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Chairman: Mr. MADEJ (Poland)

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The meeting was called to order at 10.25 a.m.

AGENDA ITEM 137: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SIXTH SESSION (continued) (A/49/10 and A/49/355)

1. Mr. CALERO RODRIGUES (Brazil) said that the International Law Commission had completed its work on the substantive consequences of internationally wrongful acts (cessation of wrongful conduct, reparation and guarantees of non-repetition), adopting four articles. It had not adopted four other articles dealing with the instrumental consequences of such acts (countermeasures), sent to it the previous year, because the corresponding commentaries were not available. The Special Rapporteur had suggested modifications to two of the articles and they had been sent back to the Drafting Committee, which had approved a new version for one, but not the other. Having received the Committee's report, the Commission had provisionally adopted three of the articles, but had deferred action again on the fourth. Since one of the three articles adopted might be revised in the light of what was subsequently decided regarding the fourth, the Commission had decided not to submit the articles adopted to the General Assembly, given that the four articles were intended to be a coherent ensemble dealing with all aspects of countermeasures. He expressed the hope that the Commission would find a satisfactory solution to the issue that had been holding up the adoption of the articles, namely, the conditions to be observed for a State to be entitled to take countermeasures.

2. From a logical standpoint, his delegation found countermeasures distasteful: a State which considered itself injured by what it saw as a wrongful act by another State could, so to speak, take the law into its own hands and apply to that other State measures aimed at forcing it to amend its conduct. Stronger States found it effective in the defence of their rights, but weaker States could not have any reasonable expectation that their countermeasures would have any effect on more powerful States. Moreover, the application of countermeasures was not subject to any external control of the actual existence of a wrongful act. There might be a dispute as to whether a wrongful act was committed, but a settlement of that dispute might take a long time. Meanwhile, the State continued to suffer from the countermeasures; it might eventually receive reparation for the harm caused, but only after a possibly long period of damage which might leave a permanent effect on its economy. If recourse to countermeasures could not be eliminated outright, it was at least indispensable to devise a system to prevent States from taking countermeasures without previous determination by an independent third party that the action was justified. The same should apply to the observance of the conditions and limitations established for countermeasures.

3. Although the Commission had devoted a great deal of attention to the question of the consequences of acts characterized as crimes under article 19 of part one of the draft articles, the problem was far from resolved. He wondered if the Commission should not have been aware on two occasions that it was moving into a quagmire in which it might get bogged down. The first had been when it adopted article 19 of part one, establishing a distinction between "ordinary"

internationally wrongful acts ("delicts") and particularly serious wrongful acts ("crimes"). The second was when, following the logic of part one, it had decided, at the suggestion of the Special Rapporteur, to give full, separate treatment to the consequences of crimes. That decision had exacerbated the problem, since the Commission had found itself facing the task of addressing the consequences of crimes in separate provisions, instead of simply considering what consequences should be attached to crimes in addition to the consequences entailed by any internationally wrongful act, as had been proposed by a former Special Rapporteur, Mr. Willem Riphagen. It was clear from the report how many problems were involved and how many solutions could be reasonably argued. Although the Commission had not formally accepted the suggestion that it should reconsider article 19 without waiting for the second reading, a debate had taken place on whether the article should be deleted or modified, if only to avoid the use of the word "crime". The debate over whether the consequences of crimes should be fully different from those of delicts or whether the concept of reparation could be used in both cases had continued, and the issue of whether reparation could have a punitive character had also been addressed.

4. There had been controversy with regard to the instrumental consequences. It had been pointed out that countermeasures were conceived on a bilateral basis, even for the breach of erga omnes obligations. The question therefore arose as to how to proceed if the obligation breached was aimed at safeguarding the fundamental interests of every State. In principle, it would be up to the community of States to react. If that meant the United Nations, the further question was whether such a reaction was the responsibility of the Security Council, the General Assembly or the International Court of Justice. Such a theoretically correct approach could result in paralysis. The complexity of those and other problems was such that some members of the Commission had suggested that if it really intended to conclude the first reading by the end of the current mandate of its members, it should put aside the consideration of the question of the legal consequences of international crimes and defer it to the second reading, when its deletion or modification might provide a solution. Despite the fact that such a procedure would leave an undesirable gap in the articles, his delegation would reluctantly consider accepting it on practical grounds. He was glad that the Special Rapporteur had said (A/49/10, para. 343) that he had sufficient indications to enable him to work out proposals relating to the consequences of crimes in time for the next session. It was to be hoped that such an optimistic assessment would prove correct.

