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Chairman: Mr. DENG (Sudan)

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The meeting was called to order at 3.10 p.m.

AGENDA ITEM 134: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTIETH SESSION (continued) (A/43/10, A/43/539)

AGENDA ITEM 130: DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (continued) (A/43/525 and Add.1, A/43/621-S/20195, A/43/666-S/20211, A/43/709, A/43/716-S/20231, A/43/744-S/20238)

1. Mr. HAYES (Ireland) said that the International Law Commission's report (A/43/10) showed that the restoration of the normal length of the Commission's session had been justified. His delegation also appreciated the report's identification of questions on which the Commission would like to have Governments' views.

2. His comments would be focused on the topic of international liability for injurious consequences arising out of acts not prohibited by international law - a topic urgently requiring development and codification. The legal cases cited in the report pointed to the need for generally accepted rules of international law in the area in question. That need had been emphasized by more recent incidents, and Ireland therefore welcomed the progress made on the topic by the Commission.

3. In the debate on the Commission's report at the Assembly's thirty-ninth session (A/39/10), Ireland had supported the Special Rapporteur's view that the principle sic utere tuo ut alienum non laedas was the appropriate conceptual basis for the topic and provided a firm foundation for rules on prevention and reparation. It had also endorsed the three principles set out in that report: every State must have, within its territory, the maximum freedom of action compatible with respect for the sovereignty of other States; States must respect the sovereignty and equality of other States; and the innocent victims of injurious transboundary effects should not be left to bear the loss. Although risk was a rational basis for rules on prevention, the definitions of "risk" and "appreciable risk" as set out in article 2 of the 10 draft articles submitted by the Special Rapporteur (A/43/10, para. 22) would seem to narrow that basis excessively. Accordingly, those definitions should be modified so that the consequent rules on prevention would have a wider application. The redefinition of those terms in order to convey the meaning of an activity highly likely to cause harm or even exceptional risk, as some had suggested, would be totally contrary to Ireland's views.

4. Inclusion of risk as an essential ingredient of liability (even if with modified definitions) would be unacceptably restrictive. Under the resulting régime, the victim would not be compensated, regardless of the injury suffered, if the risk had been hidden or had seemed less than appreciable. It was therefore essential to provide for a régime that, while basing the obligation of prevention on risk, based the obligation of reparation on harm. Ireland therefore welcomed the indication in paragraph 50 of the report that the Special Rapporteur acknowledged the need for modification of the definitions in article 2. With

(Mr. Hayes, Ireland)

regard to paragraph 49, Ireland strongly urged the Commission to decide in favour of limiting the criterion of risk to the obligation of prevention. Such a decision implied omission of reference to risk as an element of any provision covering the topic as a whole. It could be argued that an obligation of reparation for all transboundary harm to an innocent victim should be combined with a proviso that the non-existence or even the extent of risk should be among the factors to be taken into account in determining the appropriate compensation. However, there was a possibility that very grave harm could result from an activity in regard to which the risk seemed slight or even non-existent. In that connection, the concerns mentioned in paragraph 45 of the report should again be adverted to.

5. Ireland supported the Special Rapporteur's conclusion that establishing a list of activities to be covered by the draft articles was hardly feasible (para. 23 of the report), as well as his view that it would be prudent to assume that articles causing pollution fell within the topic. It also supported use of the terms "jurisdiction" and "control" in article 1. Where article 3 was concerned, Ireland agreed with the formulation "or had means of knowing", particularly since its effect should be to transfer the burden of proof to the State of origin. Ireland would like to see that clearly expressed in the text.

6. In regard to the draft articles on principles, he said that article 9 should be drafted in the light of the possibility referred to in paragraph 92 of the report, concerning "autonomous" obligations of prevention. Lastly, Ireland welcomed the indication in paragraph 82 of the Special Rapporteur's intention to elaborate on the articles and principles in question in other provisions to appear in later chapters.

7. Mr. HAMPE (German Democratic Republic) said he noted from the Commission's report that, at its most recent session, the Commission had made substantive progress on a number of major codification projects. The further development of international law and the primacy of law in international relations were particularly important at the present juncture.

8. With regard to the Special Rapporteur's fourth report on international liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/413), which contained 10 draft articles, the German Democratic Republic believed that special attention should be paid to the general provisions. In particular, it welcomed the Special Rapporteur's view that contemporary international law envisaged no general obligations to make reparation in connection with lawful activities and that the proposed rules on liability must therefore be seen as an expression of the progressive development of international law. However, unjustified generalisations must not be made in respect of the definition of the subject-matter and the criteria for defining activities that could cause transboundary harm. That applied especially to the Special Rapporteur's indication that all activities connected with the human environment should be included if they came under the criteria laid down in article 1. Apart from the fact that in practice harm to the environment generally had several sources, it would appear to be necessary to distinguish between activities

(Mr. Hampe, German Democratic Republic)

permanently causing harm to the environment and activities involving a special risk. To advocate the concept of strict liability in respect of environmental harm caused by normal industrial processes and activities would be to proceed from the incorrect idea that such environmental problems could be solved by reparation, whereas what actually mattered was not reparation as such, but the reduction or minimisation of existing damage and the prevention of future harm, as well as increased international co-operation in order to achieve that objective. Since it was difficult to determine the causal connection in such cases, reparation in respect of environmental damage permanently caused by industrial processes and activities had so far played only a small role in State practice.

9. While the Special Rapporteur's attempt to limit the scope of the draft articles to certain activities could be supported, the term "appreciable risk" used in that connection was too vague to serve as a clearly applicable criterion in practice. It thus remained to be seen whether the Special Rapporteur would succeed in modifying the definition of the term without restricting its application exclusively to preventive measures.

