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Chairman: Mr. LEHMANN (Denmark)

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

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)

1. Mr. RODRIGUEZ-CEDEÑO (Venezuela) welcomed the significant progress made by the Commission in its deliberations on the question of State responsibility and said that its work on the topic was innovative. As was the case for all rules of law, the regime of State responsibility must be adapted to the realities of international society. His delegation agreed that it was necessary to proceed very cautiously when attempting to draw a distinction between delicts and crimes in terms of their gravity, their underlying features and their consequences. The word "crime" described a grave breach by a State of a fundamental norm safeguarding the interests of the international community, which was difficult to define with precision. In his delegation's view, State responsibility for wrongful acts should be limited to delicts, meaning violations of international law the gravity of which did not affect the interests of mankind. His delegation could not agree that States could be held liable for an international crime, which would require the establishment of a regime different from that applicable to responsibility for internationally wrongful acts.

2. His delegation had reservations regarding the concept of countermeasures, since such unilateral acts could interfere with the exercise by certain international organs of their mandate to consider and resolve international disputes. The draft articles should delineate clearly all matters relating to the right to resort to countermeasures, the circumstances in which that right could be exercised and prohibited countermeasures. The right of the injured State to take such measures must be neither unlimited nor general in nature and must be in proportion to the effect of the wrongful act or of the damage caused. Particularly where crimes were concerned, certain conditions also must be met. An internationally wrongful act must have been committed, the cessation of the act or reparations therefor must have been requested and recourse must have been had to dispute settlement mechanisms. None of those conditions should be omitted where crimes were involved.

3. The objective of countermeasures must be to compel compliance with an obligation, not to impose a punishment for non-compliance. The aim was to confirm the right of the injured State to adopt measures requiring the State which had committed an internationally wrongful act to fulfil its secondary obligations. The cessation of the wrongful act, reparation and a guarantee that the act would not be repeated were the goal.

4. With respect to proportionality, (article 13) and prohibited countermeasures, (article 14) it was entirely appropriate for the draft Convention to list countermeasures which were prohibited.

5. As to the provisions concerning the settlement of disputes, his delegation believed that whereas it was acceptable that any State should be able to bring a matter before the Security Council or the General Assembly, it had serious reservations as to the desirability of granting the right to bring a matter before the International Court of Justice by unilateral application. That

provision ran counter to the established principle that the competence of the Court hinged solely on the consent of the States parties to a dispute. His delegation also had concerns regarding the right of intervention granted by article 19, paragraph 4, of part two of the draft, which went beyond the letter and spirit of norms established, in particular, by the International Court of Justice, which held that such intervention must be based on a State's legitimate interest in a case.

6. As to the settlement of disputes arising out of the interpretation or application of the draft articles, dealt with in part three of the draft, his delegation considered that the proposed mechanism was excessively rigid and conflicted with a widely accepted principle enunciated in the Charter of the United Nations, in particular, its Article 33, paragraph 1, and in various international instruments, namely, the principle of the free choice of settlement procedures. Whereas draft article 5, paragraph 1, required the agreement of both parties to submit the dispute to arbitration, paragraph 2 authorized unilateral recourse where one State had taken countermeasures. Similarly, draft article 7 also provided for unilateral recourse to the International Court of Justice. It was essential to ensure coherence between article 19 of part two and part three of the draft articles and to ensure that their language properly reflected the fundamental principles of dispute settlement, in particular, those relating to the free choice of mechanisms and the required consent to implement a given mechanism.

7. Mr. MATIKO (United Republic of Tanzania) said that the speed with which the International Law Commission codified public international law lagged behind actual practice in the interaction of nations in such fields as science, business and diplomacy. His delegation therefore hoped that the use of ad hoc working groups would be encouraged in order to speed up the Commission's work. However, it did not agree that serious consideration should be given to using additional protocols, soft codification and restatements; while they might be useful in regulating international relations, they could neither play the role of multilateral conventions nor adequately satisfy the demands of public international law.

8. It was gratifying to note that the second reading of the draft Code of Crimes against the Peace and Security of Mankind had reached an advanced stage, that the first reading of the draft articles on State responsibility would be concluded in 1996 and that elaborate preparations were under way to address other items. His delegation hoped that by the end of the century the Commission would have elaborated a comprehensive set of conventions governing and binding States in various substantive areas.

