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SUMMARY RECORD OF THE 32nd MEETING

Chairman: Mr. TUERK (Austria)

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The meeting was called to order at 10.05 a.m.

AGENDA ITEM 145: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FIRST SESSION (continued) (A/44/10, 409 and Corr.1-2, 475)

AGENDA ITEM 142: DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (continued) (A/44/465, A/44/73-S/20381, A/44/75-S/20388, A/44/77-S/20389, A/44/123-S/20460)

1. Mr. JACOVIDES (Cyprus), referring to the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, said that the legal régime governing couriers and bags should be comprehensive and uniform and should be based on the Vienna Conventions of 1961, 1963, 1969 and 1975; that functional necessity was the basic factor in determining their status; and that the draft articles should be in the form of a convention. The text not only brought together already existing rules but regulated aspects that had not been sufficiently specified in the Conventions already in force, thus striking a balance between the rights and duties of the sending State, the receiving State and the transit State.

2. There were, however, provisions that should be reviewed further. For instance, it would be preferable to make the wording of draft article 28 similar to that of article 35, paragraph 3, of the Vienna Convention on Consular Relations of 1963.

3. His delegation had no difficulty in accepting the Commission's recommendation on the convening of an international conference of plenipotentiaries, because it would be unfortunate if after so many years of work nothing were to come of it. It was, however, essential that the future Convention should be widely acceptable. To ensure that, a reasonable amount of time should be allowed for additional consultations, given the divergent views expressed in the debate. A decision could be taken on the Commission's recommendation either at the current session or later, after consultations regarding the conference, which could be held in 1991 or 1992.

4. The draft Code of crimes against the peace and security of mankind would constitute a basic instrument of deterrence and punishment for violators. It must include three elements: crimes, penalties and jurisdiction. In addition, crimes must be so characterized as to be clearly understood and legally definable.

5. The definition of war crimes should be general and not exhaustive, leaving it to the courts to review the circumstances of each case in the light of the evolving law. As regarded the term "war" as opposed to "armed conflict", his delegation preferred the latter because it was in keeping with current terminology. In any case, the expression "laws or customs of war" should not be discarded because it was established in many international conventions still in force and in the domestic law of many countries. Furthermore, the draft Code should include only serious crimes, which must be distinguished, just as in the Geneva Conventions of 1949 and Additional Protocol 1 to those Conventions, from other offences.

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(Mr. Jacovides, Cyprus)

6. The concept of crimes against humanity was broader than that of war crimes, because the latter were committed only in time of war and by belligerents. The expression "inhuman acts" could be applied both to attacks against individuals and to attacks against property, including historical and artistic monuments and especially those declared part of the heritage of mankind by the United Nations Educational, Scientific and Cultural Organization. As a result of foreign occupation, Cyprus had suffered a systematic destruction of its cultural heritage and been despoiled of artistic and religious objects.

7. As to the categories of crimes against humanity, it was obvious that genocide, covered in the 1948 Convention for the Prevention and Punishment of the Crime of Genocide, must be included among them, as should apartheid, as defined in the first alternative of draft article 14, paragraph 2, which corresponded more closely to the International Convention for the Suppression and Punishment of the Crime of Apartheid and was of general application.

8. Slavery, a crime jure gentium covered by many national legislations, must be included in the draft Code, as must the crimes listed in draft article 14, paragraphs 4 (a), (b) and (c). Cyprus had had a bitter experience of those three crimes, which continued unabated despite numerous resolutions of the General Assembly and other international bodies, including the Summit Conference of Heads of State or Government of Non-Aligned Countries held in Belgrade and the Conference of Heads of Government of Commonwealth Countries held in Kuala Lumpur.

9. The inhuman acts characterized as crimes in draft article 14, paragraph 5, should be made more specific in order to take into account the annihilation of peoples through the destruction of their cultural heritage. The same applied to the concept of the destruction of the environment, from the legal point of view, and international drug trafficking should be included in view of its serious repercussions.

10. The wording of draft articles 13, 14 and 15, which had been provisionally adopted by the Commission at its forty-first session, should be improved by emphasizing serious crimes and specifying their exact legal content. It should be stated clearly, for instance, that self-determination was a right exclusively of peoples subject to colonial exploitation and that it in no way provided justification for the secession of heterogeneous communities from an established State. Otherwise, the current system of nation States would collapse.

11. His delegation took note with great interest of the proposal by Greece to include in the draft Code a provision qualifying as an aggressor any State which deliberately did not comply with binding decisions of the Security Council aimed at ending an act of aggression.

12. Cyprus welcomed the introduction of new draft articles in chapter V of the report, as well as the attribution of equal importance to the concepts of "harm" and "risk". It was very important to establish a comprehensive régime of liability, as evidenced by the innumerable initiatives taken in the environmental field.

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(Mr. Jacovides, Cyprus)

13. With regard to chapter VI of the report, his delegation felt that the Commission should avoid doctrinal debate and focus on individual articles in order to reach a consensus on which State activities should enjoy immunity. The settlement of disputes should be taken up either in part IV of the draft articles or in the diplomatic conference convened for the purpose.

14. Concerning chapter IX, the Drafting Committee should be allowed sufficient time to complete its work. Also, Cyprus agreed that the Commission and the General Assembly should maintain closer relations, that the duration of the Commission's sessions should be maintained at not less than 12 weeks and that the Commission's work should be made known as widely as possible.