10. The concept of a general obligation regarding liability for transboundary injury remained questionable. States preferred to define and regulate concrete risk situations in specific treaties. It was very unlikely, therefore, that a general convention on liability would yield results acceptable to a majority of States.

11. The 10 draft articles in question should not be referred to the Commission's Drafting Committee until agreement had been reached on an overall concept that could command the support of a majority of Commission members as a basis for future work. Only then could the issue of the global applicability of the principles proposed in draft articles 6 to 10 be considered.

12. Mr. HILLGENBERG (Federal Republic of Germany) said that his delegation welcomed the decision to consider the Commission's report topic by topic, which enabled members of the Committee to focus their attention on a specific subject at a given time.

13. The Federal Republic of Germany was pleased to note that in the Special Rapporteur's fourth report on international liability "appreciable risk" was made the main criterion for liability. That criterion, in conjunction with the criterion of "transboundary" harm, provided a sensible basis for defining the concept of liability. However, further determination of the criteria for liability depended on a clear definition of hazardous activities. The definitions contained in draft article 2 were an attempt to describe "risk" in general terms only. International and national practice and the relevant instruments must be evaluated carefully in order to decide what kinds of activities should be covered by State liability and what such liability would be in each specific case. A list of activities could be drawn up on that basis. Apart from liability for the traditional kind of hazardous facility, other relatively new sources of risk, such as genetic research, could be included. Once a clear picture of the situation had

(Mr. Hillgenberg, Federal Republic of Germany)

been obtained, consideration should be given to whether to adopt a standard liability for all activities, or whether at least partly differing rules should apply, depending on the nature of the activity and of the risk of injury.

14. Without a definition of the circumstances in which the activities in question were carried out, it would be extremely difficult to establish the criteria for and the scope of liability. It would also be hard to draw the necessary distinction between that area and the related area of "responsibility". Such questions were all the more important as an increasing number of agreements laying down specific rules of conduct had been concluded. Disregard of such rules implied liability under customary international law, at least where the principle of "due diligence" was violated. The scope of future liability régimes for lawful activities thus became smaller.

15. Other questions requiring clarification related to causality and the definition of injury. As could be seen from the discussion of the subject of international watercourses, problems arose where the classical definition of injury was applied to extensive damage to the environment. That was a field where international law required progressive development in order to meet modern needs. Another difficult issue was the frequent accumulation of causes that together constituted substantial injury, and there was also the problem of attributing liability where there was "intervening causality" as a result of precautionary and protective measures considered necessary by the injured State. Although the Special Rapporteur's comments in his fourth report provided useful guidance in that respect, there was some doubt as to whether it would be possible to establish a general definition of injury covering all hazardous activities. The Commission might discuss that subject, taking into consideration what had already been dealt with under the subject of international watercourses.

16. The issue of "liability" still deserved the Commission's full attention. Before actually formulating the articles, the Commission should have a clear view of the criteria for liability and of the structure of the proposed articles. Furthermore, existing international instruments and national régimes must be carefully evaluated in order to produce a basis for recommendations.

17. Mr. JACOVIDES (Cyprus) said that the Commission's report (A/43/10), which was of the usual high standard, demonstrated that at its most recent session, the Commission had done sound work on many of the topics on its agenda and had made progress on the topics of State responsibility and the jurisdictional immunities of States and their property. Cyprus noted that the topic of relations between States and international organisations would be taken up in 1989. It welcomed the productive work carried out by the Drafting Committee, and wished to commend the Planning Group for its efforts. It urged that in future sessions the item State responsibility should be given the importance it deserved, particularly since progress on the question would affect attitudes and approaches with respect to the topics "Draft Code of Crimes against the Peace and Security of Mankind" and "International Liability for injurious consequences arising out of acts not prohibited by international law".

(Mr. Jacovides, Cyprus)

18. Subject to those comments, his delegation viewed with general approval the organisational matters dealt with in chapter VIII of the report. On methods of work, it maintained the view that while time-tested methods should not be radically or hastily altered, some specific aspects of the procedures should be kept under constant review. His delegation also attached importance to the proper identification of topics to be included in the Commission's long-term programme of work, and approved the request for the timely updating of the 1971 Survey of International Law. It agreed that every effort should be made to maintain future sessions at not less than 12 weeks and that summary records and all necessary facilities should be provided, including adequate staffing of the Codification Division. It welcomed the publication of the fourth edition of the booklet "The Work of the International Law Commission".

19. He expressed his delegation's satisfaction at the Commission's continued constructive co-operation with such learned regional bodies as the Inter-American Juridical Committee, the Asian-African Legal Consultative Committee, the European Committee on Legal Co-operation and the Arab Commission for International Law. He also reiterated its suggestions about the need to take into account the legal work of the Commonwealth and of the Movement of Non-Aligned Countries, as well as the contribution of the newly independent and developing countries. Cyprus fully approved the continued holding of the International Law Seminar.

20. The purpose of the debate was not to go into details, but rather to give the Commission general political guidance and clear-cut answers to the questions it had put to its parent body. His delegation's comments on the substantive part of the report would be made with those considerations in mind.

21. With regard to chapter II, he noted that the purposes of the topic "International liability for injurious consequences arising out of acts not prohibited by international law" were to cover activities which had or might have transboundary physical consequences adversely affecting persons or things, to deal with both prevention and reparation, and to allow each State to have freedom of action within its territory, but only to the extent that such freedom was compatible with the sovereignty and equality of other States. Furthermore, States should be guided by the basic consideration that the innocent victim of injurious transboundary effects should not be left to bear the loss.

22. There were three points to be considered: that the question was one of proper balance between the conflicting interests involved; that greater emphasis should be placed on the fact that the innocent victim should not be left without reparation; that when negotiations failed to settle a dispute, an effective third-party settlement procedure should be applied.

