UNITED NATIONS

General Assembly

FORTY-NINTH SESSION

Official Records

SIXTH COMMITTEE
27th meeting
held on
Friday, 4 November 1994
at 10 a.m.
New York

SUMMARY RECORD OF THE 27th MEETING

Chairman: Mr. CHATURVEDI (India)
(Vice-Chairman

CONTENTS

Distr. GENERAL
A/C.6/49/SR.27
21 November 1994

ORIGINAL: ENGLISH

94-82037 (E)

In the absence of Mr. Lamptey (Ghana), Mr. Chaturvedi (India), Vice-Chairman, took the Chair.

The meeting was called to order at 10.40 a.m.

AGENDA ITEM 137: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SIXTH SESSION (continued) (A/49/10, A/49/355; A/C.6/49/L.5)

1. Mr. DE SARAM (Sri Lanka) said that in elaborating the draft articles on State responsibility, the International Law Commission was proposing new rules of international law with regard to State "crimes" (article 19 of part one) and countermeasures. The Commission had discussed at length the question of whether a State, as distinct from those individuals governing it, could properly be said to have committed a crime. A substantial number of members were now convinced that the use of the term "crime" in article 19 was imprecise and inappropriate. Furthermore, it was felt by many that the purpose of article 19 was not to establish a distinction between crimes and delicts but rather to establish a distinction between the consequences that should arise from the infringement by a State of a jus cogens obligation and the consequences that should arise from breaches of lesser international obligations. Even if article 19 succeeded in making such a distinction, several real and substantial reservations to the article remained. First, there was thus far no satisfactory or comprehensive definition of what constituted jus cogens obligations. Secondly, the draft articles did not specify which body would determine whether a jus cogens obligation had in fact been violated. That function could not properly be exercised by either the General Assembly or the Security Council, since neither was a judicial body. Nor was the International Court of Justice a good choice because its jurisdiction was only partial and not uniform.

2. Another important issue was whether the draft articles on State responsibility should deal with the notion of punishment. In his view, the primary purpose of the articles was to restore the status quo ante, by restitution or by pecuniary compensation, in the event of a breach of an international obligation by a State. To incorporate into the draft the concept of punishment of that State would create a serious anomaly which would substantially reduce the acceptability of the draft. In his view, the draft articles should make reference neither to punishment nor to the concept of moral outrage.

3. Turning to the question of countermeasures, he pointed out that while "taking the law into one's own hands" was unacceptable under national legal systems, it was considered necessary in relations between States because of the absence of effective procedures to ensure that States respected their obligations to one another. The Commission was currently elaborating rules on the manner in which States could exercise their right to take countermeasures. Judicial or arbitral guidance in that respect was sparse and, as a result, the Commission was engaged in the progressive development of the law.

4. Most members of the Commission agreed on the following: countermeasures must be proportional to the perceived wrong; some forms of countermeasures were unacceptable in contemporary international law and should be prohibited; and uninvolved third States should not be the target of countermeasures.

5. However, other more difficult issues had yet to be resolved. In particular, the Commission had not examined as thoroughly as it should have the question raised in draft article 11, paragraph 1, and in article 12 of what preliminary steps should be required of an injured State before it could have recourse to countermeasures. One view in that regard was that it was up to the injured State to decide, based on the facts of the case, whether it should take any steps prior to countermeasures; errors could be considered after the countermeasure had been implemented. Others took the view that it was inadvisable, because of the possibilities of abuse, to grant wide discretionary powers to the State which would be taking the countermeasures. It was evident that inequalities between States would give one State the advantage in the exercise of countermeasures.

6. Preliminary steps to be taken prior to resort to countermeasures should be the following: notification by one State to another that the latter State appeared to be in breach of an obligation; notification by one State to another that unless the latter State took steps to repair that breach, countermeasures might be used; and request by the notifying State that differences between the two States be resolved through dispute settlement procedures. Because the time involved in taking preliminary steps might work to the disadvantage of the notifying State, provisions should be made for measures to preserve the position of that State during that period.

7. The articles on countermeasures should incorporate certain general principles which would be applicable in all possible circumstances: prior to the use of countermeasures, the wrongdoing State should be clearly informed that it was in breach of an international obligation; and disputes arising from the taking of countermeasures should be resolved by binding dispute settlement procedures, which could be invoked by any party involved. At the same time, the articles must be balanced and must give due consideration to the fact that various scenarios were likely to arise in connection with countermeasures. In one scenario, a State which had committed an internationally wrongful act could be recalcitrant and unresponsive. In another scenario, there could be misunderstandings in good faith between the two States involved. It was possible, too, that the injured State might be in error with regard to the applicable law.

