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SUMMARY RECORD OF THE 32nd MEETING

Chairman:	Mr. AFONSO	(Mozambique)
later:	Mr. SANDOVAL (Vice-Chairman)	(Ecuador)

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The meeting was called to order at 10 a.m.

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

1. Mr. TETU (Canada) recalled that the International Law Commission had first taken up the draft Code of crimes against the peace and security of mankind in 1947; the time gap since then highlighted the difficulty of achieving consensus on the composition of substantive offences and on procedural and related questions. However, in the light of increased international cooperation in the post-cold war era and the threat to all States caused by the most serious international offences, the time was ripe for a major effort to produce a workable scheme which would deter prospective perpetrators and, if not, ensure prosecution and punishment in accordance with the rule of law.

2. He noted that the Commission indicated in paragraph 173 of its report (A/46/10) that it was mindful that the draft Code was still open to some improvements. His delegation felt that there was a need to provide for the relationship between the draft Code and existing multilateral conventions that addressed the crimes listed in the Code; in some cases the draft Code used the definitional language of those conventions, in others it did not. There was also the even more basic question of the completely new international crimes created in the draft Code, as well as the problem of lack of clarity in the drafting of some of the provisions.

3. His delegation was concerned that the definition of international terrorism in article 24 covered only individuals who were agents or representatives of States; the definition should also encompass acts of international terrorism covered by the existing network of multilateral anti-terrorism conventions which were committed by persons not acting on behalf of a State. His delegation disagreed with the idea that State-sponsored terrorism should be distinguished from international terrorism by groups not acting on behalf of a State; to limit the scope of the draft Code in that way would create a lacuna into which the vast majority of terrorist acts would fall. The phrase "acts against another State directed at persons or property" should be clarified, and it should be made clear whether it covered hijacking of aircraft and maritime vessels.

4. The linchpin of the draft Code was the obligation expressed in the maxim aut dedere, aut judicare. The language used in article 6, paragraph 1, of the draft Code, in providing that the State where an alleged offender was present "shall either try or extradite him" overlooked the wording in the multilateral anti-terrorism conventions. Many States would only be able to agree to that type of obligation if it met the concerns and demands of their domestic criminal law processes. His delegation restated its commitment to the prosecution and punishment of the most serious international crimes that caused irreparable harm to the international and national rules of law.

(Mr. Tétu, Canada)

However, article 6, the word "try" must be replaced by language that took into account evidentiary requirements. The phrase used in the multilateral anti-terrorism conventions could serve as a guideline; there would then be an obligation either to extradite or to submit the case to a State's competent authorities for the purposes of prosecution. Moreover, if the obligation to extradite was to be workable, it should be stated that the offences contained in the draft Code were to be considered as extraditable offences between States parties which had bilateral extradition treaties and that the draft Code could be used as a vehicle for extradition between those States whose domestic law required a bilateral treaty, where one was not in existence. Consideration should also be given to whether the political character of the offence as an exception to extradition should be explicitly excluded or whether it was sufficient to have a general provision as contained in article 4, supplemented by the obligation aut dedere, aut judicare.

5. On the issue of penalties, if the Code was to operate without an international criminal court, the approach taken in the multilateral conventions was the most workable one: States parties would then be obligated to impose severe penalties that took into consideration the heinous nature of the crime. If an international criminal court was established, it might be preferable to establish specific penalties designating a minimum and a maximum. His delegation felt that a penalty of community work was not compatible with the nature of the heinous offences in the draft Code. However, confiscation of property acquired as the proceeds of the criminal act should be included. That concept played an important role in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and was also in keeping with the criminal legislation of many countries. Further studies should be done on who the beneficiary of such drug-related money should be. Other penalties in the nature of punitive fines might be appropriate in some circumstances.

6. Without an international criminal court, the draft Code would be subject to enforcement by national criminal jurisdictions. The matter of the court could not be discussed in practical terms until draft proposals as to its composition, prosecutional system and finances, and the enforcement of its sentences, were on the table. States would have to confer jurisdiction on the court and it would be necessary to determine the most workable relationship between such a court and national courts. An international criminal court could provide impartiality and objectivity and could give valuable support to the strengthening of international criminal law and cooperation between States. However, the sensitive issue of whether domestic courts or an international criminal court would have primacy of jurisdictional competence would need careful consideration. Further consideration should also be given to the advisory capacity of an international criminal court on questions of interpretation of international criminal law issues.

7. Mr. ROUCOUNAS (Greece) said that since the draft Code of crimes against the peace and security of mankind had been approved on first reading, it would be easier to determine its degree of autonomy and field of application. In the second reading, the Commission would no doubt consider the question of whether the reference to international law should be retained in article 1; yet, if the crimes defined in the Code were not crimes under international law, it was not clear how they could be considered as crimes against the peace and security of mankind. Part I contained provisions that were an essential part of the Code, such as articles 2, 5, 7 and 11; the Commission would now have the delicate task of identifying possible points of similarity with domestic law. Article 6, on the obligation to try or extradite, raised the question of efficacy and, in its final form, that obligation would be linked with the decision of the competent judge, whether national, international or both. Other matters covered in part I, for example in articles 3, 4, 8, 9 and 14 had been included because they were a vital part of the Code and derived from general principles of domestic criminal law.

8. Part II of the draft Code identified 12 particularly heinous crimes; the problem now lay in formulating definitions of them. In some cases, such as genocide (art. 19), the Commission used the definition in the 1948 Convention. In the case of the definition of aggression (art. 15) it had referred to General Assembly resolution 3314 (XXIX), "Definition of Aggression", and tried to make the definition as limited as possible. However, problems remained, such as the question of penalties for genocide as defined in the Code and genocide as defined in the relevant Convention and, in the case of aggression, the question of determining the influence of lack of action on the part of the Security Council.

