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Chairman: Mr. Enkhsaikhan ..... (Mongolia)
later: Mr. Mochochoko (Vice-Chairman) ..... (Lesotho)
later: Mr. Enkhsaikhan ..... (Mongolia)

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The meeting was called to order at 3.15 p.m.

Agenda item 150: Report of the International Law Commission on the work of its fiftieth session *(continued)* (A/53/10 and Corr.1)

1. **Mr. Win** (Myanmar) said that his Government had repeatedly expressed its support for the work of the International Law Commission since its inception. His country was making every effort to strengthen the legal system that had been in force since its accession to independence 50 years earlier. That was being done not only in order to modernize the existing laws, but to promote the rule of law within the country, especially in those areas that only in recent years had seen a cessation of armed insurgencies and achieved peace and stability. His delegation acknowledged that international law played a crucial role in the preservation of international peace and security. The topics under discussion by the Commission required clearly defined international rules that could prevent unnecessary problems in the international arena. His delegation noted with satisfaction the dissemination of international law publications by the Commission and the holding of the International Law Seminar in Geneva.

2. **Mr. Zarif** (Islamic Republic of Iran), referring to chapter V of the report of the International Law on Commission (A/53/10 and Corr.1), said that the topic of diplomatic protection had major practical significance for contemporary international relations. In view of recent developments in the field, the Commission should continue to discharge the mandate entrusted to it in accordance with its plan of work. His delegation supported the conclusions of the Working Group as contained in paragraph 108 of the report and believed that the Special Rapporteur should proceed with the preparation of his second report, to be entitled "Basis for diplomatic protection".

3. His delegation agreed that the customary law approach should form the basis for the Commission's work on the topic. Nevertheless, the growing number of bilateral investment promotion and protection agreements should not be overlooked. At the same time, the extension of the scope of the topic to extraneous issues should be avoided. The analogy between diplomatic protection and the right of petition was misleading. As explained by the Special Rapporteur, diplomatic protection could be invoked in the case of a dispute between a host State and a foreign national whose rights had been violated and who had suffered injury as a result. Since the foreign national was unable to invoke the remedies provided for under international law, the State of nationality could espouse the individual's claim in international forums. The right of petition, however, entitled an individual to bring a petition directly before a judicial body. The two institutions were thus completely separate and should not be confused.

4. Turning to chapter VI of the report, he said that in the absence of a coherent doctrine encompassing all types of unilateral acts, the Commission's work would constitute the progressive development of international law in that area. The development of rules or guiding principles would help to clarify various aspects of State acts. As far as the scope of the topic was concerned, it was essential to establish a clear framework that could facilitate the Commission's work. His delegation concurred with the Special Rapporteur that it was not necessary for the Commission to examine all types of State acts. His delegation supported the approach adopted by the Commission at its previous session, that of limiting the scope of the topic to unilateral acts of States which generated legal effects. That approach excluded unilateral acts of States linked to a specific legal regime and acts of other subjects of international law, such as international organizations.

5. While his delegation agreed that declarations should form the core of the Special Rapporteur's work, the mandate of the Commission did not preclude the study of other unilateral acts. His delegation had no objections to a study being undertaken of the silence of a State and of estoppel; it should be borne in mind, however, that silence was not a legal term and could not give rise to legal consequences. Consideration of estoppel, however, might be useful to the Commission in developing a fuller view of those types of unilateral acts which unquestionably fell within the scope of the topic. As to the extension of the scope of the topic to unilateral acts of States issued to other subjects of international law, his delegation believed that that did not fall within the Commission's mandate.

6. With regard to chapter VIII of the report, his delegation concurred with the Commission that in the absence of positive comments by States, the Commission's work on the topic should be limited to the nationality of natural persons. It remained open-minded, however, as to the necessity of undertaking further work if Governments which had recently undergone succession provided compelling reasons for doing so.

7. With regard to chapter IV of the report, it was encouraging to note that the Commission had completed the first set of draft articles on prevention in only one year. Concerning the question raised by the Commission in paragraph 32 of the report, while his delegation tended to agree with the Commission that the duty of prevention was an obligation of conduct, it wished to emphasize that within

the framework of State responsibility, the breach of an obligation of conduct could still produce consequences.

8. As to the appropriate type of dispute settlement procedure, that depended on the final form which the draft articles should take; in his delegation's view, a model law was the most suitable format. In addition to a fact-finding Commission, negotiations and recourse to a conciliation commission appeared to be appropriate mechanisms.

9. Turning to chapter V of the report, he said his delegation shared the Commission's general view that the Vienna Conventions on the law of treaties had established a practical reservations regime applicable to all types of treaties. By recognizing the right of States to reserve their positions while signing, ratifying or acceding to multilateral treaties, the Vienna regime had facilitated the accession of a large number of States to such treaties. His delegation therefore concurred with the Commission's decision to focus on remedying ambiguities and clarifying obscurities. In that respect, the draft guidelines proposed by the Special Rapporteur on the definition of reservations and interpretative declarations were a step in the right direction.

