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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)

State responsibility; international liability for injurious consequences arising out of acts not prohibited by international law (continued)

1. Mr. LEHMANN (Denmark), speaking on behalf of the Nordic countries, said that the primary norms governing the conduct of States, as well as the tertiary or procedural rules concerning the settlement of disputes between States, were amply codified in numerous treaties and other international instruments, so that what remained to be codified were the second international norms stating the conditions which had to be fulfilled in order to establish the responsibility of a State in international relations and the legal consequences which flowed from an established wrongful act. The difficulty of the undertaking reflected the well-known fact that to formulate and adopt the primary rules was one thing and to spell out the responsibility, with all that it entailed, of States violating those primary rules was quite another. A further difficulty was the need to avoid re-drafting the primary rules,

2. The Nordic countries welcomed the fact that the Commission had finally been able to steer the right course in dealing with the central remaining topic in the building of an international legal order, and urged the Commission to finalize the topic before the end of the Decade of International Law. As international co-operation expanded, many activities on the part of States entailed the need to determine responsibility in the event of a wrongful act. The Commission itself was currently dealing with several topics which had a bearing on the concept of State responsibility - the draft Code of crimes against the peace and security of mankind, tho international watercourses topic, and liability for injurious consequences *arising* out of acts not prohibited by international law. An international convention codifiying the general norms on State responsibility and its consequences would solve many problems of co-operation among States, In that connection, he expressed regret that the Commission had often failed to provide a clearer survey of its work on the topic, especially in years when a report from the Special Rapporteur had not been forthcoming or had not been considered owing to lack of time. In line with their wish to see the finalization of the topic well before the end of the century, the Nordic countries urged tho Commission to present at an early date a brief outline of the results so far achieved together with an indication of what remained to be done and the time period within which the project might be finished.

3. Turning to the Special Rapporteur's second report (A/CN.4/425 and Corr.1 (English only) and A/CN.4/425/Add.1 and Corr.1 (English only)), he said that the Nordic countries supported, in general terms, the structure adopted for that part of the project. In particular, it found reasonable the Special Rapporteur's approach of including at that stage the element of fault in the evaluation of ths faults and degrees of reparation due by the offending State. Apart from the fact

(Mr. Lehmann, Denmark)

that *even* delicts might present different degrees of gravity, it had to be remembered that the project also covered crimes and that the concept of fault was an indispensable part of the evaluation *of* any international crime committed by a State through its aqents or other oompetent authorities. In that line of reasoning, the Nordic countries also supported the Special Rapporteur's arguments in favour of including the element of punitive damages as well as of safeguards of non-repetition among the consequences of *an* internationally wrongful act.

4. Lastly, the Nordic countries regarded the carefully balanced nature of the project as a factor which might help in reaching agreement on a basic and comprehensive text which would *cover* the topic of general international *law,* still awaiting codification.

5. Mr. PUISSOCHET *(France),* speaking on the topic of State responsibility, said that international responsibility presupposed an unlawful act attributable to a State and leading *to* damage *or* loss. That was why, unlike article 1 of the draft adopted by the Commission on first reading in 1973, the articles it was considering at present, which linked reparation with the concept of injury as an essential pre-condition for international responsibility, enjoyed the support of his delegation.

6. With regard to the nature of the injury giving rise to reparation, his delegation agreed with the Special Rapporteur *and* moat memebers of the Commission (para. 328) in thinking that damage suffered by a State as a result *of* a wrongful act could broadly be divided into the two categories of "material" and "non-mater ial" or "moral" damage. As regards non-material damage, the question of the advisability *of referring* to "legal injury" was raised *(pare.* 399) in connection with article 10 (footnote 263). While the existence of such a thing as legal injury could not be denied, the question arose whether, *if* it were specifically referred to in that context, it should not also logically appear in articles 7 and 8. In fact, the reference to "legal" injury was justified only where violation of the law did not in itself constitute such injury; and, moreover, the breach had to have entailed damage to a particular State.

7. In paragraph 401 of the report, the Specie1 Rapporteur replied to members of the Commission who considered that article 8, paragraph 1 did not seem to cover the position of States not directly or not materially injured by a violation of rules concerning human rights or the environment by stating that "it was precisely in the language of paragraph 1 of article 10 that such injured States could find the basis to claim remedy". While agreeing with the Special Rapporteur that the applicable human rights provisions, given the fundamental importance of the principles involved and the very special nature of the commitments undertaken, had extended the range *of* potentially affected States and that the question of legal injury had to be considered very carefully from that viewpoint, he *felt* that in the case in point it would be preferable not to use language which, appropriate though it might be in the context of human rights or the environment, would not necessarily be so in other fields.

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(Mr. Puissochet, France)

8. In the opinion of his delegation, international State responsibility was not a penal responsibility. That was the reason why it could *not* approve the introduction of the concept of international crimes attributable to States in article 19 of Part One of the draft. For the same reason, without casting doubt upon the fact that satisfaction, or even the obligation to make reparation imposed by international law upon the State responsible for the unlawful act, might to some extent be in the nature of a punishment of that State, it would prefer paragraph 1 of article 10 not to contain terms suggestive of the vocabulary of criminal law, such as "punitive damages". It was to be hoped that the Special Rapporteur would be able to reconcile the different doctrinal approaches to that subject.

9. His delegation endorsed the basic principle to the effect that the incurring of international responsibility entailed an obligation to remedy the damage caused. It also shared the Special Rapporteur's view that the cessation of an international wrongful act was not, strictly speaking, a form of reparation. The possible modes of reparation were restitution in kind, pecuniary compensation and satisfaction, the latter two being forms of reparation by equivalent. In that connection, he welcomed the Special Rapporteur's decision to entitle article 8 "Pecuniary compensation" rather than "Reparation by equivalent".

10. The Special Rapporteur was entirely right in saying that pecuniary compensation was the main form of reparation of economically assessable damage, whether material or moral, while satisfaction was the appropriate form of reparation of moral damage which was not economically assessable. The theory underlying that formulation appeared to correspond to the traditional distinction drawn between satisfaction, the form of reparation best suited to moral injury suffered by States, and pecuniary compensation, which was more suitable to material or moral damage suffered by the injured State's nationals.

11. Commenting more specifically on some of the articles considered by the Commission, he noted with regard to article 8 (footnote 247) that it would not be possible, and indeed was not desirable, to spell out in too much detail the rules governing pecuniary compensation. However, the Commission was entrusted with the progressive development as well as the codification of international law, and there would therefore be no objection in principle to its trying to fill any gaps it might find in studying the subject by proposing solutions acceptable to States. Whether that could be done in connection with the point under consideration was, however, doubtful bearing in mind the importance of the facts in each particular case and the need to leave the necessary latitude to the judge in reaching his decision.

12. While his delegation endorsed the idea underlying both alternative *versions* of paragraph 1 of article 8, it felt that from a drafting point of view it might be useful to specify the scope of application of the article, which did not become fully apparent until paragraph 2 ("economically assessable damage"). Although it agreed with the Special Rapporteur that the two alternatives were equivalent in substance (para. 357), it preferred alternative (b); version (a) had the drawback of seeming to say that the object of pecuniary compensation was to re-establish the

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situation that would exist if the wrongful act had not been committed, whereas in fact pecuniary oomyensation was resorted to where such re-establishment of the situation was not possible.

13. With regard to article 8, paragraph 2, his delegation, for reason8 which included those given in paragraph 365 of the report - in particular the need not to neglect an element closely connected with the respect for human rights - would, like the Special Rapporteur, be in favour of retaining the proposed reference.

