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SUMMARY RECORD OF THE 20th MEETING

Chairman: Mr. ZARIF (Islamic Republic of Iran)

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The meeting was called to order at 10.15 a.m.

AGENDA ITEM 129: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FOURTH SESSION (A/47/10)

1. The CHAIRMAN expressed the Committee's appreciation for its privileged relationship with the International Law Commission, whose exceptional contribution to the development and codification of international law was universally recognized by Governments and scholars.

2. Mr. TOMUSCHAT (Chairman of the International Law Commission), introducing the report of the Commission on the work of its forty-fourth session (A/47/10), said that peace and security had no surer foundation than the rule of law and that the peaceful settlement of disputes was inconceivable without a system of just and equitable legal norms regulating inter-State relations. By promoting international law, the Sixth Committee and the Commission made an effective contribution to the realization of the objectives of the United Nations. The importance of continuing and even intensifying the fruitful dialogue the Commission had maintained over the years with its parent body was thus very much on the minds of the members of the Commission.

3. Although the results of the latest session might appear less than spectacular, the Commission had in fact achieved a lot in the form of groundwork.

4. In accordance with its usual practice of not holding a substantive debate on draft articles adopted in first reading until the comments and observations of Governments thereon were available, the Commission, at its latest session, had not considered the item "The law of the non-navigational uses of international watercourses" nor the draft articles under the item "Draft Code of Crimes against the Peace and Security of Mankind". He emphasized that it was important for the Commission to have the views of Governments on the draft articles as soon as possible.

5. With respect to the second topic referred to, the Commission had, in accordance with the invitation contained in paragraph 3 of General Assembly resolution 46/54, continued its consideration and analysis of the issues raised in its 1990 report concerning the question of an international criminal jurisdiction.

6. The Commission had decided not to pursue further during the present term of office of its members the consideration of the second part of the topic "Relations between States and international organizations", unless the General Assembly decided otherwise. Inasmuch as States had been slow to ratify and accede to the 1975 Convention on the Representation of States in their Relations with International Organizations of a Universal Character, doubts had arisen as to the advisability of continuing work on the second part of the topic, dealing with the status, privileges and immunities of international

organizations and their staff, a matter that seemed to a large extent to be covered by existing agreements.

7. Although the Commission had considered relatively few topics in 1992, all were singularly important and complex. State responsibility had, of course, always been recognized as central to contemporary international law, and some of its aspects, touching on the interpretation of the Charter and on the functioning of the Organization, had received much attention in the context of recent activities of the Security Council. The topic "International liability for injurious consequences arising out of acts not prohibited by international law" was also closely connected with pressing needs of the international community.

8. The protection of the environment, which was one of the concerns underlying the Commission's work in that area, was undeniably of acute relevance at a time when the entire world was launching an offensive against environmental degradation. As for the question of the establishment of an international criminal jurisdiction, it, too, had acquired growing topicality in the past few years, as evidenced not only by the initiative taken in 1989 by the Caribbean countries in relation to illicit trafficking in narcotic drugs, but also by recent developments in the Security Council and the International Court of Justice.

9. Chapter II of the report (A/47/10) should be read jointly with the annex, which reflected the debate and conclusions of the working group established early in the session by the Commission. In complying with the request made by the General Assembly in paragraph 3 of resolution 46/54, that it should "consider further and analyse the issues raised in its report on the work of its forty-second session concerning the question of an international criminal jurisdiction, including proposals for the establishment of an international criminal court or other international criminal trial mechanism in order to enable the General Assembly to provide guidance on the matter", the Commission had used as a point of departure the tenth report of the Special Rapporteur, Mr. Doudou Thiam, on the Draft Code of Crimes against the Peace and Security of Mankind, which had been thoroughly discussed in the plenary Commission.

10. On the feasibility or desirability of establishing an international criminal jurisdiction, many members had felt that the lack of an international organ charged with the prosecution and trial of crimes of an international character affecting the international community as a whole constituted a gap to be filled in present-day international relations. In their view, recent events on the international scene had clearly shown that the existence of such an organ could have provided a suitable way out of situations that could create international friction. The need for an objective and uniform implementation of the draft Code of Crimes against the Peace and Security of Mankind, as well as the recent changes in the international situation, were additional arguments in favour of the establishment of such a jurisdiction. Some other members of the Commission, although not denying the advantages that

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some kind of international criminal jurisdiction might have in certain international situations and with regard to certain international crimes, had emphasized the great political and technical complexity of the issue and the need for flexible approaches. Some among them had felt that international trial mechanisms other than a court might be more realistic in the present-day international situation. Still other members doubted the feasibility of establishing an international criminal jurisdiction, which involved the surrender of sovereignty by States, raised constitutional difficulties under the internal law of some States, and entailed the risk of undermining the validity of the well-established principle aut dedere aut judicare.

