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SUMMARY RECORD OF THE 28th MEETING

Chairman: Mr. MIKULKA (Czechoslovakia)

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

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

AGENDA ITEM 1401 DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (continued) (A/45/437)

1. Mr. AL-SABEEH (Kuwait) said that since the end of the First World War the need had been felt for a body of international criminal law and for an international criminal jurisdiction. The United Nations had worked continuously on the elaboration of the draft Code of Crimes against the Peace and Security of Mankind and on the establishment of an international criminal court, but many countries differed on what crimes should come under such a law and jurisdiction.

2. The Iraqi régime's war crimes, aggression, colonisation, forcible annexation, collective extermination, crimes against diplomats, torture, use of mercenaries, kidnapping of innocent people for use as human shields, terrorism, organised looting, forcible eviction and deportation of innocent people whose only "crime" was piety and patriotism all underscored the urgent need for the establishment of such a jurisdiction and court. The inhuman practices of Saddam Hussein's thugs, directed against both the people and institutions of Kuwait and the many foreign nationals living there, were manifestly intended to annihilate Kuwait's entire economic, social, health, financial, oil, educational and cultural infrastructure, in blatant violation of the principles of international law, the third and fourth Geneva Conventions and all other relevant international treaties and charters.

3. Kuwaiti children constituted 40 per cent of the population and those aged 6 to 16 attended school and he drew attention to the fact that Iraqi occupation forces had wrecked all educational, cultural and scientific institution@, burnt books, records and public libraries, and had in addition plundered research centres!, computers, audio visual equipment, tables, chairs, blackboards and even chalk. Furthermore they had destroyed all the broadcasting and publishing facilities, archives and data banks, and plundered museums, archeological treasures and irreplaceable manuscript collections, sending their booty off to Baghdad.

4. The occupation troops had seized Kuwaiti hospitals for their own use, expelling patients or leaving them to die, forcing out mothers two hours after childbirth, torturing, killing, raping and throwing out medical staff, commandeering ambulances and stealing medical supplies, equipment and even cribs, leaving new-born babies to die on the floor. The Iraqi army had also Prevented the Kuwaiti Red Crescent from carrying out its humanitarian duty and had then dissolved it, confiscating its property and detaining or murdering some of its personnel.

5. The Iraqi occupation forces had plundered banks, looted shops and stolen billions of dollars worth of Kuwaiti and foreign currency and Kuwaiti gold reserves. They had also stolen Kuwaiti aircraft, air tickets, spare parts and "high- tech" equipment belonging to the airlines, had seized cranes from Kuwaiti

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(Mr. Al-Sabeeh, Kuwait)

ports and the contents of Kuwaiti warehouses and factories, had dismantled filling stations and had mined oil wells and refineries.

6. Such was the long list of the Butcher of Baghdad'8 repugnant crimes committed not only against Kuwait but also against the peace and security of mankind. The evil and spiteful impulses of an unbalanced and bloodthirsty murderer should not be allowed to wreak havoc on Kuwait and threaten the world at large. With the help of God and assistance from the peace-loving and justice-loving countries of the world, a free and independent Kuwait would emerge and be rebuilt. Ite people and Government would eventually bring to trial the Iraqi war criminals who constituted a threat to international peace and security.

7. Mr. BELLOUKI (Morocco) said that the topic of the non-navigational uses of international watercourses was of particular importance for many developing countries where drought and desertification were a constant threat, and where rational management of water resources and preservation of water quality were vital for a growing population. The framework agreement being prepared by the International Law Commission would enable riparian States of an international watercourse to co-operate to their mutual advantage.

8. The title of article 24, "Relationship between navigational and non-navigational uses; absence of priority among users", should be shortened after the word "uses". In paragraph 1, the expression "in the absence of agreement to the contrary" enabled users to decide how to derive maximum benefit from a given international watercourse. Obviously any use must exclude damage to water quality. Paragraph 2 was generally acceptable but would be more comprehensive if the obligation not to cause appreciable harm to other States was mentioned in a reference to draft article 8.

9. Draft article 25, "Regulation of international watercourses", concerned the way in which optimal use could be made of a watercourse. Co-operation between watercourse States should be more than a moral obligation, should be undertaken at the bilateral or multilateral level and should exclude political differences.

