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SUMMARY RECORD OF THE 26th MEETING

Chairman: Mr. LAMPTEY (Ghana)

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

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The meeting was called to order at 10.30 a.m.

AGENDA ITEM 137: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SIXTH SESSION (continued) (A/4/10; A/49/355; A/C.6/49/L.5)

1. Mr. YOUSIF (Sudan) said that, with regard to chapter II of the Commission's report, concerning the draft statute for an international criminal court, as his delegation had stated at the previous session of the General Assembly, there should be no relationship between the court and the United Nations. His delegation requested the revision of the articles that conferred on the Security Council the right to refer certain matters to the court. The retention of article 23 of the draft statute would mean that the criminal court would be subject to the political influence of the Security Council and would thus forfeit its independence and distinctive character. It would also give the permanent and non-permanent members of the Security Council an advantage not enjoyed by the other States parties to the statute with regard to the initiation of criminal prosecution.

2. Article 6, paragraph 5, of the draft statute provided that, in the election of the judges, the representation of the principal legal systems of the world should be assured. It was not specified in paragraph 5 what the principal legal systems of the world were. They should be identified and should include an express mention of Islamic criminal law among the principal legal systems to be represented when judges were elected. Islamic criminal law was in effect over an extensive area among more than one billion Muslims. Moreover, the concept of applying the principle of equitable geographical distribution was inappropriate for the purposes of the establishment of an international criminal court.

3. Article 12 of the draft statute failed to mention the number of deputy prosecutors to be elected by an absolute majority of the States parties. The article should be reworded so as to be more specific on that point.

4. The question of the general jurisdiction of the proposed court and the specific crimes coming within its jurisdiction was the pivotal point of the draft statute and still raised some difficulties. In his delegation's view, article 20 of the draft statute as currently worded would serve as a good working basis but was not final. It might be appropriate to envisage drawing up a code of international crimes, as proposed by the representative of Sri Lanka in the Commission, in accordance with the principle nullum crimen sine lege. Such a code might draw on the Commission's work on the draft Code of Crimes against the Peace and Security of Mankind, the crimes specified in international treaties and the other crimes referred to in article 20 of the draft statute.

5. His delegation supported the views expressed concerning the exceptions referred to in article 42, paragraphs 2 (a) and 2 (b), on the basis of the principle non bis in idem. Those two paragraphs were in blatant contradiction with article 14, paragraph 7, of the International Covenant on Civil and Political Rights. Account should also be taken of the fact that the purpose of an international criminal court was to be complementary to national criminal

justice systems, as stated in the preamble of the draft statute, and not to be regarded as a new and separate jurisdiction.

6. The present discussion should focus on those articles that had not been the subject of unanimous agreement, and subsequently an international conference of plenipotentiaries could be convened to approve the statute.

7. His delegation endorsed the Commission's recommendation in appendix I, that the statute should be attached to a treaty between States parties and that such treaty should provide for the establishment of the court and for the supervision of its administration by the States parties. According to the degree of international acceptance, consideration might be given to making the international criminal court part of the organic structure of the United Nations, together with any other amendments that States might wish to make to the United Nations Charter.

8. With regard to chapter III of the Commission's report, concerning the law of the non-navigational uses of international watercourses, his delegation still had difficulty in accepting the term "groundwaters" as a part of the definition of a watercourse in article 2 (a) of the draft articles. It believed that the term "groundwaters" should be clarified in the text by using terms similar to those found in paragraph (4) of the commentary to article 2 of the draft articles. The difficulties raised by the use of the term perhaps lay in the possibility of a State's claiming that it was the watercourse State according to the definition set forth in paragraph 2 (c), if its territory contained groundwaters that fed a watercourse that did not pass through its territory. That could cause innumerable problems for the other States through whose territory the surface portion of the watercourse passed. Such claimant States might also seek to exercise the rights accorded to the other watercourse States under article 4.

9. In his delegation's view, article 6, concerning factors relevant to equitable and reasonable utilization, and particularly paragraph 1 thereof, lacked balance by comparison with article V of the Helsinki Rules. Articles 32 and 33 constituted important additions to the draft articles. The principle of relief to natural or juridical persons in the area who suffered harm as a result of activities related to an international watercourse should be established in article 32 at a subsequent stage or through international watercourse agreements concluded by States in the light of the draft articles. Article 33 should lay down the concept of mandatory resort to arbitration or judicial settlement, since the issue of the scarcity of water resources throughout the world was bound to raise many difficulties in the future and therefore affected international peace and security. Recourse to arbitration or judicial settlement should put a decisive end to disputes in that crucial area. Accordingly, subparagraph (c) greatly weakened the effectiveness of article 33.

10. His delegation supported the Commission's recommendation contained in paragraph 219 of its report and was in favour of the idea of convening an international conference of plenipotentiaries on the basis of the draft articles. Such a conference would give participating States an opportunity to delegate their legal and technical experts to put the final touches to the draft

articles. His delegation also supported the Commission's resolution on confined transboundary groundwater, which commended States to be guided by the principles contained in the draft articles on the law of the non-navigational uses of international watercourses, where appropriate.

11. The Sudan welcomed the Commission's appointment of two new Special Rapporteurs. With regard to the Commission's contribution to the Decade of International Law, his delegation was pleased to note that 33 members of the Commission had expressed readiness to contribute to a publication containing studies by members of the Commission. His delegation hoped that the General Assembly would consider the possibility of earmarking funds for the issuance of the publication in all the official languages of the United Nations and favoured the inclusion of a provision to that effect in the resolution on the Commission's report to be adopted at the current session.

12. His delegation commended the cooperation between Commission members and a number of other bodies. It hoped that that pattern of cooperation would continue. It also commended the Commission's decision to participate in the United Nations Congress on Public International Law, to be held in New York from 13 to 17 March 1995, and hoped that the Chairman of the Working Group on a draft statute for an international criminal court and the Special Rapporteur for the topic "The law of the non-navigational uses of international watercourses" would participate, inasmuch as those two topics constituted an important development of international law.

