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REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SIXTH SESSION (1994)

Topical summary of the discussion held in the Sixth Committee of the General Assembly during its forty-ninth session prepared by the Secretariat

Addendum

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D. STATE RESPONSIBILITY

1. General observations

1. Some delegations referred in general terms to the stage reached by the Commission in its consideration of the topic. While the view was expressed that considerable work had been done and while appreciation was expressed for the interesting debate conducted at the last session on the type of responsibility entailed by breaches characterized as crimes in article 19 of Part One of the draft articles, a number of representatives observed that there were still many questions that merited in-depth analysis - a case in point being the concept of "international crime" - and that the draft articles had a long way to go before they reached the required level of maturity.

2. Concern was expressed over the slow pace of work. The remark was made in this connection that, while the Commission had adopted a series of articles on the substantive consequences of internationally wrongful acts, it had not completed its work on four other articles dealing with the instrumental consequences of such acts (countermeasures) sent to it the previous year. It was recalled in this connection that two of the articles had, at the suggestion of the Special Rapporteur, been sent back to the Drafting Committee, which had approved a new version for one but not for the other, and that the Commission had accordingly decided not to submit the articles adopted to the General Assembly, given that the four articles were intended to be a coherent ensemble dealing with all aspects of countermeasures.

3. While recognizing the existing difficulties, a number of representatives urged that work on the topic, which had been on the Commission's agenda for many years, be completed as soon as possible. It was remarked that the progress achieved so far was sufficient for Parts Two and Three of the draft to be completed by 1996, and due note was taken of the Special Rapporteur's assurance that the Commission would be able to conclude on time its first reading of the draft.

2. The question of the consequences of acts characterized as crimes under article 19 of Part One of the draft articles

4. A number of representatives noted the quality and thoroughness of the Commission's debate, which was described as imaginative, subtle and bold. The Special Rapporteur was praised for the quality of his report; the use of a questionnaire to structure the debate was viewed as setting a good precedent that ought to be repeated. It was at the same time recognized that the Commission's debate was fraught with controversy and that the questions that had arisen underscored the political and legal complexities of the issues involved. Referring to the origin of the quandary in which the Commission found itself, one representative cited the adoption, in 1976, of article 19 and the consequential decision, taken at the suggestion of the Special Rapporteur, to give full, separate treatment to the consequences of crimes, a decision which had exacerbated the problem, since the Commission had found itself facing the task of addressing the consequences of crimes in separate provisions, instead of

simply considering what consequences should be attached to crimes in addition to the consequences entailed by any internationally wrongful act, as had been proposed by the former Special Rapporteur, Mr. Willem Riphagen.

5. Several delegations commented on the spirit in which the Commission should approach the distinction between delicts and wrongful acts characterized as crimes in article 19 of Part One of the draft articles.

6. Referring to the balance to be struck between progressive development and codification of international law, some observed, in general terms, that the Commission, while it should be wary of pursuing an ideal too far removed from reality, lest its work might become unacceptable to States and therefore meaningless, was duty-bound to go beyond stark prevailing realities in order to promote the progressive development of international law. With specific reference to the crime/delict distinction, it was remarked that the Commission should, as it had done in other circumstances, combine codification and progressive development of the law. An analysis of positive law and a mere statement that a specific category of crimes did not exist in the practice of States were not sufficient; it was also important to give due consideration to theory and to practices that might arise from it. Emphasis was also placed on the need to ensure consistency between international law and State practice and to retain concepts capable of promoting the progressive reform, development and strengthening of international institutions.

7. Other delegations warned against the risk of forgetting the basic concept of what the codification process was intended to achieve. In this connection, it was remarked that the primary objective of the codification process was not to establish a regime of criminal law regulating the behaviour of States which was unlikely to come about, but to codify widely accepted international legal procedures for settling peacefully the consequences of State responsibility for injuries caused to other States. It was also stated that attempting to develop new rules of international law with regard to controversial notions was an inappropriate and unproductive use of the Commission’s time - inappropriate because, in persevering with such notions, the Commission would step out of the role assigned to it, and unproductive because there was no point in building international conventions on concepts which met with considerable scepticism and resistance on the part of a number of States.

8. A number of representatives noted that the debate on the consequences of "State crimes" had inevitably brought to the forefront the controversy on the very distinction between two categories of internationally wrongful acts. That distinction was viewed as a valid one by some representatives but gave rise to objections on the part of others.

9. The questions which were identified in this context and on which the debate focused included the following: (1) Did the concept of State crime exist in State practice and should it be recognized in international law? (2) What was the nature of the responsibility incurred by a State for grave breaches of international law? (3) Who was competent to determine that a crime had been committed in a given case and what role devolved on United Nations organs in this regard? (4) Did article 19 provide an adequate basis for the continuation of the work? (5) Could alternatives be envisaged for the concept of "State

crimes"? (6) Which specific consequences should "State crimes" entail? and (7) Did the concept of crime have punitive implications? 1/

10. Question (1) was answered in the affirmative by a number of representatives who felt that to draw a qualitative distinction between infringements of the international public order and internationally wrongful acts which did not threaten the foundation of international society was the right approach. It was said in particular that, in the light of current practice, there were two major categories of violations of international law depending on the significance of the norm violated and the seriousness of the violation and that, at the political level, neither public opinion nor States themselves attached the same importance to minor violations of international law - for example, the occasional breach of a trade agreement - as to major violations - for instance, a situation of massive and systematic violations of the most basic human rights. The concept of international crime, it was stated, was rooted in positive law and in the realities of international life, which were generally manifested in the practice of States and the rulings of international tribunals: egregious breaches of international law, such as aggression, genocide, apartheid or the infringement of basic human rights, were distinct from ordinary delicts and should therefore be treated separately. Along the same lines, the remark was made that the concept of State crime rested on solid legal and political foundations: while crimes and delicts both involved wrongful acts committed by a State, the nature and seriousness of those acts might and indeed often did vary, so that a hierarchy of such wrongful acts should be established. It was also pointed out that, as clearly appeared from the Commission's consideration of the draft Code of Crimes against the Peace and Security of Mankind, there were some international crimes which the international community believed should be punished in some fashion and that one could therefore hardly envisage the concept of an international crime disappearing from the draft on State responsibility with sole emphasis being given to delicts.

11. Some of the representatives in question commented on the criteria to be applied in defining crimes. Those criteria were identified as follows: first, a breach involving fundamental interests of the international community and going beyond the scope of bilateral relations; secondly, a breach that was serious in both quantitative and qualitative terms. In this context, it was remarked that the distinction between crimes and delicts should not be viewed only in terms of the seriousness of the violation of customary or treaty obligations involved; it should be borne in mind that not only the victim State but the international community as a whole was injured by such acts.

12. The view was also expressed that in defining the concept of international crime, it would be useful to rely on the principle of jus cogens and that the Commission should not be discouraged by legal uncertainties about the exact definition and scope of the term, bearing in mind that 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 time was viewed as ripe for realizing the potential offered by the concept of jus cogens and giving it precision and substance, an exercise that was impossible in 1969 but could now contribute greatly to the enrichment of international law. In this context, it was pointed out that 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.

13. Question (1) at the same time elicited some negative or reserved responses. Thus, one representative said that the need for the distinction between crimes and delicts had still not been clearly established and that the distinction raised a series of questions which could not be satisfactorily answered, given the current state of international relations. Another representative observed that, although the question of the criminal responsibility of States formed part of the debate on international law theory, the international community had not established laws concerning State crimes and their consequences. He stressed that certain questions had to be answered in international legal instruments (such as whether the concept of State crimes should be recognized in international law, who would have jurisdiction if that concept was recognized and whether responsibility for State crimes differed from that entailed by ordinary internationally wrongful acts) and that, given the limited number of principles of international law that were currently universally recognized and the present structure of international relations, it would be difficult to introduce the concept of criminal acts into the topic of State responsibility and to codify a series of laws for that purpose. He therefore urged caution in dealing with the matter.