10. The French text of article 25, paragraph 2, should be harmonised with article 24, paragraph 1, by using the phrase "à moins qu'il ne soit convenu autrement". Equitable participation of watercourse States in regulation should be in proportion to the benefits which each of them derived from the watercourse, and the term "regulation" must be defined.

11. Paragraph 1 of draft article 26, as proposed by the Special Rapporteur, established an obligation which was widely honoured in practice by watercourse States. Consultations were the best way of ensuring appropriate management and protection of the watercourse, but they could not be effective without a legal framework for co-operstion. If an organisation responsible for management and the peaceful settlement of disputes were to be established, in principle by an international agredment, overlapping with draft article 4 on watercouree agreements must be avoided.

12. In paragraph 2 the chapeau should have the following wording: "The functions of the joint organization shall be, inter alia, the following:". In order to

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(Mr. Bellouki, Morocco)

simplify the article, the chapeau of paragraph 3 could be deleted, and eubparagraphs (a) and (b) added to the indicative list of functions mentioned in paragraph 2 .

13. Draft artiale 27, "Protection of water resources and installations", should be amended to avoid overlapping with other draft articles and to bring out the essential nature of the protection of water resources and installations and the obligatory nature of consultations between the watercourse States.

14. The Special Rapporteur had also submitted draft article 28, entitled "Status of international watercourses and water installations in time of armed conflict". The inviolability of international watercourses and related installations, facilities and other works should be an obligation founded in international law, to the extent that the humanitarian principles governing such issues were generally recognised. Watercourses must not be used for military purposes or poisoned in violation of the rules of international humanitarian law.

15. The Special Rapporteur's annex should be reduced and harmonised with States' liability with fault and liability without fault. Draft. article 1, draft article 2, paragraph 1, and draft article 4 of the annex could be retained.

16. Watercourse States should establish the structures and guidelines for fulfilling their obligations under the framework agreement. Draft articles 7 and 8 should be recast to make their content acceptable. The definitions of the terms used in the draft articles were scattered throughout the text and should be transferred to draft article 1, on Use of terms.

17, Draft article 2, as adopted provisionally by the Commission, stated that the articles applied to uses of international watercourses and to measures of conservation related to those uses. However, draft article 6 also mentioned the development and protection of watercourses, while draft article 7, paragraph 1 (e), mentioned protection and development in addition to conservation. The two terms "utilisation" and "protection" were mentioned in draft article 9. The draft article on the scope of the articles should therefore also cover the development, protection, utilisation and conservation of watercourses.

18. His delegation welcomed the provisional adoption of draft articles 22 to 27 at the forty-second session of the Commission. However , to comply with their obligations in respect of the protection and preservation of ecosystems and the marine environment, developing countries, despite their goodwill, sometimes required appropriate assistance.

19. Turning to the topic of State responsibility, he said that the questions dealt with by the Special Rapporteur in his second report and the discussions to which they had given rise in the Commission were an indication of the interest shown in that important and complex aspect of internetionel law. The Special Ropporteur had proposed thret new draft articles, article 8 of which provided for compensation for any damage not covered by restitution in kind which was economically assessable.

(Mr. Bellouki, Morocco)

The effort *to* codify and develop international law in matters of compensation required a flexible and cautious approach, and the principle of equity muet predominate. The Chorzów Factory case had given rise to reasonable guidelines which could provide the basis for general rules which could be adjusted to each case.

20. Although restitution in kind was discussed in the commentary to draft article 7, the absence of an agreed definition was not conducive to understanding the proposed draft article 8. Although alternative (a) of paragraph 1 of the draft article was broadly satisfactory, it would be preferable *for* the French text to start with the words "l'Etat lésé a le droit d'exiger" and for the text to mention the obligation to pay compensation.

21. Paragraph 2 should deal primarily with compensation for such material harm directly caused to the State as was economically assessable, in order to permit calculation of equitable and reasonable compensation. The component elements of moral damage were too abstract, so that such damage was difficult to quantify in most cases. The concept merited further investigation.

