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at 3 p.m.
New York

SUMMARY RECORD OF THE 33rd MEETING

Chairman: Mr. AFONSO (Mozambique)

later: Mr. SANDOVAL (Ecuador)
(Vice-Chairman)

CONTENTS

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The meeting was called to order at 3.05 p.m.

AGENDA ITEM 128: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-THIRD SESSION (continued) (A/46/10, A/46/405)

1. Mr. TUERK (Austria), referring to chapter V of the report of the International Law Commission (A/46/10), entitled "International liability for injurious consequences arising out of acts not prohibited by international law", said he regretted that the Drafting Committee had not been able to consider any of the draft articles referred to it since 1988 "due to other priorities" (ibid., para. 182). He pointed out that 13 years had passed since the Commission had included the topic in its programme of work. As the time factor was a key element for the effectiveness of any codification exercise, the Commission should make a sustained effort to achieve further progress without undue delay. The Commission had devoted only two meetings to the topic in 1991. Moreover, as indicated in its report (ibid.), despite the seven reports already submitted by the Special Rapporteur, "the position of the Commission was not entirely clear on some important issues".

2. Austria attached particular importance to that topic, as it raised many important problems in connection with the development of international environmental law.

3. The Commission, at its forty-third session, had dealt with the legal nature of a possible instrument. In his delegation's view, if a binding instrument was to be elaborated, that instrument could only be a framework convention containing provisions of a residual character. It would also seem more appropriate to leave the establishment of specific regimes to bilateral or other multilateral agreements, which could draw inspiration from the principles embodied in a framework convention.

4. It might be asked whether elaborating one single regime of liability was not too ambitious a goal. A sector-by-sector approach leading to the adoption of separate legal instruments that took into account the various factual and legal situations might be more realistic. A single regime, especially one concerning strict liability, which might apply to future as yet unknown circumstances, would amount to an open-ended obligation by States. Thus it might be preferable to take a different approach, distinguishing between hazardous activities on the one hand and harmful activities on the other.

5. His delegation was pleased to note that the majority of the members of the Commission had explicitly supported the principle that the innocent victim should not be left to bear the loss alone. It favoured a system of combined liability of the private operator and the State, in which the operator carried primary liability and the State residual liability. The Commission should draw inspiration in that regard from the ongoing work in the International Atomic Energy Agency on the question of liability for nuclear damage.

(Mr. Tuerk, Austria)

6. With regard to chapter VI of the report, entitled "Relations between States and international organizations", his delegation felt that the topic was not a priority but that, in considering it, the Commission would have to take into account the opinions expressed by the host countries if the end-product was to be widely accepted by that group of States; that had not been the case with the Vienna Convention of 1975 relating to the first part of the topic.

7. Concerning chapter VII of the report, the Commission had been dealing with the question of State responsibility for 29 years and nothing indicated that a conclusion to its work on that topic was near. State responsibility was certainly one of the core problems of international law, but there was no justification for the Commission spending several decades on it. The Commission should submit the end-product of its work to the international community within the next term of office of its members. Should it reach the conclusion that the question was not yet ripe for codification, the Sixth Committee might in such case decide to suspend consideration of it until changing circumstances offered better prospects for completing the exercise.

8. His delegation had been pleased to note the improvements made in the Commission's working methods in recent years. Further steps could be considered, such as splitting the annual session into two parts and holding meetings of the Drafting Committee between the regular sessions. The financial implications of such measures would probably not be very significant if one part of a split session were held in New York. The traditional system of Special Rapporteurs might also be reformed: the latter could be assisted by two or three of their colleagues so as to reflect a wider range of views at the stage of preparing the report, thereby facilitating its consideration by the Commission. States might then be better disposed to accept the texts emerging from the Commission.

9. His delegation felt that considerable caution should be exercised in adding new items to the Commission's programme of work. The work in progress should first be completed and there would probably be room for only one new topic during the next quinquennium. A time-limit should also be set for the consideration of matters referred to the Commission. That time-limit might coincide with the term of office of its members. If consideration of a topic could not be completed within that time, the Sixth Committee would then have to decide whether it was suitable for codification or whether its further consideration should be postponed to more auspicious times. Some of the new topics proposed for consideration by the Commission (ibid., para. 330), particularly those concerning human rights or economic questions, should be dealt with by other specialized bodies. On the other hand, the international legal aspects of the protection of the environment was a worthy topic on which the Commission should focus its attention in the years to come.

(Mr. Tuerk, Austria)

10. Austria was pleased to have been able to contribute to the organization of the International Law Seminar dedicated to the memory of Paul Reuter. The young Austrian lawyers given the opportunity to participate in the Seminar had acquired experience that had proved most useful thereafter for their work in the Austrian Foreign Ministry and in the Sixth Committee.

11. His Government wished to host a United Nations codification conference at Vienna on the question of jurisdictional immunities of States and their property.