10. With regard to the question raised by the Special Rapporteur in paragraph 41 of the report, his delegation believed that unilateral statements by which a State purported to increase its commitments to a given treaty should not be considered as reservations. Such statements were merely proposals by a State for amending a treaty, and could become binding only after their acceptance by other parties in accordance with the provisions of the treaty.

11. **Mr. Momtaz** (Islamic Republic of Iran), referring to chapter VII of the report, noted that with few exceptions, most developing countries had not yet responded to the Commission's invitation to submit written observations on the draft articles on State responsibility adopted on first reading. Experience had shown that those countries generally preferred to state their views on draft articles prepared by the Commission in the framework of the Sixth Committee. The Committee should therefore attach as much importance to statements expressed orally as to written observations. He noted with satisfaction the willingness of the Special Rapporteur to take into account the views expressed by States in debates.

12. With regard to the distinction between "criminal" and "delictual" responsibility, there was currently a general agreement, reflected in the decision of the International Court of Justice in the *Barcelona Traction* case, as to the existence of international obligations towards the international community as a whole, or *erga omnes* obligations. Since breaches of such obligations undermined the very basis of the international community, they unquestionably required a specific regime of responsibility different from the regime envisaged for violations of other primary rules of international law. The qualitative difference between the two categories of internationally wrongful acts was the source of the distinction in draft article 19 between delicts and State crimes. The international criminalization of "exceptionally serious wrongful acts" was thus intended to strengthen the notion of international public order and to preserve the highest values of humanity. The distinction also took into account the evolution of international society, which was now based on solidarity between States while at the same time reflecting their wish to respond collectively to a violation of society's common values. To abandon such a hierarchy of breaches of international obligations, as had been proposed, would be to disregard that need and to return to the traditional bilateralist approach to the law of international responsibility, which had been concerned solely with repairing the damage suffered by a State as a result of a breach of a primary rule of international law. Since the main argument of those opposed to the distinction in draft article 19 was based on the penal connotations of the concept of an international State crime, his delegation would welcome all efforts aimed at reaching agreement on a new term. It had been suggested that the concept should be defined, respectively, as a violation of a *jus cogens* norm, an exceptionally serious internationally wrongful act or a breach of an obligation that was essential for the protection of the fundamental interests of the international community as a whole. In the final analysis, all those proposals appeared to be more or less consistent with the *sui generis* nature of State responsibility, which was neither civil nor criminal, but international. Whichever the term was selected, it did not seem necessary to provide a precise definition of a wrongful act.

13. His delegation deemed it essential, however, to clarify the legal consequences arising from the violation of the two categories of rules and to determine the degrees of responsibility in each case. The distinction had no meaning unless there were real differences between the consequences. Despite the laudable efforts made so far by the various special rapporteurs, it must be acknowledged that a more detailed analysis was needed. That was the conclusion reached by the new Special Rapporteur, who had rightly pointed out that in the case of a violation of a fundamental norm, pecuniary compensation would not suffice. That was one of the issues which the Commission must address during the second reading of the draft articles.

14. Other related questions also warranted further consideration. For instance, an objective determination of the existence of a breach of a fundamental norm should not be left

to the discretion of the State which claimed to be injured. His delegation continued to believe that the International Court of Justice was the body which offered the best guarantee of impartiality and which was capable of taking a fully informed decision on the existence of such a breach. Only afterwards did the question of the international community's response arise. The current draft treated each member of the international community as an injured State, giving it the right to respond, including through the adoption of countermeasures, which, it must be admitted, posed a particularly high risk of abuse. In his delegation's view, the right of response should be given only to States that were directly affected. It had been suggested that a distinction should be made among States based on their "proximity" to the breach; the Commission should consider that question and propose objective criteria.

15. At the current stage of international relations characterized by the lack of an effective, centralized system of coercion, it was inconceivable that an injured State should be prevented from taking countermeasures. On the other hand, in order to prevent abuses, it would be prudent for the Commission not only to clarify the rules of customary international law, but also to develop clear rules limiting the circumstances under which States could resort to countermeasures. If the parties in conflict were subject to a compulsory dispute settlement procedure, that would obviate the need for countermeasures. Since that did not always seem to be the case, the inclusion in the draft articles of an obligation on the part of the injured State to negotiate prior to taking countermeasures appeared to be appropriate. The obligation to negotiate in good faith, and to conclude negotiations within the stipulated time-frame appeared to provide sufficient guarantees to the injured State that its position would not be jeopardized. In the meantime, the injured State should confine itself to taking such interim measures as seemed necessary to protect its rights.