13. His observations on the draft statute for an international criminal court and on the law of the non-navigational uses of international watercourses were initial ones and subject to the final opinion of Sudanese experts in criminal law and watercourse specialists when they participated in the relevant conferences of plenipotentiaries.

14. Mr. MIKULKA (Czech Republic) said that the draft articles on the law of the non-navigational uses of international watercourses and the resolution on confined groundwaters elaborated by the Commission reflected both its interest in developing international law and its responsiveness to current realities. The draft text on international watercourses was an improvement over the earlier version and provided a sound basis for future work. His delegation endorsed the Commission's recommendation that a convention should be elaborated by the General Assembly or by an international conference of plenipotentiaries on the basis of the draft articles, and it was willing to cooperate in such an endeavour.

15. The topic of State responsibility rightly occupied an important place on the Commission's agenda. The Commission had made progress by provisionally adopting articles 11 and 14, on countermeasures, and article 13, on proportionality, for inclusion in part two of the draft articles on State responsibility. On the whole those articles were satisfactory. The Commission had wisely postponed the adoption of article 12, on conditions relating to resort to countermeasure, and it was to be hoped that it could revise that key article to make it universally acceptable. He hoped, too, that generally

acceptable wording could be found for the provisions relating to dispute settlement procedures to be used prior to taking countermeasures.

16. At its last session, the Commission had had a rich and stimulating debate on the question of the consequences of acts which were characterized as crimes under article 19 of part one of the draft. In distinguishing between crimes and delicts, the Commission had combined codification and progressive development of the law, as it had done in other circumstances. The Commission must not limit itself to an analysis of positive law. A balance had to be maintained between codification and progressive development. It was not enough to take note that a specific category of crimes did not exist in the practice of States; it was also important to give due consideration to theory and to practices that might arise from it.

17. The proposed distinction between categories of internationally wrongful acts was based in part on the hypothesis that there was a difference between the responsibility incurred in the case of delicts and that incurred in the case of crimes. If that was not the case, the distinction on which article 19 was based was not justified. In any event, until the Commission had completed its consideration of the question, it was best not to reopen debate on article 19, which might well be subject to further modification by the Commission.

18. At its most recent session, the Commission had engaged in an unproductive debate on the use in article 19 of the term "crime". No analogy could be made between the use of that term in the article and its meaning within the realm of domestic criminal law. In the sense of article 19, "crime" did not imply that a State was criminally responsible; it simply indicated that a State had breached an international obligation which was essential for the protection of the fundamental interests of the international community. The use of that term should be without prejudice to the determination of the nature of the responsibility for a particular crime.

19. It followed from article 19 and the commentary thereto that crimes represented particularly grave breaches of peremptory norms of international law (jus cogens). Jus cogens obligations were erga omnes obligations, which did not allow for any derogation, including by means of an agreement between the parties concerned. Similarly, there could be no derogation (between parties) from the secondary rules governing the responsibility of States for infringement of jus cogens obligations.

20. Some of the difficulties that arose in attempting to determine the consequences of international crimes were directly linked to the ambiguities of primary rules. While a list of international crimes would greatly facilitate such a task, it was practically impossible to arrive at a list that would be universally acceptable.

21. Article 19 contained a general characterization of international crimes rather than a set of precise definitions. Such a general approach was adequate for the draft text, which ought to be limited to secondary rules. The definition of specific crimes should be dealt with in other instruments.

22. The absence of a list of international crimes made it difficult but not impossible to determine the consequences of State crimes. The non-exhaustive list provided under article 19, paragraph 3, provided a sound basis for attributing criminal responsibility to States. Certain crimes, such as aggression or genocide, were reasonably well defined: they were regarded by the international community as violating its fundamental rights and were also considered as crimes by the opinio juris of the international community. However, in the view of some, the current organization of the international community and the absence of a legal mechanism which had the power to determine whether a State had committed the crime in question were obstacles to identifying the consequences of international crimes. While such a mechanism was clearly needed, its absence should not hinder efforts to determine consequences. The Commission had been able to identify the consequences of international delicts even in the absence of a body with responsibility for determining that such acts had been committed.

23. One of the most important issues arising from the topic of State responsibility was whether and to what extent the articles dealing with the consequences of delicts could be applied to crimes. His delegation took the view that two separate systems of responsibility were needed - one dealing with delicts and one dealing with State crimes. While there was no difference between crimes and delicts with regard to the cessation of a wrongful act, that was certainly not the case with regard to reparation lato sensu. Given that crimes were harmful to the international community as a whole and violated peremptory norms of international law, restitution in kind was of particular importance. It might even be said that there was an obligation not to recognize the consequences of a crime. Restitution in kind in the case of crimes should not be subject to the restrictions envisaged under article 7 (c) and (d) on proportionality. Moreover, in the case of crimes, in contrast to delicts, the choice between restitution in kind and compensation was eliminated: compensation should not be available to the State victim of a crime unless restitution in kind was materially impossible or entailed a violation of jus cogens.

24. Satisfaction should include prosecution of those individuals who had helped prepare a State crime or who had actually committed it. Such an approach reflected the link between State responsibility for international crimes and the criminal responsibility of individuals who committed such crimes.

25. In respect of the instrumental consequences of a crime, priority should be accorded to a collective response by the international community as a whole. Countermeasures should be used only in the absence of collective action.

26. His delegation noted with satisfaction the Commission’s adoption of articles 1, 2 and 11 to 20 relating to international liability for injurious consequences arising out of acts not prohibited by international law. Those articles dealt mainly with the question of prevention and were a step forward in that area.

27. Mr. PIBULSONGGRAM (Thailand) said that the atrocities committed in an ever-increasing number of States had created an urgent need to establish a

permanent criminal court which would ensure that the perpetrators of crimes against humanity were brought to justice and which might prevent reoccurrences of such crimes. Ad hoc tribunals were not adequate for that purpose because they might apply international criminal law inconsistently.

28. The draft statute for an international criminal court had been significantly improved and was, in its current form, a more balanced text with greater chances of being widely accepted by States.

