UNITED NATIONS

General Assembly

FORTY-SEVENTH SESSION

Official Records

SIXTH COMMITTEE
30th meeting
held on
Friday, 6 November 1992
at 10 a.m.
New York

SUMMARY RECORD OF THE 30th MEETING

Chairman: Mr. ZARIF (Islamic Republic of Iran)

later: Mr. TOMKA (Czechoslovakia)
(Vice-Chairman)

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Distr. GENERAL
A/C.6/47/SR.30
16 November 1992

ORIGINAL: ENGLISH

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91-57579 6240S (E)

The meeting was called to order at 10.15 a.m.

AGENDA ITEM 129: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FOURTH SESSION (continued) (A/47/10, A/47/95, A/47/441-S/24559)

1. Miss BOTERO (Colombia) said that the law of the non-navigational uses of international watercourses was of crucial importance to her country. Pursuant to General Assembly resolution 46/54, paragraph 9, her delegation wished to comment on the draft articles adopted on first reading by the International Law Commission.

2. Her delegation believed that the draft articles must maintain the proper balance between the rights and duties of watercourse States. Colombia agreed that the scope of the draft articles should be limited to international watercourses and should not be extended to other watercourses. There must be a clear definition of the term "international watercourse", rather than a vague reference to "a system of surface and underground waters", as that might create difficulties from the point of view of management.

3. If the purpose of the draft articles was to enable watercourse States to enter into watercourse agreements, then their provisions must be illustrative and general. The fulfilment of a State's obligation to negotiate in good faith for the purpose of concluding an agreement with respect to a project which might adversely affect one or more other watercourse States should not be a condition for the execution of such a project; the purpose of providing for that obligation was to ensure that if there was a risk of serious harm, appropriate measures would be taken to minimize or to eliminate the potential effects. The obligation to cooperate in order to attain optimal utilization and adequate protection of an international watercourse should be binding on all watercourse States. Moreover, the obligation of watercourse States not to cause appreciable harm should apply only with regard to activities directly or indirectly carried out by them, and not to damage resulting from external factors.

4. Her delegation believed that notification concerning planned measures with possible adverse effects, the period for reply to notification, the reply to notification or the absence thereof, and the establishment of a joint management mechanism were matters which should be decided on by watercourse States themselves by means of agreements.

5. Once the deadline of 1 January 1993 established in General Assembly resolution 46/54, paragraph 9, had passed, recommendations could be made to the Assembly concerning the legal nature of the draft articles and the body to which they should be submitted for the second reading.

6. Mr. AL-BAHARNA (Bahrain), referring to the programme and working methods of the Commission (A/47/10, chap. V), noted with satisfaction that the

(Mr. Al-Baharna, Bahrain)

Commission had decided, as stated in paragraph 366 of the report, that it would endeavour to complete by 1994 the second reading of the draft articles on the law of the non-navigational uses of international watercourses, and by 1996 the second reading of the draft articles on the Code of Crimes against the Peace and Security of Mankind and the first reading of the draft articles on State responsibility. Bahrain also welcomed the Commission's intention to make substantial progress on the topic entitled "International liability for injurious consequences arising out of acts not prohibited by international law" and to undertake work on one or more new topics during the term of office of its current membership. Nevertheless, his delegation had been disappointed to learn from paragraph 362 that the Commission had put aside, for the time being, its consideration of relations between States and international organizations; it was to be hoped that the Commission would revert to the topic at a later date. His delegation further hoped that the Commission would not entirely abandon the programme of work which it had drawn up in 1991, as the selection of new topics was not an easy task. If the Commission was to reclaim its role as the principal body responsible for the progressive development and codification of international law, it must be given a new impetus by the Sixth Committee. The Committee must assign to the Commission topics which transcended the traditional boundaries of international law.

7. His delegation reiterated the proposal made at the previous session that the Commission should consider the feasibility of studying the legal aspects of the new international economic order, with a view to codifying the doctrine of permanent sovereignty over natural resources and strengthening the Charter of Economic Rights and Duties of States. That question was at the heart of current international controversies; in order to embark upon a consideration of that area, the Commission would need a mandate from the Committee.

8. His delegation in principle supported the proposals contained in paragraph 371 of the report concerning the composition and working methods of the Drafting Committee.