8. Turning to the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law, he endorsed the Commission's decision, taken in July 1992, to continue with its working hypothesis that the topic dealt with "activities" rather than "acts" and to defer any formal change of the title because additional amendments to it might be made in the future. It was clear that in its work on the topic, the Commission was dealing with something more than what was usually understood by the term international liability, namely, the liability of one State to another.

9. He welcomed the draft articles on the topic which dealt with prevention. However, it was difficult to be too hopeful with regard to the next phase of the Commission's work on so-called remedial measures. In the first place, the term "remedial measures" was an unfortunate turn of phrase. It could imply that what was to be considered was only the question of compensation for harm sustained in cases where a preventive measure was not taken. Such an approach would be inadequate, as it would not take into account what should be done, whether by enlargement of the traditional rules governing compensation to be paid by a State for damage attributable to it or through other modalities, to compensate those who had suffered substantial transboundary harm in cases where it was impossible to establish whether there had or had not been any fault in a particular case.

10. The traditional rules governing State responsibility provided for compensation in only two types of cases: (a) where transboundary harm was caused by fault attributable to the State of origin; or (b) where such a State had earlier agreed that compensation would be provided purely on a showing that an activity in its territory caused transboundary harm, regardless of whether or not it was a case of fault. However, the Commission had so far been unable to agree on the fundamental questions as to whether it was possible to conclude that compensation would be obligatory in at least some cases of transboundary harm, even where fault could not be proved, or whether a general rule to that effect should be codified in international law. He agreed with Australia that both those questions should be answered in the affirmative; nevertheless, there was no consensus in the Commission on those issues.

11. The Commission should give consideration to what its future objectives should be before the Drafting Committee became involved in the elaboration of specific texts. Such a review would be possible only if the Commission was fully informed of recent developments in the field of international environmental law, including: (a) the relevant provisions of treaties relating to transboundary harm and the various compensation procedures proposed therein; (b) national statutory enactments in a number of countries, requiring that compensation should be provided regardless of a showing of fault and setting out compensation procedures, and the amendments proposed to such legislation in the light of experience; and (c) studies carried out by intergovernmental organizations of the best means of providing compensation for environmental harm. In that connection, he drew attention to a survey of State practice and national legislation undertaken in the 1980s at the Commission's request by an expert in the United Nations Office of Legal Affairs. Similar studies in some of the areas to which he had referred would be of great benefit to the Commission's work.

12. Mr. LAMAMRA (Algeria) noted that under chapter IV on the subject of State responsibility, the Commission had devoted most of its efforts to a consideration of the concept of State crime as expressed in article 19 of part one of the draft articles, and the implications that would follow from it. His delegation shared the opinion of the majority of the members of the Commission that the distinction between crimes and delicts as embodied in draft article 19 was valid and that the concept of State crime rested on solid legal and

political foundations. Crimes and delicts both involved wrongful acts committed by a State, but the nature and seriousness of those acts might and indeed often did vary. Therefore, a hierarchy of such wrongful acts should be established.

13. While at first glance, it seemed that the concept of the criminal responsibility of a State did not exist in international law, closer examination revealed indications that justified the present wording of draft article 19. First of all, crime was not a concept exclusive to internal law. It could also be found in international law, as exemplified in the Convention of 1948 on the Prevention and Punishment of the Crime of Genocide and the draft Code of Crimes against the Peace and Security of Mankind. Furthermore, international law recognized violations so serious that they could without hesitation be called crimes, such as aggression, slavery, apartheid and violations of fundamental human rights. Citing those examples called to mind the principle of jus cogens, despite legal uncertainties about the exact definition and scope of the term. Moreover, there was a similar imprecision in the definition of "international custom" and of the "general principles of law recognized by civilized nations" referred to in article 38 of the Statute of the International Court of Justice. The problems the Commission encountered with the concept of jus cogens when preparing the Convention on the Law of Treaties should spur it on to tackle the issue again and master it during its work on the draft articles on State responsibility. He felt that it was time to realize the potential offered by the concept of jus cogens and to give it precision and substance. Codification of the concept, impossible in 1969, could now contribute greatly to the enrichment of international law.