29. In his view, a multilateral treaty was the only sound legal basis for the establishment of the court. It was the only way that States could decide freely whether or not to accept the statute and jurisdiction of the court. Any other manner of establishing the court would give rise to serious difficulties. Once created, the court should have a close relationship with the United Nations to ensure its universality and authority.

30. In revising the draft statute, the Commission had endeavoured to allay States' concerns that the court might displace national jurisdiction or interfere with existing arrangements for international cooperation and judicial assistance. However, much work remained to be done in that direction. Jurisdiction of the court should be granted largely on the basis of consent, except in certain specific cases. His delegation was pleased to note that the draft text provided for an opting-in system under which a State party to the statute of the court accepted its jurisdiction by means of a special declaration. Such an approach would ensure broader acceptance of the statute.

31. The draft statute rightly emphasized that the court should complement national criminal justice systems. However, he wondered whether that would be the case in practice. It was important that the jurisdiction of the court should be limited to the most serious crimes.

32. His delegation agreed that the Security Council should be vested with the power to refer cases to an international criminal court. However, given the political nature of the Security Council, it was perhaps inadvisable to give it such a key role.

33. Two of the draft articles were particularly welcome: article 37, under which trials <u>in absentia</u> were excluded except in circumstances which might be regarded as falling outside that category; and article 6, under which the term of office for judges was fixed at nine years.

34. The draft statute was a positive attempt to resolve many of the thorny issues involved in establishing an international criminal court. Despite its many shortcomings, the statute could serve as a basis for future negotiations. In that regard, he endorsed the recommendation to convene an international conference of plenipotentiaries to conclude a convention on the court; the convention should be preceded by a preparatory meeting to negotiate difficult issues.

35. Turning to the draft articles on the non-navigational uses of international watercourses, he noted that Thailand, as a watercourse State, had a keen

interest in the subject of watercourses and was in a particularly good position to appreciate the complex issues involved. It was essential to strike a balance between the sovereign rights of States and the community of interests, an aim which was reflected in the draft articles in the concept of equitable and reasonable utilization and participation and the obligation not to cause significant harm. Those terms were still not defined precisely enough, which made it difficult to achieve such a balance.

36. Circumstances varied so widely among States that it was difficult to formulate definitions that would satisfy all those concerned. Specific agreements and consultations in the spirit of cooperation among watercourse States could be of great help in arriving at satisfactory and acceptable solutions. However, under no circumstances should the process of consultation be considered to prejudice the sovereign rights over and optimal utilization of watercourses by watercourse States.

37. Recognizing that water resources were vitally important to many States, his delegation agreed that there was a need to elaborate a system of rules concerning confined transboundary groundwaters. It also agreed that a convention based on the draft articles should be elaborated by the General Assembly or by an international conference.

38. Ms. ŠKRK (Slovenia) praised the Commission for its outstanding work in completing the draft articles on the law of the non-navigational uses of international watercourses and resolution on confined transboundary groundwater. Since there were few States that did not qualify as watercourse States, the legal and functional range of the draft articles - which might be called the future Magna Carta on international watercourses - was therefore almost universal and should be approached with corresponding devotion and care.

39. The use of international watercourses for navigational purposes was not entirely excluded from the text, but was merely not regulated by it. Article 1 implied that the articles became operational for the navigational use of an international watercourse in cases of collision between navigational and non-navigational uses of the watercourse. It was assumed that such a conflict of interest should be solved according to the principle of equitable and reasonable utilization of an international watercourse.

40. Since the future convention on the matter was envisaged by the Commission as an umbrella convention, giving the opportunity to individual watercourse States to conclude special or subregional agreements, as required, the draft articles should be viewed as being of a dispositive nature, apart from part II (General principles). The possibility for watercourse States to become parties to watercourse agreements would, in her delegation's view, contribute to the strengthening of cooperation between watercourse States and thus diminish the likelihood of disputes. In that connection, she believed that draft article 4, paragraph 2, was not clear and should be carefully reconsidered before its final adoption.

41. She concurred with other delegations in considering that part II was the core of the text. The principle of equitable and reasonable utilization and

participation, enshrined in article 5, should be understood as a balancing factor between the watercourse State's sovereignty over its portion of an international watercourse and the legitimate uses and interests of other watercourse States. She also agreed with the view expressed in the commentary that the principle of optimal utilization did not necessarily mean the "maximum" use of a watercourse, but the most economically feasible and, if possible, the most efficient one, since an international watercourse was not an inexhaustible natural resource. Article 7, meanwhile, required a State to exercise due diligence to utilize an international watercourse in such a way as not to cause significant harm to other watercourse States. By applying the due diligence test, the Commission had taken the position that a State was not strictly responsible for its conduct or for damage resulting from activities under its sovereignty. She noted that the draft articles were silent with regard to watercourse States' liability for damage.

42. Articles 8 and 9 enshrined well-established practices on cooperation and exchange of information between States. Article 10 required special attention, stipulating as it did that no use of an international watercourse enjoyed inherent priority over other uses. Although the text admittedly stated that special regard should be given to the requirements of vital human needs, she would prefer the point to be more emphasized, given that drinking water was a basic need closely related to the right to life.

43. She was concerned about the provisions of article 23 on the protection and preservation of the marine environment, which introduced the long-distance water pollution approach to the use of international watercourses. Yet according to international legal theory and State practice, States' obligations with regard to transboundary harm on the one hand and long-distance pollution on the other differed. Apart from article 23, the draft articles basically applied to transboundary effects caused by one watercourse State on another. Pollution from land-based sources was, however, currently the major concern of coastal or estuary States. Under the provisions of draft article 23, a watercourse State which was not necessarily a coastal State of the sea area where the common terminus flowed, or even a land-locked State, faced the possibility of having to take part in action to protect or preserve the marine environment.

44. With regard to emergency situations (art. 28), she believed that there should be more detailed rules on assistance to watercourse States affected and that effective contingency planning should be an essential part of any environment-oriented agreement. Her delegation was pleased to note that provisions on international watercourses and installations in time of armed conflict (art. 29) had found a place in the draft articles. The protective clause should, however, also apply to reprisals in time of war.

