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REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-EIGHTH SESSION (1996)

Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-first session prepared by the Secretariat

Addendum

CONTENTS

CONTENTS (continued)

CONTENTS (continued)

A. STATE RESPONSIBILITY

1. General remarks

1. In view of the fact that the legal regime governing State responsibility had coalesced very slowly, the Commission's completion of the first reading of the draft articles, together with commentaries, was described as a milestone, a significant and long-awaited event, a decisive step in its consideration of a very important topic, of great value in the codification and progressive development of the topic, crossing an important threshold in the codification of rules on the subject and as a significant contribution to the United Nations Decade of International Law.

2. Nonetheless, it was suggested that the topic of State responsibility still represented a huge task for the Commission and the road to the adoption of the draft articles might well be long and rocky. State responsibility was described as a complex topic entailing important questions such as countermeasures, proportionality and dispute settlement which had proved particularly problematic. It was further suggested that the draft articles, which would represent a major breakthrough in the codification and progressive development of international law when eventually adopted, needed to be very thoroughly examined. The view was expressed that while there was much in the draft articles adopted at first reading which could make a lasting contribution to the law such as those dealing with attribution of responsibility, the text had serious flaws which the Commission must correct if its work was to receive acceptance and have a chance of usefully influencing the future behaviour of States. Attention was drawn to the legality of countermeasures and the conditions under which they could be taken as important issues that still needed to be resolved. The view was further expressed that the text as a whole lacked consistency because it was the work of several Special Rapporteurs and raised various theoretical and practical problems, particularly concerning the distinction between international crimes and international delicts, countermeasures and settlement of disputes; part one of the draft articles would need to be drastically amended to be acceptable; part two was very weak and not linked closely enough to part one; and part three was unrealistic and ineffective.

3. With regard to future work on the topic, the Commission's recommendation that the draft articles should be transmitted to Governments for comment and observations, which should be submitted to the Secretary-General by 1 January 1998, was endorsed. It was suggested that in its future work the Commission should give priority to the topic of State responsibility with the hope that the new Special Rapporteur would be able to complete his task and that the Commission would soon conclude its work on the topic of State responsibility by adopting the draft articles on second reading.

4. As to the final form of the draft articles, attention was drawn to the assumption adopted by the Commission in its earlier work concerning the convening of an international conference to conclude a treaty. In this connection, a question was raised about the viability of so massive a piece of traditional codification under the current circumstances. The view was

expressed that there was little chance of a binding convention on State responsibility being adopted, the existing solid body of customary international law on the matter might be negatively affected by the adoption of such a convention and it would be a pity if the Commission's work were to end up as a still-born treaty which damaged the customary rules on State responsibility, even though unratified conventions could have an influence on State practice. It was suggested that alternative ways must be found of absorbing the Commission's work into contemporary international law. It was further suggested that the Commission should give serious thought to presenting its final product as a declaration or expository code and that the commentaries to the draft articles were certainly more useful to the practitioner than the abstract draft articles themselves.

2. Title

5. The title "State responsibility" was described as inappropriate, as the draft articles dealt only with the general principles of State responsibility for internationally wrongful acts and did not include such topics as international liability for injurious consequences arising out of acts not prohibited by international law. It was therefore suggested that the title should be revised on second reading so as to better reflect the actual content of the draft articles.

3. Part One. Origin of international responsibility

6. The articles in part one of the draft were viewed as a fairly comprehensive statement of the origin of international responsibility attributable to a State. It was further stated that, while some of the concepts required further elaboration, the draft articles generally reflected international practice and the main theoretical elements of international law.

4. Chapter I. General principles

Article 1

7. It was suggested that from the very start the draft articles must reflect the approach that it was the damage that entailed responsibility, not a breach of obligations that were in any case ill-defined in the draft articles, and that a serious difficulty arose in terms of this approach as early as article 1.

5. Chapter II. The "act of the State" under international law

Articles 5 to 11

8. The view was expressed that the thoroughness and detail of the draft articles on State responsibility, although commendable, caused unnecessary complications at times. One example of that was articles 5 to 10, on attribution to the State of the conduct of various parties and entities, which

were followed by article 11 on the conduct of persons not acting on behalf of the State.

6. Chapter III. Breach of an international obligation

Article 17

9. This article was described as repetitive and not adding anything of significance to the principle set forth in article 16.

Article 18

10. Paragraph 1 was described as merely stating the obvious.

Article 19

11. Three different views were expressed regarding the distinction between "delicts" and "international crimes" (see also the discussion under article 40). According to one view supported by some delegations, the distinction drawn between international crimes and international delicts was well founded for the following reasons. The distinction had a place in international law as well as in private law, in view of the proportional character of the offence and the legal consequences deriving therefrom. The distinction must be based on the seriousness of the consequences and the extent of material, legal and moral injury caused to other States and to the international community; the concept of an international crime was deeply rooted in contemporary positive law; and the distinction between crimes and delicts was a qualitative one between ordinary wrongful acts and serious wrongful acts which damaged the fundamental interests of the international community. The distinction existed not only in the doctrine but also in the pattern of international relations; the reaction of the international community to a mere failure to comply with a clause in a trade treaty was different from its reaction to a serious violation of human rights; and the concept of international crimes ennobled the draft articles and the whole regime of international responsibility. The distinction was warranted since the two types of offences differed in nature; wrongful acts should be ranked in a hierarchy since the nature and gravity of the unlawful State conduct varied greatly; particularly serious offences could surely be regarded as crimes (e.g., aggression, slavery, apartheid and any act constituting a serious and systematic threat to the fundamental rights of the human being) and evoked the concept of jus cogens, i.e., peremptory norms of general international law, despite the legal uncertainties to which a precise definition of such crimes might give rise. This sound distinction had been debated at great length in the Commission and recognized by the International Court of Justice, which distinguished between the obligations of States vis-à-vis the international community as a whole and their obligations solely vis-à-vis other States.

12. According to another view expressed by other delegations, the notion of State crimes required further consideration. Draft article 19 was viewed as containing no clear definition of an international crime. Further work was required to achieve a widely acceptable draft for the following reasons. While the responsibility arising out of a serious breach differed from that arising

out of a less serious breach, the crucial issue was the nature of the obligation which had been breached. Draft article 19 failed to specify the basis on which an obligation was deemed essential for the protection of fundamental interests of the international community. The problem of defining an international crime and an international delict still remained and was attributable to the choice of inappropriate terminology which had been borrowed from internal law. It was considered essential to decide whether there were, in fact, two different types of wrongful acts and, if so, to determine the consequences of an internationally wrongful act which adversely affected the fundamental interests of the international community as a whole or to set forth the secondary rules brought into play by the violation of primary rules. The characterization of crimes in article 19 implied that it was, above all, the nature of the primary rule that determined which violations constituted crimes, thus reinforcing the impression that the definition of crimes depended on the codification of primary rules, which went beyond the Commission's design of the topic. However, it was widely felt that the question of whether the violation of a rule of international law came under a specific responsibility regime depended not so much on the nature of the primary rule as on the extent of the violation and of the negative consequences it entailed. In its second reading of the draft, the Commission should carefully re-examine that aspect of the problem of the distinction between international crimes and international delicts. Other questions included whether it served any useful purpose to designate infringements of core values of international law as crimes attributable to a State as opposed to an individual and whether a categorization of wrongful acts, irrespective of what the categories were called, was meaningful and workable.