14. Elaborating on the above views, a third representative endorsed the "continuum" approach and stressed that while more egregious acts might entail more severe consequences (such as countermeasures by other States, reparations, punishment of individuals for grave breaches of the laws of war, and even recommendations, provisional measures and forcible and non-forcible measures by the Security Council operating under Chapter VII of the Charter), attempting to establish one category of actions as "crimes" which merited action by the international community unnecessarily limited the flexibility of operating on a continuum: establishing a category of State "crimes" inevitably either must be an artificial construct or must rely on a case-by-case appraisal by the international community, in which case the utility of the concept appeared minimal at best. The same representative added that, to the extent that the Commission was seeking to express the law as it ought to be, application of the concept of "crime" to States neither advanced nor clarified the state of the law; rather, it obscured it by attempting to apply a concept of domestic law, built upon the mens rea of the individual, to a State.

15. On question (2), namely, the nature of the responsibility incurred by a State for grave breaches of international law, some delegations took the view that there was no convincing reason why, as a matter of principle, a State could not incur criminal responsibility and that the maxim "societas delinquere non potest" did not apply. It was pointed out that, in certain legal systems, legal entities could be held criminally responsible, particularly for certain economic or financial offences, even though technically such entities could not have mens rea, and that there was no reason why particularly serious acts committed by individuals using the territory and resources of a State could not, under certain conditions, be imputed to the State, thus leading to that State's criminal liability. Indeed, it was observed, the concept of State responsibility for ordinary delicts was also based on the concept of imputing to

the State acts of individuals or other entities operating as State organs. It was further remarked that the tragic events of the Second World War provided ample illustration of criminal acts committed by States, in respect of which those States had later admitted liability and had provided some financial recompense for the material consequences of the crimes committed, and that the obligation imposed upon Iraq to pay compensation to Kuwait and to individuals under the relevant Security Council resolutions following its invasion of that country in 1991 had likewise been intended to induce the State that had committed the crimes to make financial amends for the damage caused. Thus, it was stated, when criminal acts admittedly committed by physical persons were committed for the purposes of the State, on its behalf and under its authority, the acts were imputed to the State, which became responsible for them in the same manner in which, under municipal law, a corporation became responsible for criminal acts committed by its officers and could be punished for them by the imposition of financial penalties. A specific example which was mentioned in this context was that of genocide, which, being normally carried out by State organs, implied a sort of "system criminality". Also in support of the notion of criminal responsibility of the State, it was pointed out that such responsibility was postulated by article 5 of the draft Code of Crimes against the Peace and Security of Mankind and that the concept of crime was not a concept exclusive to internal law, as exemplified by the draft Code and by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, as well as by the recognition in international law of violations so serious that they could without hesitation be called crimes, cases in point being slavery, apartheid and violations of fundamental human rights.

16. Other representatives took the view that the concept of the criminal responsibility of the State found no support in contemporary State practice inasmuch as the concept of crime, although rooted in international law, only applied to individuals, not States. It was pointed out that one of the key developments in the area concerned, namely, the treatment of a decision to resort to war unlawfully as a criminal act for which the leadership of a State might be punished, was not applicable to States as States and that, furthermore, the most recent war crimes tribunal, the International Tribunal for the former Yugoslavia, had no jurisdiction to consider "crimes" of States and to hear charges of crimes of aggression by individuals - a deliberately cautious approach to the issue of crimes under international law which was not at all reflected in the Commission’s work on State responsibility. It was remarked in this context that, if the fundamental objection was deterrence, the correct approach was to channel criminal responsibility to the individuals within the offending State that had decided to undertake the State action, inasmuch as establishing the criminal responsibility of the State as a whole risked diluting the deterrence sought. A further argument adduced against the concept of the criminal responsibility of a State was that international tribunals had traditionally refused to assess punitive damages against States partly because of the absence of malice on the part of a Government of a State, as opposed to on the part of an individual.

17. Still other representatives viewed the debate as a false one inasmuch as no analogy could be made between the use of the term "crime" in the current context and its meaning within the realm of domestic criminal law: in the current context, "crime" did not imply that a State was criminally responsible; it

simply indicated that a State had breached an international obligation which was essential for the protection of the fundamental interests of the international community. The use of that term, it was stated, should be without prejudice to the determination of the nature of the responsibility for a particular crime. Those representatives concurred with the view, reflected in the Commission's report, that, for the purposes of the draft articles, the question was not one of criminal or civil responsibility but of State responsibility that arose out of criminal or delictual act. State responsibility, it was stated, was neither civil nor criminal but sui generis: international, different and specific, and it was therefore pointless to give further consideration to the validity of the maxim "societas delinquere non potest" in international law.

18. As regards question (3), namely, the question of who determined that a crime had been committed, it was generally recognized by the delegations which addressed it as a difficult one because of its political implications and of the insufficient institutionalization of the international community. It was, however, remarked that the problem arose in similar terms in connection with ordinary breaches and that, where no compulsory dispute settlement was in force between the parties to a conflict involving the question of State responsibility and its implementation, there was no alternative but to leave it to the States involved to determine the character and consequences of the wrongful act alleged to have been committed, an admittedly unsatisfactory solution to a well-known problem affecting most rules of international law given the current organization of the international community, but one which was less objectionable than might seem at first glance, given the fact that a State acting on the basis of its perception of what constituted a crime did so at its own risk.

19. Some delegations, bearing in mind the seriousness of the consequences entailed by an international crime, disagreed with the view that the determination should be left to the unilateral discretion of States and called for an institutionalized process conducted by an impartial and independent international judicial body.

20. As regards the role of United Nations organs in this area, it was recalled that the Security Council had the power to determine under Chapter VII of the Charter of the United Nations that such crimes as threats to the peace, breaches of the peace or acts of aggression within the meaning of Article 39 of the Charter had been committed and to impose relevant penalties.

21. While there was no disagreement with the view that the existing United Nations machinery should be fully utilized to solve the problems faced by the international community, several representatives advocated a cautious approach to the matter. The Security Council, it was stated, was not an independent judicial organ but an intergovernmental body which was endowed with political powers in the exercise of its primary responsibility for the maintenance of international peace and security and was basically entrusted with police functions. Enabling the Security Council to determine that a State had committed a crime gave rise to strong objections: such a solution, it was stated, would in effect confer judicial powers on a highly political organ; it would constitute a serious set-back 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, and it would also result in a confusion of powers and seriously imbalance the institutional architecture of the United Nations.

22. The question whether the General Assembly could play a role in the area under consideration gave rise to divergent views. Some delegations pointed out that the Assembly, like the Security Council, was a political organ functioning under the authority of the Charter of the United Nations, not a judicial organ mandated to judge breaches of international law by a State and to mete out punishment. On the other hand, the view was expressed that the Commission should attribute competence to determine the existence of a crime to the only international organ fully representative of the international community, namely, the General Assembly of the United Nations.

