

Chapter VII

STATE RESPONSIBILITY

A. Introduction

202. At its first session, in 1949, the Commission selected State responsibility among the topics which it considered suitable for codification. In response to General Assembly resolution 799 (VIII) of 7 December 1953 requesting the Commission to undertake, as soon as it considered it advisable, the codification of the principles of international law governing State responsibility, the Commission, at its seventh session, in 1955, decided to begin the study of State responsibility and appointed Mr. F. V. García Amador as Special Rapporteur for the topic. At the next six sessions of the Commission, from 1956 to 1961, the Special Rapporteur presented six successive reports dealing on the whole with the question of responsibility for injuries to the persons or property of aliens.¹²⁴

203. At its fourteenth session in 1962, the Commission set up a subcommittee whose task was to prepare a preliminary report containing suggestions concerning the scope and approach of the future study.¹²⁵

204. At its fifteenth session, in 1963, the Commission, having unanimously approved the report of the subcommittee, appointed Mr. Roberto Ago as Special Rapporteur for the topic.

205. The Commission, from its twenty-first (1969) to its thirty-first (1979) sessions, received eight reports from the Special Rapporteur.¹²⁶

206. The general plan adopted by the Commission at its twenty-seventh session, in 1975, for the draft articles on the topic of "State responsibility" envisaged the structure of the draft articles as follows: part one would concern the origin of international responsibility; part two would concern the content, forms and degrees of international responsibility; and a possible part three, which the Commission might decide to include, could concern the ques-

tion of the settlement of disputes and the implementation of international responsibility.¹²⁷

207. The Commission at its thirty-second session, in 1980, provisionally adopted on first reading part one of the draft articles, concerning "the origin of international responsibility".¹²⁸

208. At its thirty-first session, the Commission, in view of the election of Mr. Ago as a judge of ICJ, appointed Mr. Willem Riphagen Special Rapporteur for the topic.

209. From its thirty-second (1980) to its thirty-eighth (1986) sessions, the Commission received seven reports from the Special Rapporteur, Mr. Riphagen,¹²⁹ with reference to parts two and three of the draft.¹³⁰

Third report: *Yearbook . . . 1971*, vol. II (Part One), p. 199, document A/CN.4/246 and Add.1-3;

Fourth report: *Yearbook . . . 1972*, vol. II, p. 71, document A/CN.4/264 and Add.1;

Fifth report: *Yearbook . . . 1976*, vol. II (Part One), p. 3, document A/CN.4/291 and Add.1 and 2;

Sixth report: *Yearbook . . . 1977*, vol. II (Part One), p. 3, document A/CN.4/302 and Add.1-3.

Seventh report: *Yearbook . . . 1978*, vol. II (Part One), p. 31, document A/CN.4/307 and Add.1 and 2;

Eighth report: *Yearbook . . . 1979*, vol. II (Part One), p. 3, document A/CN.4/318 and Add.1-4 and *Yearbook . . . 1980*, vol. II (Part One), p. 13, document A/CN.4/318/Add.5-7.

¹²⁷ *Yearbook . . . 1975*, vol. II, pp. 55-59, document A/10010/Rev.1, paras. 38-51.

¹²⁸ *Yearbook . . . 1980*, vol. II (Part Two), pp. 26-63.

¹²⁹ The seven reports of the Special Rapporteur are reproduced as follows:

Preliminary report: *Yearbook . . . 1980*, vol. II (Part One), p. 107, document A/CN.4/330;

Second report: *Yearbook . . . 1981*, vol. II (Part One), p. 79, document A/CN.4/344;

Third report: *Yearbook . . . 1982*, vol. II (Part One), p. 22, document A/CN.4/354 and Add.1 and 2;

Fourth report: *Yearbook . . . 1983*, vol. II (Part One), p. 3, document A/CN.4/366 and Add.1;

Fifth report: *Yearbook . . . 1984*, vol. II (Part One), p. 1, document A/CN.4/380;

Sixth report: *Yearbook . . . 1985*, vol. II (Part One), p. 3, document A/CN.4/389;

Seventh report: *Yearbook . . . 1986*, vol. II (Part One), p. 1, document A/CN.4/397 and Add.1.

¹³⁰ At its thirty-fourth session (1982) the Commission referred draft articles 1 to 6 of part two to the Drafting Committee. At its thirty-seventh session (1985) the Commission decided to refer articles 7 to 16 of part two to the Drafting Committee. At its thirty-eighth session (1986) the Commission decided to refer to the Drafting Committee draft articles 1 to 5 of part three and the annex thereto.

¹²⁴ For a detailed discussion of the historical background of the topic until 1969, see *Yearbook . . . 1969*, vol. II, pp. 229 et seq., document A/7610/Rev.1.

¹²⁵ *Ibid.*

¹²⁶ The eight reports of the Special Rapporteur are reproduced as follows:

First report: *Yearbook . . . 1969*, vol. II, p. 125, document A/CN.4/217 and Add.1 and *Yearbook . . . 1971*, vol. II (Part One), p. 193, document A/CN.4/217/Add.2;

Second report: *Yearbook . . . 1970*, vol. II, p. 177, document A/CN.4/233;

210. At its thirty-ninth session, in 1987, the Commission appointed Mr. Gaetano Arangio-Ruiz as Special Rapporteur to succeed Mr. Riphagen, whose term of office as a member of the Commission had expired on 31 December 1986. The Commission, from its fortieth (1988) to its forty-eighth (1996) sessions, received eight reports from the Special Rapporteur, Mr. Arangio-Ruiz.¹³¹

211. By the conclusion of its forty-seventh session, the Commission had provisionally adopted for inclusion in part two, draft articles 1 to 5¹³² and articles 6 (Cessation of wrongful conduct), 6 *bis* (Reparation), 7 (Restitution in kind), 8 (Compensation), 10 (Satisfaction), 10 *bis* (Assurances and guarantees of non-repetition),¹³³ 11 (Countermeasures by an injured State), 13 (Proportionality) and 14 (Prohibited countermeasures).¹³⁴ It had furthermore received from the Drafting Committee a text for article 12 (Conditions relating to resort to countermeasures), on which it deferred action. At its forty-seventh session, the Commission had also provisionally adopted for inclusion in part three, article 1 (Negotiation), article 2 (Good offices and mediation), article 3 (Conciliation), article 4 (Task of the Conciliation Commission), article 5 (Arbitration), article 6 (Terms of reference of the Arbitral Tribunal), article 7 (Validity of an arbitral award) and annex, article 1 (The Conciliation Commission) and article 2 (The Arbitral Tribunal).

¹³¹ The eight reports of the Special Rapporteur are reproduced as follows:

Preliminary report: *Yearbook* . . . 1988, vol. II (Part One), p. 6, document A/CN.4/416 and Add.1;

Second report: *Yearbook* . . . 1989, vol. II (Part One), p. 1, document A/CN.4/425 and Add.1;

Third report: *Yearbook* . . . 1991, vol. II (Part One), p. 1, document A/CN.4/440 and Add.1;

Fourth report: *Yearbook* . . . 1992, vol. II (Part One), p. 1, document A/CN.4/444 and Add.1-3;

Fifth report: *Yearbook* . . . 1993, vol. II (Part One), p. 1, document A/CN.4/453 and Add.1-3;

Sixth report: *Yearbook* . . . 1994, vol. II (Part One), document A/CN.4/461 and Add.1-3;

Seventh report: *Yearbook* . . . 1995, vol. II (Part One), document A/CN.4/469 and Add.1 and 2;

Eighth report: *Yearbook* . . . 1996, vol. II (Part One), document A/CN.4/476 and Add.1.

At its forty-first session (1989) the Commission referred to the Drafting Committee draft articles 6 and 7 of chapter II (Legal consequences deriving from an international delict) of part two of the draft articles. At its forty-second session (1990) the Commission referred draft articles 8, 9 and 10 of part two to the Drafting Committee. At its forty-fourth session (1992) the Commission referred to the Drafting Committee draft articles 11 to 14 and 5 *bis* for inclusion in part two of the draft. At its forty-fifth session (1993) the Commission referred to the Drafting Committee draft articles 1 to 6 of part three and the annex thereto. At its forty-seventh session (1995) the Commission referred to the Drafting Committee articles 15 to 20 of part two dealing with the legal consequences of internationally wrongful acts characterized as crimes under article 19 of part one of the draft and new draft article 7 to be included in part three of the draft.

¹³² For the text of articles 1 to 5 (para. 1), see *Yearbook* . . . 1985, vol. II (Part Two), pp. 24-25.

¹³³ For the text of article 1, paragraph 2, and articles 6, 6 *bis*, 7, 8, 10 and 10 *bis*, with commentaries thereto, see *Yearbook* . . . 1993, vol. II (Part Two), pp. 53 et seq.

¹³⁴ For the text of articles 11, 13 and 14, see *Yearbook* . . . 1994, vol. II (Part Two), pp. 151-152, footnote 454. Article 11 was adopted by the Commission on the understanding that it might have to be reviewed in the light of the text that would eventually be adopted for article 12 (*ibid.*, para. 352).

212. At the forty-eighth session of the Commission, Mr. Arangio-Ruiz announced his resignation as Special Rapporteur. The Commission completed the first reading of the draft articles of parts two and three on State responsibility and decided, in accordance with articles 16 and 21 of its statute, to transmit the draft articles provisionally adopted by the Commission on first reading,¹³⁵ through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 1998.

213. At its forty-ninth session, the Commission established a Working Group on State responsibility to address matters dealing with the second reading of the draft articles.¹³⁶ The Commission also appointed Mr. James Crawford as Special Rapporteur for the topic.

214. The General Assembly, by paragraph 3 of its resolution 52/156, recommended that, taking into account the comments and observations of Governments, whether in writing or expressed orally in debates in the Assembly, the Commission should continue its work on the topics in its current programme, including State responsibility, and, by paragraph 6 of that resolution, recalled the importance for the Commission of having the views of Governments on the draft articles on State responsibility adopted on first reading by the Commission at its forty-eighth session.

B. Consideration of the topic at the present session

215. At the present session the Commission had before it the comments and observations received from Governments on State responsibility (A/CN.4/488 and Add.1-3). It also had before it the first report of the Special Rapporteur (A/CN.4/490 and Add.1-7). The report dealt with general issues relating to the draft, the distinction between "crimes" and "delictual responsibility", and articles 1 to 15 of part one of the draft. The Commission considered the report at its 2532nd to 2540th, 2546th and 2547th, and 2553rd to 2558th meetings, held from 19 May to 3 June, on 11 June, and from 31 July to 7 August 1998.

216. The Commission established a Working Group¹³⁷ to assist the Special Rapporteur in the consideration of various issues during the second reading of the draft articles.

217. At its 2547th meeting, on 11 June 1998, the Commission decided to refer draft articles 1 to 4 to the Drafting Committee. At its 2555th meeting, on 4 August 1998, the Commission also decided to refer draft articles 5, 7, 8 and 10 to the Drafting Committee. At its 2558th meeting, on

¹³⁵ For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook* . . . 1996, vol. II (Part Two), pp. 58-65, document A/51/10, chap. III, sect. D. For the text of draft articles 42 (para. 3), 47, 48 and 51 to 53, with commentaries thereto, *ibid.*, pp. 65 et seq.

¹³⁶ For the guidelines on the consideration of the draft articles on second reading decided upon by the Commission on the basis of the recommendation of the Working Group, see *Yearbook* . . . 1997, vol. II (Part Two), p. 58, para. 161.

¹³⁷ For the composition of the Working Group, see paragraph 8 above.

7 August 1998, the Commission further decided to refer draft articles 9 and 11 to 15 *bis* to the Drafting Committee.

218. At its 2562nd meeting, on 13 August 1998, the Commission took note of the report of the Drafting Committee on articles 1, 3, 4, 5, 7, 8, 8 *bis*, 9, 10, 15, 15 *bis* and A. The Commission also took note of the deletion of articles 2, 6 and 11 to 14.

1. INTRODUCTION BY THE SPECIAL RAPPORTEUR
CONCERNING SOME GENERAL ISSUES RELATING TO
THE DRAFT ARTICLES

219. The Special Rapporteur paid tribute to previous Special Rapporteurs for their work on a difficult topic and expressed gratitude to the Commission for entrusting the second reading of the draft articles to him.

(a) *Distinction between "primary" and "secondary" rules of State responsibility*

220. The introduction to his first report contained a brief outline of the history of the Commission's work on State responsibility and discussed certain general issues. One of those issues concerned the distinction between primary and secondary rules of State responsibility. That distinction, which had formed the basis of the Commission's work on the topic since its fifteenth session, in 1963, was essential to the completion of its task. The purpose of the secondary rules was to lay down the framework within which the primary rules would have effect so far as concerned situations of breach. It was a coherent distinction even though sometimes difficult to draw in the particular and even though some of the draft articles, such as article 27 (Aid or assistance by a State to another State for the commission of an internationally wrongful act), might stray slightly beyond it. He suggested that the Commission's aim should continue to be that set out at its fifteenth session, namely, to lay down the general framework within which the primary substantive rules of international law would operate in the context of responsibility; it would be more useful to keep in mind this distinction when considering particular articles so as to avoid a lengthy general debate; there might be good reasons for including an article, notwithstanding the fact that it appeared to lay down, at least in part, a primary rule; and it would be possible to assess whether the Commission had been able to develop a coherent distinction only when it had considered the draft articles as a whole.

(b) *Scope of the draft articles*

221. A second general issue was whether the draft articles were at present sufficiently broad in scope. Noting the comments and observations received from Governments, the Special Rapporteur suggested three matters that might require further elaboration: (a) reparation, particularly the payment of interest; (b) *erga omnes* obligations, which were currently dealt with in article 40 (Meaning of injured State), paragraph 3; and (c) responsibility arising from the joint action of States.

(c) *Inclusion of detailed provisions on countermeasures and dispute settlement*

222. On the other hand, the Special Rapporteur noted that some Governments had expressed concerns regarding the inclusion of detailed provisions on countermeasures in part two and on dispute settlement in part three, and that the Commission would consider those issues at a later stage in accordance with its timetable for the consideration of the topic.

(d) *Relationship between the draft articles and other rules of international law*

223. A third general issue concerned the relationship between the draft articles and other rules of international law. The Special Rapporteur noted that some Governments believed that the draft articles did not fully reflect their residual character and had therefore suggested that article 37 (*lex specialis*), of part two of the draft articles, be made into a general principle. That proposal seemed valid, but could not apply to principles of *jus cogens*. He suggested that the Commission discuss the draft articles on the assumption that, where other rules of international law, such as specific treaty regimes, provided their own framework for responsibility, that framework would ordinarily prevail.

(e) *Eventual form of the draft articles*

224. The last general issue concerned the eventual form of the draft articles. The Commission did not generally decide on its recommendation concerning this issue until it had completed consideration of the matter, although in certain contexts, such as reservations to treaties and nationality in relation to the succession of States, the decision had been made earlier. The draft articles on State responsibility had been drafted as a neutral set of articles that were not necessarily designed as a convention or a declaration. While the dispute settlement issues relating to countermeasures in part two could be considered independently of the question of the form of the draft articles, he recognized that the Commission would need to take a position on the question when considering the dispute settlement provisions in part three which could be included in a convention but not a declaration. The Special Rapporteur further recognized that, even if the Commission opted for a convention, the question of dispute settlement provisions could be left to a subsequent diplomatic conference. The preference of some Governments for a form for the draft articles which would not be a convention was clearly influenced by their concerns regarding the substance of the existing draft articles. The Commission could objectively approach the question of the form of the draft articles only after it had reviewed the substance of the draft articles in the light of subsequent developments, taken decisions on key questions and endeavoured to prepare a generally acceptable text. While noting the dual approach suggested by one Government entailing the adoption of a declaration of principles followed by a more detailed draft convention, which had been used in other fields of international law, the Special Rapporteur feared that this approach would not be acceptable to the Governments that were opposed to a convention. He recommended

deferring consideration of the question at the current session, since it would be time-consuming and would detract from the debate on the substance of the draft articles.

