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Chairman: Mr. LEHMANN (Denmark)

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The meeting was called to order at 3.20 p.m.

TRIBUTE TO THE MEMORY OF JUDGE ANDRES AGUILAR MAWDSLEY, MEMBER OF THE INTERNATIONAL COURT OF JUSTICE

1. The CHAIRMAN paid tribute to the memory of Judge Andrés Aguilar Mawdsley.

2. At the invitation of the Chairman, the members of the Committee observed a minute of silence.

AGENDA ITEM 141: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SEVENTH SESSION (continued) (A/50/10 and A/50/402)

3. Mr. VARŠO (Slovakia) said that Slovakia shared the doubts of certain delegations regarding the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law. It seemed that the Commission was seeking to create a new legal category, consisting of the imposition of obligations upon a State because it had engaged in an activity not prohibited by law. Confirmation of that fact could be found in the wording of draft article 1, which was based on two elements: the non-prohibited activity of a State, and the harm caused by that activity. There seemed to be a contradiction between those two elements, which were directly linked, raising the question whether a subject of law could be required to concern itself with the consequences of an activity which it had carried out in conformity with legal rules, and if so, whether the subject affected by that activity had a right to protection or must suffer the harmful consequences of non-prohibited activities, and whether the answers to those questions depended on the good will or bad will of the subject carrying out the activity in question.

4. It was generally recognized that the freedom to act was limited by the duty to avoid using that freedom to the detriment of others. The relations between subjects of law were based on the principle that if an act violates the rules of law, steps must be taken to satisfy any subject of law which had suffered harm as a result of that act. That clear and simple principle was a sine quo non condition for harmonizing the rights and duties of subjects of law. In the draft articles one effort had been made to strike a balance between the right of a State to carry out an activity within the framework of its own sovereign rights and its duty not to carry out activities which might violate the sovereign rights of another State. It was difficult to determine the line between those rights and duties, but the ambiguous concept of liability embodied in the draft articles did not seem to solve the problem, since, it would not meet the needs of either party in a potential dispute. Experience had shown that, once the balance between the rights and duties of legal subjects ceased to function, the legal order was endangered or even replaced by another order under which certain subjects demanded respect for their rights while ignoring their duties, to the detriment of the rights of others.

5. His delegation felt that the topic of international liability should be examined in greater depth; it might be advisable to consider whether it belonged in the domain of State responsibility. Furthermore, it was usually natural or

legal persons whose activities caused harm, and it might, therefore, be better for the consequences of such activities, and their prevention, to be dealt with at the level of private international law, a possibility which was mentioned, somewhat sceptically, in the Commission's report. That would not mean that a State would be relieved of its liability under public international law, but it would make it possible to establish liability at all levels and to ensure respect for the principle sic utere tuo ut alieum non laedas. The question of liability lay on the boundary between public international law and private international law and, in so far as it concerned the former, it must be dealt with in connection with State responsibility.

6. Slovakia agreed with other delegations that there was a need to determine what was to be regulated by the draft articles; in its view the goal should be to codify, above all, the norms relating to the protection of the environment from the standpoint of its use and exploitation for the benefit of present and future generations. The draft articles were a constructive step in that direction. The problem of transboundary harm had become significant as a consequence of the development of modern technology. Human activities having an impact on the environment fell into two categories. Some activities were planned and carried out with good intentions in order to improve nature for the benefit of individuals and of the environment; for example, States might agree on the basis of a treaty to prevent the flooding of a river which formed the boundary between their countries. Such intervention was normal and justified; it should not be a cause of concern to the international community because the States were in agreement on the improvement of the environment, and such activities did not require multilateral codification. Other activities were carried out, not in order to improve the environment, but in order to use or exploit it through the use of modern technology; for example, activities carried out in outer space, the transport of certain materials or the production of nuclear energy. Although such activities were carried out for the benefit of humankind, they were potentially harmful to the environment. While it was possible to forbid them, that might not be natural or useful for human beings. Realism suggested that such activities should be placed under control in order to prevent them from causing harm to the environment, and a rational and pragmatic solution would be cooperation among States on all aspects of environmental protection. The cooperation should be aimed first at preventing the risk of harm to the environment, then at reducing harm if an accident occurred, and lastly at ensuring reparation for any harm caused. A reference to such cooperation might be included in the title of the future international legal instrument.

7. The current situation with regard to environmental protection was not satisfactory; the existing international instruments were inadequate in view of the fact that the number of activities potentially harmful to nature was growing apace with technical and technological progress, a fact which international law could not ignore. Any future international instrument should focus on the prevention of harm to the environment. To that end, it was necessary to emphasize the following: cooperation among States to protect the environment and reduce consequences harmful thereto; cooperation among States in the appropriate international bodies, particularly in the area of setting technical safety standards for dangerous activities resulting from technological progress; the need to formulate pragmatic rules governing cooperation to reduce harm

caused to the environment in the event of an accident; and the need to delimit the liability of the various subjects of law involved for consequences harmful to the environment.