23. As to the International Court of Justice, some representatives viewed it as the best alternative. Others pointed out, however, that, in the last analysis, the Court's competence was voluntary and that unilateral declarations accepting the Court's jurisdiction were still few in number and often accompanied with major reservations. It was also noted that the jurisdiction of the Court was only partial and not uniform. Attention was drawn on the other hand to the possibility of involving the International Court of Justice in the determination of a crime or a grave breach, along the lines of the judicial settlement procedures contained in articles 65 and 66 of the 1969 Vienna Convention on the Law of Treaties. Mention was also made of the possibility of drafting an article along the lines of article VIII of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which provided that a contracting party could call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they considered appropriate for the prevention and suppression of acts of genocide.

24. Several representatives cautioned the International Law Commission against establishing new mandates for main organs of the United Nations through the draft articles of a convention on State responsibility. One representative, while being of the view that the difficulties referred to above could only be overcome through the relevant reforms of the Charter of the United Nations and of the Statute of the International Court of Justice, regretfully admitted that the international community did not yet appear to be ready for such reforms.

25. Question (4), namely whether article 19 of Part One of the draft articles provided an adequate basis for the continuation of work, elicited a positive response from a number of representatives, who found the text carefully worded and generally satisfactory subject to possible improvements based on developments in State practice or in the light of the consequences to be attached to the commission of an international crime. With reference to paragraph 3 of the article, the view was expressed that the list contained in that paragraph usefully clarified the definition in paragraph 2. While recognizing that a list of the type proposed would help dispel the ambiguities of primary rules and facilitate the determination of the consequences of international crimes, some representatives considered it practically impossible to arrive at a list that would be universally acceptable. They therefore took the view that article 19 should be confined to a general characterization of international crimes, in keeping with the Commission's decision to limit the

draft to secondary rules, and that the definition of specific crimes should be dealt with in other instruments.

26. Other representatives took the view that article 19 left much to be desired from the conceptual point of view. One of them, after noting that the article rested on 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, observed that 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. She objected to the idea underlying the article that all wrongful acts attributable to a State would fall within the scope of an international criminal law applicable to States, an idea which overlooked the fact that a wrongful act, however serious, was not necessarily a crime. Referring to the criterion of the seriousness of the wrongful act, she pointed out that, 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" and that crimes could only be defined, as they most assuredly should be in the light of the principle of nullum crimen nulla poena sine lege, if the criteria for them were properly defined. In her view, that objection could not be sidestepped by referring to the "international community", which had a political reality, but legally was an indeterminate entity. She furthermore remarked that the article invited a host of subjective judgements, relating, on the one hand, to the exact definition of "international obligation" and its "essential" nature "for the protection of fundamental interests of the international community" and, on the other hand, to the question whether an interest was "fundamental" and concerned the "international community", of which the article gave no legal definition. Referring to the list contained in paragraph 3 of article 19 and after noting that the Commission, by providing such a list, had departed from its own principle of restricting itself to secondary rules and not concerning itself with primary rules, she observed that the paragraph 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. Moreover, she went on to say, criminal justice presupposed moral and social awareness in a human community, as well as 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: none of those conditions, in her opinion, were met at the international level.

27. The same representative raised a second objection on principle to the contents of article 19, which concerned the question of whether a crime could be attributed to a State. She recalled that the concept of the criminal responsibility of juridical persons was dealt with by States in various ways and that the State was necessarily excluded from such responsibility, as long as it was alone entitled to punish. By extension, she found it difficult 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, a further problem resulting, in her view, from the confusion in article 19 between the two concepts embodied in the word "State", which, according to one meaning, encompassed the various bodies, such as administrations, governments or even

political parties, whose members or leaders could be held responsible for criminal acts and, according to another meaning, designated a more abstract legal entity (comprising a territory, a population and institutions) which, in legal terms, was neither good nor bad, just nor unjust, innocent nor guilty. The same representative concluded that article 19, conceived in the 1970s and contested as early as 1976, had no place in the modern world and had lost the usefulness intended by its authors owing to the developing role of the United Nations. She stressed in this connection that the Security Council had rightly decided that intolerable violations of a people's rights by its own Government could constitute a threat to international peace and 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, and that the Council had also implemented a wide range of measures with varying aims, including prevention, dissuasion, coercion or encouragement, and had established international tribunals competent to try crimes in the former Yugoslavia and in Rwanda. In her view, an innovative and pragmatic approach was more appropriate than the solution adopted in article 19.

28. As regards question (5), concerning possible alternatives to the concept "State crimes", which, it was noted, might lead to confusion because of its criminal-law connotations, it was suggested that the problem should be approached on the basis of two combined elements, namely, a more sophisticated elaboration of the consequences of the concept of erga omnes obligations and a more direct link with the draft Code of Crimes against the Peace and Security of Mankind, so as to make the Code, once adopted, applicable to all violations of the special category of erga omnes violations. Another suggestion was to use the terminology employed in the 1949 Geneva Conventions on the protection of victims of war, which referred to "grave breaches" of the Conventions: a distinction would thus be made between "breaches" and "grave breaches", using as a criterion the degree of gravity of the wrongful act. It was also noted that mention had been made in the Commission of the concept of violation of an obligation erga omnes.

29. All of these alternatives gave rise to objections. It was remarked that a crime and a violation of an obligation erga omnes were not synonymous terms and that, while every international crime constituted a violation of an erga omnes obligation, the contrary did not hold; thus, the infringement by a coastal State of the right of transit passage through an international strait, although it involved a breach of an erga omnes obligation, did not constitute an international crime. It was also said that the concept of erga omnes obligation, even assuming it existed in international law, 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.

30. As for the concept of jus cogens, the view was expressed that a notion which was ill-defined and from which the authors of the Vienna Convention on the Law of Treaties had drawn conclusions which introduced uncertainty into international law provided no way out and that to attempt to define a crime according to the rules of jus cogens, on the nature, content or even existence of which the best minds could not agree, was a risky undertaking. The remark was further made that even if the concept was admitted, it would not provide a

solution to the problem, since a breach of a jus cogens obligation would not always constitute an international crime.

31. The abandonment of the term "State crime" was furthermore viewed as unjustified, since the use of the term was without prejudice to the nature of the liability arising from a particularly serious breach of international law, and as ill-advised, because the term had the clear psychological advantage of stressing the exceptional seriousness of the breach concerned, which should spur the international community to take action, either within the framework of institutions or through individual States, to defend the rights and interests of both the victim State and the international community.

32. As for question (6), namely, which specific consequences should "State crimes" entail, it was pointed out that the basic discrepancy with regard to the concept of international crimes had determined the respective approaches to their consequences and that, for those who defended the concept, the commission of an international crime would give rise to a general right to submit claims - the so-called actio popularis principle - and would be accompanied by the imposition of other penalties, whereas for those who contested the concept, there would logically be no difference between the consequences of the commission of a delict and of an international crime. Determining the consequences of State crimes was viewed as a difficult task in the absence of an exhaustive list of State crimes, even though certain crimes such as aggression or genocide were reasonably well defined and were considered as crimes by the opinio juris of the international community. Other obstacles to the identification of the consequences of State crimes which were mentioned during the debate included the current organization of the international community and the lack of a legal mechanism having the power to determine whether a State had committed a crime.

33. While acknowledging those difficulties, some representatives took the view that the distinction between crimes and delicts should extend to the consequences of the commission of the acts in question and that a special regime should be established for "State crimes" at both the substantive and the instrumental levels, bearing in mind that progress in that field might promote the rule of law in international relations and uphold common international interests.

34. With regard to the question of who could legitimately react to a "State crime", either by claiming compliance with substantive obligations or by resorting to countermeasures or sanctions, a question which was viewed as one of fundamental importance in instituting a regime of international responsibility for crimes, several representatives stressed that, unlike the case of international delicts, where only the State whose legal interests had been affected was authorized to bring a complaint against the wrongdoing State, the commission of a State crime would authorize even parties other than the injured State to bring a complaint. The distinction was viewed as logical since the latter type of violation affected the very foundations of international society and as in line with the recognition by the International Court of Justice of the existence of obligations owed to the international community as a whole.