23. With regard to the relationship between "risk" and "harm", on which the Commission had requested guidance (para. 102 of the report), his delegation believed that while the concept of risk might play an important role in respect of prevention, it would unduly limit the scope of the topic by basing the entire

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régime of liability on appreciability of risk. The topic should include situations where appreciable harm occurred although the risk of harm had not been considered appreciable or foreseeable. What was required was sound judgement, common sense and co-operation between all concerned so as to achieve a fair and pragmattic result.

24. With regard to the issue of jurisdiction (para. 61), his delegation agreed that if a State could demonstrate that it had effectively been ousted by another State from the exercise of its jurisdiction, such State would be outside the scope of the topic so long as such ouster was in effect and could be demonstrated to be so.

25. Referring to chapter III, he said that with regard to the extent to which the draft articles should deal with problems of pollution and environmental protection, his delegation thought that the number of articles should be kept to a minimum, reflecting general rules concerning the subject-matter and leaving it to the States themselves to adopt more specific and detailed measures. On the issue of the concept of "appreciable harm" in the context of article 16, paragraph 2, as proposed by the Special Rapporteur, his delegation agreed with the Special Rapporteur that the term provided as factual and objective a standard as was possible under the circumstances. In the absence of specific agreements on scientifically determined levels of permissible emissions, it was possible only to have a general standard that could come as close as possible to objectivity. The term, or its equivalent, had been employed in a number of international agreements.

26. With regard to chapter IV, his delegation welcomed the use of the word "crimes" rather than "offences" in the English text. It wished to stress two points: that in order to be complete as a legal instrument, the Code needed to include three elements, crimes, penalties and jurisdiction; and that it was advisable to concentrate as much as possible on the hard core of clearly understood and legally definable crimes. To wander into grey areas would only serve to make the Commission's efforts to arrive at a meaningful Code ineffective. The scope of the Code should not be such as to make the provisions too diluted or unacceptable to the majority of States.

27. Cyprus supported the view expressed in paragraph 267 of the report that in the framework of colonialism, the concept of self-determination related exclusively to the freedom of peoples subjected to colonial exploitation, and in no way provided justification for secession from an established State by heterogeneous communities. In today's world, fully homogeneous States were rare and if, by a spurious interpretation of the lofty principle of self-determination, any ethnic group was allowed to secede from an established State, the present national State system would collapse in utter chaos.

28. The suggestions in paragraph 275 of the report concerning the inclusion in the draft Code as "crimes against peace" of such acts as the massive expulsion by force of the population of a territory and the implantation of settlers in an occupied

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territory in order to change the demographic composition of such territory merited serious consideration. Those acts should be included in some appropriate form either under "crimes against peace" or "crimes against humanity".

29. Turning to chapter V, he said his delegation fully agreed that there should be a comprehensive approach leading to a coherent and uniform régime concerning all kinds of couriers and bags; that functional necessity was the basic factor in determining the status of all kinds of couriers and bags; and that the final text should be a distinct legal instrument in the form of a convention in an appropriate legal relationship with conventions in the field of diplomatic and consular law adopted under United Nations auspices.

30. With regard to draft article 28, his delegation preferred alternative C as proposed by the Special Rapporteur, which offered the necessary flexibility and struck the right balance between the need for ensuring the inviolability of the bag and the confidentiality of its contents, on t e one hand, and the legitimate security concerns of the receiving State and the transit State, on the other.

31. The question of bags of international organisations deserved serious consideration. Appropriate provision should also be made with rega; l to recognised national liberation movements.

32. Consideration should be given to including an appropriate provision for dispute settlement either in an optional protocol or, preferably, in an integral part of the convention itself.

33. The international legal community had good reason to feel optimistic about the prospects for the prevalence of the rule of law in international relations. The improvement in East-West relations; recognition of the need for increased effectiveness and greater utilisation of the United Nations, as exemplified by the award of the Nobel Peace Prise to the United Nations peace-keeping forces; the change in attitude by both super-Powers towards third-party settlement; the greater utilisation of the International Court of Justice as the judicial arm of the United Nations; the increasing tendency towards the peaceful settlement of regional conflicts and the withdrawal of foreign troops; and greater acceptability of universal human rights norms were all positive signs. Much remained to be done, but the omens were good.

34. His country, from the beginning of its existence as an independent State, had been dedicated to the principles of the Charter and had consistently stood for the peaceful settlement of disputes, on the basis of international law and through effective third-party settlement procedures in general and, more particularly, on the basis of the elaboration of such major instruments as the Convention on the Law of Treaties and the Convention on the Law of the Sea. In 1988, Cyprus had accepted the compulsory jurisdiction of the International Court of Justice and the right of individual petition under article 25 of the European Convention on Human Rights. It had also played a leading role at the Nicosia Conference of Ministers for Foreign Affairs of non-aligned countries in promoting greater reliance on

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international law. As a small non-aligned developing country facing a major problem because of a gross violation of international law, it had been what might be called "United Nations-minded" and "international-law minded", both for reasons of principle and for reasons of self-interest. That had not yet resulted in a solution to the problem confronting it as a result of foreign invasion, continuing occupation and large-scale violation of human rights. However, his country was exerting every effort to that end, and was hopeful that, with the withdrawal of foreign troops from several other parts of the world, there would be sufficient momentum for the application to its situation of the relevant rules of international law, and for the early achievement of a solution in accordance with the relevant United Nations resolutions. In that respect, the possibilities available to the International Court of Justice were also constantly kept in mind. His country was convinced that if the rules of international law were applied, the problem could be solved fairly and justly for the benefit of all concerned and of international peace.

