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SUMMARY RECORD OF THE 26th MEETING

Chairman: Mr. MIKULKA (Czechoslovakia)

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The meeting was called to order at 3.10 p.m.

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

AGENDA ITEM 1401 DRAFT CODE OF CRIMES AQAINST THE PEACE AND SECURITY OF MANKIND *(h/45/437)* (continued)

1. Mr8. BELLAMINE-DLIMI (Tunisia), referring to ahapter III of the report of the International Law Commission (A/45/10) concerning jurisdiational immunities of States and their property, said that the growth of co-operation between States and the ever-greater number of international transactions *made* it increasingly necessar/ to establish guidelines in that area. That wae not an easy task, however, beeause it impinged on the sovereignty and interests of States, and views diverged as to the extent of that sovereignty. The Commission should take into account the practice an& relevant legislation of all States and develop compromise solutions whiah could serve the colletative intereats of the international community. A balanae must be struck between two aategories of interests, namely, those of the foreign State which wished to enjoy the broadest possible jurisdictional protection in other States, and those of the State in whose te itory the question of immunity arose and whiah wished to ensure its overall jurisdiction.

2. With regard to limitations on *or* exceptions to State immunity, as discussed in parcgraphe 172-174 of the report, she felt that a title ruah as "Activitie.J of States in respect of whiah States agree not to invoke immunity" for part III would more clearly reflect the idea that the jurisdiational immunity of States and their property was the rule in international law and that exceptions to that rule should be subject to the express consent of States.

3. Commenting on apeaifia draft articles, she said that artiale 12, relating to contract.0 of employment, was extremely important, as national courts were in praatiae the only bodies whiah oould provide effeative recourse for some aategoriee of employees of a foreign State, In that connection, the scope of the exceptions to the rule of non-immunity should be narrower, since, as set out in the draft article, they threatened to render nugatory the principle of non-immunity. Tho category of persons oovered by subparagraph (a) of paragraph 2 of the draft article was too broad and made the rule of non-immunity established under paragraph 1 inapplicable in respect of all employees who had been recruited to perform services associated with the exercise of governmental authority. Accordingly, she shared the view of the Special Rapporteur as set out in paragraph 177.

4. She felt that article 13 relating to the liability of a State to pay monetary compensation for the damage caused by an act or omission attributable to that State should be retained, since without such an eraoption to jurisdictional immunities of States, an injured individual would be virtually without recourse.

(Mrs. Bellamine-Dlimi, Tunisia)

5. With regard to State-owned ships engaged in commercial service as referred to in article 18, there was no unanimity concerning the use of the word "non-governmental" *in paragraphs* 1 and 4. While she had no objection to the deletion of that word, it bhould be made clear that, in canes where the public interest was involved in a commercial aativity carried out by a State ship, the State concerned could invoke the immunity of the ship.

6. Turning to article 19, rolating to the effect of an arbitration agreement, she felt that the scope of arbitration could be extended to a civil matter, first, because there had already been precedents in that area, and secondly, because the scope of arbitration depended primarily on the terms of the arbitration agreement. Accordingly, she saw no reason to limit the supervisory jurirdiotion of a court of a forum State to commercial contracts. Moreover, a provision should be included stating that submission to arbitration should not be construed as submission to the jurisdiction of the forum State.

7. *In* her view, artiale 20, relating to cases of nationalization, should be deleted, because measures of netionaliaation, as sovereign acts, could not be considered as representing an exception to the principle of State immunity.

8. With regard to the draft articles in *part* IV, relating to State immunities in respect of property from measures of constraint, there was still a division of opinion, Her view coincided with that of the Special Rapporteur as eet out in paragraphs 218-220 of the report. With regard to new article 21 as submitted by the Special Rapporteur, she felt that the words "[and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed]" in subparagraph (a) of paragraph 1 should be retained, beaause *if* they were deleted, measures of constraint could be taken against any property of a foreign State which was used for commercial purposes. Likewise, she favoured tho deletion of the phrase "[, *or* property in which it has a legally protected interest,]" in the preambular paragraph of article 21 and paragraph 1 of article 22 as provisionally adopted on first reading, because it was necessary to focus on property of a foreign State as the sole objeot deserving protection. She could not endorae the idea of granting to third parties protection from measures *of* constraint simply because a foreign State had an interest in the property concerned. In that connection, the draft of the 1983 Convention on Succession of States in respect of State Property, Archives and Debts, in which the concept of "interest" had been distinguished from that of "property", should be borne in mind.

9. Sir Arthur WATTS (United Kingdom) welcomed the progress made by the Commission on a significant number of draft articles dealing with juriediational immunities of States and their property. However, there still appeared to be divided views in the Commission on the underlying doctrinal and legal bares for the topic. In his view, international law had developed in such a *way* that the old rule of absolute immunity had become obsolete. *A* substantial body of State practice, as well as a number of developments in international law, supported the principle that those who found themselves involved in a dispute with the Government of a foreign State,

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acting in a non-sovereign capacity, should be able to have that dispute determined by the ordinary processes of law.

10. He attsohed partiaular importance to three points. The first concerned the question of whether or not a transaction was a "commercial transaction"; he noted that the newly-combined article 2 still referred to the "purpose" of a transaction in determining the answer to that question. He reiterated his previously expressed view that factors such as purpose should not be introduced into the definition.

11. Secondly, with regard to the concept *of* segregated State property, which was the subject of articles 11 bis and 23, he agreed with those members of the Commission who considered that the concept required further clarification. Indeed, he remained to be convinced that it was necessary to have a provision on that subject at all and believed that the Commission should give further thought to the matter.

12, As to the rules on immunity *of* States from measures of constraint, which was the subject of articles 21 and 22, his delegation shared the view of those States which favoured limiting such immunity, and could not support the granting of absolute immunity from suah measures. As the Special Rapporteur had pointed out, the recent tendency in State practice had been to restrict State immunity in that respect.