12. Mr. NASIER (Indonesia) welcomed the Commission's adoption of the final text of draft articles on jurisdictional immunities of States and their property and its recommendation to convene a conference of plenipotentiaries with a view to concluding a convention that would go a long way towards resolving the practical difficulties arising from the commercial activities of States by clarifying the law of jurisdictional immunities on that point of great importance, particularly for the developing countries. Article 2 (A/46/10, para. 28) proposed a definition of commercial transactions divided into three categories and rightly broadened the definition of the term "State" to include the constituent units of a federal State. The definitions should be further clarified to resolve the issue of whether the nature and/or purpose of the contract was to be considered when deciding whether the commercial transaction was an exception to the rule of sovereign immunity. As more and more States were engaging in commercial activities, Governments had established separate entities endowed with legal personality. In the event of a dispute, State immunity should remain intact and the claimant State should be able to bring an action only against the State enterprise. With regard to the proposed text of article 11 bis (A/CN.4/431, para. 21), the secretariat of the Asian-African Legal Consultative Comittee had clarified the question of immunity in its 1991 report by stating that article 11 bis should be interpreted as meaning that the domestic courts of the forum State had the right to bring an action against the State enterprise but not against the State itself.

13. Indonesia was particularly interested in the Commission's work in the field of the law of the non-navigational uses of international watercourses. The Special Rapporteur's seventh report (A/CN.4/436) had dealt mainly with the question of the definition of the term "international watercourse". The Commission had been far-sighted and practical in including groundwater within that definition. As to whether the term "watercourse" should be defined as a "system" of waters, his delegation felt that the "system" concept, as clarified in paragraph 73 of the Special Rapporteur's seventh report, was acceptable.

14. On the topic of the draft Code of Crimes against the Peace and Security of Mankind, the Commission had dealt with two main issues, namely, the applicable penalties and the establishment of international criminal jurisdiction. The draft Code must specify penalties for each of the crimes

(Mr. Nasier, Indonesia)

listed. As there was a wide divergence of State practice regarding capital punishment or life imprisonment, it was unlikely that States would be subjected to the provisions of draft article Z. The question remained, why would a State surrender its jurisdiction to an international court or tribunal if the crime in question would attract a heavier or lighter penalty in its own national courts. With regard to the proposals for the establishment of an international criminal jurisdiction, his delegation considered that, for the time being, national criminal courts might well be the most effective and appropriate courts to try international crimes, including drug trafficking, murder and torture.

15. Mr. PUISSOCHET (France) said, with reference to relations between States and international organizations, that it was doubtful whether a common regime could be defined for all international intergovernmental organizations, or at least for most of them. Trying to cover the institutions of the United Nations system, similar organizations having world-wide competence, and even such regional organizations as those covered by Chapter VIII of the Charter of the United Nations, was being too ambitious.

16. The discussions that had taken place on the subjects of the confidentiality of the archives of such organizations and exemptions from taxes and Customs duties were unquestionably of interest, especially when they highlighted the need to take account of new methods of transmitting and recording information, for example by computer technology or satellites. But more than anything else, they showed the great difficulty, if not the impossibility, of formulating common rules for organizations whose activities and needs were very different. The precise privileges and immunities appropriate to the aims and powers of each organization should be determined case by case. France was very firmly committed to that sort of functional approach. It would doubtless be said that the aim was only to formulate "minimal" rules applicable to all international organizations, rules that would then be supplemented case by case. Assuming that such an approach was realistic, it would be hard to say that the draft discussed by the International Law Commission could be described as "minimal". All in all, while the value of the work done by the Commission and its Special Rapporteur for the topic had to be acknowledged, the possibility of supplementing existing agreements between States and international organizations with a body of common rules could only be envisaged with the greatest caution.

17. Turning to chapter III of the report (A/46/10), he noted, with reference to the question of defining an international watercourse, that the very wide-ranging concept in the two definitions initially suggested by the Special Rapporteur went beyond the general practice of States in that area. Even if some watercourse agreements embraced the whole or the greater part of a hydrographic basin, that was not generally the case. It was very rare for groundwater to be taken specifically into account; in practice, the work of river commissions only occasionally involved groundwater, and then it was when the groundwater was in direct and continuous contact with the river. The idea

(Mr. Puissochet, France)

that waters must at least flow into a common terminus, if they were to be considered to be part of an "international watercourse" in the sense of the draft, seemed to be absolutely justified. As for tributaries, they should only be considered to be part of an international watercourse if they themselves crossed boundaries, and their effect on the main watercourse could be taken into consideration when investigating sources of pollution, for example. On the other hand, subjecting all tributaries to the same legal regime as the main international watercourse could result, in some cases, in a considerable and unjustified increase in the obligations to be placed on the States in which they were situated. A restricted definition seemed therefore to be more in keeping both with customary law and with the logic of a framework convention which left it to individual watercourse agreements to incorporate more extensive definitions where they were justified. Such a definition should be restricted to the main watercourse, from its source to its mouth, and waters directly and continuously associated with it.

18. With regard to article 27 (ibid., p. 187), it was questionable whether it could be taken as a principle that every watercourse needed regulation and that regulation itself could only be managed jointly by the watercourse States. The regulation of flows could, on the face of it, be governed by the general provisions on watercourse agreements (arts. 3 and 4), regular exchange of data and information (art. 9) and notification of planned measures (arts. 11 to 19). The only obligation that seemed to be justified was the obligation to notify other watercourse States and to agree to consultations when there might be repercussions on other States.