35. Mr. TUERK (Austria) said that on many occasions his delegation had expressed the view that ecological accidents as well as damage to the environment by continuous emissions clearly demonstrated the urgent need to advance codification and progressive development of international law in that field. The topic "International liability for injurious consequences arising out of acts not prohibited by international law" should therefore be accorded top priority among the items dealt with by the International Law Commission. His delegation believed that in order to arrive at a comprehensive régime of State liability, it would be appropriate to elaborate a framework treaty that would encourage the conclusion of bilateral or regional agreements.

36. His delegation had already voiced concern at the slow pace of work on that topic, and was therefore pleased to note that the Commission had devoted to it a considerable amount of time at its fortieth session.

37. Austria had consistently held the view that the scope of the topic should relate to the duty to avoid, minimise and repair physical transboundary damage resulting from physical activities within the territory or control of a State, a view which seemed to be gaining considerable support. It should also be borne in mind that the concept of liability for acts not prohibited by international law related to fundamentally different situations requiring different approaches. One situation had to do with hazardous activities which carried with them the risk of disastrous consequences in the event of an accident, but which, in their normal operation, did not have an adverse impact on other States or on the international community as a whole. Thus it was only in the event of an accident that the question of liability would arise. By its very nature, such liability must be absolute and strict, permitting no exceptions.

38. However, the task of the Commission also related to a fundamentally different situation, namely, transboundary and long-range impacts on the environment. In that case, the risk of accident was only one minor aspect of the problem. It was through their normal operation that some industrial or energy-producing activities

(Mr. Tuerk, Austria)

harmed the environment of other States. Moreover, such harm was not caused by a single, identifiable source as in the case of hazardous activities. For a long time, such emissions had been generally accepted because every State was producing them and their nefarious consequences were neither well-known nor obvious. The growing awareness of their harmful influence had, however, reduced the level of tolerance. In that regard, liability had two distinct functions: as with hazardous activities, it should, on the one hand, cover the risk of an accident; on the other, it must also cover, and that was its essential function, significant harm caused in the territory of other States through a normal operation. Liability for risk must thus be combined with liability for a harmful activity.

39. His delegation therefore held the view that the concept of "risk" as defined in article 2 of the 10 draft articles submitted by the Special Rapporteur (A/43/10, para. 22) was not an appropriate basis for the elaboration of general rules of international law with respect to the topic. It agreed with members of the Commission that the topic would be unduly limited if the entire régime of liability were to be based on appreciability of risk. For example, the establishment of a paper-mill causing pollution to the waters of a border river was not "highly likely to cause transboundary injury"; on the contrary, such an effect was certain. However, that had until quite recently been more or less accepted. In such a case, it was not possible to talk of "risk" either within the meaning of draft article 2 or within the ordinary meaning of the term.

40. With respect to draft article 1, his delegation shared the view of the Special Rapporteur that the term "territory" was too narrow in scope, and that the words "jurisdiction and control", already found in other international instruments, should be used instead. It seemed, however, superfluous to qualify the term "jurisdiction of a State" by the words "as vested in it by international law". As to the concept of "effective control", his delegation believed that the term "control" would be sufficient, for if control was not "effective", that would be no control at all. The question whether liability for harm beyond the jurisdiction or control of any State should also be covered by the draft was certainly not easy to resolve. His delegation had some sympathy for the view that in the light of the constant deterioration of the human environment, a limitation would be unfortunate, but it was also aware of the great difficulties involved in extending the framework of the topic to cover harm to the human environment as a whole.

41. With respect to draft article 2 (c), he asked whether damage to the environment was covered by the expression "activities referred to in article 1 and which, in spheres where another State exercises jurisdiction under international law, is appreciably detrimental to persons or objects, or to the use or enjoyment of areas". In any event, his delegation would prefer a clear reference to the environment.

42. Referring to draft article 3, he said his delegation believed that liability should in principle be independent of the question whether the State had knowledge of activities being carried out under its jurisdiction, for otherwise the innocent victim would be made to bear the entire loss. The question of knowledge should,

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however, be examined when consideration was given to the amount of compensation, and then the burden of proof should lie with the State of origin.

43. With respect to draft article 6, his delegation would support the deletion of the first sentence, since it considered such a statement to be redundant. It thought that draft articles 7 and 8, relating to co-operation and participation, should be combined into a single provision. Furthermore, it would favour making such a provision more specific and referring, for instance, to the obligations of notification, consultation and prevention, as did the articles on the law of the non-navigational uses of international water courses. With respect to the view that the State of origin had to bear the main burden both with regard to prevention and in the case of an event which gave rise to liability, he said that it was also that State which reaped the benefits of the activity.

44. Draft article 9, concerning prevention, would have to occupy an important place in any set of draft articles. Relating prevention to more objective standards and not merely leaving it to the discretion of the State of origin would constitute major progress in the area of international law under consideration. In respect of draft article 10, his delegation could see no valid reason to limit the scope of reparation by specifying that the harm must be "caused by an activity involving risk". The draft articles should specify in what cases and under what circumstances the obligation to make reparation arose, regardless of risk. A further important question was whether a ceiling on the amount of compensation to be paid for a given event should be laid down. Although frequently used, such a solution in principle frustated the basic aim of liability for acts not prohibited by international law, which was to protect the community at large from the injurious consequences of the activities of a few, and thus required full, not partial, compensation. Such a limitation might nevertheless serve practical purposes, provided the ceiling was set at a realistic level.

45. It had also been suggested that circumstances which would either increase or diminish liability, or exclude it altogether, should be taken into account. However, since the matter under consideration was absolute liability for hazardous or harmful activities which did not presuppose any unlawful act, the admission of circumstances precluding wrongfulness would be pointless. Introducing the idea of "mitigating" or "aggravating" circumstances could be justified only by the pragmatic wish to make a new obligation more acceptable to States. Liability for risk must be combined with liability for harmful activities. With regard to the latter type of liability, it was conceivable that subjective reasons for non-compliance with the required standard, such as lack of access to the latest technology or temporary financial inability to acquire it, could be taken into account as mitigating circumstances when the amount of compensation was to be determined. In any case, it was important to bear in mind that the cost of an activity should not have to be borne by those who received no benefit from that activity.