14. The Charter of the United Nations spelled out a number of fundamental principles the violation of which by a State was indisputably equivalent to the perpetration of a crime, among them the use of force in international relations and violation of the right to self-determination. None the less, defining the practical mechanisms for calling States to account for criminal acts was difficult and complicated because of its political implications and the absence of procedures and organs for prosecuting a State on such grounds. His delegation was opposed to giving the Security Council the power to act in the matter. Such a solution would in effect confer judicial powers on a highly political organ. It would constitute a serious setback to the principle of the sovereign equality of States as set forth in the Charter, since the permanent members of the Security Council, through their veto, would have permanent immunity even if they committed criminal acts. Such a solution would also result in a confusion of powers and would seriously imbalance the institutional architecture of the United Nations. His delegation encouraged the Commission to pursue its consideration of the recognition of competence to determine the existence of a crime and to attribute it to the only international organ fully representative of the international community, namely, the General Assembly of the United Nations. Another idea of merit was to attribute jurisdiction to the International Court of Justice in such cases. He was confident that the Commission would present more fully developed suggestions on the topic of State responsibility at the next session.

15. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, Algeria would like to see the specific situation of developing countries given proper consideration. His delegation was pleased to see that the articles provisionally adopted by the Commission at its forty-sixth session reflected the interdependence between economics and ecology, in particular the transboundary environmental implications of some economic activities. It also concurred in the recognition that the principles of international law created obligations on the part of States whose activities caused damage to the environment in other States or in areas outside the boundaries of national territories and therefore of interest and concern to humanity as a whole.

16. Mrs. FLORES (Uruguay), speaking on the question of the consequences of acts characterized as crimes under article 19 of part one of the draft articles said that her delegation considered the distinction between international crimes and international delicts to be significant. Paragraph 2 of draft article 19 defined an international crime as "a breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole". International delicts formed a much broader category consisting of less serious offences. From the definition one could deduce the three criteria to be applied in defining crime: first, a breach involving fundamental interests of the international community and going beyond the scope of bilateral relations; second, a breach that was serious in both quantitative and qualitative terms; and, third, recognition that the breach was a crime, a concept too subjective by itself and requiring further definition in the list contained in paragraph 3 of the article.

17. The two categories of wrongful acts would be subject to different regimes. In the case of international crimes, the breach of an obligation would authorize even parties other than the injured State to bring a complaint, whereas in the case of international delicts, only the State whose legal interests had been directly affected was authorized to bring a complaint against the State that had committed the internationally wrongful act. The distinction was understandable, because the first category dealt with violations that affected the very foundations of international society. The International Court of Justice drew a distinction between obligations that States owed to the international community as a whole and those that they owed to another State in the field of diplomatic protection. In the first instance, given the importance of the rights in question, all States could be deemed to have a legal interest in seeing those rights protected; therefore, such obligations were erga omnes. A crime and a violation erga omnes were not synonymous terms. While every international crime constituted a violation of an erga omnes obligation the contrary did not hold, since ordinary crimes, such as the infringement by a coastal State of the right of transit passage through an international strait, although they involved an erga omnes obligation, did not constitute an international crime.

18. Some who questioned the concept of State crime argued that it did not exist in lex lata, because there was no instrument making it an obligation for States to accept it, and they did not consider applicable the jus cogens provisions in

the 1969 Vienna Convention on the Law of Treaties, for two reasons: first, because an invalid treaty concluded against jus cogens was not necessarily to be considered a crime and, second, because the inclusion of the concept of jus cogens in the 1979 Convention had been conditional on acceptance of the jurisdiction of the International Court of Justice.

19. Her delegation shared the opinion that the two concepts were not identical but parallel. The category of international obligations that would nullify any treaty to the contrary was broader than the category of obligations the violation of which constituted an international crime. The establishment of the two categories of crime and delict altered the traditional view linking the wrongful act to compensation and limiting the consequences of a breach of international law to a bilateral relationship between the State committing the wrongful act and the injured State. It introduced a punitive implication. In addition to compensation, penalties might be imposed on the perpetrating State. In the Commission's language, the term "penalty" referred to a measure which while not involving the use of force was intended to inflict a punishment.

20. Under article 19, when a crime was committed, any member of the international community had the right to call for an end to the violation. In the case of international delicts, on the other hand, States not directly affected could not call for the cessation of the wrongful act. The chief point which her delegation would like to make was that there were no problems from a legal standpoint in recognizing the distinction between crimes and delicts. Such a distinction was supported both by precedent and by international instruments referring to international crimes.

21. The subject of the countermeasures entailed a number of problems, including the minimal input that internal law could provide and the absence of an effective centralized system for implementing the law at the international level. Some members of the Commission had suggested that countermeasures were incompatible with modern international law and that the topic should be approached from a new perspective. Her delegation wished to reaffirm all the arguments of fact and law it had presented two years earlier in the Commission to demonstrate that countermeasures should not be included in the draft articles, although the majority opinion on the Commission had been in favour of including the subject in the draft articles on State responsibility. Her delegation felt that the countermeasures were wrongful acts in themselves and that their wrongfulness was not obviated by the fact that they were a response to a previous wrongful act.