15. Just as with other regional bodies like the Asian-African Legal Consultative Committee, the European Committee on Legal Co-operation and the Inter-American Juridical Committee, closer contacts should be established with the Movement of Non-Aligned Countries and with the Commonwealth countries, to allow an exchange of views and familiarization with the legal work and thinking of those bodies - composed of many United Nations Member States - on both substantive law and topics to be included in the Commission's programme of work. It should be recalled that the Movement of Non-Aligned Countries had proposed that the 1990s should be proclaimed the United Nations decade of international law.

16. Commending the Soviet Union and the United Kingdom for their statements on the primacy of international law and the rule of law in international relations, his delegation pointed out that the grave situation in Cyprus as a result of foreign invasion and occupation could have been avoided if the relevant rules of international law had been observed.

17. Mr. KUFUOR (Ghana) welcomed the adoption by the Commission of the final text of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

18. With regard to the draft Code of crimes against the peace and security of mankind, which was a good basis for elaborating a generally acceptable code on the subject, it was understandable that the Commission had confined its work to the criminal responsibility of individuals, because in the final analysis, it was individuals who actually carried out the activities characterized in the draft Code as criminal. However, at some stage the question of the criminal responsibility of States would have to be considered.

19. His delegation preferred the second alternative of article 13 as presented by the Special Rapporteur, because the expression "laws or customs of war" might give rise to problems of definition. The kind of crime that should incur international criminal liability should be of such a grave nature as to constitute a crime against the peace and security of mankind. It would be advisable to have a general definition and an indicative list of crimes to give guidance to those who interpreted the law, leaving to the judge the freedom to bring new situations within the definition. The use of weapons of mass destruction, in particular

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(Mr. Kufuor, Ghana)

nuclear weapons, clearly needed to be brought within the ambit of the Code. For the many signatory countries of the Treaty on the Non-Proliferation of Nuclear Weapons, the inclusion of such a provision would reassure them about possible nuclear blackmail.

20. The Commission had rightly included apartheid in the draft Code as a crime against humanity. His delegation preferred the second alternative formulation, because it was comprehensive. However, the phrase "as practised in southern Africa" should be deleted, because it created an erroneous impression, and could perhaps be replaced by a reference to South Africa. Furthermore, the system practised in South Africa should not be confused with what some called tribal apartheid, which resulted from vestigial social customs of the societies where it was practised. The Governments of the States in which such practices occurred were doing their best to eradicate them. That would also contribute to economic development. Such forms of apartheid should more properly be considered in the Third Committee.

21. His delegation supported the characterization of colonial domination and slavery as a crime against humanity. The expulsion or forcible transfer of populations from their territory should also be included in that category. Lastly, the dumping of toxic and other dangerous wastes in developing countries should also be brought within the ambit of the Code in the context of environmental protection.

22. Mr. HAMPE (German Democratic Republic) welcomed the resumption of work on State responsibility and noted with satisfaction that the new Special Rapporteur had maintained the general approach followed by the Commission with regard to international crimes. The legal consequences of international crimes must be formulated in the most comprehensive manner possible, and the Commission should choose either the "additive" approach or a separate comprehensive formulation, because otherwise the work of the Drafting Committee might remain deadlocked until the chapter on international crimes was submitted.

23. His delegation did not share the Special Rapporteur's view that legal consequences of a punitive nature existed within the framework of State responsibility, and the Commission should abandon any reference to it in the draft articles. Nor was it in favour of replacing the word "countermeasures" by "measures", because the former implied an element of proportionality and a reference to the fact that such countermeasures were a response to an activity that was contrary to international law.

24. The cessation of an internationally wrongful act had a relatively independent function and therefore warranted a separate article. But it should be borne in mind that cessation was part of the legal consequences of the act and as such remained closely connected with reparation. State practice, the practice of the Security Council and the judgments of the International Court of Justice showed that the claims by the injured State often included cessation and reparation. Article 6 should therefore be placed directly before the article on restitution and not in chapter I of Part Two, or in Part One under general principles.

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(Mr. Hampe, German Democratic Republic)

25. The restoration of a situation through restitution in kind was an essential element of reparation, and should be given priority wherever restitution was practically and legally possible. It was indispensable where there was a violation of jus cogens norms. A regulation focusing exclusively on restoration of a hypothetical status quo ante that would have existed had there been no legal violation would be too rigid, because it would not take into account the diversity and specific nature of the primary norms violated and would give rise to speculative elements. It was therefore preferable to focus restitution on restoration of the situation as it had been before the injury and to remedy any additional damage by way of compensation, as was often the procedure in State practice. It would be very useful if the Commission were to consider whether a distinction should be made between offences and international crimes in respect of the forms of restitution.

26. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, his delegation had taken note of the revised scope of application of the draft articles and wondered whether it would be feasible to establish general and procedural rules both for activities involving the risk of causing transboundary harm and for activities which had caused transboundary harm. The broader the scope of the topic, the more difficult the establishment of uniform general rules would be. Article 2, for instance, included three definitions for the term "risk", but it did not specify which group of activities under article 1 could serve as a practical criterion for establishing categories. The efforts to include activities that caused harm to the "global commons", i.e. in areas beyond the national jurisdiction of any State, could lead to a questionable extension of the draft's scope. Although the aim was legitimate, it was not prudent to develop environmental law from the narrow angle of liability. For all of the above-mentioned reasons, the work of the subject should focus on particularly hazardous activities, using as a guideline the practice of States, which had not yet justified the introduction of general principles of liability as an expression of a widely held legal view.