45. Lastly, she believed that some final provisions remained to be elaborated, including the determination of the number of States parties required for the entry into force of the future convention. Article 311 of the United Nations Convention on the Law of the Sea might provide useful guidance in establishing the relationship between the draft articles and existing international river and watercourse agreements.

46. As for the Commission's other decisions and conclusions (chap. VI), her delegation believed that the Commission had achieved a great success with regard to the codification and progressive development of international law in respect of the law of treaties, and specifically reservations to treaties. It was also glad to note that State succession and its impact on the nationality of natural and legal persons featured among the list of topics before the Commission. She pointed out, however, that the codification and progressive development of the law on State succession, as enshrined in the 1978 Vienna Convention on Succession of States in Respect of Treaties and the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, both of which had been drafted by the Commission, had not met with great success in the contemporary practice of States. Neither Convention was yet in force, even though they regulated the basic questions of State succession including that regarding the unification and dissolution of States. Caution should therefore be shown in developing new projects in that field. It might be argued that the two Conventions did not deal with nationality, which must therefore be dealt with separately. According to the existing practice of States, however, a State's right to grant or deny its nationality to a natural or a juridical person originated in the State's sovereignty over its territory and the individuals therein. The well-established international standards with regard to changes of citizenship and dual citizenship would have to be observed on a non-discriminatory basis.

47. Mr. BERMAN (United Kingdom), before turning to other matters, regretted that standards had slipped with regard to the early distribution of the Commission's report before the start of the General Assembly. It was not reasonable to ask Governments for rapid action at the General Assembly if they had had virtually no time to absorb and reflect on the new material put forward in the report.

48. With regard to the law of the non-navigational uses of international watercourses, he commended the Commission on the simplicity and directness of style in which the draft articles were cast and for the clarity of the commentaries. He reiterated his Government's support for the adoption of a framework convention, the work on which could be completed in the Committee at a future session. Nor did his delegation see that there was any necessary incompatibility between the framework convention approach and model rules or recommendations. Although the United Kingdom had little substantive national interest in the non-navigational uses of international watercourses, it did have such an interest in how a convention would fit into the overall corpus of international law, notably that on the environment. In that context he particularly welcomed the Commission's decision to replace "appreciable" by "significant" in the qualification of transboundary harm. The change was more than just a drafting nicety; it served to situate the articles properly within the emerging system of rules in the environmental area. Noting that draft article 7 - in which, as elsewhere, the change had been made - and its relationship to draft articles 5 and 6 were the heart of the matter, he said that the way found by the Commission to make the two principles - the obligation not to cause significant harm as against equitable and reasonable utilization and participation - independent but not separate seemed an ingenious solution to a most difficult problem.

49. With regard to State responsibility, it was clear from paragraphs 230-346 of the report how divided the Commission was on whether a distinction between "crimes" and "delicts" was possible and whether it was relevant, in terms of the consequences; whether such a thing as an "international crime" existed; whether a State could incur criminal responsibility; and whether criminal responsibility was necessary in draft articles on State responsibility, the object of which was compensation, not punishment. The controversy reinforced the reservations expressed by his delegation and others the previous year; the reference to "crimes" in article 19 should simply be dropped. Not only would maintaining the reference call in question the acceptability of the final version of the draft articles, but it was debatable whether the Commission could afford to spend on one issue of doubtful utility the time implied by 117 paragraphs of the report, if it was to complete the first reading by 1996 as it intended.

50. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, he said that the wisdom of the Commission's decision in 1992 to give priority to measures of prevention in respect of activities carrying a risk of causing transboundary harm was demonstrated by the results achieved by the Commission at its forty-sixth session. The draft provisions in respect of prevention already formed the basis of a coherent and self-contained topic. His delegation was grateful to the Special Rapporteur for the thought he had given to the relationship between State liability and civil liability in his tenth report and it endorsed what it took to be his view that the consequences of a breach by the State of origin of the obligations of prevention laid down in those articles would be the consequences established by the ordinary rules of international law on State responsibility. There was no need to add any special provisions on liability in the same instrument. Moreover, activities which in fact caused harm in their normal operation could be brought within the preventive regime of the articles, provided that the harm was foreseeable. It might be also that the Commission could usefully add some articles on prevention ex post to complete the topic of preventive measures. If a decision on the future of all the articles were to be postponed to await the completion of new work on liability, however, there was a risk that the whole endeavour would be overtaken by new developments elsewhere. The main concern was to ensure that the valuable material produced by the Commission was put to practical use for the benefit of the international community. He therefore encouraged the Commission to bring its work on preventive measures to fruition, to complete the first reading of a complete set of articles on State responsibility and to bear in mind the possibility of the early submission of reports or studies on new topics to the Committee, on the basis of which the General Assembly could determine the direction of future work.

51. Mr. NATHAN (Israel), speaking on the topic of State responsibility, said that it was his delegation's view that criminal acts could indeed be committed by States: the tragic events of the Second World War provided ample illustration of criminal acts committed by States, in respect of which those States had later admitted liability and had provided some financial recompense for the material consequences of the crimes committed. Likewise the obligation imposed upon Iraq to pay compensation to Kuwait and to individuals under the relevant Security Council resolutions following its invasion of that country in

1991 had been intended, not to punish the State that had committed the crimes, but to induce it to make financial amends for the damage caused. Criminal acts were in fact committed by physical persons; but when those acts were committed for the purposes of the State, on its behalf and under its authority, the acts were imputed to the State, which became responsible for them in the same manner in which, under municipal law, a corporation became responsible for criminal acts committed by its officers and could be punished for them by the imposition of financial penalties.

