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Chairman: Mr. LAMPTEY (Ghana)

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

TRIBUTE TO THE MEMORY OF RECENTLY DECEASED INTERNATIONAL JURISTS

1. The CHAIRMAN noted with profound regret that in the interval since the previous session of the General Assembly, six eminent members of the community of international jurists had died. They were Mr. Eduardo Jiménez de Aréchaga, Mr. José María Ruda, Mr. Nikolai Konstantinovitch Tarassov, Mr. Francisco V. García Amador, Mr. Willem Riphagen and Mr. César Sepúlveda-Gutiérrez, who had been Judges of the International Court of Justice or members of the International Law Commission.

2. At the invitation of the Chairman, the members of the Committee observed a minute of silence in tribute to the memory of Mr. Eduardo Jiménez de Aréchaga, Mr. José María Ruda, Mr. Nikolai Konstantinovitch Tarassov, Mr. Francisco V. García Amador, Mr. Willem Riphagen and Mr. César Sepúlveda-Gutiérrez.

ADDRESS BY THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE

3. The CHAIRMAN welcomed the President, the Vice-President and the Registrar of the International Court of Justice, as well as the Chairman of the International Law Commission and the Legal Counsel of the United Nations, who were attending the meeting.

4. Mr. BEDJAOUI (President of the International Court of Justice) said that he wished to refer to the interesting problem of the relationship between international organizations and the International Court of Justice, give a status report and outline the prospects for an evolution that would doubtless require modification of the mechanisms created by the Charter.

5. The International Court of Justice bore the primary responsibility for the resolution of conflicts of a legal nature. For a long time, only States had had access to contentious proceedings before the Court, while the recourse of international organizations had been limited to the advisory process. However, there were situations constituting threats to peace in which the parties were usually entities which could be called "infrastatal", as for example a portion of the territory of a State, or "suprastatal", as for example international organizations, whose status as subjects of international law was unchallenged.

6. As far as the advisory process before the International Court of Justice was concerned, it was appropriate to note that although consideration had been given, during the time of the League of Nations, to conferring upon the future Permanent Court of International Justice the power to issue advisory opinions regarding disputes or questions submitted to it by the Council or the Assembly of the League, with those opinions being recognized as being morally equivalent to judgements, no provisions to that effect had been included in the Statute of the Permanent Court. Subsequently, some participants in the deliberations of the Inter-Allied Committee in London in 1943 had felt that conferring the power

to issue advisory opinions on the judicial body to be established after the Second World War would be incompatible with that body's judicial function. Others, however, had taken the view that the advisory process was as fundamental to the smooth functioning of the international community as to the resolution of disputes, and furthermore had proposed that States should have access to it; that solution had ultimately been adopted. Initially, the Dumbarton Oaks proposals would have allowed only the Security Council to solicit advisory opinions from the Court on legal questions regarding disputes which the States directly concerned did not submit to the Court for litigation. In San Francisco the international community had finally opted for the solution provided for in Article 96 of the Charter and Article 65 of the Statute of the Court, by virtue of which access to the Court remained quite limited, first because the organs and institutions concerned could request advisory opinions only on the legal aspects of questions arising within the actual scope of their activities, and second because all international organizations not covered by the definition envisaged in the Charter were excluded from the advisory process. The peacemaking value of the advisory process had been demonstrated in many instances in which, for particular reasons, the legal aspects of a dispute could not be litigated before the Court. The same could be said for its contribution to the smooth functioning of international organizations and the progress of international law.

7. Although access to the advisory process was relatively limited, participation in that process continued to be as broad as it had been in the system of the Permanent Court, for States as well as for international organizations. While there was still some debate as to whether the phrase "any [...] organization", contained in paragraph 2 of Article 66 of the Statute of the International Court of Justice, also included non-governmental organizations, there was no doubt that it covered all international organizations constituted by States and not simply the specialized agencies of the United Nations.

8. The advisory opinions of the Court were not binding, and it was up to each organ or institution to decide how to act on them. The Court itself had periodically emphasized that point, despite the fact that some of its members had insisted on the high juridical value and great moral authority of those opinions. The practice - dating back to the time of the Permanent Court - whereby States committed themselves in advance to defer to advisory opinions had been taken further in the Statute of the present Court, although in different form. It was a way of compensating for the fact that international organizations were not competent to refer cases to the Court for litigation, by including quasi-obligatory clauses in treaties between States and international organizations, by virtue of which, in the event of a disagreement between them, the Court would be asked for an advisory opinion which the parties would consider binding. Examples were to be found in the Convention on the Privileges and Immunities of the United Nations, the Headquarters Agreement signed between the United Nations and the Government of the United States of America, and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. Such a practical means of settling disputes between States and international organizations, often referred

to as "binding advisory opinions", resembled a litigation procedure but remained completely distinct from it and was not binding per se, unless by virtue of a subsidiary obligation incurred independently of the exercise of the Court's advisory function. The practice of binding opinions had evolved in a distinctive way and had been virtually institutionalized in the provisions of the Statutes of the Administrative Tribunals of the International Labour Organization and the United Nations, which provided a procedure for the Court to revise their judgements in cases where their validity had been challenged.