27. Work on procedural rules could not be successful until the scope of the draft articles had been clearly defined. His delegation therefore supported the Special Rapporteur's decision to withdraw chapter III and submit it again in 1990. The applicability of the procedure to already existing or ongoing activities raised particular problems that would require a reasonable period of adaptation. His delegation preferred the orientation towards future activities. Lastly, the shift of emphasis in the scope of the topic would make the articles less acceptable to States, especially since, in the absence of a list of the activities covered, States might not be prepared to assume obligations which were not clearly defined.

28. Mr. NAGAI (Japan), referring to the topic of State responsibility, recognized the necessity of establishing an independent provision on the cessation of an internationally wrongful act, as was done in draft article 6. With regard to draft article 7, he supported its provision that, on the one hand, the injured State might claim other modes of reparation to substitute for restitution in kind when restitution in kind was materially impossible, and that, on the other hand, the

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(Mr. Nagai, Japan)

injured State's right to restitution in kind would not be impaired even if restitution in kind was rendered legally impossible by the internal law of the State which committed the internationally wrongful act.

29. On the topic of international liability for injurious consequences arising out of acts not prohibited by international law, the Special Rapporteur in his fifth report had proposed revised texts of articles 1 to 9, taking into account the deliberations at the previous session of the Commission, and had also presented a new set of draft articles 10 to 17, relating to procedural rules, as chapter III.

30. It was to be 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 its right not to suffer injurious consequences from actions taken outside its territory. His delegation agreed with the Special Rapporteur that both harm and risk were taken as a premise in the application of the Convention by referring to "the physical consequences" and "appreciable harm". However, it believed that further consideration was necessary, because the concept of "appreciable risk" was not sufficiently precise.

31. Articles 10 to 17 stipulated procedural steps such as notification, the provision of information and warning by the State presumed to be affected. Those procedures were basically in line with the relevant articles of Part III of the draft articles on the law of the non-navigational uses of international watercourses. However, the scope of the draft articles on international liability was broader than that of the draft articles on international watercourses, and it was also necessary to take into account the unique circumstances of various regions of the world.

32. Mr. KOZUBEK (Czechoslovakia) said that, in the 1970s, the Commission had been able to adopt the first 35 articles constituting Part One of the draft articles on State responsibility, which was devoted to the origin of international responsibility. Now, a decade later, only the first five articles of Part Two had been added to the draft and the main problems of that part were still to be resolved.

33. His delegation did not entirely agree with the Special Rapporteur's intention to modify the structure of the draft so as to include procedural rules on the application of international responsibility in Part Two and to limit Part Three to the peaceful settlement of international disputes. It would be better to preserve the original concept of the draft and devote Part Two to the content, forms and degrees of international responsibility; Part Three should deal with the conditions under which responsibility could be invoked and the injured State could request that the obligations to which responsibility gave rise be fulfilled, as well as with the action that it might take to assert the rights that had emerged for such a State in relation to the offending State.

34. His delegation welcomed the proposal to devote separate chapters to the consequences of international delicts and to those of international crimes. It

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(Mr. Kozubek, Czechoslovakia)

expected that the legal consequences of international crimes would be elaborated in greater detail, since the articles 14 and 15 proposed by the previous Special Rapporteur were not completely adequate.

35. His delegation considered it essential that a separate draft article be devoted to the duty to cease internationally wrongful acts. Such a duty existed under international law and the draft should confirm that fact. In principle, his delegation found the Special Rapporteur's draft article 6 on the cessation of internationally wrongful acts acceptable. However, it shared the view of those members of the Commission who had recommended that article 6 should refer to the wrongful act "extending in time".

36. Restitution in kind, referred to in article 7, should be designed to restore the situation that existed prior to the commission of the internationally wrongful act. Restitution in kind need not necessarily exclude the possibility of claiming compensation for other damages, for example a loss of profit (lucrum cessans). The injured State should have the right to choose in what way the injury should be compensated. In principle, his delegation accepted the criteria and conditions for such a choice indicated in article 7.

37. Where the topic of international liability for injurious consequences arising out of acts not prohibited by international law was concerned, the modifications made to article 1, which was now based on the concept of appreciable risk and transboundary harm, were acceptable. Such an approach opened up the possibility of establishing much stronger legal regulations. It would also be advisable to refer to the specific rights and duties of States applicable to each type of activity, with respect to both prevention and compensation.

38. His delegation also supported article 7. Co-operation between States, particularly with regard to the prevention of harm and risks deriving from activities not prohibited by international law, was extraordinarily important.

39. Article 8 on prevention and article 9 on reparation were also very important. There were three possible concepts of the role of prevention in the draft articles: the first was to combine prevention directly with reparation; the second was to accord equal importance to prevention and reparation; the third was to conceive the draft articles as an instrument that governed prevention alone. A solution might be found in a suitable combination of the first two approaches. With regard to article 9, the question arose whether reparation was the most suitable term to use.

40. His delegation also appreciated the submission of eight new articles of chapter III entitled "Notification, information and warning by the affected State", but did not regard the use of provisions from the draft articles on the non-navigational uses of international watercourses as the best solution, since they applied to different activities.

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41. Mr. ZOULICHKI (Morocco), referring to the topic of the jurisdictional immunities of States and their property, said that the Commission had been able to avoid discussing the general principles of immunity when considering draft articles 1 to 11 bis. The discussion at the most recent session had made it possible to identify certain points of difference and to establish guidelines for making progress in the Commission's future work.

