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SUMMARY RECORD OF THE 26th MEETING

Chairman:	Mr. AL-SUWAIDI (Vice-Chairman)	(United Arab Emirates)
later:	Mrs. FLORES (Chairman)	(Uruguay)

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In the absence of Mrs. Flores (Uruguay), Mr. Al-Suwaidi (United Arab Emirates), Vice-Chairman, took the Chair.

The meeting was called to order at 3.20 p.m.

AGENDA ITEM 143: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FIFTH SESSION (continued) (A/48/10, A/48/170-S/25801 and A/48/303)

1. Mr. STANCZYK (Poland), referring to the topic of State responsibility, said that with regard to the dispute settlement regime, his delegation shared the view of those who preferred the "theoretically ideal" solution proposed by the Special Rapporteur. There was reason to believe that owing to the change in States' attitudes towards compulsory settlement procedures such procedures might become the norm in a few years, which would be a welcome and natural development. None the less, if the second alternative proposed by the Special Rapporteur attracted more support in the Sixth Committee, then that choice should be respected. It was quite possible to have a two-part dispute settlement procedure, a basic part, geared to contemporary realities, and a second more progressive part, in the form of optional provisions which would be binding only on those States that had expressly accepted them.

2. Chapter I of the Special's Rapporteur fifth report raised more questions than it answered. It had, however, the undeniable merit of touching upon all the core issues that the International Law Commission and the Sixth Committee would have to consider in their future discussions on dispute settlement. His delegation considered it premature at the current stage to comment on chapter II on international crimes: that chapter had not yet been considered by the Sixth Committee and it dealt with very complex issues giving rise to views which would be difficult to reconcile.

3. Part two of the draft articles on State responsibility called for a number of observations. Article 6, solidly anchored in current international practice, did not seem controversial. Nevertheless, it was unfortunate that the distinction between cessation of wrongful conduct and restitution might get blurred since the provision on reparation was a general one and did not distinguish between wrongful acts having a continuing character and all other types.

4. In respect of article 6 bis, his delegation agreed as a matter of principle that, in the determination of reparation and particularly pecuniary compensation, account should be taken of the negligence or the wilful act or omission of the injured State, or a national of that State. While those factors might influence the choice of a particular form of satisfaction, they were not applicable to other types of reparation. It might, therefore, be better to place the reference to negligence or the wilful act or omission in article 8 and to adopt it by reference in article 10 rather than to place it in article 6 bis.

5. The definition of restitution in kind contained in article 7 co-existed in international practice with another definition according to which restitution should aim at re-establishing the situation which would have existed if the wrongful act had not been committed. The apparent inconsistency between the definition in article 7, which did not cover compensation for lucrum cessans,

(Mr. Stanczyk, Poland)

and article 8, paragraph 2, which envisaged compensation which covered, where appropriate, loss of profits, disappeared if one considered that the different forms of reparation could be combined and did not necessarily have to be applied singly. Paragraphs (c) and (d) of article 7 might turn out to be difficult to apply as they could be interpreted in various ways. In practice, their application would depend greatly on whether parties to the future instrument had available a viable dispute settlement procedure.

6. In respect of article 8, it might, inter alia, be useful to specify which consequences of a wrongful act might entail financial responsibilities for the author, and the nature of the causal link. There was no agreement in international practice as to whether compensation should be paid for lucrum cessans or as to the nature of the interest and the method of calculating it. That meant that States would have a large amount of discretionary power. It was also appropriate to emphasize the principle according to which pecuniary compensation could only be demanded by the directly injured State, within the meaning of article 5. Article 8 envisaged compensation for economically assessable damage, while article 10 covered moral (political) damage. In his delegation's view, that option was debatable in view of international practice, which was not uniform.

7. The wording of paragraph 1 of article 10 seemed to suggest that satisfaction was merely a supplementary form of reparation. For his country, it was the only possible form in the case of political (moral) damage. A court decision or arbitral award declaring the wrongfulness of the act should be considered as a separate form of satisfaction. Paragraph 2 (c) provided in essence the possibility of applying a punitive measure to the wrongdoing State, a concept that lacked support in both practice and doctrine.

8. Lastly, it could be asked whether the application of article 10 bis might lead to humiliating demands on the State that had committed an internationally wrongful act. After all, an apology offered in application of paragraph 2 (a) of article 10 would contain, at least implicitly, assurances of non-repetition. In practice, demands for satisfaction and assurances and guarantees would probably go together.

9. The draft articles did not contain any suggestions as to considerations which might guide States in their choice of one or more forms of reparation. It should be borne in mind that excessive demands might lead to aggravation of a dispute rather than to its resolution. There again, a dispute settlement procedure relating to the interpretation and application of the articles might be of value.

10. Mrs. Flores (Uruguay) took the Chair.

11. Mr. CORELL (Sweden), speaking on behalf of the Nordic countries, said that the goal of the Commission's work on international liability for injurious consequences arising out of acts not prohibited by international law was to elaborate a draft instrument which would not only prevent damage but also provide reparation in the case of damage, thereby protecting innocent victims. Where damage had occurred, compensation should be prompt and adequate. The

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Commission's decision to consider the issues of prevention and remedial measures separately might cause undesirable delays, harmful above all to the innocent victims of transboundary harm, who had a moral right to compensation. For the benefit of those victims, the Commission should deal simultaneously with the questions of prevention and remedial measures.