9. The Commission's abandonment of a distinction between three types of international crimes (as explained in the commentary to part II) did not seem to have consequences for the substance of the draft Code. The standard format for identifying the persons to whom responsibility for each of the crimes listed in the Code could be ascribed could not be regarded as exclusive in nature.

10. The Commission had added to the draft Code the crimes of apartheid, systematic or mass violations of human rights, exceptionally serious war crimes and wilful and severe damage to the environment; some improvements and adjustments would probably be needed in those new areas. That applied, for example, to the inclusion in article 26 of the formula of "widespread, long-term and severe damage" used in article 55 of Protocol I Additional to the 1949 Geneva Conventions, which seemed to give a new dimension to the question of "long-term" damage.

11. His delegation had always felt that it was necessary to establish an international criminal court; the broad discussions of that question in the Committee should enable the General Assembly to make the Commission's mandate more specific in that respect. The Commission should continue to work on more

than one model and in particular should consider the possibility of giving exclusive competence to an international criminal court for a limited number of crimes against the peace and security of mankind. For other crimes, it should consider concurrent competence with national courts.

12. Mr. RAZAFINDRALAMBO (Madagascar) said it was regrettable that the Commission had not made more progress in its consideration of international liability for injurious consequences arising out of acts not prohibited by international law and was still considering the underlying questions and even questioning the value of the topic and its objective. There had been sufficient consideration of the matter in the Commission and the Committee to enable the Special Rapporteur to find some answers to the fundamental questions raised in his seventh report. The General Assembly should invite the Commission to accelerate the work already undertaken in the area defined in article 1 of the draft (scope of the articles) and the Drafting Committee should rapidly consider all the articles that had been submitted to it. Since the Commission had made significant progress on three other major items on its agenda, high priority should be accorded to the topic "International liability for injurious consequences arising out of acts not prohibited by international law", so that efforts would be successful by the end of the next quinquennium.

13. His delegation did not support the idea that the Special Rapporteur should direct his attention to the question of a multilateral instrument emphasizing the protection of the natural environment, because that would only call in question the positive results of several years of in-depth consideration and unduly delay the conclusion of the Commission's work. Moreover, it was not in the interest of developing countries to dilute the subject within the much broader context of damage caused to the environment. Since those countries had neither the financial resources nor the necessary technical know-how to prevent or minimize the adverse consequences of activities carried out under their own jurisdiction or control, in respect of prevention and reparation they had a greater need than the industrialized countries for clear and strict norms of responsibility determining the respective role of the State of origin and the victim State, strictly at the bilateral level, taking into account the specific situation of each country. In that respect, article 3 and article 6 should be strengthened by a more general provision recognizing the special situation of developing countries.

14. Turning to particular questions raised by the Special Rapporteur in his seventh report (A/CN.4/437), he noted that the problem of the title concerned only the English version of the text. His delegation felt that the use of the word "activities" in English would not fundamentally change the terms of the Commission's mandate. The Commission had in no way envisaged a "wrongful act" as a specific and isolated act but had determined that it could be an act "having a continuing character" or a "series of actions or omissions" (art. 25, draft articles on State responsibility). His delegation felt that the alignment of the English text of the title with the French text was perfectly legitimate.

(Mr. Razafindralambo, Madagascar)

15. As to the nature of the instrument, the Commission did not normally discuss that question before adopting a draft as a whole, at least on first reading. While it was possible that some would more easily accept hypotheses or draft articles of an instrument that would not have binding force, the reverse could also be true. His delegation was therefore in favour of formulating a framework convention with binding force. On the question of the scope of the t pic, his delegation had already endorsed the view of the Special Rapporteur that the topic should deal with activities involving risk of causing transboundary harm, as well as those actually causing such harm, and the definition he had made in his sixth report of activities involving risk and harmful effects, as well as the method of treating those categories together under a single legal regime, while taking into account the special features of each category of activities. However, the regime of prevention should essentially involve the obligation to take unilateral legislative or administrative measures which would be selected by each State. The fact that it was necessary to determine the nature of risk in the context of the topic, particularly in the articles concerning prevention, where the problem of threshold arose, was not an obstacle to establishing a single regime, because the problem arose in respect of both risk and harm. His delegation felt that the list of dangerous substances should form an annex as in the case of conventions on the prevention of marine pollution.

16. With regard to prevention, the procedural measures suggested by the Special Rapporteur should be simplified and should be indicative in nature so as not to impede the freedom of States to act without foreign interference set forth in article 6 of the draft. If necessary, a more detailed procedure could be set forth in an optional protocol. Only unilateral preventive measures designed to minimize risk should be imposed, because they derived from the obligation of due diligence including, in accordance with general international law, the obligation to make reparation for cases of possible negligence. At all events, all the principles set forth should be drafted in the most general terms possible.

17. The fundamental importance of reparation was indisputable by virtue of the maxim sic utere tuo ut alienum non laedas and of the principle that the innocent victim should not be left to bear the loss alone. There was no doubt that because of their state of economic underdevelopment and financial dependence on the industrialized States and international financial institutions, third world countries would benefit from specific criteria that would establish a more equitable balance of interests.

18. On the question of the relation between civil liability and State liability, his delegation was in favour of giving priority to civil liability as a primary obligation in the current situation of liberalization and growing privatization of national economies; it was only when activities could be attributed exclusively to a State that direct State liability could be envisaged. However, his delegation would not exclude joint or residual liability of the State when a State failed in its duty of prevention by

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failing to take unilateral preventive measures or to respect those that were mandated; if a State did take such measures it would still have a residual liability based on risk, on the profit it derived from the activity and indeed on the principle of equity.