14, As for paragraph 3, concerning lucrum cessans, his delegation pointed to the difficulty in establishing that aspect of damage when an intermediate act, itself deriving from the initial act, had affected the injured Ytatd. It considered the rule laid down acceptable a priori since the necessary causal link with the wrongful act which gave rise to the damage was evident.

15. With respect specifically to the causal link between the internationally wrongful act and the damage, the wording of article 8, paragraph 4, might benefit from being made more precise. Admittedly, the basic intention was to provide a guideline which could be adapted to each specific case depending on the particular circumstances, but it would be useful to refleat the idea that, for there to be compensation, tho causality must be certain and exclusive.

16. Article 9 concerning interest (footnote 262) was too detailed and established excessively rigid rules where there was no established practice. If, when they decided on compensation, international tribunals determined the date and modalities of payment, they were free to break up the obligation8 by establishing interest separately or by not doing so. It would therefore be preferable to omit article 9, even if it meant introducing a general formula covering the matter in article 8.

17. As for article 10 concerning satisfaction (footnote 263), paragraph 1 should be reworded to show that the list of forms of satisfaction it included was not exhaustive . As for whether guarantees of non-repetition really constituted a form of satisfaction, his delegation, while noting that it was for the injured State or the judge who might be assigned to the case to determine, depending on the circumstances of the case, whether a guarantee of non-repetition consituted adequate satisfaction, awaited with interest the separate article which the Special Rapporteur war considering preparing on that subject (pare. 403).

18. Turning to the question of international liability for injurious consequences arising out of acts not prohibited by international law, he said that he doubted whether it was possible, in the current state of international law and given the variety of situations, to codify the liability of States for lawful acts. Even an attempt to develop the law would seem to be very ambitious. In any case, it was by no means certain that it could be done successfully until the work on international liability for wrongful acts had been completed.

19. However , it appeared that the draft articles proposed by the Special Rapporteur in reality contained two distinct sets of proposals: on the one hand, a

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kind of *code* of good conduct for activities that might or did cause transboundary harm (arts. 6 and 7 and chap, III *of* the draft articles) and, on the other, rules governing liability in the *event of* harm (art, *9 and* chaps. IV and V of the draft artiales). It was hard to say whether the former provisions fell strictly within the scope of the study in question. They defined rules governing activities that might have transboundary effects, but that, in fact, had nothing to do with the problem of liability envisaged in the draft articles. Those rules would have no direct relationship with the problem of liability unless the intention was to establish that their non-observance involved the international liability of the State of origin. That would then involve liability *for* wrongful acts. If the Commission still wished to continue its consideration of the behavioural obligations that States must respect in territory in which activities that might involve traneboundary harm *were* carried out, perhaps it should make a clear distinction between the two parts of the study,

20. *As for* the Commission's declared intention *to* prepare a draft convention in that field, his delegation felt that that was a risky approach because many States were not prepared to accept the rules of liability envisaged except *for* carefully defined activities *or for a* specific geographical *area,* since their obligations were defined on a case-by-case basis depending *on* the special problems posed by those activities *or* by the physical characteristica of the space in which they were carried out. The same applied to the rules for prevention and consultation envisaged by the Commission, which had again gone *too* far for what was supposed to be a general text.

21. The Special Rapporteur intended to limit the scope of the draft articles by clarifying the notion of risk through the preparation, with the help of experts, of a list of dangerous substances, in other words, substances that created a significant risk of harm to persons, property or the environment. His delegation was prepared to endorse that approach because it saw it as a step towards a precise definition of cases in which liability for risk would be conceivable. The reference to substances would appear a priori to allow *for* greater precision than the reference to "activities". The question might arise as to whether the list envisaged was a genuine response to the problem of determining the scope of the draft articles ratione materiae. In *any* case, that step did not a priori appear sufficient to persuade anyone that the text prepared could take the form of a convention.

22. Firstly, in the preparation of the list, the same difficulties would be encountered as in the case of a list of activities. In addition to the difficulty posed by the *very* preparation of the list, it was uncertain that it would be sufficient. The choice of substances selected could not be made on the basis of exclusively technical criteria. States still had to agree on the selection and *on* the fact that the problems that those substances might cause should be solved within the framework of the draft articles and not in another technical context or in a regional context. Consultation with States would therefore seem to be indispensable in any case.

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23. Secondly, if it was conceded that an initial version could be prepared, the list might rapidly become outdated. While an updating might be thvoretiaally possible, it could cause even more practical difficulties since the draft would deal presumably with extremely heterogeneous categories of substances. One could well imagine an endless stream of proposals for amendments.

24. Lastly *and* most importantly, if the Commission tried to establish specifically to which activities or substances its draft applied, and if a fortiori it planned to give it the form of a convention, *there* would be a "shift" in the subject-matter. The result of following the current orientation would be draft articles on the prevention of harm deriving from specifically indicated activities and *on* the liability resulting therefrom, That would mean a shift from a study parallel to the study on liability *for* wrongful aats to a text of limited scope designed to be operational, The question was whether such an orientation would be precisely in keeping with the current mandate *of* the Commission and whether there was not a risk of duplication with work done in other bodies. If the Commission decided to prepare a list of dangerous substances, that list should in any case have only reference value for the States that wished to preparo a convention on a specific category of substances included in the list. In short, his delegation's view was that the rules which the Commission had undertaken to prepare should apply only to activities which posed an exceptional risk.

25. With regard to whether and to what extent the draft draft articles should provide for the liability of the State of origin for transboundary harm oaused by the activities covered by the subject and carried out under the jurisdiction or control of that State when such activities were cauduated by individuals, his delegation took the view that, in accordance with the solution8 adcpted by the *conventions* in force in the area of liability, primary liability *resided* with the operator. State liability was only subsidiary, as in the case of the convention on the liability of the operators of nuclear-pcwered ships, when the State failed to fulfil its supervisory obligation. There were few cases in which the State could be held directly liable. For that same reason, his delegation did not consider it possible to produce the text of a convention of a general nature that was not limited to carefully delineated hypotheses of activities representing an exceptional risk. Furthermore, the exceptions to the principle of the primary liability of the operator should be envisaged only in well-defined areas where such a solution appeared acceptable and appropriate on a case-by-case basis.

26. The Special Rapporteur had asked whether he should consider activities involving risk and activities with harmful effects separately. In the view of his delegation, the subject should be restricted to activities involving risk, or even activities involving an exceptional risk. Moreover, it wondered vhether it was logical to classify measures that might have to be taken to limit the harm caused by an activity that had not appeared to be intrinsicall,' dangerous as prevention.

27. In conclusion, his delegation reaffirmed that the subject of liability for non-wrongful acts could not yet be forced into a rigid framework of unambiguous and pre-established rules, such as those that might be envisaged with regard to

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liability for wrongful acts, On the other hand, the Commission would do useful work by offering States a choice from among various solutions that would enable them, when necessary, to deal with a given problem.

28. Mr. HANAFI (Egypt) said that in view of the complexity of the question *of* State responsibility, it was important to avoid establishing rigid and unnecessarily detailed rules to be applied mechanically, regardless of the situation. In that connection, it was always necessary to take into account the circumstances of the developing countries, whether the effort to codify and develop the law concerned State responsibility or another aspect of international law.

29. With regard to State responsibility (chap. V of the report), the Commission's task was not merely one of codification. When an examination of the jurisprudence, customs and established practice showed that the ruler in farce in that area *contained* lacunae, the Commission must work to fill them. The purpose of reparations was to eliminate all the consequences arising from tha wrongful act and *to* compensate for the loss that had not been made good by restitution in kind. Thus a link existed between the various modes of reparation.