19. Because of their particular characteristics, rivers could not all be subjected to a uniform regime if it was too detailed or restrictive. So the most suitable solution appeared to be a framework convention. Such a convention would comprise a collection of articles reflecting the customary law applicable to the riparian States of a single watercourse, even in the absence of any conventional undertaking between those States, followed by one or more annexes offering more detailed model agreements or clauses which the riparian States of any given river could adopt or draw on for their negotiations, and examples of cooperation. The collection of articles composing the convention proper could deal with many of the subjects tackled in the current draft, for example, use of terms, watercourse agreements, notification, emergency situations and non-discrimination.

20. Whatever solution was adopted, it would have to be flexible enough to be adaptable to every situation and not try to impose in abstracto what could only be achieved by agreement and cooperation between the interested parties, the riparian States.

21. With regard to the draft articles on State responsibility, countermeasures could only be taken with due respect for the fundamental rules of international law (non-recourse to armed force, respect for human rights, respect for the inviolability of individuals and of premises protected under

(Mr. Puissochet, France)

diplomatic law). So far as the latter was concerned, it might be asked if there was not already a "self-contained" regime, to use the Special Rapporteur's expression. With regard to the relevance of jus cogens, that concept, such as it appeared in the Vienna Convention on the Law of Treaties, prompted reservations. As for reprisals, they were only legitimate if there had really been a prior wrongful injurious act. A conviction in good faith that such an act had been committed could result in reactions and be taken into consideration in determining possible responsibility for those reactions, but that would not be a matter of reprisals in the legal meaning of the term. In conclusion, the Special Rapporteur's intention to pay particular attention to the fundamental problem of proportionality between countermeasures and the alleged wrongful act, and to try to express that principle more rigorously, was to be welcomed.

22. Turning to international liability for injurious consequences arising out of acts not prohibited by international law, he recalled that France had always expressed the strongest reservations about the possibility of codifying the topic, for two reasons. In the first place, it seemed essential to complete the draft articles on State responsibility first, so that the two regimes of responsibility and liability could be related one to the other; secondly, establishing machinery for absolute State liability for injurious consequences arising out of acts not prohibited by international law, even if that responsibility was only residual compared with the liability of the private operator involved, would be a significant development in international law which States were not ready to accept as a general rule, even if it appeared in particular conventional legal instruments.

23. In his seventh report (A/CN.4/437), the Special Rapporteur raised the question of the very title of the draft articles. It was fortunate that a thorough analysis had been made of the risk of internal contradiction inherent in formulating general norms for eliminating risks due to dangerous activities and maintaining the thesis of liability sine delicto, when the violation of such norms, if they existed, could constitute a basis for classical international responsibility. In the same way, paragraphs 27, 31 and 52 reported opinions favouring restrictive rules in respect of duties of prevention, and more flexible rules in the area of liability for risk, which could lead back to the classical concept of responsibility for failing to meet an obligation when injurious consequences resulted.

24. Considerations concerning the scope of application of the draft articles were very prominent among the questions of preventing injurious consequences due to harmful or dangerous activities. Note was taken of the particularly difficult legal problems of liability for activities that were both harmful and widespread, such as some types of atmospheric pollution from a number of sources.

(Mr. Puissochet, France)

25. On the subject of principles, the Special Rapporteur had clearly outlined the considerable difficulties which would arise from a possible combination, in respect of the same injury, of the civil liability of the operator and the liability of the State. Legal traditions included a very wide range of principles of liability, including such concepts as that of "responsabilité pour risque du fait des choses" found in French law, which were being more and more frequently applied to environmental harm, inter alia, in cases with a transboundary element. Transboundary pollution was thus governed principally by international private law, international public law intervening only in order to harmonize private liability regimes and helping to resolve conflicts of laws or jurisdictions.

26. The protection of "global commons" was a matter of growing concern and formed the subject of a number of draft agreements still in process of negotiation or recently adopted. That being so, the codification of a general regime of international responsibility for global commons appeared difficult.

27. So far as the Commission's future work on the topic was concerned, there were only two lines of action which might prove fruitful at the present stage of development of international law. The first would be to limit the codification exercise to the obligation of vigilance of States in respect of harmful or dangerous activities while endeavouring to formulate certain very general obligations of prevention and non-discrimination to which the general rules of international responsibility of States would be applicable. The other would be to opt for a more long-term exercise, preliminary to any attempt at codification of reflecting on the whole question of liability for risk, its relationship with the overriding liability of the operator, its applicability to global commons, and a possible actio popularis for the protection of global commons. Since the general law of international liability did not seem to contain any clearly established element relative to those points, pioneering work would have to be done and with a view to proposing new rules to Governments.

28. The Commission's working methods called for two comments. First, it was clearly up to the Commission itself to adapt its own methods within the framework of its mandate and on the basis of the principle of self-organization. Second, some thought should be given to the possibility of the Commission's holding two separate sessions, both at Geneva. It was most important that the Commission should make known its ideas and preferences in the matter. It would also be essential to carry out a financial study to ensure that the present budgetary allocation would not be exceeded, possibly at the cost of a modest reduction in the overall duration of the sessions.

29. There were three comments to be made on the subject of the Commission's programme of work. First, priority should be given to the completion of topics on which the Commission had been engaged for some time, in particular that of State responsibility. Second, to the criteria proposed for the selection of items for inclusion in the future programme of work should be

(Mr. Puissochet, France)

added that of the assured existence within the international community of the minimum political consensus necessary for the eventual success of the undertaking. Lastly, the Commission at its forty-fourth session could perhaps resume the consideration of possible topics for inclusion in its future programme of work on the basis of comments made in the Sixth Committee.

