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SUMMARY RECORD OF THE 22nd MEETING

Chairman: Mr. AFONSO (Mozambique)

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The meeting was called to order at 10.20 a.m.

AGENDA ITEM 135: DEVELOPMENT AND STRENGTHENING OF GOOD-NEIGHBOURLINESS BETWEEN STATES (continued)(A/C.6/46/L.5)

1. The CHAIRMAN said that several delegations had requested to speak on draft resolution A/C.6/46/L.5 after the conclusion of the debate on the agenda item, rather than at the current meeting. Accordingly, he suggested that, for the time being, no decision should be adopted on the draft resolution and that consultations should continue with a view to reaching a common position on the question.

2. If he heard no objections, he would take it that the Committee wished to adopt his suggestion.

3. It was so decided.

AGENDA ITEM 128: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-THIRD SESSION (A/46/10, A/46/405)

4. Mr. KOROMA (Chairman of the International Law Commission), introducing the report of the International Law Commission (A/46/10), said that the Commission viewed its mandate to codify and progressively develop international law as embracing various issues which affected the future of mankind and which occasionally went beyond national jurisdiction. The Sixth Committee had helped to foster such an interpretation by the Commission of its mandate. Hence. the Commission attached great importance to maintaining a fruitful dialogue with the Committee, which explained the presence of members of the Commission at the current session.

5. As indicated in paragraph 9 of the report, the Commission had concluded its consideration of the topic "Jurisdictional immunities of States and their property" and had adopted the final version of the draft articles on the topic at its forty-third session. It had also provisionally adopted draft articles on two other topics on its agenda, namely, "The law of the non-navigational uses of international watercourses" and "Draft Code of Crimes against the Peace and Security of Mankind". For the first time, the Commission had submitted to the Assembly, in the same report, one final set of draft articles adopted on second reading and two provisional sets of draft articles adopted on first reading. Furthermore, in 1989 a set of draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier had been submitted to the General Assembly. That record showed that the Commission had achieved all the goals which it had set for itself at the beginning of its term of office

6. The major difficulty which the Commission had faced in connection with the topic "Jurisdictional immunities of States and their property" had been the need to reconcile the divergent views between those countries advocating

absolute State immunity and those favouring limited immunity. The Commission had decided not to initiate a doctrinal debate but rather to concentrate on identifying those activities in relation to which it was widely agreed that State immunity could not be invoked. The difficulty in formulating generally acceptable texts had been compounded by the existence of treaty law and domestic legislation and jurisprudence which had offered diverse and sometimes conflicting solutions.

7. With regard to the specific content of the draft articles on jurisdictional immunities of States and their property, it should be noted that, on second reading, a major change had been made in article 2, which consolidated original articles 2 and 3 as provisionally adopted on first reading. The new article 2 spelled out the special understanding of the term "State" for the purposes of the draft articles. However, the general terms used in describing the concept of "State" did not imply that the provision was an open-ended formula. The term "State" should be understood in the light of its object and purpose, namely, to identify those entities or persons entitled to invoke State immunity where a State could claim immunity, and to identify certain entities and subdivisions of a State that were entitled to invoke immunity when performing acts in the exercise of sovereign authority. Accordingly, the term "State" should be understood as comprehending all types or categories of entities and individuals so identified in the draft articles which might benefit from immunity.

8. Article 2, paragraph 1 (b) contained two new elements. The first was the reference to the constituent units of a federal State, which took into account the fact that, in some federal systems, the constituent units were distinct from political subdivisions and enjoyed, for historical reasons, the same immunities as the State. The second new element was the mention of "other entities", which was intended to cover non-governmental entities endowed, in exceptional cases, with governmental authority. Accordingly, account was taken of the practice followed with relative frequency after the Second World War and still followed to some extent in recent times, whereby the State entrusted a private entity with certain governmental authority to perform acts in the exercise of the sovereign authority of the State. When private entities performed such governmental functions, they should be regarded as "States" for the purposes of the draft articles.

9. Part II of the draft articles dealt with the immunity which every State enjoyed, in respect of itself and its property, from the jurisdiction of the courts of other States. The text did not indicate whether the draft articles should be regarded as codifying the rules of existing international law.

10. Articles 6 to 9 had been clarified in various respects but had not undergone major changes. In article 6, an attempt had been made to identify the content of the obligation to give effect to State immunity and the modalities for giving effect to that obligation. Articles 7, 8 and 9 dealt with the concept of "consent" in relation to jurisdictional immunity and with

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the various forms in which such consent could be expressed. What was of essence in that context was the presumption of the lack of consent on the part of the State against which the court of another State had been asked to exercise jurisdiction. On the other hand, the articles embodied the principle that the obligation of one State to refrain from subjecting another State to its jurisdiction was not an absolute obligation, but was clearly conditional upon the absence or the lack of consent of the State against which the exercise of jurisdiction was being sought.