8. Mr. AL-KHASAWNEH (Jordan), referring to the topic of State responsibility, said he felt that it was wrong to place too much faith in the concept of proportionality because it created the impression of a substantive and objective limitation on the freedom of States to resort to countermeasures whereas in reality it would be difficult to determine whether such freedom had been abused in a given case. Modern day international relations were so complex and interwoven that a breach in one area of international relations could trigger a countermeasure in another totally different area, and it was difficult to see how the concept of proportionality could be relied upon to provide a yardstick against which the legality of the countermeasure could be judged. The view that the concept of proportionality should be abandoned altogether was an extreme position; however, in view of the importance of avoiding escalation in the application of countermeasures, and of certainty of applicable law, it might be necessary to reformulate the concept.

9. Concerning article 14, his delegation believed that the categories of prohibited countermeasures were too broadly stated and might require some additions. First, treaties establishing boundaries should be expressly included as the law of treaties protected such treaties against changes in circumstances and the unity of purpose of international law would be better served if the suspension or denunciation of such treaties were to be similarly protected from the application of countermeasures. Second, the reference to "basic human rights" in subparagraph (d) left much room for injustice. For example, his delegation believed that the rights of the citizens of a State against which countermeasures had been taken to own property in the State which had taken the countermeasures should be protected as a basic human right because countermeasures were essentially a matter between sovereign States and their effect on individuals should be minimal. Third, countermeasures should be expressly prohibited when they had significant adverse effects on third States, without prejudice to the right of the injured State to take other countermeasures.

10. With regard to the concept of "State crime", there was no doubt that, under the regime of the maintenance of international peace and security, States were currently subject to consequences which had the same effect or even exceeded the consequences of the crimes envisaged in the draft articles. The draft articles sought to introduce substantive rules in order to spare the populations of wrongdoing States from the excesses that might result from lack of regulation or political expediency.

11. His delegation was not fully convinced that it was impossible to transfer the concept of criminal responsibility from national law to international law. The maxim societas delinquere non potest applied in national societies which recognized the criminal responsibility of moral persons but did not apply in international law. His delegation felt that the question of whether the distinction between civil and criminal responsibility was dichotomous or relative was irrelevant; international responsibility for grave breaches could not be discharged solely by reparation or the payment of pecuniary compensation.

What pecuniary compensation could wipe out the effects of genocide? It was because civil responsibility could never provide restitutio in integrum that the introduction of a special class of delicts qualified as crimes was justified. A punitive element was as much a part of the concept of justice as a corrective element.

12. The division of internationally wrongful acts into delicts and crimes had been made in article 19 adopted on first reading in 1978; sound methodology required that the issue should not be reopened at every stage of the Committee's deliberations. Certain conclusions flowed from that distinction in terms of the consequences attaching to each category of wrongful acts.

13. At the same time, his delegation did not feel that the division of breaches into delicts and crimes was perfect; it was disconcerting that serious breaches which did not qualify as crimes would not carry consequences commensurate with their seriousness. There was a real danger that if the consequences of crimes were made radically different from those of delicts, little would be done to regulate through judicial assessment the law of State responsibility relating to delicts, which constituted the vast majority of cases of internationally wrongful acts. Similarly, his delegation could not understand why the obligations laid down in article 18, paragraph 1 (a) and (b) should be confined to crimes. The problem would be alleviated not by diluting the consequences of crimes but by increasing the consequences of delicts in the field of the third party settlement of disputes; his delegation would await the results of the work on the articles 11 and 12.

14. The same problem arose in respect of the settlement of disputes because of the existence of two regimes, one for the settlement of disputes where countermeasures had been applied and one for cases where countermeasures had not yet been applied. His delegation felt that a less rigorous regime for situations where countermeasures had not been applied was an invitation to injured States to resort to countermeasures so that they could better avail themselves of the dispute settlement procedure envisaged for that eventuality. It should be constantly borne in mind that countermeasures were forms of self-help that were innately inimical to the development of international law into a centralized system and were capable of abuse given the differences in power among States. His delegation agreed that a third party should decide whether there were reasons for the application of countermeasures and whether such countermeasures were within the limits established by the law.

15. His delegation had little difficulty with the substantive consequences of crimes. As to the regulation of instrumental consequences, his delegation agreed with the approach taken by the Special Rapporteur. However, that scheme must take into account the constitutional limitations on the powers of the Security Council, the General Assembly and the International Court of Justice and their equal status, and must be made less cumbersome and slow.

16. On the topic of international liability for injurious consequences arising out of acts not prohibited by international law, he noted that after 15 years of consideration of that topic, the Committee was still trying to deal with the fundamentals. Legal reasoning admitted of only two active principles of obligation: responsibility for wrongfulness, and responsibility for harm sine

delicto. From the outset, it had been obvious that if the topic was to be developed successfully, a greater infusion of progressive development than either the Commission or Committee were ready for was needed.

