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SUMMARY RECORD OF **THE 26th MEETING**

Chairman: Mr. DENG (Sudan)

later: Mr, ALI (Democratic Yemen)

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

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

AGENDA ITEM 1301 DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (continued) (A/43/525 and Add.1, A/43/621-S/20195, A/43/666-S/20211, A/43/709, A/43/716-S/20231, A/43/744-S/20238)

1, Mr. PUISSOCHET (France), referring to chapter VIII of the report of the International Law Commission on the work of its fortieth session (A/43/10), said that his delegation had noted with satisfaction the Commission's intention to devote attention during the next three years to the topics "Status of the diplomatic courier and thr diplomatic bag not accompanied by diplomatic courier" and "Jurisdictional immunities of States *and* their property". *France* had some reservations with regard to the guidelines that the Commission seemed to be following for the first topic, and *noted* that major differences of opinion continued to exist among thr various States. However, in view of the highly technical nature of the subject, a decision might be taken rapidly on the fate of the draft after a fresh examination by the Commission.

2. In his delegation's view, the Commission could make useful progress in considering the topic "The law of the non-navigational uses of international watercourses". On the other hand, his delegation had serious doubts concerning the pace of the Commission's work on the draft Code of Crimes against the *Peace* and Security of Mankind, a topic which had led it to raise highly controversial questions to which a hasty response could not be given. In view of the Commission's heavy work-load, it seemed somewhat unrealistic to think that it could draw up within the time-limit set, a draft likely to be acceptable to the majority of States.

3. His delegation had already indicated that the Commission could not *really* make progress on the topic "International liability for injurious consequsncee arising out of acts not prohibited by international law" until it completed consideration of the topic of responsibility for wrongful acts. *He* therefore thought that *it* was to the latter subject that the Commission should give priority.

4. With regard to the second part *of* the topic *of* relations between States and international organisations, his delegation had already explained why it thought that the question should not be accorded high priority.

5. With respect to the working methods of the Commission, his delegation had noted with interest the suggestions made concerning the establishment of a better dialogue between the Commission and the Sixth Committee and States. Only through such a dialogue would it be possible to produce generally acceptable texts. He stressed that a complete knowledge of the views of States war essential and he therefore wondered whether it would not be appropriate for the Special Rapporteurs to have available in good time the records of the Sixth Committee's meetings.

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6, Referring to the statement in paragraph 561 of the report that the work of the Commission would be facilitated and its efficiency enhanced rhould the General Assembly find it possible to provide an advance indication of its intentions, he said that the problem thus raised wao important. The studies made by the Commission were *not* bound to culminate in legal documents, In certain cases they could more usefully serve as a basis for recommendations or as reference codes for use by States in resolving specific problems. To consider that the adoption of a treaty conotitutrd a ratirfactory result of thr Commission's work would be to devalue that work. Adoption wac actually only one stage in the life of a treaty, and it assumed its value only through the rignature and ratification of States. The elaboration of a convention based on the proposals of the Commirsion should not be undertaken unless there appeared to be a broad consensus on a set of precise and coherent rules, as when the aim war to modify existing law and to have States undertake now commitments,

7. At the outaet of the Commission's work on the topic *of* "International liability for injurious consequences arising out of actr not prohibited by international law", his delegation had expressed serious doubts on whether there was a sufficiently established international practice in the matter to enable it to lend itself to codification. His delegation failed to understand why the general principle8 of liability should be departed from solely because an activity had transboundary effects. However, it was not opposed to the Commission ● nviraging the possibility of adopting special rules departing in certain respects from the general principles of international liability, In its view, it was highly desirable that care should be taken with regard to activities presenting a recognized danger. It rympathiaed with innocent victims, *who* rhould not have to bear the cost of their losses, while noting that limitation of that principle to transboundary effects could lead to reverse discrimination where *the* domestic legislation of the State of origin did not provide for compensation.

8. There was some ambiguity in the manner in which the question was dealt with by thr Commission. While the Special Rapporteur had stated that the object *of* the draft articles was to obligate States involved in the conduct of activities involving risk of extraterritorial harm to inform the other State which might be affected and to take preventive measures (A/43/10, pare. 24), it was not strictly speaking a matter of liability, Such liability could arise only from the failure to respect those obligations, which would then give rise to responsibility for wrongful acts.

9. Perhaps the intention was to ensure that the State continued to be liable even if it had fulfilled all the above-mentioned obligations. That would lead to objective liability, which would, however, be acceptable to many States, including France, only in specific cases for which they had accepted special obligations. It was precisely for such reasons that the text in process of elaboration by the Commission did not seem appropriate for a convention, The difficulty of establishing its scope alone would be sufficient reason to reject the convention approach. It war not possible to draw up a list of activities which might be covered by such a text, Such a list would quickly become obsolete, because of

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rapid technological advancer, *Moreover,* the danger resulting from a *apeaific* activity wax relative, That was why the convrntiona concluded thua far by States in the matter of liability had dealt either with certain activities *or* with a particular area. It would therefore be preferable if the Commission continued its work with a view to drafting a reference text which States could consult if they wished to draw up a convention concerning a specific activity *or* a specific geographical area. Such *an* approach would undoubtedly lead the Commiaaion either to avoid ratabliahing unduly detailed ruler or to ● rta.blJah alternative rules which could serve as a guide to States in the light of each particular case.

10. If the Commission's text war to be general *in* ● oopo, it seemed to his delegation that the criterion of harm was inadequate. The draft should cover activities that poaed an exceptional risk and could result in harm. It seemed entirely unrealistic to expect Statex to agree to be held liable for tranaboundrry harm when thry were not at fault, Furthermore, his dolegation preferred the word "exceptional" to "appreciable", since the latter *waa* aubjrct to different interpretations, In that connection, the definition propoaod *in* article 2 (a) *waa* very vague,

11. Referring to paragraph 33 *of* the report, he raid he failed to see why pollution could not be included in the scope of the draft article6 if it reaulted from *an* activity having the characteriatiaa to be described in the text. It ahould not, however, be made *a* special aaae since problem8 concerning the environment would appear to be within the competence of the United Nations Environment Programme rather than any other body.

12. His delegation thought that the concept of "physical consequences" should be reintroduced in article 1. With regard to article 3 ho recalled that existing conventions in the *field* of liability wero generally baaed on the primary liability *of* the operator, Where it was a queation of the liability of a State, as in thr case *of* the Convention on the Liability of Operators *of* Nuclear Ships, such liability existed only on a aubeidiary basis and if the State had failed to prrform its duty of control. The cases where the State was held directly liable when damage occurred were very rare. Furthermore, his delegation noted that the condition envisaged by that article, namely that the State knew or had means of knowing that an activity involving risk waa being or waa about to be carried out in its territory, posed a difficult problem of providing proof,

13. It would be well if the Commission *examined* further the concepts of "jurisdiction" and "control", The fact that those terms were employed in other conventions for perhape different purposes did not seem to be a reason why the scope given to them in the draft article8 should not be defined clearly.