13. Turning to the topic of the non-navigational uses of international watercourses, he welcomed the Commission's contribution to an aspect of international environmental law which was one of the central issues of the time. As in previous years, his delegation supported the "framework" approach of the draft articles, but it had yet to be convinced that the results of the Commission's work should take the form of binding rules in a convention. It might be more appropriate, and more likely to meet with general acceptance, if the rules were embodied in a set of recommendations or guidelines.

14, His delegation had noted the critical remarks made in the Commission at its most recent session concerning the inclusion in proposed annex I of a provision on the status of international watercourses and water installations in time of armed aonfliat. Dealing as it were incidentally with an aspect of the law of armed conflict in the context of the quite different subject of the régime of international watercourses might not be the best way to tackle that important question.

15. Article 3, paragraph 2, 0f annex I sought to impose a duty to co-operate in the implementation of existing international law. While suah international co-operation was desirable, he wondered whether such a provision in a legal text added anything uaeful to existing obligations, and whether it was realistic to establish an open-ended obligation to ao-operate, Paragraph 2 adopted a cautious approach to the development of specific procedures for payment of compensation, such ac aompulrory insurance or compensation funds. Given the considerable resource8 needed for the establishment of such schemes, his delegation endorsed

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that cautious approach. On balance, it felt that it might be better to omit the whole of paragraph 2.

16. His delegation welcomed the thrust of article 4, which required equal rights of access, and supported the non-discrimination principle reflected in article 5.

17. Mr. ROBINSON (Jamaica), referring to chapter III of the Commission's report, said it was not surprising that the topic "Jurisdictional immunities of States and their property" generated seemingly irreconcilable views because it impinged *on* the most fundamental issue in international law, namely, sovereignty. The jurisdictional immunity which States and their property enjoyed in the courts of another State derived from the principle of sovereignty; differences existed, however, as to the emanations of sovereign and governmental authority to which jurisdictional immunity should apply. Nevertheless, he remained optimistic that the Commission would produce a set of draft articles leading to the adoption of an international convention on the topic.

18. With regard to article 12, concerning contracts of employment, it could be argued that, as originally drafted, the exceptions in paragraph 2 of that article were so extensive as to render nugatory the non-immunity principle in paragraph 1. However, if the article was to be retained, the exceptions in paragraph 2 should be kept to a minimum. He agreed, therefore, that because subparagraph (a) of paragraph 2 could be interpreted to cover almost all contracts of employment by a foreign State, an effort should be made to reformulate it so that it did not nullify the principle of non-immunity in paragraph 1. In that connection, the Special Rapporteur's proposal, as set out in paragraph 177 of the report, should be considered.

19, With regard to article 13, dealing with personal injuries and damage to property, he had difficulty understanding the concern expressed in paragraph 166 of the report that an unlawful act or omission of a State should be determined through international procedures and not by national courts. As national courts frequently made determinations in accordance with international law, the idea that international law could be applied only by so-called international procedures was not only outmoded, but was flatly contradicted by the practice of many States.

20. On the other hand, *he* was concerned at the possible lack of consistency between article 13 and the Vienna Convention on Diplomatic Relations) obviously, the article would *not* be acceptable if it gave States a narrower immunity than waa conferred by article 31 of that Convention. Article 31 provided that a diplomatic agent should enjoy immunity from the civil and administrative jurisdiction of the receiving State except in three cases. Since the immunity of the relevant State could not be less than that of its agents, it could be argued that in so far as article 13 deprived that State of immunity in respect of such acts, it was inconsistent with article 31.

(Mr. Robinson, Jamaica)

21, As to artiales 21 to 23, he supported a formulation of those articles which set out clearly the principle of immunity from measures of constraint, followed by limited exceptions. *For* instance, *he* agreed with the provision in subparagraph (a) of article 21 as provisionally adopted by the Commission. He also believed that the phrase "and used for monetary purposes" at *the* end of subparagraph (a) of paragraph 1 of article 22 as submitted by the Special Rapporteur should be deleted, because *property* of the central bank of a foreign State in the territory of the forum State should in all circumstances be exempted from measures of constraint regardless of the purpose for which it was used.

22. Article 24, dealing with service of process, placed too much emphasis on the Ministry of Foreign *Affairs,* and attached to that. Ministry an importance *not* warranted in judiaial and litigation matters as distinct from matters relating to international affairs.

23. Turning to chapter IV of the report, concerning the law of the non-navigational uses of international watercourses, he said that the main problem relating to the draft artiales considered by the Commission at its previous session derived from their nature as a framework agreement. Two issues *arose* in that connection, one relating to policy and the other relating to law, First, it might be argued that the formulation of detailed provisions seeking to apply the general principles in the agreement was best left for the watercourse agreement6 contemplated in article 4 for adoption by watercourse States. However, he believed that there was justification for the inclusion of such provisions, subject to their clarification and amendment.

24, Second, a legal question might arise as to the harmonization of those detailed and specific provisions with the general principles in articles 6, 8, 9 and 10. *For* example, the obligation under article 22 for watercourse States individually or jointly to protect and preserve the ecosystems of an international watercourse was stated in the commentary to be a specific application of (a) the requirement in article 6 that watercourse States were to use and develop an international watercourse system in a manner consistent with its adequate protection, (b) the obligation under article 6 for watercourse States to partialpate in the protection of an international watercourse in an equitable manner, which included the duty to co-operate in its protection and development, and (c) the obligation under article 9 for watercourse States to co-operate in order to attain adequate protection of an international watercourse. But could those obligations under articles 6 and 9 be introduced into the régime of article 22 without any language to indicate the relationship between the two sets of articles7 Could it be argued that a watercourse State was in breach of its obligation under article 22 because it failed to participate in the protection of the watercourse in an equitable manner7 It might be necessary to specify the interconnection between the two sets of articles by inserting in article 22 language such as "without prejudice to articles 6, 8, 9 and 10", to indicate the applicability to article 22 of the general principles set forth in those articles.