16. The failure of negotiations or of any other peaceful dispute settlement procedure did not, however, entitle the injured State to resort to countermeasures as it saw fit. The interests of the international community required that certain categories of countermeasures be prohibited. In that context, the draft articles prohibited recourse to extreme measures of coercion aimed at undermining the territorial integrity and political independence of the wrongdoing State. Since the vagueness of the formula used did not make it possible to determine what types of measures fell under such a prohibition, the Commission must examine the issue further with reference to the recent practice of States. The application of the principle of proportionality, which was recognized by doctrine and jurisprudence, was a regulatory element, especially in the case of bilateral disputes. The question also rose as to whether the objectives underlying the adoption of countermeasures should be taken into consideration in assessing the degree of proportionality. To that end, the Commission should consider the measures adopted in recent years against the so-called "pariah" States which were guilty of violating the fundamental norms of international law.

17. **Mr. Chimimba** (Malawi) said that the streamlining of the draft articles on State responsibility had led to many improvements in the text. His delegation agreed in particular that no distinction should be made between *acta jure gestionis* and *acta jure imperii* for the purposes of article 5. There was no doubt that internal law would be relevant in certain circumstances, but not always decisive, with regard to the determination of the status of an organ of the State and the attribution to the State of the conduct of its entities. However, it might be better to refer to internal law in the commentary rather than in the body of the draft articles. The broadening of the scope of article 7 by means of an explanation in the commentary did indeed reflect the realities of the contemporary world with respect to the delegation of governmental authority.

18. Turning to article 19, he said that in their joint statement in the Committee at the fifty-first session the countries of the Southern African Development Community had indicated their preference for retaining the distinction between international delicts and international crimes. His delegation still held that position although it was mindful that others disagreed. It might be useful to explore alternative language which would avoid the criminal implications. The second alternative offered by the Special Rapporteur, combined with aspects of the fifth alternative – decriminalizing State responsibility – offered a realistic solution. The second option might pose dilemmas, but the distinction was an important one and ought to be made.

19. His delegation noted that the Commission would continue to take a "objective responsibility approach", and positive law certainly drew distinctions between certain rights and obligations. On the other hand, such distinctions did not always have to entail automatic distinctions in the consequences, particularly with regard to reparation. It would be wrong to underestimate the deterrent effect of the distinction which the Commission was seeking. Since the idea of drawing parallels between delicts and crimes seemed to have had its origins in rules of *jus cogens* and obligations *erga omnes*, a satisfactory solution might lie therein. The Commission should continue its efforts to fill the gaps between the various options.

20. His delegation was glad that the Commission had held a segment of its session in New York, thus enhancing the possibility of contacts between its members and representatives of Governments. The practice should become a regular one.

21. *Mr. Mochochoko (Lesotho), Vice-Chairman, took the Chair.*

22. **Mr. Alabrune** (France) said that France had expressed serious reservations concerning the draft articles on State responsibility because they addressed primary rules. The Commission should in fact limit its study to the codification of secondary rules. There was nothing to prevent the Commission stating as a prior condition to its work the existence of a wrongful act by a State, but the study should not deal with the content of the international obligation which had been breached. France had repeatedly stated that the existence of harm was an indispensable element for triggering State responsibility and had always criticized the idea that a failure to fulfil obligations was sufficient. It regretted that the Special Rapporteur had recommended no change in that respect in draft article 1 and hoped that his re-examination of the relationship between article 1 and article 40, on the "injured State", would allow the Commission to posit the principle that harm must exist if State responsibility was to be entailed.

23. His delegation had also frequently criticized the concept of "international crime" as defined in draft article 19 and the distinction between crimes and delicts. Some wrongful acts were of course more serious that others, but the Commission's distinction was impracticable. Moreover, it drew very few consequences from the distinction. His delegation looked forward to the conclusions of the working group to be set up on article 19, and was pleased that the Commission stressed the importance of taking the views of Governments into account during the second reading of the draft articles.

24. Some of the drafting changes in chapter II proposed by the Special Rapporteur went in the right direction but did not take full account of the written comments submitted by France.

25. The term "injured State" in article 40 was ambiguous. There again, the emphasis must be on the notion of "harm". It was a good thing that the Commission was to re-examine the definition of "injured State", but it would be wrong to do so, as it intended, on the basis of the notion of *jus cogens*.

26. The provisions on countermeasures had no place in draft articles on State responsibility, which should include only matters connected with that topic. A countermeasures regime might warrant a specific study by the Commission, but not as part of the law of responsibility. The provisions on dispute settlement seemed equally misplaced. The effect of Part Three was to establish the jurisdictional settlement of all disputes, but there was no reason to single out disputes connected with State responsibility by applying an ad hoc settlement mechanism to them. There were rarely any disputes about responsibility alone, but rather substantive disputes which had consequences for responsibility. It would be better to rely on general international law, and one solution might be to give Part Three the form of an optional protocol, if it could not be deleted. The Special Rapporteur stated in his report that he had noted the concerns expressed by some Governments about the inclusion of detailed provisions on countermeasures and on dispute settlement. It was to be hoped that he would take those concerns into account when he re-examined the two questions.