46. It was Austria's view that the elaboration of a régime of State liability for nuclear damage was an urgent necessity. Austria had welcomed the adoption of the

(Mr. Tuerk, Austria)

Joint Protocol relating to the application of the Vienna Convention on Civil Liability for Nuclear Damage of 1963, and the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 1960. A new convention was necessary, however, because the "civil law" approach enshrined in those Conventions seemed fully applicable only among States with comparable legal systems and was, furthermore, inadequate in cases of large-scale accidents. The nucleus of a new convention - the principle of State liability regarding nuclear damage and the mechanism for the settlement of claims - should be based on the provisions of the 1972 Convention on International Liability for Damage Caused by Space Objects. The necessary definitions and provisions relating to the scope of the convention could be based on the Vienna Convention on Civil Liability. State liability should be subsidiary to the existing international régime on civil liability, but should be strict, in the light of the potentially catastrophic effect of nuclear accidents, and should provide not only for reparation in respect of damage to persons and property, but also for preventive measures and for reasonable measures to repair the damage to the environment.

47. At the thirty-second regular session of the General Conference of the International Atomic Energy Agency, a resolution co-sponsored by Austria had been adopted which requested the Board of Governors of that organisation to continue, as a matter of priority, consideration of the question of international liability for damage arising from a nuclear accident, taking into account, inter alia, the recommendation to convene an open-ended working group of governmental experts for the purpose of studying further the issues involved in international liability. Austria hoped that such a working group would soon be established and would make progress in the near future.

48. The drafting of international agreements relating to particular types of activities not prohibited by international law should in no way impede the drafting of a general framework treaty by the International Law Commission. On the contrary, such a general treaty might usefully draw on elements already contained in existing agreements of limited scope.

49. Mr. XU Guangjian (China), speaking on the topic of international liability for injurious consequences arising out of acts not prohibited by international law, said that the formulation of rules of international law to deal with the pitfalls resulting from the rapid advance of modern science and technology was in line with the interests and needs of the international community. The 10 draft articles submitted by the Special Rapporteur on the topic were generally acceptable to his delegation, but a number of issues deserved further study. Care should be exercised in defining the scope of the draft articles: for example, the issue as to whether pollution that might cause transboundary injury was prohibited by general international law remained unsettled. China agreed that certain activities causing transboundary pollution should be included in the Commission's scope of study. In that regard, the Special Rapporteur's amendment of the previous draft, replacing the term "territory" by "jurisdiction" or "effective control" for the purpose of defining the applicability of the draft articles, was quite acceptable. His delegation also agreed that the concept of "appreciable risk" should be used as

(Mr. Xu Guangjian, China)

an important criterion in limiting the activities covered by the articles, but it would not be desirable to use the extent to which a risk was appreciable as the only basis for determining liability, for that would exclude low-risk or even no-risk activities which might have seriously injurious consequences.

50. With regard to "attribution", he appreciated the Special Rapporteur's consideration of the interests and special needs of the developing countries. Owing to lack of technical expertise, equipment and trained personnel, such countries might not have full knowledge of or control over all activities taking place within their borders. Certain distinctions should therefore be made in the attribution of obligations. His delegation also favoured using the principle of State of origin in determining liability.

51. The three principles underlying chapter II of the current draft were acceptable; certain parts, however, should be further refined. With regard to article 6, freedom of action for every State within its territory was an important principle based on State sovereignty which had not received proper attention in the drafting of the article. His delegation favoured the concept, in article 9, of prevention in order to prompt States into taking preventive measures to avoid or reduce transboundary injuries. However, in the implementation of preventive obligations, a uniform standard could hardly be expected to be met. The choice of actual preventive measures must be determined by each State according to such specific factors as its capability, technical know-how and available equipment. Furthermore, it was doubtful if prevention could be taken as the basis for liability. The basis for liability should be real injury. In calculating compensation for injury, however, "due diligence" should, among other things, be taken into consideration.

52. With respect to article 10, his delegation believed that the principle of reparation should be included. Achieving a reasonable balance between a too narrow or too wide range of applicability of the article was a subject for further study.

53. Mr. WATTS (United Kingdom), speaking on the topic of international liability for injurious consequences arising out of acts not prohibited by international law, said that he had noted with interest the Commission's consideration of the extent to which the topic involved the progressive development of international law rather than the codification of existing rules. His delegation shared the Special Rapporteur's view that it was not necessary to decide in each case whether or not the provision in question involved progressive development. However, since the draft articles did involve the progressive development of international law in that area, the Commission should proceed in its deliberations on the topic with considerable care. At the current stage, it would probably be better to concentrate on situations which gave rise to the bulk of the practical problems which needed resolution and to refrain from attempting to grapple with those which theoretically arose but which raised issues of limited practical significance.

54. He welcomed the Special Rapporteur's decision not to attempt to provide a list of specific dangerous activities to be covered by the draft articles. The

(Mr. Watts, United Kingdom)

alternative approach of concentrating on the elaboration of a convention of a general nature seemed the right way to proceed in that new area.

55. It was important to bear in mind at every stage in the discussion, particularly with regard to liability and reparation, that the topic was concerned with activities which, by definition, were not prohibited by international law. Considerable caution should thus be exercised before attaching to them far-reaching consequences touching the responsibility of States.