2. SUMMARY OF THE DEBATE ON GENERAL ISSUES

225. The Commission held a brief debate on the general issues identified by the Special Rapporteur for two reasons: (a) the Commission should concentrate at the current session on the question of State crimes and the articles contained in part one; and (b) for the most part, those issues could not be resolved at the current stage of work on the topic.

(a) *Distinction between "primary" and "secondary" rules of State responsibility*

226. The view was expressed that the distinction drawn between primary and secondary rules, despite all its imperfections, had considerably facilitated the Commission's task by freeing it from the burdensome legacy of doctrinal debate on such questions as the existence of damage or the moral element as a condition of responsibility. By deciding to leave aside the specific content of the "primary" rule violated by a wrongful act, the Commission had not intended to disregard the distinction between the various categories of primary rules nor the various consequences which their breach could entail.

(b) *Scope of the draft articles*

227. In terms of the scope of the draft articles, the view was expressed that it was necessary to achieve a balance between the first two parts of the draft by pruning the unduly detailed part one, especially the "negative" articles on attribution and some aspects of chapter III dealing with the distinctions between different primary rules, while filling the gaps in part one concerning important issues, such as the joint action of States (solidary liability), and giving more weight to rather superficial aspects of part two, which ignored essential, technical questions, such as calculating interest, and was too general to answer the needs of States. It was suggested that, in considering part one of the draft, a careful distinction should be drawn between those provisions which were and those which were not hallowed by State practice in order to avoid eliminating provisions on which some international judgement or arbitral award was already based. On the other hand, it was suggested that the Commission should debate the general scope of the draft articles, including the question of dispute settlement and the crucial question of crimes and, taking account of the views of those Governments that had forwarded their comments on the topic, submit various options and seek the reactions of Governments.

228. As regards the title of the draft articles, it was observed that "State responsibility under international law" would be more juridically precise and would emphasize the international law element of this responsibility.

(c) *Inclusion of detailed provisions on counter-measures and dispute settlement*

229. There was general agreement concerning the importance of considering these issues in detail at a later stage of work on the topic.

(d) *Relationship between the draft articles and other rules of international law*

230. Having regard to the ICJ ruling in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*,¹³⁸ it was considered important to indicate clearly the relationship between the draft articles to be produced by the Commission and the provisions of the 1969 Vienna Convention. The view was also expressed that the idea of extending to part one of the draft articles the *lex specialis* provision in article 37 of part two was not as simple as it looked because the special regime would prevail only if it provided for a different rule.

(e) *Eventual form of the draft articles*

231. With respect to the eventual form of the draft, some members endorsed the Special Rapporteur's suggestion to begin the consideration of part one at the current session and defer deciding on the recommended form of the draft until the next session. The view was expressed that the Commission should refrain from entering into a debate on the form of the draft articles, since such a procedural debate might obscure substantive differences, the Commission could ill afford to lose valuable time that it needed to address the extensive topic of State responsibility and it would in any case be impossible to settle that question in advance. Noting the consideration of similar issues in relation to the 1969 Vienna Convention, it was considered premature for the Commission to decide on the final form of the draft articles at the current session, particularly in view of the limited and inconclusive guidance given by Governments.

232. However, other members were not entirely persuaded by these arguments. While recognizing that the Commission usually recommended the form its draft should take after concluding its consideration thereof, the view was expressed that the Commission should have reached that stage by now; there was no reason to believe that the Commission would be in a better position to consider the question in the next year or two; and the link between the form of the draft articles and the issues excluded from or insufficiently developed in the draft articles was a fundamental reason that militated in favour of the Commission's taking an immediate interest in the matter, rather than in the dispute settlement provisions. It was suggested that a decision concerning the final form of the draft should not be postponed, since the form would govern both the structure and the content of the instrument and that, given the scepticism expressed by Governments about the likelihood of a convention on the topic being adopted in the near future, it might be expedient to adopt a compromise solution in the form of a code of State responsibility under international law that would be similar to a convention in its content, but would resemble a

¹³⁸ *Judgment, I.C.J. Reports 1997, p. 7.*

General Assembly declaration, in the extent to which it was binding.

233. The view was expressed that the elaboration of a treaty was not essential, since the positive effect of an instrument stemmed from its content rather than its form. In addition, the treaty form had disadvantages concerning the varying application of the law, depending on whether a State was a party thereto, the rigidity of treaty language and the possibility of States entering reservations. Although the preparation of a convention had seemed the most logical course of action when the Commission had begun its work on the topic, subsequent experience indicated that other options might be equally viable, given the delay in ratifying conventions which permitted certain interpretations *a contrario* to be drawn, and that consideration should therefore be given to elaborating a non-binding yet authoritative document to be adopted by the General Assembly.

234. There was some support for considering the successive elaboration of two instruments, possibly in the form of a declaration and then a convention, with attention being drawn to a similar undertaking in the field of outer space law. It was suggested that these instruments could take the form of a general declaration setting forth the essential principles of the law of State responsibility and a more detailed guide to State practice to meet the needs of States. It was also suggested, on the one hand, that the first document could set forth guiding principles in the area of State responsibility embracing the content of part one of the draft articles and incorporating some ideas from part two that were already accepted in State practice, and that the second treaty or non-treaty instrument could be more elaborate, possibly containing elements of progressive development, and would seek to tackle all aspects of State responsibility.

235. On the other hand, a concern was expressed that this two-track approach would not ensure the adoption of the second binding instrument unless there was a clear linkage between the two instruments, and that it would cause still further delays.

3. CONCLUDING REMARKS OF THE SPECIAL RAPPOREUR ON THE DEBATE ON GENERAL ISSUES

236. Following the consideration of the introduction to his report, the Special Rapporteur observed that there was no general definitions clause in the draft articles, though implicit definitions, including that of State responsibility itself, were craftily concealed in many places. Terminological questions were addressed in chapter II of his report. Although the word "responsibility" was by now too deeply entrenched in the draft and in the doctrine to be changed, he agreed that it needed explanation, possibly in the commentary.

237. He had also been giving careful thought to the way in which the very rich material contained in the commentaries could be best displayed. One possible solution would be to prepare a two-tier commentary, consisting of a first, more general and explanatory part, and a second, more detailed part. The contrast between parts one and

two that had correctly been pointed out was equally apparent in the commentaries.

238. The Commission should request the views of Governments on all questions throughout the exercise and take careful account of these views. In terms of the eventual form of the draft, the Commission could well decide that it should take the form of a declaration rather than of a convention, taking account of the limited and varied views so far received. However, while taking account of Governments' views, the Commission must at the same time reach its own conclusions, if possible by consensus, as to what course should be taken. That conclusion should be submitted as a provisional view to the Sixth Committee, and the Commission should listen very carefully to the reactions thereto.

239. While he was not opposed to the suggested approach of elaborating two successive instruments, possibly in the form of a declaration and a convention, the Special Rapporteur felt that this approach required further clarification. The approach would appear to require some differentiation between more and less essential draft articles; there was no need to make that differentiation at the current session. The Commission could ask the Sixth Committee about this option and would, of course, attend to any consensus that emerged, either from its own discussions or from those of the Sixth Committee. But the Commission did not need to reach that decision at the current session. Moreover, given the form of the draft articles and the detailed work done on them, it would be easier at the current stage to produce the detailed text first and to derive from it, if required, a more general statement of a few basic principles, than it would be to go back to basics and discuss principles at large. The latter course risked still further delays and might appear to involve setting to one side the work that had been done.

240. The Special Rapporteur hoped that, during the current session, the Commission would be able to consider the general principles in part one (arts. 1-4), together with the detailed provisions concerning attribution (arts. 5-15), which also raised important questions of principle. The substance of the topic needed to be fleshed out at the current time, on the understanding that, for the next session, he would propose a procedure for addressing the form it would take.

4. INTRODUCTION BY THE SPECIAL RAPPOREUR CONCERNING THE DISTINCTION BETWEEN "CRIMINAL" AND "DELICTUAL" RESPONSIBILITY

(a) *Treatment of State crimes in the draft articles*

241. Article 19, paragraph 1, indicated the irrelevance of the subject matter of the obligation in determining the existence of a breach or a wrongful act. This unquestionable proposition was already clear from article 1. Article 19, paragraph 4, defined residually an international delict as anything that was not a crime. Its fate therefore depended on paragraphs 2 and 3.

242. Article 19, paragraph 2, defined an international crime as an internationally wrongful act which resulted from the breach by a State of an international obligation so

essential for the protection of the fundamental interests of the international community that its breach was recognized as a crime by that community as a whole. Article 53 of the 1969 Vienna Convention was a precedent for such a circular definition. Mere circularity was not fatal to article 19. Nonetheless, paragraph 2 was problematic, as indicated by the Commission's attempt to provide clarification in paragraph 3.

243. Article 19, paragraph 3, was defective for the following reasons: it failed to define crimes; its obscurity made it impossible to know what, if anything, was a crime; it was merely indicative ("may result"); it was not exclusive ("*inter alia*"); it subjected the notion of crimes to numerous qualifications by providing that paragraph 3 applied subject to paragraph 2 and on the basis of the rules of international law in force (the only possible basis for its application anyway); it provided a series of examples which, because of those qualifications, were not examples at all; and it contradicted paragraph 2 by introducing a new criterion of the seriousness of the breach. In essence, it was nothing more than a system for *ex post* labelling of certain breaches as "serious".

244. The Commission had attempted to qualify its decision to include article 19 by indicating in a footnote to article 40 that the term "crime" was used for consistency with article 19, and that alternative phrases, such as "an international wrongful act of a serious nature", could be used to avoid the penal implication of the term "crime". In this view, the term "crime" was apparently used in the draft articles not in the ordinary sense, but in some special sense. Delict was defined as everything that was not a crime, and crime was defined as something special that was not a delict—which, even if true, was unhelpful.

245. Legal systems usually defined crimes by labelling, through defined procedures, the conduct and the perpetrator as criminal and by attaching special consequences described as criminal to them. The draft articles failed entirely to provide defined procedures and to attach distinctive consequences to crimes.

(b) *Comments of Governments on State crimes*

246. The comments of Governments on State crimes, made in the comments and observations received from Governments on State responsibility, indicated varying degrees of satisfaction or dissatisfaction with the draft: a number of Governments were vehemently opposed to the notion of crimes and regarded it as capable of destroying the draft articles as a whole; other Governments believed that there was a qualitative distinction in international law between certain breaches that could be reflected in a number of ways without necessarily using the term "crime"; still other Governments, while supporting the distinction, argued that the current draft articles were unsatisfactory because they failed to develop this distinction adequately in terms of the procedural implications or consequences of crimes.

(c) *Existing international law on the criminal responsibility of States*

247. While many provisions of the draft articles had become part of international law, having been referred to

in judicial decisions of international courts and tribunals and in the literature, article 19 had not. There had been no case in practice of the application of article 19, in contrast to other draft articles. Article 19 had given rise to a very contentious debate among jurists and neither they nor States agreed as to what should be done with it. Thus, the Commission should have a full-scale debate on article 19, which had not been reconsidered since its inclusion in the draft articles in 1976¹³⁹ over 20 years previously.

248. In the period between the world wars, following the unsuccessful experiment of the war-guilt clause in the Treaty of Versailles (which was the nearest that the international community had come to the criminalization of a State), a number of scholars whose works were analysed in the commentary had attempted to develop the notion of international crimes of State as a meaningful term. Contrary to that limited doctrinal tradition, the Charter of the Nürnberg Tribunal¹⁴⁰ provided for the punishment of individuals and did not treat the Powers in that war as criminals. Furthermore, the Nürnberg Tribunal had expressly recognized that crimes against international law were committed by men, not by abstract entities, and that only by punishing individuals who committed such crimes could the provisions of international law be enforced.¹⁴¹

249. By 1976 there had been considerable discussion on crimes in some parts of the literature, but there had been no judicial authority or generally accepted practice in the post-war period in support of the distinction. Initially, developments after 1945 had been marked by a regression. For many years the Nürnberg precedent was not followed by other international criminal trials of individuals at the international level, but rather the diffusion of certain crimes which could be tried by State courts against individuals under systems which focused on judicial cooperation and the extension of national jurisdiction. It was true that the Convention on the Prevention and Punishment of the Crime of Genocide envisaged the international trial of individuals for the crime of genocide, but it did not envisage State crime or the criminal responsibility of States in its article IX concerning State responsibility. Neither attempts to define the crime of aggression, which had the greatest possibility of being described as the crime of a State at that time, nor relevant Security Council practice provided support for the notion of State crimes. The absence of significant practice in support of the notion of crime in 1976 was implicit in the commentary to article 19,¹⁴² which referred to three judicial decisions in favour of the proposition of crimes, namely, two decisions concerning countermeasures for acts that were not crimes in any view of things, and the dictum in the case concerning the *Barcelona Traction, Light and Power Company, Limited* which concerned *erga omnes* obligations and not

¹³⁹ *Yearbook . . . 1976*, vol. II (Part Two), pp. 95 et seq.

¹⁴⁰ Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945 for the prosecution and punishment of the major war criminals of the European Axis (United Nations, *Treaty Series*, vol. 82, p. 279).

¹⁴¹ *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946* (Nürnberg, 1948), vol. XXII, p. 466.

¹⁴² See footnote 139 above.

crimes.¹⁴³ It was significant that ICJ had sought to incorporate obligations *erga omnes* within the framework of general international law, for example in the case concerning *East Timor (Portugal v. Australia)*¹⁴⁴ and the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*:¹⁴⁵ it had not treated such obligations as creating a wholly distinct category dissociated from the rest of the law. In the view of the Special Rapporteur, this was the appropriate strategy. The notion of obligations *erga omnes* did not support a distinction between crimes and delicts, particularly since many breaches thereof were not crimes as defined by article 19.

250. Since 1976 there had been an enormous debate concerning article 19 in the academic literature, a secondary source which by itself did not make international law, in particular where no consensus was thereby revealed. The primary sources, namely, treaties, decisions and State practice since 1976, likewise did not provide any support for the notion of State crimes. The decisions suggested that the doctrine of punitive damages, a minimum requirement for a system of crimes, was not part of general international law. The decision on the issue of a subpoena in the Appeals Chamber of the International Tribunal for the Former Yugoslavia in the case of *Prosecutor v. Tihomir Blaskic*¹⁴⁶ held that, under current international law, States could not be the subject of criminal sanctions akin to those provided for in national criminal justice systems. While the Security Council had established procedures for trying and punishing individuals for crimes under international law, it had never used the term “international crime” in relation to a State in the sense of article 19; it had continued to be very reticent to use the term “aggression” even in relation to clear cases of the unlawful use of force; and it had been very uneven in its condemnation of the conduct of States that might be considered criminal.