17. The topic had undergone a partial metamorphosis into an environmental topic; his delegation felt that that was grossly misconceived. First, environmental protection was best achieved at the preventive level and had nothing to do with the payment of compensation once harm occurred, which was the cornerstone of the topic. Second, the boundaries of prohibition were continuously being restricted in the interests of intergenerational equity and the freedom of others and the consequences of responsibility and not the strict liability standard would be increasingly called upon to regulate inter-State activities. For example, it was conceivable that the law would tolerate some pollution against payment of pecuniary compensation, but it was difficult to see how significant pollution could be tolerated even if there was compensation. Once that threshold was reached, it became a matter of responsibility, not liability. His delegation therefore felt that the formulation of draft article C created a confusion with State responsibility for it was the weakest formulation of the maxim sic utere tuo ut alienum non laedas. Third, confining liability to transboundary harm carried connotations of environmental protection which restricted the topics scoped. His delegation agreed that the distinction that the Special Rapporteur had made between State liability and operator liability would only add to the confusion and blur the distinction with State responsibility.

18. His delegation had no major problem with the Special Rapporteur's analysis of the responsibility of the operator, but felt that what was needed was a reassessment of the topic after 15 years of work. The Committee should accept the development of the topic almost exclusively on the basis of progressive development given the paucity of precedents. The topic should consist essentially of the requirement to compensate where harm without fault had occurred. A standard of strict liability should be the guiding principle; the perceptibility of harm should be relevant only to the extent that it might have an impact on the nature and degree of compensation. Exonerating circumstances should be admitted to regulate the operation of the standard of strict liability; there should be room for negotiations aimed at finding modalities for implementing the substantive rules; and the procedures usually associated with civil liability should be introduced into the text. The Committee would then have a clear end-product filling a lacuna in the overall system of State responsibility. Otherwise events and piecemeal developments would overtake work on the topic.

19. Mrs. FLORES (Uruguay), referring to the topic of State responsibility, said that her delegation reaffirmed its position in favour of maintaining the distinction between international crimes and international delicts, on the basis of the concept of the erga omnes obligations of States recognized by the International Court of Justice in the Barcelona Traction case.

20. Article 19, paragraph 2, of part one of the draft articles on State responsibility defined an international crime as a breach of an international obligation so essential for the protection of fundamental interests of the international community that its breach was recognized as a crime by that

community as a whole. In the case of an international crime, the violation of such an obligation would allow entities other than the injured State to make claims based on responsibility for the violation, while in the case of an international delict, only the State directly injured would be able to invoke the responsibility of the wrongdoing State. The establishment of those two categories represented a departure from the traditional approach of linking the wrongful act to reparation and limiting the consequences arising from the violation of a norm of international law to a bilateral link between the wrongdoing State and the injured State. The distinction made between crimes and delicts was not a major advance, as some delegations maintained, since the criteria for identifying a crime had already been formulated in article 19 of part one. On the question of whether a State could be punished, her delegation felt that the question of the nature of the responsibility incurred by a State for grave violations of international law, whether criminal or sui generis, did not rule out the possibility of punishment. Articles 3 and 5 of the draft Code of Crimes against the Peace and Security of Mankind supported that position since they established the criminal responsibility of the individual without prejudice to the international responsibility of the State. The distinction between international crimes and international delicts had a direct influence on the legal consequences they engendered, as her delegation had already noted in the past.

21. Her delegation felt that article 16, paragraph 2, should be analysed more fully; restitution in kind should be materially feasible and morally tolerable. It had reservations about the Special Rapporteur's position on the issue of political independence as opposed to political regime. Furthermore, the scope of the expression "the vital needs of the population" needed to be defined.

22. Article 17 should not be included in the draft articles. As her delegation had noted in the past, countermeasures would be incompatible with modern international law; such measures were inherently illegal, and were no less illegal for being a response to and consequence of a prior wrongful act.

23. In article 18, the powers of the injured State vis-à-vis those of other States should be defined more precisely. Subparagraph (f) was not necessary.

24. Her delegation believed that article 19 required further study, although it supported the role assigned to the International Court of Justice in the institutional scheme proposed by the Special Rapporteur.

25. Regarding the draft articles to be included in part three, her delegation felt that in article 7, the grounds on which the validity of an arbitral award could be challenged should be specified.