30. Article 8 (footnote 247) dealt primarily with compensation, and its heeding should be amended acaordinqly. In paragraph 1, two questions remained to be settled: when the evaluation of damage would take place and what final deadline should be set. In that context, his delegation agreed with the Special Rapporteur that the oontents of the paragraph might be considered at the same time as the draft articles in Chapter Three. Although the two alternative texts of paragraph 1 were somewhat ambiguous, alternative (a) could be retained if it was worded more clearly and if its clauses were simplified.

31. . While not opposed to *the* use of the expression "economically assessable damage" in paragraph 2, his delegation considered that it should be made more explicit and should be given a practical content by introducing general criteria into the text *or* at least by stipulating that the damage was economically assessable according *to* the principles and rules in force. The concept *of* "moral damage" should appear in another part of the draft articles, since it did not relate to economically assessable damage.

32. In article 8, paragraph 3, the reference to profits lost was too vague. It should be stated that compensation included profits the loss of which could be accurately assessed, was foreseeable and would not have been sustained if the wrongful act had not been committed. With regard to the uninterrupted causal link between the wrongful act and the loss, there must be full compensation for losses where the wrongful act was the immediate and exclusive cause, as well as for losses *where* the wrongful act was the exclusive cause, even if they were not connected with the said act immediately but through a series of events, each of which was connected with the other exclusively by a causal link.

33. There was a danger that the concept of "causal link" (para. 4) might confer upon the State an unlimited responsibility, which would run contrary to the principles laid down by the Special Rapporteur in his report and to the customary

rules in force and established practice in that area. His delegation therefore proposed that the norms referred to by the Rapporteur should be included in the text of paragraph 4. Lastly, his delegation was satisfied with the general orientation of paragraph 5, but felt it would be preferable to make it the subject of a separate article so as to make it a general rule that applied to all other forms of reparation.

34. With regard to article 9 (footnote 262), he pointed out that in jurisprudence and established practice interest was considered to be part of reparation. It was therefore important to provide expressly for the obligation to pay interest in order to ensure full reparation for the damage arising from the wrongful act. There were, however, differences of opinion regarding the dates from which and until which interest should run, and the rate of such interest. Loqioally, interest ran from the date of the decision until the *payment* of the reparation. The rate should be set according to *each* situation, taking into account the level of economic development of the country concerned. Those questions were generally left to the judgemeat of the judicial courts or arbitral tribunals, The Commission should study the question further before taking a definitive decision; it aould also decide to delete paragraph 2, as the majority of the Commission's members had suggested.

35. On the whole, article 10 on satisfaction and guarantees of non-repetition (footnote 263) raised no difficulties, but his delegation had doubts about the usefulness of the concept of "legal injury" in paragraph 1. As the Special Rapporteur had point out, that concept applied whenever there was a wrongful act, and for that reason, his delegation supported the proposal that it should be deleted.

36. The question of the impact of fault on the forms and degrees of reparation raised difficult questions to which the Commission should devote an in-depth study in the near future.

37. Mr. VIO GROSSI (Chile), referring to chapter III of the Comission's report (A/45/10) on @@Jurisdictional immunities of States and their property", suggested that it should be entitled "Restrictions on the immunity of States", but said he was open to other proposals. With regard to article 12 (footnote 79), *he* agreed with other delegations that the phrase "and is covered by the social security provisions which may be in force in that other State", at the end of paragraph 1 should be deleted. Subparagraph (a) of paragraph I should also be deleted; as to subparagraph (b), his delegation supported the solution suggested in paragraph 182 of the report.

38. The restriction of the jurisdictional immunity of the State set forth in article 13 (footnote 85) was particularly important for Chile, which had not forgotten the assassination of the former Minister, Orlando Letellier, in Washington in 1976. It was therefore essential to avoid anything that might lend itself to controversy; that could not be said for the phrase "... if the act or omission which is alleged to be attributable to the State", which did not make clear the need for a link between the person responsible for the act or omission and the defending State,

(Mr. Vio Grossi, Chile)

39. His delegation agreed with the Special Rapporteur and with the majority of members of the Commission in favouring the deletion of article 20 (footnote 96), as measures of nationalization were sovereign acts. It was also in favour of merging articles 21 and 22 (footnote 97) and retaining, in paragraph 1 (c) of the new article 21, the phrase "[and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed]" and, in paragraph 2, the idea that the property covered by paragraph 1 could not be subjected to any measures of constraint. It supported the deletion of article 23 (ibid.), but the Commission should await the final results of its work concerning the definition of "State" in article 2 and the ultimate fate of article 11 bis.

40. As certain members of the Commission had proposed, article 24, paragraph 3, should be replaced by the following text: "The document should be made available in a language acceptable to the State concerned", and the new version of subparagraphs (a) and (b) of paragraph 1 proposed by the Special Rapporteur (para. 229) should be accepted.

41. Moving on to chapter IV, "The law of *the* non-navigational uses of international watercourses", he said that article 24 (footnote 120), which, like article 25, had as its underlying principle the idea of optimum utilisation, seemed well balanced. Account should be taken, however, of the obligation not to cause appreciable harm set forth in article 8. In article 24, paragraph 2, the notion of conflict should be replaced by that of the incompatibility of several uses.

42. With regard to paragraph 1 of article 25 (footnote 122), it should be assumed that watercourse States were obliged to co-operate in the regulation of watercourses, and not only to co-operate "in identifying needs and opportunities for regulation". In paragraph 2, it should be specified that watercourse States were obliged to participate not only in the construction and maintenance of regulation works, but also in their improvement or modernization.

43. With regard to article [26] (footnote 123), his delegation also believed in the need for the rational management and optimal utilisation of international watercourses. For that reason, improvement should be made to the substance and form of that article. In Chile's view, the important point was not to create a joint organization, but to provide for joint management, which could take on different forms and involve companies or enterprises of private law.

44. Article [27] (footnote 124) should stipulate the obligation of each State to ensure the protection of water resources and related installations, facilities and other works, in accordance with the principle of territorial integrity and that of sovereignty.

45. Article [28] (ibid.) should comprise two paragraphs, one relating to peaceful uses and the other to uses in time of armed conflict. It was essential to revise its text, however, lest, in some unforeseen way, the existing rules of international law governing that field were affected.

(Mr. Vio Grossi, Chile)

46. In annex I "Implementation of the draft articles", artiales 6, 7 and 8 should be deleted. The annex should in general be revised, because the civil liability régime whioh it stipulated for the compensation of individuals went beyond the limits of a framework agreement in so far as it could require changes in national loqislation,

47. Chapter VII of the report dealt with International liability for injurious consequences arising out of acts not prohibited by international law, a principle which had not been accepted without opposition, since it ran aounter to the idea that States had only to account to themselves for their actions, and aimed at preventing certain acts involving special risks and, whero those acts could not be prevented, at organiainq reparation for the damage which they had aaused. That approach was broadly reflected in the Declaration of the United Nations Conference on the *Human* Environment (Stockholm, 1972), and specifically in its principles 21, 22 and 26.

