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SUMMARY RECORD OF THE 31st MEETING

Chairman: Mr. TUERK (Austria)

later: Mr. MARTINEZ GONDRA (Argentina)

CONTENTS

AGENDA ITEM 145: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FIRST SESSION (continued)

AGENDA ITEM 142: DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (continued)

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The meeting was called to order at 10.10 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, and 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. MOMTAZ (Islamic Republic of Iran), referring to the topic of State responsibility, observed that the Special Rapporteur had suggested, from the methodological point of view, maintaining the approach of his predecessor but dealing separately with the legal consequences of international delicts and of international crimes. That had prompted some criticism in the International Law Commission, which his delegation considered irrelevant and germane rather than substantive questions. Some members of the Commission had objected to the distinction between a delict and a crime, believing that the concept of international crimes of States was an innovation and without basis in international law. Although article 19 of Part One dealing with the notion of a crime was one of the most innovative elements of the draft articles, it did not contain anything new. The notion which began to be formulated after the First World War, figured in various international instruments. Article 19 established that, beyond the breaches of the interests of States - namely, delicts - there were crimes, consisting of acts that violated the fundamental interests of the international community. It thus implied an acceptance of public action against the author State of an international crime entailing the criminal responsibility of that State. Although the Commission had not yet ruled on the matter and the Special Rapporteur had indicated that the consequences of crimes must not be identified with a criminal responsibility, his delegation thought that that would inevitably happen. The view had been expressed in the Commission that the consequences of wrongful acts should not be defined in such terms as to negate a people's right to existence (A/44/10, para. 238). It was undoubtedly necessary, then, to reject any identification between the concept of a people and that of a State. It was possible to punish a State without having the penalty affect all its nationals. After studying the diplomatic and jurisprudential practice of reparation, the Special Rapporteur had reached the conclusion that instances of inflictive measures vis-à-vis offending States were not rare. To a certain extent, that applied to the coercive measures provided for in Chapter VII of the Charter. His delegation shared the Special Rapporteur's view that he could not put into question the very survival of article 19 and proceed to elaborate Part Two of the draft on the assumption that the category of crimes had disappeared from Part One (A/44/10, para. 244).

2. With reference to draft articles 6 and 7, his delegation believed that the cessation of an internationally wrongful act was totally separate from the reparation for any injuries caused. The example of the military occupation of a territory could be very illuminating in that regard. The withdrawal of foreign troops from the occupied territory would unquestionably constitute the cessation of

(Mr. Momtaz, Islamic Republic of Iran)

an internationally wrongful act, but it would not resolve the question of making reparation for the injuries caused by that occupation.

3. With regard to draft article 7 on restitution in kind, his delegation underscored the importance of the commentaries regarding the exception to the obligation of restitution and emphasized the principle of the permanent sovereignty of States over their natural resources. Nationalization was one of the basic examples of that principle. His delegation supported the idea that restitution in kind should not impede the exercise of that right. Also, when the State decreeing the nationalization was at a low stage of economic development, even pecuniary compensation could indirectly effect the exercise of the right to nationalize. Lastly, his delegation hoped that the Commission would give priority to the topic of State responsibility, which had been on its agenda for more than 30 years.

4. Mr. CALERO RODRIGUES (Brazil) said that both State responsibility and international liability for injurious consequences arising out of acts not prohibited by international law had been under consideration for a long time, which explained why they raised many theoretical and practical questions that required probing analysis before they could be adequately crystallized into written texts. His delegation believed that the Commission was currently in a position to accelerate work on both topics. The only problem was to do so in the two years remaining to its current membership, which did not, however, seem to be difficult. Given the status of its review of the other topics, there was time for the Commission to give adequate consideration to the two topics on international responsibility.

5. With regard to State responsibility, the Commission had not, to judge from its report, made much progress. Apart from the methodological questions, it had dealt only with two articles. In fact, those two were the result of the division of a single article, since the Special Rapporteur had made a point of considering separately the cessation of an internationally wrongful act of a continuing character and restitution in kind. The point was well taken, but did not perhaps have all the importance the Special Rapporteur attributed to it. In the view of his delegation, article 7 was the only point of real interest in that part of the report. However, its very title, "Restitution in kind", raised doubts. The report noted (A/44/10, para. 280) that there seemed to be no uniformity in doctrine or State practice as regarded the meaning of restitution in kind. For some, it meant the re-establishment of the situation which had existed prior to the wrongful act; for others, the re-establishment of the situation which would have existed if the wrongful act had not been committed. Article 7 did not indicate which of those meanings was attributed to restitution. The Special Rapporteur pointed out, however, that the provisions on pecuniary compensation established that such compensation should cover any injury not covered by naturalis restitutio in the measure necessary to re-establish the situation that would have existed if the wrongful act had not been committed (A/44/10, para. 298). That implied acceptance of the narrow concept of restitution. If so, article 7 should clearly indicate that. His delegation favoured the broad concept, but felt that the article should not be ambiguous. In any case, it considered it unnecessary to use the expression

(Mr. Calero Rodrigues, Brazil)

"restitution in kind", which was the translation of "restitutio in integrum". If the narrow concept was accepted, it would be better to return to the formulation used by the former Special Rapporteur in his proposed article 6, where the term "restitution in kind" had not been used. If instead the broad concept was adopted, the draft should refer to the obligation to re-establish the situation which would have existed if the wrongful act had not been committed.