12. In the opinion of the Nordic countries, the work on the topic of international liability should take the final form of a framework convention with binding force. Since the issue was being considered in other international forums, it was important to coordinate efforts. A declaration, or a statement of principles, by the Commission would help avoid confusion in that area and would be a step towards the successful completion of the convention. Moreover, such a declaration might serve as the basis for a more detailed consideration of the topic by the Commission. The declaration should reaffirm that States were responsible for ensuring that activities under their jurisdiction or control did not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. It should also encourage States to enact and implement environmental legislation and remind them of the principles embodied in the Rio Declaration concerning international partnership and cooperation in good faith.

13. As to the question of the non-navigational uses of international watercourses, the Nordic countries noted with appreciation that the Commission's Drafting Committee had adopted articles 1 to 10 on second reading. Since the Commission was to resume consideration of the topic at its next session, they would refrain from commenting at the current stage.

14. In regard to the planning of the Commission's activities and its working methods, the Nordic countries noted with appreciation that the Commission had planned its activities with a view to achieving as much progress as possible on specific topics. The Commission's ambition to complete in 1994 the draft statute for an international criminal court showed not only that it regarded the topic as a matter of priority but also that it was able to adapt its working methods and focus its resources in response to the international community's particular needs.

15. The Nordic countries had taken note of the two new topics proposed by the Commission for inclusion in its long-term programme of work. The proposed topic "The law and practice relating to reservations to treaties" was regarded as very important by the Nordic countries, which were gravely concerned by the continuously increasing number of reservations to treaties in the area of human rights. In some cases, those reservations negated the very meaning of the ratification of a treaty by States. The Nordic countries therefore fully supported the recommendation that the topic should be added to the Commission's agenda.

16. The other proposed topic, "State succession and its impact on the nationality of natural and legal persons", also merited consideration by the Commission, given the recent tendency to place emphasis on ethnic origin rather than domicile in granting nationality. It seemed clear that the formulation of guidelines and uniform minimum requirements for new States in the process of

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drafting law in that field would be of great importance, both as assistance to lawmakers and as a contribution to the protection of human rights.

17. Mr. FRENCH (Australia), speaking on the topic of international liability for injurious consequences arising out of acts not prohibited by international law, stated his country's reservations regarding the Commission's decision to deal exclusively with preventive measures before considering remedial measures. It was Australia's view that the Commission should devote much of its time to the issue of compensation, and it did not want the work being done on prevention of transboundary harm to take precedence over the other matters. Consideration of prevention could be only the first stage. From a legal perspective, the work of the Commission on remedial measures would be more important than the work on preventive measures.

18. With regard to the character of the obligations which States were expected to assume, Australia had reservations about the proposition that a State which complied with its obligation to exercise "due diligence" should not be liable if transboundary harm occurred. It was Australia's view that the activities of private entities could create inescapable obligations for the State of which they were nationals. A regime of strict liability was best suited to creating a balance of interest between the States concerned and the protection of victims of acts with injurious consequences.

19. Australia wished to express concern at the tendency within the Commission to raise the threshold at which acts by individuals and States might become actionable under the drafts before the Commission. That trend had the effect of placing an unacceptably high burden upon the victims of transboundary pollution and other acts with injurious consequences.

20. Australia also wished to emphasize that, while it recognized that the principal focus in relation to international liability must be on transboundary harm to other States, damage to the global commons deserved consideration and coverage by legal rules.

21. With regard to the form of the instrument that would embody the work on international liability, Australia believed it would be highly desirable for a legally binding treaty to be drafted in order to dispel, to the extent possible, the ambiguity of the concept of international liability. It might, however, be useful as an interim measure to formulate guidelines or statements of principle.

22. Turning to the issue of State responsibility, he said that Australia found the specific articles dealing with reparation, restitution, compensation and satisfaction to be generally satisfactory. In particular, it welcomed the recognition in article 6 (bis) of the need to take account of the negligence or the wilful act or omission of the injured State or national of that State which had contributed to the damage. It suggested that further thought should be given to the possibility that the conduct of other States would affect an award of compensation. It would welcome the drafting of provisions to reflect that possibility.

23. Australia had reservations concerning article 7 (d), which provided that restitution in kind was not mandatory for the wrongdoing State if it seriously

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jeopardized its political independence or economic stability, whereas failure to obtain restitution in kind would not have a comparable effect on the injured State. In Australia's view, that injected an unfortunate degree of relativism into the determination of the circumstances warranting restitution in kind.

24. Australia also welcomed the adoption by the drafting committee of the draft articles on countermeasures. It would not comment on that subject until the articles had been supplemented by commentaries and adopted by the Commission. It would suffice to say that Australia accepted the concept of countermeasures as a permissible means of redress in certain circumstances, in the absence of an effective system of dispute settlement. That being the case, should countermeasures be employed, it was better that they should be within the strictures of an internationally agreed framework.

25. Australia noted with interest the discussion that had taken place on dispute settlement procedures. It supported the proposal by the Special Rapporteur for the development of a mechanism to deal with disputes which might arise from the taking of countermeasures. That was a reasonable approach to addressing circumstances in which countermeasures were employed by an allegedly injured State before all avenues of settlement had been exhausted.