9. Turning to the question of State responsibility, he welcomed the recent progress made on the topic. The identification of crimes and the need to institute an elaborate mechanism for redress were important if progress was to be made in that area. The breach of international obligations by a State must entail accountability. Regarding the nature of crimes for which a State could be held responsible, his delegation agreed with the concept elucidated in, but not limited to, draft article 19 of part one of the draft articles. On the implementation aspect of redress, although the proposed machinery of reference to the International Court of Justice might appear unduly cumbersome, it served

a useful judicial and political purpose. However, where the alleged crime was offensively flagrant and its scope had been delineated and acknowledged by a belligerent State, the other State might question the wisdom of seeking the Court's determination before contemplating appropriate countermeasures.

10. His delegation supported the Special Rapporteur's proposal to submit disputes to international political bodies for an assessment before seizing the Court of the matter. That procedure offered the international community an opportunity to be apprised of the problem and would facilitate the work of the Court. There would be no conflict of interest or competence.

11. With regard to proportionality, dealt with in part two, article 13 of the draft articles, his delegation believed that each international crime should be dealt with in the light of its intrinsic nature, while taking due consideration of the context and time-frame in which it occurred. His delegation generally could accept the prohibitive countermeasures listed in draft article 14. However, further work was needed, in particular, on subparagraph (b), which lacked conceptual clarity. It was also necessary to delimit the "extreme" nature of those countermeasures.

12. Turning to the dispute settlement proposals discussed in part three of the draft articles, he said that the flexibility with which the settlement procedure apparently could be applied, while allowing the harmonious and speedy settlement of disputes, might not adequately protect a weaker State from a stronger and usually belligerent State. That lack of protection must be given serious attention and the seemingly obligatory aspects of the conciliation and arbitration mechanism detailed in the annex was a move in the right direction. The main feature of article 1 of the annex was that it offered the parties the opportunity to sort out their differences amicably through compulsory negotiations before they had recourse to the stricter forms of dispute settlement.

13. The provision stating that a third party could tender its good offices or offer to mediate, even when not called upon, was not uncommon and should not be viewed as an unwarranted intrusion. Most disputes that would otherwise have escalated into conflicts had been settled in that manner. The provision was carefully framed to promise objectivity while balancing the interests of the third party and those of the States involved in the dispute.

14. Should it prove impossible to achieve a consensual agreement, the conciliation commission, which functioned in the manner of a commission of inquiry rather than of a conciliation board, did not offer the best avenue for settling a dispute. Given the awkward role that the conciliation commission was supposed to play, arbitration was almost inevitable. However, the fact that countermeasures were usually taken by an offended State presented a problem; under article 5, paragraph 2, the State against which countermeasures had been taken - which was usually the offending State - could unilaterally request the intervention of an arbitral tribunal, while the other party would have to abide by the same rules and was denied the right to seek arbitration. The fact that countermeasures were normally taken by powerful States offered a possible justification for maintaining that overtly biased provision, but would not produce the desired deterrent effect on them. Since it was difficult to

apportion fault at that stage of the dispute, he suggested that both parties should be given an equal opportunity to submit the dispute to the arbitral tribunal.

15. Mr. STANCZYK (Poland), commenting on the draft articles on State responsibility, said that the concept of State crime continued to provoke dramatically divided views within the International Law Commission and the Sixth Committee. That being so it was legitimate to ask whether any viable consensus on the issue was likely to emerge within the Commission and, ultimately and most importantly, within the international community of States.