35. The delegations which commented on the issue generally agreed that the reaction to a crime should ideally be a collective one, emanating from an international organ capable of interpreting and implementing the will of the international community as a whole. While some of them recognized that in reality, owing to the current organizational structure of the international community and its lack of compulsory jurisdiction, there was no alternative but to assign to individual States, including injured States, the task of determining the appropriate reaction, objections were raised to the notion of leaving room for the unilateral initiatives of States or groups of States. In this connection the view was expressed that, lest the concept of crime should lead to the confirmation of existing power relationships, it was important to ensure that, with the exception of self-defence, States were given the right to intervene individually only where there was no collective reaction or where such reaction was impossible. The Commission was furthermore encouraged to continue to seek ways of endowing an adequately representative organ with an effective judicial verification system for determining the legitimacy of the characterization of the crime and reaction.

36. As regards instrumental consequences, the view was expressed that the use of the concept of crime as a qualifying element for determining the procedures to be followed prior to taking countermeasures, on the one hand, and for determining the quality of such measures, on the other, was problematic and was also risky, if not counter-productive, in the absence of an effective international authority which would decide when such a crime had been committed and would apply punitive measures. It was also stated that resort to the classic notion of crime might destroy the fine balance of interests which must be maintained between injuring and injured State in order to give dispute settlement procedures prior to taking countermeasures a chance of being effective. It was further remarked that countermeasures were conceived on a bilateral basis, even for the breach of erga omnes obligations, so that the question arose as to how to proceed if the obligation breached was aimed at safeguarding the fundamental interests of every State.

37. The above notwithstanding, some representatives shared the Special Rapporteur's view that a distinction should be made, in terms of countermeasures, between crimes and delicts. At the same time, they emphasized that in any regime governing reactions to the commission of a crime, the principles of peaceful settlement of dispute and proportionality should be respected, as should also be the prohibition of the use of force except in the case of measures taken in individual or collective self-defence or adopted under Chapter VII of the Charter. It was remarked, in this context that, even in response to a crime, the use of force should remain the exclusive prerogative of the organized international community and particularly of the Security Council, prior authorization from which should remain a prerequisite for the use of force in cases other than aggression, including genocide or humanitarian intervention. It was also stated that the severity and scope of the legal consequences of a particularly serious violation of international law should not exceed the threshold beyond which excessive punishment was inflicted on the population of the wrongdoing State, bearing in mind that, whatever their nature, the measures which would be taken would always directly or indirectly affect populations which for the most part were innocent. A note of caution was therefore struck as to the suggestion that the right to resort to countermeasures should be made

subject to less strict conditions in the case of crimes than in the case of delicts. Concern was expressed that making such conditions less strict might send a false signal to States which considered themselves victims of a crime that they had more latitude where countermeasures were concerned and reduce or even eliminate the possibility of effectively achieving that objective through collective reaction, instead of contributing to the restoration of the status quo ante. Emphasis was also placed on the need to pay due attention to the impact of exacerbated countermeasures on the population of the wrongdoing State.

38. Some representatives commented on the role which United Nations organs could play in this area. While attention was drawn to the special political and policing function of the Security Council in terms of its power under Chapter VII of the Charter to impose sanctions in order to maintain international peace and security, disagreement was expressed with the view that various United Nations organs, such as the Security Council and the General Assembly, could deal with the international crimes of States, given their inherently political nature and the institutional revisions that would be required for them to perform such a task. In this context, it was noted that the United Nations did not have the power, like nation States, to impose sanctions in respect of international crimes; the enforcement action contemplated by Chapter VII of the Charter was specifically geared to the objectives of its Article 39 and it was not possible to assert categorically that Chapter VII operated as a sanction mechanism in international relations. As for the possibility of adapting the powers of United Nations organs, it was viewed as very remote in the prevailing world political and economic conditions and as involving in any event a study of the primary rules of international law which might be viewed as going beyond the Commission's mandate. Noting that situations had arisen resulting in aggression, genocide and apartheid, in which the Security Council had been compelled to act as a mechanism of sanction, one representative said that ways and means should be found of articulating norms regulating the consequences of those heinous international crimes from the point of view of State responsibility.

39. As regards the substantive consequences of international crimes, concurrence was expressed with the International Law Commission's view that there was no difference between crimes and delicts as far as the obligation of cessation was concerned. Concerning restitution in kind, the view was expressed that, given that crimes were harmful to the international community as a whole and violated peremptory norms of international law, that form of reparation was of particular importance and should not be subject to the restrictions envisaged under article 7 (c) and (d). It was also stated that, in the case of crimes, in contrast to delicts, the choice between restitution in kind and compensation was eliminated: compensation should not be available to the State victim of a crime unless restitution in kind was materially impossible or entailed a violation of jus cogens. With respect to satisfaction, the view was expressed that it 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, an approach which reflected the link between State responsibility for international crimes and the criminal responsibility of individuals who committed such crimes. It was also said that, in the case of crimes, satisfaction should include not only exemplary damages but also measures affecting the dignity of the wrongdoing State.

40. As regards claimants, emphasis was placed on the need for a link between the injured party and the party engaging in unlawful conduct. The remark was made that it was that link that gave a State the right to require reparation from another State and the draft articles must contain elements making it possible clearly to identify the party entitled to initiate an action for reparation.

41. As for other consequences, some delegations referred to the general obligation on the part of all States not to recognize as valid in law any situation from which the lawbreaking State derived advantage as a result of crime and to the general obligation not to help the lawbreaking State in any way to maintain the advantageous situation created by the crime. The point was made that these were two aspects of the same obligation: to recognize as valid in law a situation in which the State which committed the crime benefited from that crime was tantamount to helping that State to maintain the situation that was created; similarly, to assist a State which had committed a crime in retaining the resulting benefits was the same as recognizing the legal consequences of the acts committed.

42. Question (7), namely, whether the concept of crime had punitive implications, elicited a positive response on the part of some representatives who felt that the State itself ought to bear a share of responsibility, whether through punitive damages or measures affecting domestic jurisdiction or dignity - a point of view supported, in their opinion, by article 5 of the draft Code of Crimes against the Peace and Security of Mankind. Other representatives took the opposite stand: one of them observed that the primary purpose of the draft 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 and that to incorporate into the draft the concept of the punishment of that State would create a serious anomaly which would substantially reduce the acceptability of the draft. He concluded that the draft articles should make reference neither to punishment nor to the concept of moral outrage.

43. Another representative expressed concern that the recognition of the criminal responsibility of a State might cast an unreservedly dark shadow over the entire population of that State and result in collective punishment. He observed that punitive measures taken against the lawbreaking State could easily affect innocent persons, even those who had been opposed to the crime and that any penalties which might have particularly severe effects on the people as a whole should therefore be avoided. He concluded that sanctions carried out against the State should be permissible only if implemented in accordance with strict procedures and with due consideration for the rights of the innocent.

44. A third representative emphasized that the recognition of the concept of crime did not mean recognition of an absolute and unlimited right to resort to countermeasures or of lex talionis by individual States or by the international community as a whole and that, without calling into question the right of victims to receive reparation and satisfaction, the vital importance of reconciliation should not be overlooked. He insisted that, in order to contain any risk of escalation which might be harmful to the stability of the international community, the substantial and instrumental consequences of internationally wrongful acts should contain no punitive aspects and that the

punitive element of the consequence of such acts, as well as the aspect of revenge, must be rigorously circumscribed in order to prevent a dangerous exacerbation of tensions.