14. In view of the uncertainty surrounding the scope of the draft articlea, his delegation had doubt6 about articles 7 and 6, which seemed to establish a legal obligation to co-operate, His delegation conridered that the aim ahould rather be to encourage a certain course of action, It war difficult to state a priori, without knowing the exact nature of the activity, that "States likely to be

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affected" - an extremely vague concept - should be invited to "consider" with the State of origin thr nature of the activity and its potential risks. Moreover, as stated in the Commission, "participation", if admitted, would be included in the measures of prevention. Therefore, article 8 could in any event be deleted.

15. He reserved him delegation's position with regard to article 10 until it knew what criteria would be adopted by the Commission to dotermine the obligation to negotiate envisaged by the text'

16. Although to the topic entitled "The law of the non-navigational uses of international watercourses" could be regarded as bring covered by the general articles of the draft, his delegation would have no major objection, if a consensus emerged along those lines, to its being the ● ubjoct of ● peoial provisions intended to rtreaa its importance, Such provisions should, however, be few in number. In his delegation's opinion, they should be rather an encouragement to resolve thr question than rulra applicable to it. Indeed, thr problems connrctrd with the pollution of international watercourses were regional, *end it* war illusory to hopr to achieve a solution through a general convention,

17. Him delegation supported the inclusion in the draft articles of a general definition of pollution, such as that in paragraph 1 of article 16 as proposed by the Special Rapporteur, However, paragraph 3 *of* that article, concerning the preparation *of* lists of aubatancea or species, appeared to be too specif ic. Such an action, Although it might be useful, should be left to the States concerned,

18. With regard to proposals concerning the protection of the environment of international watercouraea, the very notion of environment of international wstercourrea rhould be examined furthrr. As the Special Rapporteur had raid, a definition might not be *necessary*, His delegation also shared the Special Rapporteur's view that the protection of the environment of an international watercourse was most effectively achieved through régimes specifically designed for that purpose. The adoption of such régimes should be left to the discretion of States, and paragraph 1 of the proposed article 17 should therefore be drafted in less absolute terms. Him delegation could not accept that States other than watercourse States should be allowed to intervene in the protection of the environment and problems of pollution, There was also some doubt as to whether the qusotion of marine pollution, "including estuarine areas", should have a place in the draft articles, although the problem was undoubtedly of interest,

19. With regard to paragraph 2 of article 16 as propoord by the Special Rapporteur, he shared the view of the members of the Commission who felt that there was no incompatibility between the inrrrtion, in paragraph I, of the notion of "detrimental effects" in the definition of pollution and the reference to "appreciable harm" in paragraph 2 in describing effects which States should avoid, However, the formulation appeared to be too general and absolute, end regulation could perhaps be left to the States concerned. Moreover, the wording of the provision *did* not make it clear enough that the obligation which it would impose on States was truly an obligation of conduct and *not* of result, Also, it would be

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better to speak of "substantial" harm rather than "appreciable" harm, ● inco the latter ● xprorrion was not at all clear. France reserved its position *on* article 8, as provisionally adopted, concerning thr obligation not *to* cause appreciable harm because it was not clear from the text of thr article whether it was mrant am a rule of State responsibility or liability,

20. Turning to the draft Code of Crimes against the Peace *and* Security of Mankind, ho noted that, given the divergent views in the Commission aonaorning thr very definition of such crimes, it war probably not reasonable ♦□ ● xpoot it to arrive at a generally acceptable preliminary draft in the near future. Tho problrmr involved in reproducing the whole of the Definition of Aggression contained in General Assembly rrrolution 3314 (XXIX) *in* a document intended to establish criminal offences *had* not yet boon resolved. Questions remained concerning how much latitude should be loft to the judge for whom the Codr was ultimately intended am a guide. His delegation tended to share the view *of* the members of the Commission who felt that, if the text was *going* to be based on rrrolution 3314 (XXIX), the provisions of that rrrolution concerning the powers of the Security Council should be included, and that tha decisions of the judicial organ rhould be rubordinatsd to those of the Security Council. France would therefore support paragraph 5 of drrft article 12, in principle. Another question raised by some members of thr Commission wax whether a tribunal would be free to consider allegations of the crime of aggression in the ● brrnoo of any consideration or findin, by the Security Council, Although he *had* no rolution to offer *at* present, ho felt that it would be difficult for States to recognise ruah powers in the national tribunals of other States, erprcially in view of tho consequences which, according to the draft, would result in respect of trial and extradition. Moreover, courts should probably not be enabled to characterise as aggression ● ata other than those expressly listed.

21, Citing article 5, paragraph 2, *of* the Definition of Aggression, whiah characterised a war *of* ● ggrorrion as a crime against international peace, ho asked whether the draft Code was not expanding the scope of application of that notion as envisaged by the Definition, If the acts listed, or some of thorn, taken in isolation, could be *carried* out *in* the absence *of* a "war *of* aggression", ho wondered whether they would then automatically be considered as crimes against peace.

22. He felt that paragraph 1 of article 12, *in* which a link was established between the act of aggression, which could be committed only by a State, and the individuals who might be liable to be triad and punished for a crime against peace, ehould be studied further.

23. Other elements which might be included *in* a list of offences should meet three criteria, namely, they should correspond to ruler of law aaarptablo to States; they ohould be considered by States as being serious enough to aonrtitutr crimes against tho peace and security of mankind; and they rhould correspond to acts that were sufficiently well defined *and* identifiable to be set forth *in* a penal text.

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24, His delegation aharrd the doubts of some members of the Commission, mentioned in paragraph 218 *of* the report, about throat of ● ggroarion as a crime ● qainat peace. With some ● xcmptiona, a threat whiah was not followed by some specific action ahould not be regarded as *a* criminal act.

25. With regard to thr sending of armed bands into the territory of another State, the act had alrrady been included *in* the Definition of Aggraaaion, as thr Special Rapportour had pointed out.

26. His delegation had already noted that intervention was too vague and general a notion to be considered in all cases a arima against peace. Am to the alternatives for draft article 11, paragraph 3, submitted by the Special Rapportour, neither tha firrt alternative, which was too general, nor the second, which in *any* case did not taka into aaaount differences in degree, appeared to clarify the question. As for terrorism, his delegation had already drawn attention to thr difficulties it had in defining the notion, The Commiaaion should take care to ensure that its proposals did not interfere with the conventions in force which dealt with certain aspects of terrorism.

27, Thr Commiraion should not become involved in aharactrriaing as a crime against peace thr "breach of treaties designed to ensure international peace and security", The firrt problem waa to determine which treaties were meant. Although disarmament was one of the elements of security, it was not thr only one *and* should *not* be presented as such. Tho real scope of the envisaged proviaion was therefore too imprecise for it to ba included in a text intended to define crimes meriting punishment. It would be totally unrealistic to affirm that any breach of a treaty, whatever its subject, conatitutad a arima against peace. Moreover, it was impossible *to* ratabliah at which point a crime against peace would be considered to hava boon committed. He urged thr Commiaaion to bear in mind that nnt every serious violation of international law nor wary morally condemnable act, no matter how heinous waa bound to be considered a crime against peace.