16. International crimes were not an integral part of positive international law. With the exception of the war in the Persian Gulf and the consequences determined by the Security Council in its resolution 687 (1991), States had failed to corroborate their views regarding international criminal responsibility by setting in motion the substantive or instrumental consequences of a State crime in situations calling for a response by the international community. An international crime could not be equated with a breach of either an erga omnes or a jus cogens obligation, the former being a broader concept, while the latter, possibly also broader, might exacerbate rather than resolve the problem of identification. Regarding the institutional aspects of international criminal responsibility of States, any role assigned to the International Court of Justice should be carefully weighed against the past experience of the Court in other areas, such as in the Vienna Convention on the Law of Treaties with respect to jus cogens norms. Any decisions concerning the existence or attribution of a crime should give careful consideration to procedural guarantees. In particular, in building the relationship between any future convention on State responsibility and the competence of the Security Council under Chapter VII of the Charter of the United Nations, account must be taken of the Council's recently discernible willingness to give a broad reading of those competencies. A clear answer must be found to the problem of the relationship between the criminal responsibility of a State and that of an individual. It had to be decided whether determination and attribution in one system were valid also in the other.

17. His Government urged caution regarding the specific mechanism for settlement of disputes envisaged in part three of the draft articles. A clear trend had recently emerged towards more frequent use of multilateral and bilateral dispute settlement mechanisms. Therefore, any generalized mechanisms introduced by States should be conceived along modest lines and given a subsidiary role. The mechanism envisaged by the Commission, on the contrary, was tantamount to an exclusionary, self-contained system, which would obviate the need for any other mechanisms. While intellectual boldness counted for much, too great a departure from the solid ground of State practice could discourage acceptance by States. What was being proposed in the Special Rapporteur's seventh report as a postulate of a system, or as being logically inescapable, was coming disappointingly close to an artificial structure unlikely to stand on its own.

18. Draft articles 13 and 14 of part two, on proportionality and countermeasures respectively, together with the commentaries, thereto, had a solid ground in both practice and theory. However, he wondered whether the

prohibitions contained in article 14, paragraphs (d) and (e), were sufficiently precise to ensure unquestioned application, given that the mechanism for dispute settlement might be subject to particularly demanding tests.

19. Turning to the long-standing topic of international liability for injurious consequences arising out of acts not prohibited by international law, he said that progress had been far from satisfactory. While some were ready to move on to a broader area of environmental law, others urged caution, arguing that the draft articles on prevention alone might already constitute a self-contained mechanism of primary rules, and that any breach of those rules would be dealt with under the international law of State responsibility. It was difficult to define the legal consequences which might ensue from negative transboundary effects, as opposed to the breach of an obligation. It might well be argued that State practice offered no consistent theory of accountability for transboundary harm. The Commission should ensure that it did not exceed its mandate in connection with international liability by entering the sphere of State responsibility. That could occur if harm were accepted as the centrepiece of the system since, where substantial transboundary harm had occurred, liability would ensue, followed by the duty to make reparation, in turn introducing the question of whether that obligation should be assumed by the State, the operator or some combination of the two. The commentary to article C showed that the Commission was aware of that difficulty. The Commission should certainly, at some future point, deal with the law of the environment. Meanwhile, it should proceed with its work on international liability in a manner that would ultimately enable States to accept the final result of its work.

20. Mr. VUKAS (Croatia), referring to the topic of State responsibility, said that criminal responsibility could not be limited to individuals. Organizations, including Governments, which engaged in criminal activities, involved many other individuals, besides the immediate perpetrators, who indirectly contributed to the commission of crimes. Such criminal organizations and agencies should be punished and dissolved, and States should compensate their victims. That did not imply punishing the entire nation to which the organizations or agencies belonged, as claimed by some members of the Commission. He was disappointed that even the Special Rapporteur was not prepared to accept all the implications of including the term "crime" in his draft. There was no valid reason to reopen the discussion on the appropriateness of using that term in respect of States, since the Commission had accepted aggression as a crime in its discussion on the draft Code of Crimes against the Peace and Security of Mankind. All the proposals made in that connection had been based on the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), article 1 of which indicated that States were potential perpetrators of the unquestionable crime of aggression under international law.

21. Both legal doctrine and major judicial decisions had confirmed that not only individuals, but also organizations and States could commit crimes. That concept was deeply rooted in contemporary international law, as confirmed by the 1948 International Convention on the Prevention and Punishment of the Crime of Genocide, which had been invoked in 1993 by the republic of Bosnia and Herzegovina when instituting proceedings before the International Court of

Justice against Yugoslavia (Serbia and Montenegro) for the crime of genocide committed against the non-Serbian population in Bosnia and Herzegovina. The provisional measures indicated by the Court on two occasions were merely the first step in that judicial procedure against a State committing a crime. Once it had been accepted that States could commit crimes, many of the general principles of criminal law should apply to crimes committed by States.