(d) *Relationships between the international criminal responsibility of States and certain cognate concepts*

251. The Special Rapporteur believed that the provisions on State crimes as actually formulated detracted from the more important task of defining more systematically the consequences of different categories of obligation in the hierarchy of substantive norms in international law that were generally recognized, including obligations *erga omnes* and norms of *jus cogens*, norms which were non-derogable. The Commission should seek to ensure that the consequences of those categories of norms were carefully spelled out in the draft articles.

(e) *Possible approaches to international crimes of States*

252. The Special Rapporteur drew attention to five possible approaches for dealing with international crimes of

States, as set forth in paragraph 70 of his first report, namely, (a) the approach embodied in the present draft articles; (b) replacement by the concept of “exceptionally serious wrongful act”; (c) a full-scale regime of State criminal responsibility to be elaborated in the draft articles; (d) rejection of the concept of State criminal responsibility; and (e) exclusion of the notion from the draft articles, without prejudice to the general scope of the draft articles and the possible further elaboration of the notion of “State crimes” in another text.

253. In considering these approaches, the Commission should bear in mind the constraints of the international community as well as of the Commission. The former effectively precluded the possibility of imposing a system of crimes which, in important respects, would qualify the existing provisions of the Charter of the United Nations. As to the latter, the Commission had as a priority the completion of the topic during the current quinquennium.

254. The Special Rapporteur drew attention to the importance of the question of whether, in using the word “crime”, the Commission intended to convey the general connotation of a distinctive wrongful act which attracted the condemnation of the international community as a whole and which was distinct from other forms of wrongdoing in terms of the nature of the act, the special consequences to which it gave rise, and the special procedures to which it was subject. Notwithstanding many differences between the international and national systems, the analogy with national law should not be entirely rejected and the term “crime” should not be used in a completely abnormal sense. It should be stressed that whenever international texts used the term “crime”—as they often did, though rarely if ever in relation to States as such—they used the term with its normal penal connotation.

255. Turning to the options before the Commission, the first alternative was to maintain the status quo by retaining the provisions of the draft articles relating to crimes. However, those provisions did not establish any distinctive and appropriate system for crimes: part one did not distinguish between “crimes” and “delicts” in addressing issues relating to the origin of international responsibility, such as imputation, complicity or fault (*dolus* or *culpa*); part two did contain some minor distinctions between the consequences of crimes and delicts in terms of not recognizing or assisting in maintaining the unlawful situation created by a crime, but these obligations were not properly limited to crimes; and part three did not provide any specific procedure for crimes, notwithstanding the existence of such procedures in other legal systems and the procedural due process requirements that were a distinctive feature of criminal liability. The present draft articles, by minimizing the consequences of crimes, tended to trivialize delicts as well.

256. The second alternative adumbrated in the footnote to article 40 as adopted on first reading¹⁴⁷ was to replace the concept of international crime by the concept of exceptionally serious wrongful acts. There were two possible interpretations of this alternative, both of which were problematic. First, this alternative could be tantamount to reintroducing the notion of crimes under another name.

¹⁴³ *Second Phase, Judgment, I.C.J. Reports 1970*, p. 3, at p. 32, para. 33.

¹⁴⁴ *Judgment, I.C.J. Reports 1995*, p. 90.

¹⁴⁵ *Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 595.

¹⁴⁶ Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, case No. IT-95-14-PT, Appeals Chamber, 29 October 1997, para. 25.

¹⁴⁷ See footnote 135 above.

The Commission should use the term “crime” if that was its intention. Secondly, it could cover a broader spectrum of serious wrongful acts, without referring to a separate category of norms. But to indicate that only certain norms gave rise to serious breaches would trivialize the rest of international law.

257. The third alternative was to criminalize State responsibility by admitting that State crimes existed and treating them as real crimes which called for condemnation, special treatment, special procedures and special consequences. This would require significant changes in the present draft to provide a sufficient definition of crimes, a collective system for investigation, a procedure for determining the guilt of the State, a system of sanctions and, eventually, a system for purging the criminal State of its guilt.

258. The fourth alternative was entirely to exclude the possibility of State crimes because the existing international system was not ready for it, and to pursue the prosecution and punishment of crimes committed by individuals through the International Tribunal for the Former Yugoslavia¹⁴⁸ and the International Tribunal for Rwanda¹⁴⁹ and possibly the future international criminal court.

259. The fifth alternative was to separate the question of the criminal responsibility of States from the questions relating to the general law of obligations addressed in the draft articles, while recognizing the possible existence of crimes and the corresponding need to elaborate appropriate procedures for the international community to follow in responding thereto. This approach would be consistent with virtually all legal systems, which treated criminal responsibility separately, and would facilitate the elaboration of the special procedures required by international standards of due process.

5. SUMMARY OF THE DEBATE ON THE DISTINCTION BETWEEN “CRIMINAL” AND “DELICTUAL” RESPONSIBILITY

260. The Special Rapporteur was commended for a balanced and incisive first report that contained a thorough analysis of the issues and options relating to State crimes and had provoked an enlightening and fruitful debate.

(a) *Comments of Governments on State crimes*

261. There was general agreement concerning the importance of taking into account the views of Governments in considering the draft articles on second reading. In this regard, some members emphasized the need to take into account the negative views of various Governments concerning the notion of State crimes, which could affect the successful outcome of work on the topic. However, other members were reluctant to draw any conclusions from the diverse views submitted by a limited number of States, which were not necessarily representative of the views of the international community.

¹⁴⁸ Reference texts are reproduced in *Basic Documents, 1995* (United Nations publication, Sales No. E/F.95.III.P.1).

¹⁴⁹ Security Council resolution 955 (1994) of 8 November 1994, annex.

(b) *Existing international law on the criminal responsibility of States*

262. There were different views concerning the extent to which existing international law provided a foundation for the notion of State crime.

(i) *The jurisprudence of the International Court of Justice*

263. The jurisprudence of ICJ was cited as evidence that State crimes formed part of the corpus of international law and that the concept was gaining acceptance. In this regard, some members referred to the pleadings and the preliminary decision in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*¹⁵⁰ as indicating that: the recognition of genocide as a crime under international law in article I of the Convention on the Prevention and Punishment of the Crime of Genocide did not mean that only crimes committed by State agents were involved; the contemplation of the commission of an act of genocide by “rulers” or “public officials” in article IV did not exclude the responsibility of a State for acts of its organs; and article IX did not exclude any form of State responsibility, including criminal responsibility.

264. In contrast, other members expressed the view that the case contained no indication, either in the statements of the Court or the pleadings of the parties, that would suggest that the Convention on the Prevention and Punishment of the Crime of Genocide referred to the criminal responsibility of States in the penal sense. Furthermore, the *travaux préparatoires* made it clear that article IX of the Convention did not refer to the criminal responsibility of States. Rather, the role of the State responsibility regime with respect to the crime of genocide was more or less analogous to that of the general responsibility regime, and in particular to establish the responsibility of States to redress the injuries suffered by victims.

265. There were also references to the case concerning the *Barcelona Traction, Light and Power Company, Limited*¹⁵¹ and the other relevant jurisprudence of the Court concerning the recognition of *erga omnes* obligations, as part of an evolutionary process which laid the foundation for the notion of State crimes. Article 19 was described as reflecting a major stage in the evolution of international law from an early undeveloped legal system to an advanced legal system, from a bilateralism which had sought to provide reparation for the injured party only to a system of multilateralism in which a community response to the violation of community values was possible, from individual criminal responsibility to State responsibility for crimes under international law. The purpose of this evolutionary process had been to develop and consolidate, on the basis of the institution of international responsibility, the notion of international public order in the interests of the entire community of States.

266. In contrast, the jurisprudence of the Court in the case concerning the *Barcelona Traction, Light and Power Company, Limited* was described as concerning the scope

¹⁵⁰ See footnote 145 above.

¹⁵¹ See footnote 143 above.

of *erga omnes* obligations and not the criminal responsibility of States. The recognition implicit in the acceptance of *jus cogens/erga omnes* obligations was a recognition that international obligations could be owed to the international community as a whole, and not only on a bilateral basis. While the recognition of community interest could be regarded as a necessary precondition for any notion of crimes or *jus cogens* or *erga omnes* violations, it could not be said to require the invention of a notion of State crimes.

(ii) *Treaty law*

267. A comment was made that, on the basis of the Charter of the United Nations and of international practice, treaty law had placed among exceptionally serious wrongful acts aggression, genocide, war crimes, crimes against the peace, crimes against humanity, apartheid and racial discrimination. As international law, and particularly the international jurisprudence, evolved, acknowledgement of such violations by States as falling into a particular category of wrongful acts was gradually taking shape.

(iii) *International organizations*

268. The view was expressed that the fundamental interests of the international community that were threatened by an exceptionally serious wrongful act or so-called "crime" were often referred to in various international bodies.

(iv) *Definition of aggression*

269. In response to suggestions that State crimes were non-existent or indefinable, attention was drawn to the Definition of Aggression adopted by the General Assembly.¹⁵² However, other members did not share the view that that resolution constituted recognition of the criminal responsibility of States or a definition of the State crime of aggression in a penal law sense. According to those members, it was notoriously defective as a definition in any event.

(v) *Security Council sanctions*

270. There were different views as to whether the sanctions imposed by the Security Council with increasing frequency in recent years constituted a criminal penalty or measures taken to restore international peace and security. Some members were of the view that Chapter VII of the Charter of the United Nations had definitively fractured the classical bilateral relationship in the law of responsibility and its traditional unity by authorizing the Security Council, on behalf of the international community as a whole, to apply preventive and repressive measures of a collective nature, including armed force, against a State that had threatened or violated the peace or committed an act of aggression. The authority of the Council to take measures it deemed necessary against Member States under the Charter was based squarely on relations of responsibility, since the Council was empowered to take action only in the event of the violation by a State of par-

ticularly important norms of international law. In the event of a serious breach by a State of international obligations, which posed a threat to international peace and security, the Council was authorized to take preventive measures or to use force.¹⁵³ The Council's authorization of the bombardment of Iraq was cited as an example of a criminal penalty rather than a civil sanction.

271. In contrast, other members were of the view that international responsibility for particularly serious illicit acts, its content and its consequences, must be distinguished from the powers conferred by the Charter of the United Nations on the Security Council to restore or maintain international peace and security. The Council did not act in terms of State responsibility and did not impose sanctions or penalties. When confronted with a situation that posed a threat to international peace and security, it was enabled to take appropriate military or non-military measures to redress the situation. Those measures might be contrary to the interests of a State which had not committed a wrongful act or might affect a State that had committed an act viewed as contrary to international law. United Nations sanctions under Chapter VII of the Charter as well as war reparations and so-called "punitive damages" were *sui generis* and had nothing to do with criminal responsibility.

(vi) *The literature*

272. There were different views concerning the conclusions to be drawn from the divergent opinions of scholars reflected in the literature on the subject.

(vii) *Conclusions regarding State practice*

273. Some members concluded that the concept of State crimes was not established in the international law of State responsibility. There was no basis in law for a qualitative distinction among breaches of international obligations. There was no basis in State practice thus far for the concept of international State crimes, in contrast to the principle of individual criminal responsibility which had been established by the Nürnberg,¹⁵⁴ and Tokyo¹⁵⁵ International Military Tribunals, the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda, codified in numerous international instruments and would be put into practice in the future international criminal court. There was no State practice to support the notion of crimes by States in contrast to the positive developments concerning individual responsibility since the Second World War. The distinction established in article 19 had not been followed up in international jurisprudence. No State, as a legal person, in contrast to its leaders, had ever appeared as a defendant in criminal proceedings.

274. Other members considered that the existence of rules in international law essential to the protection of the fundamental interests of the international community as a

¹⁵³ See Security Council resolution 678 (1990) of 29 November 1990.

¹⁵⁴ See footnote 141 above.

¹⁵⁵ Charter of the International Military Tribunal for the Far East, *Documents on American Foreign Relations* (Princeton University Press), vol. VIII (July 1945-December 1946) (1948), pp. 354 et seq.

¹⁵² General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

whole and the fact that those rules were quite often breached were today generally admitted. Crimes, with their connotation of violence and condemnation by world opinion, were committed at the international level and could not be realistically, appropriately or accurately regarded as grave delicts. The lack of a legal judgement did not imply the non-existence of crimes but rather the absence of bodies with jurisdiction to deal with them. The notions of crime and *jus cogens* existed but were virtually never used in practice, primarily because few rules had these characteristics and serious violations were rare. But rarity did not warrant neglect of such cases, since the future of international law lay in those concepts as well as the promise of a society based on the reinforcement of solidarity. Even assuming that the weight of evidence currently tended to favour the view that international law did not recognize State criminality, that did not mean that it was not necessary or appropriate for the Commission to try to do anything about it.

(c) *Relationships between the international criminal responsibility of States and certain cognate concepts*

(i) *Individual criminal responsibility under international law*

275. There were different views as to whether a State could commit and be held responsible for a crime under international law in contrast to an individual. Some members believed that a State, as a legal person or a mere abstraction, could not be the direct perpetrator of a crime. A State acted through its organs, consisting of natural persons. The individuals who planned and executed the heinous acts of States, including the leaders of the States, must be held criminally responsible. They referred to the Judgment of the Nürnberg Tribunal indicating that crimes against international law were committed by individuals, not abstract entities. The principle of individual criminal responsibility applied even to heads of State or Government, which made it possible to deal with the people at the very highest level who planned and executed crimes, and obviated any need for the notion of State crimes, which would be further reduced by the establishment of the international criminal court. It would be more worthwhile to develop the concept of the international criminal responsibility of individuals, an area in which there had been significant developments. The international criminal responsibility of individuals did not provide any foundation for "crimes of States". It was unwise, and created misunderstandings, to draw an analogy between responsibility for State crimes with responsibility for crimes committed by individuals.

276. Other members believed that certain international crimes could be committed both by individuals and by States and that the traditional view, based on the Nürnberg approach, was too narrow. The conduct of an individual could give rise to the criminal responsibility of the State which he or she represented; in such cases, the State itself must bear responsibility in one form or another, such as punitive damages or measures affecting the dignity of the State. The crimes listed in article 19 were the result of State policy rather than individual conduct and it would be illogical to punish such acts solely at the individual level. Naturally, the penal sanction could not be the same for an

individual and for a State. Given the further development of individual criminal responsibility since Nürnberg, it would be inconsistent to refuse to recognize the particularly solemn responsibility of States themselves for the same type of offences. Such an evolution was logical and desirable, since it went in the direction of safeguarding the supreme values of mankind, international peace and justice.

277. Some members believed that a clear distinction should be maintained between State responsibility and individual criminal responsibility. The view was expressed that when a crime was committed by a State, the Government officials were held criminally responsible, but that did not mean that the responsibility of the State itself was criminal, as indicated by the case of *Prosecutor v. Tihomir Blaskic*.¹⁵⁶

(ii) *Peremptory norms of international law (jus cogens)*

278. There were different views concerning the relationship between peremptory norms of international law (*jus cogens*) and the criminal responsibility of States. Some members believed that the two notions were closely linked, as indicated by the similarity between the definition of *jus cogens* contained in article 53 of the 1969 Vienna Convention and the definition of State crimes contained in article 19, paragraph 2, of the draft. However, this did not mean that a breach of *jus cogens* necessarily entailed an international crime or that the consequences of a breach of *jus cogens* were necessarily the same as the consequences of an international crime. The Commission had not devoted sufficient attention to these issues on first reading and should do so now. While agreeing that the Commission should consider whether *jus cogens* norms were adequately addressed in the draft articles, other members did not agree that there was any link between these norms and the criminal responsibility of States which, in their view, did not exist. It was suggested that the Commission should consider the notion of *jus cogens* in relation to exceptionally serious wrongful acts rather than State crimes.