9. If, as was apparently the case, it was desirable to involve international organizations more closely in the judicial procedure, it would be reasonable to ask whether their access to the Court's advisory process could be broadened. For several years, the possibility of authorizing the Secretary-General to ask for advisory opinions from the Court had repeatedly been mentioned, but that question entailed two problems. The first was one of principle, and consisted in the fact that the Secretariat was the only principal organ of the United Nations that had no access to the advisory process of the Court, and, at the same time, the only one not constituted by States. For that reason, some feared the absence of the kind of control that was exercised in intergovernmental organizations regarding the decision to resort to the Court, as well as the lack of political support such as that enjoyed by applications presented as a result of a majority vote. The second consisted in the substantive nature of the authorization to be given to the Secretary-General for requesting an advisory opinion; for example, whether it had to be permanent, whether it had to encompass the entire range of the Secretary-General's activities, or whether it had to be subject to the agreement of the parties in the case of an emerging or existing dispute. Of course, such authorization would greatly facilitate recourse to the Court's jurisdiction by making the procedure more flexible and, as necessary, faster, inasmuch as the Secretary-General would not have to deal with third-party bodies and would avoid delicate political situations. Solutions could doubtless be found permitting the international community to make good use of an opportunity of that kind, and limit its risks at the same time.

10. It was also conceivable that access to the Court's advisory opinions might be extended to organizations that were not part of the United Nations system but could benefit from the advisory procedure, either in their external relations or in their internal functioning, regardless of whether they had a court system of their own or not.

11. With regard to the historical development of the contentious procedures, Article 14 of the Covenant of the League of Nations had stipulated that the future Permanent Court would hear any dispute of an international character which the parties thereto submitted to it. That provision had applied solely to States, the only subjects of international law, although a paragraph had been added to Article 26 of the Statute of the Permanent Court of International Justice, authorizing the International Labour Office (ILO) to furnish the Court, in labour cases, with all relevant information, thereby allowing it to participate, to a certain extent, in litigation. The Statute of the International Court of Justice adhered, in principle, to the traditional

approach adopted in 1920, stipulating that only States were fully eligible to be parties in cases before the Court or to intervene therein (Arts. 34, 62 and 63). However, in view of the proliferation of international organizations between the two world wars and in recognition of their increasingly important role, it had been decided to extend to all organizations and all cases (Art. 34, para. 2, of the Statute of the Court) the provision of Article 26 of the Statute of the Permanent Court which had referred solely to ILO. Article 34, paragraph 3, of the Statute of the Court, added at San Francisco, had extended somewhat further the limited locus standi of international organizations by requiring the Court Registrar to furnish them with communications and notifications pertaining to cases in certain circumstances. Article 34, paragraphs 2 and 3, which constituted the only formal link between international organizations and litigation proceedings before the Court while determining de lege lata the furthest extent to which organizations could be associated with such proceedings, had been reflected in successive versions of the Rules of Court.

12. International organizations, as subjects distinct from States, maintained legal relations with third parties that in many respects resembled those established by States. For example, there were strong parallels between the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, on the one hand, and the Vienna Convention on the Law of Treaties, on the other. International organizations could be parties at any time to a legal dispute and, being unable to submit it to the Court, had no alternative but to resort to ad hoc arbitration, a procedure that offered the advantage of flexibility but also had various drawbacks, such as the transitory nature of the decision-making body, the absence of a permanent secretariat, the lack of its own established rules of procedure and the lack of standard practices and legal precedent. Nor was the "binding" advisory opinion procedure entirely free of difficulties.

13. It had not taken long, therefore, for a tendency to relax the terms and endow the organizations with a locus standi in judicio to become apparent. The International Law Institute had taken a similar stance in a resolution adopted in 1954; that resolution, however, had failed to yield the anticipated results. Although the legitimacy of the principle seemed beyond dispute, its application posed sensitive problems. Access to the Court was ruled out unless the latter was competent ratione personae. For an organization to be a party to proceedings before the Court, not only Article 34 but also Article 35 of the Statute and Article 93 of the Charter would have to be amended. As for competence ratione materiae, it was a moot point whether international organizations could subscribe to the declaration of acceptance of the compulsory jurisdiction of the Court.