22. The Commission had provisionally adopted articles 11 (Countermeasures by an injured State), 13 (Proportionality) and 14 (Prohibited countermeasures) for inclusion in part two of the draft articles. Her delegation felt that even in the revised version of article 11 the injured State continued to be both judge and party, since it determined whether a wrongful act had been committed and whether the other conditions justifying countermeasures had been met. Determining whether those conditions had been met could be the source of new disputes giving rise to new wrongful acts. Nor could the possibility be ruled out that there had not originally been a wrongful act and that a State claiming

to be the victim of such an act and taking countermeasures would itself have committed a doubly wrongful act.

23. In conclusion, while acknowledging the merit in the argument that the countermeasures might serve a useful function given the current political climate in the international community, in principle her delegation did not believe that the answer to the consequences of a wrongful act was to respond with another wrongful act, particularly if there were other means of achieving the same ends. She wished to stress the importance of developing an adequate system for peaceful resolution of disputes. In addition, her delegation felt that it was essential that a third party should determine such matters as whether a wrongful act had in fact been committed, what measures were appropriate to take and whether they were proportional.

24. Turning to chapter V of document A/49/10, she noted with satisfaction that her delegation's views had been taken into account by the Special Rapporteur both in the general approach to the topic and in some specific aspects. The special nature of the topic under consideration resided in the fact that depending on the approach taken at the outset, varying conclusions might result. There was a difference between stating that transboundary harm was caused by a wrongful act and stating that the obligation to make reparation would arise only if absolute liability had been provided for.

25. With regard to prevention ex post, her delegation believed that it was essential to consider the measures to be adopted after the occurrence of an accident to prevent or minimize its transboundary harmful effects. Such measures should be included in the draft and should be compulsory for the State of origin even if the damage was caused by the activities of an individual.

26. Mr. HALFF (Netherlands), referring to chapter V of the report (A/49/10), said that while the Commission's decision to limit the scope of the topic to activities involving transboundary harm was commendable in principle, further restriction of the topic to activities involving only a risk of causing transboundary harm was questionable. It was clear that the Commission still intended to deal with all aspects of activities not prohibited by international law which entailed a risk of causing significant transboundary harm - in other words, not only remedial measures, but also preventive measures and related cooperation, matters which were not usually covered by the notion of liability.

27. The title of the chapter had in fact become a misnomer for several reasons. First, it referred to acts, while the scope of the draft articles provisionally adopted by the Commission included activities not prohibited by international law. Secondly, the title referred to liability, which did not normally relate to prevention of harmful acts, but to financial and other remedies for them. Thirdly, the title referred to injurious acts not prohibited by international law, which were not necessarily only acts involving a risk of causing transboundary harm but, under certain conditions, also acts actually causing such harm; nevertheless, the Commission had decided to deal with only the first category of acts. Fourthly, the title referred to acts not prohibited by international law, although it was clear from the articles provisionally adopted

by the Commission that not all such acts could be deemed not to be prohibited by international law.

28. What was really at stake in the topic under consideration was not "acts not prohibited by international law", since the injurious consequences of acts of that nature need not be prevented at all, but acts not prohibited or not unlawful per se under international law. In other words, the topic dealt with activities which, depending on the extraterritorial harmful effects which they might or did have and the circumstances under which they were carried out, could be either lawful or unlawful under current international law.

29. It should also be borne in mind that where the topic included the prevention and abatement of transboundary harmful effects related to the use of international watercourses, its subject-matter was already largely covered by the draft articles on the non-navigational uses of international watercourses. That in itself did not make the draft rules on liability meaningless, as such acts might also involve harmful activities not related to the non-navigational uses of international watercourses; however, care should be taken either to avoid obvious discrepancies between the two sets of draft articles, or to include clear provisions regarding the relationship between the two in case of conflict between them.

30. Subject to the preceding remarks, his delegation could, in general, support the approach taken by the Commission. The requirements of prior authorization, risk assessment, measures to prevent or minimize risk, non-transference of risk, notification and exchange of information were well-known components of modern international environmental law.

31. As the application of the articles depended on, inter alia, the existence of activities involving a risk of causing significant transboundary harm through their physical consequences, the determination of the existence of such a risk was of crucial importance. The Netherlands felt that the existence of such a risk should not be left to the unilateral determination of either the State of origin or the affected State.

32. The provision by each State concerned of information regarding activities, the risk involved and the harm which might result should not be limited, as it currently was in article 16 bis, to its own public, but to the public likely to be affected by an activity as referred to in article 1.