52. While reserving its position on the formulations contained in article 19 of part one of the draft articles, his delegation felt that State responsibility might have its origin in liability arising out of criminal acts and in liability arising out of wrongful acts that were not of a criminal nature. To that extent it accepted the crime/delict distinction that lay at the root of the provisions of article 19, a distinction which in the main was based on the effects of the wrongful acts or omissions on the international community at large and on their particular gravity. His delegation concurred with the view that, for the purposes of the draft articles, the question was not one of criminal or civil responsibility as such, but of State responsibility that arose out of criminal or delictual acts. Of course, owing to the entirely different character of a criminal act and a delictual act, the consequences arising out of those acts would also be entirely different.

53. His delegation wished to make some general comments on the principles set forth in articles 11 to 14, currently before the Commission. Countermeasures were generally recognized as a reflection of the imperfect structure of international society, which had not yet succeeded in establishing an effective centralized system of law enforcement. The question whether countermeasures had a place in the law of State responsibility was a highly complex one. It could be argued that to uphold the legitimacy of countermeasures might seriously affect the rule of law, give rise to abuse, and enable the more powerful States, which were themselves very often the wrong-doing States, to gain an undue advantage over weaker States. While those were legitimate concerns, it should not be overlooked that in certain extreme cases, States might have no alternative but to resort to countermeasures, provided that safeguards existed to prevent the abuse of the right in question, the exercise of which should in any case be conditional upon compliance with such safeguards.

54. Without wishing to engage in a premature discussion of the provisions of the relevant articles, his delegation submitted that there should be no resort to countermeasures until efforts to arrive at an amicable settlement through direct negotiations between the parties had failed; that any countermeasures taken by the injured State must be in proportion to the gravity of the wrongful acts that had given rise to them; and that countermeasures conflicting with the purposes and principles of the Charter and with the general principles of international law should not be admissible.

55. Turning to the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law (A/49/10, para. 380), he said that, while reserving its position until provisions concerning such matters as international State liability, the

liability of the operator and recourse against third parties had been drafted, his delegation considered that the object of the draft articles was to strike a balance between the sovereign right of the State of origin to use, develop and exploit its natural resources and its obligation to exercise that right in such a manner as not to cause significant harm to other States. With regard to article 11, on prior authorization, consideration should be given to a provision for withdrawal and renewal of the authorization. Article 12 was incomplete in that it did not deal with the results of the assessment and the considerations that must guide the competent authorities of the State of origin following the results of the assessment.

56. Article 13 did not spell out who was to be liable for any harm caused by the unauthorized activity. Furthermore, the operator should be required to cease the activity involving the risk and seek the necessary authorization, pending which the operator, not the State, should be liable, unless the State had failed to provide in its legislation for the need to obtain prior authorization, or had failed in its duty to exercise due diligence to ensure that such authorization was obtained. Pending authorization, such activities should not be carried out.

57. In his delegation's view, article 14 should properly be the first article in chapter II, as it established the basis for the obligations of the State of origin. Furthermore, measures taken after the occurrence of the accident should not be dealt with in the context of prevention, but in the context of remedial action. States should see to it that the relevant measures were not only adopted but also enforced. On article 16 bis, he said that, although the subject of information to the public might be one of domestic concern, the information to be provided was to be viewed as of international concern, and vital interests of the population, affecting its basic rights, were in any case involved.

58. Article 18, on consultations on preventive measures, set forth minimum provisions needed to ensure the prevention of transboundary harm.

59. His delegation proposed that the words "referred to in article 1" should be added after the word "activity" in lines 1 and 3 of paragraph 1 of article 19 - a formulation that had been adopted in paragraph 2 of that article. Alternatively, a definition of the term "activity" might be included in article 1. Furthermore, it was not clear what would happen if a difference of opinion arose as to whether or not the activities in question were covered by article 1. As for paragraph 2 of article 19, it was reasonable that the State which had denied the existence of the risk should bear an equitable share of the cost of the assessment. On the other hand, as was pointed out in paragraph (8) of the commentary to article 19, a situation might be envisaged where the State of origin might have honestly believed that the activity posed no risk of causing significant transboundary harm. On article 20, he said that paragraphs (a) and (c) of that article overlapped, and could perhaps be merged.

60. In his delegation's view, the instrument eventually to be adopted need not necessarily take the form of a convention. As the activities in question would mainly, if not exclusively, affect neighbouring States, the drawing up of

guidelines to form the framework for regional arrangements should be considered.

61. Mr. KOTZEV (Bulgaria) noted the Commission's discussion of the question of the consequences of acts characterized as crimes under article 19 of part one of the draft articles on State responsibility had been fraught with controversy. His delegation believed that to draw a distinction between infringements of international public order and internationally wrongful acts was the right approach, and that the Commission should elaborate two regimes of legal consequences, one for delicts and another for violations of erga omnes obligations. It was confident that, by adopting a more pragmatic and flexible approach, the Commission would be able to produce a well-balanced consensus text acceptable to a broad section of the international community.

62. On the question of countermeasures, his delegation reserved its right to present its comments when further action on that question had been taken by the Commission. Meanwhile, it wished to state at the outset, first, that countermeasures should be applied with great caution and restraint; and secondly, that, as a rule, countermeasures should not have a punitive character.

63. Paragraph 1 of article 11 accurately reflected the essential aims of countermeasures, namely: to achieve cessation of the internationally wrongful act; and to induce the State which had committed the internationally wrongful act to resolve the dispute with the injured State.

64. Article 13 was of paramount importance, since it effectively established parameters for the lawfulness of countermeasures. His delegation considered that the text of that article should also contain a provision requiring countermeasures to be proportional in type to the internationally wrongful act. In other words, the obligation not complied with by the injured State must, wherever possible, be the same obligation, or the same type of obligation, as that breached by the State which had committed the internationally wrongful act.

65. Consideration of article 13 should be systematically linked with that of article 14, since resort to the countermeasures listed in article 14 would in practice constitute resort to countermeasures out of proportion to the initial offence. Two principles should be observed in formulating article 14: first, it should contain an exhaustive enumeration of prohibited countermeasures; secondly, it should explicitly state that, in resorting to countermeasures, a State must not commit acts characterized as crimes under article 19 of part one of the draft articles.