45. As for the Commission's future course of action in relation to the crime/delict distinction, some delegations advocated dropping the reference to crimes in article 19 and discontinuing the work on an issue which, in their view, was not based on State practice and did not justify the time implied by 117 paragraphs of the report. Other delegations observed that since the possibility could not be excluded that the proposed distinction between two categories of internationally wrongful acts might need to be reflected in the respective consequences of the two categories of acts, it would be inopportune to call into question at the current stage the structure and content of article 19. In their opinion, the Commission should not reopen debate on the article until it had completed its consideration of the topic. Some among those delegations said that they would reluctantly consider, on practical grounds, endorsing the suggestion that the question of the legal consequences of international crimes be deferred to the second reading; this, in their opinion and despite the Special Rapporteur's sentiment that he had sufficient indications to enable him to work out proposals on the issue in time for the next session, would enhance the chances that the first reading of the draft might be concluded by 1996. Others, however, pointed out that, at whatever stage it took place, a discussion of the consequences of "State crimes" would have to be based on a clear definition of the concept in question; they therefore welcomed the resumed discussion of article 19.

3. The question of countermeasures

(a) General observations

46. It was observed that judicial or arbitral guidance was sparse in the area concerned and that, as a result, the Commission was engaged in the progressive development of the law.

47. According to one view, the legitimization of countermeasures, however carefully regulated, would tend to exacerbate disputes between States, and the inclusion of the concept in the draft articles would delay the completion of the project.

48. According to another view, the matter should be approached with extreme caution, bearing in mind that 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. It was further observed that, while stronger States could effectively resort to countermeasures, i.e., take the law into their own hands, in the defence of their rights, weaker States could not have any reasonable expectation that their countermeasures would have any effect on more powerful States. The problem, it was added, was compounded by the fact that the application of countermeasures was not subject to any external control of the actual existence of a wrongful act and that the settlement of any dispute on this point might take a long time, with possibly lasting negative consequences for the economy of the State concerned.

49. The above notwithstanding, the delegations holding the view reflected above acknowledged that the majority opinion in the Commission had been in favour of including the subject in the draft articles, thereby recognizing that countermeasures were a reflection of the imperfect structure of international society which had not yet succeeded in establishing a centralized system of law enforcement and that, while it could be argued that to uphold the legitimacy of countermeasures might seriously affect the rule of law, give rise to abuse and enable the more powerful States, which were themselves very often the wrongdoing States, to gain an undue advantage over weaker States, the fact remained that in certain extreme cases States had to be allowed to resort to countermeasures, provided that safeguards existed to prevent the abuse of the right in question, the exercise of which should in any case be conditional upon compliance with such safeguards.

50. While recognizing that there was merit in the argument that countermeasures might serve a useful purpose at the current stage of international relations, the delegations in question insisted on the need for a balanced approach. It was observed in this context 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 and it was possible, too, that the injured State might be in error with regard to the applicable law. Emphasis was also placed on the need to strike an appropriate balance between the view that it was up to the injured State to decide whether it should take any steps prior to countermeasures and 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. Steps aimed at limiting the freedom of action of States at the various stages of the process were therefore identified as follows. One representative suggested that preliminary steps to be taken prior to resort to countermeasures include: 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. The same representative observed that 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. Another representative was of the view that States should be prevented from taking countermeasures without previous determination by an independent third party that the action was justified. Other representatives insisted on the role of dispute settlement procedures. One of them was of the view that there should be no resort to countermeasures until efforts to arrive at an amicable settlement through direct negotiations had failed. Another suggested that disputes arising from the taking of countermeasures should be resolved by binding dispute-settlement procedures.

51. It was furthermore felt essential that countermeasures should be in proportion to the gravity of the wrongful act that had given rise to them, that countermeasures conflicting with the purposes and principles of the Charter of the United Nations and with the general principles of international law should

be prohibited, that attention should be paid to the situation of uninvolved third States and that any punitive intent should be ruled out.

(b) Comments on specific draft articles relating to countermeasures

52. It was remarked that the Commission had made progress by provisionally adopting articles 11, 13 and 14 for inclusion in Part Two of the draft articles and that it had wisely postponed the adoption of article 12 (on conditions relating to resort to countermeasures) in order to arrive at a generally acceptable text.

53. Some delegations felt it premature to comment on the draft articles in question as long as article 12 was still under elaboration. Others found it useful to address that specific article in order to provide guidance to the Commission for the next stage of its work.

54. Article 11 was viewed as accurately reflecting the essential aims of countermeasures, namely, to achieve cessation of the internationally wrongful act and to induce the State which had committed the internationally wrongful act to resolve the dispute with the injured State. Concern was however expressed that, even in its revised version, the article, which left it to the injured State to determine whether a wrongful act had been committed and whether the other conditions justifying countermeasures had been met, could lead to new disputes giving rise to new wrongful acts, which was all the more unfortunate as the possibility could not be ruled out that there had not originally been a wrongful act.

55. In relation to article 12, attention was drawn to the necessity of striking an equitable balance between the legitimate claim of the injured State to obtain redress of the (wrongfully) caused injury and the protection of an alleged lawbreaking State against rash or arbitrary action by the self-proclaimed victim. The view was expressed that in a phase in which no objective assessment had yet taken place, it would be more equitable and realistic to give the choice of the dispute settlement procedure to the alleged lawbreaker in order to avoid the impression of a diktat. The structure of article 12 as proposed by the Drafting Committee in 1993 was viewed as adequate in that respect, provided that the opportunity it gave to the alleged lawbreaking State to have recourse to a dispute settlement procedure was transformed into a right of that alleged lawbreaking State. Such an approach, it was stated, would also protect the injured State by allowing it to apply countermeasures as long as the alleged lawbreaking State did not offer an effective dispute-settlement procedure. In this connection, the view was expressed that the proposed text did not take into account various peaceful settlement mechanisms provided for by international law: while including the requirement that a third party must be used in settlement proceedings as a precondition for countermeasures, the Drafting Committee had overlooked the role of negotiation as the most direct and effective means of peaceful settlement.

56. The question whether provision should be made in article 12 for "interim measures of protection" gave rise to divergent views. According to one representative, the injured State should be allowed to take such measures in order to safeguard its interests during the period prior to the completion of

the dispute settlement procedures. According to another representative, the proposed separate category of "interim measures of protection" might lead to confusion since it might be interpreted as including, inter alia, the right to suspend or terminate a treaty in accordance with article 50 of the Vienna Convention on the Law of Treaties, even though such suspension or termination was a "measure of protection" established by the primary norm system of the law of treaties and had nothing whatever to do with the secondary norms of State responsibility. According to the same representative, the concept of interim measures of protection implied a subjective element of "reasonableness" which made it, in practice, indistinguishable from the notion of countermeasures.

57. On article 13, which was described as being of paramount importance since it effectively established parameters for the lawfulness of countermeasures, the view was expressed that the current text was somewhat broad and should be drafted so as to allow specialized treaty regimes, when they existed, to govern the countermeasures that might be taken for violations of those regimes. Other comments included: (1) that consideration of the article should be systematically linked with that of article 14, since resort to the countermeasures listed in article 14 would in practice constitute resort to countermeasures out of proportion to the initial offence; and (2) that the text should contain a provision requiring that the obligation not complied with by the injured State be wherever possible the same obligation, or the same type of obligation, as that breached by the State which had committed the wrongful act.