11. The title of Part III, as provisionally adopted on first reading, had highlighted the divergent views between the proponents of restrictive immunity and of absolute immunity, who had proposed the titles "Limitations on State immunity" and "Exceptions to State immunity", respectively. The title adopted on second reading reflected a pragmatic approach intended to meet all concerns.

12. The main change which had been introduced in Part III on second reading consisted of a new article 10, paragraph 3, dealing with State enterprises or other entities established by the State which engaged in commercial transactions on their own behalf and not on behalf of the State. Under paragraph 3, such State entities could be sued before the courts of another State in the event of differences arising from a commercial transaction. Since the State was not a party to the transaction, its immunity was not affected. Paragraph 3 set out a legal distinction between a State and some of its entities in the matter of State immunity from jurisdiction. In some economic systems, commercial transactions as defined in article 2, paragraph 1 (c), were normally conducted by State enterprises or by other entities established by a State which had independent legal personality. The manner in which State enterprises or other entities were established differed according to the legal system of a State. However, as a rule, such enterprises engaged in commercial transactions on their own behalf, as separate entities from the parent State, and not on behalf of the State.

13. The text of article 10, paragraph 3, was the result of lengthy discussion in the Commission. Initially, it had been proposed that an independent article should be drafted, relating to State enterprises with segregated property. However, during the Commission's debate on the proposal, some members had stated that the provision was of limited application, as the concept of segregated property was unique to the socialist States and should not be included in the draft articles. However, other members had bsen of the view that the question of State enterprises performing commercial transactions as separate and legally distinct entities from the State had a much wider application, as it was also highly relevant to developing countries and even to many developed countries. They had maintained that the draft articles should distinguish between such enterprises and the parent State in order to avoid the abuse of judicial process against the State. Taking into account those views, the Commission had adopted the current formulation, which included not only State enterprises with segregated property but also any

other enterprises or entities established by the State which engaged in commercial transactions on their own behalf, had independent legal personality and satisfied the requirements specified in subparagraphs (a) and (b). The Commission had further agreed to the inclusion of the provision in article 10, rather than as an independent article, since article 10 dealt with "commercial transactions** .

14. Although not specifically dealt with in the draft articles, fiscal matters should be borne in mind in relation to the provisions of article 10. Those matters had been dealt with in the version of article 16 provisionally adopted on first reading. Reservations had been expressed with regard to the article because it violated the principle of the sovereign equality of States by allowing a State to institute proceedings in its own courts against another State. A proposal had been made for the deletion of the article on the ground that the provision referred only to the relations between two States, i.e. the forum State and the foreign State, and to a bilateral international problem governed by existing international law. In contrast, the draft articles dealt with the relations between a State and foreign natural or juridical persons, with the purpose of protecting the State against certain actions brought against it. Accordingly, the provision was not thought to have its proper place in the draft articles. The deletion of the article had also been opposed on the ground that the provision was based on an extensive legislative practice and had been adopted on first reading. It was finally decided to delete the former article 16 on the understanding that the commentary to article 10 would explain that the deletion should not be interpreted to mean that a State might invoke immunity in a proceeding before a court of another State which related to fiscal obligations arising from commercial transactions. The non-immunity of a State under article 10, paragraph 1, in connection with commercial transactions was thus extended to fiscal matters arising from commercial transactions.

15. The remaining articles of part III had not undergone major changes, although some of them had been clarified or technically improved. In connection with the present article 16 it must be pointed out that some members of the Commission had raised the question of State-owned or State-operated aircraft engaged in commercial service, as well as the question of space objects. The Commission recognized the importance of those questions but felt that they called for more time and study. Taking into account the view expressed in the Sixth Committee that measures of nationalization, as sovereign acts, were not subject to the jurisdiction of national courts, the Commission had deleted the text of article 20 as adopted on first reading. It had also decided to delete article 28 concerning non-discrimination, which had been adopted on first reading, on the ground that it was better to deal with that topic within the framework of general international law and treaty law.

16. With the adoption of those draft articles the Commission had thus resolved the two outstanding issues relating to State enterprises and the definition of the concept of State. The Commission had felt that dispute settlement procedures could be left to a later stage.

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17. In accordance with its statute, the Commission submitted the draft articles to the General Assembly, together with the recommendation that an international conference of plenipotentiaries should be convened to examine the text and conclude a convention on the topic. The Commission had adopted on first reading a complete set of draft articles on the law of the non-navigational uses of international watercourses. The topic had been included in the Commission's programme of work in response to a recommendation of the General Assembly dating back to 1970. The need to draft rules on the equitable utilization, conservation and protection of international watercourses had become even more urgent since that date. Forty per cent of the world's population depended on the 214 basins of international watercourses shared by two or more countries; 12 of those basins were shared by five or more countries; the frequency of disputes had increased.