14. In addition to the external disputes of international organizations, relatively important internal disputes could also arise which did not lend themselves to settlement by reference to the model established by national constitutional or administrative norms. Only very few "integration" organizations, such as the European Union, had appropriate machinery for the settlement of such disputes: Articles 173 and 175 of the Treaty on European Union, for example, provided for a whole series of remedies against the actions

of the Union's main organs. The Charter provided for no such mechanisms in the case of the organs of the United Nations. If a majority within an organ or organization that was authorized to request advisory opinions from the Court wished to seek such an opinion regarding the legality of particular steps taken by the organization (as had occurred in the case of the composition of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization), the Court could only answer the question posed but its reply would not be binding.

15. It should be noted, however, that the Court, in exceptional cases and by virtue of instruments other than the Charter, could exercise control comparable to the control of legality over the decisions of some international bodies - for example, when it delivered a "binding" advisory opinion after a review of a judgement by the United Nations Administrative Tribunal or the Administrative Tribunal of the International Labour Organization, or when it issued a judgement that had an effect erga omnes under the Convention establishing the International Civil Aviation Organization (ICAO) or the Convention of the International Maritime Organization (IMO). The decision to endow international organizations with a mechanism for the control of internal legality was obviously a political measure that States could adopt, taking into account the role of the organization concerned, its nature, degree of integration and practical needs. The Court could exercise that function provided that the Charter and Statute were amended accordingly.

16. The problems mentioned were not necessarily new, but they had arisen with renewed urgency and in a new context that called for original, comprehensive and penetrating reflection. The United Nations Decade of International Law provided an appropriate framework for such reflection, and the fiftieth anniversary of the United Nations in 1995 and of the Court in 1996 would constitute additional incentives.

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

17. Mr. VERESCHETIN (Chairman of the International Law Commission) said that the International Law Commission had held an extremely productive forty-sixth session, having finally adopted two complete sets of draft articles with commentaries, namely the draft statutes for an international criminal court and the draft articles on the law of the non-navigational uses of international watercourses.

18. The main purposes of the draft statute, as set out in its preamble, were to enhance the effective suppression and prosecution of the most serious crimes of international concern and to complement national criminal justice systems when those systems would be less effective. The future court was not intended to exclude the existing jurisdiction of national courts or to affect the right of States to seek extradition and other forms of judicial assistance under existing arrangements. Concern for effectiveness was also reflected in article 35 of the draft, which would give the court discretion to decline to exercise jurisdiction if the case was not sufficiently serious or could be appropriately dealt with by

a national criminal justice system. In that regard, he drew attention to the obligation of States Parties to prosecute or extradite provided for in article 21. All those provisions were intended to allay the fears of some States that the court might displace national court jurisdiction or interfere with existing arrangements for international cooperation and judicial assistance.

19. With regard to the provisions of Part 1, it was to be noted that the term "court" had been preferred to the term "tribunal" on the grounds that the former was more comprehensive. Article 2 provided for the establishment of the court by treaty and for the conclusion between the court and the United Nations of an agreement establishing an appropriate relationship between them. That approach had been deemed preferable to creating the court as a subsidiary organ by way of a resolution or establishing it as a main organ of the United Nations through an amendment of the Charter.

20. Part 2, article 6, provided for a system of election of judges based on their criminal trial experience and the required expertise in international law. The term of office of the judges would be nine years, instead of 12 years as initially envisaged. The role of States parties in relation to the election of judges and the adoption of rules was regulated under articles 6 and 19 respectively. The role of the Presidency had been further developed and clarified in article 8.

21. In response to the views expressed by States, the jurisdictional provisions had been simplified and clarified in part 3. Under article 20 there were two categories of crimes over which the Court had jurisdiction. The first was that of crimes under general international law, which were listed in subparagraphs (a) to (d), namely genocide, aggression, serious violations of the laws and customs of war and crimes against humanity, the precise definition of which had been left to the draft Code of Crimes against the Peace and Security of Mankind. The second was that of crimes referred to in the treaties listed in the annex, which had been expanded to include the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The two categories were not mutually exclusive; on the contrary, there was considerable overlap between them. Articles 21, 22 and 23 contained crucial provisions. The general rule regarding preconditions to the exercise of jurisdiction was contained in article 21, paragraph 1 (b), which required acceptance of the jurisdiction of the Court by the State which had custody of the suspect and by the State on whose territory the crime had been committed. Under paragraph 1 (c), however, the Court had inherent jurisdiction over the crime of genocide, on a complaint being made by a State party to the Convention on the Prevention and Punishment of the Crime of Genocide. Under article 22, jurisdiction over certain crimes was not conferred automatically on the Court by the sole fact of becoming a party to the statute but, in addition, by way of a special declaration of acceptance, a requirement that did not apply in the case of States parties to the Convention on Genocide which were also parties to the statute. That important exception had been included as a litmus test of the acceptability of the notion of ipso jure jurisdiction. Article 23 provided for a second exception, which established the jurisdiction of the Court in the case of