33. Under draft articles 18 and 20, the States concerned must enter into consultations based on an equitable balance of interests with a view to achieving acceptable solutions regarding measures to be adopted in order to prevent or minimize the risk of causing significant transboundary harm. If the consultations failed to produce an agreed solution, the State of origin must nevertheless take into account the interests of States likely to be affected and could proceed with the activity at its own risk, without prejudice to the right of any State withholding its agreement to pursue such rights as it might have under the articles adopted by the Commission or otherwise. In that connection, the question arose of how the obligation to attempt to achieve a solution based

on an equitable balance of interests related to the due diligence obligation embodied in draft article 24. He wondered whether it might be assumed that the obligation laid down in draft article 14 was the real substantive obligation imposed on the State of origin, an obligation from which the States concerned could deviate if they could reach an acceptable solution in accordance with draft articles 18 and 20, but which would continue to govern their mutual relations if such an acceptable solution could not be achieved.

34. With regard to draft article 20 (c), (e) and (f), which mentioned certain factors to be taken into account in achieving an equitable balance of interests, the Netherlands believed that the risk of significant harm to the environment and the availability of means of preventing or minimizing such risk or restoring the environment (paragraph (c)) should not be separated from factor (a), but should be an integral part thereof so as to ensure that damage to the environment was included in the notion of harm. Furthermore, it was unclear on what grounds a State of origin could justifiably subordinate its standard of protection of another State's environment to the standard of protection which that other State applied within its own territory. That was true not only if the harmful effects of activities remained within the other State, but especially if they were externalized to third States, for if one State caused harm to the environment, that should not provide an excuse for another State to do the same. With regard to the degree to which States likely to be affected were prepared to contribute to the cause of prevention, the question might be raised of how that factor could be reconciled with the polluter-pays principle.

35. Turning to the tenth report of the Special Rapporteur (A/CN.4/459), he said that his country supported the approach taken by the Special Rapporteur in respect of measures of prevention ex post or "response" measures. The Netherlands also supported the approach consisting of imposing primary and strict liability on the operator for the transboundary harm caused by his activities. In that connection, the Special Rapporteur should be guided by existing civil liability conventions or conventions dealing with similar matters. In order to enable the innocent victims of activities involving a risk of causing significant transboundary harm to receive full compensation for the harm sustained, consideration should be given to a system of subsidiary liability of the State of origin in order to cover that portion of the damage that was not reimbursed by the operator. Depending on the nature of the activity concerned, the establishment of a consortium of States or private operators to bear a subsidiary liability should also be considered.

36. Mrs. BELLIARD (France) said that the Commission's debate on article 19 of part one of the draft articles had been imaginative, subtle and bold. Her tribute to the Commission was all the more sincere since her delegation had constantly pointed out that the question raised very delicate political problems and that the need or the legal value of addressing the issue was questionable. She reiterated France's position that the formulation of article 19 was premature in terms of the Commission's work on State responsibility and of the actual development of international law. Indeed, it was clear from the report that the article had met with serious reservations within the Commission itself.

37. The quality of the Special Rapporteur's report and the level of debate was such that they merited a further explanation of why her delegation was opposed to article 19 and its underlying assumptions. The first - and the most serious - was the assumption of the existence of a category of internationally wrongful acts that were precisely analogous to the crimes and delicts covered by national criminal legislation. The fragility of that assumption was clear from the difficulty experienced by the drafters of the article in defining such presumed crimes and delicts with the precision required by criminal law. Thus the article seemed to be based on the idea that all wrongful acts attributable to a State would fall within the scope of an international criminal law applicable to States. That, however, overlooked the fact that a wrongful act, however serious, was not necessarily a crime. All national legislations characterized the failure to honour agreements as a civil fault, not a criminal one. Moreover, the article stressed the seriousness of the wrongful act. Although some violations of international law were particularly serious, it did not follow that such violations committed by States could be subject to a "criminal law". Even supposing that such a law existed, it would run counter to the principle of nullum crimen, nulla poena sine lege. Crimes could not be defined if the criteria for them were not properly defined. That objection could not be sidestepped by referring to the "international community", which had a political reality, but legally was an indeterminate entity. The article invited a host of subjective judgements, such as the exact definition of "international obligation" and its "essential" nature "for the protection of fundamental interests of the international community". Who would determine whether an interest was "fundamental" and that it affected the "international community", of which the article gave no legal definition? Were the interests of all existing States involved or only those of a large number of States? If so, which?