30. Mr. KAMPER (Netherlands) said that one of the first questions arising in connection with the topic of international liability for injurious consequences arising out of acts not prohibited by international law was that whether the topic dealt only with activities which were definitely lawful under international law or with activities which were not unlawful per se. The latter category of activities might or might not be lawful depending on the circumstances in which they took place and the degree of transboundary harm they might cause. The rather ambiguous nature of that second category of activities considerably complicated the formulation of the draft articles which were to govern them.

31. The separation between acts and consequences upon which the whole approach to the topic was based was artificial; in the real world, acts and their consequences could not be separated. In theory the topic could embrace any act not unlawful per se, but the successive Special Rapporteurs and the Commission had decided to limit the scope of the topic to activities entailing transboundary physical consequences of a harmful nature.

32. In his delegation's view, the topic should in principle include not only activities involving risk of causing transboundary harm ("activities involving risk"), but also activities which actually caused such harm ("activities with harmful effects"). It might perhaps be necessary in due course to develop some separate rules for each of those two categories.

33. His delegation considered that a certain threshold should be introduced with regard to the risk or harm created by the activities covered by the topic in order to avoid the inclusion of activities in respect of which no prevention or compensation was necessary.

34. A non-exhaustive list of activities or dangerous substances could be added to a general definition indicating what kind of activities or dangerous substances would be covered by the topic; the list could not, however, serve as a replacement for such a definition.

35. The inclusion of provisions designed to set limits to the freedom of action of States to carry out or to permit activities in their territory or under their jurisdiction or control, or to prevent activities involving risk or activities with harmful effects, could only be properly judged when it was clear whether the topic was to deal only with activities which were lawful under general international law or with activities which were not unlawful per se but might be unlawful under certain conditions. In the former case the provisions concerning prevention should be phrased in recommendatory terms and

(Mr. Kamper, Netherlands)

could only be made obligatory by way of progressive development of the law through their inclusion in an international agreement. In the latter case, the provisions would have to be obligatory.

36. In the light of the existing case law, in particular the arbitration decision in the Lake Lanoux case, his delegation shared the view that prior consent of the potentially affected State would not be required before the activity could be authorized.

37. The principle in draft article 6 concerning freedom of action and limits thereto was only in part inspired by principle 21 of the Stockholm Declaration; its main basis was the maxim sic utere tuo ut alienum non laedas, which stated the obvious and was thus somewhat useless. The real question was what the right of the other States implied in cases of transboundary harm caused by activities which were not unlawful per se.

38. As for the provisions on prevention in the sixth report of the Special Rapporteur (A/CN.4/528), which were couched in obligatory terms, they would be difficult to understand if the topic was to deal with activities which were definitely lawful under international law as well as those which were not unlawful per se.

39. On the subject of strict liability, his delegation shared the view that transboundary harm should in principle be fully compensated and that the States concerned must enter into negotiations to that effect. He found it difficult to understand on what legal grounds the State of origin would be entitled to ask for a reduction in the payment. The payment of full compensation was surely the price to be paid by the State of origin for being able to continue with an activity involving or having harmful effects.

40. Innocent victims should not be left to bear the loss alone. Compensation should be based on the liability of the State of origin, the civil liability of the operator or a combination of those two forms of liability. In order to invoke the liability of the State of origin, the prior exhaustion of local remedies should not be required. Combined liability could be envisaged, as in conventions concerning compensation for nuclear damage, which would provide for the primary liability of the operator of the activity and a subsidiary or supplementary liability of the State in whose territory and with whose knowledge the activity took place.

41. As to the nature of the instrument, an international convention could be envisaged, but a decision on the question could be left to a later stage.

42. Mr. Sandoval (Ecuador) took the Chair.

43. Mr. TOMUSCHAT (Germany) expressed the hope that, during the next five years, the Commission would take advantage of its shortened agenda to advance and perhaps even to finalize its work on State responsibility and on international liability for injurious consequences arising out of acts not prohibited by international law.

44. Part One of the draft articles on State responsibility adopted in 1980 (A/35/10, part III.C) was generally deemed to provide a sound basis for the elaboration of rules on the consequences of responsibility. Nevertheless, it had also elicited a number of criticisms, in particular, because it did not openly address the question of fault and left unresolved the question of whether or not fault was a necessary element of State responsibility. The answer to that question would also have important repercussions on the treatment of liability for the injurious consequences of lawful acts; the larger the field of State responsibility, the narrower the scope of liability, and vice versa.

45. Many arguments militated in favour of reducing the role which fault could legitimately play in a system of State responsibility. A State which caused injury to another State should not be permitted to hide behind the lack of fault in order to escape compensation. Additionally, in practical terms, fault could be difficult to prove.