11. With respect to the structure of a possible international criminal court, the prevailing view in the Commission had been that the most realistic approach was a flexible one involving the creation, not of an institution, but rather of a permanent mechanism to which resort could be had immediately and without delay when needed. The court would be an ad hoc body, not in the sense of an organ created ex post facto, but rather in the sense of a pre-existing mechanism to be set in motion when the need arose, and its composition would be determined in each specific case through objective criteria that would ensure the impartiality of the judges and exclude any attempt at manipulation.

12. In connection with the court's jurisdiction, the discussion focused on the following questions: whether jurisdiction should be binding or optional; whether it should be exclusive, concurrent or of a review character; whether it should be linked to the Code or not; who should be entitled to bring a complaint before the court; and, finally, which State or States would have to give consent for the court to have jurisdiction in respect of an individual charged with a crime.

13. With respect to the first issue, most members had favoured a flexible regime whereby ratification of, or accession to, the court's statute would not ipso facto imply acceptance of the court's jurisdiction with regard to any crime. Rather, States would be left free to specify, either at the time of signature of the statute of the court or later on, which of the crimes covered by the Code or other international conventions they would recognize as crimes falling under the jurisdiction of the court.

14. On whether the court's jurisdiction should be exclusive, concurrent with that of national tribunals or of a review character, several members had opted for a system of concurrent jurisdiction. Others had felt that the proposed court could have exclusive jurisdiction on certain international crimes and concurrent jurisdiction on others. There had, however, been no agreement with regard to the identification of the two categories of crimes and doubts had been expressed as to the advisability of providing for a dual system of jurisdiction. The possibility of endowing the court with a jurisdiction of a review character had generally been considered unrealistic.

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15. With regard to the possible link between the court's jurisdiction and the future Code of Crimes against the Peace and Security of Mankind, several members had stressed that the effectiveness of the Code depended upon the existence of an international criminal jurisdiction and that the crimes covered by the draft Code should accordingly come under the court's jurisdiction. That did not mean, however, that the court's jurisdiction could not also cover some international crimes provided for in international conventions in force. Indeed, many members had stressed that the court's statute and the Code should constitute separate instruments and that a State should be able to become a party to the statute without thereby becoming a party to the Code and be free to confer jurisdiction on the court with regard to certain crimes defined in international conventions.

16. The question of who could bring a complaint before the court had given rise to an interesting discussion in plenary meeting. Many members had agreed that States parties to the statute should have the right to institute proceedings before the court, it being understood that evidence for the purpose of indictment or trial of an individual alleged to have committed a crime could also be submitted by other States or by organizations. Some members had further suggested that, under certain conditions, a State not party to the statute might be authorized to have recourse to the court.

17. On the difficult question of which State or States should give consent for the court to have jurisdiction in respect of an individual charged with a crime, he referred to the relevant paragraphs of the report.

18. On the question of the law to be applied, attention had been drawn to the need to distinguish between the rules applicable to the definition of the crime and the rules governing the rights of the accused and the conduct of the trial. With respect to the first set of rules, the prevailing view had been that, under the principle nullum crimen sine lege, the source of applicable law should be limited to international conventions defining crimes under international law. The view had, however, been expressed that international custom was also a source of substantive law in that context. By way of illustration, mention had been made of apartheid, which was generally considered a crime against the peace and security of mankind, even by States which had not ratified the relevant Convention. Reference had also been made to the fact that the Nuremberg and Tokyo Tribunals had had to rely on customary law. Interesting points of view had been expressed in connection with other possible sources of applicable law, in particular, the resolutions of international organizations, the principles generally recognized by States, judicial decisions and doctrines of publicists, as well as internal law.