22. With regard to the concept of "injured State", the claim that all States were injured by an international crime was generally unfounded, although some crimes, such as illicit traffic in narcotic drugs or severe damage to the environment, would directly affect or threaten more than one State or even all States.

23. While he viewed with sympathy the institutional scheme proposed by the Special Rapporteur in article 19 of part two of the draft, he shared the view of some members of the Commission that the majority of States were not ready to accept a dispute settlement mechanism entailing a binding decision by the International Court of Justice in respect of State responsibility.

24. Turning to the topic entitled "International liability for injurious consequences arising out of acts not prohibited by international law", he observed that the title was conceived in general terms, whereas the draft articles dealt only with liability for harm caused to the environment, together with some other issues relevant to protection of the environment. They did not cover other activities not prohibited by international law which could engage international liability, such as financial or trade activities.

25. Without venturing to propose a definition of the environment, his delegation considered that at least some components of the man-made environment should be included, and that the concept of the man-made environment should not be confined to what the Special Rapporteur referred to as the "cultural environment" (A/50/10, para. 379) since all human interventions relating to the management and conservation of natural resources should be treated as the resources themselves. He also shared the doubts expressed concerning the wisdom of excluding the human factor.

26. The definition of "transboundary harm" contained in article 2 (b) should be broadened to include the areas beyond, as well as under, the jurisdiction of any State, such as the high seas, the international sea-bed area, Antarctica and outer space. Therefore, the main principles concerning, inter alia, cooperation and prevention, should be appropriately applied to any harm caused beyond the limits of national jurisdiction, irrespective of whether the harm was caused to another State, or to mankind as a whole.

27. Concerning the Committee's method of work, he suggested that the two weeks devoted to the Commission's report could be used to advantage better. It would be preferable to have shorter statements by States on selected topics, particularly those suggested by the Commission, and a direct and immediate dialogue between the representatives of States and members of the Commission, particularly the Special Rapporteur.

28. Mr. ZAIMOV (Bulgaria) said that his delegation had always considered the topic of State responsibility to be one of the most important items on the Commission's agenda. While fully aware of the complexity of the concept of "State crimes" and the controversy to which it gave rise, his delegation endorsed article 19 of part one of the draft articles, which introduced the idea of international crimes, specified types of international crimes and distinguished between crimes and delicts. In his delegation's view, such a distinction must be based on the seriousness of the consequences of the act in question and the extent of the material, legal and moral injury caused to other States and the international community. The nature of State responsibility was neither civil nor criminal; rather it was international because it was set in motion by factual occurrences.

29. His delegation shared the view of the Special Rapporteur, summarized in paragraph 246 of the Commission's report (A/50/10) that in order for an internationally wrongful act to be classified as a crime under article 19, it must infringe erga omnes and possibly jus cogens rules; injure all States; justify a generalized demand for cessation/reparation; and justify a generalized reaction by States. Furthermore, "crime" was the appropriate word because it had long been current in legal parlance, had a negative connotation and brought a moral element into the legal domain. Lastly, since the word "crime", in article 19, had been included as adopted on first reading on 1976, it was hardly acceptable at the current stage for the Commission to reverse a decision of such importance.

30. If an international crime was to be designated as a qualified case of an international breach of law, there was a need for a special regime governing State responsibility, which must include a set of legal consequences going beyond the consequences of ordinary wrongful acts and which must put the instrumental consequences of the crime under the supervision of a judicial authority.

31. With regard to the concept of "injured State", States should not all have the same entitlements in terms of the substantive and instrumental consequences of a crime. The distinction between directly and indirectly injured States was relevant to both types of consequences.

32. On the question of countermeasures, all States should be entitled to take immediately the necessary measures to obtain cessation and avoid irreparable damage, but only the most directly concerned States should be entitled to take urgent interim measures to which the principle of proportionality would, of course, apply. In that regard, his delegation welcomed the adoption on first reading of article 13 (Proportionality) and article 14 (Prohibited countermeasures) and the seven articles contained in part three under the heading "Settlement of disputes".