66. His delegation shared the view that countermeasures should be permitted only when all means of peaceful settlement had been exhausted. However, provision could be made for some exceptions, enabling the injured State to take provisional countermeasures in order to limit or reduce the harm before initiating procedures for the peaceful settlement of disputes.

67. Turning to the topic of international liability, he said that the draft articles adopted by the Commission at its forty-sixth session were well balanced and well structured, and properly reflected such important issues as the determination of types of activities involving a risk of causing significant

transboundary harm, the content of the "due diligence" obligations and the comprehensive concept of prevention, comprising both prevention ex ante and prevention ex post. His delegation shared the view that a differentiated approach would be required for those two aspects of prevention. The proposals made by the Special Rapporteur in his tenth report constituted an excellent basis for the future work of the Commission on that topic. He hoped that the Commission would be able to draft a comprehensive set of articles in respect of activities involving a risk of transboundary harm at its next session. However, the scope of the topic should not be confined to the prevention of risk activities; the Commission should also develop the concept of State liability, taken to mean a general obligation of reparation for harm caused; and should elaborate and possibly adopt a set of draft articles on that issue during the term of office of its current members.

68. The progress achieved by the Commission at its forty-sixth session was due in large part to improvements in its methods of work. The allocation of more time to the Drafting Committee and the establishment of various working groups had proved very positive moves. His delegation hoped that the Commission would make further efforts to revise its methods of work, in order to complete its work programme during its present members' term of office.

69. Mr. VILLAGRAN KRAMER (Guatemala) said that in considering the distinction between international crimes and delicts, the Commission had endeavoured to determine whether the two offences gave rise to the same type of international liability. In the 1970s, when article 19 of part one of the draft articles had been adopted, members of the Commission had indicated their concern with establishing guidelines for distinguishing between crimes and delicts. His delegation had stated at the time, and continued to believe, that the debate in the Commission was disorienting. It was clear from the Commission's consideration of the draft Code of Crimes against the Peace and Security of Mankind that there were some international crimes which the international community believed should be punished in some fashion. It was therefore difficult to envisage the concept of an international crime disappearing from the provisions on State responsibility, with sole emphasis being given to delicts. The distinction between crimes and delicts should not be viewed only in terms of the seriousness of the violation of customary or treaty obligations involved; it should be borne in mind that not only the victim State but the international community as a whole was injured by such acts.

70. It must be recognized that there was no international body which could determine whether a delict or a crime had been committed. The current state of international law explained why regimes of countermeasures were necessary in order to compel a State which caused damage to other States to make reparation.

71. The work accomplished by the Commission was sufficient to enable it to complete the draft by 1996. His delegation, like that of Japan, urged the Commission to complete parts two and three of the draft articles on State responsibility before the expiry of the mandate of its current members.

72. With regard to countermeasures, while the Commission had not produced draft articles on the subject, it was reasonable to expect that there would be a

difference between countermeasures applying to delicts and those applying to crimes. For example, in respect of reparation and restitution in full, an illegal occupation of a territory would involve not only the return of that territory, but other obligations and responsibilities as well.

73. Turning to the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law (A/49/10, chap. V), he said that States themselves were experimenting with ways of dealing with situations arising out of acts not prohibited by international law, as shown by the texts produced by the Council of Europe and the European Union. The Commission's work was based on the well-established principle of sic utere tuo ut alienum non laedas (using one's own property so as not to injure the property of another) in international law. However, the Commission would need to determine what type of harm it wished to prevent. Progress was also being made in the area of prevention; States were prepared to accept provisions governing their conduct, not just the consequences of acts already performed. The Commission believed that it was important for States to secure prior authorization for acts liable to cause transboundary harm. In view of the world-wide debate over deregulation, the Commission might be treading on dangerous ground. While his delegation would view sympathetically any language which might resolve the issue of transboundary harm, it was unclear what the reaction of the private sector might be in countries with a capitalist economy.

74. The model followed by the Commission, that of basing responsibility on fault, might detract from the theory of responsibility based on risk. His delegation urged those States which were members of the Group of 77 to give consideration to ways of strengthening and preserving the risk model in connection with acts not prohibited by international law.

75. Mr. YU (Republic of Korea), speaking on the topic of State responsibility, said that the distinction between crimes and delicts reflected a qualitative difference between ordinary delicts and basic infringements of the international public order. The concept of crime was rooted in positive law and in the realities of international life, which were generally manifested in the practice of States and the rulings of international tribunals. Egregious breaches of international law, such as aggression, genocide, apartheid or the infringement of basic human rights, were distinct from ordinary delicts and should therefore be treated separately.

76. On the issue of State responsibility for crimes, notwithstanding some technical difficulties, a concept equivalent to mens rea could be envisaged in the case of acts attributable to States. Recognition of the criminal responsibility of a legal person under certain conditions and circumstances was evidenced by recent developments in some national legal systems. The Commission should therefore examine the possible consequences of the determination of a State crime at both the substantive and instrumental levels and establish a special regime for State crimes under its mandate to maintain a balance between the codification of international law and its progressive development.

77. With respect to the language of article 19, the current wording, though relatively satisfactory, was subject to modifications on second reading. His

delegation supported the use of the term "crimes", which stressed the exceptional seriousness of the breach concerned and might have a deterrent effect on the conduct of States.

78. The question of who would be responsible for determining that a crime had been committed and for implementing the applicable punitive measures was of fundamental importance in instituting a regime of international responsibility for crimes. At the theoretical level, it was more logical for an international judicial body which was impartial, independent and representative of the international community to make such a determination. In reality, however, owing to the current organizational structure of the international community and its lack of compulsory jurisdiction, there was no alternative but to assign that task to individual States, including injured States. His delegation did not share the view that various United Nations organs, such as the Security Council and the General Assembly, would be competent to deal with the international crimes of States. Given their inherently political nature and the need for numerous institutional revisions, none of those organs could serve as a valid legal instrument.

79. At the same time, his delegation strongly objected to the notion of leaving room for the unilateral initiatives of States or groups of States to determine the existence of State crime and the appropriate reaction. Even though the international community was unlikely to have proper mechanisms at its disposal in the near future, the Commission should continue to seek ways of obtaining an adequately representative organ with an effective judicial verification system for determining the legitimacy of the characterization of the crime and reaction.