42. His delegation was aware of the difficulties inherent in the task of codifying the jurisdictional immunities of States, but was convinced that the Commission would continue to draw up compromise solutions that were in keeping with the collective interests of the international community. The search for such solutions was reflected in the report and proposals submitted to the Commission by the Special Rapporteur, especially those concerning draft articles 1 to 11 bis.

43. His delegation considered the proposal to merge draft articles 2 and 3, entitled "Use of terms" and "Interpretative provisions", to be fully justified. It also thought it appropriate to delete article 3, paragraph 1 (d), referring to "representatives of the State acting in that capacity", in order to avoid any possible confusion between the immunities of the State and those of its representatives.

44. In defining "commercial contract", the "nature" and "purpose" tests were not equally important. The judge would have in the first place to take into account the nature of the contract, and would have recourse to the "purpose" test only as a subsidiary consideration. The Special Rapporteur had presented a variant (A/44/10, para. 441) which referred to the right of States to determine by agreement whether a contract was commercial. That proposal substantially limited the application of the "purpose" test.

45. His delegation did not think it necessary to provide, in article 3, for the hypothesis of an international agreement intended to settle in advance the question of the commercial nature of a contract.

46. Draft article 6, which set forth the general principle of State immunity, was the fundamental provision of the future instrument. The reference made in that article to the relevant rules of general international law led to a unilateral multiplication of exceptions to the principle of immunity and deprived the draft articles of their substance. The provision would in effect add to the exceptions provided for in articles 11 to 19 and would limit the scope of the rule of jurisdictional immunity of States and their property.

47. Reference had been made to the need to take account of further development in State practice. If that was the purpose, the adoption of additional protocols by the parties to the future instrument would be a more prudent solution. A provision of that type would be appropriate to ensure adaptation of the future convention to the international environment.

48. The same comments were applicable to the proposal for harmonization that was the subject of article 6 bis. If retained, the provision would bestow a character of uncertainty and instability on State practice.

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(Mr. Loulichki, Morocco)

49. With regard to article 11 bis, which dealt with the case of State enterprises with segregated State property, his delegation preferred the proposal in paragraph 504 of the report, explicitly to exclude from the definition of the expression "State", enterprises acting on their own behalf and possessing their own assets.

50. His delegation reserved its position with regard to draft articles 12 to 28.

51. Mr. ROJANAPHRUK (Thailand), referring first to the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, said that the draft articles and the optional protocols thereto were to a great extent a consolidation of the norms of international law contained in the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. With regard to article 28, concerning protection of the diplomatic bag, his delegation felt that, for security reasons, electronic screening of the diplomatic bag should be permissible only at international airports of the receiving and transit States, provided that in so doing there was no violation of the confidentiality of the documents in the bag.

52. Paragraph 2 of the same article seemed to adopt a double standard by providing that only the consular bag was to be opened if the authorities of the receiving and transit States had serious reason to believe that it contained something other than correspondence, documents and appropriate articles. His delegation considered that the principle of inviolability should apply equally to the diplomatic and consular bags. In view of the differences of views, particularly on draft article 28, his delegation supported the recommendation by the International Law Commission that an international conference should be convened to consider the adoption of the draft articles and the related protocols.

53. With regard to the law of the non-navigational uses of international watercourses, and in particular to article 22, paragraph 1, he fully supported the principle of co-operation on an equitable basis between watercourse States to prevent or mitigate water-related hazards and other adverse effects, but he thought it might be preferable to leave such co-operation to a specific agreement between States concerned, and proposed that the words "on an equitable basis" should be deleted.

54. Regarding the duty of the watercourse States to notify the other potentially affected States of any water-related danger or emergency situation originating from its territory or of which it had knowledge, referred to in article 23, it would be more appropriate if such notification was confined to the case of danger as a result of human activities. In the case of water-related danger or emergency situations that were primarily of natural origin, the watercourse State was not duty bound, but should nevertheless notify others of the danger as soon as practicable.

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55. Mr. VOICU (Romania), referring to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, said that the question was of great practical importance. An instrument on the topic would have positive implications for the stability of relations and confidence between States. In the light of the State practice of according the same treatment to international organizations as to diplomatic missions, it was to be expected that those organizations would benefit indirectly from the adoption of a new legal instrument on the status of the diplomatic courier and of the diplomatic bag. The draft articles should also refer to the diplomatic courier used for official communications with special missions. It would thus be possible to ensure a comprehensive approach and a single régime for all types of diplomatic courier. That would imply amending the wording of certain articles.

56. The draft articles adopted some of the provisions of the existing conventions on the matter, as well as principles derived from international custom. In some cases, the draft articles went beyond existing practice and improved the rules in force. Furthermore, the draft articles sought to maintain a certain balance between the legitimate interest of the sending State in ensuring the inviolability of the diplomatic bag and the security interests of the receiving and transit States. The draft articles should take the form of a convention to be adopted at an international diplomatic conference of plenipotentiaries, to be open to participation by all States.

57. His delegation favoured the draft articles presented, but had some comments to make. In article 6, paragraph 2, subparagraph (b), the words "by custom" should be deleted. Any change in the scope of application should be made only by agreement between the States. Practices that established a custom always constituted agreements between States. With regard to article 9, the question arose as to whether the nationality and residence requirements should not be applied also to the transit State in order to ensure that its citizens were not appointed as couriers without prior agreement. In article 12, paragraph 1, the distinction between persona non grata and a person not acceptable meant the distinction between diplomatic staff and administrative, technical or service staff. In the case of the diplomatic courier, the distinction had no practical application, and his delegation therefore suggested that the words "or not acceptable" should be deleted.

