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Summary record of the 13th meeting
Held at Headquarters, New York, on Tuesday, 15 October 2019, at 10 a.m.

Chair: Mr. Mlynár . . . . . (Slovakia)

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19-17806 (E)

The meeting was called to order at 10.30 a.m.

Organization of work (*continued*)

1. **The Chair** said that the Bureau was fully committed to resolving any pending issues facing the Committee with a view to ensuring that it could successfully complete its programme of work. Together with the Bureau, he had held consultations to that end with Member States, representatives of the Secretariat, the President of the General Assembly, the Chair of the Committee on Relations with the Host Country and others. He had also taken note of the views expressed by regional groups, members of the Bureau and individual delegations on how best to proceed with the Committee's work.

2. In light of the need for the Committee needed to make the best possible use of the resources allocated to it, particularly in the light of the current cash flow crisis facing the United Nations, it was his understanding that there was a consensus that the Committee would proceed with its programme of work up to agenda item 121, at which point it would revert to the consideration of the organization of work, but on the clear and firm understanding that the Committee would then proceed with the remainder of its programme of work in its entirety.

3. He took it that the Committee wished to proceed accordingly.

4. *It was so decided.*

5. **Ms. Zabolotskaya** (Russian Federation) said that the Chair and the Bureau were to be commended for helping the Committee to agree by consensus on an approach that enabled it to proceed with its work. However, that agreement did not mean that the problems faced by a number of delegations, which were being prevented from participating fully in the current session of the General Assembly, had been resolved. Her delegation, for example, was still awaiting the issuance of 18 visas for its representatives. It was therefore critical for the Chair, the President of the General Assembly and the Secretary-General to continue their efforts to address those problems and to find solutions by the time the Committee resumed its consideration of the organization of work. Informal discussions should be undertaken in the Committee on Relations with the Host Country with a view to resolving the specific issues facing the affected delegations.

Agenda item 75: Responsibility of States for internationally wrongful acts (A/74/83 and A/74/156)

6. **Ms. Nyrhinen** (Finland), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that the comments made by delegations in 2001 during the consideration of the articles on responsibility of States for internationally wrongful acts adopted by the International Law Commission suggested that most Governments found the articles to be well structured and most of their provisions acceptable. By the time of their adoption, the articles had already become widely known and cited by lawyers, publicists, Governments and legal institutions, most notably the International Court of Justice. As evidenced by case law, a variety of judicial bodies had broadly recognized the articles as an authoritative restatement of the law on State responsibility.

7. The articles reflected a widely shared consensus about the international responsibility of States, even though there might be different views on specific details in that regard. Although a multilateral convention was in general an ideal instrument for guiding State action and creating legal certainty, reopening the articles might jeopardize their delicate balance. The articles also provided a framework within which the law could continue to develop. The Nordic countries therefore continued to believe that it would not be advisable to embark on negotiations leading to a convention based on the articles, and that no further action should be taken on the basis of the articles.

8. **Mr. Scott-Kemmis** (Australia), speaking also on behalf of Canada and New Zealand, said that the articles on responsibility of States for internationally wrongful acts reflected widespread consensus on most State responsibility issues and were most viable in their current form for guiding international bodies and Governments, which consistently used them as guidelines for their decisions and viewed them as reflecting customary law. Opening the articles to diplomatic negotiation might revive the disagreements among Member States and dilute and undermine the influence of the articles. There was therefore no compelling reason to alter the status quo.

9. Although the three delegations would participate in the working group to be convened to discuss the question of a convention or other appropriate action on the basis of the articles, they believed that the risks of negotiating a convention were too great. The articles could instead be annexed to a resolution endorsing them as they current stood, thus maintaining the integrity of the articles and facilitating the progressive development of the law based on their content, without undermining them.

10. **Mr. Kanu** (Sierra Leone) said that the articles on responsibility of States for internationally wrongful acts represented a balanced and authoritative compromise.