5. Turning to the question of international liability for injurious consequences arising out of acts not prohibited by international law, he said that the curious numbering of the articles on the matter provisionally adopted by the Commission, reflecting the imprecise indication of the order in which the articles were to be placed, indicated that the Commission was not sure what structure to give to the instrument being prepared. The Commission had had doubts regarding the scope of the topic from the very beginning. On the one hand, it would have been natural to conceive the articles on liability as a counterpart of those on State responsibility. The obligation of States to make reparation for harm caused to other States which had not committed an internationally wrongful act would be recognized on the basis of the principle

sic utere tuo ut alienum non laedas. It had been argued, however, that such an approach found no support in existing practice and that it would represent too progressive a development of international law. Attention had therefore been directed towards measures of prevention; that was not wrong in itself, but it had deflected attention from liability proper.

6. According to a decision taken by the Commission in 1992, it would first consider measures of prevention and only then proceed to remedial measures, which might "include those designed for mitigation of harm, restoration of what was harmed and compensation for harm caused". Moreover, the preventive measures on which the Commission would initially work would be in respect only of activities having a risk of causing transboundary harm, not activities actually causing harm. Only then would the Commission "decide on the next stage of the work". The possibility therefore existed that liability proper, understood as a general obligation for reparation of harm caused, would not be dealt with in the articles. His delegation would find that a very frustrating result. While he had serious reservations with regard to the Commission's approach to the topic, he welcomed the well-balanced, well-structured articles on prevention adopted by the Commission.

7. Mr. YAMADA (Japan) said that since the Commission had only provisionally adopted draft articles on the question of the consequences of acts characterized as crimes under article 19 of part one of the draft articles, reserving the right to review them, he would merely offer two brief observations. First, he reiterated his delegation's concern over the very slow pace of the drafting exercise on the subject of State responsibility. When the Commission discussed the topic, the real issue it had to address was the conflict between reality and the ideal. If the Commission pursued an ideal too far removed from reality, its work could become meaningless since the resulting draft articles might not be accepted by States. On the other hand, if it were guided solely by stark prevailing realities, the progressive development of international law would be impeded. A balance should be found between the two, and the scope of discussions should be limited. It was inappropriate to spend so much time discussing issues not based on State practices, such as the notion of "State crimes".

8. Secondly, even if a serious breach of essential international obligations had consequences different from those arising from other breaches of international obligations, an institutional mechanism should be established that would be acceptable to a large number of States, whereby internationally wrongful acts - which in the future might be called "crimes" - could be identified and defined; responsibility could then be determined and disputes settled.

9. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, great progress had been made, particularly in comparison with the previous year. He felt that draft article 1 - covering activities "which involve a risk of causing significant transboundary harm" - was phrased too abstractly. Although it had the merit of permitting a flexible application of the articles, he was concerned that an

excessive burden might be placed on potential States of origin. It might therefore be worth considering the addition of at least an illustrative list of activities falling within the scope of the draft articles. He was pleased to note that the draft articles provided for obligations relating to prevention in a fairly comprehensive way and in a logical sequence. He also believed that the decision to remove the article concerning the minimization of harm once it had occurred, proposed in the Special Rapporteur's ninth report, was correct.

10. Although time had not permitted the Commission to consider the Special Rapporteur's tenth report (A/CN.4/459), it dealt with interesting and important aspects of the topic of international liability, such as prevention ex post, the relationship between State liability and civil liability, specific issues in the field of civil liability and the question of procedural channels to enforce liability. The report provided an excellent basis for the Commission's future work.

11. Mr. WANG Xuexian (China) said that it would be difficult for the Commission to formulate draft articles on the consequences of State crimes until the concept of State crimes had been defined. His delegation thus welcomed the resumed discussion on article 19 of part one of the draft articles at the Commission's forty-sixth session.

12. Although the question of the criminal responsibility of States formed part of the debate on international law theory, the international community had not established laws concerning State crimes and their consequences. Certain questions had to be answered in international legal instruments, such as whether the concept of State crimes would be recognized in international law, who would have jurisdiction if that concept was recognized and whether such responsibility differed from ordinary internationally wrongful acts. His delegation believed that, given the limited number of principles of international law that were currently universally recognized and the current structure of international relations, it would be difficult to introduce the concept of criminal acts into the topic of State responsibility and to codify a series of laws for that purpose. It thus hoped that the Commission would approach the matter with caution.