33. His delegation provisionally welcomed the new articles proposed by the Special Rapporteur, namely, articles 15 to 20 of part two, and article 7 of part three. The proposed system under article 19 of part two was bold and progressive but needed further scrutiny. In general, his delegation was satisfied that the draft articles had provided two categories of substantive consequences and the institutional means of implementing them. Owing to the

guarantees provided in draft article 20, the proposed institutional mechanism would not, in principle, prejudice the constitutional functions of the Security Council or the right to self-defence under Article 51 of the Charter of the United Nations.

34. With regard to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, his delegation welcomed the adoption by the Commission of articles A, B, C and D. There should also be provisions dealing with liability for transboundary harm caused to the global commons, which constituted, de facto, harm to interests common to all countries. It was logical that the country in the territory or under the jurisdiction of which the activity causing the harm was carried out should be liable for the damage.

35. A clear concept of harm was essential to any future work on international liability. In that connection, the Commission should consider the implications of imposing liability for wrongful acts when a State failed to fulfil its obligations of prevention, in relation to the articles on State responsibility.

36. It was important to determine the basis of the obligation of States to compensate for transboundary harm not prohibited by international law. No difficulties arose when such obligations were set forth in a treaty. However, in the contrary case, it was difficult to determine which law might be applicable. There was a need for rules in that regard under public international law, without preventing claimants from instituting procedures under private international law.

37. The most common form of reparation provided for under existing conventions on damage to the environment was very similar to naturalis restitutio or restoration of the damaged elements. The definition of harm must take that aspect into account and, in that connection, his delegation proposed that in the draft article on harm (A/CN.4/468, para. 38), the words "the status quo ante" should be inserted after "restore" in paragraph (c) (i), and that subparagraph (iii), which was not stringent enough, should be reworded.

38. Mr. BAXTER (Australia), referring to the draft Code of Crimes against the Peace and Security of Mankind, said that the content ratione materiae of the Code was clearly an issue of fundamental importance and one which would continue to give rise to controversy. In his view, only crimes of a very serious nature should be included, so as to avoid any doubt that they truly constituted crimes against the peace and security of mankind. That approach was also the most likely to attract wide adherence to the Code.

39. His delegation had noted similarities between the Commission's views and those of the Ad Hoc Committee on the establishment of an international criminal court. Both forums seemed to agree on the need to deal, at a minimum, with abhorrent acts, such as genocide, crimes against humanity and serious war crimes. The Commission's discussion with regard to aggression had also raised issues which were relevant to both the Code and the court, for example, the role of the Security Council in determining the existence of an act of aggression. It was important to coordinate the Commission's consideration of the draft Code

and the Ad Hoc Committee's debate on crimes which would be dealt with by the proposed court.

40. The crime of genocide must, without any doubt, be included in the draft Code. The definition of that crime in the Code, as well as in the statute of the international criminal court, should be based on the definition contained in the Genocide Convention. Members of the Ad Hoc Committee had expressed concern about the lack of protection offered by that convention to political and social groups. Those concerns would be addressed in great measure if acts committed against members of such groups, a systematic campaign of killing for example, could be considered as crimes against humanity.

41. His delegation endorsed "crimes against humanity" as the new title for draft article 21. That expression was being used in the statutes of the international ad hoc tribunals and appeared in the criminal legislation and penal codes of various countries. There was no need under customary international law to link crimes against humanity with armed conflict. Crimes against humanity could be committed during times of peace as well.

42. The scope of draft article 22, dealing with exceptionally serious war crimes, should be extended to include internal armed conflicts. Clearly, the notion of grave breaches of the Geneva Conventions applied only to acts committed in international armed conflicts. Failure to cover internal armed conflicts would be a serious omission, given the number of conflicts of that nature in recent years.

43. In its consideration of the topic of State responsibility, the Commission spent a large portion of its time elaborating the normative and institutional consequences of State crimes. While greatly respecting the idealism and intellectual commitment of those who had worked on the topic, in particular the Special Rapporteur, his delegation had some reservations as to the value of those efforts. The issue of State crimes raised difficult and basic questions, including the consequences attaching to an international crime committed by a State, an issue which the Commission had not resolved.