46. The lack of references to fault in Part One of the draft articles appeared to indicate that fault was a notion alien to the law of State responsibility. According to article 3 (ibid., p. 59), an internationally wrongful act of a State had only two elements, namely, conduct attributable to the State and conduct constituting a breach of an international obligation of the State. However, the question arose as to whether or not an element of fault entered into the breach of an international obligation. According to article 16 (ibid., p. 63), the reply to that question would tend to be negative. There was a breach of an international obligation by a State when an act of that State was not in conformity with what was required of it by that obligation, regardless of whether the State had really been in a position to abide by its commitments. That impression was confirmed by article 20 (ibid., p. 64) dealing with obligations of conduct or means, by article 21, dealing with obligations of result, and even more explicitly by the Commission's commentary on those two articles (Yearbook of the International Law Commission 1977, vol. II (Part Two), pp. 16-17, para. (19), and pp. 29-30, para. (35)). As to article 23 on obligations of prevention, it provided that a breach of such obligations existed if the event which the State was bound to prevent occurred, notwithstanding the measures adopted by the State. No reference was made to the degree of vigilance observed by the State or to its material capacities to act so as to prevent the incident. Nevertheless, in its commentary, the Commission essentially stated that the obligation to prevent a given event did not constitute insurance against the occurrence of that event, regardless of any material possibility of the State to control the situation (Yearbook of the International Law Commission 1978, vol. II (Part Two), p. 82, para. 6). There was a clear discrepancy between the text of article 23 and that commentary which had been highlighted by the Austrian lawyer Karl Zemanek.

(Mr. Tomuschat, Germany)

47. Articles 20, 21 and 23 could lead to strange conclusions being drawn, for instance, that the elaboration of a system of norms in the field of the environment was not necessary. Since States were required to respect the territorial integrity of their neighbours, they must abstain from causing injury beyond their frontiers, and they could be held responsible, in terms of a breach of the obligation of result, if such damage occurred. That example, being in conflict with the real legal position, which was infinitely more complex, raised the question of what was wrong with the articles under consideration. In his view, the problem was, on the one hand, that the Commission had in fact dealt in those articles with the issue of fault without ever acknowledging it and, on the other hand, that the distinction between obligations of conduct or means and obligations of result, far from clarifying the issue, led to confusion. He did not see any qualitative difference between those two types of obligation, but merely a difference of degree, the obligation of conduct or means being a secondary duty relative to the primary duty, namely, the obligation of result, which, in turn, was inextricably bound up with the obligation of conduct. The issue of fault had been touched upon only in passing, and therefore remained open to doubt; that could lead to tremendous difficulties in the practical application of a future conventional regime of State responsibility. Even if the Commission had not intended to lay down rules concerning the element of fault in articles 20, 21 and 23, their provisions would certainly be interpreted as such, and they seemed, somewhat surprisingly, to establish a regime of strict or even absolute responsibility. The issue therefore warranted reconsideration.

48. In principle, three solutions could be envisaged. First, fault could be linked to the person called upon to act on behalf of the State. However, such a construction of State responsibility by analogy with private law had long since been abandoned by international practice and jurisprudence. Rightly, therefore, the draft articles focused on acts of the State as such, which were acts of the organs of a State. At the other extreme, responsibility could be viewed as the outcome of a mere comparison between what was required by an international obligation and the de facto situation which had developed, in other words, the system of strict or even absolute liability which seemed to be reflected in articles 20, 21 and 23, but which appeared to be in conflict with the current state of customary international law. The correct solution, which was amply corroborated by State practice and international jurisprudence, was dictated by common sense. While no State could be required to do the impossible, States must satisfy certain minimum requirements and must accept an objective standard of conduct corresponding to the general features of a well-organized State.

49. That premise made it clearer why the Commission had put obligations of conduct or means in a special category; although stress was laid on the fact that they required specific conduct, the real reason for omitting any reference to fault appeared to be that a State which undertook to adopt specific measures could no longer invoke its inability to abide by its commitments. Once an objective standard had been applied, there could no

(Mr. Tomuschat, Germany)

longer be any loopholes. The situation was totally different, however, with regard to the obligation of result outside the machinery which the State had pledged to establish. States were not all-powerful entities, and even the existence of effective machinery was not a guarantee of success, a matter which international law could not ignore. With regard to the material result, the same objective standard - the model of good government - could yield different results in different circumstances. The basic criterion which should be taken into account was that of due diligence which, contrary to what was often held in legal writings, should not apply only to the omissions of a State, but also to its actions.

50. To sum up, Part One of the draft articles failed to address squarely an important chapter of the law of State responsibility, suggesting instead in an indirect fashion solutions which undoubtedly did not really correspond to the intentions of its authors. A breach of an international obligation could not be found to exist simply by virtue of a comparison between a hypothetical normative course of action and developments as they had actually occurred. A breach existed only if objective standards of due diligence - which varied according to different circumstances - had not been complied with. By and large, the general tendency of the draft articles deserved full approval. They were right in emphasizing that State conduct should be measured against a strict yardstick. However, although their general philosophy should be upheld, a careful redrafting was certainly necessary. The suggested distinction between obligations of conduct and obligations of result would appear to create more difficulties than it was able to resolve. On the other hand, a provision on fault which stressed the objectiveness of the test to be employed could be of great merit. Such a provision would well fit into Part One of the draft articles because the issue of fault belonged to the general issues of State responsibility and was therefore an element of the secondary rules which the International Law Commission was at present engaged in framing.

51. It was particularly in the field of environmental protection that stress had to be placed on the strictness of the standards to be observed. A State carrying out activities with an inherent risk of harming other States had to take all appropriate measures to reduce and control that risk; lack of expertise could not justify a slackening of security standards to the detriment of other States. That proposition, of course, would hardly be challenged: the real difficulties stemmed from uncertainties about the existence and scope of the relevant primary roles. It was precisely to those uncertainties that the concept of liability for acts not prohibited by international law owed much of its importance.