58. Article 14 was viewed by one representative as incomplete and by another as a source of difficulties. The former representative suggested that the following should be included in the article: (1) an exhaustive enumeration of prohibited countermeasures; and (2) an explicit statement that, in resorting to countermeasures, a State must not commit acts characterized as crimes under article 19 of Part One of the draft. The latter representative observed that the current text purported to prohibit certain actions regardless of the action of the wrongdoing State, an approach which could lead to unacceptable results: thus, if a wrongdoing State was inflicting extreme economic or political coercion which endangered another State’s territorial integrity or political independence (such as the imposition of economic sanctions that prevented the import of essential civilian goods), that other State would be prohibited from undertaking comparable countermeasures in an effort to end the coercion; similarly, under article 14, if a wrongdoing State had seized the diplomatic premises of another State, that other State would be prohibited from seizing the diplomatic premises of the violating State. The same representative took the view that article 13, on proportionality, made article 14 unnecessary since it only allowed responses in proportion to the degree of gravity of the initial act and the effects thereof.

E. INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

1. General comments on the approach to the topic

59. Many representatives expressed satisfaction with the progress achieved by the Commission on the topic during its last session. They noted that, despite

the complex issues involved, the Commission had been able to present a complete set of well structured and balanced articles on prevention of transboundary harm from activities involving a risk of such harm and that the articles adopted so far duly reflected the interdependence between economics and ecology, in particular the transboundary environmental implications of some economic activities. They also concurred in the recognition of the fact that the principles of international law created obligations on the part of States whose activities caused damage to the environment in other States and acknowledged the importance for the Commission's work of the well-established principle of sic utere tuo ut alienum non laedas. It was further noted that States themselves were experimenting with ways of dealing with situations arising out of acts not prohibited by international law as shown by the texts produced by the Council of Europe and the European Union. It was also observed that the increasing number of activities involving the utilization of hazardous materials or substances that might have a transboundary impact conferred particular importance on the work of the Commission and that it was essential to establish appropriate mechanisms to prevent and deal with the possible consequences of the utilization of hazardous materials.

(a) Title of the topic

60. Some concern was expressed about the title of the topic. In the opinion of one representative, the title 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, it focused on liability, a concept 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, even though the Commission had decided to deal only with the first category of acts. Fourthly, the title encompassed all 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. According to the same representative, 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 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. In that context, the view was also expressed that the acts envisaged in the articles provisionally adopted were not prohibited by primary rules of international law, so that the general wording of the title was unsatisfactory, as was also the text of article 1 entitled "Scope of the present articles". Yet another view was expressed to the effect that the approach to the topic must be clarified at the outset for there would be a difference between the nature of the articles drafted based on the assumption that transboundary harm was caused by a wrongful act and the obligation to make reparation would arise simply on the basis of strict liability.

(b) Relationship between the topic and that of the law of the non-navigational uses of international watercourses

61. It was pointed out that the topic included the prevention and abatement of transboundary harmful effects related also to the use of international watercourses and that those issues were already largely covered by the draft articles on the law of the non-navigational uses of international watercourses. It was observed that, while such a relationship in itself did not make the draft rules on liability meaningless, inasmuch as such acts might also involve harmful activities not related to the non-navigational uses of international watercourses, 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.

(c) The situation of developing countries

62. Some representatives expressed concern that developing States might be in a disadvantageous position in assessing or monitoring activities involving a risk of transboundary harm, and stated that they would welcome an article addressing this question in the chapter dealing with general provisions. In this respect, it was suggested that the Commission should also explore the possibility of giving a positive role to international organizations in the proposed legal regime. The question was raised whether the specific requirements of authorization, monitoring, etc., ran counter to the whole idea of deregulation of commercial activities of the private sector which was gaining world-wide support, including among developing countries. The concern was that such government regulations might discourage the private sector from engaging in certain manufacturing and commercial activities which were essential to the economic development of States.

2. Comments on the articles adopted at the forty-sixth session of the Commission

63. In general, the articles on prevention so far adopted by the Commission were considered to be reasonably structured and well balanced and consistent with general principles of international law and new trends in United Nations practice. It was stressed that the object of the draft articles was to strike a balance between the sovereign right of the State of origin to use, develop and exploit its natural resources and its obligation to exercise that right in such a manner as not to cause significant harm to other States. Support was also expressed for the Commission's view that further work needed to be done to determine with greater precision what type of activity fell within the scope of the draft articles. According to one view, however, it was enough for an activity to involve a risk of causing transboundary harm for it to be included in the scope of application of the draft articles.

64. It was stressed that the interest of States that might be affected by hazardous activities carried out in the territory of another State must be adequately taken into consideration in designing the prevention mechanism. In that regard, notification and exchange of information and prior consultation, as the articles provided, were viewed as indispensable elements of the preventive

regime. It was observed that it was entirely reasonable that a State that might be affected by a hazardous activity should be informed of that possibility and should be able, not only to put forward its point of view, but also to adopt unilateral preventive measures to deal with possible effects in its territory.

65. Of the articles approved by the Commission during its forty-sixth session, article 1 was described as probably the most important, inasmuch as it made it clear that the draft articles applied only to activities which involved a risk of causing significant transboundary harm. In the view of one representative, the definition of the term "risk of causing significant transboundary harm" contained in article 2, paragraph (a), provided a workable yardstick for understanding the term. According to that representative, the subjective element might not be altogether eliminated, but it was to be hoped that the States concerned would interpret article 2 (a) in such a way as not to subvert the regime being established. According to another representative, the expression "risk of causing significant transboundary harm" seemed somewhat tautologous and ought to be replaced by the definition of the term "significant" contained in paragraph (4) of the commentary, which was greatly preferable. It was recalled in this connection that, according to the commentary, "significant" should be understood as more than detectable but not necessarily substantial or serious. The adjective "significativo" was viewed as a better Spanish equivalent of the term "significant" than the word "sensible".

66. It was also noted that 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 as defined in article 1, and that, therefore, the determination of the existence of such a risk was of crucial importance. Such a determination should not, it was stated, be left to the unilateral decision of either the State of origin or the affected State.

67. With regard to article 11, on prior authorization, it was suggested that consideration should be given to a provision for withdrawal and renewal of the authorization. Another suggestion was to further clarify the second sentence with regard to periodicity of authorization.

68. With respect to article 12, some representatives noted that the prevailing view in the Commission was to leave the specifics of what ought to be the content of the assessment to the domestic laws of the State conducting such assessment. The comment was made that the role of the State in such a risk assessment exercise called for clarification. That role, in the opinion of one representative, should consist in direct intervention in the evaluation process, since it would be unacceptable that an operator alone carry out such an evaluation; State participation, it was stated, could provide some degree of impartiality. Finally, one representative found article 12 incomplete in that it did not deal with the results of the assessment and the considerations that must guide the competent authorities of the State of origin following the results of the assessment.

69. Article 13 was considered defective in that it did not spell out who was to be liable for any harm caused by an unauthorized activity. According to that view, the operator should be required to cease the activity involving the risk and seek the necessary authorization, pending which the operator, not the State,

should be liable, unless the State had failed to provide in its legislation for the need to obtain prior authorization, or had failed in its duty to exercise due diligence to ensure that such authorization was obtained.