13. On the question of jurisdiction in respect of internationally wrongful acts, his delegation believed that there was some merit in the argument that the existing United Nations machinery should be fully utilized to solve the problems faced by the international community, but that the question of whether those organs should be designated to judge internationally wrongful acts nevertheless needed careful study. The General Assembly and Security Council were political organs functioning under the authority of the Charter of the United Nations, not judicial organs mandated to judge breaches of international law by a State and to mete out punishment. Although the International Court of Justice was the main judicial organ of the United Nations, it could not exercise jurisdiction in respect of internationally wrongful acts of a State, because, under the terms of its Statute, the consent of a State constituted the basis for its acceptance of the Court's jurisdiction. Furthermore, the mandates and responsibilities of the General Assembly, the Security Council and the International Court of Justice

were all derived from the Charter. It would not be appropriate to establish new mandates for those organs through the draft articles of a convention on State responsibility.

14. Because of time constraints, the Commission had not discussed the draft articles on countermeasures formulated by the Drafting Committee in part two of the draft articles on State responsibility. However, since the Commission expected Member States to discuss those draft articles at the current session of the General Assembly with a view to providing guidance for the next stage of its work, his delegation wished to make some comments on draft article 12 (Conditions relating to resort to countermeasures), which was one of the more controversial articles.

15. His delegation supported the Drafting Committee's basic approach, namely, that settlement of a dispute by peaceful means should be considered before the victim State resorted to countermeasures. However, in drafting the article, the Drafting Committee had not taken into account various peaceful settlement mechanisms provided for in international law. While including the requirement that a third party must be used in settlement proceedings as a precondition for countermeasures, the Drafting Committee had overlooked the role of negotiation as the most direct and effective means of peaceful settlement. His delegation believed that both means could be the precondition for countermeasures.

16. In addition, China was in favour of allowing for exceptions when preconditions for countermeasures were established, as that would enable the victim State to adopt provisional countermeasures in order to limit and reduce the damage done to it before it initiated and completed procedures for a peaceful settlement of disputes. That should be required in order to protect the interests of the victim State.

17. Mr. CISSE (Senegal) commended the Commission for completing its work on a draft statute for an international criminal court. His delegation was of the view that a permanent international criminal court could offer fuller guarantees of objective, impartial and uniform application of the code of crimes against the peace and security of mankind than would ephemeral, ad hoc jurisdictions. The establishment of an international criminal court should put an end to the current practice of setting up ad hoc tribunals authorized only by Security Council resolutions, as well as avoiding a proliferation of similar institutions or the creation of regional courts.

18. On the question of the relationship of the court to the United Nations, his delegation did not oppose the solution proposed by the Commission, but would have preferred the bolder solution of making the court an organ of the United Nations. The problems posed by that solution did not seem insurmountable, particularly now that there was increasing recognition of the need to revise other aspects of the Charter.

19. Turning to the question of crimes within the jurisdiction of the court (art. 20), he said that genocide naturally fell within the court's jurisdiction under the terms of the Convention on the Prevention and Punishment of the Crime

of Genocide, which provided for genocide to be tried by such international penal tribunal as might have jurisdiction. He noted that aggression, serious violations of the laws and customs applicable in armed conflict and crimes against humanity were also listed in article 20, but were not defined therein, and that it was left to the draft Code of Crimes against the Peace and Security of Mankind to accomplish that extremely complex task.

20. In his delegation's view, the crime of apartheid should be explicitly mentioned in article 20, and not relegated to an annex. The fact that apartheid had been eliminated in one African State did not mean that there was no risk of its re-emerging elsewhere. Illicit traffic in narcotic drugs should also have been explicitly referred to in article 20: it was too often forgotten that it was in connection with that crime that the Commission had been entrusted with the task of drafting a statute for an international criminal court.

21. In spite of those reservations, his delegation accepted the definition of the court's jurisdiction ratione materiae contained in article 20. It was, however, unable fully to accept the preconditions to the exercise of jurisdiction set forth in article 21. That provision established a twofold precondition: first, the State bringing the complaint must be a party to the statute; and secondly, that State must have accepted the court's jurisdiction in respect of the crime under consideration. That twofold requirement created needless obstacles to access to the court. In his delegation's view, accession by a State to the statute should automatically imply acceptance of the court's jurisdiction in respect of the crimes listed in article 20, without the need for any additional formal acceptance thereof. International criminal law could not be entirely subordinate to the consent of States: it was also subject to the requirements of international public order. That concept of public order should determine the differences between the statute of an international criminal court and the Statute of the International Court of Justice. The latter Court dealt chiefly with disputes between States in which international public order was not necessarily an issue. Consequently, any attempt to model the statute of an international criminal court on the Statute of the International Court of Justice would be both futile and dangerous. The small, weak States needed an international criminal court, to the mandatory jurisdiction of which all States, whether small or large, would be subject.