28. With regard to the status of the diplomatic courier and tho diplomatic bag not accompanied by diplomatic courier, he said that tha primary objective ahould ba to entablish, using a pragmatic approach, aupplrmrntary rulra to fill the gaps that had arisen in practice, Thus, thr principle of unimpeded access to the ship or aircraft in *order* to take possession of the bag, as set forth in draft article 23, paragraph 3, was acceptable. On the othar hand, there did not seem to be a need far unification - even confined to diplomatic and consular bags - of régimes whose differences were explained by the differrncea in the organisationa themselves. The draft article rhould therefore not cover bogs of consular posts, special miaaiono and delegations to international organisations, nor should their acopr be extended to bags of international organisations. In view of that position of principle, France had requested that article 1, and therefore article 3, should be revised,

29. Thr ayatsm of optional declarations which allowed States to specify which categories of bags would *not* be subject to the draft ● rCicle8 was not entirely satisf● atory, However, the absence of such a provision or an equivalent régime

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would obviously make the text completely unacceptable to many States, including France. Moreover, since the criterion to be used in defining the privileges and immunities of the diplomatic courier was the functional criterion, and the solutions found in the 1961 Vienna Convention on Diplomatic Relations were satisfactory in that regard, his delegation continued to favour the elimination of all articles concerning the status of the diplomatic courier which did not correspond to that criterion, namely, articles 17 and 18 and, consequently, article 21, paragraph 3, article 22, paragraphs 3 to 5, article 19, paragraphs 2 and 3, and article 20, paragraphs 2 and 3. His delegation saw no reason why a person whose functions were essentially temporary and specific should be granted the same, or largely similar, status as members of a diplomatic mission.

30. With regard to the diplomatic bag, his delegation continued to feel that, in describing its contents, the exact terms of the 1961 Vienna Convention on Diplomatic Relations should be used. It was not appropriate to affirm its inviolability in terms other than those of the Vienna Convention, thereby casting doubt on the current state of law. Moreover, any new solution for protecting the receiving State against possible abuses should be reconciled with the need for protection of diplomatic communications. In any case, the possibility of allowing the bag to be opened should be absolutely excluded.

31. He suggested that States should be again invited to submit comments to the Commission on the topic, especially since the Commission intended to complete its work within two years.

32. Mr. KEKOMAKI (Finland), speaking on behalf of the five Nordic countries on the topic "International liability for injurious consequences arising out of acts not prohibited by international law", said that it had been difficult to identify it as an independent topic with a realistic potential for development. On the one hand, it had seemed difficult to distinguish between international liability for injurious consequences of non-prohibited acts and State responsibility for wrongful acts. On the other hand, discussing liability irrespective of such concepts as knowledge and due diligence had seemed to collapse the topic completely into the contentious realm of strict or absolute liability. What was being examined was the vast "grey area" of inter-State conduct in which States acted without violating their primary obligations, while still causing injury to other States.. Standard juridical discussion since the celebrated opinion of the Permanent Court of International Justice in the "Lotus" case (1927) had occasionally fallen victim to the temptation of assuming that international law consisted only of hard-and-fast rules, in the. absence of which a State's sovereignty and freedom of action remained unlimited. The International Court of Justice had refuted that view in its important decision in the Anglo-Norwegian Fisheries case (1949), in which it had observed that the absence of clear and specific rules on the drawing of the baselines of the territorial sea did not signify that the coastal State was free to draw such baselines as it wished. The Court had gone on to discuss the factors which the coastal State was bound to take into account in a way which was currently referred to as "balancing the interests". The relevant standard had to be constructed by reference to reasonableness and equity.

(Mr. Kekomaki, Finland)

33. In many domestic legal systems, the law had come to proceed less through clear-cut rules than by way of ad hoc compromise. The national law was often less a law of formal rules than of flexible standards. The great significance of the topic of international liability lay precisely in its orientation towards such a conception of international law. The real subject of discussion was not compensation and damage, or liability in its narrow, technical sense, but rather the principle of good faith, equity or sic utere tuo ut non alienum laedas. That was what made the topic so important. Whenever a State's action had a bearing upon another State's interests, then it could not be up to the former State to decide freely what course it would adopt. Even in the absence of specific prohibition, a standard must be deemed to exist.

34. Ultimately, the Commission's aim was to give concrete content to the overall duty of good faith, and to provide guidelines on how to measure "equity" in that area of international law. However, defining what was equitable in material terms was difficult. The Commission had therefore opted for a procedural obligation. For the Commission, "liability" meant a set of procedural obligations faced by States when a conflict of interests emerged in an area of international conduct or where specific rules were absent.

35. The Special Rapporteurs had suggested that States might be confronted with a "compound obligation" of a procedural character if a non-prohibited activity gave rise to transboundary injury, and thus to a conflict of interests. The obligation had four "degrees": first, to prevent or minimize, as far as possible, adverse consequences of the State's acts; second, to provide information on the ongoing or planned activities; third, to negotiate a regime with the affected State(s) on the future conduct of such activities, including possible reparation; and fourth, to set guidelines for settling conflicts in the absence of an agreed regime. The concept of "injury" or, as some English-speaking members of the Commission preferred, "harm", provided the focal point of the topic. It was harm - whether prospective or actual - that triggered the compound obligation.

36. The Nordic countries supported that approach to the development of the concept of international liability, for it followed directly from the considerations he had outlined. The process was gradual, and unfolded without the question of the possible wrongfulness of acts even being raised. The approach had been, wisely, a broad one. The Commission had sought to look beyond the narrow issue of compensation to the vast field of conduct not covered by prohibitory rules. It had developed the important affirmation that State sovereignty did not signify an unfettered licence. On the contrary, a State was at all times under an obligation to take into consideration other States' interests, and all conflicts should be settled on the basis of accommodation and by reference to equitable principles.

37. Turning to some of the individual issues raised during the Commission's discussion of the topic, he said that in the light of the points he had just made, the theoretically contentious issue of strict or absolute liability lost its relevance. The question was not, or not essentially, whether the Commission should accept liability without fault or what the status of such liability might be in

(Mr. Kakomaki, Finland)

general law, Rather, strict liability war only an element of the overall compound obligation, It was true that, ultimately, an obligation to pay compensation regardless of any subjective fault on the part of a State could arise. Striot liability would be a factor in the overall balance of interests which States should reek through the procedural ohannrlx open to them. Neither the Commission nor the Sixth Committee was invited to take a principled rtand on rtriot liability. What counted was that on some, and perhaps moct, occasions, *if* damage oould not be prrvrnted, clearly the moat juzt sclution was that victims rhould not 90 without compensation.