recourse to the Court initiated by the Security Council. The Commission had felt that such a provision was necessary to enable the Security Council to make use of the Court as an alternative to establishing ad hoc tribunals for crimes which affronted the conscience of mankind. Article 23, paragraph 2, provided that the Security Council must find that the State had committed an act of aggression before a charge of aggression could be made before the Court. Paragraph 3 prevented a prosecution from being commenced, except in accordance with a decision of the Security Council, in relation to a situation with respect to which Chapter VII action was being taken by the Council. Once the Chapter VII action had been terminated, the possibility of prosecutions being commenced would revive.

22. Under part 4 he drew attention to article 26, which attempted to strike a balance between the independence and accountability of the prosecutor. Under the provision the Presidency might, at the request of the complainant State or the Security Council, review a decision of the prosecutor not to proceed with an investigation or an indictment.

23. Under part 5, he singled out article 37, which provided for a public indictment procedure similar to the one provided for in the rules of the International War Crimes Tribunal for the Former Yugoslavia. The provisions on forfeiture and restitution, which appeared in the 1993 draft (A/48/10, annex, art. 53), had been deleted given their complexity and the ability of national courts to deal with such questions.

24. As for post-trial proceedings, dealt with in part 6, he drew attention to article 48, which laid down the right of the prosecutor and of the convicted person to appeal, and to article 49, which established an important difference between appeals by prosecution and appeals by defence. In the case of an appeal by the prosecutor the Appeals Chamber could not reverse or amend a decision of a Trial Chamber acquitting an accused; it could annul such a decision only as a prelude to a new trial.

25. Part 7, concerning international cooperation and judicial assistance, dealt in article 53 with the relationship between existing extradition arrangements and requests for the transfer of an accused to the Court.

26. As for part 8, dealing with enforcement, he drew attention to articles 57 and 58, relating to recognition and enforcement of judgements, respectively.

27. The International Law Commission had devoted a substantial amount of time to the draft statute, and, considering that the establishment of an international criminal court would be a major contribution to the rule of law in international affairs and would crown efforts initiated by the United Nations almost half a century before, it recommended the convening of a conference of plenipotentiaries to consider the draft statute with a view to adopting a convention on the establishment of an international criminal court.

28. In 1991 the International Law Commission had provisionally adopted on first reading a set of articles for the draft Code of Crimes against the Peace and

Security of Mankind, which had been transmitted, through the Secretary-General, to Governments for their comments and observations. In accordance with General Assembly resolution 46/54, paragraph 9, in 1994 the Commission had embarked on a second reading of the draft Code, in the light of the comments and observations received from Governments (A/CN.4/448 and Add.1) and the report of the Special Rapporteur (A/CN.4/460 and Corr.1). The Special Rapporteur had announced that he would deal with the second part of the draft Code, concerning offences to be characterized as crimes against the peace and security of mankind, in his next report, and that the list of such crimes would be prepared in accordance with a more restrictive approach than that reflected in the draft adopted on second reading. That decision had been welcomed by several members of the Commission since States were generally reluctant to waive or surrender their criminal jurisdiction and might only be willing to accept the establishment of an international criminal court in relation to the most serious international crimes. The question of the scope of the draft Code was of immediate relevance since the wording of certain provisions of the first part would necessarily differ depending on whether the Code covered a large number of offences under international law or only those crimes that involved a fundamental infringement of the international public order. In that context the appropriateness of the current title of the draft Code had been raised, since while aggression could be considered a crime against the peace and security of mankind it was more difficult to characterize genocide or crimes against humanity as such, unless the concept of peace and security was very extensively interpreted.

29. The issue of penalties, which had been left open in the draft adopted on first reading, was thorny. If the Code was to be implemented by an international criminal court it would have to state specific penalties for each crime according to the principle nulla poena sine lege. If on the other hand the Code was to implemented by national courts or by both national courts and an international criminal court, then the determination of penalties could be left to national law.

30. Many countries considered it necessary to ensure coordination between the provisions of the draft Code and the statute of the future international criminal court. While the two instruments should not be rigidly linked and while the adoption of one of them should not be contingent on the adoption of the other, there were inevitably provisions and problems common to the two drafts, given which care should be taken to avoid contradictions between them.

31. Some members of the Commission had stressed that the treaty in which the Code would be embodied should provide for an appropriate procedure for the settlement of disputes arising out of the implementation or interpretation of the instrument and specify the means of settlement to which States in dispute could have recourse in the event of failure to settle a dispute by negotiation. The Special Rapporteur would make proposals in that regard in his next report.