18. At the last session attention had been focused in particular on the definition of an international watercourse. The Commission had been proceeding on the basis of a provisional working hypothesis adopted in 1989. The definition now before the Committee described a watercourse as "a system of surface and underground waters", a phrase which encompassed rivers, lakes, aquifers, glaciers, reservoirs and canals but excluded confined groundwater unrelated to any surface water. The definition required that the surface and underground waters should flow into a common terminus. The term "international watercourse'* was defined as a watercourse, parts of which were situated in two or more States. Finally, the definition of "watercourse State", previously adopted as a separate provision, had been incorporated in the article on use of terms.

19. Article 10 set forth the general principle that no use of an international watercourse enjoyed inherent priority over other uses and provided guidelines for resolving possible conflicts between different uses.

20. Articles 26, 27 and 28 dealt respectively with management, regulation and protection of installations. Article 26 was concerned with the prevention and mitigation of a wide variety of conditions related to international watercourses that might be harmful to watercourse States. Article 27 dealt with the obligations of watercourse States in responding to emergency situations. Under article 28 watercourse States were required to employ their best efforts, within their respective territories, to maintain and protect installations, facilities and other works related to an international watercourse. The three provisions emphasised the duty of States to cooperate.

21. Article 29, dealing with international watercourses and installations in time of armed conflict, served as a reminder that the principles and rules of international law applicable to armed conflicts contained provisions relevant to international watercourses.

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22. Article 32 provided that watercourse States must not discriminate on the basis of nationality or residence in granting access to their judicial or other procedures to the victims of an activity related to an international watercourse. The article did not require watercourse States to provide a 'right to compensation for the appreciable harm suffered as a result of such an activity.

23. At the Commission's request, the Secretariat had prepared an informal consolidated version of all the articles and of the commentaries thereto in order to facilitate the task oi Governments in preparing the comments and observations which the Commission had requested them to submit through the Secretary-General.

24. The Commission had completed in 1991 the first reading of the draft Code of Crimes against the Peace and Security of Mankind, In paragraph 3 of its resolution 45/41 the General Assembly had invited the Commission to consider further and analyse the issues raised in its report concerning the question of an international criminal jurisdiction, including the possibility of establishing an international criminal court or other trial mechanism. As could be seen from paragraphs 106 to 165 of the report, the Commission had discussed various aspects of the issue, including the nature and extent of the jurisdiction envisaged, the jurisdiction ratione materiae, the conferment of jurisdiction, and the institution of criminal proceedings.

25. At its last session the Commission had incorporated in part I of the draft Code new provisions dealing with definitions and general principles. Article 3, paragraph 1, on responsibility and punishment, limited criminal responsibility to individuals to the exclusion of States. The paragraph should be read in conjunction with article 5, which provided that prosecution of an individual did not relieve a State of any responsibility under international law for an act or omission attributable to it. Article 3, paragraph 2, defined complicity as aiding, abetting or providing the means for the commission of a crime. With regard to conspiracy, the punishable conduct was participation in a common plan for the commission of a crime against the peace and security of mankind. Incitement constituted one of the elements of the 1954 draft Code and was also covered in the Genocide Convention. Paragraph 3 defined attempt in terms of the following elements: (a) intent to commit a particular crime; (b) an act designed to commit it; (c) the possibility of committing it; and (d) non-completion of the crime for reasons independent of the perpetrator's will. It was necessary to draw to the Committee's attention tha phrase appearing in square brackets in paragraph 3, for it signalled a divergence of views between those members who considered that attempt should be punishable only in the case of specific crimes and those who felt that no distinction should be made between the various crimes covered by the Code.

26. With regard to article 12, the fact that a crime against the peace and security of mankind had been committed by a subordinate did not relieve his superiors of criminal responsibility. Article 11 referred to the question of

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whether an order given by a superior for the commission of a crime relieved the subordinate of responsibility. Article 11 answered the question in the negative if, under the circumstances at the time, it had been possible for the subordinate not to comply with the order.

27. Article 14 combined the criminal law concepts of defences and extenuating circumstances. The article was tentative and would have to be re-examined on second reading. The views of Governments in that area would be welcome.

28. The definition of the crime of genocide contained in article 19 was based entirely on the definition provided by article II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The crime was composed of two elements: (a) the commission of one or more of the acts listed in the article; and (b) the intent to destroy, in whole or in part, one of the groups protected by the article. As in the case of the 1948 Convention, the article embodied the concepts of "physical" and "cultural" genocide.

29. Article 20 dealt with the crime of apartheid. The definition contained in the draft article was based on article II of the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid. However, for technical reasons, examples had been removed from the definition and the scope of the draft articles was not limited, as in the case of the 1973 Convention, by references to southern Africa.

30. Article 21 concerned systematic or mass violations of human rights. The factor common to all the acts constituting crimes under the article was a serious violation of certain fundamental human rights. The text took into account the considerable development in the protection of human rights since the 1954 draft Code, both in the elaboration of international instruments and in the bodies which implemented them, as well as in the universal awareness of the pressing need to protect such rights. Under the article only systematic or mass violations of human rights would be a crime. The systematic element related to a constant practice or to a methodical plan to carry out such violations. The mass-scale element related to the number of people affected by such violations or to the entity which had been affected. Isolated acts of murder or torture, and so on, did not come under the draft Code. Consequently, each of the subparagraphs concerning the criminal acts should be read in conjunction with the chapeau of the article.