22. Paragraph 3 should be recast in the interest of clarity and be based on the idea of a loss of actual and not hypothetical profit. In paragraph 4, the expression "an uninterrupted causal link" was unclear: the causal link between the damage and the internationally wrongful act must be direct, exclusive and continuous. Paragraph 5 introduced the logical criterion of proportionality, and was thus acceptable . Since ite content might apply to reparation in general, it should be made a separate article.

23. With regard to draft article 9, interest should be calculated by the tribunal, taking into account the circumstances specific to each case. The idea of the draft article might be more acceptable if incorporated, in very general terms, in a paragraph of draft article 8.

24. The Special Rapyorteur had also proposed draft article 10, entitled "Satisfaction and guarantees of non-repetition". In the context of reparation for moral injury, it was evident that the State committing the internationally wrongful act should not be humiliated and that its sovereignty should not be impaired. For that reason, the punitive and disproportionate nature of compensation by satisfaction must be mitigated. Similarly, tha guarantees of non-repetition of the internationally wrongful act should not be imperative in cases of force majeure and failure to foresee. Compensation and satisfaction might on occasion coincide when the injured State and the State committing the internationally wrongful act agreed on a political settlement.

25. The issue of the impact of fault on the forms and clegress of reparation, was still complex, although there had been agreement on recognizing fault RR having a certain role in the liability of States hot\ for crimes and delicts. It was, however, diff icult to establish how fault. could be attributed to a State, and how a State's deliberate intention or negligence could be determined. Responsibility in

(Mr. Bellouki, Morocco)

such cases often lay with different government bodies at different levels. A cautious approach to the problem was thus called for, but its solution would be an important step forward in the development of international law.

26. Mr. ECONOMIDES (Greece), referring to chapter II of the report, said that his delegation approved of the three new articles provisionally adopted, on international terrorism, mercenaries and the illicit traffic in narcotic drugs. It did not, however, consider that the criminal nature of terrorist acts had been sufficiently defined and wondered whether those articles should be retained. International terrorism should also be made a criminal offence, since it involved acts committed by individuals and, like drug trafficking, by its very nature constituted a crime against humanity.

27. His delegation stressed the complex and difficult nature of the three articles relating to complicity, conspiracy and attempt. All three raised issues which must be handled with due attention and caution.

28. Greece had expressed its support for the establishment of an international criminal court having competence solely for the crimes to be defined in the draft Code. Such competence would, for obvious reasons, be exclusive in the case of crimes against peace and concurrent in that of crimes against humanity.

29. With regard to the idea of including a provision concerning the breach of a treaty designed to ensure international peace and security (paragraphs 89 to 92 of the report), his delegation could not support the proposal. First, treaties of that kind were generally antiquated and their validity might be doubtful. Secondly, such a provision, if adopted, would have to be followed by so many exceptions that it would be extremely difficult, if not impossible, to apply. Thirdly, the law of treaties, the law of international responsibility and the law of the collective security of the United Nations should be amply sufficient to cover such cases.

30. In the light of recent events in the Gulf crisis, he recalled a proposal he had made in 1989. The draft Code established, as crimes against peace, the threat of aggression (article 13) and aggression itself (article 12), but the two articles did not cover criminal acts committed after an act of aggression. He had in mind illegal annexation, as had been perpetrated against Kuwait, or the artificial creation of a case of illegal succession of States, as had occurred at the expense of the Republic of Cyprus. The draft Code should therefore go further by providing penalties for all acts carried out by the aggressor in order to ensure his illegal domination, such as the illegal occupation, annexation and succession of States. Each State, and the international community as a whole, had a duty to bring about full restoration of international legality. For that reason, the draft Code should include a new provision worded on the following lines; "It is a crime against peace deliberately to disregard binding decisions of the Security Council intended to end a case of aggression and to eliminate its illegal consequences". He hoped that the Special Rapporteur and the International Law Commission would consider that proposal.