26. On the question of international liability for injurious consequences arising out of acts not prohibited by international law, the eleventh report of the Special Rapporteur had characterized harm as the condition sine qua non of any liability and compensation which might be due. Her delegation believed that the concept of transboundary harm was the key element in considering the topic. As it had noted in the past, the concepts of harm, responsibility and reparation were intricately linked. In the case of injurious consequences arising out of acts not prohibited by international law, the concept of harm was especially

relevant. When a State carried out or authorized an activity, it was implicitly authorizing the predictable consequences of such activity. While some lesser harm should be endured by virtue of the general principle of good-neighbourliness laid down in the preamble to and Article 74 of the Charter, transboundary harm could damage the territorial integrity and inviolability of another State by breaching the obligation of non-interference laid down in customary international law and embodied in the maxim sic utere tuo ut alienum non laedas. The right of a State to permanent sovereignty over its natural resources and the right to development could also be affected. In many cases, such damage amounted to an export of costs, which was a clear violation of the general principle of law prohibiting unjust enrichment. Her delegation therefore felt that beyond the existing treaty norms, harm that was caused should be compensated. That did not exclude the possibility of a regime of absolute liability for cases of transboundary harm.

27. Her delegation felt that harm to the environment could not be disregarded, but considered it to be only one of the aspects of transboundary harm. It did not agree with the view in paragraph 382 of the report that a distinction should be made between the requirement of reparation in the draft articles on State responsibility and the requirement in the current topic. Reparation should wipe out the consequences of the wrongful act and re-establish the situation which had existed previously. As noted in paragraph 384 of the report, the most appropriate remedy for harm to the environment was the total or partial restoration of the environment and when that was not possible, monetary compensation would have to be paid. Greater precision was needed in the proposed text for the definition of harm (A/50/10, footnote 226), particularly in paragraph (c). As to who should have the right of action in cases of harm, her delegation felt that individuals had locus standi for that purpose. If transboundary harm affected the rights of a State and its individuals or legal entities, provision should be made for their right to claim compensation. Her delegation believed that, in the definition of the environment that was adopted, the human factor was central and could not be excluded, in line with the approach taken in the Declaration of the United Nations Conference on the Human Environment and the Rio Declaration on Environment and Development.

28. Mr. ELARABY (Egypt) said that the draft Code of Crimes against the Peace and Security of Mankind should focus only on the most serious international offences, to be determined by reference to general criteria, such as the political character of the crime and the possibility that the latter might endanger international peace and security, as well as to the relevant conventions and declarations.

29. Given their relevance to the contemporary needs of the international community, two of the six crimes excluded from the draft Code should be retained. The first was wilful and severe damage to the environment, and he welcomed the Commission's decision to establish a working group to examine the possibility of including it in the draft Code. The second was aggression, whose very existence required determination and action by the Security Council in accordance with the provisions of Article 39 of the Charter.

30. The definition of intervention formulated in article 17 was imprecise and its application could create difficulties, particularly with respect to

evidence. It could also be argued that the most explicit contemporary manifestations of intervention were the subversive terrorist activities already covered in article 24 on international terrorism.

31. His delegation strongly supported the retention of the six other crimes included in the draft Code. It favoured the use in article 15 of the wording of General Assembly resolution 3314 (XXIX), which had proved to be flexible and practical over the years. The General Assembly's definition of aggression was not incompatible with the role of the Security Council in determining the existence of an act of aggression, since the scope of the draft Code was limited to individuals and did not cover States.

32. With regard to the crime of genocide, the new article 19 had moved closer towards covering all acts punishable under the 1948 Genocide Convention, including acts of direct and public incitement to commit genocide. The text should be extended to include attempts to commit genocide and complicity in genocide in order to bring article 19 fully into alignment with the Genocide Convention.

33. He supported the change made in the title of article 21 on crimes against humanity to give it greater clarity and to remove any doubt as to when the jurisdiction of national courts ended and that of the international court began. The general reference in the last subparagraph to all other inhumane acts, however, diluted the precise and well-defined nature of the article.

34. He also welcomed the changes made in the title and in various paragraphs of article 22, in particular the reference in paragraph 1 to the Geneva Conventions of 1949 and in paragraph 2 to the violations of the laws or customs of war. However, the new concept of exceptionally serious war crime referred to in the first line of the article was vague and might require further elaboration.

35. The increased frequency of acts of international terrorism, in particular the taking of the lives of innocent people, made it imperative to retain article 24, although slight amendments to its current wording might be needed.

36. The crime of illicit traffic in narcotic drugs (article 25) should be retained, given the magnitude of the problem, which had a severe and negative impact on the economy and public health of every country and a well-established connection with international terrorism.

37. Turning to the topic of State responsibility, he said that, at the current stage, the concept of State responsibility for crimes was not favoured by many States. States did not commit crimes and were exempt from criminal responsibility. It was for the State alone to punish and it could not itself be punished. The application of the concept of State responsibility could result in the unfair punishment of an entire people. Certain recent precedents suggested that a new norm was perhaps emerging and that the matter was still under consideration. His delegation was open to further development of international law in that field.

38. Referring to paragraph 2, article 19, of part one of the draft, he said that the first part contained positive ideas regarding the role of the General

Assembly and the Security Council in examining acts alleged to constitute international crimes. While those ideas needed to be further explored, the second part of paragraph 2 was unrealistic in so far as it encroached upon the sovereign rights of States by imposing the compulsory jurisdiction of the International Court of Justice without the prior consent of the State alleged to be in violation of Article 36 of the Court's Statute. The paragraph was also contrary to such well-established legal principles of public law as the sovereign immunity of States and the act of the State.