22. On the question of access to the court, under the draft statute only States parties could refer a case to the court. The question whether a State that was not a party to the statute should also have access to the court, subject to sharing the costs of the proceedings, called for further consideration. All States should be encouraged to have recourse to an international jurisdiction the role of which would be to ensure peace through application of the rule of law.

23. International organizations, particularly those active in the defence of human rights and humanitarian law, should also be able to bring a complaint before the court where grave and deliberate violations were involved. The Security Council's powers in that regard should also be considered, for it, too, was an international organization. Opinion within the Commission was divided

on that issue. Some feared abuses by the Security Council, and considered that, as a political organ, it should be kept apart from the functioning of a judicial organ. Others thought that, as the guardian of international public order, it would be failing in its mission if it did not refer cases to the court in the situations provided for in Chapter VII of the Charter. That did not, of course, mean that the Council should intervene in the court's internal functioning or exercise any form of supervision over it. His delegation believed that the Security Council should be able to refer to the court any situation that constituted a threat to international peace and security. It was for States to exercise vigilance and to ensure that the Council did not exceed its powers.

24. The international community was in increasingly urgent need of an international criminal court. The Commission had done excellent work on the question, and had completed that work punctually. It was now for the international community to sanction that work by convening a diplomatic conference on the question.

25. Mr. GONZALEZ FELIX (Mexico) said, with regard to State responsibility, that inclusion of the concept of countermeasures and the distinction between crimes and delicts would delay completion of the work on that topic. The distinction between crimes and delicts as embodied in article 19 of part one of the draft articles had given rise to much debate in the Commission and the Sixth Committee; yet the need for such a distinction had still not been clearly established. His delegation believed that the distinction raised a series of questions which could not be satisfactorily answered, given the current state of international relations. One of the core aspects of international liability was the need for a link between the injured party and the party engaging in unlawful conduct. It was that link that gave a State the right to require reparation from another State. The draft articles must contain elements making it possible clearly to identify the party entitled to initiate an action for reparation.

26. Mexico had repeatedly expressed its rejection of recourse to countermeasures. However carefully regulated, the legitimization of reprisals in response to an unlawful act would tend to exacerbate disputes between States. His delegation hoped that the Commission would give further thought to the possible consequences of such measures and would eliminate them from the draft articles.

27. Turning to the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law, he said that the increasing number of activities involving the utilization of hazardous materials or substances that might have a transboundary impact conferred particular importance on the draft articles. Mechanisms must be established to prevent and deal with the possible consequences of utilization of hazardous materials. Mexico shared the view that States engaging in hazardous activities must not only take preventive measures, but must also ensure that operators under their jurisdiction were complying with those measures, failing which they must assume subsidiary liability.

28. One fundamental part of the draft articles dealt with the field of prevention. His delegation believed that it was enough for an activity to involve a risk of causing transboundary harm for it to be included in the scope of application of the draft articles. States that might be affected by hazardous activities carried out in the territory of another State must necessarily be considered within the prevention mechanism. In that regard, notification and exchange of information and prior consultation became indispensable elements of the draft articles. It was entirely reasonable that a State that might be affected by a hazardous activity should be informed of that possibility, and should be able, not only to put forward its point of view, but also to adopt preventive measures to deal with possible effects in its territory. His delegation supported the approach adopted by the Special Rapporteur in that regard, and hoped that the scope of the provisions could be made as precise as possible.

29. Mr. PASTOR RIDRUEJO (Spain) said that there were now two bodies of opinion in the Commission on the subject of the consequences of acts characterized as international crimes. According to one view the distinction made in draft article 19 between international crimes and delicts was not only conceptually accurate, but was rooted in positive international law and in the realities of international life; in short, it was lex lata. According to the other view, such a distinction lacked coherence and a basis in positive international law and was, at best, lege ferenda.

30. That basic discrepancy with regard to the concept of international crimes had determined the respective approaches to their consequences. For those who defended the concept, the commission of an international crime would give rise to a general right to submit claims - the so-called actio popularis principle - and would be accompanied by the imposition of other penalties. However, for those who contested the concept, there would logically be no difference between the consequences of the commission of a delict and of an international crime.

31. In the light of current State practice, it could be said that there were two major categories of violations of international law, depending upon the significance of the norm violated and the seriousness of the violation. At the political level, it was clear that neither public opinion nor States themselves attached the same importance to minor violations of international law - for example, the occasional breach of a trade agreement - as to major violations - for example, a situation of massive and systematic violations of the most basic human rights. In the first case, such a violation elicited concern only in the affected State while, in the second case, the violation caused alarm throughout the international community, leading to a collective response.