27. The Committee must give some thought to its relations with the Commission, with a view to offering more guidance and establishing a true dialogue between the two bodies. Further topics must be proposed, such as the legal consequences of the decisions of international organizations. The Commission might usefully make a separate study of countermeasures regimes instead of dealing with the topic under State responsibility and also, as already suggested, reflect on the concept of legal person under international law.

28. **Mr. Da Gama** (Portugal) said that the draft articles on prevention of transboundary damage from hazardous activities correctly reflected the basic principles of international environmental law, although the Commission had taken a cautious approach by leaving aside for the moment the fundamental question of compensation for harm caused. Portugal had always welcomed legal solutions involving commitments to preventive action, but it was essential to establish the obligation to pay compensation for harm. The future legal instrument should therefore cover both prevention and compensation. Compensation of innocent victims must in fact be a guiding principle, but Portugal remained flexible on the shaping of the theoretical framework of such a principle. It shared the regret of other delegations at the deletion of article 1 (b), a move limiting the text to hazardous activities: activities not normally entailing risk might also cause harm, and in any event there was currently no clear definition of hazardous activity.

29. Portugal endorsed the need for reinforcement of the dispute-settlement mechanisms and welcomed the provision on a fact-finding commission in article 17, paragraph 2.

30. Portugal continued to believe that diplomatic protection should include the protection claimed for their agents by

international organizations, because of both the existing legal precedents and the basic fairness of such protection. The protection should also cover persons located in territories under a State's administration. There was a clear need for the Commission to focus on concrete draft articles. Diplomatic protection must be regarded as a sovereign prerogative of the State of nationality, a prerogative entailing discretionary State powers. For all practical purposes the persons concerned should be considered as beneficiaries of international law. As to the relationship between human rights and diplomatic protection, the two institutions should not be specifically linked in any draft articles on the topic.

31. His delegation reserved its position on the topic of unilateral acts of States pending the more substantive report promised by the Special Rapporteur. It also wished to defer its position on whether the scope of the topic should be limited to declarations, as proposed by the Special Rapporteur, or should encompass other unilateral expressions of the will of the State. As to whether unilateral acts should include acts affecting subjects of international law other than States, or limited to acts affecting other States, Portugal believed that at least international organizations should be covered.

32. On the topic of State responsibility, Portugal endorsed the position set forth by the representative of Denmark on behalf of the Nordic countries with regard to the distinction between delicts and crimes, compensation, and the distinction between *acta jure gestionis* and *acta jure imperii*. There was indeed a distinction in international law between minor offences and internationally wrongful acts resulting from a breach by a State of an international obligation. The topic clearly revealed the obstacles to the promotion of the rule of law in international relations. Portugal therefore looked forward to the three further reports promised by the Special Rapporteur.

33. Turning to the topic of nationality in relation to the succession of States, he said that his delegation supported the approach of giving priority to questions concerning natural persons over questions concerning legal persons. The free choice of nationality was of crucial importance, and the principle of the right of option should be applied to the maximum extent possible. That right was also a powerful tool for avoiding "grey areas" of competing jurisdictions.

34. His delegation also welcomed the draft articles on non-retroactivity of legislation, family unity, non-discrimination, prohibition of arbitrary decisions, and the obligation of States to prevent statelessness. The provisions on the presumption of nationality and consent were also acceptable. However, an additional effort should be made to clarify concepts such as "appropriate legal connection" and "reasonable time-limit for the exercise of the rights".

35. Portugal also believed that the draft articles should address situations of decolonization and specify that the regime applied *mutatis mutandis* to such situations. With regard to the nationality of legal persons, the Commission must begin by defining what a legal person was and then address the question of how to assess the nationality of such persons.

36. His delegation attached great importance to the long-overdue work on the topic of reservations to treaties. It was often unclear in practice which reservations were acceptable and what effect objections had on them. Since no specific consequences were attached to objections, the result was often that each State became the sole judge of the compatibility of reservations with the purpose of the treaty. Therefore, while agreeing that the Vienna regime must be preserved, Portugal believed that it was fundamentally incomplete. That was a particularly important issue in the case of rules of *jus cogens*, since reservations would clash with a pre-existing rule which the treaty had embodied. It was also wrong to condone the practices of States which knowingly made reservations against the core of a treaty. Such practices might turn universality into a hollow word. It might indeed be useful for the Commission to consider further an ad hoc reservations regime for human rights treaties.

37. **Mr. Pham Truong Giang** (Viet Nam) said that his delegation attached great importance to the question of international liability for injurious consequences arising out of acts not prohibited by international law. The regulation of those activities should be in accordance with basic principles of international law, such as sovereignty of States, sovereign equality and settlement of disputes by peaceful means. The scope of the articles must be clarified and carefully formulated. Article 1 should be reconsidered and further elaborated.

38. The term "significant" transboundary harm in article 2 (a) should be clarified. The criteria of measurement and assessment of "harm", "significant" harm or "probability" of harm should be further elaborated. His delegation agreed that States should take all appropriate measures to prevent or minimize the risk of causing significant harm to others. Nevertheless, the issue remained as to how to deal with harm of a lesser degree that was not considered "significant". Would measures only be taken in cases of significant harm, in accordance with article 3? The best solution, of course, was not to cause any harm to others; however, if harm was unavoidable and was actually caused, the State of origin

should bear the obligation. All those issues should be considered further.