38, With regard to the concepts of "appreciable risk" and "prior knowledge", the fourth report of the Special Rapportrur suggested that only those activities which involved appreciable risk *and* of whioh the State in question *wae aware* rhould be covered. That reamed a natural and acceptable suggestion, given the duties to prevent, consult and agree upon a régime. Surely any prevention or oonrultation would imply that the State war aware of the aotivity in question and that such activity war considered in some respect to involve an appreciable risk. However, further consideration should be given, *in* the light of State practice, to thr extent to which the duty to pay compensation should be related to the inherent harmfulness of the aotivity, or to the State's prior knowledge thereof, As the Commission had observed, the rubjrct war concerned more with the just distribution of cortz of economic activity in a way that was both financially rational and morally justified, than with *any* assessment of the wrongfulness or blamrworthinrss of particular actions. Aaoordingly, it wao difficult to see why the affected State and the innocent victims residing there should bear the ootz alone, especially as they did not normally have a share *in* the profits produood by tho activity. That should be a factor *in* the assessment of an overall equitable solution. The Nordic countries supported thr Commission's general approach to the topic.

39. The 10 draft articles were, with the slight nuances ho had outlined, alzo generally acceptable to them. With regard to artiolr 1, they agreed with the Special Rapportour that no list of activities covered undar the topic could be exhaustive. Therefore, the very unconditional formulation of the "appreciable risk" criterion might havr to be reconsidered, Pollution, both accidental and continuous, should be amo..g the topics to which the Commission addressed itself. Both could engage tho liability syst m envisaged under the draft articles. In order to cover the broadest range of relevant situations, the expression "under its jurisdiction or control" was preferable when the text was indicating which activities were attributable to a State, In particular, there was no reason to adopt a criterion of "effectiveness" to characterize the control. It should be clear that activities carried out by State organs and private citizens, and *even* foreignerr or foreign companies situated within the State's "jurisdiction or control" were inoluded.

40. The definition of "appreciable risk" in article 2 was acceptable to the Nordic countries. With regard to determining the extent of possible reparation, they agreed with the Special Rapporteur that only phyrioal harm rhould be included.

(Mr. Kekomaki, Finland)

41. Likewise, with respect to article 3, *an* unconditional criterion of prior knowledge rhould be linked to tho duty tc inform, consult and prevent. A8 soon as a State of origin learned of some potentially harmful activity undrr its jurisdiction or control, it had the obligation to investigate thr mattrr for itself, and to proceed with consultations and negotiation8 in ordrr to ● 8tabli8h tha necessary régime. It8 duty to pay compensation to innocent victims within and bryond its territory would then follow in accordance with the balancing principle. It went without raying that - contrary to the situation in the system *of* State responsibility - it was immaterial whether the injury was caused by private or public acts.

42, Article6 ● ✠□❐ themostimportantprincipleunderlining thr topic, namely, that ● aah State's freedom murt - unless sovereign quality was to be violated - be presumed limited by the equal freedom of other States. However, the formulation of thr principle in that article loft something to be desired. In particular, thr reference to activities involving risk would raise the difficulties to which ho had referred. A8 was suggested in the Commission's report, it might be more advisable to construct the article in three sentences which would better bring out the inherent logic of the topic,

43, Firstly, the article rhould affirm the freedom of thr State of origin to engage in any aativity in its territory or jurisdiction which it conridered appropriate and which war not prohibited by international law, Secondly, it should be affirmed that each State had thr right to be free from interference in the use and enjoyment Of its territory. Those two principles translated, in the classic language of trrritorial sovereignty, the 'two rider *of* principle 21 of the Stockholm Declaration on thr Human Environment. They reflected the main problem involved, namely, the conflict between equal sovereignties. Thirdly, the article rhould expressly mention the principle that such conflict rhould be settled by mean8 of equitable balancing, following the procedures *and* principles set out in the draft, Each of the three ● lomento rhould be ● xpro88ly stated, in order bettor to clarify the rationale underlying the draft.

44, Article 10 contained thr basic principle on reparation; the innocent victim should not alone bear thr cost of damage. It was hoprd that the content of reparation and the balancing test would be further outlined in the course of the Commission's work. It was important that the cortc *of* an activity should not be paid by those who received no benefit from it,

45, The Commission had made important progress in it8 consideration of the future relevance of international law to international order a8 a whole, Now that the ambitious scope of the topic under consideration was evident, the Commission should give high priority to it. Most modrrn problems arising out of accelerated industrialisation and the expanding use *of* technology knew no boundaries. Indeed, several tragic and spectacular incidents had shown that an international community relying simply on the principle of freedom in thr absence of specific prohibitions could not adequately cope with contemporary problems. The pressing issue was to ensure the just distribution of the ● dvantagae and disadvantages which, by force of causal necessity, were inherent in modernisation.

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46. Mr. HANAFI (Egypt) raid that the advances of science and technology had made it necessary to determine international liability for injurious consequences arising out of acts not prohibited by international law without, however, discouraging the development of science and technology or infringing upon thr sovereignty of States. Him delegation looked forward to thr establishment of a *framework* agreement comprising basic rules which would serve as a guide to the international community in darling with ruah issues. Accordingly, it wished to make certain specific comments with respect to the 10 [illegible] rticlem contained in the Special Rapporteur's fourth rrgort,

47, While accepting the practical criteria used to define the scope of the *draft* ln article 1, his delegation believed that the concept of "appreciable risk" would limit appropriate reparation for innocent victims. That concept oould be important in determining the nature of preventive measures and could • orvo am onr of the criteria to be taken into account when levels of reparation was being determined, but should not be treated as thr basis for ruah rrparaticn, Liability murt be based on the occurrence of injury, and it would not be appropriate to place such a restriction on liability towards innocent victims.

48, His delegation would comment on the terms included in draft articlo 2 once the principles and provisions of thr *draft* articles had assumed their final form.

49. The principle, content and objective of draft article 3 were acceptable to his delegation, but the text should perhaps be redrafted in order to emphasine that non-liability could be asserted only if the State of origin war unaware *of* the activity being carried out in areas under its jurisdiction or control, and that in such an event, the burden of proof lay on thst State. It war also important that the State's liability rhould cover the activities of private entities within that State, in order to ensure compliance with the obligation to provide reparation in respect *of any* injurious conuequences.

50. With regard to draft articlos 4 and 5, his delegation believed that the text should categorically require all States to adhrrr to the provisions of the framework agreement when entering into any other agreement concorning similar activities or situations. The text of draft article 5 should be retained, but required redrafting along the liner of the suggestion contained in paragraph 80 of the Commission's report *(A/43/10).* The title should also be amended to reflect that change.

51, A first reading of draft article 6, when taken in conjunction with the definition of scope in draft article 1, gave *rise* to concern because of the implication that it also covered activities carried out by a Power engaged in the illegal occupation of a territory, The suggestion that such a Power should have the right to carry out any activity it considered appropriate was unacceptable under international law,

52. His delegation believed that draft article 7 chculd include detailed reference to specific means of co-operation. The inclusion of such reference might obviate the need to retain draft article 8.