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25. Another illustration was article 23, paragagraph 2, which provided that watercourse States should, inter alia, harmoniae their policies in the prevention, reduction and control of pollution of an international watercourse. The commentary stated in paragraph 7 that the provision was a specific application *of* certain *of* the general obligations contained in articles 6 and 9, particularly the obligation under article 9 to co-operate in order to attain adequate protection of an international watercourse. Co-operation under article 9 was, however, based on sovereign equality, territorial integrity and mutual benefit. Could a watercourse State argue that it was relieved of the obligation under article 23, paragraph 2, to harmoniae its policies on reducing pollution with other watercourse States on the ground that the principles of sovereign equality and mutual benefit had been breached7 If the commentary was a proper interpretation of article 23 and many of the other articles dealt with in the report, some way would have to be found to link the obligations under the general principles of articles 6, 8, 9 and 10 with those articles which were intended to reflect a specific application of those principles,

26. The Special Rapporteur was to be congratulated on his boldness in proposing article 26 on joirt institutional management, which was an example of the detailing, refining and particularization of the general obligation under article 9 to co-operate. Some might consider it an overrefining which was beyond the scope of a framework agreement and would more properly belong to a watorcourae agreement. His delegation believed, however, that international watercourses were so vital to the survival of large sections of the world's population that their management on an agreed international basis on the lines envisaged in article 26 was an irresistible imperative of modern life. The Special Rapporteur and the Commission deserved to be commended for the brave steps being taken in the progressive development of international law in the new urea of the law of interdependence and co-operation, of which the establishment of normative requirements for consultation, negotiation and co-operation among Stat.ea was an integral part. His delegation did not, however, think it appropriate to design the consultative process set up in article 26 in such a way as to make it capable of being activated by the request of one State. It also folt that it would be preferable to provide a general description of the functions involved in the management of an international watercourse by a joint organization than to list such functions, even in a non-exhaustive manner. So long as there was a list, however, his delegation supported the inclusion of functions which were of particular importance to developing countries.

27. The purpose of annex I was not clear. If it was to oblige watercourse States to provide a régime of civil liability in their domestic legal systems for the benefit of aggrieved individuals in other watercourse States, such provisions should surely form part of the body of the draft articles and not be plaaed in an annex. Moreover, the provisions on non-discrimination, recourse under domestic law and equal right of access needed to be roformulated in simpler and clearer terms; it was difficult, in particular, to understand the language of article 2. Articles 6, 7 and 8 should be omitted, articles 7 and 8 being relevant to the draft articles as a whole.

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28. The strict obligation imposed on watercourse States under article 22 to protect and *preserve* the ecosystems of international watercourses paralleled the equally strict obligation imposed on States by article 192 of the United Natioua Convention on the Law of the Sea to protect and preserve the marine environment) however, the term "ecosystem" was narrower in scope than the term "marine environment". While it was true, as stated in paragraph (4) of the commentary, that the expression "prevent, reduce and control pollution" employed in article 23, paragraph 2, was also to be found in article 194, paragraph 1, of the United Nations Convention on the Law of the Sea, the obligation imposed by the latter *instrument* was less strict *than* that proposed under article 23. The basic obligation under article 194, paragraph 1, was hardly different from that imposed on wateraourae States under article 24 of the present draft, in respect of which paragraph (3) *of* the commentary stated that it was one of due diligence and would not be regarded as having being breached if a watercourse State had done all that could reasonably be expected to prevent the introduction of the species referred to in the artiale, Both the obligation under artiale 194, paragraph 1, of the United *Nations* Convention on the Law of the Sea and that under article 24 of the draft under consideration were obligations of due diligence; why, then, was the obligation under artiale 23, paragraph 2, *not* also couched in the language of due diligence7 *Was tho* departure from that language deliberate, and was it the intention to impose a strict obligation on the watercourse States in the matter7 Perhaps it had been felt that tho greater fragility of international watercourse systems warranted *the* distinction.

29. Lastly, commenting *on* article 25, he noted that the expression "take all measures . . . necessary" had the same meaning as in article 24; the obligation was, therefore, not atriat but was one of due diligence. But was the obligation of due diligence imposed on watercourse States to protect the marine environment consistent with the strict obligation imposed by article 192 of the United Nations Convention on the Law of the Ser. on States to protect and preserve the marine environment7 His delegation doubted whether it was correct to reduce what was a strict obligation in that instrument to one of due diligence in the present draft articles.

30. Mr. ALZATE (Colombia) said that his country attached great importance to the topic "The law of the non-navigational uses of international watercourses". Colombia was keenly aware of the need to protect and preserve river basins and watercourse systems in order to ensure their optimum utiliaation and, where they were of an international nature, to guarantee that neighbouring countries had access to them on an equitable basis.

31. In a broader context than that of the topic dealt with by the Commission, he wished to describe Colombia's positive experience gained from the establishment of commissions with Veneauela and Ecuador. In both cases the purpose of the commissions was to consider issues of joint interest, including co-ordination and the promotion of programmes, projects and agreements to improve living conditions and social and economic development in the border areas. Colombia had, *for* example, concluded a number of agreements with Venezuela dealing with: the study

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and development of the Carraipia-Paraquaahbn rivers; the re-eatabliahment and method of operation of the *joint team* for the Orinooo river; and the Orinoco hydroelectric project. In the case of Ecuador, bilateral machinery had been set up in order to promote the integration and development of Ecuador and Colombia. One subject to be dealt with by such machinery was plane for the management of shared river basins. For example, an agreement had been concluded on the management of the Mire and Mataje rivers and another on pollution aontrol *in* the Carchi-Guaitara river basin.

32. With regard to the draft articles on the law of the non-navigational uses of international watercourses, *his* delegation saw the draft as a framework instrument laying down rules of international law that would be subject to approval and development by the countries concerned. The draft should cover all non-navigational uses, and should not cover navigational uses at all. That meant that article 24 as proposed by the Special Rapporteur dealt with a matter that fell outside the scope of the text, namely the absence of priority among uses. That war an issue that could be dealt with *in* o‘ ar types of instruments. Furthermore, the aoncept of priorities should not be regarded as an abstract principle not involving specific factors. The concept must be baaed on the existence of real elements, such as the benefits to be derived by populations that depended either directly or indirectly on the watercourse in question. If priority was *not* assigned to various different types of uses, it would not be possible for *given* groups of people who were uaufructuariea to benefit from the watercourse. There must therefore be a direct relationship between the concept of assigning priority and the aoncept of the benefit to be derived.