Although his delegation had previously taken a precautionary stance on the issue of convening a diplomatic conference with a view to elaborating a convention, it had observed that the articles had, over time, crystallized and become influential in international jurisprudence. The time had therefore come to take practical steps to consider the adoption of a convention based on the articles.

11. States had the primary role in setting norms at the international level, while the mandate of the International Law Commission was to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification. States, as recipients of those recommendations, played a fundamental role in that process. Having acted on the Commission's first recommendation by taking note of the articles, the General Assembly should act on the Commission's other recommendation that it consider the possibility of convening an international conference with a view to elaborating a convention on the basis of the articles. States should be given more frequent opportunities to discuss the issue, as the current triennial debate cycle hampered effective dialogue and the prospect of reaching consensus. The Committee might wish, for instance, to take up the matter annually, in order to allow States to reach some form of agreement on a negotiation package and to find a compromise on points of where they disagreed.

12. At the current session, a consensus should be reached to request the Secretary-General to provide the General Assembly with information on all procedural options regarding possible action on the basis of the articles. The Secretary-General should also be requested to continue producing the useful compilations of decisions of international courts, tribunals and other bodies, and of information on the practice of States in relation to the articles.

13. **Mr. Košuth** (Slovakia) said that the Secretary-General's report containing the compilation of decisions of international courts, tribunals and other bodies (A/74/83) and his report containing the comments and information received from Governments (A/74/156) were very useful. They would provide an indication as to the potential *opinio juris* of particular States in relation to the articles on responsibility of States for internationally wrongful acts and as to how the articles could be framed in a future convention. Such reports should continue to be prepared in the future.

14. The articles were a coherent and balanced exposition of customary international law, most of them reflecting extensive State practice and the jurisprudence of international judicial bodies. Since their adoption, they had had a strong impact on State practice and had been applied widely by both international and regional courts, which regarded them as reflecting customary international law. The status of the articles as the relevant body of law relating to responsibility of States had contributed to their extensive acceptance and application. Subjecting the articles to negotiation at an intergovernmental conference, or by the General Assembly, would risk reviving the existing differences of views and jeopardizing their current level of acceptance and status.

15. Slovakia was therefore not in favour of elaborating a convention based on the articles. The Committee should also reconsider the idea of convening at its future sessions a working group to discuss the question of a convention or other appropriate action on the basis of the articles, as no such action seemed desirable. Slovakia would nonetheless take part in the working group to be convened during the current session and would strongly advocate against any action on the articles that would confirm its concerns. The rule of law would be best upheld and further strengthened if the articles continued to be applied in their current form.

16. **Ms. Chung** (Singapore) said that her Government's views on the articles on responsibility of States for internationally wrongful acts were set out in documents A/CN.4/488, A/CN.4/488/Add.1, A/CN.4/488/Add.2 and A/CN.4/488/Add.3. In view of the concerns expressed by a number of delegations, including her own, on the substance of certain provisions contained in the articles, and the fact that the purpose of the articles was to address foundational principles of public international law that regulated inter-State relations, the Committee should decide by consensus whether to undertake the negotiation of a convention based on the articles or to leave them to be applied by international courts and tribunals. Her delegation looked forward to the exchange of views on the matter at the meeting of the working group to be convened during the current session.

17. **Mr. Yang** Xi (China) said that over the past 20 years States had looked to the articles on responsibility of States for internationally wrongful acts for guidance in addressing the issue of State responsibility in their practice. The articles had also been invoked by the International Court of Justice and some regional courts in their judgments. China was open to considering the three options for action that the General Assembly could take with respect to the articles: convene a diplomatic conference to elaborate an international convention; adopt the articles in the form of a resolution or declaration; or take no action. The articles were well

structured, rich in content and contained comprehensive provisions that struck a balance between national interests and the shared interests of the international community. At the same time, differences in interpretation and major concerns existed among States with respect to the provisions relating to serious breaches of obligations under peremptory norms of general international law, countermeasures and measures taken by States other than an injured State. It was therefore advisable, in the interests of broad consensus on major issues where differences remained, to ensure that any future action taken on the basis of the articles was acceptable to all States.