48. Chile fully agreed with the general principles set forth in the draft articles, but was still concerned about the liability incurred by States for harm arisinq out of acts not prohibited by international law, and in partiaular nualear activities. With regard to the transboundary harm which could be aaused by the dumping of nuclear waste, it was necessary to ascertain whether that harm could still be felt after a long period of time. It was also necessary to stipulate, as in article 1, not only the harm caused by certain activities but also the risk which they created of causing such harm, thereby facilitating the taking of preventive measures. In article 2 (a), mention should be made of the use of elements of nature and of the environment where that use could cause transboundary harm, such as the use of geological faults as a dumping space for nuclear waste.

49. With regard to article 11, his delegation believed that the notification should be addressed simultaneously to all the States parties to the Convention and that their co-operation was essential. Article 16 was concerned with a partiaular application of the general duty of care and of the provision8 of article 8. The unilateral preventive measures which the State of origin was required to take under article 1 were insufficiently rigorous and that provision should therefore be studied in more depth.

50. In response to subparagraph (b) of paragraph 531, his delegation believed that the concept of international liability for injurious consequences arising out of acts not prohibited by international law had replaced the juridical criterion of subjective fault by that of objective fault. In the event of harm, therefore, the State under whose jurisdiction or control the activity causing the harm had been carried out must report that harm, without affecting the question of culpability. The State was responsible for taking the necessary safety measures to prevent the possible harm entailed by certain activities. That responsibility was the quid pro quo of a State's sovereignty. *When* those activities were carried out by individuals, the liability of the State was incurred if it had not taken the necessary measures to prevent the occurrence of trsnsboundary harm or *if* it had not exercised sufficient control over those activities. The issue was one of great importance and the frequency of transboundary harm was evidence of a "gap" in international law.

51. Mr. LIAO Jincheng (China) said that the issue of the liability of States was extremely complex and the first part of his statement would be devoted to it. Paragraph 336 of the report under consideration had stated that the Special Rapporteur had approached remedies primarily from the point of view of injuries to aliens in cases *of* torts and, in paragraph 338, that the report of the Special Rapporteur had covered too many old cases, particularly of arbitral awards made in the late nineteenth or early twentieth century, during the colonial era. China believed that one of the great successes of the International Law Commission had been its ability, year after year, to transcend the limitations of traditional international law, which restricted the liability of States to attempts on the life and the property of aliens, and to include under that heading all internationally illicit acts. The Special Rapporteur had deviated from the concept of the liability of States adopted by the Commission. Paragraph 338 had also stated that certain members had mentioned the Boxer revolt as a case which should not be *invoked* as precedent illustrating the juridical consequences of the liability of States. The Chinese people regarded the Boxer revolt as an instance of aggression against China and *of* armed imperialist intervention. His delegation therefore believed that the Connnission should not base its work exclusively on the liability of States with regard to the protection of aliens, and still less on cases of diplomatic protection of the imperialist type such as was accorded to aliens in the late nineteenth and early twentieth centuries.

52. With regard to article 8 (footnote 247), he shared the view of certain members that its title should be **"pecuniary compensation", since the title "reparation by equivalence" could be taken to mean that such reparation was equivalent to pecuniary compensation, something that had still to be established. The article was hardly acceptable, since it formulated abstract rules based on the assumption of the equality of States, while the relations between States were fundamentally unequal. The pecuniary compensation provided for in the article reflected the point of view of the developed countries When applied to claims for reparation made by the developing countries, it would have unfair consequences for those countries by depriving them of their right to development and thereby causing instability in international relations. As formulated, article 8 was an anachronism and not conducive to the progress of international law, Article 9 (footnote 262) should be deleted, because it covered matters that should be covered by article 6.

53. Concerning article 10 (footnote 263), his delegation saw in "satisfaction" a way of compensation and in "guarantees of non-repetition*' a form of "satisfaction". It was a special form of compensation for moral injury done to a State, including damage to its dignity, honour or prestige. *Concerning* "legal injury" his delegation agreed with the opinion of certain members *of* the International Law Connnission (pare. 399) that the concept should be limited; otherwise the approach adopted would be unreasonable. Furthermore, the word "punitive" *in* paragraph 1 should be deleted, because giving a punitive character to "satisfaction" *ran* counter to the principle of sovereign equality among States. Moreover, the effect of fault on the means and degrees of compensation was a complex question which required further study. The Special Rapporteur had acknowledged that fault had not played an important role in that point of view.

(Mr. Liao Jincheng, China)

54. Turning next to "international liability for injurious consequences arising out of acts not prohibited by international law", he wondered first shout the scope of the subject. In his opinion, the draft articles should apply not only to activities involving risk of causing transboundary harm, but also to activities aatually causing such harm. The Special Rapporteur preferred to treat those two items together, but that type of presentation must not give the impression that it narrowed the scope of the subject. Doubts over the combined approach raised by some member8 of the International Law Commission must be taken seriously. Indeed, in accordance with the Special Rapporteur's definition in draft article 2, paragraph 2 (f), (footnote 305) of "activities with harmful effects", activities causing harm were those in which harm was seen from the beginning as an inevitable consequence and which could be undertaken on the basis of the adoption of measures to reduce harm and compensate for harm that had already occurred. That definition excluded from the topic activities which caused harm although they appeared not to present a risk. That ran counter to the previous position of the Commission and to the majority opinion of Sixth Committee members.

55. With respect to the advisability of *drawing* up a list of activities, the Special Rapportour found that solution inappropriate for a global convention and would prefer a list of dangerous substances which would be more flexible and would have the advantage *of* more clearly defining the field of application for the articles. His delegation favoured the second solution, on the condition that the list of substances was indicative rather than exhaustive. Otherwise, the draft would take the form of a specific convention on specific activities and would be overtly restrictive.

56. The Special Rapporteur had proposed some revisions in draft articles 1 to 10. Article 2, concerning definitions, was quite different from the previous text. With its 14 definitions, it seemed somewhat lengthy, and some members believed that definitions should be made on a temporary basis because the topic related to a new area where many terms still awaited definition. His delegation believed that the definitions should be retained pending further study. Article 10 had also undergone a major change and had become a provision on "non-discrimination", *which* his delegation approved. It was important from the point of view of the right of the victim of transboundary harm to institute civil liability proceedings in the State of origin. Since national legislation varied greatly, and the State of origin was the first to be affected by the accident, that provision specified that the applicable law should be that *of* the State *of* origin. Consequently, draft article 30, on '*application of municipal law" *(footnote* 321) should be reconsidered.

57. In reading chapter III of the draft on prevention - draft articles 11 through 20 - he was pleased that the rules of procedure proposed were simpler and more flexible. The obligation of prevention should be based on the obligation of co-operation. As long as no transboundary harm had occurred, noncompliance with the obligation of prevention should not give another: potentially affected State the right to begin action. That concept had been explicitly incorporated by the Special Rapporteur in the text of article 18 (footnote 314), which stipulated that the State of origin could not invoke article 23 on '*reduction of compensation payable by the State of origin" in the case of harm resulting from a violation of

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the obligation of prevention. It was a reasonable provision which could induce the State of origin to take seriously the obligation of prevention.

58. Like many members of the Commission, he also felt that participation by international organisations would be positive and useful. The review of potential transboundary harm sometimes required highly advanced technology and equipment, which some countries might lack, International organisations should also play a positive role in promoting co-operation among States. The drafts of articles 11 and 12 (footnote 309) were thua acceptable on the whole, though not adequate. Finally, the principle of "balance of interests" embodied in article 17 (footnote 312) was of crucial importance both from the point of view of prevention and of liability.