6. The proposed article 7 established the exception of "excessive onerousness". According to that concept, the State would be exempt from the obligation of restitution in kind if it represented a burden out of proportion to the injury caused by the wrongful act or seriously jeopardized the political, economic or social system of the State which committed the internationally wrongful act. However, it seemed difficult to conceive of restitution as being a burden out of proportion to the injury. The restitution contemplated in the article was restitution in integrum, which amounted to restoring the balance, wiping out the injury. Thus, it was difficult to understand how one could speak of a burden out of proportion. It was also difficult to conceive of restitution which might seriously jeopardise the political, economic or social system of the State, unless it had resulted from the performance of the obligation which had been breached. In that case, however, and according to Part I of the draft articles, wrongfulness would have been excluded. Article 33 of Part I (A/35/10, chap. III) indicated that a state of necessity could be invoked as a ground for precluding the wrongfulness of an act which was not in conformity with an international obligation if the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril. It seemed obvious that something which seriously jeopardized the political, economic or social system of a State endangered the essential interests of that State. Restitution was not an independent phenomenon but was closely linked to the original obligation. Moreover, according to the proposed article, if restitution were excluded, reparation by equivalent would have to be applied. In that case, it would seem that such reparation would seriously jeopardise the political, economic or social system of the State. The question, in the opinion of his delegation, could be summed up in the following manner: (1) if the excessive onerousness of restitution in kind also indicated excessive onerousness of the original obligation, a state of necessity within the meaning of Part I of the draft articles must be recognised and therefore, the question should remain outside the scope of the articles; (2) if the excessive onerousness existed only with respect to restitution, a state of necessity should also be recognised. The general rules on reparation by equivalent would not apply. Either the articles should provide specific rules for determining the compensation due in that case, or the matter should be remitted to the rules on liability.

7. Referring to international liability for injurious consequences arising out of acts not prohibited by international law, he said that the Special Rapporteur's revision of the first 10 articles - which had since been reduced to 9 - considerably improved the original texts. His delegation noted with satisfaction that the idea that "harm" should be the basis for the provisions relating to liability, and that the concept of "risk" had its place in the provisions relating to prevention, had gained acceptance.

(Mr. Calero Rodrigues, Brazil)

8. The report of the International Law Commission (A/44/10, para. 313) stated that article 1 applied to "activities" but not to "acts". In the Special Rapporteur's view, activities were shaped by the acts of many persons, oriented towards broad common ends. Accordingly, consequences of acts which did not constitute activities remained outside the scope of the articles. None the less, the Special Rapporteur had indicated that within a lawful activity, there were lawful acts which might give rise to harm and certain consequences. There was no reason why legal consequences should not ensue if harm was caused to a State as a result of an isolated act not linked to an activity. Therefore, acts should not have to be connected with activities.

9. On the question of harm to be compensated, article 9, borrowing language from the articles on the law on the uses of international watercourses, stated that reparation should be due for "appreciable harm". That language was too vague and a relatively high threshold should be clearly set for determining which injuries called for reparation.

10. Articles 10 to 17 revealed a tendency to establish rigid and useless procedural provisions which did nothing but unnecessarily complicate the instruments of which they formed part. States had recourse to special procedures, notifications, exchange of information, consultations and negotiations only when they considered them useful. Imposing strict and cumbersome procedures was therefore counter-productive.

11. The new articles, to which the International Law Commission had already reacted negatively, were unacceptable. As indicated in paragraph 397 of the report, the Special Rapporteur understood that the Commission did not wish to have detailed procedural rules for prevention.

12. Paragraph 382 of the report explained the three choices considered by the Special Rapporteur, who was inclined to favour the second because he believed that the Commission would not approve the first choice. In his delegation's view, the third choice would be the best, but it would be open to any other proposals presented.

13. With respect to the question of harm caused to several States or to the "global commons", a question which was of special relevance because of modern technological advances, it was relatively easy to determine the liability of one State towards another State for harm which the first had caused or might have caused to the second. It was also possible, although somewhat more difficult, to determine the same liability if several States were affected by the harm. In the case of "global commons", however, liability could be established only with respect to an organization which, in general terms, did not exist. Organizations existed in various sectors, but were missing in many others. Consequently, if at some time the Commission decided to extend the scope of the articles to cover "global commons" as well, the text of various articles would have to be redrafted accordingly.

14. Mrs. OBI-NNADOZIE (Nigeria), referring to article 6 of the draft articles on State responsibility, in chapter IV of the report of the International Law Commission said that it could not be over-emphasized that a State whose action or omission constituted an internationally wrongful act of a continuing character had an obligation to cease such action or omission. The argument that such internationally wrongful acts of a continuing character could be less unacceptable to the international community must be discarded as contrary to the rule of law, otherwise the passage of time would legitimize illegal actions committed by States, in what would amount to a return to the law of the jungle.

15. While article 7, which dealt with restitution in kind, was acceptable, her delegation had some doubts concerning paragraphs 1 (c) and 2 (b). She wondered which of the two States (the offending State or the victim) should determine whether restitution in kind was excessively onerous for the State which had committed the internationally wrongful act. Moreover, if the language of paragraph 1 (c) were retained, any State which had committed a wrongful act could claim that the restitution in kind being demanded of it was excessive. In some quarters, it had been asserted that the Second World War would not have erupted if excessive reparations had not been demanded by the victors of the First World War. Such reasoning should not, however, constitute an obstacle to the orderly and progressive development of international law. There should be some deterrent for States which chose to live dangerously in the clear and absolute certainty that heavy restitution, which they might consider unbearable, would be one of the consequences of their conduct.