19. On the question of determining what harm should be compensated, his delegation believed that only appreciable or major harm should give rise to compensation, again for reasons of equity. The question of the scale of harm was a corollary of that question; major harm required major compensation, except for possibilities of reduction taking into account the circumstances and situations of the States concerned.

20. The problem of the "global commons" was closely linked to that of protection of the environment and was of major concern to the international community. It was connected to international norms agreed upon in a multilateral context and was already under consideration in other international bodies concerned with formulating instruments on various aspects of the environment. The Commission was not the appropriate body to carry out such a study because it was liable to be overtaken by other more specialized bodies; at best, because of its importance, the topic could be included on the Commission's long-term programme.

21. His delegation was glad that the Commission had accelerated its work on part 2 of the topic of "Relations between States and international organizations" and hoped that work on the topic could be completed before the end of the new Commission's mandate. His delegation supported the principle and formulation of the articles proposed in the fifth and sixth reports of the Special Rapporteur, which had been sent to the Drafting Committee at the Commission's forty-third session. The Special Rapporteur had largely drawn on the corresponding provisions of the Convention.

22. Mr. CORELL (Sweden), speaking on behalf of the Nordic countries, said they attached great importance to the topic "International liability for injurious consequences arising out of acts not prohibited by international law", because there was a growing realization of the need for a legal instrument in that field, dealing most specifically with transboundary environmental harm. The objective of the current drafting exercise was both to prevent damage and provide reparation and to agree on a framework for guaranteeing that innocent victims were protected from transboundary harm and promptly compensated for damage caused.

23. The Stockholm Declaration on the Human Environment contained two basic principles on the topic: principle 21, which provided that States had the sovereign right to exploit their own resources pursuant to their own environmental policies, but also the responsibility to ensure that activities within their jurisdiction or control did not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction; and principle 22, which urged States to cooperate to develop further the international law regarding liability and compensation for the victims of

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pollution and other environmental damage. It was against that background that the Commission and the Committee should view the task of progressive development of the international law on the topic.

24. Turning to the draft articles, he said that the Nordic countries favoured a binding framework convention, with the option of treating some parts of the topic in the form of guidelines or recommendations, perhaps with annexes on particular issues. However, the final decision on the status and format of the draft articles would have to be taken by the Committee. They agreed that the word "activities" should replace "acts" in the title, which would in any event have to be simplified.

25. The scope of the topic should include both activities involving risk and activities with harmful effects. With regard to risk, general objective criteria were preferable to a list of dangerous substances, for the reasons given by the Commission. If there was to be a list, it should not be exhaustive. A clearer definition of harm than the one contained in article 2 (g) was needed so that States could assess the extent of their duty to pay compensation. As a minimum, compensation should be made for the cost of measures taken by the affected State to mitigate the harm or restore the environment to its former state. The Ad Hoc Working Group of Legal and Technical Experts convened by the United Nations Environment Programme to work on a protocol on liability and compensation for damage resulting from the transboundary movements and disposal of hazardous wastes had proposed a list of the kind of losses which should be covered by the concept of damage; the list might help the Commission in its future deliberations.

26. There was a clear need to include provisions on the prevention of transboundary harm, for preventive measures must first come into play when countering such harm. In fact, the thrust of international cooperation was currently on preventive measures and, happily, the principle was manifested clearly in the draft articles. It was argued in some quarters that prevention related mainly to risk activities, but it was also relevant to the containment of the effects of harmful activities and accidents.

27. As to liability itself, the state of law was that compensation was the responsibility primarily of the operator and that any liability of the State was residual. The Nordic countries reiterated their wish for the interrelationship between State-liability and civil-liability regimes to be clarified in the draft articles, starting from the need to protect the innocent victim and with the two types of regime complementing each other. States should be encouraged to use existing civil-liability regimes as well, and the draft articles should therefore include a recommendation for States to elaborate corresponding domestic or international regimes. Since the application of such regimes might prove inadequate in some instances, it must be established whether and under what circumstances the State of origin should have extended liability. Notwithstanding the subsidiary function of State liability, it seemed to be accepted that a claim asserting State liability did not necessarily require the exhaustion of civil-liability procedures. On the

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other hand, there would be merit in establishing coordinating mechanisms to encourage the affected State to introduce a "consolidated claim", or in introducing regulations concerning the "coexistence" of the international claim and actions in national courts.

28. The views of the members of the Commission clearly diverged on the whole topic, but the Special Rapporteur had identified some general trends. He had concluded that the majority felt that activities involving risk were predominately relevant to prevention and that activities with harmful effects related to liability and compensation; that most members were opposed to lists of dangerous activities and substances; and that the Commission was not yet ready to take a position on whether the "global commons" should be included in the topic. The last question was a difficult and important one, but it could hardly be treated under the present topic. Since the issues would take a long time to solve, the whole exercise would be delayed and the prospect of a successful conclusion might even be jeopardized.

29. The most serious threats to the global environment were caused not by ultra-hazardous activities but by everyday industrial and other activities which resulted in "creeping pollution". Such activities and their transboundary effects did not lend themselves to the clear-cut application of a regime of the kind under consideration. The distinction was between activities causing transboundary harm in a situation where the State of origin and the victims were clearly identifiable and activities where there was no causal link between an operator and a victim. The Nordic countries had no ready answers as to how the issue should be tackled. However, although the problems of creeping pollution were crucial, the current exercise must be kept within practical limits. Otherwise the result might be delay and the risk that States would be reluctant to accede to the international instrument.

30. The Stockholm Conference had taken place almost 20 years ago, the topic of international liability had been included in the Commission's agenda 13 years ago, and the United Nations Conference on Environment and Development would be held in 1992. In that context, it should be the Commission's aim to conclude the topic within the next term of office of its members, ideally completing the first reading of the draft articles at its next session.