32. With respect to chapter III of the report, which dealt with the law of the non-navigational uses of international watercourses, he said that in 1994 the Commission had concluded the second reading of the draft on the basis of the second report of the Special Rapporteur. Part I, entitled "Introduction",

consisted of four articles. Article 1 restricted the scope of the draft to the non-navigational uses of international watercourses and of their waters; article 2 defined three key terms: "international watercourse", "watercourse" and "watercourse State". Article 3 provided for the framework in which the articles could be tailored to fit the requirements of specific watercourses. In that article and subsequent articles, the Commission had replaced the word "appreciable" by "significant" in Russian. There were still doubts about an equivalent term. That change had been made simply for the sake of clarity. Article 4 identified the watercourse States that were entitled to participate in consultations and negotiations relating to agreements concerning part or all of an international watercourse and to become parties to such agreements.

33. Part II of the draft, entitled "General principles", set out the fundamental rights and duties of States. Paragraph 1 of article 5 stated the basic rule of equitable utilization and paragraph 2 established the concept of equitable participation, the core of which was cooperation between watercourse States through participation, on an equitable and reasonable basis in the use, development and protection of an international watercourse. Article 6 gave a non-exhaustive list of relevant factors to guide States in the implementation of article 5.

34. Turning to article 7, he said that many Governments had queried the relationship between article 5, entitled "Equitable and reasonable utilization and participation", and article 7, entitled "Obligation not to cause significant harm". Article 7 had been extensively debated in 1994. In working out a text, the Commission had based itself on three considerations: first, that article 5 did not provide sufficient guidance for States in cases where harm was a factor; second, that States must exercise due diligence to utilize a watercourse in such a way as not to cause significant harm; and third, that the fact that an activity involved significant harm would not of itself necessarily constitute a basis for barring it. Generally, the principle of equitable and reasonable utilization remained the guiding criterion in balancing the interests at stake. Paragraph 2 of article 7 dealt with the case in which significant harm occurred despite the exercise of due diligence. In such a case, the State whose use caused the harm was obliged to consult with the State suffering the harm over the question of ad hoc adjustments to mitigate the harm and, when appropriate, compensation.

35. Article 8 laid down the general obligation to cooperate in order to attain the objectives set forth in the draft. The bases of such cooperation were sovereign equality, territorial integrity and mutual benefit.

36. Article 9, entitled "Regular exchange of data and information", set forth the general minimum requirements for the exchange between watercourse States of the data and information necessary to ensure equitable and reasonable utilization. The rules in that article constituted a specific application of the general obligation laid down in article 8.

37. Article 10 dealt with the relationship between different kinds of uses. It set forth, as a residual rule, the general principle that no use of an

international watercourse had inherent priority over other uses and provided that, in case of conflict between different uses, the situation was to be resolved by reference to the principles contained in articles 5 and 7.

38. With regard to part III, the only important change consisted in the inclusion in article 16 of a new paragraph. The paragraph sought to alleviate the possible hardship caused to the notifying State by the notified State's failure to respond, and should serve as an encouragement to notified States to respond to the notification and search for solutions to problems of conflicting uses. The costs incurred by the notifying State could be deducted from any claims by a notified State.

39. Part IV, entitled "Protection, preservation and management", had been expanded to include articles 26, 27 and 28, which had previously appeared in the part entitled "Miscellaneous provisions", bearing in mind that, in modern thinking, management in a broad sense was an integral part of protection and preservation. Accordingly, articles 26, 27 and 28 had been renumbered 24, 25 and 26, respectively.

40. Part V and the first two articles of part VI had remained virtually unchanged.

41. The last two articles of the draft called for some explanation. Article 32 set out the principle that watercourse States were to grant access to their judicial and other procedures without discrimination on the basis of nationality, residence or the place where the damage occurred. That was a residual rule. Nevertheless, article 32 had been found undesirable by several members of the Commission within the scope of the current draft articles. Article 33 provided a residual rule for the settlement of disputes, giving any watercourse State concerned the right to initiate unilaterally a fact-finding process or, if agreed, to resort to mediation or conciliation. If, after those means had been used, the States concerned had been unable to settle the dispute, they could, by agreement, submit the dispute to arbitration or judicial settlement.

42. With regard to the question of unrelated groundwater, he emphasized the word "unrelated" because, under article 2 (b), groundwaters that were related to the watercourse came within the ambit of the draft articles. Views on whether the rules contained in the draft articles should also apply to transboundary confined groundwaters had been divided in the Commission. However, since the Commission did not have sufficient practice to rely on for the purpose of elaborating draft articles on the matter that would be on a par with those devoted to international watercourses, it had opted for a mere resolution that recognized the need for continuing efforts to elaborate rules pertaining to such waters, encouraged States to be guided by the principles contained in the draft articles in regulating transboundary groundwaters and recommended States to consider entering into agreements with the other States in which the confined transboundary groundwater was located.