39. He questioned the need to advance at the current stage to the controversial concept of State responsibility for crimes. The best way to achieve the deterrence factor was to attribute criminal responsibility to the individuals from the offending State who had committed the wrongful act.

40. On the topic of international liability for injurious consequences arising out of acts not prohibited by international law, his delegation supported the Special Rapporteur's proposed new text on the definition of harm, which included harm to the environment, an issue that was of particular importance to developing countries.

41. Of the three types of liability proposed, his delegation supported the principle of joint liability between the State and the operator whereby the wrongdoing State would be liable for the outstanding compensation if the operator failed to compensate the injured State in full or in part. That principle was consistent with the ultimate duty of the State to exercise due diligence over all activities within its territory, especially those of a dangerous nature. An injuring State could never be excused from culpability for transboundary harm to the environment which affected another State, even if no fault had been found on its part.

42. Mr. AL-BAHARNA (Bahrain) said that in his tenth report on the topic of international liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/459), the Special Rapporteur had quite rightly examined the questions of civil liability together with the question of State responsibility. The draft articles proposed dealt with both substantive law and questions of procedure.

43. In his eleventh report (A/CN.4/468), the Special Rapporteur had introduced the notion of harm to the environment and proposed a text for the definition of harm. He had chosen a restricted definition of environment which limited harm to the environment exclusively to resources such as air, soil, water, fauna and flora and their interactions while dismissing the broader concept of environment which would cover landscape, property forming part of the cultural heritage and, generally, anything that caused physical harm to persons or their health, whether directly or as a result of environmental damage. It was difficult to accept that restricted definition. The concept of the environment was a changing one and could not remain static. Advances in science and technology were bound to affect human understanding of the various elements of the environment and their interaction with each other. The environment should therefore be defined in the broadest terms possible as it had been in the 1993 Convention on Civil Liability for Damage Resulting from Activities Dangerous to

the Environment and the 1992 Convention on Transboundary Effects of Industrial Accidents.

44. On the question of reparation for harm to the environment, the Special Rapporteur's view was that adverse effects on the environment could not by themselves constitute a form of harm. Developments since the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment, however, had shown clearly that environmental degradation in itself constituted harm and that the environment belonged as much to States as to others interested in its preservation.

45. As to the other issues raised in the Commission's report, his delegation supported the recommendations on the identification of dangerous activities and had no objection to the provisional adoption on first reading of draft articles A, B, C, and D.

46. Turning to the topic of State responsibility, he said that, with regard to the normative aspect, the question was whether the international State crimes should involve any special or supplementary consequences that did not apply to international delicts. With regard to the institutional aspect, the question was whether in the case of international State crimes there should be some form of intervention or action by international political and judicial bodies to regulate the arbitrariness of countermeasures by individual States or groups of States.

47. In referring to the special or supplementary consequences of international State crimes, the question arose as to the extent to which the consequences of international delicts contemplated in articles 6 to 14 of part two applied to crimes. The Special Rapporteur was of the view that, in general, cessation, restitution in kind, compensation, satisfaction and guarantees of non-repetition would apply equally to international State crimes, but conceded that the principle of political independence and territorial integrity of States would qualify the applicability of restitution in kind, which should not be effected at the expense of the political independence and territorial integrity of States. On that point, there could not be two opinions. The Commission should apply the same kind of reasoning to the remedies of compensation, satisfaction and guarantees of non-repetition. No State should be subjected to measures that jeopardized its political independence, the vital needs of its people and its territorial integrity. The question of when the political independence or territorial integrity of a State could be said to be in jeopardy was, however, a delicate one and the Commission should consider whether it could be regulated by norms of international law in the absence of third-party determination and whether it was conceivable that States would agree to third-party decisions on such vital issues.

48. The issue of the role of international institutions in the context of the legal consequences of international State crimes was complex. Theoretically, international institutions, unlike States, were not endowed with power to redress a wrongful act. At the practical level, States which normally initiated action through international institutions had different interests to safeguard. Such constraints held out little hope for a high degree of institutionalization, which was one of the options indicated by the Special Rapporteur. The most

practical course that could reasonably be adopted in the current state of international relations was to have recourse to existing institutional machinery in a guarded manner; he was heartened to see that the Special Rapporteur also held that view.

49. The International Court of Justice currently lacked the necessary jurisdiction and infrastructure to issue a binding ruling in respect of legal consequences of international State crimes. Although the Special Rapporteur had suggested that the General Assembly was the international body best qualified to determine and attribute international crimes, its role was in fact severely restricted by the constitutional limitations on its powers, and its resolutions were, not, as a rule, legally binding. Neither did the Security Council possess the requisite legal authority in connection with State responsibility for international crimes, since its role was limited to maintaining international peace and security. He agreed with the Special Rapporteur that an optimum combination of the political and judicial elements should be found.