58. The right of entry into the territory of the receiving State or the transit State (art. 14) had been formulated too broadly. That was evident in the case of a State not recognized by other States. It would be necessary to refer to articles 9 and 12 and also to include the transit State. It should also be established that entry into the territory of another State must be in compliance with the regulations of that State.

59. On the subject of article 18, paragraph 1, which established that the diplomatic courier should enjoy immunity from criminal jurisdiction, his delegation considered that the limitation of such immunity to acts performed in the exercise of the diplomatic courier's functions would allow many interpretations, which could unjustifiably delay the delivery of the diplomatic bag. The limitation of immunity should be restricted to the fields of civil and perhaps administrative

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(Mr. Voicu, Romania)

jurisdiction, and there should be no such limitation in the field of criminal jurisdiction.

60. With regard to article 22, paragraph 4, it was important to guarantee the immunity of the diplomatic courier against the execution of a criminal judgement when the courier did not enjoy complete but only functional criminal immunity - in respect of acts performed in the exercise of his functions - or when immunity from criminal jurisdiction had been waived under article 22, paragraph 1. That problem was not provided for in the text, since article 22, paragraph 4, referred only to immunity in respect of the execution of civil and administrative judgements.

61. His delegation considered the wording of article 28 to be satisfactory. The text now met the concerns expressed by Romania, among others, which had spoken at the appropriate time in favour of respecting the inviolability of the diplomatic bag. His delegation was also gratified that the former article 33 had not been retained.

62. With reference to chapter IX of the Commission's report concerning "Other decisions and conclusions of the Commission", his delegation noted the considerable progress that had been made in the codification and progressive development of international law. The Commission should base its work on the various draft conventions on the principles of strict respect for national sovereignty and independence, non-interference in internal affairs, and equal rights and mutual advantage. One positive aspect of the Commission's work had been its constant concern to improve its programme and working methods. In that regard, his delegation underlined the importance of the establishment of the Working Group set up at the Commission's 2104th meeting and valued the Group's conclusions.

63. With regard to the request that Special Rapporteurs should attend meetings of the Sixth Committee, his delegation considered their presence to be not really necessary if the scale of the financial implications was taken into account. Moreover, the secretariat prepared a thematic summary of the Sixth Committee's discussions which indicated all the important aspects of its work. If the Commission considered that the summary did not meet the needs of the Special Rapporteurs, it should study the problem and produce suggestions for improvements.

64. Mrs. RASOANAIVO (Madagascar), referring to the topic of State responsibility, said that the Special Rapporteur had recommended some changes of method which her delegation considered to be acceptable in principle. The Special Rapporteur had proposed that the legal consequences deriving from delicts and crimes should be dealt with separately. That approach was a logical consequence of the distinction between delicts and crimes adopted by the Commission in article 19 of Part One. Moreover, although the distinction between the consequences of delicts and crimes was not absolute, the change made it possible to define explicitly the rights and obligations deriving from both categories of wrongful act.

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(Mrs. Rasoanaivo, Madagascar)

65. Her delegation also accepted the Special Rapporteur's suggestion to treat the substantive legal consequences and the procedural consequences of wrongful acts separately. The former imposed strict obligations on the State that had committed the offence which were quite independent of the subsequent behaviour of the injured State. Moreover, the procedural consequences were subject to other conditions aimed at satisfying the rights of the injured State, so that it did not resort to measures intended to re-establish the status quo ante. It also seemed reasonable on the part of the Special Rapporteur to suggest that Part Three of the draft should be devoted to the peaceful settlement of disputes and that Part Two should include part of the provisions covering any obligations that the injured State or States should fulfil prior to resorting to measures.

66. With regard to draft article 6, her delegation agreed with the Special Rapporteur that the text of the article should be more categorical, stipulating in particular the right of the injured State to demand the urgent cessation of the wrongful act. Cessation was a fundamental stage and affected not only the existence and validity of the rule that was violated, but also the interests of the injured State. In its current form, draft article 7 underlined the importance of restitution in kind as compared with other methods of making reparation. However, the strict application of naturalis restitutio would encounter practical difficulties, especially in regard to non-material harm. For that reason, her delegation attached great importance to other forms of reparation, in particular reparation by equivalent compensation. With regard to the exceptions to the obligation to make restitution in kind, her delegation found the text proposed by the Special Rapporteur acceptable, but considered that the wording of article 7, paragraph 2, should be improved so as to prevent fulfilment of the obligation to make restitution being avoided on the grounds that it was "excessively onerous". It also agreed with the Special Rapporteur on the matter of the right of the injured State to choose between restitution in kind and compensation.

67. On the subject of international liability for injurious consequences arising out of acts not prohibited by international law, she welcomed the improvements made by the Special Rapporteur to articles 1 to 9 in chapters I and II, which made the text clearer and established a strict legal régime for activities that caused transboundary harm. Her delegation reiterated the comments that it had made during the forty-third session of the General Assembly to the effect that the Commission's aim should be to formulate a model agreement defining general principles which States would take into account when drawing up specific agreements. Consequently, the Commission should devote itself primarily to devising ways of preventing transboundary harm and defining the conditions for making reparations.