13. Still, according to a third view supported by some other delegations, the notion of State crimes should be deleted for it was controversial, confusing, vague, problematic, impractical and unhelpful. The controversial concept of "State crimes" should be eliminated from the discussion of State responsibility because it had not gained the broad international acceptance required for a new concept with such wide-ranging consequences. The crux of the controversy was described as whether a State could commit a crime and, if so, what the differences were between the legal consequences of a crime and of a delict, with such a distinction being viewed as difficult since criminal-law penalties were not applicable to States. State responsibility was neither criminal nor civil, but simply sui generis; any mechanical transposition of the concepts of internal law, particularly criminal law, would be an artificial, theoretical exercise. In internal law, criminal justice presupposed a moral and social conscience, a legislator empowered to define and punish offences, a judicial system to decide on the existence of an offence and the guilt of the accused, and a police to carry out the penalties handed down by a court. No legislator, judge or police existed at an international level to impute criminal responsibility to States or ensure compliance with any criminal legislation that might be applicable to them. Furthermore, universal values were not sufficiently defined and recognized to justify the approach advocated by article 19. The Commission's difficulty in working out the legal consequences of a "State crime" reinforced the view that the concept lacked an adequate juridical basis and should not be retained. As outlined in the commentary, the acceptability of that controversial distinction lay in the possibility of a meaningful statement of the consequences arising from each category of internationally wrongful act. However, the articles of part two, chapter IV, established only very slight

substantive differences which were not sufficient to justify the distinction. States would be reluctant to accept the problematic concept of State crimes, their main concern being that the criminalization of a State could result in the punishment of an entire people, with adverse consequences. It was noted that the concept of State criminality lacked the modalities for implementation. Punishing members of a Government or a high command for breaches of international criminal law on the basis of individual criminal responsibility was distinguished from punishing a collectivity like a State, which meant punishing its population and economy, which would raise major political, social and moral problems. The Commission should adopt a more useful approach by deleting the concept of international crimes and focusing on responsibility for internationally wrongful acts, or delicts since the gap between the consequences of crimes and delicts had been reduced to the point where the concept of international crimes was unnecessary.

14. The need for a concept of international crimes entailing so many troubling consequences was questioned in relation to the list of crimes since cases of aggression were already covered by the Charter system, particularly Chapter VII, and the law on collective self-defence; flagrant violations of the right to self-determination also fell under Chapter VII; human rights were the subject of a range of Charter-based and treaty-based procedures and serious breaches of human rights obligations could also be taken up by the Security Council as threats to the peace; prevention of massive damage to the environment was a matter for multilateral treaties; and intentional pollution by a State was again a matter for Chapter VII. It was considered preferable for the Commission to address the repercussions of the related concept of obligations erga omnes in State responsibility in ways less prone to misunderstanding and possibly abuse.

15. As regards paragraph 2, the view was expressed that its legal imprecision was unacceptable; the terms "essential" character of the obligation in question and "international community" were vague; and the provision seemed to correspond to the concept of jus cogens or a "peremptory norm of general international law" contained in articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties concerning an "international obligation so essential for the protection of fundamental interests of the international community", which also lacked precision.

16. Regarding paragraph 3, the remark was made that it was not apparent whether the list of examples was exhaustive. In addition, the very idea of a list of examples was open to criticism in a codification exercise. Furthermore, that list was out of date, poorly drafted and limitative and any wrongful act not enumerated in that list was regarded as a delict even though not all the delicts entailing State responsibility were of the same degree of seriousness. There was a suggestion to include the use of nuclear devices affecting the environment in view of the advisory opinion of the International Court of Justice.

17. The view was expressed that subparagraph 3 (a) raised a fundamental question concerning its compatibility with the Charter system: the Commission was venturing into the sphere of the maintenance of international peace and security; only the Security Council was empowered to determine the existence of a threat to the peace, a breach of the peace or an act of aggression under the Charter; and in the event of a conflict between the provisions of a future

convention and the Charter the latter would prevail in accordance with Article 103 thereof.

18. Support was expressed for the inclusion of massive pollution of the atmosphere or of the seas in subparagraph 3 (d) which was in line with the changing structure of international law resulting from industrial and technological development. Attention was drawn to article 218 of the 1982 United Nations Convention on the Law of the Sea under which the port State, rather than the flag State, was responsible for punishing the offence of pollution committed by private vessels on the high seas. Thus, the Convention permitted States other than the flag State to exercise universal jurisdiction to punish the offence of polluting the high seas in the same way as the offence of piracy, which was punishable by all nations as an offence against the law of nations.

19. With regard to paragraph 4, it was noted that delicts were not defined, but merely described as any internationally wrongful act which was not an international crime in accordance with paragraph 2. Delicts could also result from a failure to act which was not necessarily malicious or automatic, such as delay by a State in repaying its external debt. More detailed consideration should therefore be given to the relativity of the concept of a delict in international law, and of its possible consequences in the light of recent developments in international law and international economic relations.

7. Chapter IV. Implication of a State in the internationally wrongful act of another State

Article 27

20. It was suggested that the provision on the complicity of States contained in article 27 should be deleted because it had no foundation in positive law and embodied a purely causal responsibility.

Article 28

21. It was suggested that the responsibility of a State victim of coercion dealt with in article 28 should be addressed in the provisions on circumstances precluding wrongfulness contained in chapter V.

8. Chapter V. Circumstances precluding wrongfulness

Article 30

22. The remark was made that the Commission's work on the question of circumstances precluding wrongfulness had generated a number of apprehensions: for example, as to whether the codification of law in that field might not legitimize countermeasures as tools of "hegemonistic actions" by some Powers; and whether such measures would have the undesired effect of poisoning relations between the parties to the conflict. It was further remarked, however, that in an international community which lacked mechanisms for the enforcement of law,

States could not be denied the right to react to violations of international law by having recourse to countermeasures and that such recourse must therefore be regulated and the weakest States offered guarantees against abusive treatment.

Article 34

23. The view was expressed that while article 34, on self-defence, was appropriate, it must be remembered that in connection with its 1986 decision the International Court of Justice[1] had stated that the lawfulness of a reaction to aggression depended on respect for the criteria of necessity and proportionality of the self-defence measures. It was noted that article 34 referred to lawful measures of self-defence without defining the concept of self-defence, which was an important topic in international relations, as the principle of self-defence was often invoked by States to justify acts of aggression. The view was expressed that although customary international law on the subject had evolved, no satisfactory solution had been found to the problem of defining that concept and it was time for the Commission to study that question and clearly articulate and codify that principle, even though defining the concept of self-defence might prove as difficult as defining the concept of aggression, since armed conflicts and acts of aggression were likely to continue in days to come.

9. Part Two. Content, forms and degrees of international responsibility

24. The remark was made that the articles in chapters I, II and IV of part two of the draft contained a fairly comprehensive statement of the content, forms and degrees of international responsibility attributable to a State. It was further remarked that while some of the concepts required further elaboration, the draft articles generally reflected international practice and the main theoretical elements of international law.

10. Chapter I. General principles

Article 37

25. It was suggested that although article 37, on lex specialis, rightly provided that the rules of international law governing a particular situation should prevail over the general provisions contained in the draft articles, it might be appropriate to enter a reservation concerning article 60 of the 1969 and 1986 Vienna Conventions on the Law of Treaties, which enabled a contracting party to terminate a treaty with respect to another contracting party which had violated the treaty's basic rules. It was also suggested that the current wording of article 37 might give the impression that that specific reaction excluded any other consequences, i.e. those deriving from the draft articles on State responsibility, which required clarification since that was not the case.