80. His delegation shared in part the concerns expressed by the Commission that the recognition of the criminal responsibility of a State might cast an undeservedly dark shadow over the entire population of that State and result in collective punishment. Indeed, punitive measures taken against the lawbreaking State could easily affect innocent people, even those who had been opposed to the crime. Any penalties which might have particularly severe effects on the people as a whole should therefore be avoided. Sanctions carried out against the State should be permissible only if implemented in accordance with strict procedures and with due consideration for the rights of the innocent. Finally, his delegation urged the Commission to identify notable differences in the consequences of an international crime and an ordinary delict, bearing in mind that progress in that field might promote the rule of law in international relations and uphold common international interests.

81. Mr. CHATURVEDI (India), Vice-Chairman, took the Chair.

82. Ms. LINEHAN (Australia), referring to chapter IV of document A/49/10, said that the debate over the notion of criminal behaviour within the context of State responsibility, and the distinction between an international delict and an international crime, clearly raised basic questions about how relations between States should be regulated. Moreover, difficult questions also rose in the context of considering the consequences of an international crime - an issue which had not yet been fully addressed by the Commission. Her delegation was of

the view that the development of the concept of an international crime must be given substantial consideration by States before further work in that area was done by the Commission.

83. On the other hand, her delegation believed that the Commission's work relating to the procedures for the adoption of countermeasures had the potential to promote the peaceful settlement of disputes. Accordingly, it would be more fruitful for the Commission to focus on finalizing a text on that subject which could attract wide support and lead to the drafting of a convention within the current term of the Commission's members.

84. Australia noted the progress made towards completion of the Commission's work on international liability for injurious consequences arising out of acts not prohibited by international law (A/49/10, chap. V). However, as the most important part of that topic remained the question of liability, her delegation noted with satisfaction that the tenth report of the Special Rapporteur (A/CN.4/459) dealt with that issue and made concrete proposals in that regard.

85. The issue of liability was closely linked to the substantive obligations imposed on States, including, in particular, article 14 of the draft articles. Moreover, in the consideration of that issue, the draft articles on the non-navigational uses of international watercourses (A/49/10, chap. III), particularly article 7 thereof, should not be ignored.

86. Australia had consistently argued that Principle 21 of the Stockholm Declaration reflected a customary-law obligation on the part of States to take action to ensure that their activities did not cause environmental damage beyond their territory. That obligation was not restricted by such phrases as "take appropriate measures" or "take practical measures".

87. However, the Commission argued that the obligation to prevent transboundary harm was not in fact an obligation of result - in other words, an obligation to prevent harm - but merely an obligation to attempt to prevent harm in accordance with a standard of due diligence. While that might generally be the case in relation to measures of prevention, due diligence might not always be the relevant standard. In the case of treaty regimes, it was always necessary to examine the actual content of the obligations assumed by States, which were sometimes obligations of result.

88. While draft article 14 dealt with the need to take appropriate measures to prevent the risk of transboundary harm, the situation when harm actually occurred was unclear. It was not sufficient to provide that while action could be taken against a private operator, the State of that operator was liable only if a breach of a due diligence obligation had occurred. That was a situation in which there was a wrongful act by a State contrary to an explicit obligation for which the consequences of a breach were clearly established by international law, as reflected in draft article A.

89. In the case of a lawful act by a private operator which caused transboundary harm, private-law remedies against the private operator were insufficient. That was the issue which the Commission would need to consider at

its next session. The Special Rapporteur had provided for alternative drafts dealing with State liability in that situation - versions A and B of article 21.

90. Australia did not accept the Special Rapporteur's conclusion in document A/CN.4/459 that it would be simplest not to impose any form of strict liability on the State. Simplicity was not the relevant criterion; justice for those injured was the proper object of a liability regime.

91. The Special Rapporteur offered four options for dealing with State liability. At minimum, her country considered that strict liability should be imposed on the State subsidiary to the liability of the operator or as residual liability. It was unacceptable in the case of an activity which caused transboundary harm that the innocent victims in one State could be left without compensation because a private operator in the State in which the harm originated did not have adequate financial resources to meet the costs of compensation for the harm. It was for that reason that Australia considered residual State liability to be essential and strongly supported alternative A.

92. In that connection, Australia noted with disappointment and concern the significant weakening of article 7 of the draft articles on the non-navigational uses of international watercourses (A/49/10, chap. III). Apart from emphasizing the limited nature of the due diligence obligation to utilize watercourses in such a way as not to cause significant harm, the articles provided that if harm occurred, there was only an obligation to consult.

93. Whatever the justification for that limited obligation in the case of watercourses, the same standard was certainly not applicable to activities which had a known risk of causing significant transboundary harm through their physical consequences. The Commission should bear that in mind in its future work on injurious consequences and in determining the legal consequences for States when prevention did not work and harm actually occurred.

94. Turning to chapter V of document A/49/10, she welcomed the definition in draft article 2 provisionally adopted by the Commission of the expression "risk of causing significant transboundary harm". Australia believed it was important that, as indicated in the commentary, "significant" should be understood as more than detectable but not necessarily substantial or serious.

95. Australia also welcomed the inclusion of draft articles 12, 13, 15, 18, 19 and 20. Article 18, paragraph 3, provided that, if consultations failed, a State none the less had an obligation to take into account the interests of States likely to be affected and could proceed with the activity, but at its own risk. That wording made it clear that a State could not ignore known concerns and possible consequences and claim, when damage occurred, that it had done all that due diligence required.

96. Australia endorsed the Commission's recommendation that the draft articles should take the form of a convention. A legal instrument would establish an institutional framework for determining when it was necessary to cooperate at an international level and what regional watercourse management regimes should do.

97. While the principles adopted in the draft articles were generally applicable to the varied range of watercourses which might be affected and to confined transboundary groundwaters, keeping the draft articles focused on international watercourses would avoid confusion. It was therefore appropriate to treat confined transboundary groundwaters separately.