68. The procedures described in articles 10 to 17 of chapter III referred to compliance with obligations in respect of prevention and reparation. As to the provisions on assessment, notification and information in article 10, her delegation noted that the obligation to assess the situation should lie with the affected State and the State of origin. There were difficulties arising from the exception to the obligation to inform, appearing in article 11, an exception which was based on the need to protect national security or industrial secrets. Bearing

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(Mrs. Rasoanaivo, Madagascar)

in mind the modern technologies available to the more advanced industrialised countries, that exception could considerably weaken the obligation to inform and would put the developing countries in a subordinate position.

69. Referring to the draft Code of crimes against the peace and security of mankind, she preferred the second alternative of article 13 on war crimes, consisting of a general definition and a non-exhaustive list. On that point, her delegation was in favour of deleting the word "serious" in paragraph (a) so as to prevent a simple violation from being considered a war crime. Moreover, she regretted that the fact of being the first to use nuclear weapons had not been included in the list of war crimes. The suggestion, in paragraph 140 of the Commission's report, to distinguish three categories of war crimes was welcome. As for article 14 on crimes against humanity, her delegation approved of the Commission's approach: to have a separate provision for each crime. Genocide was the prototype of a crime against humanity. On the subject of apartheid, her delegation preferred the second alternative proposed. A more intensive review of the issue of slavery or other forms of bondage was needed, particularly concerning forced labour. Paragraph 4 seemed acceptable to her. While paragraphs 5 and 6 were also acceptable, the concept of "property" should be broadened so as to include sites or monuments that were recognized as the common heritage of mankind. The mass nature of destruction should also be stressed. Lastly, her delegation endorsed the Commission's decision to request the Special Rapporteur to prepare a draft provision on international traffic in narcotic drugs for its following session.

70. Mr. TREVES (Italy) said that, if the work on State responsibility had been completed or had advanced further, many of the problems raised by the draft Code of crimes against the peace and security of mankind and the topic of international liability for injurious consequences arising out of acts not prohibited by international law would have been solved or seen in a different light.

71. While his delegation did not wish to repeat the comments that it had made in 1988 concerning the draft articles, it reiterated that some guidelines should be given for precisely determining the meaning of restitution in kind, instead of considering only related conditions and exceptions.

72. He commended the Special Rapporteur's work on such topics as fault and the attribution to States of wrongful acts. The method of considering fault in terms of forms and degrees of reparation seemed to be fully in line with the ideas expressed in Part One of the draft articles, where fault was not mentioned as an element of the wrongful act, although the possibility existed of its playing a role in other aspects of State responsibility, for example, with regard to the degrees of reparation.

73. In view of what the Special Rapporteur seemed to have in mind, it did not seem advisable to reopen the discussion on basic concepts in the matter of attributing wrongful acts to States. The ideas that had been incorporated in Part One of the draft articles were enjoying wide acceptance. Hence, that Part, which had yet to be adopted by a conference of plenipotentiaries, should not be jeopardized.

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(Mr. Treves, Italy)

74. The topic in chapter V of the Commission's report was not ripe enough for definitive conclusions to be reached. His delegation harboured some doubts about the formulation of article 1, as it took into account only the place where the activities were carried out. It should therefore be redrafted to read: "activities carried out in the territory of a State or under its jurisdiction". The term "jurisdiction" applied, inter alia, to States' ships and aircraft, their installations and other objects such as drilling platforms and objects launched into space, expeditions sent to areas not subject to the sovereignty of any State and groups of persons of a State when in the territory of another State, such as troops authorized to pass through a country. If the term "jurisdiction" was considered too imprecise, all the situations concerned should be specified. It was inadvisable to specify them only in part, as in the draft article.

75. The phrase "places under its jurisdiction as recognized by international law" raised serious doubts. It could be interpreted to indicate that a State exercising its jurisdiction illegally but effectively in a given territory would not, in that territory, be bound by the obligations that were set forth in the articles, which was unjust and unacceptable. In its advisory opinion of 1971, the International Court of Justice had indicated that the illegality of South Africa's presence in Namibia did not exempt the illegal occupant from fulfilling the responsibilities that were incumbent upon it because the territory had been under its control.

76. The definition of "transboundary harm" in article 2, read in conjunction with article 1, seemed to exclude from the scope of the draft articles harm caused to the "global commons". That was an important question. While it was true that it raised the difficult problem of identifying the victim, and that the procedural provisions currently envisaged could not be applied to that case, the Commission should not miss the opportunity of including in the draft a phenomenon whose importance was increasing. Furthermore, the inclusion of the "global commons" would help to establish a theoretical distinction between liability in the context of the topic and State responsibility. The need for such a distinction emerged clearly in considering article 3, under which the responsibility of the State of origin seemed to depend on a wrongful act, namely the act of tolerating or of not preventing the use of its territory for activities prejudicial to other States. The only original aspect would be that in that case the illicit character of the State's behaviour would be presumed because of the place where the risk-inducing activities were conducted. The most important consequence of such presumption would be the shifting of the burden of proof which the International Court of Justice, in the Corfu Channel case, had refused to support as far as the classical wrongful acts consisting in violations of due-diligence obligations were concerned.

77. The obligation of reparation by the State of origin of damage caused by activities not prohibited by international law should be residuary in character and invoked only when none of the mechanisms provided for avoiding or minimizing damages, as well as for repairing them within the framework of private-law liability, had obtained results. Consequently, the Commission should make wider and more fully articulated the content of the rules on the obligation of co-operation and of prevention contained in articles 7 and 8 proposed by the

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(Mr. Treves, Italy)

Special Rapporteur, mentioning, even if only by way of illustration, compulsory insurance, guarantee funds, and the adoption of appropriate regulations concerning authorisation, inspection and monitoring activities.