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[1] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) Merits, Judgment, I.C.J. Reports, 1986, p. 14.

Article 39

26. Several delegations described article 39 as controversial and superfluous because Article 103 of the Charter stipulated clearly that Charter provisions prevailed over those of any other international legal instrument. The form and substance of article 39 were described as unsatisfactory because it conflicted with the other draft articles on State responsibility, and with other provisions of international law. Attention was drawn to the apprehension of some members of the Commission that a State's rights or obligations under the convention could be overridden by decisions of the Security Council taken under Chapter VII of the Charter which, under Article 25 of the Charter, Member States were bound to carry out. The view was expressed that the practical means of imputing responsibility to States for wrongful acts was a difficult and complex issue because of its political implications and no powers should be conferred on the Security Council in that regard beyond those strictly provided for in the Charter of the United Nations. Similarly, the view was expressed that the powers of the Security Council were defined clearly in the Charter and that the Security Council should not, as a general rule, deprive a State of its legal rights or impose upon it obligations beyond those arising out of the Charter and international law. There were various proposals to amend article 39 by: (a) deleting the words "as appropriate", which were described as incompatible with the draft articles in general and with those on the settlement of disputes in particular; (b) by deleting the words "and procedure"; and (c) replacing the word "subject" by the words "without prejudice". Other delegations favoured the deletion of article 39.

Article 40

27. As regards paragraph 3 of article 40, the view was expressed that including all other States as an "injured State" if the internationally wrongful act constituted an international crime was one example of the difficulties with which the concept of State crimes was fraught. The view was also expressed that some of the problems obviously stemmed from the confusion surrounding the concept of "crime" and the expression "injured State". Since the definition of a crime referred to the non-legal concept of the "international community" (article 19), all States members of that international community could lay claim to be "injured States", which was an unsustainable view. It was considered preferable to distinguish between directly injured States and those that were only indirectly injured, a distinction barely hinted at in article 40, paragraph 3. It was also suggested that the concept of "injured State" should differentiate between directly and indirectly affected States which should have different entitlements regarding the substantive and instrumental consequences of a crime. It was further noted that although the two latest Special Rapporteurs had proposed a variety of safeguards subordinating individual responses to crimes of States to United Nations law and procedures, in order to "domesticate" the consequences of the Commission's decision to consider all States as "injured" by international crimes, the existing draft articles were devoid of any such safeguards.

28. The view was expressed that reparation for the breach of an international obligation was one of the principal features of civil liability in domestic law. While in some systems a duty to make reparation might also attach to criminal

responsibility, it did so out of concern for the victim of the crime and as ancillary to the penal sanction which was imposed by way of society's condemnation of the affront to communal values. In retaining reparation at the heart of the schema of the legal consequences of an international crime, the Commission might be regarded as having paid too much attention to the injury suffered as a consequence of the wrongful act and too little attention to the societal dimension of the wrong. The question to be asked was whether the concept of an international crime signified not only that the international obligation breached was one of a particularly important kind but also that it was an obligation owed to the international community of States as a whole. In other words, the fact that under paragraph 3 of draft article 40 all States were to be regarded as injured States in relation to the commission of an international crime and that therefore all States could seek reparation from the wrongdoing State did not adequately address the collective nature of the wrong.

29. Some delegations favoured including an actio popularis since the specific consequences of an international crime should be particularly severe and it was now accepted that the perpetration of such internationally wrongful acts harmed not one State but all States. The remark was made that to the extent that the concept of "crime" overlapped with violations of the peremptory norms of international law, all States could consider themselves to be "injured" within the meaning of article 40, paragraph 3, even without determining whether the conduct in question was considered a "crime". The remark was also made that article 40 merely stated the obvious. In contrast, the view was expressed that the question of actio popularis of the injured State remained unsolved and that the consequences of the distinction between international delicts and international crimes must be examined further. It was stated that the International Court of Justice in connection with its 1986 judgment in the Nicaragua case had upheld the notion of "effective victim" in rejecting all claims by certain States that they were carrying out a so-called "actio popularis" on behalf of the international community, but without an express mandate, and that this limitation warranted further study by the Commission.

30. As regards the note to paragraph 3, a view was expressed that the distinction between the two types of wrongful acts and, consequently, between the two responsibility regimes should be maintained, though the current terminology should be reviewed. A view was also expressed that responsibility under international law was neither civil nor criminal, but purely international and, consequently, specific and therefore, in its second reading of the draft articles, the Commission should consider the possibility of either choosing other, more neutral terms, or avoiding the use of specific terms to refer to two different types of wrongful acts and making the distinction by other means, such as by dividing the text of the draft articles into different sections dealing separately with the consequences of wrongful acts as such and wrongful acts which threatened the fundamental interests of the international community as a whole. It was suggested that the Commission should confine itself to the use of the term "internationally wrongful acts", which was uncontroversial, to ensure that the draft articles used neutral terminology, while giving State practice and doctrine enough latitude to devise, at a later date, terminology that would be acceptable to all. The view was also expressed that, on second reading, the Commission should pay closer attention to the practicability of the concept of State crimes and that the proposal by some members of the Commission to replace

the expression "international crimes committed by a State" with "exceptionally serious wrongful acts of a State" deserved support. The remark was also made that State responsibility was not criminal but international in nature and triggered by factual occurrences and the inclusion of the note to draft article 40, concerning alternatives to the term "international crime", was therefore welcomed.

31. Disagreement was expressed with the statement by the Commission in its commentary to draft article 51 that it was immaterial whether a category of especially serious wrongful acts was called "crimes" or "exceptionally grave delicts". The concept of a crime had connotations which other forms of legal wrong did not have and the choice between the two terms should be made by reference to the purpose of the categorization. Thus, if the categorization was meant to signify that some forms of internationally wrongful acts were so subversive of international order or morality that the collective interest of States required their prevention and suppression, then the term "international crimes" might be appropriate. If, however, the categorization was intended as an acknowledgement that some internationally wrongful acts were by their nature or by virtue of their consequences significantly more serious than other acts of that kind and that that distinction should be reflected in the scope of the entitlement of an injured State to reparation, then some such term as "exceptionally grave delicts" would seem to be more appropriate.

32. In contrast, the view was expressed that it was important to retain the term "international crime". The concept of an international crime, which was not strictly identical to the notion of criminal responsibility in national law, indicated clearly that the violation of the legal and moral obligations essential to the peace, survival and prosperity of the international community was considered to be on a par with the most serious criminal offences punishable under national law.

33. It was suggested that care should be taken to treat the issue of the choice of terms (delicts or crimes) separately from the substantive problem, namely, the existence of two categories of wrongful acts which, however they were characterized, fell under two qualitatively different regimes. Concern was further expressed that the purely academic controversy surrounding the distinction between the two categories of wrongful acts based on the choice of such terms, would hold up progress in the consideration of the draft articles as a whole.

11. Chapter II. Rights of the injured State and obligations of the State which has committed an internationally wrongful act

Article 41

34. It was suggested that the word "immediately" should be inserted after "to cease", since the continuation of a wrongful act should not be tolerated.