(Mr. Economides, Greece)

31. Turning to chapter IV of the report, which dealt with the law of the non-navigational uses of international watercourses, he said that draft articles 22 to 27, as provisionally adopted by the Commission, seemed on the whole to be satisfactory. They were largely based on the Convention on the Law of the Sea and other relevant international instruments. In particular, his delegation supported the use of the word "ecosystem". However, the requisite balance had. not yet been aahieved, in article 23, paragraph 2, between the rights of upstream and downstream countries. In addition *to* the prevention, reduction and control of pollution, the paragraph should make provision, if only under certain conditions, *for* the elimination of pollution, Similarly, in article 26, after the words "prevent" and "mitigate", the terms "control" and, if possible, "eliminate" should be added.

32. With regard to article 24, due account should be taken of certain specific interests, particularly in connection with small rivers, such as the protection of public health and maintaining suitable water quality for domestic and agricultural uses, interests which might be of vital importance for some regions. A suggestion to that effect was made in paragraph 262 of the report.

33. Article 25, and in particular the term "regulation" should be made more specific. Article 26 was one of the key provisions of the draft. Paragraph 1 of article 27 should be worded more restrictively. Finally, article 28 should take into account the rules governing the law *of* armed conflict, and should in particular contain certain definitions mentioned in paragraph 297 of the report, such as poisoning of water resources and the diversion of rivers from their courses. In addition, the term "inviolable" was scarcely comprehensible in the context of the article and should be clarified.

34. Finally, annex I, and particularly its first five articles, seemed positive and useful. His delegation could, however, accept tho idea of incorporating those provisions in an optional protocol.

35. Some delegations had criticized the draft under consideration, taking the view that it benefited downstream more than upstream countries. He did not share that opinion. The concept of "appreciable harm", used in article 8 and other provisions *of* the draft, clearly proved the contrary and his delegation held reservations with regard to use of the term "appreciable",

36. In conclusion, he expressed the hope that the draft articles would be completed in second reading et the 1991 session of the Commission: they were of extreme urgency and ehould be finalized as soon as possible as a framework agreement.

37. Mr. SCHARIOTH (Germany) said that there had been a recent tendency in international law to limit the immunity of States from the jurisdiction of the courts of other States - a necessary development in view of the increase in international exchanges and co-operation among States. Germany favoured a limiting approach to the principle of State immunity, a practice which was also followed by the German courts .

(Mr. Scharioth, Germany)

38. Turning to chapter III of the report, he welcomed the combination of original articles 2 and 3 to form new article 2 and the Special Rapporteur's proposal to change the words "commercial contract" in paragraph 1 (c) to read "commercial transaction". However, the article continued to provide that, in determining whether an activity was a commercial transaction, not only its nature but also its purpose should be taken into account. As the determination of whether an activity was a "commercial transaction" was currently governed not by an agreement between the States concerned but by their practice, it would be hard for contracting parties to predict how an activity would be classified. Accordingly, he continued to advocate that the nature of a transaction should be the sole criterion.

39. With regard to article 11 bis, the revised draft submitted by the Special Rapporteur was far clearer than the original draft and made it obvious that the provision was indeed intended to grant immunity. As a minimum requirement for granting immunity, transparency must be ensured with regard to the capital resources of the State enterprise, for example, by means of a commercial register. The second sentence established an exemption from immunity in the event of claims on the State where a State enterprise acted on its behalf. While that exemption was welcome, in such cases the transaction would generally be concluded in the name of the State, so that the latter was the contracting party and would not be granted immunity under article 11.

40. With regard to the title of chapter III, part III, it would be expedient to find a neutral wording which would obviate the need for a commentary on the divergent theories of absolute and relative immunity.

41. With regard to draft article 12, he favoured a greater limitation of immunity than that contemplated in the draft adopted by the Drafting Committee, particularly in the case of labour-law disputes. The misgivings expressed by some States regarding the deletion of subparagraph (a) could be taken into account by the Special Rapporteur's proposal as set out in paragraph 177.

42. In the case of draft article 13, the Drafting Committee had not adopted the Special Rapporteur's suggestion, which his delegation had welcomed, namely, to delete the last half of the sentence. As adopted by the Drafting Committee, the text could be interpreted to mean that immunity could always be invoked for transboundary injuries or damage.