52. A possible reason why the process of elaborating a consistent body of environmental norms had been so slow and cumbersome was that it had been felt for too long that the relevant problems could be settled by resorting to general and abstract rules such as Principle 21 of the Stockholm Conference of 1972, the principle of territorial integrity as opposed to territorial

(Mr. Tomuschat, Germany)

sovereignty or the maxim sic utere tuo ut alienum non laedas, whose application in concrete cases gave rise to tremendous difficulties because none of them could be regarded as absolute. To prohibit all activities capable of causing environmental pollution was impossible; a balance had to be struck between the diverging interests of States with equal sovereign rights as they competed with one another in exploiting their natural resources or the global commons. He therefore welcomed the trend which had become increasingly pronounced in recent years and would doubtless receive another boost from the World Conference to be held in June 1992 towards setting forth environmental law in terms of concrete standards of behaviour addressed to any potential author State.

53. Concomitantly with that evolution, the room left for a system of liability for injurious consequences arising out of activities not prohibited by international law was bound to shrink while that for classical State responsibility would expand, a development which would represent a tremendous gain in legal certainty and clarity. State responsibility was accepted in principle as an institution of customary international law, while liability still had to struggle for general recognition. However, although more and more fields were covered by specific environmental standards, so that, in cases of non-observance of those standards, recourse could be had to the rules of State responsibility, the situation of an unforeseen and an unavoidable accident had not yet received a satisfactory legal answer. If the obligation of due diligence had been observed, responsibility could not arise. The progressive development of international law with a view to providing compensation to the victim within a context of liability for injurious consequences of activities not prohibited by international law was thus a primary necessity.

54. Mr. ARANGIO-RUIZ (Italy) recalled that at the time of his appointment as Special Rapporteur on State responsibility in 1987, the Commission had adopted, in addition to the 35 articles of Part One, five draft articles of Part Two, which was devoted to the consequences of internationally wrongful acts. Those five draft articles contained a number of general provisions of Part Two and provided the definition of the injured State.

55. According to the outline of work presented in his preliminary report (A/CN.4/416 and Add.1), Part Two was to be divided into four sections covering, respectively, (i) the substantive consequences of ordinary internationally wrongful acts, "delicts"; (ii) the instrumental consequences of such wrongful acts; (iii) the substantive consequences of international crimes of States as defined in article 19 of Part One; and (iv) the instrumental consequences of such crimes. By substantive consequences, he meant cessation of the wrongful conduct, restitution in kind, pecuniary compensation, satisfaction and other forms of reparation. By instrumental consequences he meant countermeasures or what less recent doctrine had described as reprisals, plus any other kind of measures or sanctions possibly to be envisaged in response to an internationally wrongful act and especially to an international crime.

(Mr. Aranglo-Ruiz, Italy)

56. With regard to Part Three, which was to cover the implementation of the rules on State responsibility, he had proposed that it should be reserved exclusively to the procedures for settlement of the disputes (or, possibly, of any disputes) which might arise in the interpretation and application of Parts One and Two.

57. The object of the layout was to ensure adequate treatment of the draft's most delicate and practically most significant provisions - those concerning the determination of (i) the rights and obligations of alleged victims and alleged wrongdoers, or, in other words, the substantive consequences; (ii) the countermeasures the victim could take in order to obtain redress, and the conditions and limits of lawful resort to such countermeasures; and (iii) the settlement procedures to be made available in order to ensure an equitable outcome of the crisis opened by an alleged internationally wrongful act or by the countermeasures taken in reaction thereto. In order to enable the Commission to deal adequately with such problems, it had seemed, and still seemed, indispensable to him to attain at least the same degree of articulation as that achieved by the 35 articles of Part One.

58. On the basis of the three reports submitted, respectively, in 1988, 1989 and 1991 (A/CN.4/416 and Add.1, A/CN.4/425 and Add.1, A/CN.4/440 and Add.1) and of the debates held concerning them, the Commission should be in a position to complete in 1992 the draft articles on all the consequences, both substantive and instrumental, of international delicts. In 1993, it should be able to move to the consideration of both substantive and instrumental consequences of international crimes, devoting its 1994 session to implementation problems. The two remaining years of the quinquennium would be devoted to the second reading of Part One and the finalization of Parts Two and Three. He hoped that the programme he had just outlined would allay the fears expressed by the representatives of the United Kingdom, the Czech and Slovak Federal Republic, Austria and France.

59. With regard to the substantive consequences of delicts, the Drafting Committee would be faced with a number of delicate choices, some of which would be related to the distinction between physical and moral damage and, in particular, to the treatment of moral damage to the injured State as distinct from moral damage to its nationals.

60. The Commission would also be faced with a problem which was closely linked to that of moral damage to the injured State, namely the problem of the role to be accorded to the controversial institution of "satisfaction" in the technical sense of the term, or, in other words, satisfaction as a typically international remedy, as distinguished from pecuniary compensation. The Commission would also have to settle the difficult question of fault, which, while perhaps rightly left vague in Part One, could not be ignored if the consequences of wrongful conduct were to be dealt with adequately. It was one thing to say that an act could be unlawful even in the absence of any degree of fault (negligence or dolus); it was another thing to say that negligence or

(Mr. Arangio-Ruiz, Italy)

dolus did not affect either the nature and quality of reparation or the conditions and nature of the countermeasures which were lawfully applicable. Not many Commission members had expressed their views on the subject, which was of great importance with respect to the consequences of delicts but of paramount importance with respect to the consequences of crimes. He therefore hoped that the members of the Sixth Committee would give some thought to the matter and make their views known, both on that and on the question of guarantees of non-repetition of wrongful conduct.