33. With regard to article 25 as proposed by the Special Rapporteur, his delegation agreed with the views expressed in paragraph 269 of the Commission's report. An instrument such as the one under discussion should take a flexible approach to the issue of co-operation so as to ensure that there were no constraints on initiatives concerning the construction and maintenance of works of concern to one State.

34. Article 26 as proposed by the Special Rapporteur, on joint institutional management, contained some new concepts that Pell outside the purview of a framework instrument. Any decisions on the subject in question should be taken by the States concerned at the appropriate time. Colombia therefore believed that the draft should not deal with the matter in detail, and that States should consider either individually or jointly ways of improving the management of watercourses. It should be borne in mind that such management activitiaa were very specialized and therefore did not necessarily fall within the category of general administrative matters.

35. Article 27 as proposed by the Special Rapporteur laid down rules governing the protection of water resources and installations. Colombia endorsed the principle of such protection provided that States' obligations and rights were properly balanced. The construction of works must not constitute a threat to States downstream. Works and related installations must be protected since they could be a potential risk in certain cases.

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36. With regard to article 28 as proposed by the Special Rapporteur, Colombia welcomed the interest shown in accepting the principle that international watercourses and related installationa should be used exclusively for peaceful purposes, provided that the principles of protection and preservation of resources were regarded as being included. However, it was perplexing that such a rule, and in particular the words "in time of armed conflict", should be included in an instrument based on the principle of co-operation.

37. He now wished to comment on the draft articles in annex I as proposed by the Special Rapporteur. Although the text of article 1 might be appropriate from a purely legal point of view, it was inappropriate from a geographical and biological point of view. It would therefore be appropriate to consider a definition that did not necessarily depend on the concept of either real or potential appreciable harm.

38. His delegation attached particular importance to articles 2 to 4 of annex I. Account must be taken of constitutional issues permitting the relevant States to develop those *provisions.* Colombia would be interested to see the corresponding definition laid down in the draft on international liability *for* injurious consequences arising out of acts not prohibited by international law. In the meanwhile, in any event, Colombia believed that States could reserve the right to waive immunity from the execution of judgements. It was therefore of the view that article 6 of annex I went too far. Once that part of ths annex had been revised, it should be included as an optional annex. The Commission should give careful consideration to whether or not the provisions in question should be included in the draft.

39. Lastly, his delegation wished to request that at the end of the Commission's forty-third session the report on the session should be transmitted to Governments *a8* soon as possible.

40. Mr. ORDZHONIKIDZE (Union *of* Soviet Socialist Republics), referring to chapter III *of* the report, noted that progress had been achieved by the Commission in its *work* on the topic "Jurisdictional immunities of States and their property". With regard to article 11 bis, *work* on which was *not* yet completed, he said that the concept of segregated State property had achieved wide recognition in a number of countries and was also reflected in certain international instruments, in particular *in* article 2 *of* the 1978 Protocol amending the Rome Convention on Damage caused by Foreign Aircraft to Third Parties on the Surface, article 1 of the 1969 International Convention on Civil Liability for Oil Pollution Damage and articles 1 and 2 of the 1973 Convention relating to che Limitation of Liability of Owners of Inland Navigation Vessels. The essence of the concept was, of course, that a company possessing segregated property could not invoke immunity and that State liability was not engaged in connection with that company's obligations. With regard to article 18, his delegation was in favour *of* extending the concept of segregated State property to ships owned by companies and shipping lines and used for connnercial service. The inclusion in the draft articles of the concept of segregated State property would be of considerable value in promoting close economic relations in the interests of all countries.

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41. Referring to article 12, relating to contracts of employment, he raid that the indifference or animosity which had previously characterized his Government's attitude towards Soviet citizens residing abroad now belonged to the past; provided such individuals retained their citizenship, they were now considered to be Soviet citizens with all the legal consequences which that entailed. His delegation was therefore in favour of deleting the reference to habitual residence in the State of the forum *from* paragraph 2 (c) of article 12.

42, With regard to article 19, his delegation took the view that the basic assumption should be that a State agreed to submit to arbitration voluntarily through the conclusion of an agreement. He shared the view expressed by Governments and Commission members to the effect that a State party to an arbitration agreement must retain its right to *invoke* immunity before the courts of a State that was not involved or designated by the agreement, unless the agreement contained an explicit provision to the contrary.

43. In connection with article 20 he said that measures of nationalization, as sovereign acts, were not subject to the jurisdiction of another State and could not be considered to represent an exception to the principle of State immunity. His delegation supported the Special Rapporteur's recommendation to delete the article,

44. New article 21 proposed by the Special Rapporteur on the basis of the merging of the original articles 21 and 22 represented a radical departure *from* the text of original article 21, which set forth clearly the principle of inadmissibility *of* measures of constraint. His delegation doubted whether a compromise solution could be found in the absence of clear recognition of the principle itself.

46. The provisions of new article 22 were of fundamental importance8 in particular, paragraph 1 (c) of the article was baaed on the recognition of the fact that central banks were instruments of sovereign power and their activities should consequently enjoy immunity from measures of constraint. The legal status of a central bank should be that of a state organ automatically enjoying immunity.

46, Concluding his remarks on the topic, he drew attention to the far-reaching economic changes currently taking place in the Soviet Union; in particular, he referred to the adoption of a new law on property earlier in the year and to the still more recent adoption by the Supreme Soviet of the USSR of a document dealing with the introduction of a market economy. It should be noted that the latter document established the general principle that each of the Union republics could implement its own programme and also affirmed the recognition of multiple forms of property ownership, including private ownership.