19. A brief discussion had been held in plenary meeting on the question of the relationship between an international criminal jurisdiction and the Security Council, particularly with regard to certain crimes such as aggression or threat of aggression. In that connection, the proposition that if the Security Council made no findings, the court would be entirely free to

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act in its judicial capacity had gathered a large measure of support. However, if the Security Council concluded that there had been an act of aggression, the question arose as to whether the court might be free to reach a contrary conclusion in proceedings before it. That question had given rise to divergences of views in the Commission.

20. With regard to the question of proceedings relating to compensation, some members had supported the Special Rapporteur's suggestion that an international criminal court might deal both with the criminal trial of an accused person and with the issues of compensation arising therefrom. Many members, however, had expressed strong reservations about the possibility of intermingling strictly criminal proceedings against individuals and civil claims for damages.

21. On the question of the handing over of an alleged criminal to the court, many members had supported the Special Rapporteur's suggestion that every State Party to the court's statute should be required to hand over to the prosecuting authority of the court, at the court's request, any alleged perpetrator of a crime coming within its jurisdiction, and that such handing over did not constitute an extradition. On the other hand, some members had pointed out that it was essential to ensure respect for the fundamental principles of justice and the basic human rights of the accused.

22. On the question of the "double-hearing principle" or two-tiered jurisdiction, many members had supported the Special Rapporteur's suggestion that the proposed court should be organized in such a manner as to ensure that a first ruling by the court could be reviewed within the system of the court itself. That, in their opinion, was a fundamental guarantee in any criminal proceedings, which was enshrined in article 14, paragraph 5, of the International Covenant on Civil and Political Rights.

23. At the end of the discussion in plenary meeting the Commission had decided to set up a Working Group with the mandate defined in paragraph 3 of General Assembly resolution 46/54. The Working Group would also draft concrete recommendations with regard to the various issues which it could consider and analyse within the framework of its mandate.

24. The outcome of the work carried out by the Working Group was reflected in its report, which appeared in the annex to the Commission's report (A/47/10). It was doubly important, first, because it analysed thoroughly and with a high degree of technical expertise the issues involved in the possible creation of an international criminal jurisdiction, and second, because the Commission had accepted as a basis for its future work the propositions enumerated in the Working Group's report and the broad approach set out therein.

25. The recommendations which the Working Group had arrived at were based on what had been perceived as the minimum common denominator possible to achieve consensus on further work on the question The Working Group had initially

identified five "clusters" of specific issues which had arisen from the discussion in the plenary Commission, namely, the basic structure of a court or of the other options for an international trial mechanism; the system of bringing complaints and of prosecuting alleged offenders; the relationship of the court to the United Nations system, and especially to the Security Council; the applicable law and procedure, and especially the issue of ensuring due process to accused persons; and how to bring defendants before a court, the relationship between that process and extradition, international judicial assistance to proceedings before a court and the implementation of sentences. The Working Group's report analysed each of those issues and sought to provide enough by way of an indication of its preferred approach in as balanced a manner as possible, but without going into excessive detail. The aim throughout had been to provide enough information and argument to enable a judgement to be made as to whether and how to proceed.

26. The report of the Working Group (A/47/10, annex) consisted of an introduction followed by five substantive parts. The first substantive part, part 2, entitled "General arguments relating to an international criminal court", reviewed the arguments for and against a court and considered other possibilities. Under the Working Group's approach, any attempt to establish a workable international trial system must start from a modest and realistic base. National criminal justice systems were expensive and complex and it would be difficult and infinitely more costly to replicate such systems at the international level. That was due to the fact that there was no body of international experience of the exercise of criminal jurisdiction to call on, such as had been available in the field of international arbitration when the Permanent Court of International Justice and its successor, the International Court of Justice, had been created. In those circumstances, it was better to seek to establish a flexible facility which would be available in case of need at the international level. For those reasons, the Working Group had been in general agreement that the court would be essentially a facility for States parties to its statute (and possibly, on defined terms, for other States). Certain conclusions followed from that basic approach: the court should not have compulsory jurisdiction; it would not have exclusive jurisdiction, in the sense of a jurisdiction which excluded the concurrent jurisdiction of States in criminal cases; and it should not be a full-time body, but rather an established structure which could be called into operation when required.

27. Part 3 addressed seven issues, namely (a) the method of creation of a court; (b) the composition of a court; (c) the ways by which a State might accept the jurisdiction of a court; (d) jurisdiction ratione materiae; (e) jurisdiction ratione personae; (f) the relationship between a court and the Code of Crimes; and (g) possible arrangements for the administration of a court.