9. It was satisfying to learn from paragraph 374 that the Commission had considered the question of its contribution to the United Nations Decade of International Law. At the same time, the proposal to prepare a publication which would aim at presenting an overview of the main problems of international law on the eve of the twenty-first century appeared, in the light of the Commission's current work programme, to be overambitious. If the proposal was to be implemented, however, his delegation suggested that a more modest theme should be chosen. A study of ways and means of improving the effectiveness of international law might be of practical use to the international community.

10. The recommendations contained in paragraph 373 concerning ways of improving the preparation and content of the Commission's report were of particular interest. His delegation endorsed the suggestions in

(Mr. Al-Baharna, Bahrain)

subparagraphs (5) and (6) that the summary of debates should give emphasis to trends of opinions, rather than to a detailed recording of individual views, and that the presentation of fragmentary results achieved in the consideration of a topic or an issue should be avoided.

11. Bahrain supported the Commission's decision, reflected in paragraph 376, to defer consideration of the question of dividing its annual session into two parts.

12. Mr. DE SARAM (Sri Lanka), referring to the topic entitled "International liability for injurious consequences arising out of acts not prohibited by international law", said that transboundary harm principally resulted from malfunctions in seemingly harmless activities carried out in a source State, or from activities in a source State which were acknowledged to be harmful. The two main aspects to be considered in the codification and progressive development of the applicable international law in such cases related to the measures that must be taken to prevent or reduce the possibility of the occurrence of transboundary harm, and the liability which would ensue where transboundary harm had occurred.

13. It had been agreed that the Commission should first consider preventive measures, and then, at a subsequent stage, the issues of liability and compensation. There were, however, reasons to question that order of priorities, and it seemed likely that fundamental differences of view would emerge in the course of any discussion of the difficult issues raised by liability and compensation. For example, would it be more helpful to the victims of transboundary harm if both the source State and the entity responsible for carrying out the activity were to be held liable for transboundary harm? And should such liability be residual or based on fault?

14. At the same time, there did appear to be agreement on certain fundamental issues. It was generally recognized that industrial development and technology must not be overencumbered, and that there might well be cases in which transboundary advantage also accrued from potentially harmful activities. Similarly, there was general agreement that the victims of transboundary harm should not be left without adequate compensation. There seemed therefore to be a need for rules which would facilitate, to the extent possible and in the least costly manner, the expeditious presentation and consideration of claims. From that standpoint, there was much to be said for greater recourse to the advisory jurisdiction of the International Court of Justice and additional insurance arrangements. The principal objective was the speedy and adequate coverage of conceivable damage, rather than determination of culpability. Useful international legislation in that regard had already been concluded under the auspices of the International Maritime Organization in the aftermath of the Torrey Canyon and Amoco Cadiz incidents. However, much work on questions relating to the insurance and reinsurance of risks of catastropic damage remained to be done, and it might be appropriate for the Commission to devote further consideration to those issues in due course.

15. Mr. HALLAK (Syrian Arab Republic) said that international circumstances had prevented agreement over the long-discussed question of the establishment of an international criminal court. His delegation concurred with much of paragraph 396 of the report (A/47/10), in particular points (i) and (iii). There was an urgent need for an international criminal jurisdiction, since national courts and jurisdictions appeared ineffective with regard to an important category of international crimes. The proposed international court should not have compulsory jurisdiction. Its competence should be limited to crimes of an international character, including crimes defined in the draft Code of Crimes Against the Peace and Security of Mankind; the establishment of an international criminal court should ensure an objective and unified interpretation of such a Code. However, it should remain possible for a State to become a party to the statute of the court without thereby becoming a party to the Code. There must be maximum flexibility regarding subject-matter jurisdiction, which would be easily achieved if the Code and the statute of the court were separate instruments. The treaty establishing the court should not prevent the court from being brought into a relationship with the United Nations either through an agreement pursuant to Articles 57 and 63 of the Charter or by any other means. Applicable law, penalties, due process, procedures and rules might be discussed when the General Assembly requested the Commission to draw up a statute of the court.

16. With respect to the reports of the Special Rapporteur on State responsibility, and in view of the remarks contained in paragraph 122 of the report of the Commission, his delegation felt that the Commission should exercise great caution in dealing with the subject of countermeasures, which should be examined carefully in the light of the provisions of the Charter regarding collective security.