39. Although article 7 provided that prior authorization of a State was required for activities within the scope of the draft articles, the matter of whether the prior authorization would be granted by the State of origin or the State likely to be affected was not yet clear. The question of prior authorization might relate to the issue of prior consultation among the States concerned, especially with the State that was likely to be affected by the activities that had the potential to cause harm.

40. Further discussion was also needed on article 10, which dealt with the principle of prior notification and information. With regard to the determination of the burden of liability and its level, article 12, particularly paragraphs (b), (d) and (e), should be redrafted in order to clarify the issues involved.

41. **Mr. Lavalle-Valdés** (Guatemala), speaking on the topic of reservations to treaties, said that the Commission should discuss the issues raised by reservations which modified rather than excluded the application of a particular provision of the treaty to which the reservation was being made. The question might be raised as to whether it would be lawful for a State party to a multilateral treaty to make a reservation that would have the effect of replacing one provision of the treaty by another radically different one, thus completely distorting the text under the guise of modifying the provision that was being replaced. Even though such a reservation might not have any effect as an amendment, it would still have other legal effects. It should, in fact, be considered a statement of exclusion, inasmuch as it was aimed at excluding the application of the relevant provision of the treaty to the State making the reservation. If the exclusion was compatible with the purposes of the treaty, it would be admissible. If the State making the reservation also assumed an additional obligation not imposed by the treaty, the reservation would be an extensive one as well as an exclusion.

42. His delegation considered that an extensive reservation was not really a reservation but was, rather, a unilateral act of a State. Consequently, the effects of such a reservation would not be governed by the law of treaties. A so-called reservation that increased the obligations of the other parties to a treaty was not a true reservation either. In fact, a unilateral statement made by a State without any basis in an external rule or circumstance could not be used to impose obligations on third States.

43. With regard to interpretative declarations, he said that the interpretation given to the treaty must at least be a plausible one. If it was not plausible, then the instrument was actually an amendment disguised as an interpretative declaration. With regard to the distinction between interpretative declarations and reservations, there was a third aspect to be considered in addition to the two mentioned in paragraph 517 of the Commission's report, namely that unlike reservations, interpretative declarations – provided they were plausible – did not have any legal effect.

44. As a corollary to that, it should be pointed out that nothing stood in the way of a State party to a multilateral treaty making an interpretative declaration by means of a communication to the States parties, without going through the depositary of the treaty. That procedure might not apply in the case of a conditional interpretative declaration, an interesting possibility mentioned in paragraph 512 of the report.

45. Lastly, he said that in its future work on reservations, the Commission should consider the matter of the obligations of depositaries. Such a discussion would be particularly useful to depositaries who, unlike Governments or organizations, performed their duties as depositary on a small scale. The experience of the Secretary-General of the United Nations could be very useful in that regard. His delegation understood that the guidelines followed by the Secretary-General in connection with his duties as the depositary of international treaties existed only in French; it would be very helpful if they could be made available in all the official languages of the Organization.

46. **Mr. Farrell** (Ireland) said that his delegation welcomed the continuing efforts of the Commission to develop draft articles on the subject of State responsibility. While there was some merit in making a distinction between wrongful international acts in accordance with their degree of gravity, his Government shared the view of those delegations which saw criminal responsibility as first and foremost a matter of individual moral responsibility. The best way forward in international law was to try to get universal agreement that particularly heinous behaviour on the part of individuals should be criminalized and to establish the necessary procedures and institutions at the international level to ensure that human beings were called to account for such behaviour. The current effort to establish the International Criminal Court was a move in that direction.

47. His delegation welcomed the thorough consideration given by the Commission to the topic of criminal responsibility and, in particular, the acknowledgement by the Commission of the importance of taking into account the views of Governments in considering that and other aspects of the draft articles.

48. His delegation appreciated the approach taken by the Commission in chapter III of the report, in which it itemized

those aspects of its work on which it would welcome comments by Governments.

49. He welcomed the substantial progress made by the Commission in adopting on first reading a set of draft articles with commentaries on the prevention of transboundary damage from hazardous activities. His Government would examine the draft articles in due course, having particular regard to the points raised in paragraphs 31 to 34 of the report. With regard to the Committee's decision to recommend a regime on prevention, as distinct from a regime of liability, his delegation acknowledged the importance of prevention but considered it necessary also to consider the question of liability in situations where harm did occur, so as to ensure that the innocent victim was not left to bear the damage alone. He urged the Commission to continue to consider the liability aspect of the topic.

50. On the topic of reservations to treaties, his delegation had noted with particular interest the comments of those delegations that had drawn attention to the issue of reservations insofar as they concerned human rights treaties.