Article 42

35. Some delegations endorsed the addition of paragraph 3. Although it could not be considered to be part of customary international law, it embodied the general rule of international law concerning the obligation to make adequate reparation. However, the view was also expressed that it was well established in international law, and had been confirmed in the recent practice of States and decisions of international tribunals, that full reparation (particularly in the case of expropriation) must be prompt, adequate and effective. Responsibility could not be qualified by the means or asserted lack of means of the State that had committed a wrongful act. The standard of compensation for violations of State responsibility unjustifiably departed from established customary international law, in that an injured State was entitled to obtain for itself, or for the national for whom a claim was brought, full reparation in the form of restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition (paragraph 1). That standard of full reparation was badly undercut by the provision that in no case should reparations result in depriving the population of a State of its own means of subsistence as it was a highly subjective qualification, was vulnerable to abuse and offered an easy escape for potential expropriators or others who had committed wrongful acts and sought to avoid responsibility for their actions.

Article 44

36. The view was expressed that the draft articles lacked a clear provision on the criteria for determination of the extent of the damage inflicted on an injured State or for establishing the degree of responsibility of the wrongdoing State. Modern tribunals that had considered the matter had consistently held that interest was a part of compensation. Article 44 provided that compensation covered any economically assessable damage sustained by the injured State, and might include interest and, where appropriate, loss of profits. The draft articles cast unnecessary doubt on the central role of interest as part of compensation.

Article 45

37. It was suggested that article 45, paragraph 2 (c), covered ground already covered in article 44, paragraph 2, and should be deleted.

12. Chapter III. Countermeasures

38. Some delegations welcomed the countermeasures provisions as well drafted and maintaining a fair and careful balance between the interests of the injured State and those of the wrongdoing State; a realistic solution to the problem of countermeasures; a valuable summary of State practice in that area; confirming the difference between countermeasures and responsibility as such; consistent with the approach based on the unequal capacity of States to take countermeasures; and as more balanced and less intimidating for less powerful States. The conditions for the institution of countermeasures were viewed as particularly encouraging since countermeasures were not always a satisfactory remedy between States of unequal size. The conditions and limits contained in the draft articles were therefore useful, as was the possibility of codifying

binding international rules in that regard. The draft articles on countermeasures showed that the Commission, far from seeking to maintain the status quo in the law on the use of countermeasures, had undertaken to set out clear and precise rules designed to strengthen guarantees against the abuses which could arise from countermeasures. Thus, for example, countermeasures were seen not as a right of an injured State, but only as a circumstance that precluded the wrongfulness of an act of a State.

39. The fact that the Commission had managed to contain the risks involved in the implementation of countermeasures for which rules had not yet been firmly established was particularly welcomed. The Commission's inclusion of countermeasures was justified since for some time international customary law had been laying down criteria on countermeasures and States would continue to resort to countermeasures with or without the codification thereof. It was felt that detailed regulation of countermeasures could help to offset some of the risks, especially if an obligatory jurisdiction was established. The general lines of the system adopted by the Commission seemed correct. The view was also expressed that there could be no doubt that, in accordance with international law and practice, if a State violated its legal obligations towards another State, that State was entitled to abrogate its legal obligations towards the first State. The main legal problem with regard to countermeasures was precisely their "threshold of legitimacy" or the circumstances in which countermeasures represented a legitimate response to wrongful conduct on the part of another State.

40. Other delegations emphasized the important role of countermeasures in the current international legal system and expressed dissatisfaction with the limitations and constraints imposed on such measures. The view was expressed that in the current state of international organization the right of an injured State to have recourse to countermeasures was unavoidable. All national legal systems retained some concept of countermeasures as a response to the violation of rights. There was something dangerously utopian in the notion that if only the international system could be developed further, then the concept of countermeasures could be dispensed with altogether. The view was also expressed that, given the rudimentary nature of the centralized mechanism for enforcing international law, individual means of constraint or coercion remained an indispensable component of international law. It would be senseless to ignore reality and to claim that countermeasures had no place in the law of State responsibility. The remark was made that the Commission's approach neither conformed to State practice nor was sound and that the Commission must respect the legitimate and important role of proportionate countermeasures in assuring international legality. A State might need to take immediate steps to induce compliance by a violating State and to avoid further injury to itself. The draft articles placed unjustifiable limits on an injured State's ability to protect itself in that way and created serious and unnecessary difficulties.

41. Still other delegations expressed reservations concerning the use of countermeasures and emphasized the problems arising from the possibility of abuse. The view was expressed that the commentary on countermeasures in the report stated that they might be necessary to ensure compliance with its legal obligations on the part of a wrongdoing State. Countermeasures, however, should not be viewed as a satisfactory legal remedy because each State considered

itself the judge of its rights in the absence of negotiated or third-party settlement and because of the unequal ability of States to take or respond to them. The scope of the regime should be restricted and narrowly defined since it could lend itself to abuse of weaker States. The view was also expressed that the draft articles appeared to assume that States resorting to countermeasures were acting on a basis of equality, whereas, as some members of the Commission had pointed out, to do so could lead to unjust results when the States concerned were of unequal strength or means. It was suggested that adequate safeguards should be provided to prevent great Powers from abusing countermeasures to coerce other States.

42. The approach adopted in the draft articles with regard to countermeasures was described as positive but not without its problems. It was also suggested that the aims should be threefold: to avoid an escalation of measures and countermeasures, to avoid aggravating the existing inequalities between States to the benefit of stronger States and to establish conditions relating to resort to countermeasures in the event that they could not be prohibited. A preference was expressed for a legal regime that would minimize differences in the possibilities of taking countermeasures, with great importance being attached to the Commission's role in the progressive development of international law.

43. A doubt was expressed as to whether the provisions relating to countermeasures should be incorporated into the draft articles. The use of countermeasures depended on numerous subjective assessments and posed the risk of increasing tensions between States instead of helping to put an end to unlawful conduct. The draft articles should be limited to regulating the consequences of wrongful conduct in terms of reparation, satisfaction, guarantees of non-repetition, cessation of wrongful conduct, restitution in kind and compensation, in addition to general aspects of responsibility and dispute settlement.

44. With regard to individual versus collective countermeasures, it was suggested that the draft articles should also include provisions on collective countermeasures taken through international organizations. Such a move would be consistent with international law and practice and with the logic of article 19.

45. There were different views concerning the appropriateness of including the notion of sanctions in the draft articles. The well-established term "sanctions" was described as preferable to the term "countermeasures". At the same time, there was opposition to a regime of sanctions, particularly the unilateral measures proposed by the Commission in the case of international crimes.

46. As regards the question of reciprocity, it was noted that the draft articles did not require that countermeasures should be reciprocal or that they should necessarily be taken with respect to the same obligation or the same type of behaviour as the ones underlying the wrongful act. The absence of such a requirement opened up a broad range of possible countermeasures available to injured States in a disadvantageous economic situation in relation to the wrongdoing State. That approach was consistent, for example, with the dispute-settlement rules and procedures annexed to the Agreement of 15 April 1994 establishing the World Trade Organization. It was also remarked that it did not

seem a positive move to require so-called reciprocal countermeasures since that would be detrimental to the right of the injured State.