59. Chapter IV of the draft, concerning liability (paras. 508 and following), was truly the core of the topio and called for some comment. First, article 21 proposed by the Special Rapportour (footnote 315) imposed the obligation to negotiate compensation in case of harm, an approach that would be more easily accepted by the international community. It was questionable whether existing international law provided *for* the obligation for reparation in the absence of a violation of international law. The second comment concerned the determination of liability. To say that the operator should bear primary responsibility would be in agreement with current State practice. As pointed out in paragraph 509 of the report, only the Convention on International Liability for Damage Caused by Space Objects attributed liability to the State, and that Convention was of a special nature which could not be generalized. The Special Rapporteur also said that a State should be held liable only to the extent that it had not adopted proper domestic legislation. States could also bear a residual liability. That approaah would accommodate situations where required reparation exceeded compensation to be paid by the operator, and as well as the principle that innocent victims should not suffer loss,

60. His delegation supported in principle the articles dealing with civil liability, in chapter V of the draft (paras. 520 et seq.). Article 31 (footnote 321) should be reconsidered with regard to the question of jurisdictional immunities of States and their property. His delegation would await the rosults of further deliberations on that chapter at the next session of the International Law Commission before making further comments.

61. His delegation had already commented on the concept of "global commons" and on the desirability of extending the topic to include it. The Commission should not ignore the problem of the human environment, nor the new concept of "global commons", which covered quite different problems from those in the draft articles, firstly, because of the uncertainty of its definition and legal consequences, and, secondly, because of problems in identifying countries affected by activities considering the multiplicity of States of origin, and the determination of rights and obligation of States of origin and other States. The question should, therefore, be studied in more detail and approached with caution. So much remained to be done by the International Law Commission that there was no foreseeing when it

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would complete the first reading, and it would be inappropriate to complicate the subject further. Perhaps "global commons** could be made a Separate topic in a future programme of work.

62. Sir Arthur WATTS (United Kingdom) addressed, firstly, the question of State responsibility (chap. V of the report). It was an important subject, and the Commission must be encouraged to advance its work, since it had begun its study of the topic 35 years earlier, and it had been 15 years since it had adopted the general plan.

63, The Special Rapporteur had proposed three new draft articles, which had been referred to the Drafting Committee. Regarding the first, article 8, concerning **Reparation by equivalent" (footnote 247), the Special Rapporteur had indicated appropriately that restitution in kind was the primary mode of reparation und that it should be applied whenever possible, while also recognising a need for reparation by pecuniary compensation where reparation in kind could not ensure complete reparation. In general, article 8 was welcome.

64, With regard to draft article 9 proposed by the Special Rapportour, concerning interest (footnote 262), his delegation thought that interest should be paid only in oases involving loss of property. That view was supported by the awards of international claims commissions. Secondly, it supported the general agreement in the Commission that paragraph 2 of that article, relating to compound interest, should be deleted, since such interest had been awarded only in the rarest of cases.

65. Draft article 10, entitled "Satisfaction and guarantees of non-repetition" (footnote 263), was important both in principle and in practice, as recent cases had shown. But, as the Special Rapportour had himself said in paragraph 401, the question of "moral and legal injury" should be considered with great care.

66. His delegation sincerely hoped for real and rapid progress in that important area of the Commission's work. It had noted with interest the Commission's debate concerning the material cited by the Special Rapporteur. It agreed with those who had said that it was important to examine rigorously past State and judicial or arbitral practice, of which there was plenty. When the Commission was engaged in codification, such examination was essential; when there were elements representing progressive development of the law, analysis of States' past behaviour and its consequences was essential to formulating rules for the future.*

67, In the related area of international liability for injurious coneequeaces arising out of acts not prohibited by international law, he noted that the Commission did not have many examples of State practice or of judicial and arbitral

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* The United Kingdom delegation distributed a document at the meeting containing its detailed comments on draft article 8.

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awards on which to base its work. It was therefore engaged to a much greater extent in progressive development of the law than in codification. For that reason, he wished to reaall two general aomments whiah his delegation had made at the previous session. Firstly, the articles should foaue on the practical problems which caused the most difficulty, rather than seeking to deal aomprnheneively with all aspects of the oubjeat. The proposal for an annex provided a welcome opportunity to ensure with some degree of certainty that the articles related to those activities identified as causing the most problems. Seaondly, aautfon must be exercised before attributing far-reaching consequences to lawful acts, since the articles dealt with acts not prohibited by international law. The new article 17 (footnote 312) recognized that the *duty* to oomgenaate and to negotiate reparation should be tempered by practical considerations. That new provision was most welcome.

68. Article 17 was important for *other* reasons as well. As a matter of substance, it set forth factors whiah could be taken into account during negotiations in *order* to achieve an equitable balance of interests; in other words, it indicated the practical matters which the States concerned were to take into account when negotiating reparation for transboundary harm. It also illustrated an interesting proaedural point. At the previous session, delegations had commented on draft article 9 without the benefit of the text that now appeared in article 17. With the new provision, article 9 appeared in a aomgletely different light. It also seemed more accepcable because its significance was clearer. That showed that examining articles piecemeal was not the most useful way of proceeding, since any one article might be significantly affected by articles that appeared subsequently.

69. On the subject of the Committee'8 working methods, he commended the considerable effort8 which the Commission *and* its successive Special Rapporteure had devoted since 1976 to developing a schematic outline and producing draft articles on the topic. That praise was all the more deserved because the topic largely involved progressive development of the law and *there* was no established and extensive body of State practice and case-law on which to build. The Commission had therefore developed the topic in directions which had *been* scarcely imaginable in 1978, increasing its scope so much that completion of work on the topic seemed a distant prospect. The Sixth Committee should take a fresh look at the topic, not article by article but in broad terms, to see whether it agreed with the direction the Commission's work was taking. The Committee might also consider assigning priority ' to some aspects of the topic, bearing in mind the current needs of the international community, To that *end*, the Commission should present the Sixth Committee with an overall review of the statue of its work on the topic and an indication of the direction it intended to take in the future. There was no need to wait to implement that propoeal until the Commission reached a natural break in its work on the topic, which might *not* be for several years. A report presented as soon as possible would allow the Sixth Committee to take a decision, perhaps as early as the next session of the General Assembly, on the future direction of work on international liability for injurious consequences arising out of acts not prohibited by international law.

70. Mr. VOICU (Romania) presented his aomments on the report of the International Law Commission chapter by ahapter and specified that they were of a preliminary nature, since the proposed draft articles required more extensive reflection and analysis. With regard to the first two chapters, he noted that the Commission had devoted the greatest number of meetings (16) to the topio "Draft Code of Crimes against the Peace and Seaurity of Mankind". Since that topio was dealt with under a separate item on the General Assembly's agenda, his delegation would discuss it when that agenda item was considered.

71. At the previous session, his delegation had made a number of observations on the draft articles relating to jurisdictional immunities of States and their property (ohap. III); it was pleased to note that the Commission had taken those observations into account. In accordance with Romania's proposal, the Commission had decided to replace the expression "limitations on" or "exceptions to" vith a more neutral formulation: "Activities of States in reepeat of which States agree not to invoke immunity@*.

72. Chapter IV on the law of the non-navigational uses of international watercourses illustrated the usefulness of the Special Rapporteur's analyses. He noted that there was no definition of the term "regulation" in article 25. The definition adopted by the International Law Association in 1980 seemed satisfactory and should be taken into consideration. With regard to article 26 on joint institutional management (para. 275), the best approach would be to *draft* recommendations on which States could base their own definitions of the responsibilities and powers of the organ they decided to establish. From *that* standpoint, he questioned the appropriateness of dealing with problems related to armed conflicts by means of a framework agreement. Such an approach oould impinge on the law relating to armed aonfliats or on other studies being conducted by the Commission itself, such as that on orimes against the peace sad *security* of mankind. Lastly, annex I on the implementation of the draft articles could be the starting point for *an* optional protocol.