31. The text of article 22 on exceptionally serious war crimes represented a compromise between two trends, namely, one towards a general definition of war crimes, and one which favoured the inclusion of as detailed a list as possible of all war crimes covered by the article. The chapoau of paragraph 2 set out a general definition, followed by an exhaustive enumeration of the categories of war crimes concerned. The war crimes covered by the article were not all war crimes in the traditional sense, nor were they grave breaches covered by the relevant common articles of the 1949 Geneva Conventions. Faithful to the

criterion of exceptional seriousness, the Commission had selected violations of international law applicable in armed conflicts which should be crimes under a code of that nature. Hence, the fact thet a particular war crime in the traditional sense under humanitarian law or a grave breach within the meaning of the Geneva Conventions or the Additional Protoccl was not covered by the article in no way affected the fact that they were crimes under the international law applicable in armed conflicts.

32. A war crime within the meaning of the article necessarily entailed: (a) that the act constituting a crime should fall within any one of the six categories in paragraphs 2 (a) to (f); (b) that the act should be a violation of the principles and the rules of international law applicable in armed conflicts; and (c) that the violation should be exceptionally serious. The seriousness of the violation was marked, to a great extent, by the seriousness of the effects of the violation. The six categories were exhaustive even though it fell to the court to determine or to assess whether some acts or omissions fulfilled the character of exceptional seriousness for each category. That also left some possibility for the progressive development of the international law applicable in armed conflicts.

33. Article 26 dealt with wilful and severe damage to the environment. The Commission's concern regarding harm to the environment had already been reflected in the adoption on first reading of article 19 on State responsibility. Under paragraph 3 (d) of the article, "the safeguarding and preservation of the human environment" was already regarded as one of the fundamental interests of the international community. The Commission had taken the view that the protection of the environment was of such importance that some particularly serious attacks against that fundamental interest of mankind should come under the Code and that the perpetrators should incur international criminal responsibility.

34. Article 26 applied when three elements were involved. First, dam-ge to the *'natural environment"; secondly, "widespread, long-term and severe damage"; and, lastly, the damage must be caused "wilfully". He drew the Committee's attention to paragraph (6) of the commentary which referred to the word "wilfully" contained in the draft article. That word referred to the express aim or the specific intention or causing damage. It excluded from the scope of the article not only cases of damage caused by negligence but also those caused by deliberate violation of regulations forbidding or restricting the use of certain substances or techniques if the express aim or the specific intention was not to cause damage to the environment. Some members of the Commission had found that solution to be open to criticism. In their view, article 26 conflicted with article 22 on var crimes, which also dealt, in its paragraph 2 (d), with the protection of the environment. Under article 22, it was a crime not only to employ methods or means of warfare that were intended to cause damage, but also those which might be expected to cause damage, even if the purpose of employing such methods or means had not been to cause damage to the environment.

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35. The Commission, which had adopted a standard format for identifying the persons to whom responsibility for each of the crimes listed in the Code could be attributed, had worked out three types of solutions, depending on the nature of the crime concerned. In its view, some of the crimes defined in the Code, namely, aggression (art. 15), threat of aggression (art. 16), intervention (art. 17), colonial domination (art. 18) and apartheid (art. 20) were always committed by, or on orders from, individuals occupying the highest decision-making positions in the political or military apparatus of the State or in its financial or economic life. For those crimes, the Commission had restricted the circle of potential perpetrators to leaders and organizers, the phrase which was found in the Charter of the Nürnberg Tribunal and in the Charter of the Tokyo Tribunal. A second group of crimes, namely, the recruitment, use, financing and training of mercenaries (art. 23) and international terrorism (art. 24), came under the Code whenever agents or representatives of a State were involved therein. A third group of crimes, i.e. genocide (art. 19), systematic or msss violations of human rights (art. 21), exceptionally serious war crimes (art. 22), illicit drug trafficking (art. 25) and wilful and severe damage to the environment (art. 26), would be punishable under the Code by whomever they were committed. The provisions on perpetrators must be read in conjunction with article 3 on complicity, conspiracy and attempt.

36. With regard to the question of penalties, the Commission had decided to defer that question to the second reading of the draft. Soms members had believed that the question should not be dealt with in the Code and that it should be left to domestic law. Others insisted that the question of penalties should be addressed. Among them, some had advocated the inclusion of a scale of penalties which would be applicable to all crimes, while others had favoured accompanying the definition of each crime with an indication of the corresponding penalty. Different views had also been expressed with regard to the type of applicable penalties, as reflected in paragraphs 83 to 99 of the report. The Commission had not attempted, at the current stage, to reconcile those divergent views, which could be addressed on second reading, with full knowledge of the various possible approaches.