16. As the obligation of restitution did not extend to certain acts, such as the judgements of national courts, that might be used as a pretext to negate the obligation completely. Accordingly, an international society which had accepted the rule of law should work to bring municipal and international law gradually into line. In some States, the ratification of an international treaty automatically made such a treaty part of the domestic legislation which the domestic courts were required to administer. More States should adopt such a system; that would enhance the role of international law.

17. Article 6, as formulated in chapter V of the Commission's report, did not place enough emphasis on responsibility, reciprocity and welfare, which should be a priority for States. In an age in which physical boundaries between States had ceased to constitute barriers to the transmission of harmful substances, it was important to stress the welfare of States and not just their sovereignty. Article 6 should therefore be amended to read: "compatible with the protection of the rights emanating from the sovereignty and welfare of other States".

18. Articles 12, 13 and 17, on warning and notification, assumed that States always had accurate and complete information on the consequences of activities about to be or already carried out in their territories or in territories controlled by them, which was not always the case. Moreover, the period of six months for providing information was long enough to effect irreparable damage. The Commission should therefore consider the problems emanating from those articles,

(Mrs. Obi-Nnadozie, Nigeria)

bearing in mind that the spirit of co-operation and good faith envisaged in article 7 had not always predominated.

19. With regard to article 11, which was designed to enable States to protect national security or industrial secrets, it should be recalled that in the current technologically sophisticated age, few secrets escaped satellites and other devices. It was therefore important not to allow undue emphasis on so-called national security to prevent the timely transmission of vital information on harmful transboundary activities in such a manner as would enable the notified State to take prompt preventive action to forestall the adverse consequences of such activities. National security, which was a relative concept, must not be allowed to stand in the way of effective co-operation among States.

20. Mr. LEE (Canada), speaking about international liability for injurious consequences arising out of acts not prohibited by international law, said that draft articles 1 to 9, which were reformulations of the articles submitted in 1988, had taken into account the debates on the topic in the Commission and the Sixth Committee. His delegation was pleased to note the inclusion of the concept of harm in the draft articles, which was a marked departure from the 1988 report. In seeking to limit the scope of the articles, however, article 1 had retained the notion of "appreciable risk". It would be desirable to rationalize the draft by separating the two concepts of risk and harm, with each régime covered in separate chapters. That would be conducive to reaching a consensus on the draft articles as a whole, because the concept of risk played an important role in stimulating preventive measures and, perhaps, in identifying the standard of care to be applied.

21. His delegation, which welcomed the explicit inclusion of the word "environment" in the definition of risk and harm in article 2, urged even further incorporation of the environmental perspective into the draft articles. The time had come to go beyond the precedents of the Trail Smelter, Lac Lanoux and Corfu Channel cases and Stockholm principle 21, as well as such instruments as the London Convention on the Prevention of Maritime Pollution by Dumping of Wastes and Other Matter and the United Nations Convention on the Law of the Sea, which had contributed to a substantial body of customary and conventional principles on the subject. His delegation agreed with the Special Rapporteur that the theme of the "global commons" should be dealt with in the future in the draft articles, inasmuch as Stockholm principle 21 was not limited to the damage caused to other States but also embraced damage to the "global commons". When a State persisted in an activity that seriously degraded the "global commons", it should be held liable. Irrespective of whether the work of the Commission was to be regarded as codifying or as progressively developing the law, the international community must agree on the principle that States shared a common obligation to protect and preserve the environment and its living resources within and beyond national jurisdiction. Justice and the expectations of the injured State required the criterion of liability and, in appropriate circumstances, a standard of strict liability.

22. It was important to be open-minded, flexible and imaginative in developing the law in that field, taking into consideration innovative proposals that had been

(Mr. Lee, Canada)

made concerning insurance schemes and liability funds. Consideration should be given to such ideas even where the acts in question were not inherently dangerous but were cumulatively damaging.

23. Mr. BELLOUKI (Morocco), referring firstly to the draft articles relating to State responsibility, said that article 6, as submitted by the Commission to the Drafting Committee, while establishing an equitable role for the injured State, conferred rights on the other members of the international community in the case of a violation of an erga omnes obligation. It was important to focus on the immediate nature of cessation, which was not related to a request by the injured State and did not necessarily affect the liability of the author State, which must make reparation; that explained the need for two separate provisions. In the French text, the word "acte" should be replaced by "action".

24. The exercise by the injured State of its right to reparation was subject, in article 7, to conditions that might raise obstacles. Whereas the obligation to make restitution in kind was subject to the limits of what was possible, pecuniary compensation should not be unjust for the author State of the wrongful act but should be confined to the reparation of the harm and the restoration of the status quo ante.

25. His delegation agreed with the Special Rapporteur that the legal consequences of offences and crimes must be dealt with separately; nevertheless, a strict division should not be drawn between the procedural and substantive consequences, which were interrelated. The provisions concerning the measures that the injured State could take to achieve cessation or reparation should be moved from Part Three to Part Two.

26. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, the broadening of the scope of the draft articles to include liability in respect of activities involving harm or the risk thereof to many States or to the "global commons" made it necessary to reconsider the procedural norms applicable when only one State was affected.

27. His delegation was in favour of placing appreciable risk on a par with harm, on the understanding that States were obliged to prevent risk through the exercise of reasonable diligence, as well as to repair damage while bearing in mind current and future consequences and to discontinue activities as soon as harm had occurred or was imminent.

28. In view of the work done on the law of the non-navigational uses of international watercourses, his delegation was confident that the first reading of the draft articles would be finished before 1991. The draft articles proposed, particularly articles 22 and 23, reflected a careful balance of interests and focused on the need for co-operation among watercourse States.

29. With regard to relations between States and international organizations, his delegation considered that those organizations were still secondary subjects of

(Mr. Bellouki, Morocco)

international law. As a consequence, the privileges and immunities granted to them must be based on a strictly functional criterion and not equated with the privileges and immunities of missions and diplomatic agents.

30. In closing, his delegation welcomed the holding of the International Law Seminar during the current session of the Commission and stressed its contribution to training young lawyers from developing countries.

31. Mr. HILLGENBERG (Federal Republic of Germany), referring firstly to the topic of State responsibility, welcomed the fact that the Commission had dealt at length with the Special Rapporteur's proposal to distinguish between the legal consequences of wrongful acts and of crimes. International crimes were violations of erga omnes obligations, whereby compliance could be demanded of all States; at the same time, it would be necessary to determine what were secondary rights of non-violating States. At the current stage of discussion, it would be inappropriate to raise questions concerning parts of the draft already provisionally adopted in first reading. Nevertheless, it would be necessary to re-examine thoroughly in due course the draft articles of Part One dealing with general principles of responsibility.

32. His delegation was pleased that the Commission had referred articles 6 and 7 to the Drafting Committee. A final decision on whether to move article 6 could be left until such time as a clear picture of the draft's overall structure had emerged.

33. Draft articles 8 to 10 in the Special Rapporteur's second report deserved a number of general remarks. Article 8 clearly stated that reparation was to take the form of material compensation and that questions of fault might play a role only in establishing liability, but not in assessing the reparation. His delegation had no objection to that. It did have doubts, however, on the need to devote a separate article, article 9, to compensation for loss of profits, which had already been dealt with satisfactorily in article 8. Under article 10, States might demand satisfaction for violations of their dignity. When assessing the extent of moral damage, the circumstances played an important role. In any event, it was essential to avoid establishing too direct a link between the degree of fault and the nature and amount of reparation. His delegation also had misgivings about adopting the term "punitive damages". In assessing reparation for moral damages, it was more important to focus on the notion of adequate compensation for the injured party than on punishing the injuring party; that was prevailing international practice. In a final remark on article 10, he pointed out that a State was normally under no obligation to provide safeguards against the repetition of violations and was free to choose the safeguards it deemed appropriate.

34. The topic of international liability for injurious consequences arising out of acts not prohibited by international law had still not been given clear contours. The attempt fully to regulate liability in an internationally binding form was an ambitious undertaking, as was the proposal that States be required to comply with a

(Mr. Hillgenberg, Federal Republic of Germany)

formalized procedure in the event of activities that caused harm or involved risk. More cautious steps were perhaps better suited.

35. Before adopting individual draft articles, the Commission should discuss the overall scope of the draft and analyse, inter alia, the appropriateness of confining liability to specific activities involving risk, the question of causality, the definition of damage and the relationship between liability for activities not prohibited by international law and State responsibility for activities violating their international obligations. It could be inferred from State practice that States must assume liability for the consequences of specific activities approved by them which involved the risk of appreciable transboundary harm. In no circumstances should liability of States be established for any transboundary harm emanating from their territory or should States be subject to specific international procedures in all cases of harmful transboundary effects.

36. His delegation renewed its recommendation that national and international legal practice should be thoroughly reviewed and due consideration given to the proposals made and to the negotiations aimed at establishing international obligations in specific hazardous areas of industrial activity. With regard to articles 10 to 17, it was important to consider carefully whether the rules proposed by the Commission to regulate the non-navigational uses of international watercourses could also be extended to other areas.

37. Mr. VILLAGRAN KRAMER (Guatemala), referring to the draft Code of crimes against the peace and security of mankind, said that he was reasonably certain that it would be ready as a whole before the end of the twentieth century. The Commission was adopting new approaches that were interrelated with other topics, such as State responsibility. It was contemplating the possibility of delimiting and distinguishing between crimes and wrongful acts, on the one hand, and defining some of the most serious war crimes on the other, and that provided sufficient leeway for specifying the legal effects of what should be punishable and what fell within State responsibility. That criterion was of great methodological value, because it enabled crimes deemed serious to be distinguished from otherwise wrongful acts, thereby categorizing them with greater clarity and precision and facilitating the work of the competent court.

38. With respect to war crimes, his delegation was in favour of the second alternative of article 13 proposed by the Special Rapporteur. The term "serious" was merely illustrative. It was important to separate and differentiate various categories of war crimes, and not just to enumerate them. In that context, his delegation supported the suggestion, made in pages 146 and 147 of the Commission's report to distinguish and treat separately crimes against persons, crimes committed on the battlefield in violation of the rules of war and crimes constituted by the use of prohibited weapons, including nuclear weapons.