(Mr. Hanafi, Egypt)

53. The content of draft article 9 wao of particular importance since the taking of preventive measures might be regarded a8 one of the • rrontial criteria in assessing liability and thus in determining levels of reparation.

54. With regard to the subject of draft article 10, it •☋❒ • 88ential to ● mphariar unequivocally that reparation was obligatory in cases whore injury occurred. Thr text rhould specify tho criteria to be used in determining thr level of reparation because of the overriding need, referred to by his delegation *on* many occasions to reduce thr burden on victims of such injury, to do 80 by the quickest available mean8 *and* to *avoid* any confusion in the apportionment of liability.

53. Mr. YEPEZ (Venezuela), referring to paragraph 23 of the Commission's report, *maid* that he ● hared the concern expressed by the Special Rapporteur as to whether the draft articles rhould include a list of activities covered by the topic, since such a list would become outdated in thr light of further ● aiontific and technological progress. Moreover, the more inclusion of a particular activity in the list did not mean that it wan likely to cause harm, Accordingly, his delegation war pleased that thr Special Rapportour had recommended the elaboration of criteria by which activities involving risk could be *identified.*

56. As to the question *of* whether activities causing pollution rhould be brought within the scope of the articles, him delegation believed, prima facie, that they rhould be included. The discussion on whether pollution was prohibited in international law was over. There was general recognition on that point in the international community, in the light of the 1972 Stockholm Declaration and subsequent international declarations *on* pollution, as well a 8 specific agreements prohibiting pollution, Inclusion *of* pollution-causing activities was justified because international law did not prohibit specific act8 thst ware the origin or cause of pollution and because possible harmful consequences did not depend on a voluntary action or on negligence. Moreover, while it was true that it was difficult to identify the State of origin of continuous pollution, it was still preferable to ● stabliuh a régime of liability than for the affected State to have no legal recourse for it8 protection.

57, His delegation considered that regulation of international liability for injurious consequence8 arising out of act8 not prohibited by international law constituted one aspect of the progressive development of international law and, accordingly, that topic should not be limited to the determination of acts which entailed appreciable risk. Rather, the topic should also deal with the determination *of* the consequences arising out of appreciable *injury* and rules rhould be drafted regarding the obligation to provide compensation for the resulting injury. His dolegation agreed that the draft articles should be broad and general in scope and rhould serve as an incentive to Stat88 to conclude specific agreements on the subject.

58. With regard to draft article 1, his delegation had doubt8 a8 to the desirability of using the concept of "risk" as a criterion limiting the scope of ths articles. He understood that wherr a particular activity *involved* appreciable risk of causing injury, the State responsible should take prudent safeguard control

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and prevention measures and, if injury did result, even after those measures had been taken, the responsibilty of the State could be attenuated or lessened. However, strict liability rhould not be bared solely on risk, and him delegation agreed with thorn members of the Commission who had felt that the concept of rirk was ambiguous, since ituationm could arise where considerable injury could rerult oven if the aativity causing it did not present an appreciable rink, The injury inflicted on the right8 of Staten rhould take precedence over the criterion of pPrOCiable injury.

59. Am war stated in garaqragh 46 of the report, it might bo desirable to delve further into the possibility Of focusing on activities creating an appreciable rink of tranrboundary harm, with it8 concomitant principle8 of prevention, co-operation and notification, but dealing separately with the activities that caused tranrboundary harm. The Special Rapporteur appeared to 9roer given him suggestion that necessary modification8 could be introduced in rtiolo 2 to include activities with low risk.

60. Him delegation agreed that, while the word "territory" wan too narrow, the words "jurisdiction" or "control" am used in article 1, were not sufficiently clear. Accordingly, an effort rhould be made to include in that provision all the terms essential to the implementation of thr articles, ensuring that they wore adequately dot ined. Him delegation also harboured doubt8 am to the desirability of the phrase "vested in it by international law" am a qualification of the word8 "jurisdiction of a State", minor it conrider ed that the aationr of a State within it8 territory or where it xeraimod jurisdiction wore bared on the concept of sovereignty, and the expression "vested in it by international law" could lead to confusion,

61, With regard to article 3, further aonrideration should be given to the desirability of including force majeure and its consequences with regard to possible compensation for the injury caused. Perhaps the language relating to the presumption that a State know or had means of knowing that an aativity involving risk was being, or war about to be, carried out in its territory or in area8 under its jurisdiction or control could be made more explicit. In article 4, the phrase "subject to that other international agreement" required clarification, for its connection with the rent of the rule wan unclear,

62. Although the Principle in article 5 should be retained, it should be clarified further, perhaps utilizing the language which appeared in paragraph 80 of the report, Article 9 should be expanded, or further rule8 relating to prevention rhould be drafted, in order to incorporate certain objective preventive measures that Staten rhould take. The word "reasonable" rhould be deleted mince it introduced a subjective element that could give rise to difficulties of interpretation, With respect to article 10, it war necessary to explain how roparaticn would be made, what circumstances would give rime to the obligation to make reparation, and the possible exception8 to the obligation,

63. Lastly, him delegation urged the Commission to give priority to the draft article8 under consideration.

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64. Mr. CRAWFORD (Australia) raid that the moat recent consideration by the International Law Commission of thr topic of international liability for injurious consequences arising out of acts not prohibited by international law suggested that *a* number of major issues, particularly *in* the environmental field, remained unresolved an8 that an imaginative approaoh which avoided narrow definition8 of the cases in which State activities gave rise to obligations of notification, prevention, *co-oporrtion,* or ultimately reparation, was required. Thr basic task of *any* legal régime in that area was to ensure that thr innocent viot'm was adequately compensated in situations where lore was attributable to thr fault of a State, or to the oonduat of a State to which the appropriate rules rttachrd liability, The Commission should *not* confine it8 work to dealing with a limited category of transboundary injury, and rhould not allow itself to be distracted by purely procedural issues.

66. One of thr difficulties with the draft article8 ourrrntly under consideration was that they oonorntrated on the concept of risk, without focusing on the prevention of transboundary injury, the notification of the imminent likelihood of such *injury,* the limitation of damage once injury had occurred or was inevitable, *and* the question *of* liability for injury which had actually occurred. To that range of issues should be addrd che question of supplementing ♋■♎ ● naOUraging special régimes for resolving particular problems. Those issues, although they were related to the question of liability for injurious consequences arising from harm across boundaries and not resulting from acts themselves contrary to international law, raised further issues which were not identical and rhould not be made to depend upon a single narrow definition of tke scope of thr dra.' articles, The question of the obligation to notify imminent tranmboundsry injury, .or example, was a separate issue.