(iii) *Obligations erga omnes*

279. There were different views as to whether obligations *erga omnes* should be further developed in the draft articles. Several members believed that there were significant differences concerning the legal consequences of the breach of an obligation *erga omnes* which were not adequately addressed in the draft. Suggestions for improving the draft included: providing a suitably graduated regime of responsibility to deal with *erga omnes* obligations; and setting out the legal consequences of their violation in the context of differentiated and balanced regimes. In considering these consequences, some members also emphasized the importance of bearing in mind that, although all *jus cogens* norms were by definition *erga omnes*, not all *erga omnes* norms were necessarily imperative or of fundamental importance to the international community.

¹⁵⁶ See footnote 146 above.

280. Other members expressed concerns regarding giving primacy to or further developing the consequences of obligations *erga omnes* in the draft. These obligations were described as only one of three types of rules which formed increasingly smaller concentric circles, namely: *erga omnes* obligations, *jus cogens* norms, and international crimes. The *erga omnes* principle was also described as mainly concerning the interest and standing of States (*locus standi*) in a particular case which could give rise to certain problems in terms of the right of any State: (a) to bring an action to protect a public or collective interest of the community which could result in a proliferation of legal actions and increase State reluctance to accept the jurisdiction of ICJ; (b) to assert a legal interest in vindicating the community or collective interest outside the judicial arena, for instance, in international forums; (c) to take countermeasures, unilaterally or jointly, against what they perceived to be the offending State or States; (d) in the absence of judicial control, to become a self-appointed policeman of the international community; and (e) to assert a claim for compensation without having suffered any material damage.

281. Several members emphasized the need to examine carefully the relationship between obligations *erga omnes*, *jus cogens* norms and exceptionally serious wrongful acts or State crimes when considering the consequences of internationally wrongful acts. It was suggested that the current draft articles should be reviewed to determine whether they needed to be reorganized or reformulated, particularly with respect to attribution of the illicit act, circumstances precluding wrongfulness, identification of the injured State, rights and obligations of other States, means of compensation, operation of self-help mechanisms, dispute settlement and the relationship between the general regime of responsibility and special regimes.

282. While recognizing the relationship between the notion of State crime and the notions of *jus cogens* and *erga omnes*, some members were of the view that the notion of State crimes should be dealt with in the draft articles because it was not synonymous with the other notions and should not be trivialized by being replaced by or relegated to a species of them.

(d) *Possible approaches to international crimes of States*

(i) *Preliminary issues*

a. Notion of “objective” responsibility

283. There was support for the concept of “objective” responsibility as a fundamental basis for the entire draft, one which rested on solid grounds. The view was expressed that the Commission had taken the truly revolutionary step of detaching State responsibility from the traditional bilateralist approach that had been conditioned upon damage, instead choosing an objective approach based on the transgression of a rule that brought State responsibility closer to the public order system found in modern national law. It was suggested that the Commission now had to take the remaining, second step to implement the conceptual revolution, where it was most necessary, in response to breaches of international law which

constituted offences against the international community as a whole. The notion of objective responsibility was described as an acknowledgement in resounding terms that there was such a thing as international lawfulness, and that States must respect international law even if they did not, in failing to respect it, harm the specific interests of another State, and even if a breach did not inflict a direct injury on another subject of international law. In short, an international society founded on law existed. The “objective” character of responsibility was further described as being most apparent in relation to international crimes because it was in that context that the general and “objective” interests of the international community as a whole must be protected. It was felt that neither the insertion of damage as one of the constituent elements of a wrongful act nor the reference to some form of *culpa* or *dolus*, in other words a *mens rea*, could be expected to introduce greater clarity or stability into international relations, given the subjective nature of such notions.

b. Civil law or criminal law nature of State responsibility

284. Different views were expressed concerning the nature of the law of State responsibility and its implications for the question of State crimes. Some members considered the notion of State crimes as inconsistent with the civil law nature of State responsibility. Other members believed that the law of State responsibility, which governed relations between sovereign equals, was neither criminal nor civil, but rather international and *sui generis* in nature. Still other members suggested that there could be future developments in the law of State responsibility in the direction of a separation of civil and criminal responsibility.

c. Domestic law analogy

285. There were different views concerning the implications of the domestic law analogy with respect to the question of State criminal responsibility. Some members believed that the analogy with domestic law could be useful in developing the notion of the criminal responsibility of States, with attention being drawn to the development of the notion of corporate criminal responsibility in some legal systems and to international standards in relation to criminal process. This did not mean that the Commission should proceed from a preconceived idea of crime based on domestic law or that every aspect of domestic law would be relevant in the international context. Other members believed that domestic criminal law did not provide any foundation whatever for “crimes of States” and that the idea of criminalizing the State should be abandoned to avoid confusion with domestic law notions that applied solely to individuals and could not be assimilated in international law.

d. Relevance of Chapter VII of the Charter of the United Nations and other special regimes

286. There were different views concerning the relationship between the draft articles and special regimes such as Chapter VII of the Charter of the United Nations. In response to concerns expressed regarding the risk of encroaching on the responsibility of the Security Council

for matters within its competence, the view was expressed that the Council's role would not be undermined by the criminalization of State conduct since no one had proposed a change in its primary responsibility for the maintenance of international peace and security. Whereas the Council dealt with political aspects of such crimes, the regime of State responsibility should address their legal and juridical aspects. Furthermore, Council practice had been inconsistent in dealing with such situations and the permanent members of the Council had frequently, by exercising the right of veto, prevented the international community from taking effective measures against States involved in the commission of international crimes.

287. At the same time, the view was also expressed that it was important to realize that existing international law provided more comprehensive special regimes for dealing with the violations listed in article 19, such as Chapter VII of the Charter of the United Nations concerning aggression, the United Nations human rights regime and the network of environmental treaties. The Commission should therefore adopt a cautious approach that would ensure the residual or supplementary nature of the future system of legal consequences to breaches of community obligations that were covered by specific regimes. The view was also expressed that the regime of State responsibility should not figure prominently in the endeavour of the international community to take action to suppress such abhorrent State crimes as aggression, genocide and war crimes; the Security Council was the political institution authorized to take action either under article VIII of the Convention on the Prevention and Punishment of the Crime of Genocide or under Chapter VII of the Charter; defects in this system could only be remedied by the United Nations itself and not by a regime of State responsibility. The necessity or usefulness of the notion of crimes was diminished in view of the provisions in the Charter for the maintenance of international peace and security and the current vigorous action by the Council under Chapter VII of the Charter.

(ii) *Approach embodied in the present draft articles*

a. Definition of State crimes in article 19

288. The definition of State crimes contained in article 19 was, on the one hand, described as confusing, circular, lacking the necessary precision for criminal law, unhelpful for the indictment of any individual or State, and uncertain because it was dependent on subsequent recognition by the international community. On the other hand, it was pointed out that all definitions were necessarily difficult, somewhat arbitrary and incomplete; the definition contained in article 19 was neither less precise nor less complete than that of "peremptory norm of international law" (*ius cogens*) contained in article 53 of the 1969 Vienna Convention; and article 19 was arguably clearer and more explicit because it gave examples to clarify the concept. It was also noted that the legal technique used in article 19 of providing a general criterion for crimes followed by an enumeration of the most obvious crimes was imperfect, but not unknown. Attention was drawn to a different approach suggested by the Special Rapporteur, in paragraph 48 of the first report, of defining crime by referring to its distinct procedural incidents or its

consequences and defining delicts as breaches of obligations for which only compensation or restitution was available, and not fines or other sanctions.

289. As to article 19, paragraph 2, a concern was expressed that requiring recognition by the international community as a whole necessitated either a unanimous decision of States, which would be difficult if not impossible to achieve, or the agreement of essential components of the international community, which were not clearly indicated. There was a suggestion to amend the provision as follows: "An internationally wrongful act which results from the breach by a State of an obligation that is essential for the protection of fundamental interests of the international community as a whole has specific legal effects."

290. The view was expressed that the idea of the existence of this category of wrongful acts should be maintained in paragraph 2, but that paragraph 3 should simply be deleted. The additional requirement of gravity ("a serious breach") in paragraph 3 was considered to be unjustified, given the inherently serious nature of the crimes listed in paragraph 2. In response to criticisms of article 19, paragraph 3, as merely a listing of vague concepts of crimes that was contradictory to paragraph 2, it was pointed out that the draft Code of Crimes against the Peace and Security of Mankind¹⁵⁷ provided a mere enumeration of these crimes rather than a specific definition.

291. As regards paragraph 3 (a), some members were of the view that aggression had been recognized as a State crime; aggression was an extremely serious breach of international law that could only be committed by States and not by natural persons; and the draft articles must therefore address the question of such extremely serious breaches of international law. In contrast, other members were of the view that aggression should not be used as the prime example of State crimes because it could not be defined in the draft articles in view of the role of the Security Council under the Charter of the United Nations; the draft Code did not define aggression because of the enormous difficulty of defining such a concept; the relevant General Assembly resolution¹⁵⁸ was a political text and not a legal instrument; aggression was committed by persons acting on behalf of the State and using its resources; and a State had never been tried for aggression but the leaders of a State had been tried, for example, at Nürnberg.

292. With regard to paragraph 4, it was suggested that a clearer distinction should be made between international crimes and international delicts based on the degree of gravity of the breach, to avoid equating the breach of an international tariff clause with aggression or genocide. On the other hand, some members believed that it was inappropriate to use the terms "crime" and "delict" which were associated with the field of criminal law to denote an unrelated phenomenon. The domestic criminal law connotations of the terms "crime" and "delict" were considered inappropriate in the international sphere because the responsibility of the State was neither civil nor criminal,

¹⁵⁷ For the text of the articles, and the commentaries thereto, as adopted by the Commission at its forty-eighth session, see *Yearbook* . . . 1996, vol. II (Part Two), p. 17, document A/51/10, para. 50.

¹⁵⁸ See footnote 152 above.

but international. Doubts were also expressed about the term “delict”. The Special Rapporteur noted that the word “delict” could not be used in the sense of article 19 without reintroducing the notion of crime.

b. Treatment of State crimes in part one

293. The view was expressed that the provisions of part one (other than article 19) had been drafted exclusively for the purpose of dealing with “delicts” and had become applicable to “crimes”, as it were, *faute de mieux*. The Commission had never considered whether certain provisions of part one, such as those relating to circumstances precluding wrongfulness, should not be reformulated. The question of the specific characteristics of the “secondary rules” connected with breaches of the “primary rules” essential for the protection of the fundamental interests of the international community as a whole needed to be raised in relation to the entire draft. In part one, certain draft articles could not be readily applied to breaches of a multilateral obligation and still less readily to breaches of obligations *erga omnes*, a category of obligations which was wider than that referred to in paragraph 2 of article 19 in view of the “qualitative” distinction between *erga omnes* rules, depending on whether or not they had the nature of peremptory norms. Nevertheless, in view of the “technical” nature of the rules set forth in part one, the question arose as to whether, within the category of *erga omnes* rules, a differentiation based on a “qualitative” distinction of their “content” was still necessary or in what cases it was necessary.

294. The view was also expressed that the Commission had elaborated part one of the draft in the context of a general regime of responsibility to avoid the fragmentation of different regimes; the Commission had not adequately reflected the notion of State crimes by carefully laying the groundwork for two regimes; and the Commission should reconsider the provisions in part one to achieve better alignment of the various parts of the draft, with reference being made to paragraph 77, and the footnote therein, of the Special Rapporteur’s first report.

295. The view was further expressed that articles 1 and 19 were based on the same foundations and should be read together, and that any changes to article 19 would automatically entail consequences for the preceding articles.

c. Notion of an injured State

296. There was general agreement that the Commission should give further consideration to the definition of an injured State contained in article 40, particularly in relation to *erga omnes* obligations, *jus cogens* and possibly State crimes or exceptionally serious wrongful acts. There was also general agreement that these notions were not coextensive and should receive separate consideration to avoid any confusion.

297. The view was expressed that article 40, paragraph 3, implemented the community interest in strong reactions to violations of community obligations by designating every State as “injured” and granting them the full range of responses to “crimes”, including the right to take

countermeasures, which rendered the danger of abuse particularly great. It would not be contrary to the community interest in strong responses to violations of community obligations to introduce a differentiated schema of responses available to different States based on their “proximity” to the breach, when States were the victims thereof. Article 40 could be redrafted to distinguish three different categories of States injured by breaches, as in article 60 of the 1969 Vienna Convention, as an important step towards a solution.

d. Consequences of State crimes

298. Some members were of the view that the notion of State crimes could not be justified by the trivial, incorrect and confusing consequences set forth in the draft articles, which failed to provide for any criminal penalties, punitive damages, fines or other sanctions. It was considered insignificant to extend the applicability of restitution, and possibly jeopardize the political independence of the wrongdoing State, while rejecting the more serious notion of punitive damages. The duty to withhold assistance was considered derisory and the duty to cooperate was also ineffective in practice. It was considered incorrect to suggest that non-recognition and the duty not to aid and abet were specific to wrongful acts designated as crimes.

299. In contrast, the view was expressed that the Commission’s inability to define the regime of so-called “crimes” could not be ascribed just to the complexity of the issues arising from breaches of obligations essential for the protection of the fundamental interests of the international community, and even less to the absence of such breaches in international life; it was due largely to the inconsistent approach adopted by the Commission which, after dealing with “ordinary” breaches—“delicts”—had failed to devote sufficient attention to “crimes” on first reading. Similarly, it was pointed out that during the first reading the Commission had first addressed the consequences of crimes and delicts in an undifferentiated manner and later addressed the actual consequences of crimes, which had resulted in the elaboration of unsatisfactory provisions. It was suggested that in the second reading of the draft the Commission should consider on an article-by-article basis each candidate for status as a crime under article 19 with a view to determining whether and to what degree the regime of secondary rules to be devised by the Commission would be applicable to them.

300. Some members believed that during the second reading the Commission should draw a systematic distinction between the consequences of crimes and of delicts rather than discontinue consideration of the consequences of crimes. A qualitative distinction was necessary if only from the point of view of reparation, since pecuniary compensation was inappropriate in the case of serious crimes such as genocide. It was suggested that the draft articles should draw a balanced distinction between the two categories of responsibility, provide a separate regime for violations of a norm fundamental to the safeguarding of the international community as a whole which was not found in articles 51 to 53, and fill a number of other gaps, including in respect of who could raise the matter of a violation, what was the machinery for determining the existence of a serious violation and how and by whom the corresponding penalties would be established. It was also

suggested that the Commission should try to develop separate consequences for crimes, taking into account the procedural aspects and guarantees of due process for criminal States, possibly in a separate chapter that might be optional in nature and provide the international community with the widest range of choice. It was further suggested that some of the consequences which should have been set aside for crimes had been included in simple delicts, for example, the provisions on countermeasures. In addition, the Commission had disregarded the fundamental consequences of the notion of crime, namely: (a) punitive damages, the existence of which in international law was indicated by article 45, paragraph 2; and (b) the denial of State immunity to individuals who committed serious acts as government officials on behalf of the State which permitted them to be brought before international criminal tribunals.