31. Mr. CALERO RODRIGUES (Brazil) observed that at its forty-third session the Commission had done very little work on the topic "State responsibility", and there were no new elements requiring comment at the current stage. On the topic of international liability, however, the Commission had held in-depth discussions, and the current state of the topic warranted comment by the Committee. The Commission had established a reasonable foundation for the draft articles, and the basic premises on which it seemed to have reached an understanding were by and large acceptable. His delegation would not comment on three of the seven issues mentioned in paragraph 182 of the Commission's report (A/46/10): the title, because it was not very important; the nature of the topic, because that should be decided at a later stage; and harm to the global commons, because that should be the subject of a new topic.

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32. As to the remaining four issues, the scope of the topic seemed to have been satisfactorily defined, with a majority in favour of including both activities involving risk and activities producing harmful effects. The rules on prevention should obviously cover the concept of continuing activities, but it was not obvious that the same concept should be applied to the provisions on liability. Harm might be caused by isolated acts, and the general principles underlying the topic seemed to suggest that such acts should also give rise to liability. The Commission had given the question of harm its fundamental place in the topic: actual harm entailed liability, while prospective harm, or risk, created obligations of prevention. His delegation was glad that most of the members of the Commission did not favour the inclusion of a list of dangerous activities or substances, for such a list had no place in a general instrument and would be a source of problems.

33. Paragraph 222 of the report indicated that there was considerable support for the Special Rapporteur's proposals concerning principles important to the topic. They should indeed be developed in the draft articles, but there were other general points which could usefully form the basis for additional principles. One was the proposition that the innocent victim should not be left to bear the loss, and another was the valid principle of sic utere tuo ut alienum non laedas. Equally important was the principle of due diligence. The Commission was now in a good position to draft the chapter on principles.

34. On the question of prevention of transboundary harm, it must be remembered that not every activity which might cause such harm should necessarily be subject to the draft articles. Thresholds must be defined: the risk must have a certain magnitude and the possible harm a certain degree of gravity. Although it would not be easy to define the notion, the Commission could surely do it. An initial assessment must be made in order to determine whether an activity fell within the scope of the articles, and the Commission must decide whether any role in that assessment belonged to States which might be affected by the harm. From that point on, measures of prevention were in order and should range from unilateral measures taken by the State in which the activity was conducted to measures requiring the participation of other States. As to whether the obligations should be substantial or procedural, his delegation believed that firm substantive obligations should be set and that the procedural obligations should be further simplified and presented only as recommendations.

35. On the last of the seven issues, that of liability for transboundary harm, innocent victims should clearly be compensated, and in principle in full, but the specific elements of each situation must be taken into account, particularly the economic position of the States concerned. The dominant and welcome trend in the Commission was in support of a combined liability, with the private operator carrying primary liability and the State residual liability. The Commission had not reached a conclusion on the role to be assigned to the rules of civil liability. In his delegation's view it should not be a predominating one: compensation should not be sought under the draft articles if already obtained under civil-liability rules in the domestic

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legislation of the States concerned. The provisions on the point could be made more detailed, and in that regard the comments just made on behalf of the Nordic countries were very interesting.

36. Mr. Sandoval (Ecuador), Vice-Chairman, took the Chair.

37. Mr. MIKULKA (Czechoslovakia), speaking on general aspects of the topic of "international liability for injurious consequences arising out of acts not prohibited by international law", said that, although the Commission had been unable to submit even one part of the draft articles, it should not be concluded that its work had been ineffectual. The topic was a particularly complex and difficult one which involved legal and political questions that required careful consideration. The very fact that there had been a crystallization of views represented progress which would benefit the Commission's future work.

38. His delegation shared the view that there was no absolute principle in customary international law relating to a State's liability for reparations or compensation for material transboundary harm arising out of physical activities carried out in its territory or under its control. Objective liability always flowed from the provisions of special agreements. Moreover, examples of the concept of objective liability found in current treaty law between States were rare and exceptional. That position represented his country's preference in terms of the approach that should be adopted by the Commission in elaborating the draft articles and in its future work on the topic.

39. In view of the absence of precise rules in customary law concerning liability for transboundary harm, the approach should reflect the fact that the topic was concerned more with the progressive development of international law rather than with its codification. The Commission should therefore elaborate the principles relating to the subject, drawing inspiration from existing treaty law.

40. The question of the title of the topic was related to the problem of the Commission's mandate. Liability for harm arising out of acts of the State not prohibited by international law and international liability for injurious consequences arising out of activities not prohibited by international law were two different concepts. The concept of acts not prohibited by international law, or lawful acts, was the opposite of the concept of unlawful acts. However, both unlawful and lawful acts involved the State as the author of such acts and as the actor to which the consequences of its own conduct were directly attributable. The concept of acts not prohibited by international law therefore recalled the situations mentioned in the draft articles on State responsibility under the heading "Circumstances precluding wrongfulness". The Commission had agreed that the term "acts" in the English title of the topic should be replaced by "activities", which covered both activities of the State and activities carried out by entities other than the State.

(Mr. Mikulka, Czechoslovakia)

41. With regard to the principle of reparation, the Commission had supported a combination of approaches whereby the objective liability of the State for activities carried out by it or under its authority would be combined with a residual liability for harm caused by the activities of private operators where reparations could not be obtained on the basis of the civil liability of such operators. His delegation had no objection to the modification of the topic of the title in English.

42. Turning to the question of the nature of the instrument, he said that whether or not the instrument was to be of a binding character depended largely on its future content. The draft articles should, however, be envisaged as an instrument of a residual nature within the framework of which individual regimes could be established under bilateral or multilateral agreements.