26. Australia strongly supported the idea of using the United Nations Decade of International Law to propose a minimum dispute settlement mechanism. That should not, however, exclude the possibility of States' agreeing to more extensive or supplementary mechanisms, including bilateral treaties or acceptance of the compulsory jurisdiction of the International Court of Justice.

27. In regard to the future work of the Commission, Australia supported its decision to add two further topics to its programme of work, namely "Law and practice relating to reservations to treaties" and "State succession and its impact on the nationality of natural and legal persons". Australia's initial view was that an amendment to the Vienna Convention on the Law of Treaties should not be the aim of discussions on reservations to treaties. It would be preferable to envisage a statement of principles analogous to the general comments of the Human Rights Committee on particular articles of the International Covenant on Civil and Political Rights. On the question of State succession with respect to nationality, Australia endorsed the proposal in the report of the Commission that the most appropriate path would be one that led to a statement of principles to be adopted by the General Assembly rather than a convention, particularly in view of the history of conventional international law in that area.

28. Mr. KOTZEV (Bulgaria), referring to chapter III of document A/48/10, said that it would be necessary to examine further the comprehensive concept of prevention, which comprised an obligation to prevent the occurrence of an accident (prevention ex ante) and an obligation to contain or reduce the extent and scope of harm once it had occurred (prevention ex post).

29. It would be necessary to adopt a differentiated approach to those two regimes of prevention, taking into account the legal consequences of the obligations deriving from them. While in the case of prevention ex ante, preference should be given to precautionary measures aimed at preventing the

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occurrence an accident causing significant harm, the same was not true in the case of prevention ex post, where the obligation was to reduce, control or minimize the harmful effects. Several provisions of the United Nations Convention on the Law of the Sea mentioned the need, when dealing with the protection of the marine environment, to prevent, reduce and control pollution of the marine environment.

30. Accordingly, it might be advisable, at the current stage, to concentrate on the study of prevention ex ante, without excluding the need to examine the legal consequences of preventive measures ex post from the standpoint of the clean-up obligation and the polluter-pays principle.

31. As to the specific draft articles on the topic, his delegation believed that article 11 (Prior authorization) required further consideration, especially in order to determine its legal basis and scope, since the legal nature of the obligation of the State of origin to seek prior authorization depended upon the existence or absence of such a treaty obligation. Where a treaty provision required prior authorization to be obtained for activities liable to cause significant harm, non-performance would constitute a breach of that obligation and would thus entail the responsibility of the wrongdoing State. On the other hand, where there was no such treaty obligation, then the principle of cooperation might be more appropriate. It should also be clarified whether prior authorization would, ipso jure, deprive the injured State of the right to invoke the liability of the State of origin. In his delegation's view, prior authorization should not adversely affect the sovereign rights of any State, and should be based on the principle of the balance of interests. At the current stage, prior authorization should be considered within the framework of the principle of cooperation and good-neighbourliness.

32. Article 12 (Transboundary impact assessment) should be considered in the light of the rights and obligations contemplated in article 11. His delegation agreed with the Special Rapporteur that cooperation was "an essential part" of the obligations under those two articles (A/48/10, para. 143).

33. Article 13 (Pre-existing activities) should be clarified since, in its current form, it contained some ambiguities, for instance, with regard to the legal consequences of the issuance of a warning and the continuation of activities involving risk. His delegation agreed with the Special Rapporteur (A/48/10, para. 152) that the "due diligence" principle embodied in article 14 was "the core of the articles on prevention". That provision might constitute the legal ground for the "polluter-pays" principle. However, it should be borne in mind that a breach of that principle would entail responsibility for damage which had already occurred.

34. The obligations relating to compensation and compulsory insurance should be regarded as innovations from the standpoint of the progressive development of international law, since compensation, in accordance with the existing law, presupposed a breach of an obligation entailing responsibility.

35. Articles 15 (Notification and information), 16 (Exchange of information), and 18 (Prior consultations) should be considered on the basis of the principle of cooperation and due regard for the balance of interests.

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36. Article 20 (Factors involved in a balance of interests), as currently drafted, would benefit from further elaboration. However, article 20 bis (Non-transference of risk or harm) was drafted in conformity with the generally recognized principles embodied in several international instruments, including the Stockholm Declaration of the United Nations Conference on the Human Environment, the Rio Declaration on Environment and Development and the United Nations Convention on the Law of the Sea.

37. Turning to chapter IV of document A/48/10, he said that the express provision in article 6 (Cessation of wrongful conduct) that the cessation of wrongful conduct in the case of a wrongful act attributable to a State should be considered "without prejudice to the responsibility it has already incurred", constituted a very important safeguard clause.

38. With regard to article 6 bis on reparation, the fact that it referred to the whole set of articles on the legal consequences of the wrongful act made it very appropriate. The requirements for the determination of reparation, listed in paragraph 2, were important, as was paragraph 3, which, in accordance with article 27 of the Vienna Convention on the Law of Treaties, prohibited any State from invoking the provisions of its internal law as justification for its failure to provide full reparation. The main aim of article 6 bis was to eliminate the consequences of an internationally wrongful act in order to re-establish the pre-existing situation, as far as possible through restitution in kind, as provided for in article 7, or through compensation, if and to the extent that the damage was not made good by restitution in kind, as stipulated in article 8, paragraph 1 (Compensation), which covered any economically assessable damage. Thus, articles 6 bis, 7 and 8, which established a coherent regime of various forms of reparation for all types of material damage, would find support in wide State practice and jurisprudence.