301. As regards article 53, it was suggested that the Commission should develop and supplement the fairly limited but not negligible consequences of international crimes envisaged in article 53 of the draft to make them more valid and convincing. Article 53, subparagraph (a), was characterized as reflecting a fundamental difference in the consequence of crimes and delicts, namely, in the event of a crime, all States, including the direct victim, were under an obligation not to recognize as lawful the situation created by an unlawful act, unlike the victim of other violations. It was questioned whether anyone could oppose the obligation of not recognizing as lawful the situation created by an international crime or not rendering assistance to a State which had committed an international crime in maintaining the situation so created. While not opposing the non-recognition of consequences arising from so-called crimes of States, concerns were expressed regarding the *a contrario* implications, for example, with respect to the acquisition of territory by the lawful use of force in self-defence. The duty not to recognize as lawful the situation created by a crime was also described as manifestly insufficient, for example, in cases of genocide. In addition, the duty of non-recognition and of cooperation in expunging the consequences of a crime were described as reflecting a growing spirit of solidarity among members of the international community and an attempt to act as a community according to a notion of international public order, which was a positive development in the obligation of solidarity among States. It was suggested that the concept of community based on solidarity was slowly gaining ground and must be taken into account in elaborating the legal provisions that would regulate relations among States.

(iii) *Replacement by the concept of "exceptionally serious wrongful acts"*

302. Some members supported the suggested approach of replacing the notion of State crimes by the concept of "exceptionally serious wrongful acts" which, in their view, would be more consistent with the international or *sui generis* nature of State responsibility and would avoid the confusion resulting from the domestic law analogy and penal law connotations which had complicated the consideration of the topic. Other members were of the view that the concept of "State crime" did not have an intrinsic penal connotation; a word had the meaning that

was given to it in a particular legal system; terminology was not an important issue; and the term "State crime" could be replaced by another term as long as the basic idea reflected in article 19, paragraph 2, was retained. There was a suggestion to replace the term "crime" by "breach of a rule of fundamental importance for the international community as a whole" or even the violation of a rule of *jus cogens*. Still other members believed that the term "State crime" had acquired a certain meaning and a degree of acceptance; changing the terminology of the concept might trivialize it; the concept of State crime should be equated with the concept of crime in domestic law; and, insofar as possible, the serious consequences normally attached to crime in domestic law should attach to State crime.

303. A number of views and suggestions were expressed concerning how the Commission might proceed with this approach. The view was expressed that the elimination of the category of particularly serious illicit acts from the topic of responsibility would be an unacceptable step backwards in the process of building a more just and more equitable international order; the Commission should continue considering that special category of exceptionally serious wrongful acts and define as clearly as possible the criteria to be used for identifying such acts and the specific norms on responsibility that would be applied to them; and the basic idea underlying the particular seriousness of such wrongful acts indicated in article 19, paragraph 2, which took account of the need to protect the higher interests of the international community as a whole, should be retained without criminalizing international responsibility.

304. The view was also expressed that the Commission could not ignore the need to equip rules of international law, which consecrated fundamental interests of the international community, with an adequate system of legal consequences of breach; the Commission should develop a system of differentiated responsibility which included an adequate regime of State responsibility for grave breaches of fundamental obligations in the community interest which incorporated two elements: an *erga omnes* obligation extending to all States and a *jus cogens* norm from which States were not permitted to contract out *inter se*; and article 19, paragraph 2, could provide a good starting point for developing a new concept to denote international obligations owed to the international community instead of crimes.

305. It was suggested that in reality there were degrees of responsibility depending on the primary rule breached that involved various levels of responsibility, rather than just crimes and delicts, and required a deeper analysis to determine the different consequences in terms of codification of the norms involved. A more satisfactory result would be achieved by determining the degrees of responsibility by reference to the kind of rules breached, instead of by dealing with the question of crimes which had hindered rather than promoted progress in an area that required legal precision. It was considered important to distinguish among the various degrees of wrongful acts that a State could commit in violation of various international obligations and, above all, to determine the legal consequences arising from the various categories of

wrongful acts. It was also considered necessary to contemplate degrees of obligations running from those applying to a relationship among subjects of law and those that touched on the fundamental interests of the international community, since they had differing legal consequences. While in the context of relations between subjects of law it was for the injured State to take action and the damage and causal relationship were constituent elements of the regime of responsibility, as were the compensation or indemnification required, in the case of the violation of an essential norm or one of superior degree, it was for the community to take action, direct harm was not indispensable and the penalty was the consequence of the violation. It was also suggested that it would be more useful to perceive a continuum of the seriousness of a breach from the minor breach of a bilateral obligation to the material breach of an obligation owed to all States of a much more serious nature. The Special Rapporteur indicated that it would not be helpful if the work on the topic was constrained by a rigid dichotomy between crimes and delicts, particularly since the very same act could constitute either a delict or a crime in relation to different persons or entities.

(iv) *Full-scale regime of State criminal responsibility to be elaborated in the draft articles*

306. Some members favoured developing the notion of State crimes in the draft; did not see any problem in doing so because the first reading had been predicated on the existence of State crimes; believed that the Commission could define the content of the notion of State crimes and elaborate the relevant regime within its present mandate which was not limited to certain aspects of State responsibility; but did not consider it necessary to elaborate all of the five elements envisaged by the Special Rapporteur in this approach. The assertion of the necessity of the five elements of a regime of State criminal responsibility was based on a preconceived idea of the notion of "crime" which incorrectly assumed that this regime in international law must be identical in all respects with internal law, failed to take account of the differences between international society and national societies and failed to recognize that words had the meaning given them by the legal system to which they belonged. The view was expressed that the Commission had no intention of criminalizing the conduct of States in the same sense as national law and that the draft articles on State responsibility did not, strictly speaking, contain any criminal element. It was described as utopian to envisage a system of State responsibility which included these elements.

307. Other members did not support this approach for the reasons given in their support of the approaches discussed in paragraphs 302 to 305 or 312 to 318.

a. *Precise definition of State crimes (nullum crimen sine lege)*

308. The view was expressed that it would be a difficult task to elaborate a precise definition of State crimes. It was suggested that it would be sufficient to provide a general definition of the notion of State crimes rather than defining the elements of the crimes, which was not necessary.

b. *Adequate procedure and appropriate institution for investigation and determination of State crimes*

309. Some members believed that the Commission should consider an appropriate procedure and institution for the objective determination of a State crime. It was considered necessary to provide a special procedure or set of rules which would satisfy the international community's legitimate desire to have some protection mechanism since, at the international level, there was still no legislative, judicial or police authority which attributed criminal responsibility to States or ensured compliance with any criminal law. It was also considered necessary to provide an appropriate institutional mechanism for establishing objectively when a crime or delict had been committed, a question which should not be left to the subjective determination of the injured State, to avoid the risk of the notion of State crime being abuse by the powerful to oppress the weak.

310. Other members considered it unrealistic to envisage such a procedure or institution at the current stage of development of the international community, which provided no central authority to determine and impute criminal responsibility, no procedure for determining with authority whether a crime of State had been committed, no commonly accepted mechanism to decide on the existence of a crime and the requisite legal response, no mechanism endowed with criminal jurisdiction over States authorized to mete out punishment, and no institution fit to enforce criminal justice for State crime. The view was expressed that criminal justice presupposed the existence of a judicial system to decide whether an offence had occurred and to determine guilt but it would be extremely difficult to transplant the penal concept of crime into the realm of international law in view of the absence of the above procedures and institutions, which reflected the maxim *par in parem non habet imperium*. It was noted that the previous Special Rapporteur, Mr. Arangio-Ruiz, had attempted to provide a competent independent authority to whom the task of classifying the act as a crime might be entrusted but that the proposed complex regime for handling accusations of State crime had been rejected by the Commission as unworkable, contrary to the Charter of the United Nations, and beyond the Commission's mandate.

311. It was suggested that, since the community of States was still based largely on a decentralized system characterized by reciprocity and founded on the sole competence of States to ensure respect for law in accordance with their individual interests, States should have a duty to take the necessary steps to bring the responsible State to justice in an international community where the rule of law prevailed.

c. *Adequate procedural guarantees (due process)*

312. The comment was made that if the notion of State crimes was retained, it would be necessary to incorporate in a draft dealing with the general law of obligations a number of procedural provisions dealing, for example, with a possible prosecuting agency, complaints system, rules of defence and evidence, arrest, bail and release as well as an international judicial authority with compulsory powers to determine guilt and matters pertaining to sen-

tence, which would lead to a chaotic result. It was also pointed out that, although it was necessary to take account of procedural aspects of the notion of State crimes, it would not be possible to guarantee due process of law.

d. Appropriate sanctions

313. The view was expressed that civil responsibility, such as compensation, was inadequate to redress the injury suffered as a result of certain serious breaches such as genocide, and that punitive damages were part of any system of reparative justice. It was suggested that the Commission needed to give careful consideration to State practice, including the Security Council measures taken against such States as apartheid South Africa, Iraq and the Libyan Arab Jamahiriya before dismissing the possibility that a State could be regarded as criminal with respect to the question of punishment.

314. The view was also expressed that sanctions imposed by the Security Council as a political institution to maintain international peace and security could not be compared to criminal penalties imposed by a judicial body. The State, by definition, could not be the subject of criminal sanctions such as those provided for in national criminal justice systems, as indicated by the recent decisions of the International Tribunal for the Former Yugoslavia and the Inter-American Court of Human Rights. The view was expressed that compensatory damages and exemplary or punitive damages flowed from delicts and the general law of obligations and criminal penalties flowed from crimes; it was pointless to call an act a crime unless it entailed the necessary penal sanctions; some internationally wrongful acts were more serious than others but that did not necessarily make them crimes; and internationally wrongful acts of a serious nature could be compensated for by damages reflecting the serious nature of the acts.

315. Some members also expressed concern that any attempt to punish the State for its crimes, rather than those of its leaders who were responsible for the crimes, could in practice result in collective punishment. Punishing a State that was not a democracy was described as tantamount to punishing innocent people and forcing them to bear a burden of guilt for generations for an act in which they might be in no way implicated. However, other members did not consider it unacceptable to envisage punitive measures against a State. It was suggested that greater attention should be given to the population of the State which suffered the consequences of the violation of breaches of international law of another State and which had no way of controlling or influencing the leaders of that State. It was also observed that, in practice, the population of an entire State was punished by measures adopted by the Security Council.

e. Rehabilitation

316. The view was expressed that the fifth element concerning avoiding stigmatizing a State with criminality overlooked today's reality. The view was also expressed that the concept of State crime could not be incorporated in the draft on State responsibility because it would be

unfair for a successor State to inherit acts characterized as a crime of its predecessor.

(v) *The question of the rejection of the concept of State criminal responsibility*

317. Several members thought the concept of State crime was unnecessary and unworkable for the reasons given in relation to the present draft (see paragraphs 288-301 above). In their view, the concept of State crime was inherently flawed; had no legal value; could not be justified in principle; was contradicted by the majority of developments in international law; was not essential to the Commission's task; was not adequately addressed in article 19, and attempting to do so would substantially delay work on the topic; would not be acceptable or ensure due process without a judicial or quasi-judicial institution that could adjudicate whether a State had committed a crime, which the international community was not prepared to accept; and would exacerbate disputes between States which would more readily refer to each other as criminals.

318. In contrast, other members favoured retaining the concept of State crimes for the following reasons: the notion of State crimes in terms of exceptionally serious violations which affected the international community as a whole and could not be addressed merely by compensation was not new and could be traced to developments beginning in the nineteenth century; the terms "delict" and "crime" had become part of the public consciousness and the corpus of international law and State responsibility; the notion of State crimes was part of an evolutionary process in international law and the development of the international community which was exemplified by such related concepts as obligations *erga omnes*, *jus cogens* and international solidarity; the concept of State crime served an important deterrent function which should be strengthened by addressing it in the draft articles; in fact States often committed crimes and some States were currently subjected to conditions that treated them virtually as criminal States; the deletion of the concept of State crimes would be retrogressive, would ignore important developments in international law and would be a disservice to the topic and to the rule of law in international relations.

(vi) *Exclusion of the notion from the draft articles*

319. There was some support for preserving the concept of State crime as a topic for separate treatment in the future which would enable the Commission to take account of future developments in international law. The comment was made that the Commission could not convert the draft articles into a comprehensive code of "criminal" and delictual State responsibility for three reasons: first, the draft articles were essentially concerned with "civil" responsibility, as indicated by articles 3 (Elements of an internationally wrongful act of a State), which dealt with responsibility for omission or negligence, 10 (Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity), which dealt with responsibility for *ultra vires* acts, 27 (Aid or assistance by a State to another State for the commission of an internationally

wrongful act), which dealt with responsibility for complicity in the absence of intent or *mens rea*, and 29 (Consent), which dealt with consent as a circumstance precluding wrongfulness; secondly, the draft articles did not contain the essential components of a criminal justice system or essential principles of criminal law; and thirdly, the draft articles did not do justice to the concept of State crime. It would therefore be preferable to complete a code of general responsibility in the current quinquennium and to request a new mandate to embark upon a code of State criminal responsibility in the strict sense. The necessity of obtaining a new mandate for such an undertaking was questioned by some members. In contrast, other members believed that the deletion of article 19 would not prevent future consideration of the concept of crimes of States and there was no reason to encourage the consideration of the concept, whether as an element of State responsibility or otherwise.

320. There were different views concerning the inclusion and possible content of a saving clause if the Commission decided to delete the concept of State crimes. It was suggested that the draft should include such a clause clearly indicating that the Commission recognized the existence of State crimes and did not reject article 19, similar to article 4 of the draft Code of Crimes against the Peace and Security of Mankind.¹⁵⁹ Alternatively, it was suggested that it would be more appropriate to indicate that the deletion of article 19 was without prejudice to the possible future development of the notion of State crime outside the existing draft articles either as a separate topic for the Commission, through State practice or through the practice of international organizations. However, it was also stated that if the rationale was to avoid an *a contrario* conclusion the deletion of article 19 was without prejudice to the possible utility of the concept of crimes in some other context. Such a decision could not be founded on the basis that the Commission was dealing only with general law of obligations, which most legal systems treated separately from crimes.

321. Other members were against the exclusion of the notion concerning the distinction between delicts and crimes from the draft articles for reasons explained above, in particular in paragraph 318.

6. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR ON THE DEBATE CONCERNING THE DISTINCTION BETWEEN "CRIMINAL" AND "DELICTUAL" RESPONSIBILITY

322. The Special Rapporteur observed that the draft articles were unsatisfactory on nearly all accounts in their treatment of the broad field of multilateral obligations. There was general agreement in the Commission that the topic of State responsibility was not limited to merely bilateral responsibility. However, the original vision that the Commission had had in formulating article 19 in 1976 had not been realized. At that time, the Commission had specifically excluded the "least common denominator" approach to international crimes, but in fact that was the approach subsequently adopted. Even those who

supported the fundamental distinction between international crimes and international delicts embodied in article 9, paragraph 2, had not denied that there had been a diversion of intentions.

323. In considering the draft articles on second reading, the Commission was faced with the serious problem of differences of opinion on article 19. It would not be constructive to resolve the question by a vote at the current stage; there was significant support for the various positions taken. The disagreement among members was obvious, and an indicative vote would not only be very undesirable but would not resolve the problem. The Special Rapporteur understood the concern regarding the continual pursuit of compromise solutions, but that was inevitable in a deliberative body such as the Commission. The Commission could produce constructive compromise solutions that could serve as the basis for further discussion by States, as demonstrated by those it had adopted on the future international criminal court.