37. Lastly, it should be noted that, pending the receipt of the comments of Governments, the draft no longer maintained a distinction between crimes against peace, war crimes and crimes against humanity.

38. The Commission was aware that some important issues connected with the Code were still outstanding. The views of Governments on those issues, as well as on the articles as provisionally adopted, would be most helpful at the second reading stage.

39. Turning to chapter V of the report, on the topic "International liability for injurious consequences arising out of acts not prohibited by international law", he said that the Special Rapporteur, Mr. Julio Barboza, had felt that there was merit in raising in his seventh report a number of basic questions

which must receive a clear answer if the future draft was to rest on solid foundations. The topic was particularly important from the perspective of environmental concerns, where no general principles of liability had been agreed upon, as yet. The Commission's work in that area would therefore fill a significant lacuna. Another general point raised in the Commission had been the need to pay special attention to the situation of developing countries, which were often insufficiently equipped to determine the potential harmfulness of a specific activity and lacked the financial resources needed to compensate the damage if it occurred.

40. Among the main issues raised by the Special Rapporteur were, first, the question whether the future instrument should focus on activities causing transboundary harm or also encompass activities posing a risk of transboundary harm and, second, the related question whether prevention should be considered as forming part of the topic. Many members of the Commission tended to answer both questions in the affirmative.

41. The basic principles on which the future instrument should rest were generally considered to include the following: the principle sic utere tuo ut alienum non laedas, the principle that the innocent victim should not be left to bear the loss alone, the principle of the balance of interests and the principle of States' freedom of action subject to certain limits along the lines of principle 21 of the Stockholm Declaration, according to which States had the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control did not cause damage to the environment of other States or areas.

42. As for the form which the end-product of the Commission's work should take, it had been proposed that two separate instruments with varying degrees of binding force should be elaborated, one dealing with liability and the other comprising a set of non-binding procedural rules. The question of the allocation of liability between a State and a private operator had also been extensively discussed. It should be clear from what he had said that the discussion had been of an exploratory nature, enlightened, however, by the considerable amount of reflection devoted to the topic in the past few years.

43. Turning to chapter VI of the report, dealing with the second part of the topic "Relations between States and international organizations", he said that in 1991 the Commission had held an in-depth discussion on the fifth and sixth reports of the Special Rapporteur, Ambassador Díaz-González. The fifth report had dealt with the question of the archives of international orgaaizations and with the question of the publication and communications facilities accorded to international organizations. The sixth report contained a detailed study of the practice and problems in the area of fiscal immunities and exemptions from customs duties enjoyed by international orqanizations. Some members of the Commission had indicated that the topic had afforded the Commission an excellent opportunity to perform a classic codification exercise by organizinq

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and systematizing existing norms and establishing clearly the essential minimum to which international organizations were entitled in that regard. Those members had further indicated that the Commission's task might also involve various aspects of progressive development in the regulation of relatively new areas of international relations, such as the use of satellite communications by international organizations or the highly sensitive questions that might be raised by the future extension of peace-keeping operations.

44. Emphasis had been placed on the need to safeguard the confidentiality of archives and ensure their inviolability, and on the obligation of States to refrain from any administrative or jurisdictional coercion in that area. On the question of publication and communications facilities, it had been stressed that international organizations needed to enjoy full freedom, subject to the proper application of the functional criterion. For example, although some organizations such as the United Nations needed to use all available means of communication, other organizations which were more limited in scope did not really need to use the whole range. Such distinctions were particularly important in the case of some means of communication such as radio and television stations.

45. Regarding fiscal immunities and exemptions from customs duties, it had been pointed out that the basic reason for the fiscal immunity of an organization lay in the principle that the host State should not derive unjustified benefit from the presence of an international organization on its territory. An additional reason put forward had been that the host State had to facilitate the accomplishment of the purposes of the organization. Exemptions from customs duties were based on the principle that organizations had to enjoy some independence in order to pursue their objectives and exercise their functions. In that connection, emphasis had been placed on the need to distinguish between official and other uses in order to determine the limits to which such exemptions should be subject.

46. Chapter VII, which was devoted to State responsibility, was confined to a summary of the presentation by the Special Rapporteur, Mr. Arangio-Ruiz, of his third report, devoted to the instrumental consequences of an internationally wrongful act or "countermeasures", namely, to the legal regime of the measures that an injured State could take against a State which had committed an internationally wrongful act and, notably, in principle, the measures applicable in the case of delicts. The relevance of the item had been vividly brought out by contemporary events on the international scene, and the Commission would certainly be enlightened in its task by current developments in the practice of States. The study of the topic of State responsibility would benefit greatly from the probable reduction in the workload with which the Commission had had to cope in the quinquennium that was coming to an end, in view of the considerable progress achieved on four of the items on the agenda. At the previous session of the General Assembly, some delegations had asked for the presentation by the Commission of a report on the state of the topic. On that point, reading from the introductory

statement made by Professor Arangio-Ruiz at the Commission's 2238th meeting, he noted that what remained to be done could surely be completed within the next five years.