43. The Commission had paid a well-deserved tribute to Mr. Rosenstock and his predecessors for their excellent work as special rapporteurs. The Commission recommended the elaboration of a convention by the General Assembly or by an international conference of plenipotentiaries on the basis of the draft articles.

44. He drew the Committee's attention to chapter IV, entitled "State responsibility". A superficial reading of that chapter might give the impression that the Commission was at a standstill. It was true that in 1994 no article on the topic was being officially submitted to the General Assembly, but that was merely a reflection of the complexity of the two issues currently pending before the Commission, both of which had to undergo a slow process of maturation and rapprochement before a generally shared view could crystallize into draft articles.

45. The first issue was the controversial question of countermeasures, which had long been debated by the Commission. The Commission had adopted three articles on the subject: article 11, which outlined the broad framework within which a State was entitled to resort to countermeasures; article 13, which dealt with proportionality; and article 14, dealing with prohibited countermeasures. Article 12, on the conditions to be met by the injured State for recourse to countermeasures to be lawful, was still outstanding, and article 11 might have to be reviewed in the light of the text that would eventually be adopted for article 12. Although articles 11, 13 and 14 had been adopted at the previous session, they had not been formally submitted in view of the fragmentary results that had been achieved on the issue.

46. Another issue which had proved to be as controversial as that of countermeasures related to the consequences of acts characterized as crimes under article 19 of Part One of the draft articles. The debate during the Commission's forty-sixth session had confirmed that positions remained widely divergent. Some believed that the distinction between crimes and delicts reflected a qualitative difference between ordinary delicts and basic infringements of the international public order. That distinction was rooted in positive law and in the realities of international life. Others believed that there was a continuum from minor breaches at one end of the spectrum to exceptionally serious breaches at the other; the concept of crime was devoid of basis in positive law and the establishment of violations of different kinds would undermine the effectiveness of the concept of violation erga omnes. Thus the first group held that crimes entailed consequences different from those of ordinary delicts as regarded not only the available remedies and the regime of countermeasures but also the circle of States empowered to react. On the other hand, the second group believed that no qualitative distinction could be drawn between the consequences of internationally wrongful acts or claimed that the elaboration of a regime of State responsibility for crimes would pose insuperable difficulties at the current stage. The Special Rapporteur was elaborating proposals relating to the consequences of crimes for submission to the forty-seventh session and would welcome any guidance which the Sixth Committee provided him in that connection.

47. Turning to chapter V entitled "International liability for injurious consequences arising out of acts not prohibited by international law", he said that the Commission had had before it the tenth report of the Special Rapporteur but had decided to defer its consideration until the following session. The Committee might recall that, in 1992, the Commission had decided to proceed by stages in its handling of that complex topic and to address first the issue of preventive measures in respect of activities involving a risk of transboundary harm. Fortunately, the Commission had made considerable progress at its most recent session on the issue of preventive measures in respect of activities involving a significant risk of transboundary harm and had adopted a complete set of articles on the matter.

48. Referring to article 1 and, specifically, to the third criterion for determining the scope of the draft articles, namely, activities involving a risk of causing significant transboundary harm, he said that the reference to risk excluded from the scope of the draft articles activities which actually caused transboundary harm such as creeping pollution, and that the words "transboundary harm" were intended to exclude activities which caused harm only in the territory of the State within which they were undertaken or which caused harm to the so-called global commons per se but not to other States. As for the criterion that harm should be caused by the "physical consequences" of an activity, that excluded transboundary harm which might be caused by State policies in monetary, socio-economic or similar fields.

49. Concerning the provisions relating to "prevention", he stressed that "authorization", mentioned in article 11, referred to the fact that governmental authorities must grant permission, in whatever form, to conduct an activity, for example, where an innocuous activity became one involving a risk of causing significant transboundary harm. Concerning article 12, risk assessment enabled a State to determine the extent and the nature of risk involved in an activity and, consequently, the type of preventive measures which should be adopted. While the Commission felt that it was preferable for domestic law to determine who should undertake the assessment and what should be its content, article 12 provided that the assessment should contain at least an evaluation of the impact of the activity not only on persons and property but also on the environment of other States.

50. In accordance with article 13, the State was required to "ascertain" whether activities involving a risk of causing significant transboundary harm were being conducted in its territory or under its jurisdiction and, if so, to direct those responsible to obtain the necessary authorization. That should be understood as an obligation of due diligence, requiring reasonable and good faith efforts by States to identify the activities under consideration. The Commission was of the view that the determination as to whether the activity should be stopped pending authorization should be made by the State of origin. If the State chose to allow the activity to continue, it did so at its own risk. The expression "at its own risk" left open the possibility that future articles under that topic might prescribe the consequences of such conduct for the State of origin and did not affect the normal application of the rules on international responsibility. Some Commission members favoured deleting the

words "at its own risk", which in their view prejudged the question of liability.