66. Article 1, which int.oduced the notion of activities which created an appreciable risk of causing transboundary injury, was unduly narrow in scope, and hi8 delegation agreed with the Special Rapportour that it was not appropriate to draw up a list Of such activities, and also that the subject of pollution, among others, should b e covered. It was questionable whether the duty to notify affected States of imminent transboundary injury rhould depend upon whether that injury was, when the activities creating the risk wore performed, "highly likely". *Once* such injury became likely, there should be an obligation to notify, in the interest of other States; the obligation could be without prejudice to the question of liabi'.ity. There wac thus all the more reason to impose such an obligation, bearing *in* mind the idea of co-operation in good faith between States. Moreover, the notion of "appreciable risk" in article 1 was combined with a number of other definitions which rendered its rcopr still narrower.

67. For example, paragraph (a) of article 2 failed to clarify what was meant by a "simple examination", or thr situation that would arise if the risk in question war actually known to the States concerned even though it was not evident from such an examination. Similarly, the paragraph stipulated that thr "physical properties" of the things concerned must be such that they were "highly likely to cause transboundary injury throughout thr process", which appeared to mean that the likelihood rhould be one which was continuous throughout *the* process of use. Thus a use which in normal circumstances war not highly likely to cause transboundary

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injury except in defined circumstances would appear not to be covered by thr paragraph, since the risk did not occur "throughout the process". On that basis, for example, the operation of a nuclear power plant which in normal circumstances war safe but which became acutely unsafe in certain condition8 or a8 a result of some forma of operator error, would not be covered at all by the draft articles. If romething wont wrong with such a plant and notification became an issue in terms of imminent transboundary injury to other States, such notifioation would not be required.

68. In addition, it seemed that the risk, which was to be both appreciable and highly likely as well as continuour "throughout the process", must be a risk of transboundary injury. The requirement that the injury murt be appreciable, highly likely and continuous seemed also to apply to it8 transboundary ● rgrat.

69. The proposals did not reflect the commercial and insurance realities confronting the operators of enterprises, nor did they refloat round policies of liability as ● mbodiod in the laws of moat, if not all, States. States were in a position, by licensing and by requiring operators to have adequate financial resources and operating procedures, to ensure that damage was limited and that compensation was available rhould it occur. There was no reason why liability should be excluded for trmrboundary harm oaurrd by physical ● otivitirr undrr the jurisdiction of a particular State just because there was no perceived appreciable risk, if there were othrr ● loment8 that would warrant 8 finding of liability, Tho basis of liability rhould not be confined to the foreseeability of risk, ● 8pooially in the restricted terms ● nVi8Bged in the draft articles.

70. An additional point related to the scope of the draft articles, which a8 they etood were not limited to rat8 prohibited by international law: in fact, they extended to acts of any description whatever. The point was clearly recognised in the current version of article 5, which recognised that the draft articles "do not specify" the circumstances to which their title appeared to limit them, but that they applied to a wider range of cases, irrespective of thc legality or otherwise of the act which gave rise to thr injurious consequences. Draft article 5 went on to provide that the other consequences attached to the unlawfulness of the original acts would none the less continue to apply. In short, there was nothing in draft articles 1 or 2 to limit the draft articles to acts not contrary to international law, a situation whioh was undesirable for several reasons. Firstly, it was desirable in principle that the draft articles should have the same scope as the topic for study approved by the General Assembly, and that the Commission rhould not lay down rule8 applicable to the general area of State responsibility in the context of a topic concerned with acts not themselves unlawful under international law. There were good ground8 for the Commission to deal specifically with that topic as a sub-category of the general rules applicable to State responsibility, without prejudice to those general rules. The failure of the draft articles to limit themselves to the situation of act8 not contrary to international law rendered demarcation of the two topics vary much at risk,

71, A second reason for insisting on a more limited version of the draft articles was that the rule8 with respect to liability and notification were very likely to

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be different and more stringent in the case of *act8* whioh were intrinsically unlawful under international law, irrespective of rny actual occurrence of transboundary injury, The faat that the draft articles did not reflect such a limitation suggested, in particular, that the general principles stated in chapter II were applicable to the whole range of State rativity, and not merely State rativity which was not contrary to any other rolrvrnt rule of international law. A State could thus use article 6 to Claim legality for a questionable or dangerous activity conducted within it8 territory: the draft article would only be acceptable if it8 scope wore limited to activities not otherwise oontrrry to international law.

72, A further difficulty with draft article 6 was that it made no reference to injurious consequences occurring at the international level but not within the jurisdiction of another State' In that ocnneotion it war importrnt to boar in mind the wording of principle 21 of the Stockholm Declaration, whioh provided that any activity in one State murt not damage the environment of rnothrr State or of areas beyond th8 limit8 of national jurisdiction. The latter aspect was completely excluded in the current draft articles, notwithstanding the importance of areas of *the* natural heritage whioh ware beyond the limits of national jurirdiation and thus, in some sense, part of thr common heritage of mankind,

73, Draft article 9, which dealt with the important issue of prevention, rtipulated, in addition to the various limitation8 imposed by articles 1 and 2, thrt the activities should "presumably" involve risk. It had already been provided *that* the risk should be appreciable on a simple examination, that it should relate to appreciable injury, and that it should be highly likely: in such circumstances it was not clear what war added by the word "presumably". A8 it8 inclusion in a rection dealing with principles suggested, draft article 9 was only a beginning; it war important that the Commission should draw *on* the considerable work it had already done on the duty of co-operation in relation to international watercourses, and that it8 approach to related issues should be consistent.

74, In the light of such considerations it war not surprising that hi8 delegation found the existing version of article 10 disappointingly negative. Although it provided that there murt be reparation for appreciable injury, it completely failed to attach liability to any defined person with respect to such injury, and raid nothing about a situation in which an innocent victim war affected by a transboundary injury in common with other persons who might be liable for it. That was too narrow an approach, bearing in mind the fact that the subject matter of the draft article8 a8 a whole war international liability for injurious consequences. The Commission should not deal with issues of prevention and procedure while ignoring issues of liability: there was a rick that procedural matters would become the main fooue of its deliberations.

75. Him dolegation urged the Commission to continue its important work in that area, taking into account the need *for* satisfactory rules to deal with the liability of States in situations wherr victims of transboundary harm were not adequately compensated by other mechanisms, such as private law remedies, specific

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international régimes or mutual co-operation between States. On thr *othrr* hand, his delegation did not support any change in thr title of the topia at thr ourrrnt stage: before considering any ruah change, it would need to be reassured that any proposal to that effect was widely rupportrd and would not overlap with other items on the Commission's agenda, *in* particular State responsibility and thr non-navigational uses of international watercourses.