43. The problem of cooperation and prevention, to which the Commission attached special importance, and the problem of compensation for harm were two independent questions. The duty to repair transboundary harm could in no way be linked to the obligation of a State in the area of cooperation or prevention. If that were so, the topic would be indistinguishable from that of State responsibility. His delegation shared the view that liability for repairing transboundary harm arising out of acts not prohibited by international law should be based on the maxim sic utere tuo ut alienum non laedas and on the principle of equity whereby the innocent victim should not be left to bear the loss alone.

44. The problem of harm to the "global commons" was a serious one with universal consequences. It was, however, quite distinct from the original topic and should therefore not be included in the draft articles. The Commission could return to the question, as a separate topic at a later stage.

45. With regard to the other topics in the Commission's programme of work, his delegation hoped that progress would be made at the Commission's forty-fourth session on the important topic "State responsibility".

46. On the topic "Relations between States and international organizations", the Commission should re-examine its purpose in considering the topic in view of the problems encountered with regard to the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.

47. His delegation saw no urgent need for the inclusion of a new topic in the Commission's programme of work. In its new quinquennium, the Commission should concentrate on completing the various sets of draft articles in its current programme of work. None of the topics in the proposed new list seemed particularly appropriate for inclusion in the programme of work. Many were ambiguous while others could more properly be dealt with in bodies other than the Commission. The process of codification of the major topics of international law was drawing to an end and the new needs of the international

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community lay in the area of the progressive development of international law in fields in which State practice had not yet established fixed rules. The choice of new topics should only be made after a careful analysis of the needs of the international community.

48. Mr. LEHMANN (Denmark), speaking on behalf of the Nordic countries, said that the subject of State responsibility was one of the crucial chapters of international law which still remained to be codified and the Nordic countries wished to see its codification move forward in a speedy and structured manner. It was therefore regrettable that the Commission had not considered the third report of the Special Rapporteur. Consequently, it would be inappropriate for the Committee to comment on the report, thereby reversing the roles of the Commission and the Sixth Committee. He wished to state, nevertheless, that the report was a crucial one which touched on probably the most difficult aspect of the whole topic, namely, the scope of a State's right to take self-enforcing measures in order to redress an internationally wrongful act and to obtain guarantees of non-repetition. The Nordic countries urged the new Commission to embark on a thorough consideration of the report as well as of the topic as a whole during its next and following sessions.

49. Turning to the programme and working methods of the Commission, he noted with satisfaction that the Commission had presented its draft articles on the topic "Jurisdictional immunities of States and their property". It was now time for the Commission to focus attention on the other items on its agenda, particularly the three interrelated topics on State responsibility, which it should seek to complete in its next quinquennium. The three topics should be considered in parallel to enable the Sixth Committee to evaluate the entire field of State responsibility. Their completion during the United Nations Decade of International Law would represent a major contribution to the strengthening of the international legal order. In those circumstances, the inclusion of new items in its agenda would distract the Commission from completing the draft articles on the entire field of State responsibility. Moreover, the new topics listed in paragraph 330 of the Commission's report (A/46/10) did not seem apt for the codification efforts of the Commission. The proposed topic on the legal effects of resolutions of the United Nations, for example, would be an academic exercise in view of the dynamic evolution of the United Nations itself. Other topics, such as "international commissions of inquiry (fact-finding)", and "the law of confined international groundwaters" were already being dealt with in existing forums, including the International Law Commmission. On the other hand, it would be useful for the Commission to consider the topic of the legal effects to be given to reservations and objections to reservations to multilateral conventions.

50. Turning to the future working methods of the Commission, he said that the piecemeal approach adopted in the past should be abandoned in principle and that the Committee should require that draft articles submitted to it for comments should be presented in such a way that the overall picture of the problem was clear and sufficiently substantive to permit meaningful debate. Future reports of the Commission should identify those issues on which the guidance of the Sixth Committee was required.

51. Mr. CRAWFORD (Australia), referring to the topic "International liability for injurious consequences arising out of acts not prohibited by international law", said that, in view of the submission of the draft articles by the Special Rapporteur and the Commission's extensive discussions, it was time for the Commission to reach some firm conclusions, especially since many other bodies were grappling with the same issue in particular contexts and were looking for principled guidance. While the issue of damage to the "global commons" should be addressed by the Commission, it should be treated as a separate topic.

52. Turning to the specific matters discussed by the Commission at its forty-third session, he said that, while his delegation supported the change in the title of the topic, it was important not to lose sight of the most important and difficult part of the exercise, which was reparation and compensation for injury. It was true that in particular forums States were understandably reluctant to commit themselves to liability. But that was even more reason why the Commission should address the issue directly and from first principles. It should take as its general starting-point the proposition that an innocent victim should not be left without a remedy and it followed that the State from which transboundary harm originated was the international actor which was primarily responsible. That did not mean that it was exclusively liable or that it could not meet its liability by establishing suitable mechanisms of recourse so that it was not the State itself that paid for any harm. It must be the State, however, against which another injured State and its citizens were able ultimately to look for a remedy. The Special Rapporteur had noted that a combination of civil liability and State liability had attracted support. According to that approach, compensation was the responsibility of the operator, under the principle of civil liability, with residual liability being assigned to the State. That approach corresponded to that of a number of the existing conventions governing specific activities. However, while that might be a correct description of the practical operation of a number of civil liability and compensation conventions, it was not a correct analysis of the basic legal position. States were free to enter into agreements under which such compensation would be provided in whole or in part by the operator through a civil liability regime, but that did not alter the basic proposition that a State was liable to provide full compensation for damage caused to other States or their citizens by activities within its jurisdiction or control. Full compensation might not be provided under such agreements for a variety of reasons, including that the agreement provided for limitations of or exonerations from liability. It was therefore wrong to equate State liability with a requirement that the State itself bear the full financial burden of any compensation payment. A State should ensure through its regulatory system that activities were carried out in a way that would ensure that private operators had funds available to cover any compensation payment that the State would otherwise be obliged to meet.