61. The regime of countermeasures, which was by far the most difficult aspect of the subject to tackle, was characterized by the two main features of de lege lata and de lege ferenda. Firstly, whether one looked at practice or at doctrine, one could find hardly any of the similarities to the regime of responsibility within national legal systems which made it relatively easy to transplant into international law, in the area of substantive consequences, private law sources. Secondly, the lack of an adequate institutional framework in the "society of States" made it very difficult to determine the features of any exiting or even conceivable regulation of the conduct of States. On the one hand, all States had a tendency not to accept any authority above themselves. On the other hand, despite the principle of equality, factual inequalities tempted stronger States to impose their economic, if not military power. The fact that that was obvious by no means made the problem any easier to solve. Indeed, one of the crucial aspects of the Commission's task appeared to be to find ways, through a combination of the best of lex lata with prudent but not unimaginative progressive development, of reducing the impact of the great inequality among States failing adequate third-party settlement commitments - in the exercise of their faculté (and possibly obligation) to apply countermeasures. Progressive development appeared to be imperative with regard to both Part Two and Part Three.

62. Whether the Commission would be able to do enough in that respect remained to be seen. The elimination of the main source of ideological conflict was a positive factor, although not free of worrying side-effects. In addition, other signs which had recently come to the fore were still difficult to interpret, notably the ambiguous concept of a "new international order". The serious crisis which had caused the concept to be evoked had also had interesting repercussions which bore directly upon State responsibility.

63. The more the areas within which States were bound by international obligations was extended, the more essential it became that adequate rules should be codified and progressively developed in order to ensure compliance with international obligations; international responsibility represented practically everything which general international law possessed by way of instrumentalities of implementation. He therefore hoped that in the coming quinquennium the Commission would give priority to the topic of State responsibility and the related topic of international liability for injurious consequences arising out of acts not prohibited by international law.

64. Mr. Afonso (Mozambique) resumed the Chair.

65. Mr. DE SARAM (Sri Lanka) said that the Commission should now complete as soon as possible its work on Part Two and Part Three (if there was to be one) of its draft articles on State responsibility, and thus conclude its first reading of the draft articles as a whole. It could then begin the second reading before its next five-year term came to an end, which would be a substantial accomplishment. In any event, it should proceed very carefully to ensure that, once adopted in the form of a convention, the draft articles would attract the widest possible adherence by States, given the enormous effort and time which had been invested in them.

66. Regarding the topic of international liability for injurious consequences arising out of acts not prohibited by international law, the time had come for careful and conclusive consideration to be given to what exactly the Commission should do with the topic and how it should proceed.

67. Under it current title, the topic was clearly elusive. One reason was that the title gave the topic a very wide scope; the topic could now be viewed as reaching out, in fact, to encompass all inter-State relations, except such conduct as was prohibited by treaty or by the generally recognized rules of customary international law. Another reason was that the demarcation line between the topic of international liability for injurious consequences arising out of acts not prohibited by international law and the topic of State responsibility remained poorly defined. In fact, Part One of the draft articles on State responsibility was not explicit as to whether, in the area of non-contractual obligations, liability for harm to one State resulting from a lawful activity on the territory of another State would arise only should the latter State be shown to be at "fault": in other words, only if the harm in question was shown to have resulted from an intentional act or negligence attributable to the "author" State. Under the topic of international liability for injurious consequences rising out of acts not prohibited by international law what was being dealt with was - principally - the case where lawful activity on the territory of one State might, notwithstanding the absence of fault on the part of that State, give rise to harm of extreme gravity and scope, and even harm on a disastrous or catastrophic scale, on the territory of another State.

68. In order to deal with the difficulties in question, as the Special Rapporteur had indicated, manageable perimeters should be established for the topic, along the following lines: (a) the topic should be limited to physical harm; (b) what was being dealt with was principally, and possibly even exclusively, cases where disastrous or catastrophic transboundary harm was caused in one State by a lawful activity in another State; (c) at the current stage, it would be advisable not to enter too deeply into the question of harm caused to areas outside the jurisdiction of any State - in other words, into matters relating to the "global commons"; (d) on the basis of the criterion of fault, a demarcation line should be established between the topic of international liability for injurious consequences arising out of acts not prohibited by international law and the topic of State responsibility.

(Mr. De Saram, Sri Lanka)

69. With regard to the manner in which the Commission should proceed, it must be borne in mind that the Commission must operate on the basis of consensus. That was where the difficulties experienced by the Commission arose: on the one hand there was the view that the principle sic utere tuo ut alienum non laedas, which lay at the heart of the topic, should be incorporated into the draft articles as a general rule of inter-State relations; and on the other hand there was the view that that principle had a proper place only in treaties on specific matters. The question thus arose as to whether it was indeed realistic for the Commission still to endeavour to formulate a general multilateral convention on the topic in question - even in the form of a framework convention - or whether it would be preferable to consider alternatives, such as the conclusion of bilateral agreements and regional multilateral agreements between States regarding specific activities of a particularly dangerous nature or a declaration of general principles by the General Assembly along the lines of that being prepared by the Legal Subcommittee on the Peaceful Uses of Outer Space regarding the use of nuclear power sources in outer space. In any event, the Commission must not continue with the frustrating approach which it had taken over the past 10 years.