78. With regard to article 9, his delegation thought that to underscore the distinction with State responsibility for wrongful acts, it would perhaps be more appropriate to use a different term, such as "indemnification". Also, the need to restore the balance of interests affected by the harm could have as a consequence the fact that the victim State would receive full indemnification of its loss only in limited cases, and he recalled that the only convention in force dealing with reparation by States of damage arising from activities not prohibited by international law, namely the Convention on International Liability for Damage Caused by Space Objects, provided explicitly for the right of the victim State to obtain full reparation.

79. Mr. TANG Chengyuan (China) welcomed the fact that the Commission had resumed its work on State responsibility. He took note of the changes proposed by the Special Rapporteur, the most salient being the separate treatment of wrongful acts and crimes, which would help to highlight their different nature and different legal consequences, including the rights and obligations of parties with regard to various forms of reparation and to the cessation of the internationally wrongful act. Although some members of the Commission considered that such a distinction was artificial and did not believe it necessary to include article 19 in Part One, his delegation felt that the expansion of the scope of State responsibility to international delicts in general and to international crimes such as aggression, colonial domination and racism reflected the development of international law. The difficulties involved in elaborating the provisions on the matter should not prevent members from making a separate study of the legal consequences of international delicts in general or from improving article 19 of Part One on second reading of all the articles. The consequences of international crimes could at least be treated as a supplement to the provisions concerning wrongful acts in general. His delegation therefore accepted in principle the change proposed by the Special Rapporteur. It also considered that draft articles 6 and 7 had a recognizable basis in theory and State practice and were necessary.

80. With regard to the topic of international responsibility for injurious consequences arising out of acts not prohibited by international law, his delegation had taken note of the concept of "global commons", which it had studied with great care. The Commission must not ignore the need to deal with harm to the human environment. Indeed, while activities which caused harm to the global commons in areas beyond the national jurisdiction of any State and the ensuing liability fell within the scope of the topic under consideration, there was no doubt that the concept of global commons and its legal implications were still not well defined and gave rise to many theoretical and practical difficulties, including its relationship with the principle of territorial sovereignty of States.

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(Mr. Tang Chengyuan, China)

81. The activities to be regulated in connection with that topic were those which were carried out in the territory of a State or in places under its jurisdiction or control and whose physical consequences caused, or created an appreciable risk of causing, transboundary harm. The meaning of "transboundary harm" was clear when the affected State was a neighbouring State of the State of origin. However, the question arose which was the affected State when activities caused harm to the "global commons". Moreover, if it was accepted that the activities which caused harm to the "global commons" fell within the scope of the topic under consideration, the question arose how was the State of origin to be determined and what were the rights and obligations of the State of origin and other States. Activities causing the "greenhouse effect" or the depletion of the ozone layer had cumulative effects. They were the consequences of industrial and technological activities carried out by mankind over a long period of time. It was the common responsibility of mankind to reduce and gradually eliminate the activities which caused harm to the "global commons" through international co-operation and by taking practical and effective measures. In elaborating the relevant laws and standards, the international community should take into account the specific situation of the developing countries. It could be seen from the foregoing that the question whether to include the "global commons" in the scope of the topic under consideration required in-depth study.

82. His delegation approved in principle the revision of articles 1 to 10. In the revised version of article 1, the concepts of "harm" and "risk" were given an equally important role. In that way, the draft article applied both to activities which caused transboundary harm and to those which created the risk of causing transboundary harm. In addition, in view of the fact that the scope of the topic was no longer confined to activities creating the risk of causing transboundary harm, it was necessary to limit the scope of liability and to link the liability with the nature of activities.

83. Article 7 had a new text which required that the State of origin and the affected State should join efforts in dealing with transboundary harm and risk. Article 8 attributed the liability for prevention to the State of origin and at the same time allowed it, in so far as it was able, to use the best practicable, available means to carry out preventive measures. That provision was reasonable and practical and of particular importance to the developing countries, whose responsibility for preventing such harmful activities should be compatible with their level of economic and technological development.

84. Chapter III of the draft articles dealt with procedures relating to the prevention of transboundary harm, placing emphasis on assessment, notification and warning about activities falling within the scope of article 1. In general, the State of origin and the affected State should make sincere efforts at co-operation and adopt practical measures to reduce or avoid activities that might cause transboundary harm. However, the procedural provisions should in no way imply that a State could veto the sovereign right of another State to act freely within its territory.

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85. The CHAIRMAN said that Kenya had become a sponsor of the draft resolution on UNCITRAL (A/C.6/44/L.5).

86. Mr. HAYES (Ireland) said that the topic of international liability for injurious consequences arising out of acts not prohibited by international law was clearly distinguishable from that of State responsibility. His delegation shared the view (A/44/10, para. 336) that there was a considerable State practice, both conventional and in terms of judicial decisions, which ascribed liability to certain lawful activities causing transboundary harm.

87. The Commission had considered two preliminary issues: whether treatment of the topic should include activities involving extended harm or the risk of harm to many States, and activities causing harm to the "global commons". His delegation agreed with the Special Rapporteur (A/44/10, para. 310) that both issues fell within the scope of the topic. As indicated in paragraph 342, some members felt that the Commission could not fail to consider the question of harm to the environment. The Special Rapporteur had declared his intention to study those questions further and his delegation awaited the result with interest.