50. He further agreed that the International Court of Justice should be given jurisdiction to pass a binding judgement on issues in dispute, as opposed to exercising a merely advisory function.

51. Article 15 appeared acceptable, as it was based on the generally approved principle that a crime, as defined in article 19 of part one, would necessarily entail all the consequences of delicts in addition to supplementary and aggravated consequences.

52. He supported the provisions of article 16 relating to the substantive consequences of an international crime committed by a wrongdoing State, as defined under article 19 of part one of the draft, given that paragraph 3 made an exception to the rules and principles of international law regarding substantive consequences of international crimes committed by wrongdoing States thereby protecting their independence and territorial integrity and the vital interests of their peoples. He also subscribed to the comments by some members of the Commission to the effect that, contrary to the provisions of article 19, paragraph 5, of part two, presentation by an injured State of a demand for cessation of the wrongful act constituting an international crime should not be conditional upon a prior determination by the International Court of Justice.

53. In his view, the adaptations and modifications contained in article 17, in respect of articles 11, 13 and 14, deserved further consideration.

54. He agreed with the general remarks made in paragraph 301 of the report to the effect that article 18 failed to provide in its provisions "a distinction between the rights of the State whose individual rights were violated, and the rights of other States". On the other hand, in contract to the view expressed in paragraph 302 of the report, he believed that the requirement in paragraph 1 of a prior decision of the International Court of Justice for the obligations contained therein to come into effect was well-founded and valid.

55. With regard to article 19, he agreed with the view voiced by a number of members of the Commission that the institutional scheme set forth therein had many positive features.

56. He was pleased to note that article 20 reaffirmed the principle that articles 15 to 19 of part two did not affect any decisions taken by the Security Council under the Charter, or the inherent right of self-defence as provided in Article 51 of the Charter.

57. He supported the Special Rapporteur's proposal to include in part three draft article 7, providing for binding third party dispute settlement in any disputes arising between States parties with respect to the legal consequences of crimes under articles 6 to 19 of part two. He agreed that such a draft article should reflect the provisions of article 66 of the 1969 Vienna Convention on the Law of Treaties.

58. Commenting on the articles in part three of the draft and the annex thereto, he said that the settlement dispute mechanism they embodied represented a bold step in the progressive development of international law in respect of the settlement of disputes between States, which was traditionally based on the free choice of means of settlement. He agreed with those members of the Commission who thought it was wise, in the light of State practice, to include in the draft a mechanism for compulsory settlement of disputes such as that envisaged in part three, as being a reflection of progressive development of international law.

59. Ms. FLORES (Mexico), referring to the topic of State responsibility, said that the international community could delay no longer in reaching a clear and precise determination of the consequences arising from breaches of obligations under international law and identifying the legitimate means and mechanism to which States might have recourse to obtain redress for the ensuing harm.

60. The United Nations had been engaged in establishing a legal framework for State responsibility for 40 years, in the context of rapidly evolving inter-State practice which provided ample material on which to base that work. However, she was concerned by the Commission's current approach and considered that its work would be prolonged by its insistence on retaining in the draft articles concepts which created confusion.

61. Among the points open to question in the Commission's report, her delegation was particularly concerned about the provisions relating to countermeasures, the consequences of international crimes, and the settlement of disputes. Her delegation had on several previous occasions expressed doubts about including the first two points in the draft articles. It would be preferable to eliminate the provisions on countermeasures, which would certainly produce an imbalance since only strong States could take such action.

62. Her delegation shared the concern expressed by other delegations regarding the drawbacks attendant upon the concept of international crimes, and urged the Commission to consider to what extent that concept was useful within the general regime of State responsibility.

63. Mexico had already emphasized the importance of including in the draft provisions concerning disputes settlement mechanisms, which must be effective and expeditious in order to preclude the counterproductive effects of a process

which was excessively lengthy or expensive or restricted the freedom of States to choose their own means of settlement.

64. The legal framework of State responsibility should revolve around three basic principles: the existence of an act or omission that breached an obligation established by an existing norm of positive international law; the attribution of that wrongful act to a specific State; and the existence of loss or harm resulting directly from such conduct.

65. The Commission would be in a better position to complete the draft articles if it concentrated on analysing those points and their consequences with regard to reparation, and on analysing the legitimate mechanisms to which States affected by wrongful conduct could have recourse. The introduction of ancillary elements, whatever their theoretical justification, merely created practical difficulties and hampered the completion of an important instrument which was eagerly awaited by the international community.

66. Mr. VILLAGRAN KRAMER (Guatemala), referring to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, said that his delegation viewed the topic in terms of liability for wrongful acts, liability for acts not prohibited by international law and liability for abuse of rights, and in the context of the possibility that a consensus could be achieved regarding the responsibility entailed by international crimes. As industry in highly developed countries grew ever bolder and capitalism gained momentum in developing countries, venture capital was becoming prevalent all over the world. Hence, the possibility that transboundary harm might become more prevalent and assume greater magnitude could not be ignored. The topic therefore called for precise conceptualization and should be clearly understood by developing countries, which had to deal with the repercussions of major economic activities.