38. The Commission must already in 1976 have been conscious of the considerable uncertainty surrounding its definition, since it had given examples in paragraph 3 of various wrongful acts which could be termed international crimes. By so doing it had departed from its own principle of restricting itself to secondary rules and not to concern itself with primary rules. Moreover, the paragraph reflected some confusion. It dealt with government policies which were justly criticized by a large majority of States, but which were the product of political orientations reflecting the ideological concepts of a particular period of history rather than acts clearly identifiable as criminal under any jurisdiction. Indeed, it contained such acts as transboundary pollution which not all national legislations had yet criminalized. Nothing could disguise the totally subjective nature of article 19, not even the concept of the erga omnes violation of a general principle of international law. Even if such a concept existed in international law it might well be insufficient to determine on its own an international public policy the violation of which would make a State subject to criminal sanctions.

39. Some members of the Commission had suggested that international crime could be defined as a violation of jus cogens. In her delegation's view such a vague and debatable concept provided no way out of the impasse. France was opposed to it, not only because the concept was ill-defined but because the authors of the

Vienna Convention on the Law of Treaties, to which France was not a party, had drawn from it conclusions which introduced uncertainty into international law. To attempt to define a crime according to the rules of jus cogens, on which the best minds could not agree as to its nature, content or even existence, was a risky undertaking. Moreover, even the concept of jus cogens would not provide a solution to the problem, since violations of such a law would not necessarily be serious enough to qualify as State "crimes", even if the concept was admitted.

40. Putting her delegation's point of view in a more positive way, she said that, as some members of the Commission had pointed out, State responsibility was neither criminal nor civil, but sui generis: international, different and specific. It would be misleading to impose on it mechanically the concepts of national law, particularly criminal law. Moreover, criminal justice presupposed moral and social awareness in a human community. It also presupposed a legislator empowered to define and punish crimes, a judicial system to try them, and forces of law and order to enforce the punishments handed down by a court. No such bodies existed at the international level. Universal values, though they undoubtedly existed, were too imprecise to carry the weight imposed on them by article 19.

41. Her delegation's second objection on principle to the contents of article 19 concerned the question of whether a crime could be attributed to a State. The Commission had so far wisely restricted itself to crimes that could be attributed to individuals, though even that was a difficult task. One area of difficulty was the criminal responsibility of juridical persons, a concept which had been the subject of much controversy and was dealt with by States in various ways. The new criminal code in France excluded the State from such responsibility; the State alone was entitled to punish and therefore could not punish itself.

42. By extension it was hard to see who, in an international community of over 180 sovereign States, all with the power to punish, could exercise such power over other sovereign States. Although chapter VII of the Charter gave the Security Council powers to maintain or restore peace, it gave it no legal or criminal function with regard to States.

43. Another problem lay in the confusion in article 19 between the two concepts embodied in the word "State". One meaning of the word was the various bodies, such as administrations, governments or even political parties, whose members or leaders could be held responsible for criminal acts. According to the second meaning, under international law, the State was a more abstract legal entity comprising a territory, a population and institutions; in legal terms it was neither good nor bad, just nor unjust, innocent nor guilty.

44. In those circumstances her delegation regretted that the majority of the Commission seemed to be intent on continuing down the same path, at least at its next session, and pursuing its consideration of the specific consequences of acts qualified as crimes under the article. Not only was its decision attended with considerable difficulties, but, as the representative of France had said the previous year, in persevering with article 19 the Commission would step out

of the role assigned to it, and to no purpose, since even if its conclusions were approved by some States in the form of a convention, such a convention would not affect the competence of United Nations organs as defined by the Charter.

45. She believed that article 19, conceived in the 1970s, debated and contested as early as 1976, had no place in the modern world. It had lost the usefulness intended by its authors owing to the developing role of the United Nations: the Security Council was managing, despite difficulties, to carry out the responsibilities imposed on it by member States. Moreover, the Council had rightly decided that intolerable violations of a people's rights by its own Government could constitute a threat to peace and international security, with the result that those guilty of exceptionally serious internationally wrongful acts, as envisaged in article 19, were subject to prompt and appropriate action. In addition, the Council had implemented a wide range of measures with varying aims, including prevention, dissuasion, coercion or encouragement. They might seek to prevent repetition or to provide reparation. They were not of a punitive character, even though they were often characterized as sanctions. Lastly, the Council had established an international tribunal competent to try crimes in the former Yugoslavia and envisaged the same formula for Rwanda. Such an innovative and pragmatic approach was more appropriate than the solution adopted in article 19. In other words, the article was either premature or out of date. It should be dropped from the draft articles under discussion in the Commission.