39. The special provision on satisfaction (art. 10) was useful, in particular, for repairing the moral or political damage caused by the wrongful act. The Commission had taken the right approach in listing in an exhaustive manner in paragraph 2 of that article the forms which satisfaction was likely to take. The safeguard clause in paragraph 3 which prohibited the impairment of the dignity of the State committing the internationally wrongful act was appropriate.

40. Article 10 bis, which gave the injured State the right to obtain from the wrongdoing State assurances or guarantees of non-repetition of the wrongful act, further supplemented the set of remedies available to a State which was injured by an internationally wrongful act. However, it would be desirable to indicate, at least in the commentary to that article, the most appropriate remedies of that kind, taking into account State practice.

41. With regard to the draft articles on countermeasures proposed by the Special Rapporteur (arts. 11 to 14), his delegation believed, first, that countermeasures should be applied with great caution and restraint; secondly, that they should not, as a rule, have a punitive character; and thirdly, that they should be admissible only when all means of peaceful settlement had been exhausted.

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42. As to the provisions which the Special Rapporteur had proposed concerning the peaceful settlement of disputes, his delegation supported, in principle, a comprehensive set of provisions on third-party dispute settlement procedures, including international arbitration, judicial settlement and recourse to the International Court of Justice. In that connection, it shared the view of the Commission that, with the end of the cold war and the trend towards enhancing the rule of law in international relations, a more positive approach should be taken to the establishment of a dispute settlement regime, including a wider acceptance of compulsory third-party settlement procedures.

43. Lastly, with regard to the law of the non-navigational uses of international watercourses, he said first of all that acceptance was an important consideration in deciding whether the draft articles should take the form of a framework convention or model rules. He preferred, however, the solution of a framework convention, on condition that it met the requirements of widespread acceptance.

44. Secondly, his delegation was in favour of the idea of fact-finding and dispute settlement clauses, regardless of the final form. The dispute settlement procedures should be adapted to the particular nature of each watercourse and particular emphasis should be placed on the establishment of appropriate river-basin institutions for cooperation between the States concerned.

45. Thirdly, it supported the proposed amendment to article 1 on the scope of the draft articles, which would insert the word "management" before the word "conservation", which would be in line with the integrated approach to water resources management and protection of the environment as recognized by the United Nations Conference on Environment and Development.

46. Fourthly, it supported the proposed amendment to article 2 (b) concerning "confined groundwaters" and the amendment which would move the definition of "pollution" from article 21, paragraph 1, to article 2, which dealt with the use of terms.

47. Mr. BIGGAR (Ireland) said that consideration of the topic of international liability for injurious consequences arising out of acts not prohibited by international law in both the Commission and the Sixth Committee had become bogged down largely for two reasons, namely over-ambition and conceptual indiscipline.

48. The adoption of a convention on the subject was vital, if only from a practical point of view since the situations envisaged in the draft articles occurred frequently, particularly those in which an accident occurred in the course of normal activity carried out by an individual, a company or a State without anyone being at fault and as a result of which the property of an innocent person in a neighbouring State was damaged. It would clearly be unfair to leave the innocent neighbour to suffer financial loss alone.

49. The principle sic utere tuo ut alienum non laedas therefore applied in that situation and should be the foundation of the convention. If it was accepted that there was no fault on the part of the innocent victim or the operator of an

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activity, it was, for practical and pragmatic reasons, highly acceptable for the State in whose territory the operator was situated to take responsibility for the damage. Furthermore, that responsibility should be objective and rest not on high principles but rather on prosaic considerations linked to everyday life.

50. His delegation considered that the Commission should not as a priority attempt to establish a major principle of law but should set up a legal mechanism which would make it possible to assess the distribution of the economic loss resulting from harm, following the example of the common law system which had confined itself to establishing such a mechanism without going so far as to list the chemical substances which made an activity dangerous or describing every kind of activity in order to indicate a solution for each individual case.

51. There was no point in trying to draw up such a list or of listing all the activities which could be considered potentially dangerous. The Commission seemed, moreover, to be unaware of the fact that dangerous activities and substances could move in space and change in nature. The Commission would surely benefit from being aware of the limitations of its resources and should then attempt only to devise a relatively simple legal mechanism based on clearly defined universal principles.

52. In that context, it was good that the Commission had decided it would be prudent to approach consideration of the topic in stages and to establish priorities. However, it was to be regretted that the Commission continued to think that it might be too early to reach a final decision on the scope of the topic.

53. His delegation did not agree with the opinion of the Commission (para. 109) that once the articles on preventive measures had been fully developed, it might suffice for the Commission to conclude that it might be unnecessary to proceed to the second phase of the work, namely, the formulation of rules on compensation for damage. There, too, the Commission seemed unaware of the fact that no matter what precautionary and preventive measures were taken, accidents would inevitably occur. It would therefore be illogical to stop after considering the idea of prevention.