53. The Commission's report also recorded the view that strict liability of States could not be extended to cover activities that were "essentially private" (para. 239). However, if the liability of a State to provide

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compensation arose from its obligation not to allow activities within its jurisdiction or control to harm other States or the "global comm[illegible]s", then the distinction between "private" and "State" activities had limite[illegible]lidity.

54. Turning to the future work programme of the Commission, he said that, since the establishment of the International Law Commission in 1947, one of the lessons of the experience of law reform agencies and commissions had been the phenomenon of the "second generation" problem. In their first phase, such bodies had a natural agenda of items which everyone agreed should be taken up. That had been true of the Commission, with its fundamental contribution to, inter alia, the law of the sea and the law of treaties. "Second generation" topics, however, tended to be more difficult, controversial, and less obviously useful. They were often interdisciplinary and technological changes had cut across both the established categories of the law and the work of other agencies.

55. The Commission had not yet completed the "first generation" of international topics, since it was still working on such fundamental topics as State responsibility, international liability for injurious consequences of lawful activities, and the law of the non-navigational uses of international watercourses. The Commission should give priority in its next term to the completion of such topics. The experience with the "second generation" of projects also suggested that a slight modification in the Commission's methods of work was required.

56. In the case of some of the topics suggested by the Commission as possible new areas of work, it might be useful for the Commission or a small working group thereof to undertake a provisional preliminary study in order to give a clearer idea of what would be involved in the project, of what a set of draft articles on the topic might look like, and of how it might relate to other texts or the work of other agencies. However, the eventual outcome of consideration by the Commission of the 12 listed items was mostly unclear, and his delegation could not agree to its taking them up without some preliminary study, even in the case of the "global commons", which his delegation did think should be taken up by the Commission. There was a serious question what such a project might look like, what it might contribute to the corpus juris and how its provisions might relate to other texts dealing with the "global commons". The topic would be a good one for a preliminary study. Like other delegations, Australia doubted whether many of the listed topics would prove suitable, as some, like extradition, were better suited to bilateral or regional arrangements, and others, like the rights of national minorities, were obviously a matter for other agencies.

57. Sir Arthur WATTS (United Kingdom), referring first to the topic "State responsibility", said that the third report of the Special Rapporteur (A/CN.4/440 and Add.1) raised a number of important and difficult issues relating to the measures that could be taken by an injured State against a wrongdoing State. His delegation was therefore disappointed that the

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Commission had been unable to consider the report at the forty-third session, but hoped that the following year it would be able to give the topic renewed attention.

58. On the associated topic "International liability for injurious consequences arising out of acts not prohibited by international law", the Commission's work had been thorough and wide-ranging. His delegation considered it the duty of the Sixth Committee to provide the Commission with some guidance on which aspects should be given priority in the light of the current needs of the international community. He agreed with the view expressed by the Swedish delegation earlier that it was too early to decide whether the fruits of the Commission's work should ultimately be adopted in a binding or non-binding form; that decision would depend on the ultimate content of the Commission's draft articles. The Commission should not feel that its work must lead to an outcome either wholly binding or wholly non-binding. Obligations which could be precisely defined might be given legally binding status, while those which were general and wide-ranging might more appropriately become guidelines.

59. The substance of the topic seemed to fall into two distinct parts: prevention of transboundary harm and compensation for such harm. The United Kingdom considered the development of preventive regimes to be the most valuable aspect of the Commission's work, for where damage to the environment or human health was concerned, prevention was always better than cure. The object should not of course be to prohibit otherwise lawful activities, but to regulate the manner of their operation so as to prevent or minimize the risk of transboundary harm and to require that information and consultation be offered to the affected State in good time. To that end, the Commission could either aim for precisely defined legal obligations in relation to specific hazardous substances and activities, or it could promote the development of broader preventive regimes by providing a framework for further instruments or ad hoc negotiations. The Commission should be clear as to which it wanted before the material went to the Drafting Committee.

60. His delegation would like to see further consideration of the consequences of non-compliance by the State of origin with preventive obligations, and saw no reason why such non-compliance should not give rise to legal responsibility in the normal way.

61. Where transboundary harm occurred which could not be attributed to any breach of legal obligations on the part of the State of origin, liability should rest with the operator, for States could not assume financial liability vis-à-vis non-nationals for all acts by private entities and individuals under their jurisdiction. That would not accord with the "polluter pays" principle, to which the United Kingdom attached importance. States could, however, realistically institute effective liability systems in their domestic law and ensure that recourse against the operator was available to non-nationals and other States on a non-discriminatory basis. State responsibility should be engaged for failure by the State to provide adequate civil remedies. The

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Commission might help States in that respect by, for example, drafting model clauses on civil liability which States could consider adopting in their domestic law. States should also be encouraged to strengthen their international arrangements for reciprocal recognition of civil jurisdiction and enforcement of civil judgements. Strict or residual liability should not be imposed on States not in breach of obligation, unless by virtue of other instruments designed to deal with specific problems.

62. His delegation was not convinced that there was any sound basis for treating the topic as a subject outside the application of the normal rules of State responsibility; its essential relationship to those rules had not been satisfactorily resolved in the Commission's work, and yet it was one of the most important of the fundamental issues still needing to be resolved before detailed drafting work could usefully resume. Lastly, he felt that the title of the item did not necessarily fit the content and that the Commission might like to consider the alternative title of "International responsibility for transboundary harm".