88. The Special Rapporteur had presented a revision of previous draft articles 1 to 10, which had since become articles 1 to 9, and, in general, the changes signified improvements.

89. His delegation welcomed the redrafting of article 1 in order to assign an equally important role to the concepts of "harm" and "risk", a view which Ireland had expressed on other occasions. His delegation also welcomed the new definition of "appreciable risk" (art. 2 (a)) and related amendments to articles 3, 6 and 9, which avoided excessively limiting the scope of the topic.

90. With regard to the list of activities to define the scope of the topic, his delegation wished to reiterate its statement at the previous session to the effect that it was not feasible to elaborate the list and strongly urged dropping the idea. That list could not be exhaustive and even an indicative list could be misleading.

91. Referring to strict liability as an element in the topic, he said that it was not the same as absolute liability. The Special Rapporteur had indicated (A/44/10, para. 313) that it was not his intention to adopt the concept of absolute liability. Strict liability was liability deriving from a causal relationship between activity and harm. That concept, which was accepted in many national legal systems, had also been recognized in many instruments and decisions in international law. The schematic outline which the Commission had adopted as the basis for its work on the topic provided for a very limited form of strict liability. Its application would be determined through negotiations between the State of origin and the affected State. Moreover, it would not apply at all if there was an agreement between the States concerned on hazardous activities. His delegation believed that the incorporation of that element should not cause alarm to Governments.

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(Mr. Hayes, Ireland)

92. Referring to the articles revised by the Special Rapporteur, he said that his delegation believed that article 2, on the use of terms, could be left to the Commission and its Drafting Committee for the time being. His delegation was pleased to note that article 3 set forth the juris tantum presumption that the State of origin knew or had means of knowing about the activities mentioned in article 1. It also welcomed the fact that the revised version of chapter II, on principles, did not include the previous article 9. His delegation welcomed the new text of the current article 8, on prevention, which established an "autonomous" obligation of prevention, i.e., an obligation which was not connected with the eventual harm and its reparation. However, the current wording of article 9, which omitted references to the fact that the effects of harm should not be borne by the innocent victim alone, was not satisfactory. While there might have been difficulties in drafting that provision, they did not seem to constitute sufficient grounds for such an omission.

93. Draft articles 10 to 17 were new. In his delegation's view, the Commission had been wise to conclude that those articles should be examined more closely before being referred to the Drafting Committee. The procedures set out in those articles were too detailed to have the necessary flexibility. Three approaches to procedural steps for prevention were listed in paragraph 382 of the Commission's report. His delegation believed that the Special Rapporteur had opted for the approach which provided for the application of general and flexible procedures. Moreover, the Special Rapporteur should be urged to prepare separate articles for activities involving risk of harm and those causing harm. Lastly, he stressed that the need to develop a régime capable of winning general approval was becoming increasingly urgent. Although the topic was very complex, it was to be hoped that the Commission would accord it high priority.

94. Mr. AL-BAHARNA (Bahrain), expressed the hope that, as the question of State responsibility had been on the Commission's agenda for a long time, it would be accorded higher priority at the following session. Regarding the structure of parts two and three of the topic, the Special Rapporteur had proposed dealing separately with the legal consequences of "delicts" and "crimes", transferring provisions concerning "implementation" from Part Three to Part Two, and confining Part Three to settlement of disputes. His delegation agreed with those changes.

95. With respect to articles 6 and 7, his delegation agreed with the Special Rapporteur that "cessation" and "reparation" were distinct from one another, although, in certain cases, they were closely linked. In practice, injured States requested cessation together with restitution in kind and other forms of reparation, and, consequently cessation was not always perceptible per se. As cessation was related to reparation, it should appear in Part Two of the draft articles and not in Part One, on general principles. The Drafting Committee should make the text of article 6 more precise and bring it into line with the other provisions of Part One.

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(Mr. Al-Baharna, Bahrain)

96. In his delegation's view, restitution in kind, one of the most important remedies against international delicts, should be defined in article 7 in the most acceptable form possible. The objective of restitution in kind was to wipe out, as far as was feasible, the consequences of a wrongful act by establishing the situation that would have existed had the act not been committed. However, in the text proposed by the Special Rapporteur, the meaning of restitution in kind was not sufficiently clear and unequivocal, and therefore, the wording of the article must be improved.

97. While his delegation approved in principle the exception of material impossibility in article 7, paragraph 1 (a), it could not understand how, in the exception of paragraph 1 (b), a restitution could be contrary to a peremptory norm of international law, unless the primary obligation from which the restitution derived was also contrary to that norm, in which case it would be devoid of legal consequences. Furthermore, as the idea of specifying peremptory norms of general international law was controversial, paragraph 1 (b) would make restitution in kind too indeterminate. His delegation wondered whether it was truly necessary to retain that paragraph.

98. His delegation had doubts with respect to the legal basis of the condition established in paragraph 1 (c) and therefore hoped that the Drafting Committee would examine the possibility of replacing the expression "excessively onerous" by a more felicitous one without the conditions specified in paragraph 2.

99. Although his delegation had no objection to paragraph 3 of article 7, it doubted whether it was necessary, given that international law did not justify the violation of international obligations.

100. His delegation would reserve its opinion on paragraph 4, article 7, until such time as the Commission had considered the second report of the Special Rapporteur.

The meeting rose at 1.15 p.m.

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