54. His delegation shared the view expressed in paragraphs 108 to 111 of the report, which rejected the primacy of the notion of prevention and reaffirmed the need for the obligation of reparation, which lay at the heart of the draft convention. If the Commission intended to elaborate an effective convention, it would, in due course, be obliged to consider the formulation of rules on compensation for damage arising out of the occurrence of transboundary harm.

55. Lastly, the Commission tended to lose sight of the question of the disparity of resources between States of origin, States victims of transboundary harm and various operators, and the fact that the subject principally concerned relations between States. While leaving open the possibility of deciding the actual amount of the compensation in negotiations, held in good faith, between the parties, it ignored the fact that in order for the negotiations to be meaningful, the parties to them should be equals or near equals. Neither did it take account of the difference in economic and scientific resources between

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developed and developing countries, which was crucial to the future development of the draft convention.

56. In conclusion, while there was no question of giving up such an important enterprise, the Commission should not err on the side of over-ambition but should make further efforts to elaborate a convention which, while it would not be a panacea, would provide a reasonable means of limiting damage and providing equitable compensation to the victims of activities not prohibited by international law.

57. Mr. CASTELLI (Argentina) remarked that State responsibility was probably the most important topic, but also one of the most difficult, that the Commission had faced, because of the inherent political obstacles, as shown on the one hand by the distinction made in article 19 of Part One of the draft articles between responsibility for international delicts and the criminal responsibility of the State, and on the other hand by the difficulties it had experienced in reaching a comprehensive agreement on article 12 of the draft articles, concerning countermeasures. Accordingly, the Sixth Committee could express a valid view only on the consequences of wrongful acts.

58. The draft articles on the topic adopted provisionally at the 1993 session of the Commission (art. 1, para. 2 and arts. 6, 6 bis, 7, 8, 10 and 10 bis), without being controversial, were none the less important to the extent that they dealt with the essential consequences of a wrongful act and were one of the mainstays of Part Two of the draft, which in fact covered the content, forms and degrees of responsibility.

59. Although his delegation considered that the draft articles contributed, with few exceptions, to the codification and progressive development of the law of responsibility, it nevertheless believed that the corresponding commentaries departed from the doctrinal tradition established by the Commission, according to which the commentaries were intended solely for the appropriate interpretation of the articles they accompanied. It would suggest that they should be revised on second reading in order to adapt them to that tradition.

60. The meaning of article 1, paragraph 2, was not clear since that provision appeared to contradict article 7, which imposed on the State that had committed an internationally wrongful act the secondary obligation of making restitution in kind. In fact that paragraph called in question the logic of the distinction between primary international rules and secondary international rules, which the Commission had felicitously followed until then. Its actual effect was to enable the primary rule to survive a violation and enter the domain reserved by definition for secondary rules and obligations.

61. In contrast, his delegation had no objection to article 6 (Cessation of wrongful conduct). It would probably have been useful to mention in the commentary that it embodied a common practice to which international tribunals often had recourse.

62. Article 6 bis (Reparation) contained the solution adopted in the Chorzów Factory case, or in other words, two forms of reparation, one intended to wipe

(Mr. Castelli, Argentina)

out all the consequences of the wrongful act and the other, to re-establish the situation which would, in all probability, have existed if that act had not been committed. That was the end towards which the legal consequences set forth in the subsequent articles tended, and those articles, if combined, could wipe out all the consequences of the wrongful act as completely as possible and thus effect restitutio in integrum. Indeed, restitution in kind, combined for example with lucrum cessans, could wipe out the damage caused through failure to comply with the primary obligation by re-establishing the pre-existing situation and also providing compensation for the loss of profits suffered in the meantime by the injured State.

63. His delegation still had some reservations about paragraph 2, in which the Special Rapporteur had intended to introduce the notion of fault lato sensu in the reparation stage. Paragraph 3, on the other hand, was quite acceptable, since it invoked a fundamental principle of the law of nations.

64. As for the four exceptions contained in article 7 (Restitution in kind), while the first two (subparas. (a) and (b)) seemed inevitable and the third (subpara. (c)) was acceptable, the fourth (subpara. (d)) referred, according to the commentary itself, to very exceptional situations and might be of more retrospective than current relevance.

65. Article 8 (Compensation) applied that extremely common form of reparation to "any economically assessable damage", combining it, where appropriate, with interest and loss of profits. The Commission was right in establishing in the commentary a distinction between compensation and other types of reparation that might have the character of sanctions and had dealt judiciously with the aspects relating to the causal link (paras. 6 to 13 of the commentary).

66. His delegation considered that the Commission had been well advised to consecrate satisfaction (art. 10) as a legal consequence of the violation of certain obligations, for it made it possible to cover certain types of non-material damage and provide full restitution.

67. As for assurances and guarantees of non-repetition, his delegation felt that they too constituted a way of stepping back in time, or in other words, establishing a trust that had been broken through the wrongful act.

68. In respect of dispute settlement, his delegation considered that it would be possible to gain acceptance by the international community of the Special Rapporteur's proposal that a set of dispute settlement procedures should accompany the draft articles. On the other hand, his proposal regarding the establishment of a compulsory third-party settlement system was problematic.