70. The view was expressed that article 14 should properly be the first article in chapter II, as it established the basis for the obligations of the State of origin. It was further observed that measures taken after the occurrence of the accident should not be dealt with in the context of prevention, but in the context of remedial action, and that States should see to it that the relevant measures were not only adopted but also enforced. "Due diligence", provided in article 14 as the standard of obligation to prevent or minimize the risk of transboundary harm, was considered by some representatives appropriate and well-recognized in international law. One representative, however, wondered whether it might be assumed that the obligation laid down in article 14 was a substantive obligation imposed on the State of origin, since it appeared that States concerned could deviate from that obligation if they could reach an acceptable solution in accordance with articles 18 and 20. Another representative stressed that the concept of "due diligence" should not be interpreted narrowly as, in his opinion, had been done in the case of article 7 of the draft articles on the law of the non-navigational uses of international watercourses. According to the same representative, whatever the justification for that limited obligation in the case of watercourses, the same standard was certainly not applicable to activities which had a known risk of causing significant transboundary harm through their physical consequences and that point should be borne in mind by the Commission in its future work on injurious consequences and in determining the legal consequences for States when prevention did not work and harm actually occurred.

71. It was suggested that article 15 be merged with articles 16 and 16 bis into a single article, since all three provisions related to aspects of the same subject, namely, notification and information, exchange of information and information to the public.

72. With reference to article 16 bis, it was pointed out that, although, strictly speaking, the subject of information to the public might be considered of domestic concern, the information to be provided should be viewed as of international concern and as of vital interest to the population who might be affected by such a harm: therefore, the duty of a State to provide information regarding such activities, the risk they involved and their potential harm should not be limited, as it currently was in article 16 bis, to its own public, but to any public likely to be affected by such an activity.

73. With regard to article 17, one representative supported fully the exemption from the duty to provide information based on grounds of national security, but invited the Commission to explore further whether the ground of industrial secrets should be retained and, if so, under what conditions. Another representative emphasized that "national security" should not be made a pretext for concealing information or refusing to cooperate.

74. With reference to articles 18 and 20, it was noted that the States concerned were under an obligation to 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. It was remarked that if the consultations failed to produce an agreed solution, the State of origin had nevertheless a duty to 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 was raised as to how the obligation to attempt to achieve a solution based on an equitable balance of interests related to the due diligence obligation embodied in article 14, bearing in mind that the obligation of due-diligence was not based on balance of interests, but on other considerations. The above notwithstanding, article 18 was considered by several representatives as one of the most important provisions in the area of preventive measures and as fairly and equitably setting forth the minimum requirement needed to ensure the prevention of transboundary harm. With specific reference to paragraph 3, it was noted that the wording used barred a State which proceeded with an activity in the circumstances envisaged by the article from claiming that it was unaware of the concerns expressed by other States about the activity and its possible consequences in case damage occurred.

75. As regards article 19, it was proposed that the words "referred to in article 1" be added after the word "activity" in lines 1 and 3 of paragraph 1 - following the model of paragraph 2 - or, alternatively, that a definition of the term "activity" be included in article 1. The question was also raised of what would happen if a difference of opinion arose as to whether or not the activities in question were covered by article 1. As for paragraph 2, the view was expressed that, while it was reasonable to expect the State which had denied the existence of the risk to bear an equitable share of the cost of the assessment, a situation might be envisaged, as pointed out in paragraph (8) of the commentary, in which the State of origin might have honestly believed that the activity posed no risk of causing significant transboundary harm, in which case it should not be obliged to share the assessment cost.

76. Article 20, specifying or enumerating the factors involved in an equitable balance of interests, was considered to be of practical assistance to States involved in activities with a risk of causing transboundary harm. It was noted that the factors listed in subparagraph (c) (namely, the risk of significant harm to the environment and the availability of means of preventing or minimizing such risk or restoring the environment) should not be separated from the factors in subparagraph (a) (namely, the degree of risk of significant transboundary harm and the availability of means of preventing or minimizing such risk or of repairing the harm), but should be an integral part thereof so as to ensure that damage to the environment was included in the notion of harm. It was also observed that 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: the question arose not only if the harmful effects of activities remained within the other State, but also and 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. It was noted that one of the factors that should be taken into account in reaching an equitable balance of interests was the degree to which States likely to be

affected were prepared to contribute to the measures of prevention. In that connection, the question was raised as to how that factor could be reconciled with the polluter-pays principle, which theoretically imposed full liability on the polluter and not the State.

3. Courses of action open to the Commission

77. According to one view, the draft provisions in respect of prevention already formed the basis of a coherent and self-contained topic and there was no need to add any special provisions on liability in the same instrument, particularly since activities which in fact caused harm in their normal operation could be brought within the preventive regime of the articles, provided that the harm was foreseeable and since nothing prevented the Commission from adding some articles on prevention ex post to complete the topic of preventive measures. Concern was expressed that, if a decision on the fate of all the articles were to be postponed until work on liability had been completed, the whole endeavour might be overtaken by new developments elsewhere. Emphasis was placed on the need to ensure that the valuable material produced by the Commission was put to practical use for the benefit of the international community and the Commission was therefore encouraged to bring its work on preventive measures to fruition.

78. According to another view, it was regrettable that the Commission, having focused its efforts on the central issue of prevention, should seem disinclined to consider another equally central issue, namely, liability for hazardous activity, on the grounds that the matter was simple and that general rules of international law applied. Such an approach was viewed illogical for, if general rules of international law applied, it ought to be possible to state those rules. It was also viewed as departing from the Commission's previous practice which had been to flesh 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 were therefore urged not to miss that unique opportunity to clarify, and where necessary progressively develop, the law regarding so central an issue as liability. It was observed in this connection that the obligation of States to make reparation for harm caused to other States in the absence of an internationally wrongful act was recognized on the basis of the principle sic utere tuo ut alienum non laedas and regret was expressed that the Commission, basing itself on the argument that such an approach found no support in existing State practice and would represent too progressive a development of international law, should have directed its attention towards measures of prevention at the expense of liability proper, which was the central issue of the topic. Along the same lines, concern was voiced that, under the plan of work agreed upon in 1992, the possibility existed that liability proper, understood as a general obligation for reparation of harm caused, might not be dealt with in the articles.

79. Also commenting on the above-mentioned plan of work, one representative took the view that the reference to "remedial measures" as the next stage of the work on the topic was unfortunate, for 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. He viewed such an approach as 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.

80. The same representative, after recalling that 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 showing that an activity in its territory caused transboundary harm, regardless of whether or not it was a case of fault - noted that 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. While being of the view that both those questions should be answered in the affirmative, he noted with concern that there was no consensus in the Commission on those issues.

81. For the reasons expressed in the previous paragraph, it was suggested that the Commission should review and give further consideration to what its future objectives should be before the Drafting Committee became involved in the elaboration of specific texts on liability. Such a review, it was stated, 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, attention was drawn to a survey of State practice and national legislation undertaken in the 1980s at the Commission's request by the Office of Legal Affairs. It was felt that similar studies in some of the areas dealing specifically with liability would be of great benefit to the Commission's work.

4. Comments on the tenth report of the Special Rapporteur (A/CN.4/459)

82. With regard to prevention ex post, some representatives agreed that measures to be taken after the occurrence of an accident in order to minimize its harmful consequences were essential; that there should be provisions addressing those measures; and that compliance with such measures should be compulsory for the State of origin even if damage was caused by activities of private parties. The Special Rapporteur's suggested phrase "response measures" was viewed as the most logical and the most telling: it was observed in this connection that response measures were neither concerned with reparation nor

preventive, since they could be taken only after the occurrence of an accident; they were simply specific emergency action. However, the question was raised whether it was better to speak of "appropriate measures" or of "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.