47. The placement of the countermeasures provisions was questioned by some delegations. The view was expressed that, while the content of the chapter on countermeasures had no logical relationship to part two, in which it was situated, it was closely linked to the notion of an internationally wrongful act committed by a State, since countermeasures were usually taken in response to such acts. It was therefore suggested that the draft articles on countermeasures should constitute a new part three. The view was further expressed that countermeasures constituted a specific unilateral means of coercive settlement taken against a State which refused to fulfil the obligations arising from its responsibility and seek an amicable settlement of the dispute. It was therefore illogical to place the countermeasure provisions between the provisions on responsibility for ordinary international delicts and those on responsibility for international crimes. It would have been better to locate the provisions on countermeasures at the end of part three, on settlement of disputes, or even in a separate part four.

Article 47

48. Support was expressed for article 47, which provided safeguards against unjust results of countermeasures applied between States of unequal strength or means. Similarly, the view was expressed that, while an injured State was entitled to take countermeasures against a State committing an internationally wrongful act, that right should be exercised only as a last resort, when the wrongdoing State failed to comply with its obligations. Article 47 was found to be well balanced and containing the necessary criteria for mitigating the impact of countermeasures on the wrongdoing State. A further mitigating element was found in the reference in article 47, paragraph 1, to articles 41 to 46, which provided for a series of remedies to be sought in good faith by the State which had committed the wrongful act with a view to avoiding countermeasures. The view was also expressed that recourse to countermeasures was not a direct and automatic consequence of the commission of an internationally wrongful act. It was subject to the definition, in advance, by the injured State of the behaviour considered as wrongful and to the presentation of a request for cessation and reparation. Furthermore, it was not available until after the State having committed the infraction had failed to respond to such a request in a satisfactory manner. Those conditions were intended to reduce the risk of premature, and therefore abusive, recourse to countermeasures.

49. As regards paragraph 1, it was noted that article 47 set out the basic definition of the right of an injured State to take countermeasures, which was intrinsically linked to the definition of an injured State contained in article 40. For that reason, problems with the latter article, such as the qualification of all States parties to a multilateral treaty as injured in cases where collective interests were protected, also had a bearing on article 47. Continuing doubts were expressed concerning the enlargement of the meaning of "injured State". It was also suggested that while all States were regarded as injured by the commission of an international crime, only the "effective victim" was entitled to recourse to countermeasures.

50. With regard to the purpose of countermeasures, the view was expressed that the goal of countermeasures was not to be punitive, but should be reparation or restitution. State practice unquestionably showed that, in resorting to countermeasures, the injured State could seek either the cessation of the wrongful conduct or reparation in the broad sense. It could not, however, take countermeasures as a means of inflicting punishment.

51. The remark was made that the criterion of "as necessary" contained in article 47, paragraph 1, appeared to place a time limit on countermeasures, whereas the Commission, in paragraph (6) of its commentary to article 47, indicated that the limits on such measures related to their "adequacy" or content.

52. Regarding paragraph 2, the view was expressed that the relationship between article 47 and article 49 required clarification.

Article 48

53. In support of article 48, the view was expressed that the provision, which restricted the conditions under which an injured State might resort to countermeasures, was well balanced. The view was also expressed that the article seemed to have been drafted in the right spirit and would probably dispel the legitimate doubts of smaller States. In contrast, it was suggested that the preconditions for the lawfulness of countermeasures contained in paragraph 1 must be reassessed.

54. Some delegations expressed concerns regarding the obligation to cooperate in paragraph 1. It was stated that article 48 required that, prior to taking countermeasures, an injured State must fulfil its obligation to negotiate provided for in article 54, without stipulating how much time must be spent on such negotiations. Thus, if a State violated a treaty commitment, the injured State apparently could not withhold a proportionate benefit to the wrongdoing State under the same or a different treaty without some months of prior negotiation; it must accept continued injury to itself. It was also stated that while there were good arguments for limiting and controlling such measures, the limits must be practicable and the controls must not hamper the exercise of the right to take countermeasures. Judged against those criteria, the preconditions set out in article 48, paragraph 1, seemed problematical. To demand prior negotiations as a condition for the lawfulness of countermeasures was to tilt the balance significantly in favour of the wrongdoer or putative wrongdoer. Nor could the balance be redressed satisfactorily by borrowing concepts of interim measures of protection from the field of judicial settlement.

55. As regards interim measures, the view was expressed that all States were entitled to take immediate measures to obtain cessation of a wrongful act and avoid irreparable damage but only the most directly concerned States should be able to take urgent interim measures. In that connection, the careful balance the Commission had managed to strike between the rights and interests of injured States and those of States which were the object of countermeasures was welcomed. The view was also expressed that while the introduction of the concept of interim measures of protection appeared to be an adequate solution, defining such measures remained a problem. In certain circumstances, where

interim measures were permitted but countermeasures were not, it might be difficult to decide whether a particular reaction to an internationally wrongful act was or was not permissible, which would have obvious implications for foreign policy. It was noted that article 48 did not specify the nature of interim measures of protection which were necessary for the injured State to preserve its rights, or how such measures differed from the proportionate countermeasures prohibited by the article. It was suggested that the interim measures should be defined in order to ensure that they remained distinct from countermeasures and the conditions for the adoption of interim measures should also be specified, as the absence of any form of control was unacceptable. The remark was made that measures for the preservation of rights should be taken immediately upon the occurrence of the wrongful act. In that context, it would be helpful if the arbitral tribunal could decide at an early stage whether the measures taken were truly interim measures and whether they were warranted. The remark was also made that the concept of "interim measures of protection" might well prove troublesome if such measures were exempt from the duties of prior negotiation and submission to arbitration, for an injured State might decide to resort immediately to such action, which the target State might regard as full-blown countermeasures. However, the concept might create an incentive for States to accept the element of compulsory arbitration contained in article 58, paragraph 2. That element ought to be protected against any attempt to destroy the balance by evading the obligation to resort to arbitration by means of a reservation while accepting the conventional licence to engage in countermeasures.

56. With regard to paragraph 2, some delegations expressed satisfaction with the provisions on the settlement of disputes with respect to countermeasures. It was stated that the elimination of the procedure for the settlement of disputes over countermeasures referred to in article 48 would impair the machinery and make it unacceptable to many States. In expressing support for article 48, the view was expressed that the provision for compulsory dispute settlement was essential to the implementation of a future convention on State responsibility. On the other hand, the view was expressed that a voluntary third-party dispute settlement system was indispensable to weaker States under contemporary international law.

57. Article 48 was also described as one of the most hotly debated provisions of the chapter on countermeasures; the basic problem was not the formulation of the article, but the position of the principle of the peaceful settlement of disputes within the whole system of international law. It was remarked that the Commission had not confined itself to codifying State practice, but had also dealt with the thorny issue of the relationship between recourse to certain dispute settlement procedures and the taking of countermeasures. The Commission had endeavoured to give priority to the principle of the peaceful settlement of disputes without impairing the effectiveness of the countermeasures to be adopted by an injured State. Thus, the Commission had imposed on both the injured State and the wrongdoing State an obligation to negotiate before countermeasures were taken, and had also provided for the suspension of countermeasures where the wrongdoing State engaged in good faith in a binding dispute settlement procedure.

58. Some delegations favoured placing greater emphasis on dispute settlement procedures before the taking of countermeasures. The view was expressed that the right of injured States to take countermeasures should be invoked only as a last resort after all reasonable and peaceful means of dispute settlement had been exhausted. It was noted that some members of the Commission, while approving the provisions on countermeasures contained in chapter III, preferred that the procedures for the peaceful settlement of disputes should be exhausted prior to the taking of countermeasures, a consideration discussed in a balanced manner in the commentary to article 48. The view was also expressed that countermeasures could give rise to abuse by powerful States, and therefore clarity and precision were required. Preference was expressed for requiring binding third-party settlement of disputes as a precondition for initiating countermeasures. Countermeasures would only create tensions between the States which would eventually have to be resolved by some peaceful settlement procedure. It was suggested that that result might be achieved earlier if such a procedure was adopted instead of countermeasures. If such means established that a wrongful act had been committed, then the injured State, if no other recourse was available, might be authorized to take countermeasures.