51. With regard to chapter X and, in particular, the future work of the Commission, his delegation agreed that the Commission should not restrict itself to traditional topics and that it should also consider topics that reflected new developments in international law and pressing concerns of the international community as a whole. He had noted with interest the topics referred to in paragraph 554 of the report, and in particular, the reference to topics such as human rights, environment and shared natural resources, as worthy of the Commission's attention in future years. With regard to paragraph 555, his delegation wished to record its appreciation of the contribution made by the Commission to the preparation of the original draft of the Statute of the International Criminal Court.

52. His delegation was pleased to have supported the trust fund for the international seminar for young lawyers, held in Geneva in May 1998, and noted with satisfaction the good geographical distribution of participants, particularly from developing countries.

53. **Mr. Sotirov** (Bulgaria) said that his remarks would focus on the topic of State responsibility and, more specifically, on the distinction between "international crimes" and "delicts as internationally wrongful acts", as set forth in draft article 19, paragraph 4. There was a qualitative distinction in international law between the most serious internationally wrongful acts, which affected the interests of the international community as a whole, and other wrongful acts. Therefore, a clear distinction should be drawn between more and less serious wrongful acts. The distinction between the two categories of violations was to be found in existing law and State practice.

54. While his delegation supported the retention of article 19, it considered that the definition of "international crimes" in paragraphs 2 and 3 of that article needed further clarification. The category of crimes might be defined in other ways, for example, by reference to the existence of some specific system for their investigation and enforcement or to their substantive consequences.

55. Part Two, dealing with the consequences of international crimes, did not specify the distinctive and exclusive consequences of such crimes. Nor did it lay down any special procedure for determining authoritatively whether a crime had been committed, or what its consequences should be. Thus, the current draft articles failed to develop the distinction between crimes and delicts adequately in terms of the procedural implications or consequences of crimes. There was a marked contrast between the gravity of an international crime, as expressed in draft article 19, on the one hand, and the rather limited consequences of the international crime mentioned in articles 51 to 53. There was a further contrast between the strong procedural guarantee associated with countermeasures under draft article 48 and Part Three, and the complete absence of procedural guarantee associated with international crimes.

56. Once the existence of the category of international crimes was accepted, the consequences of the distinction must be dealt with in draft articles, which should set forth as precisely as possible the different treatment and different consequences with respect to different violations.

57. Regarding the distinction between "criminal" and "delictual" State responsibility, his delegation was not in favour of developing a regime of criminal responsibility of the State and "penalizing" that responsibility. It was important to include the concept of the distinction between crimes and delicts in the draft articles. At the same time, the acceptance of that distinction did not necessarily lead to the establishment of two different types of State responsibility. His delegation considered that the law of State responsibility was neither civil nor criminal, but purely and simply international.

58. **Mr. Kerma** (Algeria) said that the Commission's work on nationality of natural persons in relation to succession of States was particularly timely, given the profound political changes that had taken place in recent years and the appearance of new subjects of international law. The draft articles on the topic should be helpful as States sought solutions to the often complex situations they had to face. Some of the rules reaffirmed in the draft articles were

particularly relevant, including the provisions on statelessness and family unity. Other concepts embodied in the draft articles, including those of dual nationality and multiple nationality, had not yet been universally accepted. In that regard, the Commission should adopt a pragmatic approach in order to avoid potential disputes between States.

59. On the question of the nationality of legal persons, it seemed unlikely that the Commission would be able any time soon to draft rules that would be practical and immediately applicable. The nationality of legal persons was a much more complex issue than that of natural persons. The experience of States having had a recent experience with succession would undoubtedly make a useful contribution to the Commission's work. The decision to pursue consideration of the matter would be made in the light of the comments which States submitted to the Commission, particularly concerning its future approach.

60. The major difficulty concerning the controversial subject of reservations to treaties was that the 1969 Vienna Convention on the Law of Treaties did not cover all aspects of the matter. Nevertheless, he shared the Commission's view that the reservations regime pursuant to that Convention was flexible enough to maintain a satisfactory balance between the goal of maintaining the integrity of a treaty text and the need for universality.

61. Interpretation of the objectives of the monitoring bodies established under certain human rights treaties was particularly problematic. The sole objective of such bodies was to ensure application of the treaty in question and they could not assume other powers, such as competence to evaluate the permissibility of reservations, unless explicitly mandated to do so under the treaty in question, to which they owed their existence in the first place.

62. His delegation would comment in due course on the complicated subject of the definition and formulation of reservations, as well as on the draft guidelines on reservations contained in the report. The Guide to Practice reflected the current trend followed by States, particularly concerning reservations having territorial scope and reservations formulated jointly. He agreed with the Special Rapporteur that statements designed to increase the obligations of their author could not constitute a reservation. The conclusions of the Special Rapporteur concerning the definition of reservations provided food for thought with a view to clarifying and finalizing the definition. He looked forward to seeing the Commission's final conclusions concerning the distinction between reservations and interpretative declarations.