51. Article 14 established a due diligence obligation whereby each State was required to formulate policies designed to prevent or minimize transboundary harm. Article 14 [20 bis] provided that, in taking measures to prevent or minimize a risk of causing transboundary harm, States were under an obligation to ensure that the risk was not "simply" transferred, directly or indirectly, from one area to another or transformed from one type of risk into another.

52. Article 18 stated that a balance must be maintained between two equally important considerations, namely, that the activities were not prohibited by international law and, at the same time, that it would be unfair to allow those activities to be conducted without consulting potentially affected States and without taking appropriate preventive measures. The article therefore provided for the holding of consultations among the States concerned, in good faith and without delay. Should the parties fail to agree on acceptable preventive measures, the State of origin could continue to conduct the activity but would be under an obligation to take into account the interests of the States likely to be affected by it.

53. Article 19 addressed the situation in which a State, although it had received no notification of an activity under article 15, had serious reasons to believe that an activity involving a risk of causing it significant harm was being conducted in another State. In such a case, the State of origin would be under an obligation to enter into consultations and, if it was established that the activity was covered by the draft articles, the State of origin might be requested to pay an equitable share of the cost of the assessment of potential harm.

54. Concerning the last chapter of the report and referring, in particular, to the planning of activities for the remainder of the quinquennium, he stressed that the Commission had confirmed its intention to complete by 1996 the second reading of the draft articles on the Code of Crimes against the Peace and Security of Mankind and the first reading of the draft articles on State responsibility. It would also endeavour to complete by 1996 the first reading of draft articles on activities involving a risk of causing transboundary harm, under the topic of international liability for injurious consequences arising out of acts not prohibited by international law. It would also have to begin work on the topics of "the law and practice relating to reservations to treaties" and "State succession and its impact on the nationality of natural and legal persons".

55. The Commission attached great importance to cooperation with other bodies such as the Asian-African Legal Consultative Committee, the European Committee on Legal Cooperation and the Inter-American Juridical Committee as a way of fostering exchanges of ideas and experience.

56. The last section of the report dealt with the thirtieth session of the International Law Seminar, held in conjunction with the forty-sixth session of

the Commission. The Seminar was funded by voluntary contributions to the United Nations Trust Fund for the International Law Seminar and the Commission had noted with satisfaction the contributions of Austria, Denmark, Finland, France, Germany, Iceland, Norway, Slovenia and Switzerland to the Fund. Thanks to those contributions, it had been possible to award a sufficient number of fellowships to achieve adequate geographical distribution of participants. The Seminar also enabled young lawyers, especially from developing countries, to familiarize themselves with the work of the Commission and the activities of the many international organizations which had their headquarters in Geneva. As all the available funds were nearly exhausted, the Commission recommended that the General Assembly should again issue an appeal to States to make the contributions necessary in order to hold the Seminar in 1995 with the broadest possible participation. In 1994, very limited interpretation services had been made available to the Seminar. Apparently the Secretariat had taken steps to have the Seminar included in the calendar of conferences for 1995. It was to be hoped that Sixth Committee members would urge their colleagues in the Fifth Committee to take a positive stand on that issue and that the Seminar would be provided with full services and facilities at future sessions, despite existing financial constraints.

57. Mr. JACOVIDES (Cyprus) agreed with the decision of the International Law Commission to recommend the elaboration of a convention by the General Assembly or by an international conference of plenipotentiaries on the basis of the draft articles on "The law of the non-navigational uses of international watercourses". He noted, in particular, the contents of draft article 33 and reiterated the position of principle that all multilateral law-making treaties concluded under the auspices of the United Nations should encompass an effective and expeditious dispute settlement procedure.

58. The Commission had done considerable work on the topic of State responsibility. Of particular note were the provisional adoption of draft article 14 on prohibited countermeasures, based primarily on jus cogens, and the interesting debate on the type of responsibility entailed by breaches characterized as crimes in article 19 of Part One of the draft articles. While recognizing the existing difficulties, he wished to urge that work on that topic, which had been on the Commission's agenda for many years, should be completed as early as possible and should include a chapter on the effective and expeditious binding settlement of disputes.