17. International liability for injurious consequences arising out of acts not prohibited by international law was a highly complex area, in which fault and strict liability seemed to overlap to a certain degree, which made it all the more difficult to establish an acceptable theoretical foundation. He hoped that the Commission would be able to deal with that topic in an effective manner in order to arrive at a generally acceptable instrument.

18. As to the law of the non-navigational uses of international watercourses, his delegation was pleased that the Commission had decided to transmit the draft articles provisionally adopted on first reading through the Secretary-General to Governments for comments and observations in preparation for a second reading of the draft articles. It also welcomed the decision of the Commission not to pursue further, for the time being, the question of relations between States and international organizations.

19. Mr. Tomka (Czechoslovakia), Vice-Chairman, took the Chair.

20. Mr. AKAY (Turkey), referring to the proposal to establish an international criminal jurisdiction, said that there appeared to be a genuine desire on the part of the international community to set up such a court in

(Mr. Akay, Turkey)

order to bring to justice the perpetrators of crimes against humanity. The issue had become particularly urgent in the light of the widespread and grave breaches of the Geneva Conventions that were taking place in Bosnia and Herzegovina: bringing those responsible for such wanton aggression before a court would have a deterrent effect on potential offenders. Such a court would also serve as an appropriate forum for the trial of offences involving international drug trafficking or crimes against diplomats and other internationally protected persons. However, the issue needed to be examined in greater detail, and in any case as a question separate from that of the draft Code of Crimes. Although his delegation had not arrived at a definitive position, it believed that the jurisdiction of the court should be ad hoc, and that major legal and political issues would have to be resolved with regard to extradition.

21. Additional difficulties would arise in connection with the rights of intergovernmental and non-governmental organizations to institute proceedings before the court.

22. The deliberations of the International Law Commission on that subject should be preceded by a resolution of the Sixth Committee requesting comments from Governments, thus largely obviating the need for future amendments to the statute of the proposed court.

23. The topic of State responsibility involved very complex aspects of both a legal and a political nature, and the question of countermeasures, which would be covered in part two of the draft articles, was particularly intractable, involving as it did the need for a clear definition of the concept of an "injured State". Countermeasures played an extremely important role in conflicts arising from breaches of treaties, and it was not unknown for States which themselves were responsible for breaches of international treaties to claim the status of injured States.

24. Mr. AROSEMENA (Panama), referring to chapter II of document A/47/10, said that the establishment of an international criminal court had been a goal of the international community since the end of the Second World War, in response to horrendous acts of genocide perpetrated during that conflict. Currently, the question of an international criminal trial mechanism and the draft Code of Crimes against the Peace and Security of Mankind were acquiring new relevance in the light of the events in the former Yugoslavia and other parts of the world. Accordingly, his delegation believed that the time had come to establish a standing, full-time, international judicial body.

25. In his delegation's view, the draft Code of Crimes and the question of the establishment of an international criminal court were closely interrelated and could not be dealt with separately. There could not be a code of crimes against the peace and security of mankind unless there was an international criminal jurisdiction to administer it; likewise, without such a code, a court would lack objective competence. For that reason, if a State became a party to the court's statute, it must thereby, ipso facto, become a party to the

(Mr. Arosemena, Panama)

Code; at the same time, a State party to the Code should have the option of applying any other international treaties mentioned in the statute.

26. His delegation also believed that the court's jurisdiction should be binding, irrespective of the nationality of the accused, with regard to all the crimes defined in the draft Code of Crimes and in other international conventions. In other words, international law should take precedence over national law. It was in the interest of small States, including Panama, that there should be a uniform international criminal justice system to which they could have access, since they often had neither the requisite infrastructure nor adequate security mechanisms to bring accused persons to trial.

27. The applicable penalties and procedure should be stipulated in the court's statute so as to ensure due process. National law would be resorted to only if there were aspects not covered by the court's statute. Every State party to the statute should be required to hand over to the court any alleged perpetrator of a crime within its jurisdiction, and such transfer to the court should not be regarded as extradition. The procedure for the handing over of accused persons should be defined in the statute.

28. His delegation supported the establishment of an independent standing prosecutorial organ for the purpose of initiating cases and bringing defendants before a court. If that should prove unfeasible, then at least in the first phase, an independent prosecutor should be appointed on an ad hoc basis, as recommended by the Working Group in paragraph 506 of document A/47/10. Any State, whether or not it had become a party to the statute of the court, should have the right to institute proceedings.