63. In view of its importance to the progressive development of international law, the complex subject of international liability for injurious consequences arising out of acts not prohibited by international law demanded the sustained attention of the Commission. Pending the Commission's final decision on the matter, however, States should exercise all precautions to prevent possible injurious consequences of hazardous activities. He welcomed the consideration given to the transboundary implications of certain economic activities for the environment and noted that the draft articles reflected the basic principles of international environmental law. He also supported the controversial view that the principles of international law created obligations for States whose activities were harmful to the environment of other States. The compensation payable for damages, however, should vary according to the economic and social development of the country responsible, in which case particular attention should be devoted to the specific situation of the developing countries, which were the most vulnerable in that respect.

64. He similarly supported many of the Commission's recommendations, contained in the important final chapter of the report, that were aimed at improving its efficiency. Without the full cooperation of the Sixth Committee and Governments, however, the Commission would be unable to fulfil its mandate satisfactorily. In conclusion, he expressed approval of the subjects identified by the Commission for inclusion in its long-term programme of work and reiterated his strong support for the Commission in its determined pursuit of the work on its agenda.

65. *Mr. Enkhsaikhan (Mongolia) resumed the Chair.*

66. **Mr. Pfirter** (Observer for Switzerland), commenting on the draft guidelines on reservations to treaties, expressed approval of the composite method adopted by the Commission in its efforts to arrive at a comprehensive definition of reservations that would reflect the pertinent elements of the definitions contained in the three Vienna Conventions of 1969, 1978 and 1986. He queried, however, the precision of the term "purports to exclude or to modify the legal effect" contained in the resulting "Vienna definition" set out in draft guideline 1.1. It would be more precise to define reservations as purporting to "exclude or to limit the legal effect" of certain provisions, particularly since statements designed to increase the obligations of their author were not reservations in the sense of the Vienna definition and since all reservations were aimed at wholly or partially neutralizing certain provisions of a given treaty. Further consideration should be given to draft guideline 1.1.1, which was flawed in that a reservation should not relate to the way in which its author intended to apply a treaty. Furthermore, the word

"reservation" at the beginning of the draft guideline failed to alleviate the concern which he shared with other delegations that confusion might arise concerning across-the-board reservations and straightforward interpretative declarations.

67. He regretted that the composite method had not been used in the formulation of draft guideline 1.1.2, according to which the means of expressing consent to be bound by a treaty excluded the declaration of succession to a treaty provided for under the 1978 Vienna Convention. Such a declaration was a means of expressing that consent and should therefore be regarded as an instance in which reservations could be formulated. Accordingly, the draft guideline should involve a general renvoi to the 1978 Vienna Convention on the understanding that clarifications would be made in the part of the Guide to Practice relating to the succession of States in relation to reservations to treaties.

68. It was surprising that draft guideline 1.1.3 did not include the terms "modify", "limit" or any of their derivatives, as the possibility could not be entirely excluded that a State responsible for the international relations of a territory might, at the time of signing a treaty or expressing its consent to be bound by it, formulate a declaration aimed at limiting the application of the treaty or the legal effect of some of its provisions in regard to that territory. The slight imbalance in the second part of the draft guideline could be redressed by adding the words "or some of its provisions" after the words "that treaty".

69. Draft guideline 1.1.7 concerning reservations formulated jointly provided reasonable provision for future situations which were likely to arise, while the additional draft guideline provisionally adopted by the Commission appeared to pose no problems in that it stated the obvious.

70. Draft guideline 1.1.6 adopted by the Drafting Committee was not altogether essential, as it repeated a component of the definition of reservations contained in draft guideline 1.1. In the context of draft guideline 1.1.5, however, it would help to clarify the concept of reservations. In connection with the latter draft guideline, he considered that a statement designed to increase the obligations of its author was a unilateral commitment that should not be classed as a reservation.

71. **Mr. Mikulka** (Special Rapporteur on nationality in relation to succession of States) said he was pleased to report that several Governments had submitted their written comments on the draft articles on nationality of natural persons in relation to the succession of States before the deadline of the end of October 1998. Notwithstanding the comments made on the topic during the current debate, he hoped that still more written comments would be received and that the Commission would complete its second reading of the draft articles in the spring of 1999.

72. Having reviewed the steps taken thus far in connection with the second part of the topic, namely the question of the nationality of legal persons in relation to the succession of States, he said that he and the Commission would jointly analyse the comments received on the options proposed by the Commission concerning the possible orientation to be given to its work on that question, if indeed the Commission were invited to consider it. It was clear, however, that the question elicited little enthusiasm and that there was insufficient support to justify immediate consideration of it. One solution would be to separate the two parts altogether, complete work on the first part and refer the second part to the Working Group on future topics, in which context the Commission could evaluate the framework for the question and the extent of its usefulness or urgency compared to the other new topics proposed. He emphasized, however, that his remarks were made without prejudice to the position of the Commission itself, to which he would faithfully transmit at its next session all further views which he received on the subject.