59. Substantial progress had also been achieved on other topics: the topic "International liability for injurious consequences arising out of acts not prohibited by international law", through the adoption of a complete set of provisions on prevention; the decision to appoint special rapporteurs on the new topics of "The law and practice relating to reservations to treaties" and "State succession and its impact on the nationality of natural and legal persons"; the decision to complete by 1996 the second reading of the draft articles on the Code of Crimes against the Peace and Security of Mankind and the first reading of the draft articles on State responsibility; the decision to contribute to the Decade of International Law through the publication of a volume containing the views of members of the Commission on current topics of international law; the

continued and fruitful cooperation with regional bodies; and the holding, once again, of the International Law Seminar.

60. Very useful work had been done on the draft Code of Crimes against the Peace and Security of Mankind, which contained many important articles, notably draft article 21 on "Systematic or mass violations of human rights" and draft article 22 on "Exceptionally serious war crimes", which had been adopted on first reading in 1991. Cyprus had taken the lead in calling for a revival of the item in the General Assembly, with the conviction that such a legal instrument, which served an important purpose of punishment and deterrence, deserved a place in international law. Such a code should be comprehensive and should encompass well-understood and legally definable crimes so as to ensure the widest possible acceptability and effectiveness. He was pleased to note that, in his report for the following session, the Special Rapporteur intended to limit the list of such crimes to offences whose characterization against the peace and security of mankind was hard to challenge. He also agreed that draft article 5 should be retained and that a State should be held internationally liable for damage caused by its agents as a result of a criminal act committed by them. The 15 draft articles had been submitted to the Drafting Committee and, in light of the contents of paragraphs 92 to 209 of the Commission's report, he wished to express confidence in the ability of the Special Rapporteur to eliminate unnecessary provisions.

61. It was significant and gratifying, both in terms of public perceptions and in terms of the contribution to the progressive development of international law, that the International Law Commission had come up with a timely response to the General Assembly's mandate concerning the draft statute for an international criminal court. Besides the ad hoc tribunals set up for particular situations, such as the International Tribunal for the Former Yugoslavia (Security Council resolutions 808 (1993) and 827 (1993) and the similar efforts advocated in the case of Rwanda, in recent years the momentum had been steadily building in all forums for the establishment of a permanent body. He wished to cite in particular the call made by the President of Cyprus during the Commonwealth Heads of Government Meeting, held in Cyprus in 1993. The Commonwealth, which represented nearly a third of the United Nations membership and shared a common legal heritage, could make its voice heard in the progressive development of international law and institutions, especially taking into account the significant role played in that regard by the Caribbean members of the Commonwealth. The creation of a permanent court would prevent situations which had received much publicity and given rise to complaints of double standards in dealing with certain problems.

62. The appropriate forum for commenting on the draft would be a conference of plenipotentiaries. Cyprus reserved its position on the structure of the proposed court and stressed that such a court would exercise jurisdiction only over the most serious crimes of concern to the international community and that it was intended to be complementary to national criminal justice systems.

63. Part 3, on the "jurisdiction of the court", was rightly described as central to the draft statute. The list of crimes in article 20 was along the

right lines. Under paragraphs (c) and (d), he preferred the formulation used in articles 22 and 21, respectively, of the draft Code of Crimes against the Peace and Security of Mankind, which had been adopted by the Commission on first reading. He recalled that article 22 of the draft Code, under the heading of "Exceptionally serious war crimes", included the establishment of settlers in an occupied territory and changes in the demographic composition of an occupied territory. He also wished to draw attention to paragraph 4 of the Protocol additional to the 1949 Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I).

64. He would have welcomed a less modest approach and a court with compulsory and exclusive jurisdiction, tied to a slimmed down and therefore more effective Code of Crimes; a court which was an organ of the United Nations, a permanent body with jurisdiction sufficiently broad to include crimes under general international law.

65. Those aspects could be debated in a conference of plenipotentiaries, but it was important to proceed expeditiously, not to lose the existing momentum, and to be sufficiently pragmatic to recognize that international law-making was as much the art of the possible as politics itself. The results achieved, though modest, represented the broadest common ground and left the door open for subsequent evolution and expansion, when the proposed international criminal jurisdiction would have been established and would have proven its worth and viability.

66. It was a source of satisfaction to those who valued the international legal order that the Commission, far from shirking its responsibilities, had come up with a relatively quick response in the form of the completed draft statute before the Commission, after adopting its 60 articles and their commentaries together with a recommendation for its adoption at a conference of plenipotentiaries. Although several issues remained outstanding, he was confident that the current momentum and the good reasons which had created it were sufficient to overcome the remaining obstacles and that the treaty establishing the international criminal court could come into existence by the fiftieth anniversary of the United Nations as a major element of the current Decade of International Law. In conclusion, the delegation of Cyprus urged the General Assembly to approve the Commission’s recommendation for the convening at the earliest possible time of an international conference of plenipotentiaries to finalize the draft statute so that an international criminal court could finally become a reality.

The meeting rose at 1.15 p.m.