59. The view was expressed that the injured State's obligation, in taking countermeasures, to fulfil its obligations in relation to dispute settlement seemed to prejudge the issue of whether part three of the draft articles, which concerned the dispute settlement regime, was mandatory. It was suggested that the Commission should therefore re-examine the content of articles 47 and 48 very carefully in the second reading. Furthermore, serious doubts were expressed as to whether the provisions concerning countermeasures were consistent with part three. Recourse to countermeasures must, as far as possible, be linked to a process of peaceful settlement of disputes. The inclusion in article 48 of an obligation to negotiate before resorting to countermeasures thus seemed to be a step in the right direction. In order to reconcile two mechanisms which appeared at first sight to be contradictory, it might be useful to draw on article XXIII of the General Agreement on Trade in Services, which subtly linked a procedure for peaceful settlement of disputes with the adoption by one or more contracting parties of measures, justified in the light of the circumstances, vis-à-vis one or more other contracting parties.

60. Paragraph 4 was described as being not very specific concerning the nature of the "request or order emanating from the dispute settlement procedure". As indicated in the commentary, such orders could also include those that were technically non-binding. It was unclear, therefore, whether they could include not only provisional measures indicated by a court, but also recommendations issued by conciliation commissions. The divergence in wording between article 48 and the commentary contributed to the uncertainty, since paragraph 4 referred to "the dispute settlement procedure" without further qualification, whereas the commentary referred to courts and tribunals.

Article 49

61. The remark was made that the principle of proportionality was reflected in State practice. In expressing support for article 49 on proportionality, the view was expressed that there was no need to expand the interpretation of the principle of proportionality any further, for the matter had to be left to the

court concerned with the dispute settlement. The view was also expressed that the proportionality of countermeasures was one of the basic determinants of their legitimacy and that principle was all the more important in that the effects of a crime could affect the community of States to varying degrees. It should therefore apply individually to each injured State. In contrast, the view was expressed that it was essential to ensure that the wrongdoing State did not take retaliatory measures, which would escalate the dispute, and that the provision on proportionality was too general and therefore required further consideration.

Article 50

62. Some delegations welcomed the list of prohibited countermeasures. Most of the prohibitions listed in subparagraphs (a) to (e) were described by some delegations as jus cogens. It was felt that the article had been drafted in the right spirit and that its elimination would be unacceptable to many States. It was suggested that the words "economic" and "political" in subparagraph (b) should be deleted to broaden the scope of the "coercion" since environmental and other forms of coercion could also endanger the territorial integrity or political independence of a State.

13. Chapter IV. International crimes

63. In support of chapter IV, it was noted that the Commission had found it necessary to include a chapter on the consequences of an international crime committed by a State in the light of article 19; otherwise the distinction between "delicts" and "crimes" would be meaningless. Hence, the consequences of international crimes should include not only remedies typically provided by civil law, such as cessation of the wrongful act, restitution in kind, monetary compensation and satisfaction, but also those characteristic of public law. The remark was also made that the provisions on dispute settlement did not contain any element of compulsory arbitration specifically designed to counter the dangers of unleashing the concept of international crimes in an international legal environment still characterized by individual auto-determination of rights and duties. It was suggested that the previous proposal of a two-phased procedure involving the Security Council and the International Court of Justice nevertheless had some merit. It was also suggested that the existence of internationally wrongful acts should be determined by the Court or its ad hoc chamber.

64. In contrast, the view was expressed that the greatest challenge would be to determine the consequences of violations according to their seriousness at the international level. It was stated that domestic legislation provided for the criminal responsibility of legal persons and there were merits in developing the concept of international criminal responsibility. The view was also expressed that one of the paradoxes or weaknesses of the draft articles was that they deduced practically no consequence from the concept of a crime. The draft articles ought to have defined a regime specific to the crime.

65. The view was further expressed that the distinction made in the draft articles between international crimes and international delicts was impractical,

as were the consequences referred to in draft articles 51 to 53. The remark was made that the scepticism about the legal feasibility and political desirability of the concept of international crimes and the resulting apprehensions had not been dispelled now that the entire system of the legal consequences of such crimes was under consideration.

Article 51

66. It was noted that the effect of chapter IV was that all the remedies applicable to international delicts would apply to international crimes, as would the provisions concerning countermeasures, with the additional consequences applicable to international crimes being set out in articles 52 and 53. The view was expressed that, as there was no discussion of differences in the instrumental consequences, it seemed unlikely that countermeasures, the highly individualized remedy provided for delicts, would also be appropriate in a case where the entire international community had been injured. Support was expressed for the two-stage procedure described in the commentary to article 51 provided that institutional guarantees were established. However, it was noted that the Commission had not included that system in the draft articles, thereby giving rise to serious concerns about the perverse effects of the concept of an international crime.

Article 52

67. The view was expressed that the Commission was correct in attaching other specific consequences to international crimes, even though the draft articles did not envisage the imposition of sanctions. It was suggested that the specific consequences of an international crime should be particularly severe and should include the imposition of sanctions. In contrast, the view was also expressed that the notion of an international crime committed by a State continued to arouse controversy and, in particular, it was feared that situations could arise in which any State or group of States might feel entitled to impose sanctions unilaterally, thereby undermining the foundations of the international legal order.

68. It was noted that the article provided for the relaxation of the usual limitations on claims for reparation. Subparagraphs (c) and (d) of article 43 limited restitution in kind, as opposed to compensation, when it would seriously jeopardize the political independence or economic stability of the wrongdoing State. However, that limitation did not apply to international crimes because of their serious nature, and in that case restitution could not be denied. The view was expressed that the Commission had taken an important step in the right direction in the provisions concerning the consequences of acts characterized as international crimes, even though article 52 failed to spell out clearly the specific forms of responsibility for international crimes. The problem was difficult but must be solved, for otherwise the value of a future legal instrument on State responsibility would be considerably diminished. Based on the position that the legal consequences of an international crime went beyond the consequences of ordinary wrongful acts, it was suggested that the draft text should be further refined on second reading. In particular, article 52, on the specific consequences of international crimes, should be expanded to include instrumental consequences.

69. The remark was made that the question of the removal of the limitations on the entitlement of an injured State to obtain restitution in kind must be treated as a consequence of the categorization of a wrong rather than as a question of the equity of requiring restitution in kind in a particular case. The remark was also made that article 52, despite its promising title, was disappointing because it eliminated two limitations on restitution in kind and the restriction on satisfaction prohibiting demands impairing the dignity of the wrongdoing State and undermined its political independence and economic stability. The Commission's justification for the elimination of that restriction seemed odd. It was further remarked that article 52 (a), which did away with limitations on restitution in kind for an international crime, was particularly dangerous. It could be used to justify inflicting serious punishment on an entire people for the wrongdoing of its Government, thereby compromising international security and stability. The view was expressed that since the distinction between delicts and crimes naturally entailed specific consequences, it was appropriate to devote a whole article to the issue. However, the consequences of a crime must never jeopardize the territorial integrity or political independence of the State committing the crime. The matter was so important for the maintenance of international peace and security that those exceptions must be expressly stated. With regard to the limitation on the entitlement of an injured State to obtain satisfaction, it was further remarked that the impairing of the dignity of the wrongdoing State seemed to be such a vague and subjective concept as to be of dubious value whatever the categorization of the wrongful acts.