73. **Mr. Pellet** (Special Rapporteur on reservations to treaties) said that the Committee's decision to invite all the Special Rapporteurs of the Commission to address it would facilitate dialogue, although he hoped that that interchange could be made even more effective. The Committee had a right to expect the Commission to meet the needs of Member States but, in order for it to do so, States must provide clearer and more specific guidance than was currently the case. In response to repeated requests from the Committee, the Commission had modified its methods of work. The Committee, for its part, must consider ways of improving its consideration of the Commission's annual report.

74. Turning to the topic of reservations to treaties, he observed that most delegations had supported the Commission's decision not to depart from the definition of reservations contained in the Vienna Conventions of 1969, 1978 and 1986. While he understood why a few delegations had suggested that the Commission should have taken the opportunity to modify the definition provided in those Conventions, he did not agree, since such a course of action would have created confusion, not only with respect to draft guideline 1.1 (definition of reservations) but throughout the draft guidelines, the purpose of which was to analyse reservations to treaties in light of both the Vienna Conventions and subsequent practice.

75. The problem had been to determine whether the word "modify", which appeared in the definition of reservations

given in all the Vienna Conventions, could be interpreted to authorize not only statements intended to limit a State's obligations under a treaty, but also those intended to increase its rights. Many speakers had supported his own view that unilateral statements by which a State purported to increase its rights did not constitute reservations. However, the Commission had not yet found an appropriate way of expressing in a guideline a concept which appeared simple but was in fact complex because, in a sense, a State could be considered to have increased its own rights by making any reservation which limited its responsibilities under a treaty. He was convinced that the Commission would find appropriate wording for that concept during the coming year, taking into account the comments of delegations. Some delegations had suggested that the Commission should simply avoid raising the question in the draft guidelines because of its complexity and theoretical nature. However, the very purpose of the guidelines was to meet the needs of States in cases which, while unusual, did in fact occur.

76. A few delegations had suggested that the attempt to define reservations was not a practical matter and that the Commission should proceed directly to deal with the validity of reservations and States' objections thereto. However, in his opinion it would not be possible to implement the guidelines without some means of determining whether a given unilateral statement did, in fact, constitute a reservation, without prejudice to the question of its validity. In that regard, there appeared to be support for his decision to deal simultaneously with reservations and interpretive declarations, a procedure which would make his own task more difficult but would simplify that of the end users.

77. Turning to issues other than the definition of reservations, he said that one delegation had opposed the use of the word "*directive*" as a translation of the English "guidelines" in the title of the draft. However, it was important to bear in mind that the draft articles were intended to form part of a guide and were, therefore, clearly not compulsory in nature. Moreover, the words "*lignes directrices*", proposed by the delegation in question, had little meaning in French.

78. While most delegations had approved of the wording of draft guideline 1.1.1, several had agreed with the Commission members who had considered that the text lent itself to confusion with interpretive declarations. The Commission would reconsider that article in light of those comments. However, he was less convinced by the delegation which had suggested that the draft guidelines should follow the Vienna Conventions in restricting the definition of reservations to unilateral declarations concerning specific provisions of treaties, a position which was not borne out by State practice.

79. A few delegations had noted that draft guideline 1.1.2 did not state that reservations could be formulated at the time of State succession. He wondered whether it would be better to consider amending that article or whether the matter should be dealt with in the context of the Commission's treatment of reservations in the context of State succession.

80. On the other hand, he saw no reason to incorporate mention of State succession into draft guideline 1.1.3 or to limit that guideline to colonial situations. One delegation had stated its intention to transmit its comments on draft guideline 1.1.3 to the Special Rapporteur at a later date; in that regard, he considered it appropriate for delegations or international organizations to convey to the special rapporteurs their positions on any aspect of the draft, whether officially or informally.

81. The general agreement on draft guideline 1.1.5 was encouraging since it demonstrated that States were not necessarily opposed to proposals involving the progressive development of international law, provided that such proposals were reasonable and intended to prevent problems which had not yet arisen but which might do so in the future.

82. Several delegations had stressed the need for an objective mechanism of dispute settlement in matters related to reservations. The Commission had not dealt with that problem but would consider doing so, although it might be argued that such a mechanism had no place in a guide and might better be handled through a protocol.

83. Various delegations had reiterated their positions concerning the preliminary conclusions which the Commission had adopted in 1997. He did not plan to reconsider those conclusions until the majority of the guidelines had been adopted and comments had been received from Member States and human rights organizations.

84. The fact that, despite its length, his third report had not dealt with a number of complex problems showed both the difficulty of the topic and its importance to the Commission and to States parties. In his next report, he planned to deal with procedures for the formulation of reservations and, if time allowed, with the central question of the validity of reservations. Lastly, while he was pleased that the Commission's work had led to useful discussion in other forums such as the Council of Europe and the Asian-African Legal Consultative Committee, the silence of such a large number of delegations to the Committee was less than encouraging.

The meeting rose at 6.05 p.m.