83. As regards liability, some representatives supported the Special Rapporteur's approach, which imposed primary and strict liability on the operator for the transboundary harm caused by his activities. In this connection, the Special Rapporteur was invited to find guidance in existing civil liability conventions or conventions dealing with similar matters. It was also suggested that 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 aimed at covering that portion of the damage that was not reimbursed by the operator. A further suggestion was that, depending on the nature of the activity concerned, the establishment of a consortium of States or private operators to bear a subsidiary liability also be considered.

84. It was observed that the issue of liability was closely linked to the substantive obligations imposed on States, including, in particular, article 14 of the draft articles, and that, in the consideration of that issue, the draft articles on the law of the non-navigational uses of international watercourses, particularly article 7 thereof, should not be ignored. In that context, one representative stressed that principle 21 of the Stockholm Declaration reflected a customary-law obligation on the part of States to take action to ensure that their activities did not cause environmental damage beyond their territory, an obligation which was not restricted by such phrases as "take appropriate measures" as used in draft article 14 or "take practical measures" used in conventions such as the 1982 Convention on the Law of the Sea (article 194 (1)), relied on in the commentary to article 7 of the draft articles of the law of the non-navigational uses of international watercourses.

85. It was further noted that the Commission had considered the obligation to prevent transboundary harm not to be an obligation of result - in other words, an obligation to prevent harm - but merely an obligation to attempt to prevent harm in accordance with the standard of due diligence. One representative, while considering that approach to be generally acceptable in relation to measures of prevention in respect of many activities, observed that due diligence might not always be the relevant standard in all measures dealing with prevention in all forms of activities and that, in the case of treaty regimes, an examination of the actual content of the obligations assumed by States would reveal that some of such obligations were in fact obligations of result. The same representative pointed out that, while draft article 14 dealt with the need to take appropriate measures to prevent the risk of transboundary harm, the situation when harm actually occurred was unclear. She considered it inadequate to provide that, while action could be taken against a private operator, the State of that operator was liable only if a breach of a due diligence obligation had occurred, bearing in mind that that was a situation in which there was a wrongful act by a State contrary to an explicit obligation for which the consequences of a breach were clearly established by international law. She

therefore invited the Commission to keep in mind that, in the case of a lawful act by a private operator which caused transboundary harm, private-law remedies against the private operator were insufficient.

86. Some representatives disagreed with the Special Rapporteur's conclusion in the tenth report that it would be simpler not to impose any form of strict liability on the State. Simplicity, it was stated, was not the relevant criterion; justice for those injured was the proper object of a liability regime. Imposing strict liability on the State subsidiary to the liability of the operator or as residual liability was viewed as a minimum, as it was unacceptable that the innocent victims of an activity which caused transboundary harm could be left without compensation because a private operator in the State in which the harm had originated did not have adequate financial resources to meet the costs of compensation for the harm. Noting that the Special Rapporteur had proposed alternative drafts dealing with State liability in that situation, one representative, while expressing preference for the alternative which provided for a State's residual liability for breach of its obligations of prevention, emphasized that a duty of due diligence and State liability for failure to comply with preventive obligations should not exclude from the draft articles the concept of State liability without fault and that there should be a duty to make reparation also where no violation of rules on prevention had taken place. In this perspective, he viewed residual State liability as essential, in the sense that reparation by the State of origin for transboundary harm should be invoked only after unsuccessful recourse to the mechanisms and procedures for reparation of damage established under the civil liability regime.

87. Other representatives struck a note of caution in this respect. They pointed out that to make the State bear absolute liability for harm caused by lawful actions, even if only residually for that not borne by the operator, would involve a significant development of international law which States might not be prepared to accept. With reference to the argument that States had accepted the Convention on International Liability for Damage Caused by Space Objects, it was noted that in that particular Convention 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. It was therefore suggested that, without prejudging the final form of the draft articles, one could usefully draw up a list of principles, if necessary with variants, to which States could refer when setting up specific liability systems and which, without being binding, would have a harmonizing effect while leaving scope for diversity.

88. Other comments included: (1) the observation that the possibility of setting up insurance schemes should be considered in a positive spirit; (2) the remark that the operator should be defined as the entity - whether a company, group or other person - holding effective responsibility for the general direction of the enterprise; and (3) the observation that the rules proposed by the Special Rapporteur for a competent court were on the whole satisfactory, as they corresponded to the generally accepted principles of private international law.

5. Final form of the draft articles on the topic

89. While support was voiced for the elaboration of a binding instrument, the view was also expressed that the instrument eventually to be adopted need not necessarily take the form of a convention inasmuch as, in relation to activities which would mainly, if not exclusively, affect neighbouring States, there was merit in drawing up guidelines to form the framework for regional arrangements. Along those lines, one representative felt that while it was too early to conclude that the topic was ripe for codification in the form of an international treaty, the work done by the Commission could provide valuable guidance for States in their practice.

F. OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

90. As regards the Commission's methods of work, it was noted that the allocation of more time to the Drafting Committee and the establishment of various working groups had proved very positive moves. It was noted, in particular, that the practice in recent years of setting up working groups had the advantage of expediting exchanges of views and meant that the consideration of an issue was more likely to be concluded in a reasonable amount of time. It was accordingly suggested that this practice should be maintained in the future: the question of State responsibility, it was stated, could be usefully considered in a working group during the Commission's forthcoming session.

91. The Commission was further encouraged to continue to indicate in its reports those specific issues in which expressions of views by Governments were invited, given the excellent results achieved so far with that procedure.

92. The hope was expressed that the Commission would make further efforts to revise its methods of work, in order to complete its work programme during the current term of office of its members.

93. A number of delegations welcomed the appointment of the Special Rapporteurs for two new topics, namely, "State succession and its impact on the nationality of natural and legal persons", and "The law and practice relating to reservations to treaties". Both topics were described as of great practical value and highly relevant. The hope was expressed that, in dealing with them, the Commission would give full consideration to the practice and the interests of all countries.

94. With specific reference to the latter topic, it was pointed out that the principles of international law relating to reservations required further clarification. It was observed in this context that the Commission had achieved great success with regard to the codification and progressive development of international law in respect of the law of treaties, and specifically reservations to treaties.

95. As for the topic "State succession and its impact on the nationality of natural and legal persons", satisfaction was expressed with its inclusion in the Commission's agenda. The point was made however that the codification and progressive development of the law on State succession, as enshrined in the 1978

Vienna Convention on Succession of States in Respect of Treaties and the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, both of which had been based on drafts prepared by the Commission, had not met with great success in the contemporary practice of States: neither Convention was yet in force, even though they regulated the basic questions of State succession, including that regarding the unification and dissolution of States. Caution was therefore urged in developing new projects in that field, inasmuch as, according to the existing practice of States, a State's right to grant or deny its nationality to a natural or a juridical person originated in the State's sovereignty over its territory and the individuals therein, it being understood that the well-established international standards with regard to changes of citizenship and dual citizenship had to be observed on a non-discriminatory basis.

96. On the question of the Commission's contribution to the United Nations Decade of International Law, the idea of issuing a publication containing studies by members of the Commission met with a favourable response. The General Assembly was encouraged to consider the possibility of earmarking funds for the issuance of the publication in all the official languages of the United Nations.

97. Support was also voiced for the Commission's views, reflected in paragraphs 398 and 399 of its report, that summary records of its proceedings should continue to be provided. The hope was expressed that the current practice of providing summary records and of publishing them in volume I of the Yearbook of the International Law Commission would be maintained.

98. Finally, emphasis was placed on the usefulness of the Seminar of International Law and on the decisive role of voluntary contributions in keeping it operational.

Notes

1/ Some representatives answered questions (1) to (3) in the context of their reply to question (4). Their views are accordingly reflected in paras. 25 to 27 below, on question (4).