Article 53

70. It was noted that the article provided for a set of obligations arising for all States. The view was expressed that a case could be made that they should flow from the commission of any internationally wrongful act and not only from an international crime or an exceptionally grave delict. The view was also expressed that the provision raised some difficulties, particularly in not clearly addressing recourse to countermeasures in defence of "fundamental interests of the international community". That raised the delicate question of the institutionalization of reprisals for the crime outside the context of the United Nations. Such a provision might imply recognition of what was known as actio popularis, a mechanism regarding which the practice of the International Court of Justice was not entirely settled. It would in any case be difficult to implement; only the Security Council, which had prime responsibility for the maintenance of international peace and security under the Charter, could initiate an action of that type.

71. As regards subparagraph (a), the view was expressed that if crimes were deemed to violate norms of jus cogens, then the obligation set out in article 53 was already part of primary rules and did not need to be reiterated in the context of State responsibility.

72. Regarding subparagraph (b), the remark was made that it was essential to prevent the consequences affecting all the citizens of the State committing the crime. The obligations set out in article 53 amounted in fact to minimum collective consequences altogether in keeping with general international law and the recent practice of the Security Council. The article had the advantage of

not proceeding by analogy and keeping to a minimum the criminal implications of the term "international crime".

73. With regard to subparagraphs (c) and (d), the view was expressed that if a collective response by the international community was to be achieved through countermeasures, there must be a central institution with authority both to determine the fact that an international crime had been committed and to coordinate that collective response. The fact that the Commission believed that the United Nations could serve as the central institution amounted to recognition of the convergence of the law of State responsibility and the law of international security embodied in the Charter of the United Nations. The Charter contained provisions on the organization of a collective response to the wrongful acts of States which endangered international peace and security. Such acts were unquestionably breaches of obligations essential for the protection of the fundamental interests of the international community, referred to as international crimes in article 19. While the two categories of acts might not coincide completely, they should not be separated. It could be argued that under the law of international security decisions were taken by political organs and under the law of State responsibility decisions would be taken by judicial bodies and would be binding on all States on questions relating to international crimes. No such judicial body existed and it was highly unlikely that the international community would agree to establish one. The concept of international crimes should not be included in the articles on State responsibility unless provision was also made for the establishment of machinery to deal with the legal consequences of such crimes. Otherwise, the distinction between the consequences of "international delicts" and "international crimes" would be purely descriptive or didactic, lacking the normative element which the Commission had considered essential in drafting article 19.

74. The remark was made that the seriousness of consequences of crimes entailed the establishment of institutional guarantees, particularly mandatory recourse to jurisdictional organs, for otherwise the notion of an international crime would be subjected to political manipulation and become a source of discord between States. It was noted that the question of whether an international crime had been committed was subject to the general system for the settlement of disputes contained in part three, which, except in the case of countermeasures, did not provide for obligatory recourse to jurisdictional settlement. However, if a State could be charged with an international crime unilaterally by the allegedly injured State, and unless the draft articles established obligatory recourse to a jurisdictional mechanism, the way would be opened up for political manipulation, and the notion of an international crime would not help to preserve the peace. It was also remarked that, in the absence of a judicial mechanism that could be invoked unilaterally, wrongful conduct was characterized largely by the States concerned; thus, the conflict over the violation itself would be compounded by a further disagreement over its characterization. At the same time, the view was expressed that objections concerning the difficulty of attributing criminal responsibility to a State and to the non-existence of international organs exercising criminal jurisdiction and carrying out prosecutorial functions were not insurmountable, especially considering that the international system had its own characteristics and it was therefore unlikely that the concept of an international crime could imply any kind of criminal responsibility on the part of a State.

75. A view was expressed supporting the former Special Rapporteur's proposal for dealing with the institutional consequences of international crimes, which would entail a two-stage procedure, consisting of, first, a political assessment of the situation by the General Assembly or the Security Council and, second, a decision by the International Court of Justice as to whether an international crime had been committed. Such a system, according to this view, would make maximum use of the potential offered by the United Nations system, ensure respect for the jurisdiction of the competent bodies and meet the need for a rapid response to an international crime. The consequences of an international crime were an integral part of the law on State responsibility and, as such, should be dealt with in the draft articles from the standpoint of both lex ferenda and lex lata. Above all, they must not be consigned to the category of political action by the Security Council with a view to the maintenance of international peace and security. In contrast, the view was expressed that the problem with this approach to the question of deciding before which organ and on what legal basis a State could be accused of an international crime was that the Security Council and the General Assembly as the organs responsible for characterization of an international crime, as in the past, might take a complaisant attitude towards extremely serious wrongful acts, and moreover their competence was limited by the Charter and, furthermore, any new competences for these bodies would require a revision of the Charter, which hardly seemed possible in the current circumstances. Therefore a preference was expressed for the International Court of Justice; the Commission's argument that the characterization could be effected within the framework of part three of the draft articles therefore seemed entirely acceptable. The analogy of jus cogens treatment by article 66, subparagraph (a), of the Vienna Convention on the Law of Treaties was a striking one, and the International Court was perfectly capable of assuming responsibility for the characterization of international crimes.

76. The view was expressed that it was inconceivable that a viable regime governing criminal responsibility could fail to include an appropriate enforcement mechanism that would come into play before States resorted to countermeasures. While in the current circumstances it was unrealistic to entrust to international bodies the task of taking all the necessary decisions and measures to enforce the legal consequences of crimes, it was suggested that the Commission, in its second reading of the draft articles, should set forth general principles in that area for a number of reasons. First, the question of enforcement posed much greater problems at the international than at the national level because institutions for the enforcement of obligations were, generally speaking, much more developed nationally than internationally. Indeed, not only did domestic criminal codes provide for the trial of suspected wrongdoers and for the punishment of those found guilty of an offence, but at the national level institutions, courts and tribunals also existed for the holding of such trials as well as detention facilities and institutions for the investigation of suspected criminal behaviour. No comparable institutions existed as yet in the international order. While there was indeed a plethora of international institutions designed to facilitate negotiation and cooperation among States, they fell far short of what was required for the effective enforcement of obligations the breach of which might give rise to criminal responsibility on the part of the State. It was true that the Security Council had been granted the competence to take such action as might be necessary to

maintain or restore international peace and security. It was doubtful, however, whether, in the absence of the conferral of comparable competence upon an international body in relation to international crimes, States would ever be held to account in any meaningful way for the commission of international crimes.

14. Part Three. Settlement of disputes

77. Different views were expressed concerning the dispute settlement provisions contained in part three. Some delegations welcomed the inclusion of the graduated dispute settlement procedures envisaged in part three, with great importance being attached to the amicable settlement of disputes caused by internationally wrongful acts. The dispute settlement provisions were described as encouraging and as a bold step forward in the progressive development of international law since the doctrine on dispute settlement had traditionally been based on consent to or free choice of means of settlement and the current text made recourse to conciliation compulsory if either party rejected the other options. It was suggested that the Commission should now make an extra effort to improve the text so as to avoid any disadvantages to weaker States.