28. With respect to the court's jurisdiction ratione materiae, the Working Group thought that it should extend to specified existing international treaties creating crimes of an international character, including the draft

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Code of Crimes against the Peace and Security of Mankind (subject to its entry into force). Furthermore, in the Working Group's view, when drafting the Statute of a court, the possibility should be left open that a State might become a party to the Statute without thereby becoming a party to the Code, or that a State might confer jurisdiction on the court with respect to the Code, or with respect to one or more crimes of an international character defined in other conventions, or an ad hoc basis. The criterion should be that of maximum flexibility with regard to the jurisdiction ratione materiae of a court, and that would be most readily achieved if the Code and the Statute of a court were separate instruments. However, as indicated in the Working Group's report (A/47/10, annex, para. 464), that substantive conclusion was without prejudice to the question of the treatment of the subject within the Commission, bearing in mind the connection of the issue in the General Assembly to the draft Code of Crimes and to the proposal of Trinidad and Tobago, which had called in 1989 for an international court or other mechanism to assist States in dealing with such problems as trafficking in narcotic drugs.

29. General Assembly resolution 46/54 had requested the Commission to examine, inter alia, "proposals for the establishment of an international criminal court or other international criminal trial mechanism". Part 4 explored the various possible options in that regard. Its basic premise was that, whether at the national or the international level, in relation to serious offences of an international character defined in the various treaties and in the draft Code of Crimes, the only appropriate "trial mechanism" was a criminal court, duly constituted - in other words, a body with appropriate guarantees of independence exercising judicial functions. One line of argument in the Working Group had suggested that the words "other international criminal trial mechanism" had in mind the creation of a very flexible, essentially voluntary mechanism. As indicated, the Working Group accepted much of the thinking behind that approach. The suggested outline for an international criminal court was as flexible, facultative and voluntary as an international court could be.

30. According to another line of argument, what was needed was a mechanism to assist national trial systems. The Working Group had discussed various suggestions in that respect, but the majority of its members had thought that those suggestions did not address the major concerns that underlay calls for an international criminal jurisdiction.

31. Part 5 of the Working Group's report dealt in particular with the question of applicable law. In its report (A/47/10, annex, para. 501), the Working Group concluded that it was not easy to condense the various aspects of the question into a brief formula. In particular, a general clause, paralleling Article 38 of the Statute of the International Court, would not do justice to the complexity of the issues. None of the categories of rules listed in Article 38 could be dispensed with, but it might be necessary to add references to other sources such as national law, as well as to the secondary

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law enacted by organs of international organizations, in particular the United Nations.

32. Lastly, in part 6, on prosecution and related matters, the Working Group outlined some possible solutions to the general question of how proceedings could be initiated before an international criminal court. Its discussion was based on the assumption that such a court would not try defendants in absentia. The following issues were examined: (a) the system of prosecution; (b) the initiation of a case; (c) bringing defendants before a court; (d) international judicial assistance in relation to proceedings before a court; (e) the implementation of sentences; and (f) the relationship of a court to the existing extradition system.

33. In paragraph 104 of its report (A/47/10), the Commission had accepted as a basis for its future work the proposals enumerated in paragraph 396 of part A of the Working Group's report. It had agreed that the study in the Working Group's report had confirmed the view that a structure along the lines of the one suggested in the report could provide a workable system. The Commission had also concluded that, through the ninth and tenth reports of the Special Rapporteur and the report of the Working Group, it had completed the task of analysis of the question of establishing an international criminal court or other international criminal trial mechanism, entrusted to it by the General Assembly in 1989. Further work in that area would therefore require a new mandate from the General Assembly providing a clear and specific indication as to how to proceed in the future. The Commission had gone beyond the stage of general and exploratory studies; the next step would be the elaboration of a detailed draft statute. Every year in the relevant resolution, the General Assembly requested the Commission to indicate the issues on which Governments should express their views. The Commission had done so in paragraph 15 of its report. It was of the utmost importance for Governments to take a clear stand on whether it should now undertake the elaboration of a draft statute on an international criminal court.