69. On the question of the consequences of international crimes, his delegation, while realizing that it was not easy to make a pronouncement on that topic on the basis of a preliminary report, would not like to lose the distinction between the consequences of the violation of a unilateral obligation and those of the violation of an obligation sufficiently essential to the safeguard of the fundamental interests of the international community to be considered an international crime.

70. Mr. AL-BAKER (Qatar), referring first to the question of an international criminal jurisdiction, welcomed the result of the proceedings of the Working Group to which the Commission had entrusted the elaboration of the related draft statute. The Group had made a concerted effort to elaborate an integrated text establishing the functions and procedures of the proposed tribunal. Moreover, the draft proposed several alternative versions. Once the text had been considered in the Sixth Committee and the General Assembly, it would be included in a resolution establishing the proposed international criminal tribunal.

71. The topic of international liability for injurious consequences arising out of acts not prohibited by international law was most interesting from the standpoint of environmental law. Protection of the world environment, which involved all peoples, could be guaranteed only if a limit were imposed on activities harmful to the environment, especially when they had transboundary effects. His delegation had followed the Commission's work on that point with interest and hoped that there would soon be an integrated draft text for the protection of the world environment.

72. Turning to the question of the law of the non-navigational uses of international watercourses, he expressed the hope that the draft articles, once completed, would contain a provision that went further than the conventions currently in force and would provide a general multilateral framework to be added to those conventions.

73. Referring to the future programme of work of the International Law Commission, he was pleased that the Commission had responded to the wish expressed by the General Assembly in its resolution 47/33 and had thus decided to take up the question of the "right of reservations" with a view to filling a legal gap and clarifying the ambiguous aspects of the validity of "reservations" as compared with "interpretations". The work on that subject would certainly be an important contribution to the development of public international law. It was also useful for the Commission to contemplate a study on confined groundwaters. It was to be hoped that when the work was completed, the Commission would decide to integrate that subject with the material relating to international watercourses.

74. Mr. LAMAMRA (Algeria) recalled the historical, logical and legal context of the examination of the statute for an international criminal court, which it was difficult to separate from the main question of the draft Code of Crimes against the Peace and Security of Mankind. Indeed, a code without any judicial body to apply it would be pointless, but a court without any prior rigorous definition of the applicable law would be inoperative. The two aspects were inseparable. Such a court, if established, would be meaningless and lacking in any real impact unless the means were provided for repressing acts unanimously recognized by the international community as crimes against the peace and security of mankind, stating them to be such and referring them to the jurisdiction whose establishment was contemplated.

75. Conversely, the elaboration of the draft statute for an international criminal jurisdiction must not slow down the Commission's work on the draft Code. Inasmuch as the draft had already been adopted on first reading, it was highly desirable that the Commission should resume its examination in accordance with its usual working methods. In other words, what was involved was a

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combined enterprise, and the two aspects of the question had to be explored with the same interest and diligence. The current concerns of the international community offered favourable conditions for appreciable progress in that twofold direction.

76. Concerning the nature of the international criminal tribunal, Algeria believed that it should be a permanent institution, not an embryonic structure that sat intermittently on an ad hoc basis. Recent international events had shown to what extent an international criminal court was wanting, for its mere existence would have helped defuse grave crisis situations. True, it had been possible to resort to ad hoc bodies, but they were palliatives that could not be relied on indefinitely. A permanent international criminal jurisdiction would also have the advantage of guaranteeing the objective, uniform and impartial application of international law by avoiding the element of chance inherent in the setting up of a jurisdiction after the occurrence of the reprehensible acts brought before it.

77. Only permanent international judges would be capable of placing themselves above political considerations. Equal, independent and impartial justice could only be ensured by a permanent court comprised of judges elected to rule, in good conscience and through the application of general and objective legal norms, upon the cases referred to them.

78. On the subject of the jurisdiction of the future court, his delegation shared the view expressed by many others that jurisdiction ratione personae should be limited to individuals. However, jurisdiction ratione materiae seemed too restrictive in the draft, in so far as none of the three alternatives proposed in article 23 addressed the need to confer on the court sufficient authority in keeping with its lofty mission. Acceptance by a State of the Court's statute meant acceptance ipso facto of its jurisdiction over all crimes identified as falling within its jurisdiction. Any other solution would call into question the value of the very acceptance by the State of the court's statute.

79. With regard to the law to be applied by the court, the draft articles proposed a formula which must be reviewed and complemented: the listing in article 22 of a number of crimes punishable under existing international conventions. That approach raised several questions, including the question of the compatibility of the provisions of the court's statute with the provisions of conventions relating to the principle "try or extradite". The logical application of that principle could lead in either case to the practical impossibility of submitting cases to the court, since it would be for States to decide whether to try the accused themselves or to extradite him to another country. The Commission's draft attempted to resolve that contradiction by proposing a kind of preferential jurisdiction in favour of the court, but subordinating it to States' good faith alone. From that perspective, the very usefulness of the international court was called into question, since it was to be anticipated that national preference would very often prevail. (Incidentally, the list of crimes contained in article 22, even though supplemented by article 26, was far from exhaustive: international terrorism, for example, was missing from the list.) On the question of applicable law, therefore, Algeria was of the view that the only coherent approach would be to

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establish exclusive jurisdiction over a certain number of crimes against the peace and security of mankind which had been previously identified in a universal code binding on all States.