44. Article 19 of part two of the draft articles on State responsibility raised a number of fundamental and still unresolved issues. One was the use of political organs to make the initial determination of the existence of an international crime. Another concerned the proposed function of the International Court of Justice: assuming that it continued to operate in its current manner, was the Court suited to make the final decision with regard to the existence of an international crime and would it be able to respond quickly enough to an international crime which was being committed by a State?

45. His delegation endorsed the view of many others which were concerned about the Commission's focus on State crimes. The practical benefits for States were not sufficient to justify further expenditure of the Commission's limited time on that matter. He urged it to take steps to ensure that it would reach its goal of completing the first reading of the draft articles on State responsibility by the following year.

46. His delegation commended the Commission on its work on countermeasures and dispute settlement, which would be of immediate practical value to States. Articles 13 and 14 of part two and the commentaries thereto were a valuable summary of State practice in that area.

47. With regard to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, his delegation considered it unfortunate that the Commission had been able to give only preliminary consideration to the Special Rapporteur's last two reports. International liability was an important matter for States and the Special Rapporteur's focus on that aspect was welcome. In future years, the Commission must allow sufficient time for examination of the topic and, in that regard, as suggested by the delegation of Ireland, it might give some thought to reorganizing the manner in which it considered the item.

48. His delegation found it unacceptable that the victim of injury from an incident resulting in transboundary damage could remain uncompensated merely because the private operator involved did not have sufficient financial resources. Residual State liability was essential and, accordingly, his delegation strongly favoured alternative A under article 21. There might even be another possibility, similar to option C in paragraph 26 of the Special Rapporteur's tenth report (A/CN.459) wherein the State in which the incident occurred would be liable for any residual damage not compensated by the operator, regardless of whether there was fault on the part of the State.

49. His delegation did not believe that harm to the environment should be limited to "service values". Under certain circumstances, compensation might be sought in relation to damage to the intrinsic values of a landscape. In that context, he wished to draw attention to current efforts to elaborate a liability annex to the Protocol on Environmental Protection to the Antartic Treaty.

50. At its 1995 session, the Commission has adopted four new draft articles on international liability, among which article C (Liability and reparation) was particularly welcome. Nevertheless, the new articles raised certain concerns. First, the references to "significant" transboundary harm meant that genuine harm might go uncompensated because it failed to reach the rather high threshold of "significant". Secondly, the use of the standard of due diligence to prevent or minimize the risk of causing transboundary harm, and the fact that such an obligation was not an obligation of result, did not seem to be appropriate under all circumstances. His delegation accordingly welcomed the reference in article A to "specific obligations owed to other States in that regard", which indicated that specific treaty regimes might contain obligations of result concerning measures to prevent or minimize the risk of transboundary harm. Thirdly, according to the commentary, the initial clause of article C, which read "In accordance with the present articles", was designed to convey the understanding that the principles of liability were treaty-based. If that implied the absence of any basis for the principle in customary international law, his delegation strongly disagreed. Australia had long held the view that liability arose under customary law for transboundary pollution.

51. The Commission must in future schedule enough time for an adequate consideration of the topic of international liability. That matter was

currently under consideration in several multilateral forums, including the International Maritime Organization, which was elaborating an international convention on liability and compensation for damage in connection with the carriage of hazardous and noxious substances by sea, and the Standing Committee on Nuclear Liability of the International Atomic Energy Agency.

52. Ms. HOUMMANE (Morocco) said it was unfortunate that the members of the Commission had been unable to resolve their differences with regard to the draft Code of Crimes against the Peace and Security of Mankind. As a result, final adoption of the Code had had to be postponed.

53. The Commission must make every effort to complete its work on the draft Code, in order to provide the proposed international criminal court, on which work seemed to be proceeding well, with a reliable and comprehensive legal instrument for the suppression of exceptionally serious crimes. Such an instrument was urgently needed in view of the increase in serious crimes against the peace and security of mankind, perpetrated by individuals who very often acted with impunity.

54. The Special Rapporteur had reduced the number of crimes included in the draft Code from the original 12 to six. Her delegation would have preferred a code encompassing exceptionally serious offences which threatened the peace and security of mankind. At the same time, it appreciated the efforts of the Special Rapporteur to limit the list to offences whose designation as crimes under the Code would hardly be disputed, in order to settle the long-standing dispute between the maximalist and minimalist schools.