34. He then turned to chapter III of its report, on State responsibility. Under the general plan adopted by the Commission at its thirty-seventh session in 1975, the draft would consist of a Part One on the origin of international responsibility; a Part Two on the content, form and degrees of international responsibility, and a possible Part Three on the question of settlement of disputes and the implementation of international responsibility. The Commission had provisionally adopted Part One on first reading in 1980. It was currently dealing with Part Two, which would have four chapters. Chapter One had been provisionally adopted on first reading in 1986. Chapter Two, on the legal consequences of an international delict, would have two sections. At its forty-fourth session, the Commission had focused its attention on future sections 1 and 2 of Chapter Two. With regard to section 1, it had received from the Drafting Committee articles 6 (Cessation), 6 bis (Reparation), 7 (Restitution in kind), 8 (Compensation), 10 (Satisfaction) and 10 bis (Assurances and guarantees of non-repetition).

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In line with its policy of not adopting articles not accompanied by commentaries, the Commission had agreed to defer action on the proposed draft articles until its next session. At the same time, the Commission had decided that the statement made in plenary meeting by the Chairman of the Drafting Committee in introducing the proposed draft articles should be placed at the disposal of members of the Sixth Committee. The Drafting Committee had reserved the possibility of supplementing articles 6 to 10 bis with other provisions. The fact that the Drafting Committee's work on section 1 of Chapter Two had not yet taken definitive shape was an added reason for deferring comments on it.

35. The Commission had also given considerable attention in plenary meeting to the topic of State responsibility. Its discussions had been based on the third and fourth reports of the Special Rapporteur, both of which had dealt with the legal regime of the measures that an injured State might take against a State having committed an internationally wrongful act and more specifically, in principle, with the measures applicable in the case of delicts. The prevailing view in the Commission had been that, although the measures in question were tantamount to reprisals, they should be referred to as "countermeasures", the term used in article 30 of Part One of the draft, as well as by the International Court of Justice and by arbitral tribunals. Some members had expressed doubts on the advisability of dealing with that issue in the context of the draft articles on State responsibility. They had questioned the compatibility of countermeasures with contemporary international law. They had also pointed out that the application of countermeasures could lead to abuses as a result not only of power disparities but also of the inherent risk of starting spirals of escalation detrimental to the stability of international life. However, most members had thought that, given the imperfect nature of law enforcement mechanisms at the international level, some latitude had to be left for direct, independent action by injured States and that the elaboration of a legal regime would keep the scope of permissible unilateral initiatives to a minimum. Such was the position of the Special Rapporteur in his third and fourth reports. Those reports contained three articles (articles 11, 12 and 13) on the conditions for the legality of countermeasures and a fourth article (article 14) on prohibited countermeasures.

36. Under article 11, entitled "Countermeasures by an injured State", lawful resort to countermeasures was conditional upon (1) the actual existence of an internationally wrongful act and (2) the prior submission by the injured State of a demand of cessation/reparation. Those two conditions had generally met with the Commission's approval. Some members, however, had insisted that the basis for lawful resort to countermeasures was not so much the internationally wrongful act as the prejudice caused by that act and had said that their approach would limit abuses, restrict the number of States that could claim the right to resort to countermeasures and reduce the risk of subjective evaluations.

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37. Article 12, entitled "Conditions of resort to countermeasures", required in its paragraph 1 that before resorting to countermeasures the injured State should have exhausted all available amicable settlement procedures and duly communicated its intention to the wrongdoing State. Some members had suggested the possibility of making the exhaustion of amicable settlement procedures not a precondition for resort to countermeasures, but a parallel obligation, in other words, to provide for a regime in which the right to impose countermeasures would be suspended if the wrongdoing State agreed to a dispute settlement procedure in which a legally binding determination as to the wrongfulness of the act could be reached and reparation required. The Special Rapporteur had pointed out in reply that an injured State normally would be able to demonstrate that the wrongdoing State was using delaying tactics to escape its obligation of cessation or reparation. It also had the possibility of resorting to interim measures of protection and would, in any case, under paragraph 2 of the article, be relieved from the requirement of exhaustion of available settlement procedures if the wrongdoing State failed to cooperate.