29. The many possibilities and alternatives outlined in the reports of the Special Rapporteur and the Working Group demonstrated the feasibility of establishing an international criminal court. Those possibilities should be discussed thoroughly with a view to arriving at a consensus text. If the international community did not have the resources to establish such a mechanism immediately, short-term solutions could be found, such as utilizing the infrastructure of the International Court of Justice or the Office of the Legal Counsel of the United Nations. His delegation supported the Working Group's recommendation that the expenses relating to the court's operation should be borne by the States parties to its statute.

30. Mr. SOLIMAN (Egypt) said that, in the context of the third and fourth reports of the Special Rapporteur on State responsibility, countermeasures were a reflection of the imperfect structure of the international society which had not yet succeeded in establishing an effective centralized system of law enforcement. At the same time, recent developments affecting the form and character of international relations were opening encouraging prospects for the adoption of an approach that was in harmony with the current reality of such relations. Despite the apparent factual inequality between States with regard to possible intervention and economic reprisals, the draft articles

(Mr. Soliman, Egypt)

should reflect the realities of international life, inasmuch as countermeasures were actually used, and should endeavour to establish a framework of restrictions and conditions that prevented their arbitrary use and took account of the particular situation of the developing countries and the ways in which they differed from the developed countries. Egypt therefore supported the view that countermeasures should be placed under collective control and should not be regarded as a punitive instrument, but only as a means of urging a country that had committed a wrongful act to abide by the international rule of law. Self-defence did not come within the framework of countermeasures, which should be restricted to acts that did not call for the use of force, and measures of retortion had no place in a draft on State responsibility, for the reasons given by the Special Rapporteur. In the use of the suspension and termination of treaties as countermeasures, it was essential for the procedures laid down in the 1969 Vienna Convention on the Law of Treaties to be followed, in particular those in its article 60.

31. The draft articles should contain a settlement regime, particularly in light of the fact that positive developments in international relations would encourage such a trend. The exhaustion of amicable settlement procedures as a precondition for resort to countermeasures would not be to the advantage of the wrongdoing State, and such a condition would be a guarantee of the non-arbitrary use of countermeasures.

32. The existence of an internationally wrongful act was recognized as the sine qua non condition for lawful resort to countermeasures, since it was difficult to rely solely on the bona fide conviction of the State concerned. There must be several objective signs in addition to the existence of an internationally wrongful act, including refusal to negotiate or refusal to accept resort to a settlement procedure. Since the adoption of a countermeasure found its justification in the prejudice caused by an internationally wrongful act, the draft articles should incorporate the Special Rapporteur's definition of countermeasures as "the generality of the reactions of a State in response to a breach of international law by which it is injured". The wrongful act must give rise to "damage" in the broad sense of encompassing legal or moral injury.

33. It was essential that the draft articles on State responsibility should be subordinate both to the provisions of, and to the procedures provided for in, the United Nations Charter on the maintenance of international peace and security and, in particular, to any recommendations or decisions adopted by the Security Council in the discharge of its functions with respect to dispute settlement and collective security. The Security Council had the power to oversee the use of countermeasures and to indicate whether, in any given case, it believed them to be disproportionate, and it might request a State to delay the taking of countermeasures. The words "as appropriate" should therefore be deleted from article 4 of part two as provisionally adopted, since the draft articles should not be inconsistent with the Charter provisions. His delegation did not agree with the views of some delegations concerning the

(Mr. Soliman, Egypt)

concept of pre-emptive self-defence, because they were not in accord with the clear provisions set forth in Article 51 of the Charter.

34. His delegation disagreed with the Special Rapporteur in his attempt to show that, in the case of a violation of a multilateral obligation concerning human rights or the environment, all States were in the same position. The International Court of Justice, in the case concerning Military and Paramilitary Activities in and against Nicaragua, had clearly stated that there existed a difference in legal status between the actual victim of aggression and other States which, in a somewhat artificial sense, could be said to be "legally affected".