46. Turning to the question of international liability for injurious consequences arising out of acts not prohibited by international law, she offered some comments on the new draft articles presented by the Special Rapporteur in his tenth report (A/CN.4/459). With regard to prevention ex post, her delegation believed that the Special Rapporteur's suggested phrase, "response measures", was the most logical and the most telling. She agreed that response measures could not be concerned with reparation, but she was less sure that they should be used for measures of prevention, since they could be taken only after the occurrence of an accident. They were neither strictly preventive nor did they belong in the sphere of reparation; they were simply specific emergency action. The new paragraph (e) therefore seemed apt, although there could be some discussion of the relative merits of "appropriate measures" and "reasonable measures", to ensure that the phrase could be interpreted as referring to measures to limit both the seriousness and the extent of transboundary harm.

47. With regard to the relationship between State liability and civil liability, she agreed with the Special Rapporteur's conclusion that State responsibility was normally subsidiary to that of the operator. The possibility of setting up insurance systems should also be considered in a positive spirit. As for other points raised in the report, she believed that the operator should mean the entity - whether a company, group or other person - holding effective responsibility for the general direction of the enterprise and final responsibility for any failures of safety. The rules for a competent court were

satisfactory, in that they corresponded to the generally accepted principles of private international law.

48. She pointed out that to make the State bear absolute liability for harm caused by lawful actions, if only residually for that not borne by the operator, would involve a significant development of international law. It was not clear that States would accept such a change, even though they had accepted some specific instruments such as the Convention on International Liability for Damage Caused by Space Objects. In that case, however, it was specified that space activity was restricted to States alone, which was not necessarily so in all the activities to which the draft articles might apply. That being so, she recommended that, without prejudging the final form of the draft articles, it would be useful to draw up a list of principles - if necessary with variants - to which States could refer when setting up specific liability systems. Without being binding, such a list would help to harmonize international responsibility for the injurious consequences of lawful acts, but at the same time leave scope for diversity.

49. Mr. GAWLEY (Ireland), speaking on the topic of international liability, welcomed the Commission's view that further work needed to be done to determine with greater precision what types of activity fell within the scope of the draft articles. It was also important to continue its work on article 2 in order to define with greater precision the terms used in the draft articles.

50. Having focused its efforts on the central issue of prevention, the Commission had seemed disinclined to consider another equally central issue, namely, liability for hazardous activity. Some delegations believed that the Commission should deal only with prevention, and should abandon any attempt to deal with liability, on the grounds that the matter was simple and that general rules of international law applied. Ireland believed that such a view was wrong. To begin with, it was illogical: for if general rules of international law applied, then it ought to be possible to state those rules. Secondly, the early history of the Commission's work had shown the value of fleshing out areas of law initially thought to be relatively straightforward: diplomatic relations, the law of treaties and the law of the sea were examples of areas in which the law had been clarified and developed. The Commission, and the international community, ought not to miss that unique opportunity to clarify, and where necessary progressively develop, the law regarding so central an issue as liability.

51. Mr. MOESI (Botswana) welcomed the adoption by the Commission of a draft statute for an international criminal court. Botswana fully supported the establishment of such a court, and did not question the need for international cooperation measures to complement traditional criminal justice systems based on national sovereignty. His delegation noted with satisfaction that the court was to be established, not by resolution of a United Nations organ, but by treaty, and that an "opting-in" system would be adopted with regard to acceptance of the court's jurisdiction.

52. In his delegation's view, the fact that access to the court was limited to the State party impeded the achievement of the objective of bringing those who committed international crimes to justice. Juridical persons other than the State party should also be afforded access to the court. It should be borne in mind that the victims of international crimes might be individuals. Were those individuals to have no recourse to the court? If it was felt that such a provision would cause more problems than it would solve, then that view should be clearly stated. Furthermore, article 26, paragraph 5, conflicted with article 27, paragraph 2 (b), for the former suggested that the final decision whether to prosecute lay with the prosecutor, whereas the latter suggested that the final decision lay with the presidency. Article 26, paragraph 5, also failed to specify what would happen if the prosecutor declined to prosecute even after being asked by the presidency to reconsider his decision. The draft required improvement in that regard.

53. His delegation wondered whether the omission of any reference to the qualifications of a defence counsel had been deliberate. Article 41, paragraph 1 (d), also gave the impression that any person of the accused's choosing might conduct his defence. There were many reasons why that state of affairs would be undesirable. No less important was the need to ensure that all officers of the court were subject to the same ethical rules, and that the judge, the prosecutor and the defence counsel were all ministers of justice.