39. With regard to crimes against humanity, the enumeration of the individual acts characterizing those crimes would clarify the elements of a definition which it would also be advisable to establish, having regard to the role that motive could play in certain cases but not in others. Draft article 14 submitted by the Special

(Mr. Villagran Kramer, Guatemala)

Rapporteur therefore deserved praise. It was important to emphasize the acts concerning property and assets of vital importance for mankind, such as the environment and drug trafficking. In both cases, the legal property or asset to be protected was collective. That explained why the gravity of the acts was given a very careful legal definition. The concept of ecological offence or crime might be used in the future. With regard to international drug trafficking, co-operation between States in judicial matters and the possible setting up of an international court to judge such offences in specific cases was of particular importance.

40. As for the new articles on crimes against the peace, consideration should be given to the advisability of deleting the title of article 12 and exploring in depth the matter of economic patterns of intervention.

41. Mr. CORELL (Sweden), speaking on behalf of Denmark, Finland, Iceland, Norway and Sweden, said that the topic of international liability for injurious consequences arising out of acts not prohibited by international law was of interest to the Nordic countries and that their general views on the item had been presented in 1988 by the representative of Finland. The Nordic countries had expressed the hope that an appropriate legal instrument on international liability, particularly as it related to transboundary environmental harm, would be elaborated at the earliest possible date. The problems relating to environmental protection, including the environment of neighbouring States and the "global commons", were considerable.

42. After the Chernobyl disaster, the Nordic countries had suggested that the draft convention on international liability should be accorded high priority so that a set of general rules, a framework convention, could be drawn up. More specific rules covering specific areas, such as nuclear accidents, should be prepared within other international organizations such as the International Atomic Energy Agency (IAEA). The concept of international liability should be developed under those general rules without touching on the question of possible wrongfulness. Whether or not damage occurred as a result of illegal conduct, justice required that innocent victims must be compensated.

43. The Nordic countries supported the general approach taken by the Commission. According to its report, the proliferation of conventions suggested the legal feasibility of a more general régime. Most members of the Sixth Committee, including the Nordic countries, wished to establish a régime of State liability. The best method would be to prepare a framework convention which would encourage the conclusion of more far-reaching regional treaties and bilateral agreements. Despite the existence of many international instruments, a general framework convention would not be superfluous. The existence of a general practice called for codification.

44. The Nordic countries had traditionally supported the formulation of international law on liability and compensation for victims of pollution and other harm. In that context, mention should be made of principles 21 and 22 of the Declaration of the 1972 United Nations Conference on the Human Environment.

(Mr. Corell, Sweden)

Principle 21 declared that States had the sovereign right to exploit their own resources pursuant to their own environmental policies and the responsibility to ensure that activities within their jurisdiction or control did not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. According to principle 22, States must co-operate to develop further the international law regarding liability and compensation for victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.

45. The Stockholm Conference had taken place nearly 20 years earlier. It was regrettable that the international community had not yet managed to develop a system of international law on environmental protection. The classic legal view was not applicable in that case. An approach based on an interest in protecting the victim instead of identifying the culprit was lacking. Protection required co-operation among States, the exchange of information and ad hoc negotiations.

46. There were no general standards sufficiently specific to give the national lawmaker a clear idea of the consequences of regulation. Such standards must be sufficiently broad to take into account risk and harm which might arise from the use of new technologies in the future.

47. The general approach was set out in a proposed text which was still too abstract. The scope of the convention had been clarified, but greater attention must be devoted to the obligations that flowed from it. It was questionable whether States Members of the United Nations were prepared to become parties to a convention under which they would be obligated to accept the liability for harm caused by activities which were unspecified, unforeseen, and, to some extent, which did not yet exist. The texts produced could take the form of binding rules or a limited set of binding rules combined with guidelines laid down in a code of conduct.

48. Attention must be focused on formulating short general standards using the terminology of similar international or bilateral agreements. Such a short basic text could be supplemented by annexes or appendices. That method had been used in formulating international and regional environmental conventions, such as the 1974 Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area, the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, the 1974 Paris Convention for the Prevention of Marine Pollution from Land-based Sources, and the 1985 Vienna Convention for the Protection of the Ozone Layer.

49. The Rapporteur had brought the definition of the term "appreciable risk/harm" into line with the corresponding definition in the item on the law of the non-navigational uses of international watercourses.

50. The revised text of Parts One and Two of the current draft contained general provisions and principles. The Nordic countries wished to see article 1 divided into separate paragraphs for the "harm" and "risk" situations, respectively.

(Mr. Corell, Sweden)

Referring to article 5 on the absence of effect on other rules of international law, he said that the Nordic countries would prefer the second text between brackets, which was clearer than the original text. The revision of article 6 had brought it closer to article 1 and to Stockholm principle 21.

51. The Rapporteur had mentioned two new preliminary issues on which he had invited comments from Member States. The first was the question of liability in respect of activities involving extended harm to many States and the consequent risk. The other was liability in respect of activities causing harm to the "global commons". The Nordic countries welcomed those additions. The standards formulated for those issues would have an important impact on the development of equivalent texts in future conventions on the atmosphere and climate.

52. The Nordic countries hoped that the future draft would mention certain special issues. The provisions dealing with liability and compensation could be somewhat more explicit. The scope of the term "liability" must be clarified. States required more clarification concerning criteria for compensation. That question should be treated separately, and the provision should suggest a choice of factors to be considered in determining the level of compensation.