35. As recommended by the Working Group established by the Commission, the topic of international liability for injurious consequences arising out of acts not prohibited by international law should be understood as comprising both issues of prevention and of remedial measures. Despite the recommendation of the Working Group that a decision on the nature of either the articles to be drafted or the eventual form of the instrument that would emerge should be postponed, his delegation supported the view that the articles should, within reason, be of a mandatory character so as to contribute to the progressive development and codification of the rules of international law. Although the practice of the Commission was in accordance with the recommendation of the Working Group, it might be better if the Commission decided on the nature of the instrument before completing preparation of the articles in the light of the special nature of the topic. Rather than elaborating a declaration or statement of principles on the topic, the Commission should formulate well-defined rules of a mandatory character. Priority should be given to the topic, since the progress made thus far had been very slow.

36. Although the title of the topic dealt only with liability, it was essential that the articles should include rules on the prevention of harmful acts, and that they should not be assigned to an annex but have the same mandatory force as the other articles.

37. In connection with draft article 1, on preventive measures, it was important that prior authorization should be obtained, that it should be granted by the State concerned only after an assessment of the impact of the activity in question, and that States should withhold authorization until the operators had obtained insurance.

38. The principle of notification and information embodied in draft article 2 was fundamental, and it was in accord with existing principles in Egyptian internal law. His delegation welcomed the requirement that the State of origin should seek the assistance of competent international organizations in determining the impact of harmful activities, an idea that was endorsed by the Convention on Biological Diversity of 5 June 1992.

(Mr. Soliman, Egypt)

39. Draft article 4, on prior consultation with regard to activities with harmful effects, was the cornerstone for preventive measures. The prior consultations provided for in articles 4, 5 and 7 should have the aim of obtaining the agreement of the affected State on a regime governing such activities. His delegation differed with the view expressed in the Commission that the term "consultation" was very often used in cases where there was no obligation to obtain consent, and it did not agree that article 4 nullified article 5, concerning alternatives to an activity with harmful effects. A second paragraph should be added to article 5 to the effect that if the operator did not put forward alternatives which made the activity acceptable, the State of origin was obliged to withhold authorization. Article 8, on the settlement of disputes, was useful and necessary, and its inclusion strengthened Egypt's view that the draft articles should be of a mandatory character.

40. With regard to the definition of risk proposed by the Special Rapporteur in connection with article 2, on the use of terms, his delegation agreed with the view expressed in the Commission that it was difficult to reach agreement on the use of qualifying terms such as "appreciable", "substantial" and "significant" before agreement on the content of the articles themselves, and that it was necessary to distinguish in that connection between activities that posed a risk and those that had a harmful impact.

41. Mr. LAOUANI (Tunisia) said that the instruments formulated by the Commission were an expression of the teachings of the most highly qualified publicists of the various legal systems and schools in the world, and as such, even before they entered into force, they could be implemented by the International Court of Justice under Article 38, paragraph 1 (d) of its Statute.

42. His delegation took note of the Commission's decisions regarding its organization of work, and encouraged it to make substantial progress on the subject of international liability for injurious consequences arising out of acts not prohibited by international law. It welcomed the Commission's decision to prepare a publication presenting an overview of the main problems of international law on the eve of the twenty-first century, in the context of the Decade of International Law.

43. On the question of an international criminal jurisdiction, his delegation supported the Commission's establishment of a working group; its mandate fully accorded with the request made by the General Assembly in resolution 46/54. The Commission's work on the draft Code of Crimes and on the question of an international criminal jurisdiction would help strengthen the rule of law in international relations. The formulation of a Code of Crimes which reconciled the different concepts of the various legal systems and the establishment of an international criminal jurisdiction to implement the provisions of the Code would fill a void.

(Mr. Laouani, Tunisia)

44. The establishment of an international criminal court would inevitably involve problems of compatability with the domestic law of States and the competence of their courts. A balance must be found between the principle of respect for the sovereignty of States and the need to strengthen the implementation of international law. His delegation supported the view that initially the court should be a flexible mechanism; that approach would make it possible to overcome the political difficulties deriving from State sovereignty and the legal difficulties deriving from the competence of States. It also felt that the only law applied by the court should be the Code of Crimes, which should contain all applicable rules in respect of penalties, procedures and the precise definition of crimes. Such an instrument would be clear and precise. While his delegation supported the draft Code adopted by the Commission at its forty-third session, it believed that some of its articles, and particularly article 9, needed further review; the Commission should therefore continue its work on the draft Code and draft statute.