47. In connection with chapter VIII, the last chapter of the report, entitled "Other decisions and conclusions of the Commission" he drew attention to three points.

48. The first point concerned the length of the Commission's session. The solution to a number of outstanding issues raised by the draft Code of Crimes against the Peace and Security of Mankind, as adopted in 1991 on first reading, hinged on the Commission's approach to the question of establishing an international criminal jurisdiction. It would be very difficult to finalize the Code in 1993 unless decisive progress was made in 1992 on that particular question. The Commission would therefore probably have to devote a considerable amount of time to the completion of the mandate given to it in that respect by paragraph 3 of General Assembly resolution 45/41. Much time would also be needed for the consideration of the third report of the Special Rapporteur on State responsibility which the Commission had been unable to discuss at its most recent session. The highly topical question of "International liability for injurious consequences arising out of acts not prohibited by international law" was also one on which the Commission's contribution was eagerly awaited by the international community. A number of draft articles were already pending in the Drafting Committee, but the working out of generally acceptable texts would be a very time-consuming task. The same remark applied to the topic "Relations between States and international organizations". Also, at the beginning of a new quinquennium, it was customary for the Commission to devote a significant amount of attention to the consideration of its methods of work. The Planning Group would therefore have to be allowed sufficient time for that at the next session.

49. His second point concerned the report which the General Assembly had requested the Commission to submit in relation to its decision to allow for two weeks of concentrated work in the Drafting Committee at the beginning of its most recent session. During those two weeks, the Drafting Committee had been able to complete its second reading of the topic "Jurisdictional immunities of States and their property" and the formulation of new articles of the draft Code of Crimes against the Peace and Security of Mankind.

50. The third point concerned the Commission's long-term programme of work. The Commission had drawn up a list of 12 topics from which it would select topics for inclusion in its long-term programme. It would welcome the guidance of members of the Sixth Committee in identifying those topics which might be considered as ripe for progressive development and codification. The Commission attached great importance to such guidance, which amounted to an expression of the wishes of the international community in connection with the codification and progressive development of a given topic.

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51. The Commission had continued its cooperation with other legal bodies such as the Asian-African Legal Consultative Committee, the Inter-American Juridical Committee and the European Committee on Legal Cooperation. The Commission deeply cherished those relationships, which enabled it to keep abreast of developments *in* those bodies, to their mutual benefit.

52. In that same spirit, a group of members of the Commission, as well as other scholars in international law, had participated in a Seminar on the draft Code of Crimes against the Peace and Security of Mankind and the establishment of an international criminal jurisdiction, organized by the Foundation for the Establishment of an International Criminal Court and the International Criminal Law Commission.

53. Some members of the Commission and other legal experts on disarmament had participated in the meetings of the Committee on Arms Control and Disarmament Law of the International Law Association, held in Geneva.

54. During t.he Commission's session, the twenty-seventh session of the International Law Seminar, had also taken place. In accordance with a decision adopted by the Commission at its forty-second session, the Seminar had been dedicated to the memory of Professor Paul Reuter. The Seminar was funded by voluntary contributions from Member States and through fellowships awarded by Governments to their own nationals. The Commission had noted with particular appreciation that the Governments of Austria, Denmark, Finland, Germany, Ireland, Morocco, Sweden, Switzerland and the United Kingdom had offered fellowships to participants from developing countries through voluntary contributions to the appropriate United Nations assistance programme. Thus, of the 596 participants, representing 146 nationalities, admitted to the Seminar since its inception in 1964, 308 fellowships had been awarded. The Commission continued to attach great importance to the Seminar, especially for young lawyers, as it enabled them to familiarize themselves with the work of the Commission, thereby promoting international law. However, as the available runds were almost exhausted, the Commission recommended that the General Assembly should again appeal to States which were in a position to do so to make the voluntary contributions needed in order to hold the Seminar in 1992 with the broadest possible participation.

55. In 1991, the Gilberto Amado Memorial Lecture had been given by Mr. Francisco Rezek, Minister for Foreign Affairs of Brazil, on the topic "International Law, Diplomacy and the United Nations at the End of the Twentieth Century". The lectures had been made possible through the generous contributions from the Government of Brazil, for which the Commission wished to express its gratitude.

56. The Commission was also grateful to the Government of Switzerland and the International Committee of the Red Cross for their hospitality and interest in its work.

57. The Commission had always received considerable guidance and support in its relationship with the Sixth Committee. At all times, a symbiotic relationship had existed between the two. Perhaps that relationship was now more vital than ever before, in view of the renaissance of international law and the crucial role it was destined to play in international relations. The Commission, like the Sixth Committee, considered that its task was to facilitate the purpose and objectives of the United Nations. It was his hope that the productive relationship which had always existed between the Sixth Committee and the Commission would continue during the current session, with a view to reaching useful conclusions in that regard.