47. Turning to chapter IV of the report, dealing with the topic "The law of the non-navigational uses of international watercourses", he said that the protection and preservation of the environment formed one of the topic's key issues, being *of* vital importance not only to each individual State but to mankind as a whole. His Government was convinced that the problem of the environment could be resolved only

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by joint efforts on the part of all States and wished to intensify its co-operation in that field with other countries, inter alia, within the framework of international organizations. His delegation therefore actively supported the idea reflected in the draft articles that States should co-operate with a view to the preservation of water resources and the protection of the safety of hydraulic installations. The object of paragraph 1 of article 24 as proposed by the Special Rapporteur, to the effect that, in the absence of agreement to the contrary, neither navigation nor any other use enjoyed an inherent priority over other uses, was, in his view, to harmonize the joint and individual interests of watercourse States.

48. With regard to articles 26 to 28 as proposed by the Special Rapporteur, his delegation endorsed article 26 on joint institutional management and supported the idea of establishing joint commissions of watercourse States to deal with practical issues. It should be noted, however, that the establishment of joint management of the watercourse as a whole, unlike the management by individual watercourse States of their own parts of the watercourse, would require special agreement in each case.

49. Article 27, on protection of water resources and installations was acceptable as a whole; in particular, he welcomed the inclusion of a reference to water resources, their protection being closely connected with the problem of preventing pollution. His delegation also endorsed the principle set forth in article 28 that international watercourses should be used exclusively for peaceful purposes.

50. With regard to articles 7 and 8 of annex I, he said that the measures proposed, and in particular the convening of a conference of the parties corresponding, in essence, to a fully-fledged international organization, was inconsistent with the framework agreement character of the draft. His delegation had serious doubts as to the appropriateness of including those articles in the draft. In conclusion, referring to the proposed annex II on fact-finding and settlement of disputes, he said that the matter should be determined by the watercourse States themselves in documents agreed between them on the basis of the framework agreement being prepared by the Commission.

51. Mr. VUKAS (Yugoslavia) said that his country had always had the greatest esteem for the Commission's work and had ratified almost all the multilateral conventions drafted by it. The Commission's tasks were particularly important today, when new avenues of universal international co-operation were opening up. It therefore came as no surprise that the international community should turn to the Commission in establishing the programme for the Decade of International Law. Furthermore, in addition to its legislative work, the Commission organized seminars that were the best training for postgraduate students and young professors of international law.

52. He wished to make some general remarks of a technical nature about the Commission's reports. It was not necessary to repeat the history of each topic in every report, or to give a detailed explanation of the consideration of topics at a particular session. Some details were even included both in the section containing

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a general description of the Commission's *work* and in the individual sections dealing with the consideration of each partioular topia. Lastly, it would be useful to know whose opinions were hidden behind suoh expressions as "some members", "the remark was made" or "a further view was".

53. With regard to the topic "Jurisdictional immunities of States and their property", his delegation would prefer a more neutral language for the title of part III, suoh as "Cases in which State immunity may not be invoked before the court of another State".

54, As far as the exclusion of immunity of a State in cases of personal injuries and damage to property was concerned, the solution provisionally adopted by the Commission in article 13 met the requirements of justice. However, the consequences of the insertion of any provision on that question into the framework of the topic of State immunity should be carefully studied and harmonized with the rules on State responsibility.

55. In article 18, paragraph 3 (a), his deleqstion suggested that after the words "a claim in respect of collision or other accidents of navigation" the following phrase based on article 211, paragraph 1, of the United Nations Convention on the Law of the Sea should be added: "Inclusive accidents which might cause pollution of the marine environment, including the coastline, and pollution damage to the related interests of coastal States".

56. Turning to the topic "The law of non-navigational uses of international watercourses", he observed that the draft instrument in question deserved to be aalled a "framework instrument" se much as the majority of multilateral treaties that represented the progressive development of international law and its codification. Since it was extremely difficult not to enter into details, however, the Commission should not insist on refraining from going beyond the limits of a framework instrument. At the same time, it was questionable whether implementation principles and settlement-of-disputes provisions could be annexed to a framework instrument, as suggested by the Special Rapporteur.

57. On the subject of article 24 as proposed by the Special Rapporteur, his delegation believed that the principle of absence of priority among uses was based on the outdated problem of the priority of navigational uses. Since some priorities should be established, his delegation was glad that it had already been stressed in the Commission in 1990 that domestic and agricultural utilization should be given priority over other uses.

58. In article 25 as proposed by the Special Rapportsur, it would be useful to specify that each watercourse State could regulate an international watercourse on its own territory, provided that such regulation had no negative or harmful effects for any other watercourse State or for the watercourse itself.

59. The principle proposed by the Special Rapporteur in article 28 seemed unrealistic at the current point in time. It was hard to see how States could be

(Mr. Vukas, Yugoslavia)

expected to accept more stringent obligations than those they had been willing to accept in the 1977 Protoools Additional to the Geneva Conventions of 1949.

60. He wished to comment on artioles 22 to 27, as provisionally adopted by the Commission at its forty-second session. The use *of* watercourses, which were *only* a part of the entire hydrosphere, should be co-ordinated and harmonized as much as possible with the use and protection of the seas. Suah a link was closely established in article 26. *However,* there were some provisions in the articles that differed unnecessarily from the rules adopted for the protection and preservation of the ocean. One aould understand the use of the term "ecosystem" instead of "environment" in the specific case of watercourses. Less understandable was the extreme simplification of the definition *of* "pollution" in comparison with the existing definitions in many treaties,

61. Furthermore, his delegation did not understand why it had been necessary to formulate article 24, on the introduction of alien or new species, in such a way that, contrary to article 196 of the Convention on the Law *of* the Sea, it seemed that the introduction of such species was prohibited only if it caused harm to other watercourse States and not if it was detrimental only to the ecosystems of the waterways under the jurisdiction of the State that introduced such species.

63. Those provisions, together with others in the *draft* articles, proved that further harmonization of the draft articles with relevant and generally accepted international rules and standards *for* the protection of the marine environment was indispensable.