67. One important step in that connection was to identify what could cause transboundary harm, and the Commission had been correct in taking as its starting-point the existing conventions dealing with issues concerning such harm. Transboundary harm might arise from activities carried out by three types of agent: the State, acting in its own capacity or in its capacity as operator, private operators, and mixed operators, where both the State and private parties were involved. The draft articles should therefore include, as had been proposed, a definition of the terms "operator" and, in particular, "private operator".

68. It was essential to make a clear distinction between "substantial" or "significant" harm and any other type of harm. In general, the Commission appeared to be making progress on defining the concept of harm. The definition proposed by the Special Rapporteur in his eleventh report (A/CN.4/468) provided clear and useful guidelines. His delegation agreed with the statement in paragraph 397 of the Commission's report that, in a preliminary stage, harm should cover the following elements: loss of life; personal injury or other impairment of health; loss of or damage to property and impairment of the natural resources, (including ecosystems), and human or cultural environment of the affected State.

69. His delegation endorsed the proposal by the Special Rapporteur to include prevention ex post in the chapter on prevention rather than in the chapter on reparation. Ten years previously, the Commission, in its work on the topic of international liability, had focused on acts not prohibited by international law. At that time, it had placed particular emphasis on responsibility for activities entailing risk and stressed that the entire topic should be viewed within the framework of strict liability. In 1992, the Commission had changed its approach: it had decided that the topic of international liability should be understood as comprising both issues of prevention and remedial measures and that the former should be considered first. That had led in turn to an emphasis on due diligence and, concomitantly, on guilt.

70. The Commission needed to clarify that matter. It was examining the problem of liability within the framework of prevention and, at the same time, it was dealing with the concept of liability for risk. Operators fell under the regime of strict liability whereas States, in the context of prevention, fell under the regime of responsibility for wrongful acts. In the event that harm occurred and the State involved had failed to take the required measures of prevention, that State could be held responsible; if an accident occurred, the operator was immediately liable. If in a particular case the State was also acting as operator, then it must assume full liability for both categories (prevention and operation). If the activity was being carried out by a private operator, that operator must assume full liability.

71. Such innovative reasoning opened the way to capitalism. Realistically it must be acknowledged that private operators, as opposed to States, were the most likely to be involved in the activities in question and, accordingly, the financial means envisaged to give effect to the fact of liability, such as insurance, were appropriate. However, as proposed by the Special Rapporteur, in the event that a private operator failed to meet his obligations completely, the State would assume subsidiary liability. His delegation endorsed that view.

72. His delegation was not fully satisfied with the draft articles. According to the draft text, non-compliance by the State of origin with the obligations of prevention set forth in the articles would result in the consequences provided for under international law with regard to breaches of international obligations. At the same time, according to article C (Liability and reparation), liability arose from significant transboundary harm and must give rise to reparation. In his view, two basic principles of law, which transcended the specific draft articles under consideration, must be incorporated in the final text: first, all damage must be repaired, and second, anyone who in the exercise of a right caused injury must repair that injury. The draft articles, as they stood, tended to diminish the force of the two principles.

73. One issue that remained to be resolved was that of the liability of the operator and the State when harm was caused to third parties.

74. Mr. CALERO RODRIGUES (Brazil) said that in endorsing the intention of the International Law Commission to undertake work on the topics "The law and practice relating to reservations to treaties" and "State succession and its impact on the nationality of natural and legal persons", the General Assembly, in its resolution 49/51, had said that it was so doing "on the understanding

that the final form to be given to the work on these topics shall be decided after a preliminary study is presented to the General Assembly". Perhaps because the Assembly's words lacked clarity, the Commission had interpreted that phrase differently in the two cases. In relation to reservations to treaties, it had decided that the conclusions of the debate on the Special Rapporteur's first report would serve as the preliminary study requested by the Assembly. In relation to State succession and nationality, however, the Special Rapporteur had interpreted those words to mean that the topic belonged in the category of "special assignments" and, consequently, should be considered in a manner different from the Commission's customary procedure.

75. That interpretation went beyond the intentions of the General Assembly and complicated matters unnecessarily. A Working Group on State Succession and its Impact on the Nationality of Natural and Legal Persons, established in 1995 by the Commission, had produced a first report which by no means met the requirement of a "preliminary study". Indeed, that report amounted to little more than a summary of the Special Rapporteur's first report and failed to provide the concrete guidelines which the Commission needed to engage in practical work and move away from the realm of theory. The Working Group would be reconvened the following year. His delegation could not endorse that approach. The Special Rapporteur's first report supplied all the elements necessary to complete the requested study in a short period of time. Yet, the Commission seemed to be moving away from presenting a preliminary study and to be embarking on the preparation of a detailed substantive study.