58. Mr. CALERO RODRIGUES (Brazil) said that consideration of the Commission's report topic by topic was a good working method, as it brought order and focus to the debate. None the less, it did not provide an opportunity for general comments and, therefore, an effort might be made to rectify that shortcoming in future.

59. The Commission had indeed accomplished a great deal of work. Al though his delegation would have to look carefully at the draft articles on jurisdictional immunities of States and their property in order to give an opinion on the recommendation contained in the report that an international conference should be convened to examine the text in question and to conclude a convention on the subject, it felt that some very general comments about the draft articles on the law of international watercourses and the draft Code of Crimes against the Peace and Security of Mankind were in order. Moreover, the latter two sets of articles had been sent to Governments for their observations and comments, which meant that, for the time being, the most practical approach would be for delegations simply to urge their Governments to comply with the Commission's request.

60. Of the other three remaining topics on the Commission's agenda, State responsibility and international liability for injurious consequences of acts not prohibited by international law were of the utmost importance and deserved the full attention of both the Commission itself and the Sixth Committee. On the other hand, as his delegation had suggested four years earlier, consideration of the topic of relations between States and international organizations could be deferred and even removed from the agenda. The usefulness of a new convention on a subject that was apparently adequately covered by existing instruments was questionable.

61. As for new topics for future consideration by the Commission, the proposed list of 12 topics seemed only preliminary. At a time when the membership of the Commission was being renewed, representatives to the Sixth Committee might indicate their preferences for certain topics and their doubts or even objections regarding some of the topics, and they could suggest new ones.

(Mr. Calero Rodrigues, Brazil)

62. His delegation had doubts concerning several topics, in some cases because it was not convinced of the usefulness of codifying the subjects in question and in other cases because the complexity of the subjects indicated that the task would be impossible. In his delegation's view, only two of the topics proposed were important, and this could even be incorporated in the Commission's current agenda. The first topic concerned legal aspects of the protection of the environment of areas not subject to national jurisdiction ("global commons") , which would be an excellent complement to the current work on liability, and the second topic concerned the law of confined international groundwaters. In the Commission's draft, the articles on watercourses applied to groundwaters which constituted a unitary whole with surface waters, by virtue of their physical relationship, but did not cover groundwaters which did not bear such a relationship, in other words, confined groundwaters. The regulation of the rights and obligations of States regarding such waters when they crossed international borders would be very useful.

63. The jurisdictional immunities of States and their property was a domain of international law in which a chaotic situation prevailed. The traditional concept of absolute immunity had not resisted the assault of changing times, and States had extended their activities to fields which did not fall within the classic realm of State activity. However, no rules had been agreed for governing the new situation and each State acted independently. Some legislations even called into question the basic principle of par in parem imnerium non habet which was essential to orderly international life. For that reason alone, the necessity of arriving at an agreement which would harmonize positions and set the new rules that were to govern in new times must be recognized. After years of work under the leadership of two able and competent Special Rapportaurs, the Commission had made a tangible effort to reconcile different positions and reach a rational compromise. Perhaps the results were not entirely satisfactory and further adjustments were necessary, but such adjustments could be made only when Governments met at an international conference to exchange ideas and proposals.

64. His delegation therefore fully supported the Commission's recommendation that the General Assembly should convene an international conference of plenipotentiaries to examine the draft articles on the jurisdictional immunities of States and their property, in order to elaborate a convention on the subject.

65. Mr. MONTES DE OCA (Mexico) said that the activities carried out by the International Law Commission and described by its Chairman in introducing the report represented the conclusion of an important stage in the Commission's work. The codification and progressive development of international law could not take place in isolation from the current situation, which was characterized by profound changes and the steady disappearance of the previous ideological frames of reference. It was possible that the report of the Commission still reflected varying attitudes of States operating in a world in transition in which the concept of the State and its relationship with the

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individual was undergoing constant change. The reality of the late 1970s and the 1980s, when the Commission had taken up and developed the draft articles on the jurisdictional immunities of States and their property, was very different from the current reality. It had to be determined whether the draft articles, which reflected the reality of a particular decade, were falling behind the times. In that respect, the challenge continued to be to seek a balance between international cooperation, the responsibility of States and respect for their internal jurisdiction. Moreover, the trends towards economic integration and commercial freedom amongst States, which were relatively new, would influence the treatment of jurisdictional immunities of States and their property. With regard to the Commission's recommendation that an international convention on that subject should be drawn up at an international conference, his delegation would prefer the option of establishing a working group of the Committee to consider the articles submitted by the Commission.