45. In connection with State responsibility, the delicate question of countermeasures arose. His delegation preferred the term "countermeasures" to "reprisals". There had clearly been no unanimity in the Commission on the question of whether there should be a codification of countermeasures. His delegation felt that the scope of countermeasures should be limited and strictly defined, as a constructive means of promoting law and strengthening guarantees against the risks of abuse of countermeasures. The conditions for the legality of countermeasures set forth in draft article 11 gave rise to many problems because the concepts of a "wrongful act" and an "adequate response" were not made clear, leaving open the possibility of imprecise or subjective judgements. The Commission must ensure that factual inequalities between States did not work to the advantage of the strong. Particular attention should be paid to developing countries, which did not have the same capacity for reaction or countermeasures as developed countries. Countermeasures should not be punitive, but should aim to secure an end to the wrongful act. They must therefore be different from sanctions.

46. His delegation encouraged the Commission to continue its consideration of the question of international liability for injurious consequences arising out of acts not prohibited by international law during the current quinquennium, since, at a time when the entire world was launching an offensive against environmental deterioration, the Commission's work would represent a very important contribution to the development and codification of international law. The topic should be considered in stages, and priorities should be established among the aspects to be considered. His delegation agreed that the subject should first be considered in its preventive dimension. The draft articles should therefore first envisage the preventive measures required in respect of activities involving risk and then the remedies needed when those activities actually caused transboundary harm. At the same time, the Commission should not lose sight of the urgent need to regulate activities which actually caused transboundary harm.

(Mr. Laouani, Tunisia)

47. The Commission should define a theoretical basis for the topic that would be generally acceptable. It could draft directives or declarations of principle which would fill the theoretical void and make it easier to reach agreement on the content of the future articles. The Commission should base its work on the achievements of the United Nations Conference on Environment and Development and the universal consensus on protection of the environment.

48. His delegation felt that it was premature to decide on the final form of the instrument to be drawn up; the Commission should be guided by the current and future needs of the international community and by the contribution the draft articles could make to the codification of international law.

49. Mr. CAMACHO (Ecuador) said that, on the question of State responsibility, and specifically of countermeasures, his delegation fully shared the view that countermeasures were a reflection of the absence of an effective centralized system of law enforcement and that, given the current level of development of international law, they would continue to be needed for a long time to confront internationally wrongful acts. However, as noted by the Commission, countermeasures were often the prerogative of the more powerful States. They did not afford protection to weaker States, and were frequently used as an instrument of intervention or aggression. It was therefore important to define carefully the conditions under which countermeasures could be applied. In that context, his delegation felt that articles 11, 12, 13 and 14 left many problems unresolved.

50. His delegation was particularly concerned that under draft article 11, the determination that a wrongful act had been committed was left to the State which took countermeasures, thereby making it possible for the supposedly injured State to become a judge and a party to the conflict; and draft article 13 did not indicate any criteria for application, thereby allowing the State taking the countermeasures to determine subjectively the type, conditions and amount of reparations demanded. Those two provisions could give rise to greater problems than those that the draft articles set out to solve, and could make it possible for a State, on the pretext of making reparation for a wrongful act, to use countermeasures to commit even greater crimes. Much work needed to be done on the draft articles before his delegation could approve them.

51. Mr. ZMIEYVSKIY (Russian Federation) said that the question of international liability for injurious consequences arising out of acts not prohibited by international law was of great significance both currently and for the future. It involved establishing a global legal regime which would effectively protect man and the environment from the rapidly accelerating negative consequences of development, above all in the scientific and technical fields, which were threatening the very foundations of life on earth. The Commission's work once again confirmed the significance of consolidating the efforts of the community of nations on the basis of international law, in order to confront the challenge posed by the realities

(Mr. Zmievyskiy, Russian Federation)

of the nuclear age, which had intertwined the fates of all States and peoples.

52. It was somewhat disappointing that the Commission, after 14 years, had not yet achieved the desired results. It was apparent from the report (A/47/10) that there was still no agreement among members of the Commission in respect of the conceptual framework of the topic, the concept of "international liability" or the form of the instrument to be drawn up and the legal force of its norms. Of course, the situation was to a considerable extent caused by objective factors, above all the complexity of the questions involved at the international and national levels.

53. Steps must be taken to intensify the Commission's work and make it more productive. His delegation supported the Commission's decision that future consideration of the topic should be carried out in stages and that priorities should be established. It agreed that prevention should be considered first, and, only then, remedial measures.