43. He supported the Special Rapporteur's recommendation to delete the word "non-governmental" in draft article 18, paragraphs 1 and 4, because the criterion of "commercial purpose" was in itself sufficient to ensure that immunity was not granted. With regard to draft article 21, differences between immunity granted for contentious proceedings and for enforcement proceedings should be kept to a minimum. He supported the Special Rapporteur's proposal that draft articles 21 and 22 should be merged. New article 21 took into account his delegation's view that the phrase in original article 21 "[, or property in which it has a legally protected interest,]" resulted in an undesirable expansion of immunity. The question of whether the phrase "[and has a connection with the object of the claim,

(Mr. Scharioth, Germany)

or with the agency or instrumentality against which the proceeding was directed)" should be maintained in new article 21, paragraph 1 (c), require& further examination, although deletion would appear to be indicated. The words "and used for monetary purposes" which had been added to now article 22, paragraph 1 (c), reflected a request by his delegation.

44. New article 23 appeared to be expedient, in that if a State could invoke immunity in contentious proceedings where an autonomous State entity which pursued commercial purposes was liable, forced execution on the State's property must be possible where the State placed such property at the disposal of the autonomous State entity for commercial purposes.

45. He welcomed the suggestion that the words "and if the court had jurisdiction in accordance with the present articles" should be added to draft article 25, paragraph 1, and interpreted the addition to mean that the question of immunity must be examined by the court ex officio.

46. With regard to the law of the non-navigational uses of international watercourses, Germany, as a riparian State of several major watercourses, was particularly interested in the development of international law in the field of environmental protection. The Commission had drafted language which made it sufficiently clear when riparian States of international watercourses must take action to prevent or reduce any harmful effect of certain conditions or human conduct on other watercourse States or their environment. The proposed articles were also closely related to other rules of international law serving the same purpose; that close link with existing conventions would be conducive to establishing tile most comprehensive system possible of complementary global and regional régimes of international watercourses.

47, Draft article 23 imposed a general obligation on watercourse States to prevent and reduce pollution of international watercourses, and in addition, its paragraph 3 required them to co-operate in identifying harmful substances. That provision underscored the concept of preventive measures to protect watercourses. Draft article 24 was a forward-looking provision in that it took account of the introduction of "new species" into international watercourses. Draft article 25 represented an important addition to global and regional efforte to protect the marine environment. His country, bordering on the heavily polluted North and Baltic Seas, realised that rivers must not be cleaned up at the expense of the marine environment. Draft article 26 made it clear that the responsibility of watercourse States included not only practices in their sphere of competence but also other sources of hazard. Under draft article 27, a wide-ranging provision which also included non-contracting States, watercourse States would be obliged to prepare jointly for emergency situations and to take appropriate action if they arose.

40. With regard to the definition of an international watercourse, he reiterated his view that the draft articles should use the wider tsrm "international watercourse system" so as to ensure the most comprehensive and effective protection possible.

(Mr. Scharioth, Germany)

49. The eight draft articles proposed for annex I required further examination. He welcomed the approach taken by those provisions and felt that three oentral ideas should be emphasised8 first, the principle that watercourse States should attach the same importance to possible adverse effects on other States of aatlvities in their territories as to such effecte in their own territory) second, the equal treatment of natural or juridical persona in other States and of those in the watercourse Stated of origin in respect of the prevention of and information on possible haaards as well as aompensation where damage had aatually occurred; third, the strengthening of the position of private persons in exercising those rights. Those principles were consistent with current trends in environmental policy and were increasingly being incorporated into international instruments dosiqnsd to protect the rights of the individual against trensboundary hasards. In that context, he had no objection to the wording of articles 1, 2, 3, 4, paragraph 1, and article 6, except to ask whether article 4, paragraph 1, and article 5 did not place obligations on future contracting States which were too extensive and too difficult to define.

50. Understandably individuals who might potentially be affected would also wish to be involved in the preparation in other States of decisions designed to avoid haaards. However, a legal claim to be involved similar to that granted by the national law of other States to their own nationrls or organisations would place a great strain on such procedures. Of course, the provisions proposed by the Special Rapporteur were virgin territory *for* many States. The national legislation and different legal traditions of Member States suggested that it might be possible to reach agreement only on the lowest common denominator. That applied especially to the status *of* private individuals.