76. While the topic referred *to the* International Law Commission was that of international liability for injurious consequences arising out of acts not prohibited by international law, the draft articles were not limited to acts *not* prohibited by international law and did not deal with injurious consequences as such, but merely with a very restrictive range of such consequences, making no clear provision for international liability,

77, Mr. LUKIANOVICH (Union of Soviet Socialist Republics) raid that the comprehensive security system proposed by the Soviet Union war also a proposal for a roundly based international legal order founded on the principle of the primacy of law *in* politics. His delegation was convinced that thr International Law Commission's work rhould take into roaount the need to ● labarate and adopt generally ● aoagtablo provisions rimed at safeguarding international legality and enhancing the role of the law as a regulatory mrchanirm in international relations.

78. The Special Rapporteur for tho topic of international liability for injurious consequences arising out of aotr not prohibited by international law had taken thr view that there was no norm in general international law establishing the principle of aomprnration for injury, and that, if such • norm were to be covered by tho draft ● rtioloa and supported by the requisite number of States in a aonvrntion, it would result in a kind □↗ ● brolute liability which was alien to the contemporary community of nations. The Special Rapporteur had ● oaordinqly ● xprorrod readiness *to* forgo the principle □↗ ● brolute liability *in* favour of a régime in whioh liability did not arise in all cases of tranrboundary injury, In the interests of securing *the* agreement of as mrny States as possiblo, the Special Rapportour had acknowledged that his draft articles wore not based on ourrsnt law, and thur did not conrtitutr codification so much as progressive development of international law, The Soviet Union fully agreed with the Special Rapporteur's conclusion that "any meaningful development of the topic had to rely *on* sound judgement, common sense, co-operation and concerted efforts *on* the part *of* thr Commission" (A/43/10, para. 37).

79, Thr Special Rapportrur had also referred to the modest object of thr draft articles, whiah was to obligate States involved in the conduct of activities involving risk of extraterritorial harm, to inform the other State which might be affected and to tako preventive measures. Inrtrad of specified compensation, it was proposed that there should be an obligation to negotiate in good faith with a view to making reparation for harm caused.

80. Particular importanoe should b● ● ttaohed to the Special Rapporteur's suggestion that thr principle of compensation for injury was necessary whrn there

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was no agreed treaty régime between thr State of origin *and* thr affected State *or* States.

81. The Special Rapporteur was quite right to restrict the topic of liability, whioh war barrd on the existence of a substantial element of risk in lawful activities that, *an a* result of circumstances, might give rise to appreciable harm, Such liability would arise irrespective of whether thr State was able to foresee such a result of its ● ativitirr, or whrthrr it had done everything in its power to prevent the occurrence of such harm,

82. Some members of the Commission were ● ndaavouring strenuously, *and* in his delegation's view unjustifiably, to broaden the scope of liability for tranrboundary injury resulting from lawful activity, Thry favoured expansion of tho scope of the draft articles to include harm caused to, inter alia, thr common areas of the high seas, outer space, and tho osone layer. I n their view, such liability derived from the very fact of tranrboundary harm, irrespective of the naturr of thr source of ruoh harm, Thry considered that the régime of liability could not be barrd on the concept of risk, and that if it were, it would offer extremely limited possibilities *for* reparation, with the victims of tranrboundary harm receiving compensation only for lore caused by activities involving risk.

83. His delegation oould not agree with that position. It considered that it war impossible to arrive at a concept of overall liability before dealing with thr question of liability for *harm* in specific fields of lawful activity, Accordingly, the USSR supported tho Special Rapporteur, who favourrd a more practical approach.

84. His drlrqation ● qrord with those members of thr Commission who considered that, at the present stage of scientific and technological development and in the light of the emergence of *now* forms of ● otivitioo which entailed risk but *wore* of benefit *to* society, ● ooidontr causing tranrboundary harm were to some ● ntrnt to be regarded as a common misfortune. In ruah circumstances, it waa proper to expect that the Stato of *origin* rhould co-operate in order to mitigate the consequences of an accident,

85. The policy of seeking positive ● lomentr also emerged in the approach to tho question of compensation for harm, Thr Special Rapportour took thr view, which had been supported by *many* members of thr Commission, that the experimental nature of certain technological activities of States of origin, and the fact that, as a result of the adoption of preventive measures, such States might incur substantial costs, should be taken into account,

86. Tranrboundary harm should not be the sole basis on whioh liability in connection with lawful activities arose. Aooount muet also be taken of the risks incurred by a State which was pioneering *now* technology, and its contribution to eliminating the consequences of an accident. The interests of all the States conoernrd must be taken into account.

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87. On the question of compensation for transboundary harm, his delegation wished to stress that such compensation at State level was possible only on the basis of agreements concluded specifically for that purpose. At the same time, bearing in mind the economic and legal reforms currently under way in the Soviet Union, his delegation was prepared to consider the possibility of solving the problem within the framework of civil law, on the basis of the limited liability of juridical persons.

88. His delegation also considered that, taking into account the diversity of issues involved in the topic and the many differences in conceptual approach, the Commission should direct its energies to elaborating general principles or guidelines which States could use in concluding special agreements in that area.

89. Mr. KIRSCH (Canada), referring to the issue of international liability for injurious consequences arising out of acts not prohibited by international law, said that the Special Rapporteur had produced the elements of a central chapter of a comprehensive convention. In so doing he had responded in a significant way to the appeal made by the Brundtland World Commission on Environment and Development for Governments to strengthen and extend existing international law. The International Law Commission and the Sixth Committee might thus now be able to make a real contribution in the area in question. It was gratifying to see the priority that the topic had received at the Commission's most recent session and to note that the Commission had demonstrated an increasing environmental awareness. The Commission's debates on the subject had been constructive, and there currently appeared to be a widespread recognition of the need for progressive development of the relevant law, as well as for its codification. It was worth recalling, in that connection, that one of the most important principles agreed to at the 1972 Stockholm Conference on the Human Environment had been that States should co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of States to areas beyond their jurisdiction (principle 22).

90. Turning to the Special Rapporteur's report and to particular draft articles, he observed that article 1 raised the basic issue of whether risk or harm was the basis of liability. The Special Rapporteur had introduced the concept of "risk" as a criterion determining the types of activities to be covered by the articles proposed by him thus far. However, if risk was adopted as the sole criterion of liability, activity causing transboundary harm must pose an "appreciable risk", failing which, the activity would not lie within the scope of the topic and would not trigger liability. Canada was unable to accept such a conclusion. There were many kinds of activities in which the risks might appear slight but the effects might be catastrophic. To exclude from application of the articles cases involving appreciable harm would deprive victims of reparation in those situations, simply because the risk of harm had not been considered appreciable. The concept of risk played an important role in stimulating preventive measures and even, perhaps, in identifying the standard of care to be applied. In that connection, Canada strongly supported the Special Rapporteur's approach, as reflected in his fourth

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report (A/CN.4/413, para. 44) and the Commission's report (para. 50). In sum, the scope Of the subject must include liability for injurious consequences, or, in other words, "appreciable harm". Canada saw no objection to the concept of appreciable risk being utilised as the corner-stone of one chapter of the topic, but it could not accept that the topic should begin and end with the concept of appreciable risk,

91. Canada wished to associate itself on that issue with the position stated by Brazil at the Committee's previous meeting. Moreover, it supported the broad approach reflected in the principles set out by the Special Rapporteur in paragraph 86 of his fourth report, which were based on Stockholm principle 21 and should govern the future deliberations of the Commission and the Sixth Committee on the topic. Principle 21 expressed the positive obligation of States to preserve and protect the environment, not only of their neighbours but in areas beyond national jurisdiction. Moreover, it struck the correct balance between a right and the corresponding obligation of a State: to be free to act but not so as to cause injury to other States. Care must be taken not to tip the balance too far in favour of the freedom of States to act. A further problem was that if the articles were to be based solely on appreciable risk, rather than appreciable harm, they would tend to focus mainly upon accident-prone, hazardous activities. The injurious consequences of long-term, gradual pollution might not be adequately covered, if at all.