80. The link between the proposed tribunal and the United Nations presented a problem which had not received all the attention it merited. Algeria held the view that the tribunal should be an organ of the United Nations, not only in order to give it the moral authority of the world body, but also to demonstrate the indivisibility of international law and order. That approach would in no way affect the independence and autonomy of the tribunal and, in that regard, the Statute of the International Court of Justice (ICJ) provided a good example for the election of judges, their status, the automatic acceptance of the Court's Statute by all Members of the United Nations, and the modalities for instituting proceedings.

81. Turning to the question of the international liability of States for both internationally wrongful acts and for injurious consequences arising out of acts not prohibited by international law, he noted that the difficulties that had been encountered with respect to binding dispute settlement procedures were gradually being resolved. The three-step mechanism - conciliation, arbitration, ICJ - proposed by the Special Rapporteur seemed to be sound in principle and perfectly consistent with the means of peaceful settlement of disputes provided for in Article 33 of the Charter. That mechanism also concerned disputes arising out of countermeasures, which should be very strictly regulated. Agreement seemed to have been reached on the need to prevent the escalation of measures and countermeasures, to prevent the de facto inequality of States from being accentuated by a de jure inequality, and to regulate in a restrictive and binding manner recourse to countermeasures.

82. On the question of liability arising out of acts not prohibited by international law, there seemed also to be general agreement on how to approach the subject: completion of the first phase devoted to activities which were liable to cause transboundary harm, followed by the elaboration of rules governing compensation for damage caused, on the basis of principles which seemed to have met with general approval: right to compensation of the party affected by transboundary harm, and the "polluter-pays" principle. In any event, the Commission should continue to focus its attention on that aspect of international liability, since the topic led its work into new directions.

83. The Commission had resumed its consideration of the draft articles on the law of the non-navigational uses of international watercourses, focusing on two major questions. The first was the question of the form of the final product, which had provided an opportunity to confirm the Commission's preference for a framework convention, and it was on that assumption that its previous work had been conducted. The Sixth Committee and the replies of Governments had amply confirmed that choice. The second question, that of the inclusion in the draft articles of dispute settlement provisions, did not appear to create any particular difficulties either.

84. Turning to the Commission's programme of work for the rest of the quinquennium, he noted that the Commission proposed to complete by 1994 its

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second reading of the draft articles on the law of the non-navigational uses of international watercourses, and to make substantial progress on the topic of international liability for injurious consequences arising out of acts not prohibited by international law. It would be necessary, however, for the Commission to re-establish a balance between its work on the draft statute for an international criminal tribunal, whose completion was expected by 1994, and its consideration of the draft Code of Crimes against the Peace and Security of Mankind, which would not be completed until 1996, although it had already been adopted on first reading two years previously. The second reading of both drafts should be completed by 1995. For the long term, it was most important for the Commission to focus its immediate efforts on topics which were already being considered and to identify for the future new topics on which a consensus could be reached and which could guide the Commission's work in the right direction.

85. The period of transition the world was undergoing should restore international law to its proper place as the ultimate point of reference for regulating peaceful coexistence and cooperation among States. On the threshold of the new millennium, the Commission must play an exemplary role.

86. Mr. CAFLISCH (Observer for Switzerland) said that the Commission's work on State responsibility and the non-navigational uses of international watercourses had been characterized by the importance which it had attributed to the issue of the peaceful settlement of disputes. It was true that that type of settlement was the concern of States parties to a dispute, which appealed to a third party only in case of their own failure to settle the dispute. Recourse to the means of settlement must be able as a last resort to lead to a binding settlement based on international law. In the past, the Commission had perhaps not paid sufficient attention to that problem. It justified its approach by referring to the reservations of some States vis-à-vis the intervention of third parties, as well as its concern not to jeopardize the adoption of the substantive rules contained in its draft articles.

87. The international situation had changed, however, and in order to ensure the development of jus gentium, as provided for in the Charter, the Commission should seek to go beyond existing rules, mechanisms and institutions: it should innovate. A diplomatic conference convened for the purpose of considering a draft elaborated by the Commission would not depart from the substantive rules contained in the text just because the text contained provisions for the peaceful settlement of disputes which were considered too progressive. If necessary, it would delete or amend such provisions.

88. In the view of his Government, all general multilateral conventions should provide for peaceful third-party dispute settlement procedures. In the past, conventions drafted on the basis of work done by the Commission had provided either for an optional jurisdictional procedure or for compulsory conciliation. Neither approach was satisfactory. Third-party dispute settlement mechanisms appeared to be particularly necessary in an area with such great potential for disputes as that of the law of the international responsibility of States, particularly in the context of countermeasures. Countermeasures were, in fact, extreme examples of a country taking justice into its own hands, and provision should be made for an impartial and objective party to judge, without delay,

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whether such measures were justified, and, if necessary, to punish the State taking them.