51. Mr. CALERO RODRIGUES (Brazil) said that only slow progress had been achieved on the topics of State responsibility and international liability for injurious consequences arising out of acts not prohibited by international law (chapters V and VII, respectively, of the Commission's report). Given their aomplerity that was understandable, but the point should have been reached from which the Commission could move at a faster and more stc-ady pace. The result6 of the forty-second session's work were only mildly satisfying, no general agreement having been reached on some basic issues. The Commission and the two Special Rapporteurs should be encouraged to ensure the suacescful early completion of the work, thus making a signal contribution to the Decade of International Law.

52. It was particularly to be regretted that in connection with State responsibility the Commission had failed to indicate the specific issues on which the expression of views by Governments would be of special interest for the continuation of its work, as had been requested in General Assembly resolutions of which resolution 44/35 was the most recent. Too many questions were raised by the draft articles on State responsibility for any delegation in the Sixth Committee to address them all. Without guidance from the Commission, comments were likely to be made at random, and some delegations might even feel tempted not to state their positions at all, fearing that their view might not be of use for the continuation of the Commission's work on the topic.

(Mr. Calero Rodrigues, Brazil)

53. Referring to article 8 of the draft on State reeponeibility, he, agreed with the view expressed in the Commission and endorsed by the Special Rapporteur (paragraphs 346 and 347 of the report) that the present title should be changed to "Pecuniary compensation". There was no eubetnntive difference between the two alternative versions proposed for paragraph 1 of the article, and the indication of the purpose of pecuniary compensation cu ld be simplified, if, as previously suggested by his delegation, article 7 on restitution were to be drafted more clearly.

54. Referring to article 8, paragraph 2, he said that the expression "any economically assessable damage" wae appropriate; the expression "material damage" might appear preferable at first sight, but it could be interpretod in the narrow sense of physical damage, not covering damage to some rights such as intellectual rights, which might repreeent considerable economic loss. The paragraph also spoke of "any moral damage", but seemed to imply that only such moral damage as was "economically assessable" was meant. To consider that no moral damage to the State was economically assessable while some mural damage to individuals could be so assessed seemed illogical; notwithstanding the arguments advanced by the Special Rapporteur in favour of his position, his delegation saw no need to single out damage to nationals in either Article 8 or article 10. If damage to a national could be economically assessed, it should give rise to an obligation of compensation) if it could not, there should be an obligation of satisfaction.

55. His delegation agreed that the damage to be compensated included both damnum emergens and lucrum cessans; it was not satisfied, however, with the definition of lucrum cessans proposed in article 8, paragraph 3. Not only was the phrase eomewhat oddly turned, but it also failed to specify what was to be considered a loss of profits. It was to be hoped that the Commission would arrive at a more convincing wording.

56. While his delegation had some doubte regarding the expression "an uninterrupted causal link" used in paragraph 4 of the article, even with the explanation provided by the Special Rapporteur in paragraph 371 of the report, it was still more skeptical about some of the suggestions made in the Commission and reflected in paragraph 372. If the Commiceion could agree that "the cause must not be too remote or speculative" and that there should be "a sufficiently direct causal relationship" between the wrongful act and the damage, as some members had argued, then the beat answer might indeed be to provide an adequate explanation of the sxpreeeion "uninterrupted causal link" in the commentary.

57. The principle set forth in paragraph 5 of the article, namely, that the State which committod a wrongful act was responsible only for the damage caused by that act, was a truism and, as such, unlikely to be disputed. That being so, it was hardly appropriate to speak of the compensation being "reduced accordingly"; in fact, compensation should not be reduced but should simply apply to that part of the damage which had been caused by the wrongful act. The reference to possible "contributary negligence" on the part of the injured State appeared unnecessary; if the injured State concurred in cauc:ing the damage, the part of the damage thus

(Mr. Calero Rodrigues, Brazil)

caused obviously could not be attributed to the wrongful act. That was a simple consequence of the principle of apportionment of damage and did not require to be mentioned in the text. He did not propose to comment on article 9, since many members of the Commission had spoken in favour of its deletion and the Special Rapporteur, in paragraph 397 of the report, had agreed with that suggestion.