38. Article 12, paragraph 2, listed the cases where the requirements in paragraph 1 did not apply. The first such case concerned the failure of the wrongdoing State to cooperate. The second case concerned interim measures of protection taken by the injured State until the admissibility of such measures had been decided upon by an international body within the framework of a third party settlement procedure. The third case related to countermeasures taken as a result of the wrongdoing State's failure to comply with interim measures of protection ordered by an international body. The paragraph had generally met with a favourable reaction in the Commission, although concern had been expressed by some members that excepting measures of protection taken by the injured State might lead to a weakening of the fundamental principle laid down in Article 33 of the United Nations Charter.

39. Article 13, dealing with proportionality, provided that, in determining whether countermeasures were not disproportionate, account would be taken of the gravity not only of the internationally wrongful act, but also of its effects. While proportionality generally had been recognized as a crucial element in determining the lawfulness of a countermeasure, several members had been concerned that it might provide an illusory guarantee against abuse, particularly since the Special Rapporteur had abandoned the distinction made by his predecessor between action taken by way of reciprocity, i.e., connected with the obligation breached, and action taken by way of reprisal. As a result, a breach in one field of law could trigger a countermeasure in another area of relations between States concerned that was totally removed from the one in which the original obligation had been breached. Various suggestions had been made for clarifying the scope and content of proportionality (A/47/10, paras. 211 to 216).

40. Article 14 on prohitibed countermeasures occupied a central place in the regime which had been devised by the Special Rapporteur. Under paragraph 1,

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prohibited countermeasures included those involving the threat or use of force, those violating the rules of international law on the protection of human rights, diplomatic law or the peremptory norms of international law and those violating the rights of third parties. While there had been a broad measure of agreement in the Commission on those five elements, the proposed formulation had been viewed as too analytical and as having the twofold drawback of raising problems of overlap between the unresolved concepts involved and entailing the risk of undesirable a contrario interpretations. Concerns also had been expressed that the catalogue of prohibited countermeasures might not be exhaustive.

41. As to paragraph 2, it had been widely acknowledged that extreme measures of political or economic coercion could have consequences as serious as those arising from the use of armed force. However, many members had found it imprudent for the Commission to reopen the question of the meaning of the term "force" as used in Article 2, paragraph 4, of the Charter and various alternatives had been envisaged to deal with the issue. Paragraphs 1 and 2 of article 14 therefore would have to be carefully reviewed. At the conclusion of its debate, the Commission had agreed to refer the four articles proposed by the Special Rapporteur to the Drafting Committee.

42. He drew attention to the last part of Chapter III, entitled "The question of countermeasures in the context of articles 2, 4 and 5 of Part Two adopted on first reading at previous sessions of the Commission". The first of the issues dealt with "self-contained regimes". The question raised was whether the rules constituting those regimes affected - and, if so in what way - the rights of States parties to resort to the countermeasures provided for under general international law. The Special Rapporteur was of the view that the exercise of the facultés of unilateral reaction provided for under general international law must remain possible in at least two cases: first, in the case in which the State injured by a violation of the self-contained system had secured from the conventional institutions a favourable decision but was not able to obtain reparation through the system's procedures and, secondly, in the case in which the internationally wrongful act was an ongoing violation of the regime. The debate in the Commission had revealed three main trends on the question of self-contained regimes. Some members had felt that the matter was one of treaty interpretation and that the Commission therefore could leave it aside. Others had supported the Special Rapporteur's view that in all cases there was a "fall-back" entitlement to resort to the remedies provided under general international law. Lastly, others had felt that, as a matter of principle, procedures under existing international treaties should take precedence and that collective responses to unlawful conduct should be favoured and the unfortunately rare examples of self-contained regimes viewed as models to be followed in other fields of international life.

43. With regard to the second issue raised, namely, the relationship between the draft under elaboration and the United Nations Charter, the Special Rapporteur had indicated that the effect of article 4 would be to subordinate

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the provisions of the draft on State responsibility to the provisions of the United Nations Charter on the maintenance of international peace and security and, in particular, to any recommendations or decisions adopted by the Security Council in the discharge of its functions with respect to dispute settlement and collective security. He had expressed concern that the retention of article 4 would force the Commission to examine issues which lay outside its mandate, in particular, the relationship between chapters VI and VII of the Charter or the relationship between the Security Council and the International Court of Justice. Some members had been of the view that the power of decision of the Security Council was strictly confined to measures aimed at re-establishing international peace and security under Chapter VII of the Charter and that the Council was not empowered to impose on States settlements or settlement procedures in relation to disputes or situations dealt with in Chapter VI, on which it only could make recommendations. Other members had felt that the comments of the Special Rapporteur were inconsistent with the responsibilities of the Security Council, the object of Chapters VI and VII of the Charter and contemporary practice.