53. An international régime of State liability would allow for compensation to victims where harm of great magnitude was caused. Liability could also be claimed from another State for harm to the environment in cases where the specific operator causing the actual harm could not be identified.

54. In extremely grave situations, civil liability régimes would prove inadequate with respect to compensation of victims. Civil liability régimes were valuable complements to State liability. The Nordic countries wished to see the interrelation between State liability and civil liability régimes clarified in the text, and considered that a system should should be created in which a State liability régime and a civil liability régime complemented each other. States should also be encouraged to use existing civil liability régimes. It would be advisable to introduce into the text a recommendation to States to elaborate, on a domestic or international level, corresponding civil liability systems.

55. The Nordic countries believed it was necessary to take a clear position on the question of the delimitation between the present convention and existing or future special conventions and agreements. It was understandable that members of the International Law Commission might be of the opinion that the question could be solved by a reference to article 30 of the 1968 Vienna Convention on the Law of Treaties or to the general rules of international law. However, States needed more guidance on that point.

56. Finally, the convention should make clear the dividing line between its rules on liability and the rules that were contemplated for a future convention on State responsibility and a code of crimes.

57. The CHAIRMAN announced that Argentina and Spain had joined the sponsors of the draft resolution on UNCITRAL contained in document A/C.6/44/L.5.

58. Mr. KOROMA (Sierra Leone), referring to the draft code of crimes against the peace and security of mankind, said that the discussion of the item in 1989 coincided with the fiftieth anniversary of the outbreak of the Second World War. It was encouraging that the reservations of some delegations seemed to be dissolving. His delegation had always taken the view that the examination of the topic should be viewed not as an attempt to revive the past but rather as an effort to promote respect for international law.

59. With regard to article 13, on the definition of war crimes, he wished to point out that customary law predated the various conventions on the topic. The modern law of war was largely found in treaties which had been codified over the past 100 years. Those precedents, as well as the use of custom as a source of law, should be borne in mind in defining war crimes. In that regard, it should be recalled that the Charter of the International Military Tribunal of 1945 not only contained a definition of war crimes, but went on to list them. His delegation was of the opinion that the same approach should be taken, namely, that of a definition followed by an indicative list. It therefore preferred the second alternative text of article 13 submitted by the Special Rapporteur. The definition would seem to include not only customary law, but conventions and the generally recognized principles of law applicable to armed conflicts as well.

60. As to the inclusion of gravity in that definition, that was, strictly speaking, a matter relating to sanctions. Any violation of the laws of war was a war crime for which the perpetrator might be punished. The concept of gravity had been introduced by the 1949 Geneva Convention, which established that grave breaches and other violations of the Conventions were considered war crimes if committed on a small scale, but crimes against humanity when committed on a large scale. Seriousness was acknowledged as a criterion for war crimes, but a violation was considered a violation, notwithstanding.

61. Where article 14 was concerned, his delegation was of the view that a definition of crimes against humanity should be adopted. The most important element was that they were crimes that affected not only one type of civilization, but the human race as a whole. No offender who had committed such a crime should find refuge by stating that its victims did not belong to a civilized race. His delegation also supported the inclusion of genocide as a crime against humanity, but had some reservation regarding the reference to "intent" in article 14 (1).

62. With regard to apartheid, there was a solid legal basis for characterizing it as a crime against humanity. As to the definition, his delegation preferred the second alternative text for article 14 (2), which was a virtual reproduction of the relevant text of the International Convention on the Suppression and Punishment of the Crime of Apartheid. The reference to southern Africa should be retained because of the historical genesis of the offence. With regard to slavery or any other form of bondage, especially forced labour, it was unfortunate that, despite the efforts of the international community and the United Nations, those practices

(Mr. Koroma, Sierra Leone)

were still perpetrated in various parts of the world, including the African continent. An article which made such practices crimes against humanity was therefore to be welcomed.

63. Forced labour, which was akin to slavery, should be considered a crime against the human race. Although the International Labour Organisation had been concerned with the issue, it was up to the General Assembly to declare forced labour an offence against the peace and security of mankind.

64. Although the forced transfer of population had been considered illegal since the turn of the century, and was prohibited in the 1907 Hague Convention and in the 1949 Geneva Conventions, the practice still persisted in various parts of the world, and specifically in South Africa. The General Assembly could help proscribe that practice by declaring it a crime against humanity.

65. Mr. Martínez Gondra (Argentina) took the Chair.

66. The destruction of property other than in time of war had long been considered a crime against humanity. UNESCO had further developed the 1954 Hague Convention in respect of protection of property during armed conflict, with a view to preserving mankind's cultural heritage. His delegation therefore supported the proposal to include that crime in the draft code.

67. His delegation welcomed the inclusion of the article on the threat of aggression, which was the fruit of the international community's endeavours to outlaw the use of force. In the past, there had been many cases of States that had lost their independence through threats and ultimatums. Contemporary international law prohibited not only the use of force, but also the threat of the use of force, and thus its inclusion in the code would reaffirm the position of the international community in that regard.