89. There were two aspects that required further clarification. In the first place, the dispute settlement procedure relating to countermeasures should not be too far removed from the general procedure applicable in cases of disputes concerning the interpretation or application of the provisions of the future convention; for the time being, that question could not be settled. In addition, the procedure envisaged should be reasonably simple. The system proposed by the Special Rapporteur seemed too complex. It would be preferable to provide that, if conciliation failed, the more diligent party would be able to take the matter to the International Court of Justice - if the States involved in the dispute had accepted its jurisdiction - or otherwise, to initiate unilaterally an arbitration procedure. Thus, there would be a choice between judicial or arbitration procedures and, moreover, conciliation would be followed by a single jurisdictional procedure. His Government therefore endorsed the overall approach taken by the Special Rapporteur, but would suggest that instead of providing for two successive jurisdictional channels, a single one - i.e., arbitration - should be accepted, unless the parties to the dispute had accepted the jurisdiction of the International Court of Justice.

90. Commenting on certain specific points in draft articles 1 to 6, submitted by the Special Rapporteur (A/48/10, paras. 244 and following), he said that with regard to article 1, the unorthodox idea of granting the Conciliation Commission the power to take measures of protection was excellent, inasmuch as it would allow an impartial third party to terminate immediately countermeasures that were prima facie unfounded, and thus to prevent harm which, in the last analysis, might eventually be found to be unlawful. In addition, article 1 of the annex (para. 279, note 79) provided that the members of the Conciliation Commission might, in certain cases, be appointed by the President of the General Assembly, whereas the usual practice had been for such appointments to be made by the Secretary-General of the United Nations. In the case of the members of the Arbitral Tribunal, article 3 of the annex retained the established approach of entrusting the task of appointing the arbitrators to the President of the International Court of Justice. Draft article 3 provided that, failing an agreed settlement, either party was entitled to submit the dispute to an Arbitral Tribunal. According to article 3, paragraph 6, of the annex, the parties were invited to draw up a special agreement. Failing the conclusion of a special agreement within a period of three months, the dispute could be brought before the Arbitral Tribunal by an application by either party (art. 3, para. 8). It was hard to understand why such a rule had been included. The concept was borrowed from old conventions, and the rule would probably delay a procedure which was intended to be expeditious.

91. Turning to the topic of the law of the non-navigational uses of international watercourses, he said it would be difficult, at the current stage of the work, to take a stand as to what form the draft articles should take. If his Government found the final text satisfactory, it would be in favour of a framework convention. If, however, the final version was not entirely satisfactory, his Government would prefer model rules, which watercourse States would be able, but not required, to use.

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92. His Government would accept the draft on three conditions: the text must achieve a suitable balance between upstream States and downstream States; it should not make it difficult or impossible to use international watercourses; and it should provide suitable mechanisms for the peaceful settlement of disputes.

93. The priority assigned to the rule on the obligation not to cause "appreciable" harm to watercourse States, established in draft article 7 (para. 409), to a large extent contradicted the principle of equitable and reasonable utilization set forth in draft article 5 (para. 404). Indeed, the emphasis on the obligation not to cause appreciable harm would give priority to existing uses over potential activities, whereas the relationship between current activities and proposed activities should be approached from the standpoint of the principle of equitable and reasonable utilization. The best solution would be simply to delete article 7; the obligation not to cause harm would not be affected because, under article 6, paragraph 1 (c) and (d), the effects of the use or uses of the watercourse in one watercourse State on other watercourse States, as well as the existing and potential uses of the watercourse, were among the factors that had to be taken into account in determining equitable and reasonable utilization, thus excluding activities causing significant pollution.

94. His Government would go along with the solution suggested by the Special Rapporteur (para. 410), which reflected actual practice. The obligation not to cause harm should be envisaged within the context of the principle of equitable and reasonable utilization. Moreover, the new text would replace the expression "appreciable harm" by the term "significant harm", thus precluding the possibility of a watercourse State paralysing another State by alleging that it was causing harm which, even though minimal, would still be appreciable.

95. The text to be produced by the International Law Commission on the question should be relatively simple, and should not have the effect of hindering the use of international watercourses. A first step in that direction would be to include in draft article 7 a qualitative standard, replacing the concept of "appreciable harm" by that of "significant harm". Another step would be to refrain from changing the scope of the draft instrument as set forth in article 1. In particular, unrelated confined groundwaters should not be included. Extending the scope of the treaty to include such waters could have unpredictable implications, and, in particular, could cause a good number of States to reject the draft.

96. Draft article 4, paragraph 2 (para. 389) was disturbing: if a watercourse State was allowed to concern itself, under cover of a treaty, with what other States planned to do on the watercourse, and to trigger the consultation mechanism envisaged in draft articles 11 and following, it was hard to see why it should be entitled to become a party to the treaty without the consent of the original parties, simply because the use envisaged was the subject of a treaty.

97. In addition, the type of dispute settlement procedures to be chosen would depend on the final form which the Commission chose for the draft. Model rules would not be binding for anyone, and they would not bother anyone. There was no reason to oppose such an approach. However, if the idea of drawing up a

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framework convention prevailed, it would be necessary to establish peaceful means of settling disputes arising from the interpretation or application of the rules of the convention. Neither the optional jurisdiction approach nor the compulsory conciliation approach was satisfactory. Ample room should be allowed for means already accepted by the States parties to the dispute. If such means did not exist, were not used or were ineffective, a compulsory jurisdictional procedure should be envisaged inasmuch as what was at issue was the interpretation or application of a legal instrument. It would be quite reasonable to envisage allowing for a choice between arbitration and recourse to the International Court of Justice, for that practice was becoming increasingly common.

The meeting rose at 5.50 p.m.