56. First of all, with regard to article 1, his delegation supported the comments in paragraphs 54 and 55 of the Commission's report (A/43/10) about the need for the scope of the articles to be limited to certain activities having physical consequences, and hence for a reference to physical consequences to be reintroduced in article 1.

57. Secondly, in the same article, his delegation saw considerable disadvantage in relying on the concept of jurisdiction to determine the link between the risk-creating activity and the State in question, because the concept lacked precision and clarity. Even within a given State, jurisdiction was not a single concept. As stated in paragraph 61 of the Commission's report, the Special Rapporteur felt that jurisdiction included the competence to make law and apply it to certain activities or events. That double condition was one which bore further consideration. If it was to be adopted, it needed to be specified clearly in the draft article, since it did not follow automatically from the use of the term "jurisdiction". He was not convinced that the text did in fact deal satisfactorily with all possible situations which might arise and for which the notion of territory was considered inadequate. In resorting to the concept of jurisdiction, however, the text introduced confusion even in respect of those situations which in practice accounted for the vast majority of occurrences with which the draft articles attempted to deal. Articles which concentrated in clear terms on such areas as activities occurring within a State's territory would deal with most of the practical problems.

58. The third point arising in connection with article 1 concerned the requirement that an activity, to come within the scope of the draft articles, must be such as to create an appreciable risk of causing transboundary injury. The introduction of the element of risk was helpful in establishing an acceptable framework for the draft articles. While it would wrong to limit the topic to activities which were ultra-hazardous, it would be equally unwise to try to cover activities which, at the relevant time, were not perceived to carry with them any significant risk. Once risk was established, it was appropriate for certain obligations prescribed in the draft articles to apply, especially those relating to co-operation and prevention.

59. Physical harm was a necessary requirement for the existence of liability and any obligation to make reparation. Whether harm alone, flowing from an activity not previously perceived to carry with it any significant risk, should give rise to liability was a matter on which his delegation retained an open mind. At the

(Mr. Watts, United Kingdom)

least, principles of liability and reparation, where the harm flowed from an activity not perceived as involving significant risk, probably should be different from what they should be where the risk was clearly foreseen. It should also be remembered that not only was the activity itself by definition lawful, but in the no-risk situation those who caused the injury and those who suffered from it could both be regarded as "innocent".

60. To the extent that risk was relevant, the question arose as to the degree of risk required. The word "appreciable" was inappropriate in the context, mainly because it was ambiguous. In a very literal sense, something was appreciable, irrespective of its quantity, if it was detectable or identifiable. That was not the intention, as he understood the report. The intention appeared to refer to risks which were greater than normal. It would be more accurate to speak about significant risks, or a risk of significant effects, and it would be useful specifically to add that de minimis effects were excluded.

61. Article 3 caused his delegation some concern. Paragraphs 68, 69 and 71 of the report suggested that the Special Rapporteur understood the article to contain a presumption that the State of origin knew or had means of knowing about the risky activity being carried out, which presumption could be rebutted by the State of origin if it showed evidence to the contrary. He saw nothing in the text of article 3 establishing any such presumption, and his delegation would not regard any such general change in the burden of proof as appropriate.

62. With regard to article 7, his delegation could accept in principle the desirability of States co-operating in preventing or minimising transboundary injuries, but the scope and content of the co-operation required should be made clear through the inclusion of express provisions concerning notification and exchange of information. Similarly, co-operation as a principle had to be translated in practice into co-operation between particular States. The identification of those States, especially in relation to preventive action concerning possible future injury, was not straightforward and required further consideration and clarification.

63. Article 8 was too vague regarding the processes in which States likely to be affected should participate. One answer was given in paragraph 90, which provided that "the State of origin should permit participation by States exposed to a potential risk in choosing means of prevention ... [which] would cover the procedural steps for prevention". If that was the intended scope of the obligation to permit participation, it should be made clear in article 8 itself.

64. It was difficult to comment in detail on article 10, since it was dependent on as yet unknown criteria to be laid down elsewhere in the draft articles. As article 10 stood, while the implementation of the duty to make reparation would seem to be a matter for negotiation, the duty itself could be seen to be a matter of strict - or possibly even absolute - liability. The report acknowledged in paragraph 98 that the introduction of strict liability in that context "was likely to encounter the resistance of a great many Governments". He registered his

(Mr. Watts, United Kingdom)

delegation's concern on the matter and hoped that it would be satisfactorily clarified in the criteria to be elaborated in due course. Those criteria should deal, inter alia, with the question of the standard of liability, and associated questions concerning the permissible defences and exceptions to liability.

65. Mr. MAKAREVICH (Ukrainian Soviet Socialist Republic) said that positive developments in international relations had been gaining momentum. There was increasing awareness of the interdependence of the contemporary world and a growing conviction that comprehensive security could be established only by strengthening the legal foundations of international life and ensuring the primacy of international law in politics and inter-State relations. That new approach made it all the more important to make full use of the International Law Commission as the competent organ of the General Assembly in matters of international law.

66. Thanks to rapid scientific and technological progress, the topic of international liability for injurious consequences arising out of acts not prohibited by international law was of concern to all States. The relevant codification of international law would promote trust and co-operation between States and help to avert the adverse consequences of scientific and technological progress. Accordingly, the Commission should concentrate on elaborating general principles on which States could rely when concluding specific agreements.

67. The Special Rapporteur's report (A/CN.4/413) and the 10 draft articles he had submitted showed that the discussion in the Commission had been largely taken up with questions relating to a conceptual approach to the topic and with defining its scope. In his delegation's view, the Commission could achieve fruitful results in formulating the substance of individual articles only if the fundamental aspects of the topic were thoroughly worked out and agreed upon. The resulting texts could then form the basis for an comprehensive document covering the legal settlement of issues relating to international liability for injurious consequences arising out of acts not prohibited by international law.