76. Returning to the topic of reservations to treaties, he noted that the Special Rapporteur's first report on that topic was a modest and brilliant work, offering an exhaustive analysis of the issues involved. While pointing out the many ambiguities and gaps in the 1969, 1978 and 1986 Vienna Conventions dealing with the law of treaties, the Special Rapporteur had expressed the firm conviction, with which his delegation fully agreed, that previous achievements must be preserved and that it was the task of the Commission to clarify the ambiguities and fill in the gaps.

77. In general, his delegation endorsed the conclusions drawn by the Special Rapporteur on the basis of the general debate in the Commission, and contained in paragraph 491 of its report.

78. The first report of the Special Rapporteur on State succession and its impact on the nationality of natural and legal persons, took a commonsense and cautious approach to an area where legal minefields abounded and every step had to be carefully measured. One criticism was perhaps in order: most of the issues dealt with in the report were considered in their general meaning, rather than in their significance in relation to State succession. Too much attention was given to almost endless categorization and breaking down of concepts and not enough to presenting general concepts. That fragmentation was unfortunately repeated, and even aggravated, in the report of the Working Group.

79. In his report, the Special Rapporteur had recalled two basic principles: nationality was governed essentially by internal law, and was also of concern to the international order. In cases of State succession, such concern was even more unquestionable. Succession of States on a large scale might give rise to

statelessness, depriving individuals of a right proclaimed in article 15 of the Universal Declaration of Human Rights, and could lead to situations of double nationality, a potential source of tensions and disputes. The intervention of international law might in that case be fully justified. A consensus had emerged in the Commission on the obligation of the States involved in a succession to negotiate the questions of nationality, an idea developed slightly in the Working Group's report. Unfortunately, as a result of too much categorization, the principles had become somewhat diluted. The question was whether a simple obligation to negotiate was sufficient to ensure that the problems related to nationality resulting from a succession of States would actually be resolved. He hoped that the Commission would be in a position to present a preliminary study on the topic to the General Assembly in 1996.

80. With regard to the Commission's long-term programme of work, he recalled that at its most recent session, the Commission had begun work on two new topics. Three other topics remained on its agenda. In his view, the fewer the items on the agenda, the more conscientious and comprehensive a study could be made of each topic. It had been suggested in the Commission that a new topic, "Diplomatic protection", should be included in its agenda and that a feasibility study should be done on a topic relating to law of the environment. He was not certain that such a course was appropriate: members were currently in the penultimate year of their mandate and the Commission already had a session of intense work before it. Additional assignments would only result in more time constraints and a reduction in quality. It would be preferable, in his view, to postpone consideration of those two suggestions until after the new members had been elected.

81. The representative of Austria had earlier expressed the view that because international relations had radically changed, changes in international law must follow and, in consequence, the Commission should not continue using the same traditional working methods and should strive to eliminate "a certain stagnation which was besetting the classical methods of promoting codification in the United Nations system". That logic was clear but not entirely without flaws. First, the changes which had occurred in international relations were not necessarily radical. Secondly, he was not convinced that international law should move in some of the directions indicated. He did not, for example, support the view that multilateral conventions should be replaced as the primary instruments of codification by alternative instruments of "soft codification" such as General Assembly resolutions, declarations, or restatements of customary law. "Soft law" was a contradiction in terms: what characterized law was the constraining nature of its norms - the fact that they gave rise to "hard" obligations. Other possibilities which had been suggested, such as making wider use of reservations and "opting out" procedures, would also weaken international law. If anything, international law needed to be strengthened in order to meet the needs of the international community.

82. The representative of Austria had also called attention to procedures of the Commission which merited review and had suggested that an open-ended sessional ad hoc working group should be established at the Commission's fifty-first session, which would be given a broad mandate to review the codification process in the United Nations system which would, as he understood it, include a review of both conceptual and procedural issues. A serious concern was that

consideration of conceptual issues in a working group would turn into an academic exercise of limited practical value. At the same time, the methods of work of the Commission could hardly be improved from the outside.

83. The representative of Austria had further suggested that the General Assembly might choose to intervene in the organization of work of the Commission in a bolder fashion than before. His delegation doubted the wisdom of depriving the Commission of the prerogative of conducting its own affairs. In any event, nothing should be done without consultations with the Commission.

84. The concerns raised by the representative of Austria certainly merited consideration. If a working group were to be established, its mandate should be defined more clearly. Furthermore, the Commission should be asked to provide, in its next report, a concise description of the procedures it currently followed and an assessment of the extent to which alternative procedures might make its work more effective. If such an assessment were not completed in 1996, it might be necessary to wait until the new members of the Commission had become fully familiar with existing procedures and were in a position to evaluate any proposed changes. In the long run, it might be useful to consider the possibility of revising the Statute of the Commission, which was almost 50 years old.

The meeting rose at 6.05 p.m.