63. Mr. KNOX (United States of America) said that his delegation noted with pleasure that the Commission had had a very productive session with regard to the topic of "The law of the non-navigational uses of international watercourses", having made steady progress towards completing a first reading of a complete set of draft artioles by 1991. His country shared the two main objectives of the six articles provisionally adopted by the Commission at its forty-second session, namely to protect and preserve international watercourses from environmental damage, and to protect watercourse States from harmful conditions and emergencies.

64. In its international efforts, the United States had recognized the importance of preventing, reducing and controlling pollution of international watercourses and the marine environment. It was, for example, currently co-operating with Canada in order to control the introduction of zebra mussels, a species that met the requirements of article 24. It was also concerned to prevent harmful conditions and emergency situations of the types described in articles 26 and 27, and to mitigate the damage they caused. To that end, it had concluded joint marine emergenay contingency plans with Mexico, Canada and the Soviet Union, and had actively participated in the development of emergency response measures with the Economic Commission for Europe (ECE), the International Maritime Organization (IMO) and OECD, in addition to measures concluded within the framework of regional agreements.

(Mr. Knox, United States)

65. With regard to the specific provisions of part IV, his delegation would welcome a more detailed explanation of the way in which the provisions were intended to relate to those adopted earlier. In particular, it would like the Commission to clarify the relationship between those specific obligations and the fundamental obligations contained in draft articles 6, 7, 8, 9 and 10, since such a clarification would help his delegation to respond more specifically to the provisions of part IV.

66. With regard to part V, his delegation trusted that the Commission would take into account such recent developments in international law as the convention on oil pollution preparedness and response that would soon be aonoluded under the auspices of IMO and the convention on haaardous installations which was being negotiated within the framework of ECE.

67. With regard to the proposed annex to the draft articles, his delegation agreed with those members of the Commission who had stated that articles 6 to 8 exceeded the scope of a framework agreement. It also noted that, in general, the proposed annex touched on issues of civil liability which were currently under scrutiny in many contexts, notably in connection with the Easel Convention on hasardous wastes and the proposed IMO convention on carriage of hasardous and noxious substances, in addition to other topics currently under consideration by the Commission itself. With regard to article 4 of the annex, his delegation would encourage the Commission to take note of the recently negotiated ECE convention on assessment of environmental impacts in the transboundary context, and in particular the language used in that convention in dealing with the subjeat of civil liability.

68. His delegation noted the Commission's intention to submit a complete set of draft articles to the Committee in 1991 on the topic of the jurisdictional immunities of States and their property. The draft articles would only be worth while, however, if they were likely to command the broad support of the international community. That would only be possible if the Commission took fully into account the diverse and changing practice of States in that area, which was not the case with the articles as currently drafted. His delegation therefore suggested that the Commission should concentrate less on endeavouring to complete a set of articles that were unlikely to command broad support in the light of various anachronisme, and more on evaluating in detail the current practice of States.

69. Mr. TOMKA (Czechoslovakia) said that his delegation welcomed the progress made by the Commission with respect to the question of jurisdictional immunities of States and their property and hoped that a final draft adopted on second reading would be submitted to the Committee at the forty-sixth session of the General Assembly. The rules governing the jurisdictional immunities of States and their property were not codified in a single law in his country) rather, they were included in its law on private international law and civil procedure and its law on administrative procedure, both of which gave priority to international conventions. The results of the United Nations codification efforts on the subject would have an important influence on his Government's decision whether to adopt a separate law on the topic. His delegation felt that every effort should be made to

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reach generally acceptable solutions in that area of prime importance for the international community.

70. The draft articles should set out the fundamental principle that States and their property enjoyed immunity from the jurisdiction of the courts of another State. The exceptions to that principle should be established clearly in part III of the draft. His delegation fully supported the proposal by the Special Rapporteur to delete the bracketed phrase included in original article 6 on first reading, since the reference to general international law might raise the possibility of unilateral interpretations of international law by domestic courts and unduly restricted acta jure imperii. His delegation would therefore prefer the heading of part III to read "Exceptions to State Immunity" rather than "Limitations on" or "Restrictions on" such immunity. However, it was open to a different formulation along the lines suggested by the Special Rapporteur or certain other members of the Commission at its forty-second session.

71. His delegation endorsed the inclusion of the various exceptions proposed in articles 11 to 19 of the third report of the Special Rapporteur, but reserved the right to raise the question of the specific language used at a later stage. Upon further reflection, his delegation no longer insisted on the deletion of articles 12 and 13. It agreed with the Special Rapporteur that article 20 should be deleted in view of the controversy it had aroused following its adoption on first reading and the fact that the Commission had not been asked to express an opinion on the territorial effects of nationalization.

72. With respect to part IV, his delegation preferred the second version of articles 21 to 23 proposed by the Special Rapporteur in his most recent report and considered it an improvement.

73. Strictly speaking, the title "Jurisdictional immunities of States and their property" was incorrect, since only States themselves, and not their property, could be the subject of law, whether international or domestic. The language of article 6 adopted on first reading correctly expressed the concept, whereas the language of article 1 and the main title of the draft needed improvement. He was confident that the Commission would make the appropriate clarifications in its final version of the text.

74. He commended the Commission for its progress *on* the law of the non-navigational uses of international watercourses, particularly since the topic had become of increasingly greeter practical importance for many States, including his own. His delegation shared the concerns which had led the Commission to adopt articles 22 to 25, and articles 26 and 27 did not pose any problems for it.

75. With respect to article 26 as proposed by the Special Rapporteur, on joint institutional management, his delegation did not agree with those *members* of the Commission who felt that the text was superfluous, since articles 4, 9 and 10 already adopted by the Commission contained the necessary elements underlying the legal basis for co-operation among watercourse States. The establishment of a

(Mr. Tomka, Czechoslovakia)

joint body to ensure management should be dealt with in a separate article, and his delegation endorsed the concept underlying article 26. Articles 27 and 28 as proposed by the Special Rapporteur should also be retained,

76. It was not necessary to elaborate an annex on the implementation of the draft articles. The draft was to serve as the basis for the conclusion of a convention or a framework agreement and it therefore was impractical to call for the convening of a Conference of the Parties within two years of the entry into force of the text, as was proposed in article 7 of the annex. Furthermore, the provisions of the Vienna Convention on the Law of Treaties pertaining to amendments were adequate and therefore no separate article on the subject was needed in the Commission's draft. The question of jurisdictional immunity covered in article 6 of the annex should be doalt with in a thorough manner in a different instrument which the Commission was in the process of finalizing.