70. As to the substance of the topic, with regard to the question of whether those who had suffered damage should be required to exhaust all remedies in the "author" State before a claim was presentable at the inter-State level, a solution should be adopted similar to that provided for in the Convention on International Liability for Damage caused by Space Objects, which gave the victim of damage the possibility of presenting a claim for compensation to the "author" State at the inter-State level without having first exhausted local remedies, but excluded the admissibility of a claim at the inter-State level if a victim had decided to take advantage of local remedies available in the "author" State.

71. Lastly, special financing arrangements would have to be envisaged for transboundary harm that was so vast that it called for compensation that exceeded the limits usually provided for in most countries for such cases. Some international instruments already included such provisions. For example, the International Convention of 1971 on the establishment of an International Fund for Compensation for Oil Pollution Damage and the Convention of 1988 on the Regulation of Antarctic Mineral Resource Activities. Needless to say, the problems involved in establishing a compensation fund were not easy to solve. Nevertheless, the question should be considered.

72. Mr. VILLAGRAN KRAMER (Guatemala) said that it was surprising that the Committee should be constantly finding fault whenever significant progress was made in respect of the draft Code of Crimes against the Peace and Security of Mankind. One might wonder whether States really wanted to have a satisfactory code by the end of the twentieth century.

(Mr. Villagran Kramer, Guatemala)

73. The methodology used by the Commission was very useful even though it no longer maintained a distinction between crimes against peace, war crimes and crimes against humanity. That methodology made it possible to distinguish between the effects of classification of crimes, penalties and the field of application of various jurisdictions in respect of the State and individuals responsible for crimes. However, the time had come to reassess that method.

74. In the view of his delegation, if it was actions that gave rise to criminal responsibility, they were also attributable directly to individuals. It was crucial to stress, however, that the Charter of the United Nations did not attribute responsibility to State officials, but to States themselves in cases of aggression. It was for the Security Council to determine the aggressor State and, logically, the Council should also determine who were the officials directly involved. In that case it was States which could be brought to justice.

75. The Organization of American States had considered that question in relation to mutual assistance and had established that a regional body could also determine that a State was the aggressor when aggression was perpetrated at the regional level. Consequently, the Security Council was not the only competent body on the subject. Regional bodies were also competent. The Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization could consider the possibility of coordinating the search, within the United Nations and the Security Council for a solution to that particular problem, in cooperation with the regional organizations.

76. His delegation felt that intervention must be retained as a crime in the Code for the very simple reason that small countries were the most vulnerable to intervention or attacks on the part of powerful countries. The list of crimes must remain open. The Commission must continue to consider the question so that, if necessary, it would be able to include in the list other crimes or offences which might materialize in the future.

77. With regard to penalties or punishment, a penalty should be envisaged for each specific crime. While it was true that there was no penalty that was common to all legal systems, the penalty of imprisonment existed in all legal systems. The severity of the penalty must therefore depend on the seriousness of the crime committed.

78. The confiscation of property acquired illegally must be envisaged and regulated by the Code on the basis of two precedents: the United Nations Convention of 1988 against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which provided for the confiscation of such property, including funds deposited in banks, and the Inter-American Juridical Committee, which was working to establish a framework to determine not only the civil effects of that type of crime, but also specific measures which could be laid down to supplement criminal penalties.

(Mr. Villagran Kramer, Guatemala)

79. On the subject of State responsibility, he said that that the extensive judicial practice on the subject in the form of arbitral awards and decisions taken by courts and by the International Court of Justice, which was the primary source for the draft articles, should be embodied to the greatest possible extent in an international instrument.

80. International liability for injurious consequences arising out of acts not prohibited by international law was not yet governed by a general principle; that shortcoming must therefore be remedied. To that end, there were at least two parameters which should be taken into account in identifying the content of that concept: (a) no one could avoid the consequences of his acts and (b) there must be reparation for all damage caused. Those two parameters, which were embodied in the form of general principles in some legal systems, should be a guide at the international level in formulating a text which would make it possible to find the best solution to the question.

81. It was not yet clear whether the instrument should include acts involving an element of transboundary risk and whether due diligence, or the obligation of prevention, should at least be considered as forming an integral part of the question. At all events, the Commission must take up the question of risk to the extent that it involved the application of the theory of so-called objective responsibility; it was not possible to disregard the requirement of due diligence in the modern world when considering activities involving elements of risk. That was an important question for developing countries, but even more so for industrialized countries. The developing countries had to insist that it was activities involving risk that gave rise to the application of the theory of objective responsibility. That question was not simply a matter for the domestic law of States but could also be regulated by international law; when damage was transboundary in nature, it exceeded the competence of the domestic judge. It was therefore very important to have an international mechanism which would replace the domestic regime in such cases. The State could adopt internal regulations, but the coordination of such rules at the international level was essential so as to enable individuals to have a satisfactory text they could resort to.

The meeting rose at 5.55 p.m.