63. Mr. Al-BAHARNA (Bahrain), referring to the topic "International liability for injurious consequences arising out of acts not prohibited by international law", said that his delegation had noted with satisfaction the efforts to re-evaluate the development of the topic in the Commission and the opportunities provided to members to reconsider their positions (A/46/10, para. 182). On the question of the general issues discussed in paragraphs 183 to 197, his delegation was mindful of the difficulty of drafting an instrument where consensus was lacking, particularly on the content and structure of the proposed instrument. Instead of reopening issues already examined, the Commission might wish to take a bolder step and proceed, as suggested in paragraph 196, to have the Drafting Committee examine the first 10 articles so as to obtain a more concrete consensus. Although the Commission's task was mostly to select principles relating to the environment, the selection of norms ought not to be limited to environmental matters but should extend to all activities of individuals and organizations that caused or might cause transboundary harm. Moreover, the existence of various multilateral treaties on different aspects of liability for injurious consequences highlighted the importance of the work on the current topic. The treaty or convention concluded thereunder would provide essential principles and rules on the question of liability and would thereby create a general institutional charter governing all aspects of international liability for injurious consequences arising in the stated circumstances.

64. His delegation saw the title of the topic as too narrowly defined and believed it should be more broadly stated so as to accommodate both "acts" and "activities". As to whether the envisaged instrument should be binding or non-binding, the task of codification and the progressive development of international law would be best served by formulating rules in the context of a convention.

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65. With respect to the scope of the instrument, it ought to deal with activities involving risk as well as those causing transboundary harm, but his delegation believed that a certain reasonable separation was inevitable, given the fact that actual harm caused would have to be viewed more seriously than potential harm. It viewed with favour the proposals made in paragraph 217.

66. A greater degree of consensus had emerged on the general principles (paras. 222 to 226) that would constitute the core of the instrument. As the principle of prevention formulated by the Commission involved the mitigation of harm actually incurred in the territory of a State, it was clear that as formulated by the Commission the proposition was much broader than the conventional idea of "prevention", for the Commission had thought fit to include under that principle what was actually a duty resulting from the consequences of harm caused.

67. With respect to reparation, his delegation was in favour of a combination of civil and State liability. Civil liability would lie directly with a private operator and the State might be only indirectly involved.

68. The various principles mentioned in paragraphs 225 and 226 were essential to any regime of liability, but their identification was only a preliminary step; the substance of the work would involve the formulation of a scheme for the interplay of those principles, and of subsidiary rules to qualify and limit the scope of their application. The Commission would also need to adopt certain policy guidelines, especially to balance the interests of various groups and States.

69. His delegation believed that the notion of appropriate preventive measures was important and should be included, not only because it supplied reasonable checks and might reduce the scale of transboundary harm, but also because it gave legal substance to the concept of risk. If that concept was admitted as being relevant to the topic, a regime lacking in preventive measures would be inherently weak. With respect to the question of the threshold over and above which the affected State could demand prohibition of an activity, the Commission should consider merely referring to harm which was unreasonable in scale or intensity, or even dispense with any reference to a quantitative or qualitative test.

70. With respect to the divergent opinions in the Commission on compensation and liability, his delegation was not entirely convinced that primary liability should be placed upon the private operator. The fundamental question was whether there was good reason to depart from the established rule, which placed strict liability on the State in whose territory the offending activities were conducted. His delegation was of the opinion that the basic principle confirmed in the Trail Smelter arbitration should be adhered to. As the State exercised absolute authority over all lawful private and public sector activities in its territory, it was reasonable to place primary international liability on the State and subsidiary liability on the

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operator. At any rate, "to leave it to States to make what provisions they saw fit for the operator to be made liable for transboundary harm", as suggested in paragraph 246, meant simply preserving the status quo.

71. With respect to compensation for harm caused, his delegation believed that it should be payable for all appreciable transboundary harm, regardless of whether or not it resulted from activity known to involve risk. As far as the amount of compensation was concerned, the sum should be negotiable, but only where the offending State admitted liability and accepted the principle of compensation. Otherwise, the adoption of judicial or quasi-judicial procedures might be the optimal solution.

72. While his delegation was convinced of the need to avoid harm to the "global commons", it considered the issue inappropriate for inclusion in the current topic. The Commission would need more scientific studies to examine all aspects of harm caused to the "global commons" by such activities. As such studies were not yet available, it might be inadvisable to formulate detailed rules on matters that were still in embryonic states of investigation and research. For the time being, the general rules and principles contained in the Stockholm Declaration, the Basel Convention and the Montreal Protocol might suffice.

73. Mr. NTSAMA (Cameroon), referring to the topic "Jurisdictional immunities of States and their property", said there was no doubt that the implementation of the theory of State immunity had been uneven. One country had observed that while the 1961 Vienna Convention on Diplomatic Relations provided for the jurisdictional immunity of diplomatic agents, it made no such provision for that of diplomatic missions and hence for that of accrediting States. According to Cameroon, the explanation for that was simple: the State by definition enjoyed jurisdictional immunity and did not need to have it conferred by an international convention. The International Law Commission had emphasized that fact in its comment to article 18, wherever it referred to the principle par in parem imperium non habet and observed that no sovereign State could exercise its sovereign power over another equally sovereign State. Necessarily, then, no measure of execution or constraint could be taken by the authorities of one State against another State or its property.

74. Since the draft articles dealt with both jurisdictional immunity and immunity from execution, it might be appropriate to change the title accordingly.

75. In connection with part III, "Proceedings in which State immunity cannot be invoked", his delegation considered that the primary criterion for identifying such proceedings was the distinction between acts and behaviour by the State exercising governmental authority (jus imperium) and functioning as an economic agency. While commercial transactions might well not be subject to jurisdictional immunity, it was important not to include in that category transactions which, although commercial, fell within the realm of activities in which the State exercised governmental authority, such as the purchase of premises for use as a chancellery or diplomatic residence.

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76. In his delegation's view, article 11, on contracts of employment, was liable to lead to uncertainties in that it would be difficult to determine whether an employee had been recruited to perform functions closely related to the exercise of governmental authority. Would it be acceptable, for example, for employees who were nationals of the State of the forum to exercise their right to strike in an embassy? In such cases, he believed, diplomatic solutions were surely better than judicial settlements.