58. The reference to legal injury in article 10, paragraph 1, was inappropriate. Satisfaction in the forms indicated in the paragraph was not due for every wrongful act but was reserved for instances of moral injury, traditionally equated with injury to a State's dignity, honour or prestige. The text should make it perfectly clear that satisfaction was the remedy to be applied to a moral injury in its traditional sense and not to legal injury, a much wider concept; even some precision should be given to the concept of moral injury, perhaps through a reference to the injured State's dignity, honour or prestige.

59. As to the forms of satisfaction indicated in paragraph 1, he agreed with those members of the Commission who had suggested that the reference to punitive damages was unnecessary and should be deleted, With reference to the proposed inclusion of assurances or safeguards against repetition as a form of satisfaction, he did not believe that such guarantees should be envisaged only in cases of moral injury, but might also have an important role to play in connection with wrongful acts which caused economically assessable damage, The Special Rapporteur's readiness to consider a separate article for guarantees of non-repetition was to be welcomed.

60. He also had doubts concerning the assertion in paragraph 3 that the declaration of wrongfulness of an act by a competent international tribunal might constitute in itself an appropriate form of satisfaction. While such a declaration might be an adequate form of reparation for a legal injury, satisfaction for moral injury as such would require some form of positive conduct on the part of the offending State. Lastly, he agreed with paragraph 4 of the article. In no case should satisfaction imply humiliation, nor should it, in principle, result in the violation of a State's sovereign equality or domestic jurisdiction. However, the language of the paragraph as a whole could be improved.

61. Turning to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, he said that the large number of draft articles presented by the Special Rapporteur did not mean that work on the topic was advancing rapidly: on the contrary, the Commission had not yet settled some of the problems fundsmental to the topic's further development. The Committee's task was facilitated in the present instance by the indication in paragraph 531 of two specific! points on which comments were invited. Before presenting its views, his delegation wished to express its appreciation to the Special Rapporteur for his skilful handling of a most difficult topic.

(Mr. Calero Rodrigues, Brazil)

62. The first question concerned the introduction of a list of dangerous substances as a possible aid in clarifying the concept of significant risk. His delegation had not favoured a list of activities involving risk and it did not favour a list of dangerous substances. The fact that a substance included in tho list was being handled did not mean that the activity in question necessarily created a risk of transboundary harm; on the other hand, such a risk might be created by activities which had no connection whatsoevar with a dsngoroun substance. In the light of the considerations aet forth in paragraph 483 of the report it seemed clear that the advantages of a list would be minimal and that the effort involved *in* preparing such a list would not be justified. More impor tent would be to make sure that the rules designed to govern the obligations of States concerning activities involving substantial risk were flexible and did not. place a straitjacket upon States. Particular care should be exercised with regard to procedural rules which, when spelt out in too much detail, tended to give rise to bureaucracy.

63. With regard to the second point raised by the Commission (para. 531 (b)), his delegation considered that liability of the State in the situations mentioned should not be completely excluded but might, *in* some instances, be considerably reduced, becoming merely residual. The main purpose was, after all, to establish rules aimed at ensuring that an innocent victim was not left to bear the loss. That purpose was to be achieved by guaranteeing compensation. Whether thr compensation came from the State under whose jurisdictional control tho activity causing the harm had taken place or from the operator conducting the activity was, in practical terms, of limited importance. Unlike certain international instruments dealing with specific fields in which the operator had a well-defined and primordial role, the draft under consideration was to have a general character; it therefore seemed advisable to seek an adequate balance between the obligations of the State and those of private parties which had conducted the activity causing transboundery harm. Although theoretically the State could always seek redress from the operator, it had to be borne in mind that a small country might find it difficult to deal with a large and powerful trensnational corporation. On the other hand, as some members of the Commission had pointed out, it would be unfair to allow States to avoid liability by hiding behind the operators. He wonde red whether a decision on the doctrinal issue involved was really essential for a satisfactory development of the articles. The theoretical basis on which the articles were being developed seemed supple enough not to preclude tha introduction of articles which might in fact result in a flexible system of attribution of liability. That was the pragmatic course which the Commission should fol low, leaving it to future jurists to undertake a deep doctrinal analysis.

The meeting rose at 5 p.m.