77. Mr. PAZARCI (Turkey), referring to the draft articles on the law of the non-navigational uses of international watercourses, emphasized his delegation's belief that the Commission's task was to prepare a framework agreement setting out general principles and rules which would subsequently be elaborated upon, on a case-by-case basis, in the light of the interests concerned and the particular circumstances of the region involved. Some of the draft articles contained in the annex proposed by the Special Rapporteur introduced a system of private civil liability. That exceeded the scope of the topic, which should focus on modalities for the use of watercourses rather than on types of sanctions. Moreover, articles 7 and 8 of the annex exceeded the scope of an arrangement which should leave States free to take the appropriate action in respect of the use of watercourses in a specific region.

78. An undesirable shift in the approach to the subject of the use of watercourses had developed in recent years, causing the Commission to stray from the criteria initially adopted. The initial, correct, approach, reflected in articles 2 and 6, was based on the search for a solution which took into account the legitimate interests of both upstream and downstream States, as well as the environment, of all States, affected by international watercourses. However, that broad approach appeared to have given way, in the draft articles provisionally adopted by the Commission at its forty-second session, to a much narrower view which was concerned only with harm to watercourses and the neighbouring environment and did not take into account the water and energy requirements of watercourse States as a whole. The ultimate result was that the draft protected the interests only of downstream States while attributing liability solely to upstream States.

79. If the drafting process continued to be governed by that approach, his delegation feared that the resulting text would deal solely with the uses of international watercourses by upstream States and their attendant obligations. That dangerous approach could be seen in article 23, paragraph 2, adopted provisionally by the Commission. It appeared even more clearly in article 26, which in fact sought to protect only downstream States from drought and desertification while imposing obligations on upstream States, totally disregarding

(Mr. Pazarci, Turkey)

the latter's need for water in order to prevent or mitigate drought or desertification in their own territory. His delegation urged the Special Rapporteur and the Commission to restore the necessary balance between the rights and interests of upstream and downstream States on the basis of justice and equity.

80. The Special Rapporteur frequently referred, in the content of the yroteation of the marine environment, to a related provision in the United Nations Convention on the Law of the Sea. However, that Convention generally referred to the proteation of the international marine environment and not to that of areas under national jurisdiction. Sinae the Commission was concerned solely with areas under national jurisdiction, it was inappropriate for it to borrow from the Convention the phrase "individually or jointly" in the context of the protective measures to be taken, particularly since the Convention on the Law of the Sea immediately qualified the phrase with the words "as appropriate", and its article 193 recognized the sovereign right of States "to exploit their natural resources pursuant to their environmental policies". The use of the word "jointly" in the draft instrument under consideration appeared to place upstream States at a disadvantage once again, and he urged the deletion of the phrase, or at loast its tempering, where used in the draft artiales that had been adopted provisionally, particularly artiales 25 and 26.

81, Turning to the draft articles iattoduaed by the Special Rapporteur at the Commission's forty-second session, he said that his delegation found articles 24 and 25 to be properly balanced and supported the inclusion of the concept6 contained therein. However, it had doubts concerning article 26, on joint institutional management. The text had no foundation in general international law and, given the current status of international law with respect to national sovereignty, it was hard to imagine - unless all the States concerned agreed - that a State could be compelled to accept a role by a third State in the management of a portion of a watercourse on its own territory. While it was true that the draft article imposed only the obligation to consult, the text was too ambitious, since joint institutional management was the stated ultimate objective. At most, consultations could be sought among the riparian States of a particular watercourse to solve common problems pertaining to its management, but only if ail the States concerned agreed to the consultation and not solely at the request of one of those States.

82. With respect to article 27, on the protection of water resources and installations, while his delegation endorsod the general idea contained therein, it had doubts particularly with respect to paragraph 2, which might enable a riparian State to abuse its position by attempting to use the proposed consultations as an excuse to monitor or even intervene in the activities of a neighbouring State with respect to the management of portions of a watercourse on the neighbour's territory,

83. Lastly, his delegation endorsed the principle underlying article 28.

84. Mr. LOULICHKI (Morocco), referring to the topic "Jurisdictional immunities of States and their property", said that the Special Rapporteur had endeavoured in his third report to take full account of the views expressed in the Commission and the Sixth Committee in order to arrive at a text which aould be adopted in second reading at the next session of the Commission.

85. Since his delegation had already made known its views on articles 1 to 11 bis, it would confine its comments to articles 12 to 28, which had often given rise to differences of opinion within the Commission. In article 12, which was conceived as a limitation on jurisdictional immunity, the Special Rapporteur was trying to reconcile the interests of a State concluding a contract with an individual for a specific purpose with those of the State in whose territory the contract was to be carried out in whole or in part. His delegation approved of the aubatance of the draft article in that it provided a guarantee to employees recruited by a State of *respect* for the rights deriving from the contract *of* employment. At the same time, however, it construed the text *on* not detracting from the freedom of States to recruit or not to recruit an employee and to renew or not to renew the contract of employment, It followed that the courts of the State in whose territory the contract was performed could only be seized of questions relating to the rights accorded to the employee by the contract of employment and not by the recruitment itself.

86. Article 13 seemed to have a similar purpose. Its effect would be to exclude personal injury and damage to property from the principle of jurisdictional immunity . *Since* in such cases it would be difficult to obtain diplomatia protection, the injured party must have some effective recourse, However, such recourse should be limited to cases involving injury or damage resulting from traffic accidents, and should only cover compensation.

87. In the same context of limitations on the principle of jurisdictional immunity, the Special Rapporteur had recommended the inclusion in article 15 of a reference to plant breeder's rights and rights in computer-generated works. Those additional elements were of too technical a nature to be incorporated in *the* international instrument which the Commission was currently drafting, and should therefore be excluded from the draft articles.