98. Her delegation supported the convening of a diplomatic conference to draw up a convention based on the draft articles in preference to submission of the text directly to the General Assembly for adoption. Australia also endorsed the Commission's recommendation that the proposed resolution on transboundary groundwaters should be adopted.

99. Her delegation believed that the principles of international law relating to reservations required further clarification. It also believed that the future work of the Commission on the topic of State succession and its impact on the nationality of natural and legal persons could be of great value to States.

100. Mr. KALITA (India), speaking on the law of the non-navigational uses of international watercourses, said that, after two decades of work by the Commission, there were several options as to the future of course of action. The first was for the United Nations to convene a diplomatic conference to adopt the draft articles finalized by the Commission. Secondly, the draft articles could be reviewed by a working group of the Sixth Committee. The third option was for the General Assembly to accept the draft articles by a resolution and then open them for signature by States parties. India preferred the third course of action.

101. One of the major issues arising from the draft articles was the definition of the scope of the proposed convention. Over the years, there had been considerable debate within the Commission on whether the draft articles should deal only with surface waters or, in addition, with groundwaters both related and unrelated to the surface waters and other types of bodies of water connected to the watercourse. It had finally been decided that, while the question of groundwaters unrelated to the surface waters of the watercourse required further study, some of the general principles laid down in the draft articles could usefully be applied by States in regulating and sharing among themselves even such bodies of unregulated groundwaters.

102. The question of when and under what circumstances a State was obliged to consult and, if necessary, negotiate with other States in respect of the utilization of that portion of the watercourse that lay within its territory had also given rise to extensive discussion. In practice, that issue often created difficulties among States.

103. The definition of the relationship between watercourse States adopted in article 2 did not explain the concept of an "international watercourse" except to state that "a 'watercourse' means a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus". The use of the word "system" was intended, however, to cover a number of different components of the hydrological system through which water flowed, including rivers, lakes, aquifers, glaciers,

reservoirs and canals. So long as those components were interrelated, they formed part of the watercourse by virtue of being a unitary whole. The definition in article 2 (b) also referred to "flowing into a common terminus" as another criterion for determining an international watercourse. Again, that criterion was essentially included to delimit the scope of the draft articles and thus to limit the legal relationship between two or more watercourse States. That criterion had been slightly modified on second reading with the addition of the word "normally" in response to the submission that some rivers divided themselves into surface and groundwaters before reaching the sea and therefore might not be regarded as having met the criterion of "flowing into a common terminus". By including the word "normally", the Commission had made it clear that the burden of proof lay upon States which wanted to apply the current draft articles to regulate rivers not flowing into a common terminus on the ground that there existed a physical relationship and a unitary whole for the major part of the length of the watercourse.

104. Another important issue was the relationship between draft articles 5 and 7. In article 5, the Commission sought to reconcile the concept of equitable and reasonable utilization and participation with the obligation not to cause significant harm noted under article 7. The Commission proposed that States must exercise due diligence to utilize a watercourse in such a way as not to cause significant harm. However, if significant harm was none the less caused to another State, in the absence of an agreement, the States concerned should consult with each other over the extent to which such utilization was equitable and reasonable.

105. The Commission’s approach was based on three conclusions. First, that article 5 alone did not provide sufficient guidance for States in cases where harm was a factor; secondly, that States must exercise due diligence to utilize a watercourse in such a way as not to cause significant harm; and thirdly, that the fact that an activity involved significant harm would not of itself necessarily constitute a basis for barring it. In other words, in certain circumstances, "equitable and reasonable utilization" of an international watercourse might still involve significant harm to another watercourse State. In such instances, the principle of equitable and reasonable utilization remained the guiding criterion in balancing the interests at stake. For those who preferred not to subordinate the principle of equitable and reasonable use to the concept of avoidance of adverse harm, the compromise achieved was less than satisfactory, but could be accepted in the interest of consensus.

106. With regard to the principle of non-discrimination, article 32 provided that, unless the watercourse States concerned had agreed otherwise, a watercourse State was obliged not to discriminate on the basis of nationality or residence or place where the injury had occurred, in granting to a person access to judicial procedures, or a right to claim compensation or other relief in respect of significant harm caused by activities carried on under its jurisdiction. A view had been strongly advocated that such a principle of non-discrimination in favour of foreign nationals had no place in the proposed convention, even if there was some justification for redressing injury to foreign nationals, since the draft articles essentially concerned the relationship between co-riparian States. Moreover, where planned measures were

involved for the development of a State, any priorities concerning the utilization of its natural resources should be confined to matters of policy and the interests of the nationals of that State.

107. It had been argued in defence of article 32 that it contained nothing but a general provision and that foreign nationals would not be entitled to anything more than what was provided in the law of the State concerned. Such a right of access in favour of foreign nationals would arise only if there was no agreement between the watercourse States concerned on the matter of protection of the interests of persons, natural or juridical, who had suffered or were under a serious threat of suffering significant transboundary harm as a result of activities related to an international watercourse. Despite those clarifications, his delegation was still of the view that article 32 did not have a proper place within the structure of the proposed convention.

108. Turning to the final major issue, namely, the settlement of disputes, article 33 promoted the settlement of disputes keeping in view the choice of means of such settlement and the need for mutual agreement before any one of the options could come into play. The Commission had attempted to insert in the article, however, a rule for a compulsory fact-finding commission comprising three members. That provision reflected the need for a comprehensive and compulsory dispute settlement procedure. Such an arrangement, however, required greater discussion and elaboration, even though the essence was that disputes should be resolved peacefully and by mutual agreement.

109. On the whole, the draft articles were generally acceptable and had accommodated the different perspectives of the States and authorities on the subject. The balance of interests thus achieved could be supported in the interest of consensus. His delegation hoped that no fresh attempt would be made to reopen the delicate balance of interests, since any such effort would involve a long and avoidable process of further contention among States without the prospect of achieving any greater success than that which the Commission had already achieved.

The meeting rose at 1.15 p.m.