73. Chapter V of the report showed that the Special Rapporteur on the question of State responsibility had successfully dealt with the main aspects of his subject: the rubstsntive consequences arising from an internationally wrongful act other than cessation and naturalis restitutio, and reparation by equivalent, satisfaction and guarantees of non-repetition. He had also dealt with the question of the impact of fault, in a broad sense, *on* the forma and degrees of reparation. That was a very complex issue, and the Special Rapporteur had had *to* cite a large number of old arbitral awards rather than relying on more recent data, However, he had established a certain balance *in* his research by recoqnisinq the importance of diplomatic practice, It was through such practice, in fact, that general international law was developed. Analysis of it was therofore relevant, especially in view of the scarcity of international case-law *on* the subject.

74. With regard to draft article 8 proposed by the Special Rapporteur (footnote 247), on "Reparation by equivalent", further consideration should be given to the title in order to avoid any ambiguity. The concept of reparation by equivalent was founded on a well-known and relatively clear principle. Moreover, the Permanent Court of International Justice had provided an excellent point of

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departure. The terminology used in paragraph 2 of the artiole should be refined; for ● xamplo, thr expression "economically assessable damage" was a self-evident description, for it meant that in order to be compensated, damage had to be assessable in economic terms. In the same paragraph, it would be preferable to retain tho ● xpresaion *@moral damage" beoause the proposed alternative expression, "immaterial damage", oould give rise to interpretations that diverged widely from the meaning normally attributed to that expression.

75. Article 9 on "Interest" (footnote 262) had a teahniaal aspect but benefited from a flexible formulation, as could be seen from the second paragraph proposed in the report. It seemed loqioal and normal that compound interest should be awarded whenever necessary in order to ensure full compensation, and that the interest rate should be the most suitable to achieve that result. However, se members of the Commission had said, it was preferable not to go into detail. Lastly, the decision on the placement of the article should be taken when the entire set of draft articles was complete.

76. Article 10 on "Satisfaction and guarantees of non-repetition" (footnote 263) dealt with a very delicate issue. In practice, the injured State often had difficulty in obtaining full and complete satisfaction. The distinction between moral injury and legal injury must be examined with the utmost care because its importance was practical as well as theoretical, particularly in cases involving rules of international law on the protection of human rights and of the environment. The language of paragraph 4 of the article should be refined, but should continue to express the idea that the forma of satinfaction should not be humiliating to States or inconsistent with their sovereign equality.

77. The impact of fault on the forms and degrees of reparation (paras. 408-412) was a question which deserved more extensive discussion. The attribution of fault to a State was highly complex, *and* practice varied considerably. According to some members of the Commission, fault by State agents should not be imputed indiscriminately to the State. That idea, which was mentioned in paragraph 412, should be analysed with care.

76. Chapter VII of the report, on international liability for injurious consequences arising out of acts not prohibited by international law, set out the schematic outline proposed by the Special Rapporteur, which his delegation found entirely aaoeptable. Mention should be made of the timeliness of, inter alia, article 8 on Prevention (footnote 307), under which States of origin must take appropriate measures to prevent or minimize the risk of transboundary harm. Consultations had an important role to play in that connection and the States concerned were called upon to consult in good faith and in a spirit of co-operation.

79. Consultations did not, however, preclude unilateral preventive measures. Draft article 16 entitled "Unilateral preventive measures", proposed by the Special Rapporteur (footnote 310), was thus wholly relevant. Mention should be made of the practical value of a proposal which required the State of origin to counteract the effects of an incident that had already occurred and that prenented an imminent and grave risk of causing transboundary harm.

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80. The question of determining whether the future oonvention would apply to harm caused in the territory of a single State or in the territory of several States was not of the essence. If suoh harm affected several States, there must obviously be rules whioh would apply to that de facto situation, However, if the aotivity of *a* State caused harm to the "global commons@@, the situation went beyond the scope of the draft *in* preparation. There were other aspects of those "global commons" which would *have* to be regulated in a different way from territories which fell within the sovereignty of a State. Lastly, the future convention would have to incorporate the direot liability of transnational corporations which operated in the territory of other States and whose activities caused transboundary harm.

81. Mr. LOULICHKI (Morocco) said that, in considering the draft artioles on international liability for injurious consequences arising out of acts not prohibited by international law as a whole, *one* oould not fail to note the great flexibility, and sometimes uncertainty, whioh was a feature of some of the draft articles and which derived either from a perceived divergence in State practice or from the absence of a etable practice reflecting a customary norm. His delegation therefore fully understood the oaution with which the Speoial Rapporteur was approaahinq a topic that primarily involved the progressive development of international law and related to situations eaoh of whiah had its own specific features.

82. Responding to the questions raised by the Commission in paragraph 531 of the report, his delegation said that it agreed with the Speoial Rapportour that there oould be no *major* difference, from the standpoint of the legal régime, between activities involving risk and activities with harmful effects. At the same time, it could not agree with the view that the scope of the articles should be specified in the form of a list of harmful activities or substances. A general definition would seem more in line with the Commission's aim of arriving at a framework convention with universal scope.

83. With regard to draft article 10 (footnote 308), which dealt with non-discrimination between the effects of activities that arose in the territory of one State and those arising in the State of origin, the provision, which would guarantee domestic remedies to foreigners on the same footing as to nationals, would be applicable in the case of similar or comparable legal systems but could not be imposed in the form of a convention on States parties with differing legal systerns. On the other hand, such States could include a provision to that effect in bilateral agreements.

84. Article 17 (footnote 312) should be brought into line with article 9 (footnote 307) : the latter article established the principle that reparation should seek to restore the balance of interests affected by the harm, while the former listed the factors to be taken into account in achieving a balance of interests. His delegation agreed with the Special Rapporteur's comment in paragraph 500 that the factors listed in article 17 "were not truly legal norms and hence they might be inappropriate for inclusion in these draft articles". It did, however, recoqniae that the reference to a balance of interests was relevant in the

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oontext of ohapter III of the draft articles, which dealt with the obligation of prevention and its consequences, In that regard, draft article 20 (footnote 314) provided for the prohibition of an activity if transboundary harm could not be avoided or could *not* be adequately compensated.

85. In view of the importance of prevention in the draft artiolee, the Commission should eliminate from the wording of the obligations arising under chapter III terms which would weaken its scope, such as "in an attempt to establish a régime" (art. 14), "encouraging the adoption of compulsory insurance" (art. 16) or "should withhold authorization" (art. 17). In his delegation's opinion, failure by a State to comply with its obligations should also have more deterrent consequences than the mere prohibition of an injurious activity.

86. Chapter IV of the draft articles concerned compensation for harm and the liability attributable to the state of origin or *the* operator. In that respect, draft article 21 (footnote 315) established the obligation of the State of origin to negotiate with the State affected by an injurious tranaboundary activity "bearing in mind that the harm must, in principle, be fully compensated". His delegation would prefer the article to establish, in an opening paragraph, the principle of compensation and to indicate, in a second paragraph, the circumstances which would justify limited reparation. With regard to the choice of the party to be held liable for tbe transboundary harm, if the Commission decided to retain the lisbility of the operator, it would have to establish a link between the operator and the State of origin and stipulate a residual lisbility on the part of the latter, the main aim being to ensure the best possible reparation for the harm. The Special Rapporteur had proposed two alternatives for draft article 25 (footnote 316) ooncerninq cases in which there was a plurality of States of origin. The second alternative, which envisaged a shared liability between the States of origin in proportion to the harm which each one of them had caused, was more realistic and seemed to have a better chance of acceptance by States parties. The Special Rapporteur had therefore been right to recommend its retention.