44. The third issue which had been raised by the Special Rapporteur was related to the definition of the term "injured State", which was contained in article 5 adopted on first reading. Under that article, the infringement of any right of a State constituted, with or without material damage, an injury. Thus, a violation of obligations arising, for example, under rules concerning disarmament, promotion of and respect for human rights and environmental protection simultaneously injured the subjective rights of all the States bound by the norm, whether or not they were specifically affected. Whether one distinguished between "directly and indirectly injured States" or, as the Special Rapporteur preferred, between "differently injured States", the problem arose of determining to what extent each of the States was entitled, on the one hand, to claim cessation, restitution in kind, pecuniary compensation, satisfaction and/or guarantees of non-repetition and, on the other hand, to resort to sanctions or countermeasures. The Special Rapporteur had attempted to solve those problems by suggesting the inclusion of a new article 5 bis, which was produced in footnote 57 of the report. Some members had supported that proposal; others preferred to indicate, either in the draft articles or in the commentary, first, that the capacity of differently injured States to take countermeasures should be proportional to the degree of injury suffered by the State taking the measures and, secondly, that if the most affected State or States disclaimed restitutio in integrum, no other State should be able to claim it.

45. He turned next to chapter IV of the report, devoted to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, emphasizing in that connection the increasing relevance of the Commission's endeavours to formulate a theoretical legal basis for general principles of environmental law, in the light of the progress made at the Rio Conference in regard to the protection and preservation of the global environment. At its last session, the Commission

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had considered the eighth report of the Special Rapporteur which, based on the majority view, had separated out prevention and presented a series of articles intended as recommendations or guidelines to States. The Special Rapporteur had also proposed clearer definitions of the concepts of risk and harm, taking into account new developments in environmental law. It was his intention to dwell in particular on the decisions taken by the Commission on the topic, since they would determine the orientation of its future work.

46. In his report, the Special Rapporteur proposed to draw a distinction between prevention of transboundary harm and compensation for transboundary harm. Two sets of rules would thus be formulated. Under the first, States would be called upon to take unilateral preventive measures by adopting rules and regulations in respect of their industrial or other activities that might cause transboundary harm. Under the second set of rules, private operators would be held liable for transboundary harm caused by them and States would make proper domestic legislative modifications to that end. Nine articles on prevention, of a recommendatory nature, were proposed in the report. The articles concerned both activities causing transboundary harm and activities involving a risk of causing such harm, and provided for various measures, including legislative ones, to be taken by States in whose territory such activities were about to be undertaken. They were advised to resort to licensing systems to compel their industries to conduct environmental assessments and use the best available technology. The articles also provided for information and notification procedures, to be applied in case of potential transboundary harm, and for consultations aimed at removing or reducing harm or the risk of it. A number of factors were listed which the negotiating States should take into account in reaching agreement. Lastly, methods for dispute settlement were also recommended.

47. As part of the debate in the Commission on general issues, many members had noted with concern that progress had been slow and that the theoretical basis of the topic had not yet been clearly defined. Some had attributed the lack of progress to the absence of consensus on the general approach to the topic and on its scope. Divergent views had been expressed on a series of questions, such as whether attention should focus on prevention of transboundary harm or extend to liability for harm caused, whether consideration should be given only to activities which normally caused transboundary harm or also to activities involving a risk of causing such harm, and whether the Commission should aim at developing guidelines and recommendations on the subject or at formulating binding rules. In the absence of consensus on those basic questions, no progress could be achieved.

48. Although it might seem that the debate on that topic at the Commission's last session had been entirely fruitless, it had in fact prompted the identification of areas in which general agreement could be reached. To that end, an open-ended Working Group had been established which had taken a number of decisions, reflected in paragraphs 344 to 349 of the report. The decisions did not cover every aspect of the topic, nor were they final, but they

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provided a minimum basis of consensus and could be reviewed and possibly broadened as appropriate. The decisions related to the scope of the topic, the nature of the instrument to be drafted, the choice between the concept of "acts" and the concept of "activities" and the content of the Special Rapporteur's next report.