78. Other delegations expressed dissatisfaction with the dispute settlement procedures envisaged in part three as too complicated, lengthy, rigid, inflexible, impractical, burdensome and costly. The remark was made that in the non-judicial phase of the settlement, the parties should be able to move directly from unsuccessful negotiations or conciliation to arbitration, recourse to good offices and mediation being at the discretion of the parties. The remark was also made that there was an infinite variety of legal and factual circumstances and disputes potentially implicating State responsibility; it was therefore impossible or irresponsible to decree any particular rigid form of settlement. The Commission must take a more realistic position regarding dispute settlement during the second reading of the draft articles. At most, the Commission should propose only alternative voluntary mechanisms which States might use.

79. Still other delegations questioned the need to include any dispute settlement provisions. It was suggested that part three of the draft articles should be deleted, and if necessary, consideration could be given to inserting a separate article in the chapter on countermeasures, reiterating the provisions of Article 33 of the Charter. The view was also expressed that the dispute settlement provisions were not essential to the State responsibility regime; there was no reason to reiterate in the draft articles the dispute settlement provisions contained in the Charter of the United Nations and other international instruments; and, furthermore, part three was incomplete since it did not include judicial settlement by the International Court of Justice.

80. There were also different views as to the extent to which part three should provide for compulsory dispute settlement procedures. Noting that no provision was made for a mandatory jurisdiction for the settlement of disputes arising from the future convention except in the case of countermeasures owing to the praiseworthy desire to secure the greatest possible acceptance of the future convention, the view was expressed that it would have been preferable to provide

obligatory recourse to jurisdictional means of dispute settlement for the whole of the draft text. While attention was drawn to the importance which the Commission had attached to the provisions on dispute settlement, agreement was expressed with those members of the Commission who had thought the criticisms of such a compulsory mechanism groundless. It was suggested that greater emphasis should be placed on judicial proceedings and that the exhaustion of judicial remedies should be compulsory for all States parties. However, while support was expressed for the inclusion of appropriate third-party dispute settlement procedures, the view was also expressed that the general regime of dispute settlement was very ambitious and it might be more realistic to concentrate on those parts of the draft where, by common consent, compulsory procedures were desirable, as in the case of countermeasures.

81. While delegations welcomed the inclusion of some measure of compulsory third-party involvement, it was suggested that there was no need to reinvent the wheel and that the dispute settlement provisions should be expressly assigned a role subsidiary to the many existing procedures. It was remarked that, given the reservations expressed by some States, the proposal to make part three subsidiary to already existing procedures and mechanisms should be discussed further. Regret was expressed that the Commission had not yet found a way to avoid the risk of conflict between the dispute settlement procedures set forth in part three of the draft and those which might be applicable under other instruments in force between States, inter alia, in terms of their hierarchy or the conditions for their implementation.

82. Some delegations supported in principle the inclusion of dispute settlement procedures as an integral part of the draft. However, the view was also expressed that the understandable and praiseworthy wish of some members of the Commission to see an increasingly integrated and organized international society must be set against reality, possibly by making part three indicative in the form of an optional protocol. Similarly, optional procedures were described as preferable inasmuch as the draft articles covered the entire issue of State responsibility and, therefore, most of the disputes that could arise between States.

Article 56

83. A conciliation procedure that could be invoked unilaterally was welcomed, but the procedure was described as insufficient. It was suggested that if conciliation failed, each State must be able to launch a judicial process that would culminate in a binding verdict since that alone would ensure the effectiveness of any future convention on State responsibility.

Article 57

84. Regarding the task of the Conciliation Commission, the inclusion of a fact-finding function as one of its tasks was welcomed since fact-finding was very important in elucidating the truth with impartiality, which was why any obstacles to the effective functioning of that independent commission should be removed. It was suggested that the phrase "except where exceptional reasons make this impractical" should also be deleted, as it might impede the Conciliation Commission in its fact-finding work in the territory of any party

to the dispute. At the same time, the remark was made that the task of the Conciliation Commission would perhaps prove a futile attempt to find a solution to the conflict of interests that had arisen.

Article 58

85. As to the relationship between the right to take countermeasures and the possibility of resorting to dispute settlement mechanisms, it was noted with satisfaction that the Commission had taken into account various concerns by providing that recourse to dispute settlement procedures was no longer the prerogative of the injured State alone since the alleged wrongdoer could now propose such procedures with a view to avoiding countermeasures. Support was expressed for the linkage between countermeasures and the settlement of disputes whereby a State taking a countermeasure indicated its prior consent to seeking a peaceful settlement and therefore disagreement with the view that the provision whereby only the wrongdoing State could refer a dispute to arbitration was in breach of the rule which required the mutual consent of both parties to arbitration, while recognizing that the linkage between the two issues should be deliberated further. The view was expressed that the measure of control established over the implementation of countermeasures was a step in the right direction but should be further developed; in the interval between the failure of negotiations and the establishment of an arbitral tribunal, a State might be subject to the adverse effects of such countermeasures; and it should be possible for either party to invoke arbitration unilaterally as soon as the dispute was characterized since it was pointless to delay recourse to arbitration which could effectively induce a State to comply with its obligation of reparation.

86. In contrast, the compulsory arbitral procedure provided for in article 58, paragraph 2, was also described as controversial. The view was expressed that article 58 was debatable at a fundamental level since it aimed at establishing a sort of compulsory jurisdiction of the arbitral tribunal along the lines of Article 36 of the Statute of the International Court of Justice, which was optional, and that States could not be compelled to submit disputes to an arbitral tribunal contrary to the very principles of arbitration based on the free will of States. Paragraph 2 was also considered to be debatable since it was generally a negotiated compromise, not a unilateral request, that enabled a case to be submitted to an arbitral tribunal. The remark was made that while the purpose of that provision was to restrain the injured State from taking countermeasures and to prevent further disputes from arising between the parties, it ran counter to the principle of international law that arbitration should have the consent of all the parties to a dispute. The remark was also made that there was something faintly perverse in the situation envisaged by article 58, paragraph 2, where, by taking countermeasures, the injured State acquired the right to have the underlying dispute settled by arbitration, but only if the wrongdoing State challenged the countermeasures. It seemed preferable to adhere to the more general guideline that countermeasures should be recognized as a legitimate measure of last resort, subject to a criterion of necessity.

Article 60

87. There were different views concerning article 60, which was described as controversial. On the one hand, the view was expressed that a dispute settlement procedure that culminated in the International Court of Justice could be reliable and practical, reaffirming the role of the existing jurisdictional bodies and avoiding a proliferation of new bodies that was sometimes the subject of criticism. On the other hand, the compulsory competence of the International Court of Justice established under article 60 was described as unacceptable since the settlement of disputes by a court was and must remain optional. The remark was made that the International Court of Justice had not been given jurisdiction to confirm the validity of an award or to invalidate it in whole or in part, yet article 60, paragraph 2, provided that the Court could, upon the request of any party, decide on the validity of an award. While different legal systems contained varying provisions concerning the validity of an arbitral award, no existing international instrument or customary practice envisaged the possibility that an arbitral award in an international dispute would not be implemented as a result of objections raised by one party to the dispute. The view was also expressed that while the parties concerned might agree to submit the dispute to arbitration, that did not mean that if there was no partial or total settlement of the dispute, either party should be compelled to accept one or more further compulsory arbitration procedures.