32. His delegation believed that international law should be consistent with State practice in terms of distinguishing between the two types of violations: serious violations (referred to as "crimes" in draft article 19) and lesser violations (referred to in that article as "delicts"). That distinction should also extend to the consequences of the commission of either act; in other words, the commission of a crime should give rise to the obligation to make reparation

and to the imposition of other penalties, while the commission of a delict should entail simply the obligation to make reparation.

33. In view of the seriousness of the consequences entailed by an international crime, the question arose of who determined that a crime had been committed. Obviously, such a determination could not be left to the unilateral discretion of States, but must be made in an institutionalized way. That was where the insufficient institutionalization of the international community became evident. Within the United Nations, only one body, the Security Council, had the power to determine, under Chapter VII of the Charter, that such crimes as threats to the peace, breaches of the peace and acts of aggression had been committed, and to impose the relevant penalties. Furthermore, the Security Council was not an independent judicial body, but an intergovernmental body which basically exercised police functions. A jurisdictional body, such as the International Court of Justice, would be in a better position to determine independently that an international crime had been committed and to impose the corresponding sanctions. However, in the last analysis, the Court's competence was voluntary, and not only was there significant reluctance to accept its jurisdiction, especially in respect of the most serious disputes, but even those States which had made unilateral declarations accepting the Court's jurisdiction had done so with major reservations.

34. Accordingly, his delegation believed that while the concept of an international crime was well grounded in the legislative sphere, the application of the concept in the institutional sphere ran up against difficulties that could only be overcome through the relevant reforms of the Charter of the Statute of the International Court of Justice. Unfortunately, the international community did not yet appear to be ready for such reforms. Nevertheless, his delegation supported the retention in legislative texts of the concept of an international crime, as it would promote the progressive reform, development and strengthening of international institutions.

35. Turning to the topic of international liability for injurious consequences arising out of acts not prohibited by international law (A/49/10, chap. V), he noted with satisfaction that the Commission had provisionally adopted several articles on prevention of transboundary harm. That was commendable in the light of the conceptual difficulties involved in the consideration of the topic, especially the distinction between primary and secondary rules. In that connection, his delegation remained convinced that the acts envisaged in the articles provisionally adopted were not prohibited by primary rules of international law; accordingly, his delegation was not satisfied with either the general wording of the topic or article 1 entitled "Scope of the present articles", because it specifically referred to "activities not prohibited by international law". Nor did his delegation endorse the use of the term "sensible" in the Spanish version of article 1 and the following articles, as it believed that the appropriate term in Spanish should be "significativo".

36. Mr. HALFF (Netherlands), referring to chapter IV of document A/49/10, said that his delegation supported the distinction between "crimes" and "delicts". That distinction reflected the difference between basic infringements of

international public order and ordinary delicts which did not threaten the foundation of international society, namely, the coexistence of sovereign States.

37. There were no convincing reasons why, as a matter of principle, a State could not incur criminal responsibility; accordingly, the maxim societas delinquere non potest, according to which a State, including its people as a whole, could not be a subject of criminal law, did not apply. In his country, legal entities could be held criminally responsible, particularly for certain economic or financial offences, even though technically such entities could not have mens rea. There was no reason why particularly serious acts committed by individuals using the territory and resources of a State could not, under certain conditions, be imputed to the State, thus leading to that State's criminal liability. Indeed, the concept of State responsibility for ordinary delicts was also based on the concept of imputing to the State acts of individuals or other entities operating as State organs.

38. While his country was aware that the need to impose criminal responsibility on States had been questioned on the ground that the same objective could be achieved through the concept of jus cogens or erga omnes obligations, the Netherlands believed that the concept of an international crime and that of a breach of jus cogens or erga omnes obligations need not always correspond exactly. While an international crime would always involve a breach of a jus cogens or erga omnes obligation, a breach of such an obligation would not always constitute an international crime.

39. His delegation believed that article 19, as currently drafted, was satisfactory and should be retained, subject to possible improvements based on developments in State practice or in the light of the consequences to be attached to the commission of an international crime.

40. With regard to the important question of who determined that an international crime had been committed, the Netherlands believed that to leave such a determination to the discretion of individual States was far from ideal and that ultimate determination should be reserved for an impartial and independent international judicial body, such as the International Court of Justice, either by providing for compulsory jurisdiction or through acceptance of jurisdiction in an additional protocol.