88. His delegation was in favour of deleting article 20, which had been conceived as a general reservation clause in cases of nationalization. Since natioaaliaation was a sovereign act, it was not subject to jurisdiction before the courts of another State.

09. His delegation was in favour of merging articles 21 and 22, and hence found merit in new article 21 as proposed by the Special Rapporteur, paragraph 1 (c) of which established the *necessary* connection between property intended for use *for* commercial purposes and the object of the claim.

90. With regard to the scope of article 25, which dealt with default judgement, his delegation agreed with the view expressed by some members of the Commission, as reflected in paragraph 233 *of* the report, that it was incumbent upon the judge to inquire ex officio into the issue of immunity under the draft articles.

(Mr. Loulichki, Morocco)

91. In conclusion, he said that his delegation did not think it necessary to retain article 28, on non-discriminatioa, since a number of articles in the draft left open the possibility for States parties to the future instrument to extend to each other, by *means* of an agreement or on the basis of the principle of reciprocity, treatment which was more or less favourable than that provided by the instrument.

92. Mr. AL-BAKER (Qatar) said that there was a tendency to believe that, with regard to the jurisdictional immunities of States and their property, countries were divided into two opposing camps, the wealthy industrialized countries supporting State immunity and the poorer developing countries opposing it. Many eminent jurists rejected such a division and a number of delegations, including his own, had refuted that erroneous view of the situation. It was therefore with some surprise that his delegation had noted the statoment in paragraph 217 of the Commission's report to the effect that the industrialized countries were inclined towards restrictive immunity. The time had *come* to set aside such a false and ideological understanding of the positions adopted by various States and to deal with the legal issue, which was of a technical character, from the point of view of jurisprudence rather than of political attitudes, particularly in a world in which ideological differencea were converging. Jurists from different countries would be capable of achieving a harmonious view of the issue when they examined it from an objective, legal point of view and set aside ideological hypotheses that had no scientific basis and no place in the history of the issue under discussion.

93. With regard to article 12 on the topic, and with particular reference to paragraph 178 of the Commission's report, his delegation considered that the criterion for the inclusion or exclusion of labour disputes should not be the nature of the employer but the nature of the work performed by the employee *and* whether or not it was associated with the exercise of governmental authority. Embassies and other State agencies overseas employed individuals to perform work of the same kind porformed by their colleagues in the private sector and which was not associated with the exercise of governmental authority. The acceptance of that criterion would accord with the prevailing trend in the legislation relating to immunity adopted by a number of States in various parts of the world. His delegation therefore supported the view that paragraph 2 (a) of article 12 should be deleted.

94. His delegation did not agree that the words "nor a habitual resident" should be deleted from paragraph 2 (c) of article 12, since the State of the forum had a clear interest in protecting its habitual residents in the same manner as its citizens. That waz a widely accepted concept in various fields of international law, so that the assimilation of habitual residents to citizens had been conceded in fields other than that of jurisdictional immunity.

95. His delegation supported the view of thoae in favour of retaining article 13, since it provided for compensation for death or injury attributable to a foreign State in the territory of the State of the forum. In such circumstances, an injured individual must have the right to seek and obtain compensation. Az a

(Mr. Al-Baker, Qatar)

matter of international human rights law, individuals must have some effective recourse. If the draft article was deleted, then the Commission's draft would be incompatible with the laws States which had codified jurisdictional immunity, all of which contained such a provision, Deletion of the article would therefore render wide acceptance of the draft less likely.

96. The Government that had proposed adding the wordz "recognition and enforcement', to subparagraph (a) of article 19, mentioned in paragraph 209 of the Commission's report, had been his own. His delegation had examined the compromise proposal made by the Special Rapporteur that the term "recognition" would suf f ice, on the understanding that the recognition of the award should be interpreted as the act which entailed "turning the award into a judgement or a title equivalent to a judgement by providing it with an exequatur or some similar judicial certificate", and was of the view that that proposal was acceptable. His country did *not* therefore insist on the retention of the word "enforcement" alongside "recognition".

97. Tbe eight articles contained in annex I to the draft articles on the law *of* the non-navigational uses of international watercourses were generally to the point and could arouse no objection. His delegation had been particularly gratified that the worJ "appreciable" had been used in the various articles of the annex to qualify damage instead *of* the word "substantial". The Commission had been correct to use that qualification in other draft articles, for example in article 23, paragraph 2.

98. His Government had supported the establishment of an international criminal jurisdiction under the draft Code of Crimes against the Peace and Security of Mankind, and it was of the view that its subject-matter jurisdiction should be limited to the crimes defined in the Code. The court's jurisdiction should be limited to individuals, although his Qovernment had no objection to discussion of the question of extending its jurisdiction to States at a later stage, It nevertheless believed that criminal responsibility was in the first instance the responsibility of individuals who abused their authority in *the* State. His delegation would prefer an international criminal aourt with exclusive jurisdiction rather than concurrent jurisdiction between an international criminal court and national courts in view of the nature of the crimes that would be referred to it. If there was any practical possibility *of* endowing national courts with such jurisdiction, then there would be no need to consider the establishment *of* an international criminal court at all.

99. His delegation believed that there zhould be a close relationship between the court and the United Nations in order to enhance its international character. The court should be *of* moderate size and the judges should represent the main legal systems of the world.

100. In the context of international liability for injurious consequences arising out of acts not prohibited by international law, his delegation approved of the idea of giving more precise meaning to the concept of "significant risk" by

(Mr. Al-Baker, Qatar)

compiling a list of dangerous substances rather than a list of dangerous activities. Any list of the kind must, in its view, be exhaurtive. It was the natural or juridical persons engaged in activities that had harmful effects that should be held liable for transboundary harm. The State in whose territory ruah activity *took* place should not be considered liable merely on the ground that the *damage* occurred there. It should be considered liable only if it had actually committed an offeacr that contributed to the damage, and, the plaintiff who alleged that ouch an offence had occurred would bear the burden of proof.

The meeting rose at 6 p.m.