87. Draft article 24 provided for the submission, through the diplomatic channel, of claims for reparation. Such a procedure relied on the prior exhaustion of domestic remedies, a condition which the Commission should take into account in the draft as a whole.

88. Finally, his delegation doubted the usefulness of draft articles 26 and 29, but thought it appropriate to include in the draft some general considerations regarding the legal régime applicable to areas beyond national jurisdiction of States (pars. 526). It hoped that, at its next session, the Commission would direct its endeavours towards firmly establishing the main concepts on which that aspect of liability should be based.

89. Mrs. OBI-NNADOZIE (Nigeria) said that draft articles 8 (Reparation by equivalent), 9 (Interest) and 10 (Satisfaction and guarantees of non-repetition), as proposed by the Special Rapporteur on State responsibility, were of particular interest to her delegation.

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90. With regard to draft article 8 (footnote 247), her delegation agreed that the dictum of the Permanent Court of International Justice in the Chorzów Factory case, namely, that reparation was to wipe out all the legal and material consequences of the wrongful act, should serve as the starting point for formulating the provisions on reparation by equivalent. It was only logical that monetary or pecuniary compensatory measures should be adopted in the application of that dictum both to injured nationals *and* States.

91. Her delegation hoped that further studies *on* paragraph 2 *of* that draft article would clarify the criterion of "economically assessable damage" and would avoid controversial interpretations. It also believed that the economic assessability of damage should be based an the degree of damage rather on the financial status of the offending State. It agreed with the general principle in paragraph 3, provided that the loss of profits was real and could be assessed. Lastly, the uninterrupted causal link mentioned in paragraph 4 remained an important and valid criterion, although it might lead to unlimited liability *for* a State.

92. Draft article 9 (footnote 262) posed a problem for her delegation. While noting the reasons adduced by some members *of* the Commission for its total deletion, her delegation felt that it was still necessary to provide for interest to be paid on the amount awarded as principal, as that might prompt the State which had committed an internationally wrongful act to accelerate payment *of* the principal.

93. On draft article 10 (footnote 263), entitled "Satisfaction and guarantees of non-repetition*', her delegation agreed with the Special Rapporteur that satisfaction was characterized by its retributive *or* punitive nature (para. 390). However, it wae not a punitive measure. The *reference* to "moral *or* legal injury" needed clarification, since the dignity, honour and prestige of the State were part of its sovereign rights.

94. Turning to chapter VII of the report, on international liability for injurious consequences arising out of acts not prohibited by international law, she welcomed with satisfaction the provisions *of* chapter III of the draft, on prevention, which called for assistance by international organizations to developing countries. It was also important to stress that the welfare *of* other sovereign States should be a legitimate *concern* of all States. Therefore, in a situation where the assessment of a proposed activity showed that transboundary harm could not be avoided or could not be adequately compensated, authoriaation for such dangerous activity should be refused. The activity should even be banned unless the necessary preventive measures were taken. If traneboundary harm still occurred, the State of *origin* should be held liable and should be required to indemnify the injured State. It was the responsibility of States to ensure, through the mechanisms at their disposal, that the activities conducted in their territory did not cause harm to other States. Compensation and reparation should always be commensurate with the harm caused. However, the fact that injuries often tonk a long time to manifest themselves underscored the need *for* the criterion of a causal link between the wrongful act and the injury.

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95. Although the idea of a list of dangerous substances had its merits, such a list could never be exhaustive and therefore would create loopholes for bad and harmful conduct.

95. Lastly, her delegation looked forward to the outcome of future work on harm to areas beyond national jurisdiction (para. 526), which were particularly important with respect to the environment, and believed that the Commission should place more emphasis on that aspect at its next session.

97. Mr. VUKAS (Yugoslavia) said that although the three new draft articles prepared by the Special Rapporteur on State responsibility stated the general principles of applicable law on the subject, a general question remained to be answered: namely, to what extent such general principles could satisfy the problems of State responsibility in various fields of contemporary international law (including the use of nuclear energy, economic relations between States, the global environment, human rights and the rules of warfare). The future development of the law on State responsibility probably would lead to the establishment of specific rules in specific fields of international law, and the general principles stated in the draft would serve as residual rules.

98. Draft article 8 (footnote 247) was generally acceptable to his delegation, for it correctly reflected the existing law. In respect of paragraph 1, his delegation preferred alternative (a), which was simple and clear in legal terms. It would also prefer to see the reference to "any moral damage sustained by the injured State's nationals" transferred from article 8, paragraph 2, dealing with pecuniary compensation, to article 10, dealing with "satisfaction". The paragraph should have included a provision on the material damage sustained by the injured State's nationals.

99. It was true that besides damnun emergens, compensation under article 8 shoald also include lucrum cessans. Paragraph 4 of the article stated that only the existence of an "uninterrupted causal link" between the internationally wrongful act and the damage justified pecuniary compensation. However, there were situations in which States should be held responsible for damages although there had been an interruption between the beginning of the harmful activity and the wrongful act. Like draft article 7, regarding restitution in kind, draft article 8 should contain limitations, particularly if damage had not been caused by wilful intent.

100. In the opinion of his delegation, there was no aeed for a separate draft article 9 (footnote 262). The problem of interest should be considered within the general framework of lucrum cessans, dealt with in article 8, paragraph 3.

101. In general, his delegation had no problems with draft article 10 (footnote 263), but felt that the notion of "legal injury" in paragraph 1 should be studied more thoroughly. In respect of paragraph 2, it noted a discrepancy between the title and the content of the draft article: "guarantees of non-repetition" were mentioned in the title separately from satisfaction, while in the body of the

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paragraph they figured as one of the forms of satisfaction. He was therefore pleased that the Special Rapporteur was prepared to consider a separate article for guarantees of non-repetition.

102. Turning to chapter VII of the report under consideration, on international liability for injurious consequences arising out of acts not prohibited by international law, he said, firstly, that in the title of the article the expression "international liability" should be replaced by "State liability", since draft article 9 (footnote 307) provided that "the State of origin [should] make reparation for appreciable harm caused by an activity carried out in its territory or in other places under its jurisdiction". Whatever the eventual decision of the Commission concerning the liability of the operator, at least residual liability should remain with the State of origin. The close link between that topic and the question of State responsibility had been pointed out by the Commission during its discussion of liability for harm to areas beyond national jurisdiction.

103. As other delegations had pointed out, the inclusion of a list of dangerous substances in article 2 would hardly help to clarify the scope of the draft articles, since the list could not be exhaustive. Such a list could, however, be annexed in the form of guidelines. The same applied to the long list of factors, now appearing in draft article 17 (footnote 312), to be taken into account to achieve an equitable balance of *interests among* the States concerned.

104. In addition to the changes *already* made in the definition of "transboundary harm" in draft article 2 (g) (footnote 305), his delegation believed that the scope of the notion should be broadened to include not only territories under the jurisdiction or control of another State, but also areas beyond national jurisdiction, such as the high seas, the sea-bed, Antarctica and outer space. Naturally, such a change in the definition of "transboundary harm" would also require a consequential change in other parts of the draft. Although his delegation recognized that it would not be easy to adapt the present draft articles by including the so-called "global commons", it did not think that their protection should be restricted to State responsibility for lawful acts.