324. The exceptionally rich debate on the topic had shown the complexity of the problems raised by article 19, and the reality of the issues raised by paragraph 2. To illustrate first of all the complexity of the concept of State crime, the Special Rapporteur mentioned cases where a single act could be considered as a "crime" against one State but as a "delict" against another because the two would be affected by its consequences to different degrees. As to paragraph 2, there was general agreement concerning the existence of obligations to the international community which should be duly reflected in the draft articles. The draft inherited from the "least common denominator" approaches the defect of treating the multilateral forms of responsibility effectively as bilateral forms: article 40, paragraph 3, converted the so-called multilateral obligation into a series of bilateral obligations, which created a very severe problem, not just in theory, but also in practice, by licensing States that were injured in a general sense and that were not the primary States concerned to adopt unilateral approaches. The previous Special Rapporteur had been stymied by that issue after three years of work, and that had been a contributing factor in his resignation. Neither the Commission nor the Working Group had found a solution to the massive procedural difficulty that would exist if individual States were authorized severally to represent community interests without any form of control.

325. In sum, the Special Rapporteur wished to make five major points. First, there was dissatisfaction with the distinction between international crimes and international delicts, which had been the subject of many criticisms, including the confusing penal law connotations of the term "crime" and the inappropriateness of the domestic law analogy. The Commission appeared to be ready to envisage other ways of resolving the problem than by establishing a categorical distinction between crimes and delicts.

326. Secondly, there was general agreement concerning the relevance of the established categories of *jus cogens* and *erga omnes* obligations and the narrower scope of the first category as compared to the second. ICJ had formulated the idea of *erga omnes* obligations in its judgment in the case concerning the *Barcelona Traction, Light and*

¹⁵⁹ See footnote 157 above.

*Power Company, Limited*¹⁶⁰ in the context of a fundamental distinction with respect to very important norms. The examples it had given in its famous dictum had, in fact, been examples of norms currently regarded as *jus cogens*. The Court had not intended to indicate that the existence of *erga omnes* obligations depended on the existence of multilateral instruments or that the provisions of multilateral instruments necessarily applied *erga omnes*. Those two modern notions with respect to State obligations were assuredly part of the progressive development of the law and could have important implications within the field of State responsibility.

327. Thirdly, there was general agreement that the present draft articles did not do sufficient justice to those fundamental concepts, particularly in article 40, which would certainly have to be redrafted. A further question was whether, within the field of *erga omnes* obligations or *jus cogens* norms, a further distinction should be drawn between more serious and less serious breaches. That distinction certainly made sense in relation to *erga omnes* obligations. The usefulness of such a distinction was less clear in respect of *jus cogens* norms. In respect of any norm whatever there could be a threshold problem: how extensive did a process have to be before it constituted genocide, for example, or a crime against humanity? But it was very hard to say that international law drew a further distinction within each of those categories between "serious" crimes against humanity or "serious" genocide and other cases. Article 19, paragraph 3, was a source of confusion in that regard.

328. Fourthly, there was general agreement that the draft articles created significant difficulties of implementation which needed further reflection, such as the problems of dispute settlement; the relationship between the directly injured State and other States. In this regard it should be stressed that the primary victims of violations of the most fundamental norms, such as the prohibition of genocide or the right of self-determination, were usually populations rather than other States. The violation of fundamental norms committed against populations or human groups inevitably posed serious questions of representation and exacerbated the problem of distinguishing between directly and less directly injured States. Given those difficulties of implementation, which must not be underestimated, the general regime of State responsibility was to some extent residual, and not just in relation to the most obvious case of aggression, which was expressly dealt with by the Charter of the United Nations. It was true that, in respect of collective obligations of a fundamental character, the rules of State responsibility might even have negative, and not merely positive effects, for example, precluding the unilateral application of measures of enforcement by one or a few States. If the existence of a collective interest was recognized, the problem was in ensuring that the enforcement measures applied retained a collective character, which was a deficiency of article 40. Hence, the Commission should reconsider those problems, taking into account the proposal made by a number of members to adopt a more differentiated regime, for

example distinguishing between cessation and reparation in connection with the rights of injured States.

329. Fifthly, general agreement had emerged between the two groups of members who had expressed diverse views in the discussion, that article 19 did not envisage a distinct penal category, and that at the current stage of the development of international law the notion of "State crimes" in the penal sense was hardly recognized. Both sides had endorsed the proposal, which the Commission had itself approved in 1976, namely that State responsibility was in some sense a unified field, notwithstanding the fact that distinctions were made within it between the obligations of interest to the international community as a whole and obligations of interest to one or several States. The Special Rapporteur retained the firm conviction that, in the future, the international system might develop a genuine form of corporate criminal liability for entities, including States. Most members of the Commission had refused to envisage that hypothesis and had spoken out in favour of a two-track approach which entailed developing the notion of individual criminal liability through the mechanism of ad hoc tribunals and the future international criminal court, acting in complementarity with State courts, on the one hand, and developing within the field of State responsibility the notion of responsibility for breaches of the most serious norms of concern to the international community as a whole, on the other.

330. With regard to the genuine criminalization of State conduct, which had been described as a utopian project, the Special Rapporteur stressed that it was not merely a question of labelling and that if the Commission was to return to it in the future, it must attach genuine penal consequences through genuine procedures.

7. INTERIM CONCLUSIONS OF THE COMMISSION ON DRAFT ARTICLE 19

331. Following the debate, and taking into account the comments of the Special Rapporteur, it was noted that no consensus existed on the issue of the treatment of "crimes" and "delicts" in the draft articles, and that more work needed to be done on possible ways of dealing with the substantial questions raised. It was accordingly agreed that: (a) without prejudice to the views of any member of the Commission, draft article 19 would be put to one side for the time being while the Commission proceeded to consider other aspects of part one; (b) consideration should be given to whether the systematic development in the draft articles of key notions such as obligations (*erga omnes*), peremptory norms (*jus cogens*) and a possible category of the most serious breaches of international obligation could be sufficient to resolve the issues raised by article 19; (c) this consideration would occur, in the first instance, in the Working Group established on this topic and also in the Special Rapporteur's second report; and (d) in the event that no consensus was achieved through this process of further consideration and debate, the Commission would return to the questions raised in the first report as to draft article 19, with a view to taking a decision thereon.

¹⁶⁰ See footnote 143 above.

8. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF
DRAFT ARTICLES 1 TO 4 OF PART ONE

332. The Special Rapporteur noted that his first report addressed two issues relating to the draft articles on State responsibility: questions of terminology that arose in respect of the articles as a whole, and recommendations concerning the general principles set out in articles 1 to 4 of part one, chapter I.

(a) *General observations on the
process of second reading*

333. The Commission was beginning the substantive discussion of the articles on State responsibility on second reading, which merited two observations. First, the Commission's practice was not to adopt a draft article definitively on second reading until all the draft articles had been adopted, since the draft articles had to be considered as a whole. Secondly, the Commission's consideration of the draft articles in part one, particularly chapters I and II, was without prejudice to any conclusions that might be reached with respect to article 19. If a notion of international crimes of State in the proper sense was adopted, it would involve more extensive changes to part one than were envisaged at the current stage.

(b) *Questions of terminology*

334. The Special Rapporteur noted that the draft articles contained no definitions clause. Instead the draft specified what the terms meant as required. The matter of a possible definitions clause could be revisited at a later stage. He also noted that terminology used in the draft articles had been questioned and drew attention to the tables included in the report containing the equivalents, in all working languages, of several key terms.

335. Although the phrase "internationally wrongful act" had its direct equivalent in five of the working languages of the United Nations, the Russian language version was closer to "internationally unlawful act". The term "internationally wrongful act" had been well established in the general debate on responsibility and should be retained. The Russian version might require reconsideration.

336. He suggested replacing the phrase "State which has committed an internationally wrongful act" by "wrongdoing State" for two reasons. First, that phrase was much more succinct. Secondly, the use of the past tense implied that the wrongful act had been completed, but the draft articles clearly also applied to wrongful acts of a continuing character. He noted that ICJ had used the term "wrongdoing State" in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*.¹⁶¹

337. The terms "injury" and "damage" required clarification as well. The draft articles referred to "injured State", not injury, and the term was defined in article 40 to mean a State which had suffered *injuria*, an injury in the broadest possible sense. Nowhere in the draft articles was there any indication that "injury" was a correlative to "damage": a State might be damaged without being injured, and vice versa. The word "damage" was used in

the draft articles to refer to actual harm suffered, and a distinction was drawn between economically assessable damage and moral damage. That general concept of damage, covering both economically assessable and moral damage, ought to be distinguished from the term "injury", meaning *injuria* or legal wrong as such. Other questions of terminology arising in part two could be considered in due course.

(c) *General and saving clauses*

338. The draft articles contained three saving clauses, articles 37, 38 and 39, but none of them were in part one. It had been suggested that those saving clauses should apply generally to the draft articles, especially article 37. Applying article 39 to the draft articles as a whole might also alleviate some of the difficulties raised by that article. While agreeing in principle with these suggestions, the Special Rapporteur proposed reserving the question of general and saving clauses until those articles in part two were taken up.

(d) *Title of part one, chapter I*

339. The Special Rapporteur indicated that the Drafting Committee might consider the suggestion to replace the title of part one, "Origin of international responsibility", by "Basis of responsibility" since the word "origin" was somewhat unusual and had a broader connotation than merely an inquiry into issues of responsibility; it might be taken to refer to broader historical issues, as in the phrase "origins of the French revolution".

(e) *Article 1*

340. This provision was intended to cover all internationally wrongful conduct constituting a breach of an international obligation, whether arising from positive action or an omission or failure to act. There was no general requirement of fault or damage for a State to incur responsibility for an internationally wrongful act. Rather questions of damage or fault were referred to the primary rules. A general requirement of damage for international obligations would, in effect, convert all treaties into provisional undertakings which States could ignore if they felt that they would not thereby cause material damage to other States. Furthermore, violations in certain fields of international law, such as human rights law, usually did not entail damage to other States.

341. There were three important qualifications associated with the absence of a general requirement of fault or damage, which alleviated the legitimate concerns of States about vexatious claims, interference by non-interested States, and so forth. First, there were rules of international law where damage was an essential element of the obligation; it was simply that not all rules were of this type. Secondly, the question of less directly injured States or a multiplicity of injured States was a separate matter which arose in part two. Thirdly, damage was not irrelevant to responsibility, for example, in terms of the amount and form of reparation or the proportionality of countermeasures.

342. While the draft articles were intended to deal with the topic of responsibility of States, part one was not

¹⁶¹ See footnote 138 above.

limited to the responsibility of States to other States and left open the question of entities other than States relying on that responsibility. However, there was nothing in the doctrine or case law to suggest that the secondary rules governing the responsibility of States to other persons in international law would be based on essentially different conditions than in the case of responsibility to other States. However, the obligation of a State was always correlative to the rights of one or more other States or persons. This precluded the possibility of abstract responsibility, that is to say, of responsibility in a vacuum. Although the scope of part two was limited to the rights of injured States, it was preferable for the purposes of part one to state the notion of responsibility in "objective" terms, in conformity with the position long taken by the Commission.

343. The Special Rapporteur accordingly recommended that article 1 be adopted without change, subject to subsequent further consideration of its relation to the concept of "injured State" as defined in article 40 and applied in part two. He also noted that many of the observations concerning article 1 were also relevant to article 3.

(f) *Article 2*

344. This provision was a complete truism which had never been denied in any quarter. Its denial would amount to a denial of the principle of equality of States and of the whole system of international law. Moreover, the article did not deal directly with the topic of international responsibility but, rather, with the possibility of such responsibility. It was an example of the tendency towards over-refinement, which was one of the problems with the draft articles. He recommended deleting this unnecessary provision.

(g) *Article 3*

345. Article 3 was important both for structural reasons and for what it did not say. In particular it omitted any other general condition for responsibility apart from those referred to in its subparagraphs (a) and (b). Although the English word "act" did not normally connote both act and omission, as did the French term "*fait*", article 3 made it perfectly clear that "act" was used in the sense of both act and omission. The proposal to include "legal acts", or, rather, "acts in law", in subparagraph (a), was unnecessary since the current wording already covered acts in law and this point could be clarified in the commentary. Thus article 3 could likewise be adopted without change.

(h) *Article 4*

346. The proposition contained in article 4 had been repeatedly affirmed in international law beginning with the "*Alabama*" case.¹⁶² As PCIJ had pointed out on many occasions, the characterization of an act as unlawful was an autonomous function of international law not contingent on characterization by national law and not affected by the characterization of the same act as lawful under national law. That did not mean that internal law was irrelevant to the characterization of conduct as unlawful; on

the contrary, it might well be relevant in a variety of ways. Noting the absence of any criticism of the article in the comments and observations received from Governments, he recommended its adoption without change.

347. In conclusion, the Special Rapporteur proposed that the Commission should, after debate, refer articles 1 to 4 to the Drafting Committee with the recommendation that articles 1, 3 and 4 be adopted without change and that article 2 should be deleted. The Drafting Committee might also give consideration to changing the order of the articles, so that article 3 would precede article 1, and to changing the title of part one.

9. SUMMARY OF THE DEBATE ON DRAFT ARTICLES 1 TO 4 OF PART ONE

(a) *Questions of terminology*

348. Some doubts were expressed concerning the proposal to use the expression "wrongdoing State" given its possible connotations. Likewise the term "responsible State" was also not entirely satisfactory. It was suggested that, in French, the term *État mis en cause* might be used.

(b) *Title of part one, chapter I*

349. Support was expressed for the proposal to amend the title. It was suggested that in the French version the term "basis" should be rendered as *les fondements*.

(c) *Article 1*

350. There was support for maintaining article 1 without change.

351. A threefold objection to the concept of damage was expressed in support of the Special Rapporteur's proposal not to include a separate requirement of damage. First, a special damage requirement would *ex post facto* create confusion with regard to the primary rules which often did not contain such a requirement, especially in economic or material terms. Secondly, the more global concept of *injuria* and the injured State was preferable in the light of developments in international law since the Second World War, indicating that there could be liability without proof of special damage. Thirdly, an overemphasis on the concept of damage would prejudice the useful concept of moral damage, particularly in the field of human rights.

352. Referring to the requirement of "fault", it was pointed out that in English, fault or *culpa* did not always include an element of intention (*dolus*) and therefore the expression "fault or intention" could be useful in the commentary.

353. It was also observed that if the concept of the criminal responsibility of the State were to be maintained, the question of fault as a general requirement would have to be discussed again and the question of culpable intent (*mens rea*) would have to be dealt with in the context of State responsibility.

354. The Special Rapporteur noted that article 1 did not expressly mention the concept of fault but, paradoxically, that concept appeared to be present in the term used in the

¹⁶² The Geneva Arbitration (see footnote 31 above), pp. 653 et seq.

French text. The problem did not arise in English because the term “wrongful” did not necessarily have the pejorative connotation of “fault”. The Drafting Committee might consider the possibility of using the term “responsible State”, which would offer the twin advantages of avoiding any negative connotation and of being concise.

(d) *Article 2*

355. There were different views concerning the proposed deletion of this article. It was suggested that the commentary should explain its deletion to avoid any misunderstanding.

356. The Special Rapporteur suggested that the idea underlying this provision, the important idea of the equality of States before the law, could be reflected in a preamble to the draft articles, as well as in the commentary.

(e) *Article 3*

357. The view was expressed that not only must conduct consisting of an action or an omission be attributable to the State under international law, as provided for in subparagraph (a), but the breach of the international obligation referred to in subparagraph (b) must also be assessed in the light of international law, and that was not expressly stated. It was therefore suggested that the article should read:

“There is an internationally wrongful act of a State under international law when:

(a) Conduct consisting of an action or omission is attributable to the State;

(b) That conduct constitutes a breach of an international obligation of the State.”