55. It seemed unfortunate, nevertheless, that deliberate and serious harm to the environment had not been included on the list. That type of harm represented not only an increasingly common phenomenon but also a serious threat to current and future generations. It clearly met all the conditions universally understood under criminal law as defining a crime, namely, a physical initiative which was in violation of the law and which gave rise to an injury, there being a causal link between the act and the outcome. One example, which must not be allowed to continue with impunity, was the illicit dumping of toxic waste in the territory of or in waters under the national jurisdiction of certain countries.

56. The new version of draft article 15 on aggression was welcome but could be still more rigorous. In that connection, more consideration should be given to the role of the Security Council and to the principle of the independence of the proposed international criminal court.

57. Her delegation felt that the proposed new title of article 21 was an improvement, although the title should still reflect the massive and systematic nature of the crimes concerned.

58. As to penalties, it was true that the Code should include crimes, penalties and jurisdiction, in order to accord with the principle nullum crimen sine lege, nulla poena sine lege. However, since crimes against the peace and security of mankind could take the most diverse forms, a maximum penalty should be established, taking into account the seriousness of the crimes concerned,

leaving it to the judge to decide on the penalty in the light of attenuating or aggravating circumstances.

59. On the subject of State responsibility, her delegation agreed that a distinction should be made between State responsibility for crimes and individual criminal responsibility under the future Code of Crimes against the Peace and Security of Mankind. Although the international responsibility of States for acts or omissions regarded as international crimes did not require the identification or precise definition of the crimes in question, all crimes against the peace and security of mankind were considered to be crimes under international law and entailed the criminal responsibility of their perpetrators and also State responsibility. A State which had suffered material damage because of the unlawful conduct of another State should be entitled to obtain reparation; however, for humanitarian reasons and taking into account the vital needs of the population, limits should be placed on the reparation demanded from the State which committed the crime.

60. Her delegation had reservations about the wisdom of including countermeasures in the draft articles and noted with satisfaction the Commission's decision not to submit the articles in question to the General Assembly. Those articles could legitimize the use of coercive measures at the expense of justice and equity, which should be the key elements of a new world order. International relations must be governed by the rule of law in order to preserve the sovereign equality, territorial integrity and the political independence of States.

61. With regard to article 14, paragraph (c), on prohibited countermeasures which infringed "the inviolability of diplomatic or consular agents, premises, archives and documents", it should be noted that diplomatic law provided that an injured State could declare a diplomatic agent persona non grata, break or suspend diplomatic relations, or recall its ambassadors; those were acts of retaliation which did not require any precise justification. However, the question of the inviolability of diplomatic and consular agents, premises, archives and documents was an absolute rule from which no derogation was authorized. That minimum guarantee of protection was essential to ensure communication among States during crises and at other times.

62. Her delegation felt that the working group should continue its consideration of the question of State succession and its impact on the nationality of natural and legal persons since the subject had become particularly relevant in recent years. It agreed with the Special Rapporteur that, in contrast to international treaties or State property, archives and debts, nationality, being governed essentially by internal law, excluded a priori any notion of "substitution" or "devolution" since international law could not replace internal law in determining which individual was a national. That principle was recognized under international law (the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws), in case law (the 1955 Judgement of the International Court of Justice in the Nottebohm case) and in legal doctrine.

63. A distinction needed to be made between the granting of nationality, which was within the exclusive competence of each State, and its opposability, which

was a matter for international law, although States were reluctant to admit any limitation on their competence in that respect. In practice, the problem of nationality in cases of the ceding or return of territories should be resolved within the framework of an international agreement reflecting a balance of the interests of the States concerned. International law on the subject should be based on general rules deriving from State practice in order to eliminate cases of statelessness and dual nationality in cases of State succession and resolve problems deriving from conflicts of law and jurisdiction.

64. Mr. MAPANGO (Zaire) said that State responsibility for international crimes was a very important topic because it was essentially based on the purposes and principles of the Charter of the United Nations and if successfully defined would enable States to live in harmony and small States to survive alongside large States, which had a duty to protect them.