66. Mrs. SZAFARZ (Poland) said that al-though the draft articles on jurisdictional immunities of States and their property embodied the concept of a rather limited immunity of the State, in contrast with the concept of absolute immunity, they still did not seem to go far enough in that direction. The draft articles were a compromise solution, but not all compromises were felicitous) their adequacy depended largely on the durability of the principal interests involved and, in relation to the subject under consideration, there had been considerable changes recently in Central and Eastern Europe. With regard to Poland, the philosophy of the omnipotence of the State was now and forever part of history and had been replaced by a philosophy of a person-oriented State. In the economic sphere, Poland was moving rapidly towards a market economy and the privatization of State enterprises was under way. That being so, it was in Poland's interest to promote tho justified interests of natural and juridical persons even at the expense of the State. Her delegation believed that the trend to limit the immunity of the State, which dated back to the 19508, was by no means accidental and that it would sooner or later encompass more and more countries. The draft articles on the jurisdictional immunities of States and their property should therefore be amended at a diplomatic conference which should be convened in the near future.

67. As to the draft articles under consideration, her delegation was inclined to give serious consideration to the arguments in favour of omitting the reference to the purpose of the transaction when evaluating its commercial or non-commercial character (art. 2, pare. 2). Perhaps the expression "agencies or instrumentalities of the State" in article 2, paragraph 1 (iv) could be made more Precise so as to exclude entities which were separate juridical persons capable of suing or being sued. In the case of article 12 on personal injuries and damage to property, it might be worth adopting the solution of the European Convention on State Immunity (art. 11). That article should also cover, in a more precise manner, acts committed by representatives of States in their private capacity. Her delegation saw some merit in the proposal to

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supplement article 17 on the effect of an arbitration agreement by adding a special clause on the recognition of the award in disputes concerning an arbitration agreement in respect of which the State could not invoke immunity,

68. In general, her delegation hoped that, if carefully drafted, the future convention on jurisdictional immunities of States and their property would facilitate and accelerate radical change in the economic and legal aspects of international relations.

69. The draft conventions elaborated by the Commission had, as a rule, been of very high quality and could be commended. As to the future, her delegation believed that the Commission should first continue its current unfinished topics and, if possible, try to finnlize them before the end of the United Nations Decade of International Law. That applied, in particular, to the Draft Code of Crimes against the Peace and Security of Mankind and to the topic of State responsibility. Her delegation also considered that the Commission was the most appropriate forum to elaborate a draft statute for an international criminal court.

70. With regard to the Commission's proposals for its long-term programme of work, her delegation felt that the topic "International legal regulation of foreign indebtedness" was very important but did not seem sufficiently mature for codification.

71. The second topic "The legal conditions of capital investment and agreements pertaining thereto", should be dealt with within the framework of UNCITRAL.

72. The third topic "Legal aspects of the protection of the environment of areas not subject to a national jurisdiction (global commons)", was both interesting and important and deserved particular attention because the protection of the environment of areas not subject to a national jurisdiction would also result in the protection of the environment of the territory of States. Her delegation was therefore in favour of including that topic in the Commission's agenda.

73. As to the fourth topic "The law of confined international groundwaters", her delegation agreed with the Commission that the time had come to elaborate generally acceptable rules of international law on that topic, but believed that the problem of groundwaters should be regulated together with the problem of international watercourses under the general heading "land waters". Land waters should be treated as one complex system, the way they existed in reality.

74. Although the legal effects of United Nations resolutions was a particularly attractive topic for any international lawyer, her delegation doubted whether the Commission was an appropriate forum to deal with it.

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According to the law of international organizations it. was for the principal organs of the organizations themselves to make authoritative interpretations of their statutes, including provisions regulating the adoption of resolutions, their legal force, etc. That being so, the General Assembly and the Security Council should themselves decide on those issues. Her delegation supported the inclusion of the topic of extraterritorial application of national legislation in t.he Commission's agenda since it was of interest to all States and was appropriate for codification.

75. For the time being, the topic "Extradition and judicial assistance" should be limited to the domain of bilateral and regional treaties; there was no urgent need to regulate that problem on a universal basis.

76. The topic "International commissions of inquiry (fact-finding)" was also pertinent for the Commission and, in the view of har delegation, the Sixth Committee itself should start the negotiation process in that respect.

77. The topic "The law concerning international migrations" was of growing importance; current international law in that respect should be supplemented and the whole subject might have to be regulated anew. Her delegation therefore strongly supported its inclusion in the Commission's agenda.

78. The topic. "Rights of national minorities" was also of growing significance but, since it was part of the problem of human rights, the Commission on Human Rights was best suited to deal with it.

79. The United Nations Decade of International Law put. a lot of responsibility on the International Law Commission, Both the quantity and quality of its future draft conventions should be particularly impressive and her delegation was convinced that the Commission would live up to the expectations of the international community.

80. Mr. YOUSIF (Sudan), after noting that he had closely followed the introduction of the Commission's report on the work of its forty-third session, expressed support for the Commission's future work. His delegation, which was greatly interested in the matters to be discussed in the Committee, might speak on other agenda items.

The meeting rose at 12.30 p.m.