77. His delegation welcomed the conclusions reached by the Commission in respect of part IV, "State immunity from measures of constraint in connection with proceedings before a court". It did, however, consider that paragraph 1 of article 18 should be amended to begin with the following wording: "No measures of constraint, whether interim, interlocutory, conservatory or executory, such as attachment, arrest and execution, against property of a State may be taken ..."

78. Turning to the topic "The law of the non-navigational uses of international watercourses", he welcomed the innovative nature of the draft articles provisionally adopted by the Commission on first reading, but queried the definition provided in article 2 (b) of a "watercourse": such a definition would entail a comprehensive review of existing maps, which did not indicate groundwater. Developing countries in particular did not have the means to revise their maps accordingly, and a definition which included groundwater might have the effect of making many watercourses "international", with incalculable consequences.

79. Referring in conclusion to the draft Code of crimes against the peace and security of mankind, he said there was a danger that the draft Code could become too generalized, and he therefore proposed that it should be confined to crimes already recognized by the international community as being crimes against mankind: the entry into force and the implementation of such an instrument would be closely linked to consensus on its scope. His delegation was not in principle opposed to the establishment of an international criminal court, without prejudice to existing arrangements. The Code itself should be sufficiently selective in enumerating crimes against the peace and security of mankind to ensure its effectiveness, and the penalties provided should be commensurate with the offences.

80. Mr. MOMTAZ (Islamic Republic of Iran), referring to the topic "International liability for injurious consequences arising out of acts not prohibited by international law", said that his delegation took a favourable view of the Special Rapporteur's proposal for an overall review of the International Law Commission's work on the topic, particularly in the light of the fact that, since 1988, the Drafting Committee had not been in a position to consider any of the articles submitted to it by the Commission. For that reason, the Commission's position on certain issues remained unclear. In the meantime, treaty law on international liability had been evolving rapidly, a circumstance which the Commission could not overlook. It would therefore seem

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timely to give delegations the opportunity to make their views known on the underlying issues and to provide the Commission with guidelines for its future work.

81. His delegation favoured a framework agreement which would allow arrangements to be made at the bilateral and regional levels while ensuring the necessary flexibility. However, it should not be overlooked that the economic and financial situation of States might greatly influence their attitude to the provisions adopted: it would be difficult, if not impossible, to try to apply the same standards for liability and fixing of compensation without taking such circumstances into account.

82. It had been asked whether the Commission should confine itself to considering the injurious consequences of activities which caused transboundary harm or whether it should also concern itself with activities involving risk of such harm. The main reason for the inclusion of the topic in the Commission's agenda was the concern to compensate the victims of harm caused by activities carried out in places under the jurisdiction of a State other than that in which the victim resided. Priority should therefore be given to reparation for actual damage.

83. To extend the scope of application of the draft articles to activities involving risk of harm would, in his delegation's view, render the task of the Commission extremely complex. Since all human activities were accompanied by some element of risk, the Commission should concentrate on defining those activities which were regarded as dangerous.

84. To tackle the latter question would inevitably lead the Commission to arrive at more substantive preventive measures which might well go beyond the mandate initially entrusted to it. The obligations of States in respect of reparation should be carefully distinguished from their obligations in connection with prevention. As international law stood, each State was required to take all necessary precautions to prevent the harmful consequences which might result from dangerous activities. To facilitate that task and ensure a measure of uniformity, it would be best to proceed at the regional level, an approach which offered the advantage of taking into account the specific features of the States concerned.

85. With regard to the question whether any future instrument should cover harm caused to the "global commons", his delegation felt that, despite the absence of an international body responsible for the global environment, the principle affirmed in customary and treaty law, in the 1972 Stockholm Declaration and in various General Assembly resolutions that States were obliged to ensure that activities carried on within their jurisdiction or under their control did not cause harm in regions outside their jurisdiction was sufficiently well established for it to be worthwhile to invite the Commission to consider the issue and make proposals, in the interests of developing international law in respect of liability and compensation for harm caused to the "global commons".

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86. Secondly, it would be appropriate to stress that the object of the exercise should be to find general rules for compensation. In that context, it was natural to invoke the liability of the State of origin of a harmful activity: the primary liability of such a State was a function of its sovereignty. However, in practice most of the activities concerned were carried out by private operators, and under international law the obligations of the sovereign territorial State were confined to the adoption of legislative and administrative provisions aimed at limiting the risk of harm and ensuring that those provisions were complied with.

87. For that reason, primary liability lay with the operator in such cases. States must therefore ensure that their domestic law provided remedies to enable victims to obtain redress in their courts or to obtain prompt and adequate compensation by other means. The principle of equality of treatment of victims, whatever their nationality or place of residence, would ensure that the system of civil liability of the operator was upheld.

88. There were, however, circumstances in which the civil liability of the operator was not in itself sufficient to safeguard the interests of the victim. The operator might, for example, claim insolvency on the grounds of the scale of the compensation, or it might prove difficult, if not impossible, to identify the perpetrator. That was the main reason for invoking the concept of liability on the part of the State of origin as a last resort, an approach with which his delegation found itself in agreement. In that connection, reference had been made to the residual liability of such a State, but it should not be overlooked that the specific circumstances in developing countries sometimes were such that, due to lack of financial resources, they might not be in a position to compensate the victims. As suggested by the Special Rapporteur, it might be appropriate to establish a special fund for such purposes: financing of the fund would be provided by States according to a scale which reflected their economic status.

89. In conclusion, he said that he hoped that the Commission would, in the next five-year period, accord greater priority to a topic which had, due to the other issues claiming its attention, been so far somewhat neglected.

The meeting rose at 12.55 p.m.