68. An agreed conceptual approach to the topic must take into account the fact that many types of activity covered by the draft articles were of great importance, not merely to the State involved in those activities, but to the world community as a whole and to scientific progress in general.

69. Particular emphasis should be placed on the statement of the Special Rapporteur to the effect that there was no norm in general international law requiring compensation for every harm. Such an approach opened up prospects for developing international law in that field through the formulation of new rules. It was therefore necessary to adopt a flexible approach which relied on recognition of the need to limit liability, based on the existence of a significant element of risk attaching to legitimate activities which, as a result of circumstances, might cause appreciable transboundary harm. It appeared from the discussions that an approach which did not insist that transboundary harm was the only circumstance in which such liability would arise and which applied a principle based on the concept of risk borne by States engaged in pioneering scientific and technological progress

(Mr. Makarevich, Ukrainian SSR)

would be more equitable and logical and would enjoy greater likelihood of acceptance by States.

70. His delegation supported those members of the Commission who had welcomed the Special Rapporteur's readiness not to adopt the principle of strict liability in an automatic fashion which would not allow for any flexibility. It also agreed with the Special Rapporteur, in paragraph 112 of his fourth report (A/CN.4/413), that the principle of reparation would prevail if there was no agreed treaty régime between the source State and the affected State or States.

71. In resolving issues relating to reparation, account must be taken not only of the interests of the affected State, but also those of the State in whose territory the accident which gave rise to harmful transboundary consequences occurred. In particular, account must be taken of any safeguards or preventive measures by that State, and any contribution to making good the consequences of the accident. It was very important that both the document as a whole and its individual articles particularly those relating to the settlement of questions of compensation, should in general terms encourage co-operation between States and the provision of assistance to a State which had caused injury, in order to mitigate the effects of the accident.

72. At previous sessions of the General Assembly his delegation had affirmed that the document under consideration should contain a provision to the effect that compensation for transboundary harm at State level was possible only on the basis of specifically concluded agreements. Given that the economic self-sufficiency of enterprises was expanding in the Ukrainian SSR, his delegation did not exclude the possibility of solving the problem under civil law on the basis of limited liability of juridical persons.

73. In conclusion, he stressed that in its work on the topic the Commission should take as its basis the principle that the draft articles should reflect the interests of all countries.

74. Mr. TARUI (Japan) said that, in its future programme of work, the Commission should proceed to a second reading of the draft articles on the two topics on which it had completed a first reading, taking fully into account the comments and observations received from Governments. It was of the utmost importance that the Commission should devote close attention, among the other topics, to the question of State responsibility, with a view to early completion of the first reading of the relevant draft articles.

75. Turning to chapter II of the Commission's report, he said that work on the topic of international liability for injurious consequences arising out of acts not prohibited by international law was of a pioneering nature, with few precedents to rely on, and that it addressed many aspects of the progressive development of international law. He therefore hoped that the Commission would consider the topic with care, bearing in mind the need to strike a balance between the right of a State to conduct activities within its own territory and the right not to suffer

(Mr. Tarui, Japan)

injurious consequences from actions taken outside its territory, and that it would refrain from attempting too hastily to start codifying the relevant rules.

76. As for the scope of the "present articles", referred to in draft article 1, his delegation generally agreed with the Special Rapporteur that those articles should not apply to all types of activities that caused transboundary injury, but only to those involving an "appreciable" risk. However, further consideration was necessary, since the concept of "appreciable risk" was not sufficiently precise as a criterion for demarcating the scope in question.

77. The principles set out in draft articles 6 to 10 contained a number of controversial questions, such as the relationship between the duties to take preventive measures and to pay reparation, the principles of liability for preventive measures and reparation, and the amount of such reparation. In particular, it was not appropriate to treat the general rules of strict liability as general principles in international law. He hoped that the Commission would take a realistic approach to those questions, taking into account the provisions of the national laws of various countries.

78. Mr. ROSENSTOCK (United States of America) said that the short time that had elapsed since the Commission's report had been made available had not allowed Governments adequate time to give due consideration to the complex and novel topics covered therein. Perhaps future reports could be briefer, of a length somewhere in between the long document before the Committee and the brief introduction to the item given by the Chairman of the Commission. The views he was about to present were of a provisional and preliminary nature.

79. The cautions expressed by the representative of France merited serious consideration. While it was difficult to assess the work on a topic when its full scope was not yet known, the draft articles appeared to go far beyond the present state of law. Under existing law, States generally could engage in activities within their territory without being required to inform or consult. The duties to notify or compensate, where they existed, arose generally under treaties, such as the 1986 Convention on Early Notification of a Nuclear Accident and the 1972 Convention on International Liability for Damage Caused by Space Objects. Guidance was also supplied by arbitral decisions such as the Lac Lanoux and Trail Smelter cases, which existed in specific legal and geographical contexts. Also relevant was the Declaration of the United Nations Conference on the Human Environment.

80. His delegation was inclined to associate itself with those representatives who had expressed doubts regarding the suggested focus on risk and the procedural approach deriving from it outlined by the Special Rapporteur. He did not question the relevance of the notion of risk, but rather, the extent of reliance or focus upon it in the report.

81. Some delegations in the Commission had given the concept of risk a broad interpretation, and others, a narrow one. The Special Rapporteur appeared inclined to mix the concepts of risk and harm, in that he would include low-risk activities

(Mr. Rosenstock, United States)

where there was a potential for substantial harm. Whatever other defects might exist in a risk-oriented approach, if a broad definition were taken as the starting point, a draft more ambitious in scope than most Governments were likely to find acceptable would be the probable result.