68. Similarly, unlawful intervention in violation of the United Nations Charter was an offence against the peace. In the opinion of his delegation, to include "seriously" in the definition of the offence would be tantamount to introducing a double criterion of seriousness, as it had been agreed that only serious offences would find a place in the code. Moreover, there was a school of thought according to which even indirect intervention was a violation of the Charter. It would therefore be better to stick to the criterion of violation of the United Nations Charter, and not to add the element of seriousness.

69. With regard to the crime of colonial domination and other forms of alien domination, he pointed out that the United Nations had always defended the right of colonial peoples to self-determination. Nevertheless, that right should be strengthened on the basis of General Assembly resolutions 1514 (XV) and 2625 (XXV), as well as of the advisory opinions of the International Court of Justice on Namibia and Western Sahara. Under contemporary international law, the principle of self-determination had been declared a peremptory norm of international law and an imperative legal order. Therefore, the maintenance by force of colonial domination

(Mr. Koroma, Sierra Leone)

or any other form of domination in violation of the Charter of the United Nations constituted a crime against peace. In any event, colonialism was a crime not only in the case of violation of the principle of self-determination. Consequently, it would have been preferable for the article to read: "Colonial or other forms of alien domination is illegal if carried out against the principles of the United Nations Charter."

70. With regard to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, he welcomed the fact that international organizations had been included in the draft articles, thereby protecting the confidentiality they required in carrying out their functions. That confidentiality was required particularly in respect of United Nations peace-keeping activities.

71. The expression used in the draft articles to define the diplomatic bag, namely "packages containing official correspondence and documents", did not make it possible to know exactly what constituted the diplomatic bag. A definition without reference to "packages" would be preferable. That observation also applied to article 24 on the identification of the diplomatic bag. Furthermore, article 25 on the contents of the diplomatic bag made no reference to packages, but merely said that the diplomatic bag might contain only official correspondence and documents or articles intended exclusively for official use.

72. Article 26 on transmission of the diplomatic bag by postal service or any mode of transport was of great importance to the developing countries, since most of them sent their bags unaccompanied. That article should be more explicit in order to take certain facts into account. For example, collection of bags at airports was frequently delayed because the consignees had not been informed about their arrival. In some cases, diplomatic bags were lost for a long period of time and, in addition, when they were not accompanied by diplomatic courier they might not even benefit from the provisions of article 28 since they might have been violated, examined or screened by electronic or other technical devices prior to being claimed by the consignees. Therefore, it was to be hoped that when those articles were next considered, sufficient provision would be made for the protection of the unaccompanied diplomatic bag.

73. In article 28, the Commission had succeeded in reconciling the competing interests of the sending State, the transit State and the receiving State. With a view to maintaining the confidentiality of official communications, the diplomatic bag, as established in paragraph 1 of that article, had to be inviolable and exempt from examination directly or through electronic or other technical devices. He supported the wording of article 28, paragraph 2. That provision struck the required compromise between the need of the sending State for confidentiality and the need of the transit or receiving State for security. However, the article did not address the case when the consular bag originated from a mission to its home State and there was suspicion as to its contents on the part of the State from which it was to be dispatched.

(Mr. Koroma, Sierra Leone)

74. With a view to bringing out its meaning more clearly, article 30 on protective measures in case of force majeure or other exceptional circumstances needed to be reformulated.

75. In his opinion, article 32 supplemented the provisions on the diplomatic courier and the diplomatic bag appearing in the conventions in force.

76. His delegation supported the methodology suggested for elaborating the topic of State responsibility, the importance of which could not be over-emphasized. The distinction between delicts and crimes and their legal consequences would facilitate determination of the rights and obligations of parties. Consideration should also be given to the proposal to separate reparation and cessation.

77. Cessation and restitution in kind were different remedies. The first was the obligation to terminate the wrongful conduct and to re-establish the normative action of the primary rule breached. Cessation was not, strictly speaking, a form of reparation but a primary rule which must therefore find its place among the general principles, without excluding the possibility of its being combined with other remedies, as was frequently the case in the diplomatic field. Restitution was treated differently in domestic and international law. In domestic law the purpose of restitution was to place both parties in the position in which they would have been had there been no contract. Although restitution in integrum was also present in international law, its purpose was to restore the status quo which had existed before the commission of the wrongful act.

78. Restitution must not be materially impossible or excessively onerous. Nor, however, must the perpetuation of an injustice be permitted. In no case must domestic law be used to defeat restitution or prevent the exercise of the right to self-determination.

79. International liability for injurious consequences arising out of acts not prohibited by international law gave rise to difficulties. His delegation considered that the topic related to liability for harm caused as a result of activities carried out under the jurisdiction of another State. States were obliged not to cause harm to another State by their transboundary activities. However, if such harm occurred, the State of origin was liable. Thus harm was the basis of liability, and to make risk the basis of liability would make the topic unduly unwieldy, since every activity included a measure of risk. On the other hand, in determining liability, the risk factor had to be taken into account, along with other factors such as negligence and foreseeability. In fact, while the report attempted to consider both harm and risk as separate bases for liability, they were not contradictory concepts; they were integral and constituted the basis of liability as a unity. In determining liability, other factors also had to be taken into account.

80. There was no need to refer to the procedure for settling disputes at the current stage of the deliberations. What was important was to establish general principles and legal guidelines so that States could adopt preventive measures.

(Mr. Koroma, Sierra Leone)

Although that did not necessarily involve a framework agreement, his delegation would accept such an agreement if it was found to be necessary.