54. The idea of a civilized dialogue should underpin the concept of international liability; it would make it possible to maintain a balance of interest of all the parties involved. Important components of such a dialogue were the requirement that States should assess potential transboundary harm; regulation of activities capable of causing harm, notification and information, prior consultation, alternatives to an activity with harmful effects, and procedures for the peaceful settlement of disputes.

55. The delicacy and unpredictable scope of the problems that arose made it necessary to take into account other factors involved, including the level of economic development of States, the need to balance their interests, fairness, and due care. The idea of establishing an effective international insurance system should be studied in detail. The possibilities of charitable organizations and voluntary funds could also be drawn upon in that respect. Various international organizations could contribute to a just solution of questions of international liability.

56. A flexible approach was needed to the question of the form of the instrument, since agreement on questions of substance would help in finding adequate solutions with regard to the legal nature of the norms to be worked out. The instrument that was drafted could alleviate and, if possible, eliminate the tension that arose in respect of problems of international liability, thereby contributing to the development of good relations among States in a spirit of good-neighbourliness, mutual understanding and trust.

57. Mr. PELICARIC (Croatia) said that the need for an international criminal court was increasingly felt within the international community. The present situation in the former Yugoslavia, the widespread human rights violations and atrocities against civilians and the practice of so-called "ethnic cleansing" demanded urgent action.

(Mr. Pelicaric, Croatia)

58. A report prepared under the auspices of the Conference on Security and Cooperation in Europe expressed the view that the establishment of a permanent international criminal court would take considerable time, and strongly advised against waiting for such a court to be established before action was taken against the serious criminal acts committed in connection with the armed conflict in the territory of the former Yugoslavia. His delegation was therefore in favour of establishing an ad hoc international tribunal for crimes committed in Croatia, Bosnia and Herzegovina and other parts of the former Yugoslavia. His Government had repeatedly proposed the holding of international trials for war crimes, crimes against humanity and international law, and crimes of genocide committed in the territory of the former Yugoslavia, so that all perpetrators and organizers of such crimes, irrespective of their nationality, religion or present whereabouts, might be brought to justice. Croatia was fully prepared to cooperate with experts in that field, and had already offered to do so.

59. With regard to the question of the applicable law, the authors of the aforementioned report had examined the Penal Codes of the Socialist Federal Republic of Yugoslavia and Croatia, and had come to the conclusion that their provisions constituted a sufficient legal basis for the administration of justice with respect to suspected war criminals in the former Yugoslavia. In that connection, it should be noted that Croatia, but not the Federal Republic of Yugoslavia, had abolished the death penalty.

60. Besides having legal and humanitarian importance, the establishment of an ad hoc international tribunal would also be of the greatest political importance, in that, it would significantly contribute towards stopping and resolving conflicts in the region as a whole. His delegation therefore suggested that the proposed tribunal should have jurisdiction in respect of the entire territory of the former Yugoslavia. In conclusion, he expressed the hope that the General Assembly would renew the mandate of the International Law Commission to proceed with the work of drawing up the necessary rules for an international criminal jurisdiction.

61. Mr. Zarif (Islamic Republic of Iran) resumed the Chair.

62. Mr. TOMUSCHAT (Chairman of the International Law Commission), noting the wealth of comments and ideas put forward during the Committee's consideration of the report of the Commission on the work of its forty-fourth session, said that the summary records, as well as the customary topical summary of the discussion held in the Sixth Committee, would be brought to the attention of the Commission's members. In addition, the Special Rapporteurs would receive the original texts of all statements made on their respective topics. The Committee's views not only were a most valuable source of inspiration for the Commission's work, but also served as an irreplaceable gauge of the extent to which that work was meeting the needs of the international community at any given time. He was gratified to note that, subject to certain reservations, the report had on the whole been well received by the Committee. The

(Mr. Tomuschat)

Commission would, of course, take all critical comments fully into consideration.

63. Referring to the Commission's preliminary work on the statute of an international criminal court, he noted that a clear majority of delegations had supported the suggestion that a new mandate should be given to the Commission to go ahead with that project. Some delegations had even expressed the view that the drafting process could be completed within a year; others had struck a more cautious note, stressing the need to give Governments a full opportunity for an in-depth examination of all the implications. The point had been made that the commitment implicit in formally entrusting the Commission with drawing up the statute of an international criminal court would have limited scope, its significance being simply that making a start on the legislative process was considered worthwhile. In giving the Commission a clear mandate, the General Assembly could at the same time request it to pay special attention to any comments that Governments might wish to make by early 1993. In any event, the Commission would do its utmost to adapt its working methods to the challenge which a mandate to elaborate the statute would represent. While acknowledging the formidable character of the task, it did not shy away from it, and would make every effort to work as expeditiously as possible.