82. The problems that might exist in the procedural approach taken were largely of a practical nature. Consultations leading to the balancing of interests and fact-finding seemed central to the approach as his delegation understood it. Such an approach was plausible in the context of neighbouring States with continuing material interests. That indeed had been the prevailing model in the minds of those who drafted the Declaration of the United Nations Conference on the Human Environment.

83. However, when the focus was broadened to encompass very distant potential effects, for example, among shifting groups of States in various parts of the world, serious questions arose regarding the procedural approach. One could readily visualise emerging from the suggested schematic outline a layering of quasi-regulatory negotiations among States, some engaging in activities covered by the draft articles, on the one hand, and others claiming potential harm, on the other hand. That cumbersome process could easily unduly restrict or delay a State from exercising its freedom of action with respect to its own territory. The balance between economic interests and environmental concerns struck in principle 21 of the aforesaid Declaration had been carefully arrived at and should not readily be upset. It was necessary to find a way to protect or compensate potential victims without unduly restricting economic development. An approach focusing on harm rather than risk was the better route to that end.

84. Mr. VILLAGRAN KRAMER (Guatemala) said that, while initially his country had viewed the question of international liability for injurious consequences arising out of acts not prohibited by international law as being of concern primarily to the highly industrialised countries, a serious industrial accident in Asia and subsequent nuclear accidents elsewhere had impressed upon it how important it was also for the developing countries to participate seriously and objectively in the debate, with a view to the ultimate adoption of a convention.

85. Three important legal principles governed Guatemala's approach to the topic: first, the right of one State ended where the right of another State began; secondly, no one could benefit from an act without being subject to its legal consequences and, thirdly, whoever caused the damage should make appropriate reparation. The general theory of liability distinguished between acts caused by lack of knowledge or experience, those caused by negligence and those caused by unforeseen circumstances. Risk and injury were very directly related and, contrary to the view of delegations which found the emphasis on risk in the report to be misleading, his delegation felt that the approach taken was the appropriate one and that it most accurately reflected the situation of the developing countries.

86. The report of the Special Rapporteur deserved the full attention of developing and highly industrialised countries which should bear in mind that it was

(Mr. Villagran Kramer, Guatemala)

imperative to prescribe preventive measures as well as corrective measures. If the theory of appreciable risk set out in the report was accepted, there was no need to include a list of activities deemed to present an appreciable risk.

87. The concept of continuous pollution fell within the context of the draft articles if risk was interpreted as proposed by the Commission. The efforts of a number of highly industrialized countries to prevent pollution and their adherence to multilateral conventions on the subject were to be commended.

88. With respect to the scope of the draft articles, he suggested that, in article 1, the words "as vested in it by international law" should be replaced by the words "in accordance with international law". Referring to the definitions provided in article 2, he said that it might be preferable to replace the word "physical" with the word "material". The phrase "transboundary injury" offered the advantage that it permitted the inclusion of appreciable harm caused to objects as well as persons, and covered the use and enjoyment of areas, two concepts which deserved full support. The concept of renewable resources should also be included in the interpretation of the phrase "use or enjoyment of areas".

89. Lastly, the Commission should provide guidance regarding risks and injury derived from unlawful activities.

ORGANIZATION OF WORK

90. The CHAIRMAN said that delegations would recall that, at the Committee's 16th meeting on 18 October 1988, he had informed them that he had received a letter dated 12 October 1988 from the President of the General Assembly transmitting a letter from the Chairman of the Fifth Committee, in which the Chairman of that Committee invited the Sixth Committee to express its views, by the first week of November 1988, on agenda item 115 entitled "Programme planning" which was allocated to the Fifth Committee.

91. Delegations would also recall that, with their approval at that meeting, he had communicated, on the same day, the text of the President's letter with its attachments to the regional groups for their comments. He had not yet received any comments from the regional groups, and would therefore assume that, if he did not receive any comments by the following day, the Sixth Committee had no observations to make regarding the item and, as in the past, he would inform the Fifth Committee accordingly.

92. He also informed the Committee that he had received a letter dated, 27 October 1988, from the President of the General Assembly transmitting a letter of 26 October 1988 from the Chairman of the Second Committee concerning agenda item 12 "Report of the Economic and Social Council", which had been allocated to that Committee. The relevant part of the letter of the Chairman of the Second Committee read as follows:

(The Chairman)

"By its resolution 1988/63 entitled 'Guidelines for international decades' of 27 July 1988, the Economic and Social Council, in pursuance of General Assembly resolution 42/171 of 11 December 1987, recommended guidelines for international decades for adoption by the Assembly. A copy of these guidelines (document A/C.2/43/L.2) is attached to this letter.

"Because the guidelines concern subjects of priority in the political, economic, social, cultural, humanitarian or human rights fields, I am writing to the Chairmen of the Main Committees of the General Assembly to request the views and comments, if any, of their Committees on aspects of the guidelines that may fall under the mandates of their respective committees.

"In order to ensure that the guidelines adopted take fully into account the views of all the Main Committees of the Assembly, it would be appreciated if such views might be communicated to the Second Committee no later than the second week of November 1988."

93. Following the pattern established in the Sixth Committee with regard to similar letters from other Main Committees of the General Assembly, he proposed to forward the letter in question to the Chairmen of the five regional groups of the Sixth Committee for their comments, if any, and to return to the matter the following week, once the views of the regional groups had been formulated. If he saw no objection, he would proceed accordingly.

94. It was so decided.

95. Mr. KOROMA (Sierra Leone) said that, while he did not oppose the procedure adopted, he thought that delegations should be encouraged to find time to consider any recommendations that might emerge from the discussions in the regional groups before they were sent to the President of the General Assembly.

96. The CHAIRMAN said that, if the regional groups thought that the issue should be discussed in the plenary meetings of the Sixth Committee, arrangements could be made to do so.

The meeting rose at 5.50 p.m.