65. Zaire's position on the concept of State crimes remained unchanged; the State, because of its legal personality and in the context of its varied relations with other States, was responsible for its acts, including crimes or delicts violating international law. As in the case of individuals, a clear distinction needed to be made between crimes and delicts committed by States in order to draw all the legal consequences. As noted in paragraph 254 of the report, a breach of an international tariff clause could not be placed on the same level as genocide or occupation of territory by another State. His delegation was concerned about the selective approach taken by certain delegations, deriving from a divergence of interests which was not always clearly perceived, especially by third world delegations.

66. Reference was made, in paragraph 261 of the report, to the Guiding Principles for Crime Prevention and Criminal Justice adopted by the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders; if, on the basis of those Principles, not only persons who had acted on behalf of an institution or corporation, but also the institution or corporation itself, were made criminally responsible, the international community would be in the forefront of the development of international law. Although some delegations had taken the view that the incrimination of States could lead to the punishment of an entire people, his delegation believed that if provisions were made to spare the population of the State concerned from extreme hardship, that would strengthen the mechanism for the protection of the population, rather than leaving the whole question unregulated, disguising the punitive aspect under the cover of restitution or guarantees of non-repetition. The Commission must heed the lessons of history.

67. Since the Commission had unanimously adopted article 19 of part one, of the draft articles, which embodied the concept of "State crime", it was unacceptable to be constantly reverting to a question which had already been decided. The relationship between the legal regime of the consequences of crimes and other existing or prospective legal regimes was stressed in paragraph 270 of the report. Concerning the view that a distinction should be made between State responsibility and individual criminal responsibility under the future Code of Crimes against the Peace and Security of Mankind, his delegation was disappointed that while the argument nullum crimen sine lege had been used to exclude certain crimes from the Code, the Commission could not bring itself to

define the criminal acts or omissions of States as crimes, despite its unanimous adoption of article 19 of part one of the draft articles. The advocates of that approach were the same as those who had taken it upon themselves to select the crimes to be included in the draft Code and also wanted to restrict international State responsibility so that States could avoid prosecution for crimes and also the condemnation of the international community. His delegation could not support that approach, particularly since all the crimes envisaged were true crimes under international law and therefore entailed the responsibility of their perpetrators, with all the consequences envisaged in the report.

68. On the implementation of that responsibility, while a State could not be imprisoned, it could be prosecuted for reparation of the damage it had caused. His delegation therefore supported the Special Rapporteur's view in that respect, which would exclude any excessive clause which would unduly infringe on the rules and principles of international law concerning the protection of the sovereignty, independence and stability of the offending State; that should alleviate the concerns of those who wanted to exclude the responsibility of States for crimes they had perpetrated.

69. His delegation supported the idea that that responsibility should derive from a particularly serious violation of an erga omnes international obligation, which must naturally give rise to all legal consequences, with the necessary adjustments for aggravated responsibility.

70. His delegation endorsed the Special Rapporteur's institutional scheme, whereby the political organs of the United Nations would make a preliminary political assessment, and the International Court of Justice would make a decisive pronouncement on the existence of an international crime. It noted that the draft articles on State responsibility had deterrent as well as punitive value.

71. On international liability for injurious consequences arising out of acts not prohibited by international law, his delegation believed that that type of responsibility derived from the concept of the risk taken by the perpetrator of the activity which caused transboundary harm. When a causal link could be established between the activity and the damage caused, State responsibility was entailed. When the actions were those of an individual, they still entailed the responsibility of the State because the State controlled all activities which might give rise to transboundary harm.

72. Mr. SANGIAMBUT (Thailand), referring to part two, article 13, of the draft articles on State responsibility, on the question of proportionality, said that the negative formulation "shall not be out of proportion" might allow for the possibility of an escalation of reprisals; that question needed to be resolved since countermeasures should be temporary and when the situation reverted to normal or reparation was settled they should be discontinued.

73. Mr. RAO (Chairman, International Law Commission) said that paragraph (5) of the commentary to article 13 made it very clear why a flexible negative formulation had been used in that article and how it was linked to determining the degree of gravity.

The meeting rose at 5.35 p.m.