(f) *Article 4*

358. It was pointed out that the second sentence did not indicate clearly that internal law must be in conformity with the provisions of international law and that the sentence should be replaced by more neutral wording, such as: “Internal law cannot, in this regard, take precedence over international law.”

10. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF DRAFT ARTICLES 5 TO 8 AND 10 OF CHAPTER II OF PART ONE

(a) *Introduction*

359. The Special Rapporteur noted that chapter II defined the conditions in which conduct was attributable to the State under international law. The articles contained in this chapter must be considered in the context of article 3, which set forth the two essential conditions for State responsibility: (a) an act or omission which is attributable to a State; and (b) a breach of an international obligation of that State. Chapter II dealt with the first of those conditions.

360. Although the draft articles in chapter II had been thoroughly reviewed, it was reassuring to note that their basic structure and many of the formulations had not been

challenged by State practice or judicial decisions over the past 20 years. Rather, the proposed changes in the draft articles were intended for the most part to clarify certain aspects and to deal with certain new problems, rather than to introduce any fundamental changes of substance.

361. The Special Rapporteur suggested that it was useful first to focus on articles 5 to 8 and 10 concerning the ordinary and general conditions for attribution before turning to articles 9 and 11 to 15, which dealt with certain special problems, including the proposal for a new article 15 *bis*.

(b) *Comments of Governments*

362. Comments of Governments on articles 5 to 15 were quite substantial and were fully canvassed in the first report.

363. A number of Governments expressed concern that the basis for attribution should be sufficiently broad to ensure that States could not escape responsibility based on formal definitions of their constitutive organs, particularly in view of the recent developments concerning the increasing delegation of public functions to the private sector, such as the maintenance of prison facilities. On the other hand, no Government had so far argued that the conditions for attribution should be more restrictively defined.

(c) *Recent State practice*

364. Since the articles contained in chapter II were adopted in the 1970s, there had been a number of important decisions and other relevant practice in that field of international law. It was important to ensure that any important developments were fully reflected.

(d) *Terminology*

365. The Special Rapporteur noted that the Commission had elected to use the term “attribution” rather than “imputability”. The Drafting Committee might wish to consider using the term “imputability” given its use in subsequent decisions of ICJ and of other tribunals, which might imply that the term “attribution” had failed to gain acceptance. However, the Special Rapporteur preferred to retain the term “attribution”, which reflected the fact that the process was a legal process; by contrast, the term “imputability”, at least in English, implied, quite unnecessarily, an element of fiction.

366. The Special Rapporteur also suggested replacing the title of chapter II, “The ‘act of the State’ under international law”, by “Attribution of conduct to the State under international law” to correspond to article 3 and to avoid recalling the distinct notion of “act of State” recognized in some national legal systems.

(e) *Basic principles underlying the notion of attribution*

367. The Special Rapporteur drew attention to certain basic principles underlying the notion of attribution, namely the limited responsibility of the State, the distinction between State and non-State sectors, the unity of the State, the principle of *lex specialis* under which States

could by agreement establish different principles to govern their mutual relations, and the distinction between attribution and breach of obligation, which was of fundamental importance.

(f) *Article 5*

368. Despite the proposal by one Government to replace the term "organ" with "organ or agent", the Special Rapporteur preferred to retain the distinction between organs and agents, which was addressed separately in articles 5 and 8 since different considerations applied to organs as compared with agents.

369. While noting that internal law was of primary relevance in determining whether a person or entity was to be classified as an organ, the Special Rapporteur agreed with a number of Governments that had suggested deleting the reference to internal law to avoid creating the impression that it was necessarily the decisive criterion. There were several reasons for doing so. First, internal law considered in isolation could be misleading, since practice and convention also played an important role in many legal systems. Secondly, internal law might not provide an exhaustive classification of State organs and indeed that law might not use the term "organ" in the same sense as international law for the purposes of State responsibility. Thirdly, in some cases, narrow classifications of "organs" under internal law might amount to an attempt to evade responsibility, which under the principle in article 4 a State should not be able to do. The relevance of internal law as an important criterion could be explained in the commentary.

(g) *Article 6*

370. That article was not so much a rule of attribution as an explanation of the scope of the term "organ" in article 5. It made clear that State organs could belong to the constituent, legislative, executive, judicial or any other branch of government, that they could exercise international functions or functions of a purely internal character, and that they could be located at any level of government. Although any uncertainty concerning these issues had been resolved well before 1945, at least two of the elements were sufficiently important to merit explicit recognition. In addition, article 6 confirmed that all conduct of a State organ acting as such was attributable to the State, without implying any limitation in terms of enumerated powers. Nor should there be any limitation or distinction for purposes of attribution of conduct to the State, in contrast to other areas of law, such as State immunity.

371. The reference in article 6 to the irrelevance of the distinction between functions of an international or an internal character was, however, unnecessary; it suggested too categorical a distinction between "international" and "internal" domains. The point was sufficiently obvious and undisputed; it could be sufficiently addressed in the commentary.

372. The reference to the "superior or subordinate" position of an organ was too narrow since it could be viewed as excluding intermediate or independent and autonomous organs. The Special Rapporteur considered it preferable to clarify that provision by referring to all State

organs "whatever their position in the organization of the State".

373. The Special Rapporteur recommended that articles 5 and 6 be retained with the proposed drafting changes and combined in a single article, since the latter was really an explanation of the former rather than a distinct rule of attribution.

(h) *Article 7*

374. Paragraph 1 stated the well-established principle that the conduct of an organ of a territorial governmental entity was part of the structure of a State, even though it enjoyed a degree of autonomy within the State. That provision could, however, be deleted since the acts of such an entity were attributable to the State under the more clearly formulated article 5.

375. Paragraph 2 dealt with entities that were not part of the State but nonetheless exercised governmental authority, a situation which was of increasing practical importance given the recent trend towards the delegation of governmental authority to private-sector entities. That provision had not been subject to any criticism by Governments; if anything, the concern was that the provision should be sufficiently broad to encompass the proliferation of those diverse entities. However, on balance the existing provision seemed to cope with the various difficulties, especially when read with article 8. The Special Rapporteur recommended that the provision be retained, and that the notion of governmental authority be further clarified in the commentary, *inter alia*, to reflect the diverse recent practice.

(i) *Article 8*

376. When an entity acted on behalf of a State pursuant to express instructions, its actions were clearly attributable to the State under subparagraph (a). The question arose whether the conduct should also be attributable to the State when the entity acted under its direction and control. The subsequent jurisprudence provided some support for replacing the express authorization test by a broader effective control test. The Special Rapporteur recommended clarifying the paragraph to cover both situations of actual instructions and cases of direct and effective control where there was a nexus to the act in question. On the other hand, the provision should not be so widely drafted as to risk covering the activities of State-owned corporations, whose activities were not, in fact, directed or controlled by the State.

377. Subparagraph (b) covered the rare but important case where a person or entity exercised governmental authority in the absence of an effectively functioning Government. However, the formulation of that provision was somewhat paradoxical since it suggested that potentially unlawful conduct entailing State responsibility was nonetheless "justified". The Special Rapporteur recommended retaining that provision with a clarifying amendment to replace the term "justified" with "called for".

(j) *Article 10*

378. That article addressed situations of unauthorized or *ultra vires* conduct, which was nonetheless attributable to the State provided that the conduct was performed “under cover” of the official capacity. The law of treaties took a strict view of the extent to which States could rely on their internal law to escape their international obligations; *a fortiori* this should be the case in the law of State responsibility. Subsequent jurisprudence and comments of Governments indicated universal support for that principle. The Special Rapporteur recommended retaining the provision; the Drafting Committee might, however, consider using the phrase “acting in or under cover of that official capacity” to cover the notion of apparent capacity, and amending the concluding phrase to read “even if, in the particular case, the organ or entity exceeded its authority or contravened instructions concerning its exercise” for reasons of clarity and consistency with the proposed deletion of the reference to internal law in article 5.

II. SUMMARY OF THE DEBATE ON DRAFT ARTICLES 5 TO 8 AND 10 OF CHAPTER II OF PART ONE

(a) *General remarks*

379. There was broad support for the Special Rapporteur’s general approach to the articles contained in chapter II of part one. Satisfaction was expressed with the absence of any serious or far-reaching changes in the draft, which had been cited with approval by the highest judicial bodies and had achieved widespread acceptance.

(b) *Terminology*

380. Support was expressed for retaining the term “attribution” rather than “imputability”, as recommended by the Special Rapporteur.

381. In contrast, certain members asked whether the notion of “imputability” might be more appropriate in cases such as those covered by article 10 or in cases of vicarious liability. Some support was also expressed for the term “imputability” in the light of the relevant jurisprudence. It was suggested that both terms could be used in the draft articles and commentary as appropriate.

(c) *Title of chapter II*

382. Support was expressed for the proposed new title of the chapter as a more accurate indication of its content and as a way to avoid possible confusion with the “act of State” doctrine.

(d) *Article 5*

383. There was some support for the proposed deletion of the reference to internal law, as it was considered confusing and misleading, and instead clarifying the matter in the commentary. The view was expressed that the important role of internal law in determining the structure of the State should not be overestimated since international law played the decisive role in that determination for purposes of international responsibility, as indicated by the relevant

jurisprudence cited in the first report. Other cases where internal law had been disregarded included the Bantustans under the former apartheid regime in South Africa. Although those had been classified by South African law as independent and not as “organs” of the State, that classification had been ignored and rejected by the international community and by national courts in third States. While there was support for the proposed deletion for reasons of legal certainty, the view was also expressed that the term “internal law” was sufficiently broad to cover practice.

384. However, there was considerable concern regarding the proposed deletion, given the essential relevance of internal law in determining the organs of a State. It was pointed out that the organs of a State could only be defined by its internal law. It was also pointed out that the reference was the *raison d’être* for that article, which was consistent with the right of States to determine their own internal structure in the absence of any a priori definition of State structure under international law. Different views were expressed concerning the relevance of the principle of self-determination and the legal personality of the State in that regard.

385. There were also different views as to whether the deletion of the reference to internal law was justified by the possibility that States would attempt to avoid responsibility by relying on their internal legal structures and, in particular, by *ex post facto* changes therein. However, the view was expressed that those matters were sufficiently addressed by articles 4, 7 and 8.

386. The necessity of the proposed introductory clause “For the purposes of the present articles” was questioned; on the other hand, it was pointed out that attribution for the purposes of State responsibility was a different exercise than attribution for the purposes of the law of treaties or unilateral acts.

387. While support was expressed for retaining the final clause of article 5, it was also described as unnecessary and too restrictive. There were different views concerning the proposed reformulation of the final clause. On the one hand, support was expressed for the reformulation as a useful clarification stated in more neutral terms. On the other hand, a question was raised as to the necessity and usefulness of referring to the functions and positions of State organs. According to that view, article 6 could simply be deleted and covered in the commentary.

388. It was suggested that, in the proposed definitions clause, it would be useful to define the term “State” to mean “any State according to international law, whatever its structure or organization whether unitary, federal or other”. It was also suggested that the reference to the formal structure of the State in article 7 should be taken into account in referring to a State entity in article 5. It was further suggested that the notion of State entity could be clarified in the commentary.

(e) *Article 6*

389. There was support for deleting article 6 and combining it with article 5, as proposed by the Special Rapporteur. However, the view was also expressed that article 6

should be retained as a separate article in view of the importance of the principle reflected therein.

(f) *Article 7*

390. Agreement was expressed with the importance attributed by the Special Rapporteur to addressing the complex problem of delegating State functions to the private sector, with a question being raised as to whether it should be addressed under article 7, paragraph 2, or elsewhere. The view was expressed that it was difficult to define a priori the functions of a State because of the continuing evolution in the functions reserved for the public sector and those delegated to the private sector. Attention was also drawn to three different situations in that evolutionary process: (a) the State maintained a monopoly over its functions while delegating the exercise of some of them to public or private entities; (b) the State entirely abandoned its functions and handed them over to the private sector; and (c) the State retained its functions, but at the same time allowed parallel functions to be exercised by the private sector to encourage competition.

391. There were different views concerning the proposed deletion of the reference to territorial governmental entities. Some members emphasized the importance of including territorial governmental entities such as constituent units of a federal State, which were not the same as State organs. It was considered particularly important to confirm that the acts of those organs were attributable to the State on the same basis as organs of the central Government, even if they enjoyed the greatest degree of autonomy and had sufficient independent legal capacity to act on their own at the international level, for example, by entering into agreements. Attention was also drawn to regional entities of a State which might conclude transborder agreements. The view was expressed that the matter was of sufficient importance to merit its inclusion in the article under discussion. The concern about a possible overlap with article 5 could be addressed by including the reference to territorial governmental entities in article 5 itself. However, concern was expressed about addressing the matter in article 5, which could entail complicated drafting, lessen the clarity of article 5 and create undesirable *a contrario* implications.

392. The view was expressed that it would be preferable to use the term "functions", which was broader than the term "governmental authority", or at least to clarify the use of the latter term in the commentary. Conversely, it was pointed out that the replacement of the term "functions" by "governmental authority" could lead readers to believe that the draft articles concerned *acta jure gestionis*, which was not self-evident and should in any case be made clear in the commentary.

393. In expressing support for retaining the proviso contained in the final clause, it was suggested that the proviso could be clarified by adding the phrase "it is established that" after the word "provided".

(g) *Article 8*

394. Some members were of the view that the situations covered by the article needed to be clarified in both the text and the commentary. It was important to ensure that

the provision was sufficiently broad to cover situations such as those addressed by ICJ in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*¹⁶³ and the cases of disappearances in Latin America, which presented particularly difficult evidentiary problems and where evidence of actual instructions would naturally be difficult or impossible to obtain. Attention was drawn to situations in which States facilitated or encouraged individuals or groups to commit unlawful conduct without giving formal explicit instructions, or even exercising direct control.

395. Support was expressed for the Special Rapporteur's proposal to amend article 8, subparagraph (a), to reflect the control test, with attention being drawn to the varying degree of sufficient control required in different specific legal contexts. While supporting the proposed text, a question was raised as to whether it would cover situations in which a State set up a puppet State which was subject to its political control when there was no overt military control and the internal law of the former indicated that it was not responsible for the latter. It was emphasized that "puppet States" should not be equated with territorial governmental entities.

396. On the other hand, concern was expressed that the proposed clarification could, contrary to the underlying intentions behind the proposal, result in a narrower and more rigid rule of attribution which would make it more difficult to determine responsibility. In response to the concern that the new formulation might be too restrictive, attention was drawn to two complementary factors, namely the proposed new article 15 *bis* and the responsibility of a State for the failure to prevent the actions of groups or individuals that were not attributable to it.

397. A preference was expressed for retaining the term "justified" in article 8, subparagraph (b).

398. A question was raised as to whether the use of the phrase "in fact" in article 8, subparagraphs (a) and (b), was necessary. On the other hand, it was pointed out that subparagraph (a) of article 8 at least was concerned with cases of de facto authority and therefore the phrase was useful.

(h) *Article 10*

399. The view was expressed that territorial governmental entities should not be included in the article.

400. A preference was expressed for retaining the term "competence", subject to further clarification in the commentary, rather than the term "authority", which might be narrower. It was also pointed out that the French version of the term "competence" indicated a power exercised within a legal framework in contrast to a power exercised in fact.

¹⁶³ See footnote 103 above.