41. With regard to aggression (art. 19, para. 3), nothing could prevent the Security Council from determining, in accordance with the powers conferred on it by the Charter, that an act of aggression had occurred, provided that the act constituted aggression under the terms of Article 39 of the Charter. The same would apply to the categories of internationally wrongful acts referred to in article 19, paragraphs 3 (b) to 3 (d), provided that they entailed a breach of the peace within the meaning of Article 39 of the Charter. However, it should be stressed in that connection that in determining the existence of such acts, the Security Council was endowed with political powers in the exercise of its primary responsibility of maintaining international peace and security.

42. With regard to the question of who could legitimately react, either by claiming compliance with substantive obligations or by resorting to countermeasures or sanctions, the Netherlands believed that such a reaction should ideally emanate from an international organ capable of interpreting and implementing the will of the international community as a whole. There, too, the special political and policing role of the Security Council, in terms of its power under Chapter VII of the Charter to impose sanctions in order to maintain international peace and security, should be recognized.

43. With regard to the substantive consequences of the commission of an international crime, his country was of the view that such consequences should be qualitatively different from those arising from the commission of delicts from the standpoint of reparation and satisfaction. Therefore, a restriction normally applying to restitution in kind and relating to the excessive onerousness of such restitution need not apply, draft article 7 (c) notwithstanding. Moreover, satisfaction could include not only heavy "punitive damages", but also measures affecting the dignity of the State which committed the crime.

44. With regard to countermeasures, a distinction should be made between the consequences of crimes and of delicts. His delegation would await further proposals on that subject from the Special Rapporteur. Such proposals should pay due attention to the impact of the exacerbated countermeasures on the population of the State which committed a crime. A general obligation on the part of all States not to recognize as valid in law any situation from which the law-breaking State derived advantage as a result of the crime, or a general obligation not to help the law-breaking State in any way to maintain the advantageous situation created by the crime, would appear to be an acceptable countermeasure.

45. However, it should be clear that resort to the use of force should remain prohibited, except in the case of measures taken in individual or collective self-defence or those adopted by the Security Council under Chapter VII of the Charter in situations involving the crime of aggression. Even in response to a crime, the use of force should remain the exclusive prerogative of the organized international community and particularly of the Security Council, prior authorization from which should remain a prerequisite for the use of force in cases other than aggression, including genocide or humanitarian intervention.

46. Moreover, in adopting countermeasures in response to crimes, injured States should remain bound by the principle of proportionality.

47. Mr. LEHMANN (Denmark), speaking on behalf of the Nordic countries and referring to chapter IV of document A/49/10, said that the Nordic countries still held the view that the distinction between crimes and delicts was relevant. For example, the crime of genocide, or a crime against peace, such as aggression, was, of course, committed by individuals and not by legal entities such as States. However, crimes such as genocide were directly or indirectly imputable to a State since they were normally carried out by State organs, implying a sort of "system criminality". In such situations, responsibility

should not be limited to the individual acting on behalf of a State. The State itself must also bear a share of responsibility, whether through punitive damages or measures affecting the domestic jurisdiction and dignity of a State. That point of view was supported by the wording of article 5 of the Draft Code of Crimes against the Peace and Security of Mankind, which provided that prosecution of an individual for a crime against the peace and security of mankind did not relieve a State of any responsibility under international law for an act or omission attributable to it.

48. If the term "crime" as applied to a State was too controversial, it might be preferable to use the terminology employed in the 1949 Geneva Conventions on the protection of victims of war, which referred to "grave breaches" of the Conventions. Accordingly, a distinction would be made between "breaches" and "grave breaches", using as a criterion the degree of gravity of the wrongful act.

49. The question of who determined that a crime had been committed did not appear to be different from the same question in connection with ordinary delicts or breaches. Where no compulsory dispute settlement procedure was in force between the parties to a conflict involving the question of State responsibility and its implementation, the alternative was to leave it to the States involved to determine the character and consequences of the wrongful act alleged to have been committed. While that was not a very satisfactory solution, it was a well-known problem affecting most rules of international law given the current organization of the international community. The possibility of involving the International Court of Justice in the determination of a crime or a grave breach, along the lines of the judicial settlement procedures contained in articles 65 and 66 of the 1969 Vienna Convention on the Law of Treaties, could be further explored. Another possibility would be to draft an article along the lines of Article VIII of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which provided that a Contracting Party could call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they considered appropriate for the prevention and suppression of acts of genocide. However, the Commission itself should not engage in a review of the powers of the General Assembly or the Security Council.

50. Ms. DAVIDSON (United States of America) said that it was an inappropriate and unproductive use of the Commission’s time to try to develop, under the rubric of State responsibility, new rules concerning international crimes by States. The views of other States reflected considerable scepticism and resistance to that notion, and the Commission’s report raised numerous issues.