64. While it had generally been recognized that the draft Code, once completed, should be one of the instruments to be applied by the court, a clear majority of speakers had argued that the court should not be automatically linked with the Code. At the same time, it had been felt that because of the principle nullum crimen sine lege - lex being understood as written law - the court should not be called upon to base its sentencing of criminals on rules of customary law. The proposition that the court should have power only over individuals but not over States had received unchallenged support; the question of the character of the court, on the other hand, had given rise to more divergent views, a considerable number of delegations feeling that the mechanism envisaged by the Commission failed to meet the requirements of stability and predictability.

65. Turning to the topic of State responsibility and, in particular, to the draft articles on countermeasures suggested by the Special Rapporteur, he noted that while all delegations had agreed that the matter should be approached with extreme caution because countermeasures had sometimes served as a pretext for unlawful conduct on the part of powerful States to the detriment of weaker States, not all delegations had drawn the same conclusions from that premise; some took the view that countermeasures did not form a necessary element of a regime of State responsibility and should be left aside, and others favoured the inclusion of countermeasures in the rules governing State responsibility. The latter group of delegations, which had also been the larger one, had argued that countermeasures not only were a fact of international life, but also had a useful function in upholding the international legal order, inasmuch as they constituted one of the few

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remedies which international law placed at the disposal of the injured State. No one, however, had denied that resort to countermeasures should in any event be made subject to strict criteria of admissibility. Some link with procedures for the peaceful settlement of disputes had been generally advocated, although views had differed on whether complete exhaustion of all available procedures should be a condition for resorting to countermeasures, or whether it would be sufficient to establish, for instance, an obligation to suspend countermeasures as soon as the alleged wrongdoer was prepared to accept a binding settlement procedure. The Commission would greatly benefit from the debate when embarking upon the issue in the Drafting Committee at the beginning of its next session.

66. The topic of liability for injurious consequences arising out of acts not prohibited by international law had also received a great deal of attention. Many delegations had deplored the fact that after 14 years of grappling with the topic the Commission had still not definitively approved a single provision. Reiterating the hope expressed in his introductory statement that a fresh start could be made on the topic on the basis of the conclusions reached by the Working Group established at the forty-fourth session, he said that the Commission would carefully consider the criticisms expressed with regard to the new instructions given to the Special Rapporteur. The United Nations Conference on Environment and Development had unquestionably given renewed urgency to a project first embarked upon in 1978. One of the best contributions the Commission could make to the Decade of International Law would be to complete a set of draft articles on transboundary harm.

67. He noted with satisfaction that all but one of the delegations which had spoken on the subject had welcomed the Commission's decision not to pursue its work on the second part of the topic of relations between States and international organizations. The needs of the international community had evolved in a direction not foreseen at the time when the topic had been included in the programme of work of the Commission. The work already accomplished would, however, remain a valuable source of information not only to scholars, but also to practitioners dealing with legal issues related to international organizations.

68. As for the question of new topics to be included in the Commission's long-term programme of work, the need to identify new areas of work would obviously depend to a large extent on the decision the Committee would adopt on the issue of an international criminal court. If the Commission received the mandate it had requested, it would be very busy for some years to come; if not, there might be some room for new initiatives. In any event, the Commission, at its next session, would carefully consider all proposals made by its members and by Governments.

69. Lastly, referring to the International Law Seminar, which was held concurrently with a part of the Commission's session each year, he stressed the unique nature of the opportunity provided by the Seminar for young

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diplomats and scholars, in particular from third world countries. He therefore reiterated the recommendation in paragraph 391 of the report (A/47/10) that the General Assembly should again appeal to all Governments, especially to those of industrialized States, to make the voluntary contributions that were needed for the holding of the Seminar in 1993 with as broad a participation as possible. As in 1992, the Commission would again endeavour to associate the participants closely with its work by inviting them to deal with one of the topics currently on the agenda. The positive experience gained from that new type of working relationship called for repetition and enlargement.

The meeting rose at 12.35 p.m.