12. THE SPECIAL RAPPORTEUR'S CONCLUDING REMARKS
ON THE DEBATE ON DRAFT ARTICLES 5 TO 8 AND 10
OF CHAPTER II OF PART ONE

401. As regards the title of chapter II, the Special Rapporteur noted that there was general agreement concerning the proposed amendment.

402. With regard to article 5, it was necessary to respond to the serious concerns raised by Governments about precluding a State from escaping responsibility for an entity which was in truth an organ because it was not labelled as such under internal law or might even be mischaracterized. In that regard, it was necessary to recognize the complementary role played by national and international law concerning the notion of the organ of a State. On the one hand, the term "organ" had a particular meaning in international law. On the other hand, the content of the organ of the State largely depended on the internal structure of the State as determined by internal law, including practice and convention within that State.

403. It was considered useful to use the formula "acting in that capacity" in article 5, to emphasize the distinction between the usual cases involving State organs covered by article 5 and the exceptional cases involving other entities covered by article 7, paragraph 2.

404. Regarding article 6, there seemed to be broad support for combining that provision with article 5.

405. As to article 7, territorial governmental entities could best be dealt with in article 5 to avoid any suggestion of overlap between those provisions while addressing the concerns expressed regarding the proposed deletion of article 7, paragraph 1. In addition, the conduct of entities covered by article 7, paragraph 2, clearly required more detailed consideration.

406. As regards article 8, it was necessary to ensure that the scope of subparagraph (a) was sufficiently broad and sufficiently precise in view of the importance of that provision and the questions raised by subsequent jurisprudence. The proposed clarification to article 8, subparagraph (a), had been intended as an amplification, not a narrowing, of the previous formulation, having regard in particular to the discussion of the issues in the case concerning *Military and Paramilitary Activities in and against Nicaragua*. The Drafting Committee could, however, discuss whether some other formulation was to be preferred.

407. There seemed to be no objections to article 8, subparagraph (b), which was a well-established principle recognized in the relevant jurisprudence. However, consideration should be given as to whether the proposed title of article 8 accurately reflected the content of that provision.

408. While article 10 reflected a universally agreed principle, its formulation might be improved, and useful suggestions in that regard had been made in the debate.

13. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF
DRAFT ARTICLES 9 AND 11 TO 15 *BIS* OF
CHAPTER II OF PART ONE

(a) *Introduction*

409. The Special Rapporteur noted that four of the articles provided that conduct was not attributable to the State unless otherwise provided by other articles. The negative formulations contained in those four articles were devoid of content, since under article 3 it was necessary that conduct should be attributable to the State. There was also the question why the particular elements referred to, especially in articles 12 and 13, were singled out as a basis for "non-attribution". Those articles were largely unnecessary and should be deleted.

410. The remaining articles addressed four special problems concerning, respectively, attribution with respect to the organ of a State acting on behalf of another State (articles 9 and 12), international organizations acting on behalf of a State (articles 9 and 13), insurrectional movements (articles 9 and 15) and other cases (articles 11 and 15 *bis*).

411. The Special Rapporteur's recommendations were intended to retain all of the substantive content of those articles and to make certain additions to take account of State practice since their adoption.

(b) *Articles 9 and 12*

412. Article 9 provided that when a State lent one of its organs to another State, the conduct of the organ was attributable to the receiving State. The relatively diverse practice was reflected in the examples cited in the first report. As emphasized in the commentary, that was a narrow concept which required that the organ actually be placed at the disposal of another State; that implied both that the organ should be carrying out the purposes of the receiving State and that it should be, at least at the level of policy if not of detail, under the control of that State. That limited but useful provision should be retained so far as it related to the organs of States.

413. Article 12 was an unnecessary negative formulation; it should be deleted, and the issues that it raised should be addressed in the commentary to article 9.

(c) *Articles 9 and 13*

414. Article 9 also addressed situations in which an organ of an international organization was placed at the disposal of a State. It was difficult to find examples of such cases, which, at least according to some international organizations, including the United Nations itself, were inconceivable. The Special Rapporteur noted that a number of complex questions had arisen in recent years concerning the responsibility of States in relation to international organizations. However, those questions should be addressed in the context of the law of international organizations. He therefore recommended deleting that element from the draft and adding a saving clause (article A) which would make it clear that the draft articles were without prejudice to the responsibility of international organizations or of States for the conduct of international organizations.

415. Article 13 was the second unnecessary negative formulation that should be deleted.

(d) *Articles 14 and 15*

416. Article 15 contained two positive rules of attribution concerning insurrectional movements. In that instance, it was reasonable to begin with the negative proposition that, as a general rule, the acts of an insurrectional movement were not attributable to a State subject to the two exceptions; thus, old articles 14 and 15 would be combined into one. As to the exceptional cases, it was important to distinguish between the exceptional case in which the insurrectional movement succeeded in becoming the Government of the targeted State, on the one hand, and cases in which the insurrectional movement became part of a national reconciliation Government, on the other hand. If the Government of a State could only bring elements of an unlawful opposition movement into a new Government at the expense of assuming all the liabilities of the opposition movement, that would tend to discourage steps towards conflict resolution and national reconciliation. The exception should therefore only apply in the narrow case where the opposition movement actually defeated and replaced the Government of the State concerned.

417. The Special Rapporteur proposed that the exception should only be limited to "the conduct of an organ of an insurrectional movement" which was "established"; it should not apply to the uncoordinated conduct of its supporters.

418. Article 15 had been criticized in the literature for failing to distinguish between national liberation movements and other insurrectional movements which did not have any international status or recognition. That criticism failed to distinguish between the question of attribution and the question of the obligations incumbent upon certain movements, especially those whose higher status might be associated with greater responsibilities under international humanitarian law. That matter could be addressed in the commentary.

(e) *Articles 11 and 15 bis*

419. Article 11 was the fourth unnecessary negative formulation that should be deleted, and the rich commentary should be incorporated in the commentary to article 15 *bis*. In addition, article 11 was problematic because it indicated that the conduct of private individuals was not attributable to the State, which was not true in all cases. It was important to indicate clearly the limited extent to which private conduct was attributable to the State, but that could be done by other means.

420. Article 15 *bis* was intended to cover cases in which private conduct was subsequently adopted or acknowledged by the State, as in the *Lighthouses* case¹⁶⁴ or the case concerning *United States Diplomatic and Consular Staff in Tehran*.¹⁶⁵ It was important to distinguish between conduct that was merely endorsed in terms of general

approval and conduct that was actually adopted by the State in the strong sense of article 15 *bis*, and the language "acknowledged or adopted as its own" was intended to achieve that. Those cases did, in fact, occur with some frequency.

14. SUMMARY OF THE DEBATE ON DRAFT ARTICLES 9 AND 11 TO 15 *bis*

421. Many members endorsed the excision of the negative formulations and the streamlining of the text as significant improvements.

(a) *Article 9*

422. Members drew attention to the need to ensure that the article was sufficiently broad to cover a variety of situations. A question was raised as to whether article 9 covered cases in which a State exercised consular relations in the interest of or on behalf of another State. The view was expressed that the article should address the relatively common phenomenon of the partial representation by one State of another State in a limited area to clarify the responsibility of the representing and represented States. It was suggested that the complex situations in which an organ exercised functions within its own competence on behalf of another State might require further consideration.

423. A question was also raised as to whether the article should cover cases in which a State was required to act by a decision of an international organization.

424. Support was expressed for the proposed retention of the article without reference to international organizations and for the proposed saving clause with respect to international organizations.

(b) *Article 11*

425. Support was also expressed for the proposed deletion of the article as unnecessary.

(c) *Article 12*

426. Support was further expressed for the proposed deletion of the article as unnecessary. On the other hand, the view was expressed that the article should be reformulated to address the points raised in paragraphs 246 to 252 of the first report of the Special Rapporteur.

(d) *Article 13*

427. Support was expressed for the proposed deletion of the article as unnecessary and as consistent with the scope of the draft indicated by article 1, with importance being attached to the inclusion of the proposed saving clause.

428. A doubt was expressed concerning the proposed deletion of the article, with attention being drawn to two problems concerning the relationship between States and international organizations. First, there was the problem of States attempting to hold the headquarters State responsible for acts taken by international organizations within its territory. Secondly, there was the problem of a non-member State recognizing the responsibility of an

¹⁶⁴ Decision of 24/27 July 1956 (*France v. Greece*) (UNRIAA, vol. XII (Sales No. 63.V.3), pp. 161 et seq.).

¹⁶⁵ *Judgment, I.C.J. Reports 1980*, p. 3.

international organization, which entailed the implicit recognition of its legal personality or status. If those matters were not addressed, it was considered essential to include the proposed saving clause.

429. According to another point of view, the draft was exclusively concerned with State responsibility and it was therefore not relevant to specify the exclusion of the responsibility of international organizations.

(e) *Articles 14 and 15*

430. Agreement was expressed with the proposed merger of articles 14 and 15.

431. Some members questioned the use of the term "insurrectional movement". The view was expressed that the term was outdated; moreover, the commentary did not reflect decolonization practices since the 1960s. The view was also expressed that the article failed to distinguish between insurrectional movements and national liberation movements which had achieved international recognition and status.

432. The comment was also made that even if the same responsibility regime applied to an insurrectional movement and a national liberation movement, the terms could not be equated given the negative connotation of the former and the positive connotation of the latter. It was suggested that consideration should be given to the responsibility implications of the recognition of an insurrectional movement or national liberation movement, possibly in part two of the draft. It was also suggested that an attempt should be made to find a new term.

433. A wide spectrum of civil strife was noted, ranging from internal disturbances and mob violence to an insurrectional movement or even an established *de facto* government on part of the territory of a State. Those distinctions needed to be clearly delineated. The view was also expressed that State responsibility was a function of effective control, not lawful control, as indicated in the advisory opinion by ICJ in the case concerning *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*,¹⁶⁶ and that, in consequence, the question of the status of insurrectional movements was beyond the scope of the current topic; to introduce it here would only complicate the task and create quite unnecessary difficulties. The draft should address legal questions relating to attribution in general terms to cover a variety of cases and not political questions relating to insurrectional movements.

434. It was suggested that the terms "insurrectional movement" and "national liberation movement" were both largely outdated, and that caution was advisable in discarding those terms in favour of a new term that might also date quickly. It was thus suggested that the term "insurrectional movement" could be retained in the absence of a suitable, equally broad alternative.

435. As regards paragraph 1, it was pointed out that the territorial host State could be held responsible for neglecting to prevent acts of an insurrectional movement in its territory against another State. Even if the State could not be held responsible for the acts of an insurrectional movement, it could be held responsible for its own omissions in failing to prevent uncontrolled forces from causing damage in certain cases. It was also pointed out that the State should be held responsible when some factions of the Government were involved in some way with or otherwise supported a rebel group which caused injury to another State or third parties, and that the draft should address the different variations, possibly in a separate article.

436. In contrast, the view was expressed that it was impossible to address every variation and that the article should do no more than establish the limits of attribution to the State in the case of insurrectional movements: remaining issues were a matter for the primary rules. The view was also expressed that it was a conceptual error to refer to State responsibility for the acts of an insurrectional movement, in contrast to the failure of the State to take the necessary preventive measures, and that such matters could be adequately addressed in the commentary.

437. Support was expressed for retaining article 15, paragraph 3, dealing with the responsibility of insurrectional movements themselves. A doubt was expressed concerning the proposed deletion of the "without prejudice" clause in paragraph 3 and the possibility of not taking account of the relevance of such issues in recent years and their influence on the development of, *inter alia*, international humanitarian law.

438. As to the cases where conduct of an insurrectional movement was attributable to the State, consideration should be given to addressing cases in which the insurrectional movement became part of the new Government or was granted a degree of autonomy within the State structure by the Government.

439. It was suggested that consideration should be given to including a "without prejudice" clause to ensure absolute clarity as to the continuing role of the primary rules, particularly those relating to the obligations of result of a State with respect to insurrectional movements. Depending on the obligation, a State was often not relieved from responsibility owing to insurrection or civil strife.

440. A concern was expressed regarding proposed new article 15, with paragraph 1 being described as unclear, the reference to the insurrectional movement succeeding in becoming the new Government being questioned as unnecessary in view of article 15 *bis*, and the reference to at least some of the preceding articles being questioned as unnecessary and irrelevant.

441. A question was raised concerning the use of the term "established" in the *chapeau* of paragraph 1 of the proposed new article 15. It was suggested that the phrase "established in opposition" was self-evident and unnecessary. The view was also expressed that the term "established" should be interpreted to refer to the moment when an insurrectional movement exercised effective control over part of the territory of a State, and that the responsibility of the State continued up until that moment.

¹⁶⁶ See footnote 20 above.

(f) *Article 15 bis*

442. Support was expressed for the proposed article as addressing an important lacuna in the draft. However, the comment was made that article 15 *bis* should be concerned with cases where the acknowledgement of the earlier conduct amounted to a form of recognition of an existing situation, that is to say, where it had a probative value, as distinct from cases where the adoption of conduct occurred *de novo* without any earlier involvement by the State.

443. It was suggested that the article could be redrafted as a positive formulation. It was also suggested that a saving clause concerning the responsibility of insurrectional movements or national liberation movements should be included as article 15 *bis*, paragraph 2, or article 15 *ter*.

444. A question was raised concerning the necessity of that provision and the use of the word "or" rather than "and" in the concluding phrase.

15. THE SPECIAL RAPPORTEUR'S CONCLUDING REMARKS
ON THE DEBATE CONCERNING
DRAFT ARTICLES 9 AND 11 TO 15 *BIS*

445. The Special Rapporteur noted that many useful comments had clarified and illuminated the general understanding of those articles. He noted that the articles created few major problems of principle, with the possible exception of article 15.

446. There was general agreement that the responsibility of international organizations and of States for acts of international organizations were important subjects that were worthy of study in their own right but that they raised problems that went well beyond questions of attribution. The wisest course of action would be to exclude them from the current draft. That exclusion necessitated a saving clause since attribution issues were involved. It had been suggested that the saving clause should cover acts carried out within the framework of an international organization as well as the acts of the international organization itself. On the other hand, States could assume

individual responsibilities in the context of conduct which took place in the forum of an international organization, and that distinction needed to be recognized.

447. Article 9 had received general approval. Although some examples or organs placed at the disposal of another State might be considered vestiges of colonialism, there were other examples where the consent of the States concerned had been given freely. The omission of the article would create problems concerning the breadth of article 5.

448. There was general agreement that the negative formulations contained in articles 11 to 14 were unnecessary and could be deleted, with any useful elements being addressed in the commentary. The problem raised concerning the conduct of one State in the territory of another State required further reflection, possibly in chapter IV of part one.

449. There was also general agreement concerning the proposed merger of articles 14 and 15. The Drafting Committee should consider whether new article 15 should be formulated in the negative or in the positive. Given the general support for retaining the reference to territorial governmental entities in article 5, consideration should be given to the relationship between articles 5 and 15. The Special Rapporteur still believed that the term "established" was necessary to indicate a threshold for the insurrectional movements for purposes of article 15, and to distinguish between territorial governmental entities and de facto administrations covered by articles 5 and 15 respectively.

450. Questions of terminology raised with respect to the terms "insurrectional movements" and "national liberation movements" should be considered by the Drafting Committee. It might be necessary to include a brief introductory article in the draft to indicate that its scope was limited to the responsibility of States and did not extend, for example, to the responsibility of insurrectional movements.

451. Finally, there was general agreement concerning the need for proposed new article 15 *bis*.