49. With regard to the first point, the Commission had noted that, although it had identified the broad area of the topic, it had not yet made a final decision on its precise scope. It had agreed that in order to facilitate progress on the subject, it would be prudent to approach its consideration in stages and to establish priorities. Lastly, it had decided that although the topic should be understood as comprising both issues of prevention and of remedial measures, prevention should be considered first and only then should the ILC proceed to the question of remedial measures which in that context might include those designed for mitigation of harm, restoration of what had been harmed and compensation for harm caused. Once articles had been drafted on those two aspects of activities having a risk of causing transboundary harm, the Commission would decide on the next stage of the work.

50. With regard to the nature of the instrument to be drafted, the Commission had decided to defer the decision, in accordance with its usual practice, until the work had been completed. The Commission would examine and adopt the articles proposed for the topic, on the basis of the merits of the articles, their relevance to the contemporary and future needs of the international community and their possible contribution to the promotion of the progressive development of international law and its codification in that area.

51. With respect to the choice between the concept of "acts" and the concept of "activities", the Commission had decided to maintain its working hypothesis according to which the topic dealt with "activities" and to keep the title unchanged since further work on the topic might make additional changes necessary. In due course, the Commission would make a comprehensive recommendation on the title of the topic.

52. In view of those decisions, the Commission had requested the Special Rapporteur, in his next report, to examine further the issues of prevention only in respect of activities having a risk of causing transboundary harm and to propose a revised set of draft articles to that effect.

53. Turning to the last chapter of the report, entitled "Other decisions and conclusions of the Commission", he said that the Commission intended to complete by 1994 the second reading of the draft articles on the non-navigational uses of international watercourses, and by 1996 the second reading of the draft articles on the Code of Crimes against the Peace and Security of Mankind and the first reading of the draft articles on State responsibility. The Commission also intended to make substantial progress on the topic "International liability for injurious consequences arising out of acts not prohibited by international law" and to undertake work on one or more new topics.

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54. In regard to the long-term programme of work dealt with in subsection 2 of section D, the Commission had taken steps with a view to identifying topics which might be recommended to the General Assembly for inclusion in the Commission's programme of work and would report on the matter in due course.

55. In an effort to streamline its procedures and increase its efficiency, the Commission had adopted guidelines on the composition and working methods of the Drafting Committee and on the format of its report to the General Assembly and would start implementing those guidelines as far as possible at its next session.

56. In accordance with the wish expressed by the General Assembly in resolution 46/54, the Commission had resumed its consideration of the possibility of dividing its annual session in two parts and in that connection had considered a preliminary study prepared by the Secretariat on the administrative and financial implications of such a division. It subsequently came to the conclusion that the suggestion of dividing the annual session in two parts had not received enough support and had indicated that improvements in the effectiveness of its work should continue to be sought under the current arrangements.

57. With regard to the Commission's contribution to the Decade of International Law, the idea of issuing a publication containing a series of articles, prepared by members of the Commission, on the main problems of international law on the eve of the twenty-first century had been accepted in principle. Preparatory work was already under way and would continue at the next session. Other suggestions were under study.

58. As indicated in section E, the Commission had continued its cooperation with other legal bodies, including the Asian-African Legal Consultative Committee, the European Committee on Legal Cooperation and the Inter-American Juridical Committee. The Commission set great store by its relationship with those bodies since they enabled it to keep abreast of their activities.

59. Section H dealt with the twenty-eighth session of the International Law Seminar, which was funded by voluntary contributions from Member States and through fellowships awarded by Governments to their own nationals. The Commission had noted with particular appreciation that the Governments of Austria, Denmark, Finland, France, Germany, Hungary, Jamaica, Morocco, Sweden, Switzerland and the United Kingdom had made fellowships available, in particular to participants from developing countries through voluntary contributions to the appropriate United Nations assistance programme. Of the 619 participants, representing 147 nationalities, who had taken part in the Seminar since its inception in 1964, fellowships had been awarded to 326.

60. The Commission continued to attach great importance to the Seminar, which enabled young lawyers to familiarize themselves with its work and thereby promoted international law. However, since all the available funds were

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almost exhausted, the Commission recommended that the General Assembly should again appeal to States which were in a position to do so to make the voluntary contributions that were needed for the holding of the Seminar in 1993 with as broad a participation as possible.

The meeting rose at 11.50 a.m.