54. His delegation welcomed the provisions of article 47, on applicable penalties, which could, however, be further improved by the addition of a provision requiring the person convicted to compensate the victim whether or not a fine had been imposed. Provision should also be made for forfeiture orders and seizure in respect of the proceeds and profits from the crime, which could then be used for purposes such as compensation. Finally, his delegation supported the view that further in-depth study of the draft Statute was needed before a conference of plenipotentiaries was convened.

55. Mr. TOMKA (Slovakia) said that his delegation shared the view that an international criminal court should complement national criminal courts and should exercise its jurisdiction only when special circumstances so warranted. Slovakia supported in principle the Commission's recommendation that an international conference of plenipotentiaries should be convened to study the draft statute and conclude a convention on the establishment of an international criminal court, and supported the idea that further preparatory work should be done by an ad hoc committee or working group in the next inter-sessional period before a decision was taken on convening such a conference.

56. On the topic of the law of the non-navigational uses of international watercourses, Slovakia felt that the community of nations would be well served by the rules proposed by the Commission once they had been embodied in an international convention. The draft articles as finally adopted showed the positive influence of new concepts such as that of sustainable development, and were conceived so as to constitute a solid basis for a framework convention. There was no doubt that bilateral or regional agreements on the utilization of specific international watercourses would continue to play a prominent role in

the future, and would constitute a lex specialis operating in parallel with the proposed framework convention; however, States would henceforth find inspiration in the draft articles when negotiating such agreements. His delegation commended the Commission on its decision to include provisions on settlement of disputes in the draft articles and stressed the useful role which could be performed by the proposed fact-finding commission in dispute settlement. While not opposed to the proposal that the General Assembly might elaborate a convention, his delegation preferred the alternative approach, in view of the complexity of the issues involved, of convening a diplomatic conference, possibly in the spring of 1996.

57. Turning to the topic of State responsibility, he said that it was premature to comment on the draft articles on countermeasures while work on draft article 12 was still incomplete. On the issue of the legal consequences of crimes, Slovakia considered that the distinction between crimes and delicts was fully justified and well rooted in contemporary international law. While acknowledging that the language of article 19 of part one of the draft articles could be further improved at second reading by, inter alia, moving the list of examples in paragraph 3 to the commentary, his delegation saw no reason to question the concept of international crime as reflected in article 19. However, the Commission should attempt to find an alternative to the term "crime", which might lead to confusion because of its criminal law connotations. In his delegation's view, there was no criminal responsibility of States in international law, and international responsibility should not be equated with that under criminal or civil law. The crime/delict distinction was based on a difference in the nature of the breach, rather than in its gravity. A closer link should be established between the concept of peremptory norms, or jus cogens, and the concept of an international crime. Each and every breach of a peremptory norm should be considered an international crime: it was absurd to speak of more serious and less serious breaches of a peremptory norm, just as it would be absurd to speak of more and less serious aggression, or of more and less serious genocide. However, it had also to be conceded that there was as yet no general agreement as to what rules had a peremptory nature. For instance, his delegation seriously doubted whether the principle pacta sunt servanda was of a peremptory nature. The breach of a peremptory norm affected the whole international community, and should entail responsibility of the law-breaking State vis-à-vis the whole international community, not just vis-à-vis the directly injured State. Consequently, the new legal relationship of international responsibility was an erga omnes relationship, permitting no inter partes derogation.

58. The Commission should now focus on determining the legal consequences of international crimes of States, by defining the content of international responsibility for international crimes as opposed to responsibility for delicts. His delegation considered that there was no difference as far as the obligation of cessation of a wrongful act was concerned. Concerning restitution in kind, the restrictions normally applying thereto, such as the excessive onerousness of such restitution should not be applicable. Satisfaction should include the obligation to institute criminal proceedings against or extradite those who, in exercising public authority, had participated in the preparation

or perpetration of international crimes attributed to a State. Guarantees of non-repetition should be stricter than in the case of delicts, and should include the entitlement of the international community to adopt measures which might in other circumstances be regarded as interference in domestic affairs.

59. After so many years devoted to the search for a satisfactory approach, the Commission's work on the topic of international liability for injurious consequences arising out of acts not prohibited by international law had finally borne fruit. It was still too early to conclude that the topic was ripe for codification in the form of an international treaty, but the work done by the Commission could now provide valuable guidance for States in their practice.

60. Slovakia fully supported the view expressed by the Commission in paragraphs 398 and 399 of its report, regarding the essential need for the continued provision of summary records of its proceedings. It was to be hoped that the current practice of providing summary records, and of publishing them in volume I of the Yearbook of the International Law Commission, would continue.

The meeting rose at 1 p.m.