81. The practical importance of the topic "Jurisdictional immunities of States and their property" could not be overestimated. The frontiers of the topic had been expanded to embrace very diverse spheres. However, care must be taken not to provide for the possibility of lawsuits being brought against States with a view to exposing them to foreign jurisdiction. The purpose of the draft articles was to reaffirm and strengthen the concept of jurisdictional immunities, with clearly stated exceptions. From that standpoint, the replacement of the principle of State immunity by that of functional immunity not only weakened the efficacy of the rule but also introduced uncertainty and, in some cases, might even impede the economic growth of developing countries.

82. Turning to the articles themselves, his delegation welcomed the fact that the criteria of nature and purpose had been retained for determining the commercial character of the contract, a compromise solution that favoured the interests of a number of developing countries. It supported the reformulation of article 4, paragraph 1, to include the phrase "under international law". In article 6, the nucleus of the draft articles, the deletion of the bracketed phrase, which would have limited their scope and left their interpretation to States in accordance with their own understanding of the law, was appropriate. However, paragraph 455 of the Commission's report should not be taken to mean that a restrictive interpretation limiting the jurisdictional immunities of States had been approved.

83. His delegation could accept draft article 7 with a minor amendment, the deletion of the phrase "in a forum State" in the second line of paragraph 1.

84. Article 8 was also acceptable, but it should include an additional proviso to the effect that where there had been a fundamental change in the circumstances prevailing at the time of the signing of a contract, the State which had consented to the exercise of jusrisdiction by a foreign court would be able to claim immunity. There was ample legal authority for such a provision in domestic law, in the opinions of international jurists, in the decisions of the International Court of Justice and in the Vienna Convention on the Law of Treaties.

85. There were still conflicting views regarding the title of part III. In the case of jurisdictional immunity, the existence of the rule was not contested. The Commission's mandate was to state the rule clearly, together with the exceptions. His delegation favoured the title "Exceptions to State Immunity".

86. As regarded article 11, which was the main exception to State immunity, revised paragraph 1 was an improvement over the original although it still oversimplified the matter in its assumption that a particular activity was commercial when in fact it was the activity itself that might be in dispute.

87. The intention behind articles 12 and 13 was laudable. It was only right that an individual who had performed services under contract or had suffered personal

(Mr. Koroma, Sierra Leone)

injuries or damage to property should be compensated. However, such problems were better dealt with between governments. The question in article 13 could be addressed through an insurance policy. In his delegation's view, that was the best way to deal with the matter and it was a direction already taken by a number of States. The functional immunity of the State and its authorities accordingly remained intact.

88. His delegation rejected the implication of article 19 that the conclusion of an arbitration agreement was always tantamount to a waiver of immunity in disputes relating to the validity or interpretation of an arbitral award.

89. The placement of article 20 on cases of nationalization could give the impression that it formed part of the exceptions to the rule of State immunity, whereas nationalization measures were sovereign acts of a State. Sierra Leone therefore called for the deletion of that article.

90. With regard to article 21 on State immunity from measures of constraint, his delegation preferred the proposed reformulation of the article (A/44/10, para. 578). The revised text of article 24 was also an improvement and a simplification.

91. Turning to the law of the non-navigational uses of international watercourses, his delegation welcomed the two draft articles on water-related hazards, harmful conditions and other adverse effects and on water-related dangers and emergency situations. Africa, paradoxically, had an abundance of rivers and yet suffered from the effects of drought and desertification. African countries experienced drought one year and severe flooding the next. In order to control floods, the watercourse States must establish co-operative arrangements, which would involve taking steps such as a timely exchange of data and information or the joint installation of a hydrological forecasting system or network. The articles required some rewording and amendment, but they were useful and were likely to contribute to the development and establishment of hydrological projects among African States.

92. His delegation welcomed the progress made on the topic of relations between States and international organizations. If international organizations were to achieve their objectives and carry out the tasks and functions assigned to them by member States, they must be granted the necessary privileges and immunities. The report was marked by great clarity. The methodology was pragmatic and appropriate. His delegation looked forward to an in-depth consideration of the topic in the future.

93. His delegation had taken note of the Commission's efforts to comply with General Assembly resolution 43/169 concerning its programmes, procedures and methods of work. Its decision to set up a working group should enable it to recommend suitable topics to the General Assembly for possible codification and development.

(Mr. Koroma, Sierra Leone)

94. Sierra Leone would like the Commission to consider at a future date the feasibility of developing the law on movement of persons across international frontiers. That would entail a study and clarification of the principles of international law on expulsion of persons.

95. His delegation welcomed the continuing co-operation between the Commission and other bodies such as the Asian-African Legal Consultative Committee, the European Committee on Legal Co-operation and the Inter-American Juridical Commission. The Sixth Committee could have benefited from a dissemination of the results of some of the studies done by the Inter-American Juridical Commission, for example, on drug trafficking and extradition.

96. His delegation attached considerable importance to the International Law Seminar and thanked those Governments which had provided fellowships to enable the Seminar to be held.

97. Lastly, the Gilberto Amado Memorial Lecture had that year aptly been delivered on "Reflections on Legal Aspects of United Nations Peace-keeping". It was timely to consider the legal basis of peace-keeping, which helped the United Nations achieve its primary objective of promoting the maintenance of international peace and maintaining law and order.

The meeting rose at 1.10 p.m.