvantion that might emerge therefrom, were to achieve a broad measure of acceptance, especially by those States in whose aourts issues of immunity most □↗ ♦♏■ ♋□□•♏ •

50. The first issue was whether special provision should be made for State enterprises with segregated State property. Many States conducted aspects of their affairs through separata corporations ● stablished under their own law and having title to their own property. The courts of other States would normally recognise the separate status and property of such ● ntitias and, in mast circumstances, questions of tha liability of tha State itself for acts of a separate ● atity would normally not arise. Thosa were not issws of jurisdictional immunity striotlp so-called but issues of substantive liability. Such issues were not regulated by the currant draft articles, although it might be desirable to add a savings clause to make clear that the draft artiales were without prejudice to the attribution of any liability to a given legal ● ntity under the law governing the status and transactions of that eatity. Australia favoured recognition of the institution of State enterprises with sagrogatod State property. Such a change to the draft articles might well ● nablo sow States to accept other proposed provisions, especially those concerning execution against property set aside for use by State enterprises.

51. Referring in particular to the terms of draft artialas 12 to 28, as proposed by the Special Rapporteur, ho pointed out that draft articlo 13, as worded, accorded with tho practice of thcso States which had taken a public position oa the issue of personal injuries and damage to property. Tha draft article should not be limited to traffio acaidonts nor to ● vents covered by insurance. To make clear the specific aharaater of that provision, his delegation saw merit in tha proposod proviso to the offect that article 13 was without prejudice to sny issuo of State responsibility. It should likewise be provided that article 13 appliod only to injuries or damage done by a person in tho torritory of tha forum State. His delegation could not agree with the objection that it was incongruous for artiole 13 to provide for the liability of tho State itsolf in cases where a diplomatic representative of the State, whose act caused the injury, would be immune from liability. Diplomatic immunity was quite distinct from State immunity.

(Mr. Crawford, Australia)

52. So far as draft article 14 was concerned, he could not agree that paragraph 1, sub-clauses (c) to (e) could simply be deleted, because the principle underlying that legislation was valid. In none *of* those cases could the fact that *one* claimant was a State be allowed to prevent the local courts from deciding *on* the disputed claims. *The draft* article should be retained whether or not the aforesaid sub-clauses were retained.

53. Draft article 15 should be extended to cover new categories of intellectual property rights generally recognized, such as rights in computer programs. Draft article 19 should be limited to the specific issue of jurisdiction over *the* conduct of arbitrations, leaving the recognition and enforcement of arbitral awards to be dealt with by other provisions, especially the provision dealing with commercial contracts and the recognition and enforcement of arbitral awards. Draft article 20 was perhaps not strictly necessary, but it might be better to retain it.

54. On the issuo of execution and enforcement of judgements, his delegation supported the view of the majority of the Commission in preferring the second alternative version of articles 21 to 23 proposed by the Special Rapporteur, especially if the words in brackets in draft article 21, paragraph 1 (c), were omitted. It must be stressed that no question arose as to the execution against genoral State property of judgements obtained against a *separate* State enterprise with its own legal personality. Accordingly, draft article 23, which dealt with segregated State property, should be retained.

55. Draft article 26 also needed to be considered in the context of enforcement. As it stood, the article was ambiguous: it was not clear whether the immunity was from the making of a court order requiring a State to perform or refrain from performing a specific act, or *merely from* suffering *a* monetary penalty for violating such an order. Article 26 should therefore be reformulated in order to make it clearer,

56. With regard to draft article 24, on service of process, the Special Rapporteur apparently proposed to delete paragraph 1 (a), which was not desirable and was inconsistent with the basic principle of consent.

67. With regard to draft article 25, there had been a suggestion to include a requirement that a court should not issue a default judgement without considering ex officio whether the foreign State was immune. That certainly warranted further consideration: there had been cases where default judgements had been issued in circumstances where it seemed reasonably clear that the defendant State could have relied on immunity. Moreover, the rules relating to default judgements were very much part of the internal procedural law *of* each State. If such a special provision was to be inserted, three limitations should be imposed. First, the provision should extend only to the issue of immunity; secondly, the court should *not* be required to go beyond the facts as they appeared on the papers before it; and, thirdly, that principle should apply to the question of whether it appeared that the defendant was a foreign State as defined.

58. Mr. KEKOMAKI (Finland), speaking on behalf of the five Nordic States'- Denmark, Iceland, Norway, Sweden and Finland - on the issue of the non-navigational uses of international watercourses, referred to draft articles 22 to 27 provisionally adopted by the Commission in 1990. Since the Nordic countries had already commented on the matters in question in their two previous statementa, endorsing the Commission's approach in general, the current statement would be restricted to some brief comments.

59. First, articles 22 to 25, which were quite generally formulated, contained broad principles or statements of environmental policy rather than detailed rules. The implementation of the provisions on the prevention, reduction and control of pollution would be determined on the basis of local circumstances. The sort of co-operation established in regard to planned measures (part III of the draft), which consisted in the duties to notify and consult, should be fully applicable to ensure adequate environmental protection. It might be necessary to spell that out more clearly in the draft.

60. The Nordic countries noted that as a result of changes made in articles 26 and 27 in order to clarify the distinction between "normal" haaards and emergency situations - as suggested by many countries, including the Nordic countries themselves - and as a result of the deletion of the reference to equity in article 26, the environmental provisions of the draft were very close to being finalized. Furthermore, the Nordic countries would like to reiterate their view that when the relationship between the different uses was established care should be taken to avoid a mere ad hoc settlement that ignored the interests of future users and those of the community at large.

61. On the subject of annex I, on which Governments' comments had been requested, the Nordic countries endorsed the approach taken by the Special Rapporteur, who believed that watercourse problems should be resolved on the private level, through courts and administrative bodies, in so far as possible (A/CN.4/427, para. 39). The annex was based on a number of general principles, such as use of domestic remedies, non-discrimination and equal access. In drawing up the annex, the Special Rapporteur had used the Nordic Convention of 1974 on the Protection of the Environment as a source of inspiration, and had used the experience gained at the regional level, especially within the framework of the Organisation of Economic Co-operation and Development, in tackling problems relating to transboundary pollution. Several reasons spoke for domestic procedures at the private level: they were usually less costly; they involved the individuals and companies actually engaged in the relevant activities; they provided a more effective incentive to comply with the rules; in certain cases they were faster than diplomatic channels; they led to legally binding and enforceable determinations of the relevant parties' obligations; and they encouraged regional co-operation in the management of the particular watercourse system. Obviously, the weight of such considerations depended on the particular circumstances.

62. The provisions of annex I atressed what was essential for the establishment of a non-discriminatory private-remedies system, and reflected existing texts. The Nordic countries were ready to support the ideas of non-discrimination, equal right

(Mr. Kakomaki, Finland)

of access and information, u ● xptorrod in ● rticles 3 to 5. They shared the general opinion that articles 6 to 8 went beyond the scope of a framework agreement. The idea of convening a conference of the parties appeared to be unhelpful with regard to the draft under consideration, and the amendment provision wu likewise hardly necessary. As to the place of articles 1 to 5, it war less important whether they were ultimately incorporated into the body of the draft or included in an annex.

63. The proposed institutional ● rrmganoato must meet the requirements of efficient management. In ● nm cases the ● rtablirbamat of joint commissions might be too cumbersome, partioululy in respect of small boundary rivers. The Nordic countries assumed that in ruah cases the institutional suggestions would be sufficiently flexible.

The meeting rose at 12.20 p.m.