51. First, the actions that might be taken by States which entailed the responsibility of other States operated along a continuum. More egregious acts might entail more severe consequences, such as countermeasures by other States, reparations, punishment of individuals for grave breaches of the laws of war, and even recommendations, provisional measures and forcible and non-forcible measures by the Security Council operating under Chapter VII of the Charter. Attempting to establish one category of actions as "crimes" which merited action

by the international community unnecessarily limited the flexibility of operating on that continuum. Establishing a category of State "crimes" inevitably must be either an artificial construct or must rely on a case-by-case appraisal by the international community, in which case the utility of the concept appeared minimal at best.

52. Secondly, application of the nomenclature "crime" to those more egregious actions did not reflect contemporary State practice. The concept of crime was rooted in international law, but only as applied to individuals, not States. One of the key developments in that area was the treatment of a decision to resort to war unlawfully as a criminal act for which the leadership of a State might be punished. That development, however, was not applicable to States as States. Furthermore, the most recent war crimes tribunal, the International Tribunal for the former Yugoslavia, had no jurisdiction to consider "crimes" of States and to hear charges of crimes of aggression by individuals. The international community had therefore approached the issue of crimes under international law in a deliberative and cautious manner which was not at all reflected in the Commission's work on State responsibility. Indeed, international tribunals had traditionally refused to assess punitive damages against States partly because of the absence of malice on the part of a Government of a State, as opposed to on the part of an individual.

53. Thirdly, to the extent that the Commission was seeking to express the law as it ought to be, application of the concept of "crime" to States was undesirable. Doing so neither advanced nor clarified the state of the law. Rather, it obscured it by attempting to apply a concept of domestic law built upon the mens rea of the individual, to a State. Furthermore, if the fundamental objective was to deter unlawful behaviour, the appropriate manner for doing so was to channel criminal responsibility to the individuals within the offending State that had decided to undertake the State action. Establishing the criminal responsibility of the State as a whole risked diluting the deterrence sought by regarding individuals as criminally responsible. Her delegation agreed with that of Austria and others that the Commission was delaying completion of its important work on State responsibility by allowing itself to be distracted by the unpromising notion of so-called State crimes.

54. With regard to the other articles of part two of the draft articles, the United States had already expressed its concerns over the formulations of articles 7, 8, 10 and 10 bis. Article 14, on prohibited countermeasures, raised difficulties because it purported to prohibit certain actions regardless of the action of the wrongdoing State. Thus, if a wrongdoing State was inflicting extreme economic or political coercion which endangered another State's territorial integrity or political independence - such as the imposition of economic sanctions that prevented the import of essential civilian goods - that other State might not undertake comparable countermeasures in an effort to end the coercion. States could not and would not accept such a prohibition. Similarly, under article 14, if a wrongdoing State had seized the diplomatic premises of another State, that other State might under no circumstances seize the diplomatic premises of the violating State. In such circumstances, the other State had a duty to respect and protect the diplomatic premises of the

wrongdoing State, but requiring the other State to continue to treat those premises as inviolable indefinitely was unreasonable and inconsistent with State practice. The presence of article 13, on proportionality, made article 14 unnecessary; States might only respond in proportion to the degree of gravity of the initial act and the effects thereof. So long as the initial act did not consist of the actions stated in article 14, then the responding State could not undertake such actions.

55. Article 13 was itself somewhat broad and should be crafted to allow specialized treaty regimes, where they existed, to govern the countermeasures that might be taken for violations of those regimes.

56. She noted that the Commission had chosen two important and timely new topics, namely, "The law and practice relating to reservations to treaties" and "State succession and its impact on the nationality of natural and legal persons", for its future work.

57. Mr. PFIRTER (Observer for Switzerland) said that the distinction between the two categories of internationally wrongful acts made in article 19 of part one of the draft articles on State responsibility had raised a number of questions which underscored the political and legal complexities of the issues involved. Since the possibility that such a distinction would need to be reflected in the respective consequences of the two categories of acts could not be excluded, it would be inopportune to call into question the structure and content of article 19. That article had been carefully worded and constituted an excellent working base for the Commission, which should be encouraged and supported in its study of the consequences of particularly serious violations of international law.

58. The view that the essential characteristic of the concept of crime was that it freed State responsibility from the limitations of bilateralism was open to challenge, since any breach of an obligation erga omnes simultaneously and legally injured all States concerned by that obligation. It was true, however, that the expression "crime" had the clear psychological advantage of stressing the exceptional seriousness of the breach concerned, which should spur the international community to take action, either within the framework of institutions or through individual States, to defend the rights and interests of both the victim State and international community.