105. Mr. YEPEZ (Venezuela), recalling the second report of the Special Rapporteur on the question of State responsibility, pointed out, with respect to the distinction drawn between "material" and "moral" damage, that damage to a State or individuals resulting from an internationally wrongful act could be of both types. Generally speaking, material damage was easy to define, as were its consequences. "Moral" damage, however, did not entail a patrimonial loss, and was analysed in terms of suffering or the moral injury to the victim whose rights were affected as well as to his honour, prestige or dignity, which were intangible notions that must be defined to some extent, even if it was difficult to measure them in monetary terms and compensate them by means of pecuniary reparation or satisfaction. His delegation favoured maintaining the notion of moral damage *in* domestic law and in international practice.

106. The objective of the principle of "reparation by equivalent", generally accepted in the doctrine, was to restore for the injured party the situation which

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would have existed if the harmful act had not occurred. It therefore implied that the reparation should be identical or equal to the damage, namely, neither less than or more than such damage. Although *in* international practice the criterion was not applied in all cases, consideration of the subject required taking all possibilities *into* consideration and seeking solutions that were generally acceptable both in cases where there was a contractual responsibility and in cases where there was no contractual responsibility. Furthermore, the draft articles should not have the effect of restricting the autonomy of the parties. It might therefore be useful to insert a provision which expressly stated that specific types of compensation represented acknowledgement of responsibility for, and reparation of, the damage.

107. With regard *to* draft article 8, entitled "Reparation by equivalent" (footnote 247), he said that his delegation preferred the text proposed for paragraph 1 in alternative (a) which, although identical to alternative (b) as far as the substance was concerned, was better phraeed from the standpoint of *form*, although it could still be improved. Paragraph 1 should contain the following interdependent elements: the right *of* the injured State to claim from the State which had committed the wrongful act pecuniary compensation, the obligation of the latter State to make restitution for damage by paying compensation, and the fact that the purpose of pecuniary compensation was to make good any damage not covered by restitution in kind. If all those elements were combined in a suitable manner, the paragraph would be acceptable.

108. With regard to the inclusion *in* the draft *of* a specific provision concerning interest (art. 9, footnote 262), he said that his delegation felt a priori that such a provision would serve no useful purpose and could give rise to controversy. Indeed, State practice with regard to interest rates, dies a quo, compound interest and terms differed from one country to another, and might be irreconcilable. It would be more logical, in order to take interest into account in calculating *compensation,* to establish *in* the draft articles the obligation to pay interest so as to ensure full reparations for the damage, and draw up a general provision whereby the details would be left up to the courts. Such a provision could be included in article 8 or elsewhere.

109. Draft article 10, concerning satisfaction and guarantees of non-repetition (footnote 263), was acceptable, although it could be improved in the light of the views expressed during the debate in the International Law Commission and the Sixth Committee. In paragraph 1, the *reference* to "legal injury" should be deleted, since that concept was implicit in any wrongful act. It would be sufficient, therefore, to speak of "moral *injury*" resulting from any injury to the State's dignity, honour or prestige.

110. As far as the forma *of* satisfaction were concerned, it would be better to draw up a general provision without going so far as to establish the form such satisfaction should take; perhaps one might stress the idea of "guarantees of non-repetition of the wrongful act", in reference to the wrongful act which gave *rise* to the injury, whether it was of a pecuniary nature or not.

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111. With regard to the question of the impact of fault on the forms and degree8 Of reparation, he said that his delegation was inclined to hold the view, widely accepted in practice, that fault played a significant role in determining the consequences of a wrongful act, which must be left to the determination of appropriate decision-makers such as international arbitral tribunals and courts.

112. Turning to the question of international liability for injurious consequences arising out of acts not prohibited by international law, he said that he agreed with the Special Rapporteur that activities involving risk and activities with harmful effects had more features in common than distinguishing features, and that it should therefore be possible to examine their consequences in a similar manner under a single régime. he also agreed with the Special Rapporteur's idea of proposing the establishment of a single régime for both types of activities in which there was a need for notification, information and consultation between the States concerned. That did not mean, however, that the definition of activities with harmful effects might not include those activities which caused damage, when the risk of damage had not been foreseen.

113. With regard to the *scope* of the draft, he said that his delegation agreed with the Special Rapportout that it might be advisable to follow the approach taken by the Committee of Experts for the European Committee on Legal Co-operation of the Council of Europe, i.e., to define inti insically dangerous activi tier in relation to the concept of dangerous substances, a list of which had been annexed to the rules, and what was done with such substances, namely, handling, storage, production, unloading and similar operations. The list could be as long as possible without being exhaustive. As envisaged in the draft articles, dangerous substances could be defined as those which created a significant risk of harm to persons or property or the environment. Such a system would have the advantage, on the one hand, of providing the necessary flexibility to avoid unduly restricting the scope of the draft and, on the other hand, of allowing for considerable precision.

114. In tho view of his delegation, articles 1 and 2 of the draft were acceptable as they stood, but the wording of article 2 (a), which referred to "activities involving risk", should be re-examined in order to include other activities in the definition; in subparagraph (f), the concept of "activities with harmful effects" should be more clearly defined. Subparagraph (h), which referred to "[Appreciable] [Significant] harm', should be developed end clarified, since it posed a number of conceptual difficulties when it came *to* a comparison with negligible harm, which was normally tolerated, and which had not been defined either. With regard to articles 3, 4 and 5, his delegation agreed that the title of article 3 should be raf ined, and that article 4 should be brought into line with the Vienna Convention on the Law of Treaties. Article 5 could also be improved.

115. His delegation shared the view that flexible procedural rules should be envisaged to secure preventive measures. It therefore agreed with the wording of articles 11 and 12, although it wished to point out that that should not preclude further examination of the role of international organizations which might participate in preventive activities.

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(Mr. Yepes, Venezuela)

116. He doubted whether it was either necessary or advisable to bring in the factor8 or criteria intended to give content to the concept of balance of interests in article 17, because what was sought was not so much a set of legal *norms a8* of guideline8 which States might or might not wish to take into account in their consultations or negotiations. Finally, hi8 delegation was in favour of maintaining article8 18, 19 and 20. Article 18 reconciled the fact that failure to aomply with the obligation8 of prevention, particularly in the matter *of* procedure, should not constitute grounds for a potentially affected State to institute proceeding8 and the fact that failure to comply with those obligations should entail certain consequences, in particular, that of preventing the State *of* origin from invoking the provision8 of draft article 23 in its favour.

117. Referring to paragraph 531 of the Commission's report, in whiah it requested the views of Governments, he said that hi8 delegation took the position that any transboundary harm gave rise to liability, regardless of *any* preventive measures that might have *been* taken by the State *of* origin. Hence, the draft articles should expressly state that any traneboundary harm entailed the obligation to pay compensation, instead of merely establishing the obligation to negotiate such compensation.

118. F'nally, on the question of determining which party was liable, i.e., the question of establishing whether the State of origin or the operator should be held liable, his delegation favoured the view that, without prejudice to the liability *of* operators, owners, carriers and others, the primary liability should fall on the State of origin because, in the final analysis, the State of origin exercised control over the activities carried out in it8 territory, *and* it was responsible *for* ensuring that such activities did not cause injury *to* others. Consequently, article 21 should clearly establish the obligation to pay compensation, and the idea that it must he full compensation, Another provision might also be included to establish under what circwnstancee compensation might be reduced.

The meeting rose at 6.25 p.m.