92. The foregoing observations indicated some of the significant difficulties that the Commission would face when it dealt with continuous, latent, diffuse, long-range and indirect pollution. Those problems should not be considered intractable, and they must be addressed. Information exchange, data collection and monitoring, for example, should be facilitated by the appropriate international organizations. The problem of attribution and liability where there were many States of origin would undoubtedly prove more difficult to resolve on issues relating to damage to "the *commons*". That problem might need to be dealt with by specific agreements or conventions, which might require what one member of the Commission had termed the "promotional" or "incentive" approach aimed more at prevention than at liability.

93. The limits on freedom of action and the duty to co-operate were dealt with Well in articles 6 and 7 of chapter II. With respect to article 8, Canada wondered whether participation of potentially affected States ought to include input at the planning stage of high-risk projects. Article 9 was clear, provided that it was read within the context of the whole of the proposed convention. The question of whether reparation must be tied to risk, as presented in article 10, needed further consideration in the light of the low-risk/high-harm debate.

94. In past years, there had been much discussion in the Commission and in the Sixth Committee *on* the doctrinal basis of the topic. The short answer to the theoretical problems in question was to cite the series of precedents affirming that liability for injurious consequences could attach even in cases where the activity per se was not prohibited. He referred, in particular, to the Trail Smelter, Corfu Channel and Lac Lanoux cases. However, it was only necessary

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to roach agreement on the need for progressive development of the law in the field, whatevrr the nature, scope *or* content of existing positive law. In those circumstances, it war extremely ● naouraging that many members of the Committee had now called for a ret of principles elaborating the positive duty to preserve and protect tl› environment analogous to article 192 of part XI? of the United Nations Convention on the Law of the Sea. All of part XII *of* the Convention war generally recognised as reflecting customary law. The Special Rapportaur had laid thr foundatioa for a broad, positive and concrete approach of the rort that the Commission war now beginning to follow - a development whose importance could not be over-•mphariaod.

95, *It* was worth taking note of the Final Statement of thr World Conference *on* the Changing Atmosphere, hold at Toronto in June 1988 (A/C.2/43/2), which referred to a number of important first steps that had already been taken in developing international law and practices to address pollution of the *air* and drew attention to the fact that there was no overall convention constituting a comprehensive international framework, Canada ha3 invited experts to discuss a comprehensive framework convention on the protection of the atmosphere at a meeting to be held at Ottawa in February 1989. It was to be hoped that that law-making conference would make a full contribution to the progressive development of the global law of the environment,

96. Mr. BENNOUNA *(Morocco)*, referring to the issue of international liability for injurious consequences arising out of acts not prohibited by international law, raid that there was an increasing awareness of the urgent need to protect the world's basic natural equilibrium, without regard to national sovereignty. In that connection, it wax particularly revealing that a new item, on the conservation of climate as part of the common heritage *of* mankind, had *been* included in the General Assembly' a agenda. Consideration of the issue of international liability for the injurious consequences in question wao essential in order to adjust international law to the technological revolution, The distinction between codification and the progressive development *of* international law was not a major issue at the current stage. It wao, above all, essential to identify activities not covered by the traditional law of liability that were likely to cause major harm to others. Although imagination was called for, it would also be necessary to adapt a number of existing concepts so as to meet the requirement8 of a given situation. It might, in fact, be more appropriate to speak of a number of situations, each situation having its own specific characteristic6 - which was why the Special Rapporteur had opted for the preparation of a framework agreement. States would then be *free* t.o conclude specific agreements dealing with particular activities. For example, the issue of international liability for injurious consequences arising out of acts not prohibited by international law could be linked to the question of the régime governing international watercourses. The approach adopted by the Special Rapporteur was both realistic and appropriate. Although the goal of the draft articles might be modert, the draft would serve as a guide and a code of conduct for States.

(Mr. Bennouna, Morocco)

97. With regard to the controversy about the concepts of "risk" *and* "injury", it war not *clear* whether thr fact that injury had occurred made it possible to characterise *an* activity involving risk, or whether thr existence of an activity involving risk called for reparation of the resulting injury. Thur phrared, the problem was obviously insoluble, The appropriate approach was to focus *on* the idea that risk and injury formrd a continuum, Initially, at the point where the risk wail identified and there was only potential injury, thr way murt be paved for *an* exchange of information and preventivr measures. At a later stage, if the injury actually occurred, there must be provision *for* a right to *reparation,* taking account *of* all thr relevant circumstances from the time of the identification of the risk to the actual occurrence of the injury, It was thur possible to proceed *in* both directions and either co rtart with the risk in order to characterise thr resulting injury or to rtart with the injury in order to assess *the* original risk. There war no need to draw up a list of the activities concerned. It would be preferable to develop general criteria in order to give States sufficient flexibility to prepare specific agreements *geared* to their particular situationc. The risk of pollution must not be ● xcludod a priori from the draft,

98. Turning to the 10 draft articles proposed by the Special Rapporteur, ho maid that whore article 1 was concerned, a clarification of the conorgt of "effective control" was needed, as well as of the situation regarding *the* activities of tranenational corporationr in the territory of a given State, which were ● otually under th. effective control of foreign interests. Article 2 described as appreciable both the risk and thr injury that the rink war likely to cause. However, it would be sufficient to refer simply to the risk that *war* likely to cause appreciable tranoboundary injury, An additional provision should be inserted between articles 2 and 3 in order to clarify the issue of who was to identify thr risk in question. Such a provision should lay down an obligation on the part of the State of origin to notify other States, am well as e right of execution for the State that might be affected. It would thus be possible to distinguish between existing and now activities, Article 3 rhould clarify the issue of areas under a State's jurisdiction, particularly in the case *of* maritime areas, such as the exclusive economic sone, where there were competing competences. Articles 7 and 8 should contain details on the ● rtablishment *of* machinery to deal with the obligation on the part of the States concerned to negotiate. Article 9 should also contain details on the machinery to be established in order to prevent injury. Lartly, article 10 should make reference to ths provisions on prevention where the evaluation of the reparation due was concerned,

The meeting rose at 6.20 p.m.