59. The concept of crime was an evolving one conditioned by the degree of seriousness of the internationally wrongful act. It referred to the breach of an obligation erga omnes the seriousness of which affected peaceful coexistence among States and the foundations of the entire international community. The seriousness of the violation of public international law thus distinguished crimes from other internationally wrongful acts which did not affect the fundamental interests of the international community and which could be characterized as ordinary delicts.

60. While it might be tempting to replace the term "crime" by another expression lacking in penal connotation, the advantages of using the term were

considerable, since its use was without prejudice to the nature of the liability arising from a particularly serious breach of international law. As several members of the Commission had pointed out, the responsibility of States was neither criminal nor civil. It was simply international, different and specific, and it was therefore pointless to give further consideration to the validity of the maxim "societas delinquere non potest" in international law.

61. Most members of the Commission were of the view that State responsibility was rigorously circumscribed in the draft articles to the obligation to make reparations, which did not imply any punitive element. The aim of the draft articles was certainly not to punish the wrongdoing State. At the same time, however, it was not merely to obtain reparations for an internationally wrongful act. Before the injured State demanded compensation for the injury suffered, it was essential that the State which committed such an act should cease such action.

62. Given the way in which the international community was currently organized, it would be for each State to determine the commission of a particularly serious violation of jus gentium. While such a solution was by no means ideal, since States, especially those directly affected, might be guided by subjective considerations, a number of safety nets existed. For example, a State whose conduct was based on its perception of what constituted a crime must be aware that its responsibility might be engaged even in the absence of any fundamental violation of international law. Also, the measures which a State proposed to take in reaction to an international crime would be subject to certain conditions, compliance with which could be verified by the rest of the international community on the basis of objective criteria. Finally, before one or more injured States were permitted to react individually, they should be encouraged to react collectively or to agree on the countermeasures that would best ensure the cessation and reparation of a particularly serious violation of international law.

63. In that regard, the General Assembly, the Security Council and regional organizations had an essential role to play. Lest the concept of crime should lead to the confirmation of existing power relationships, it was important to ensure that, with the exception of self-defence, States were given the right to intervene individually only where there was no collective reaction or where such reaction was impossible.

64. It had been rightly pointed out that the recognition of the concept of crime did not mean recognition of an absolute and unlimited right to resort to countermeasures or of lex talionis by individual States or by the international community as a whole. Without calling into question the right of victims to receive reparation and satisfaction, the vital importance of reconciliation should not be overlooked.

65. In order to contain any risk of escalation which might be harmful to the stability of the international community, the substantial and instrumental consequences of internationally wrongful acts should contain no punitive aspects. While it might not be possible to totally eliminate the punitive

element of the consequences of such an internationally wrongful act, that aspect as well as the aspect of revenge must be rigorously circumscribed in order to prevent a dangerous exacerbation of tensions.

66. The prohibition of the use of force and the principles of peaceful settlement of disputes and proportionality were rules which must be respected in any legal regime governing reactions to the commission of a crime. The severity and scope of the legal consequences of a particularly serious violation of international law should not exceed the threshold beyond which excessive punishment was inflicted on the population of the wrongdoing State. It must be remembered that, whatever their nature, the measures which would be taken would always directly or indirectly affect populations which for the most part were innocent.

67. While the search for a balanced solution was certainly not easy, Chapter VII of the Charter and the practice of the Security Council might perhaps be helpful, even though the Chapter in question had not been conceived in terms of the establishment of a regime of State responsibility.

68. Switzerland did not fully share the view of the Special Rapporteur that the right to resort to countermeasures should be made subject to less strict conditions in the case of crimes than in the case of delicts. Making such conditions less strict might send a false signal to States which considered themselves victims of a crime that they had more latitude where countermeasures were concerned. Instead of contributing to the restoration of the status quo ante, such a step would reduce or even eliminate the possibility of effectively achieving that objective through collective reaction.

69. On the other hand, his delegation shared the view of the Special Rapporteur and of most members of the Commission on the possible intensification of the countermeasures envisaged for delicts which did not involve the use of force. It would be better, however, to avoid measures which had particularly harmful consequences for the general population.

70. His final remarks concerned the general obligation not to recognize the consequences of a crime and not to assist the "criminal" State. The reasons for making a distinction between those two obligations were not clearly set out. In fact, the obligations were one and the same. To recognize as valid in law a situation in which the State which committed the crime benefited from that crime would be tantamount to helping that State to maintain the situation that was created. Similarly, to assist a State which had committed a crime in retaining the resulting benefits was the same as recognizing the legal consequences of the acts committed.

The meeting rose at 12.25 p.m.