18. **Ms. Dickson** (United Kingdom) said that the articles on responsibility of States for internationally wrongful acts potentially applied to all fields of international law, in that they set out general rules for establishing that a breach of the law had occurred and the consequences of such a breach. The articles were highly influential and had been referenced by both international and national courts and tribunals in their judgments and by States when formulating their legal positions.

19. In the drafting of the articles, the International Law Commission had made great efforts to identify and reconcile differing State positions. However, while there was general consensus among States that many of the articles reflected customary international law, there remained a significant number of articles on which States' views diverged, or for which there was insufficient or insufficiently uniform State practice, for such a determination to be made. It was therefore premature to assert that all the articles enjoyed sufficient consensus among States or were sufficiently grounded in practice for it to be said that they reflected customary international law in their entirety. Pursuing a convention based on the articles could disturb the balance struck during the drafting of the articles and could provoke further differences of views, jeopardizing the coherence that the articles were designed to instil.

20. Although her delegation held the Commission's outputs in the highest regard, it had noticed, in some academic writings and judgments, a certain lack of clarity as to the legal force and status of some of those outputs. On occasion, they had been relied upon as an articulation of international law without a full consideration of whether they were sufficiently underpinned by State practice and *opinio juris*. It was therefore important to ensure that international law continued to be properly formulated and developed in accordance with well-established principles. Given the lack of consensus on the articles, the time was not yet right to begin negotiations towards a convention based on the articles. Her delegation was, however, open to considering, when the time was right, whether such a convention would be appropriate.

21. **Mr.** Elsadig Ali Sayed **Ahmed** (Sudan) said that State responsibility was a fundamental principle of international law stemming from the sovereign equality of States. Most of the provisions of the articles on responsibility of States for internationally wrongful acts were an expression of customary international law. Article 50, paragraph 1 (a), for example, specified that countermeasures must not affect the obligation of States to refrain from the threat or use of force, a principle embodied in the Charter of the United Nations. That provision not only reflected existing international law but was also consistent with a number of authoritative pronouncements in international case law. Article 50, paragraph 1 (b), which stipulated that countermeasures must not affect obligations of States to protect fundamental human rights, could bring more assurances concerning respect for the fundamental needs of individuals living in the State, including health care and education.

22. With regard to future action, the only way of ensuring that the rules of State responsibility were clear and known to all subjects of international law was to crystallize the articles in the form of a legally binding treaty, which would contribute to legal certainty and better application and promotion of international law. The time was ripe to convene a diplomatic conference to negotiate and adopt such an instrument. A dispute settlement mechanism should also be included in the future convention, to bring certainty and predictability to the application of the convention and prevent abuse in the form of excessive or unjustified invocation of countermeasures against other countries. That was especially true given that the articles were applied actively in practice as norms of customary international law and provided important guidance for international judicial bodies. By and large, they constituted a careful, balanced text which could provide a good basis for future consideration.

23. Although some delegations had doubts as to the need for a legally binding instrument, it was important to show flexibility and to avoid prejudging the outcome of the negotiations to be undertaken as part of a diplomatic conference. Such a conference would allow for the participation of all States, further enhancing the political acceptance of the rules reflected in the articles, and provide a forum for reaching a consensus. It would not be necessary to renegotiate the provisions of the articles, which would serve as the "default" base text, and many of the provisions would be accepted as part of the treaty. Any amendments to the basic text would have

to be formally adopted through the established voting procedures. The working group would be an excellent forum for discussing the possibility of holding such an event.

24. More detailed comments on those issues could be found in his written statement, available on the PaperSmart portal.

25. **Mr. Simcock** (United States of America) said that his Government's position that the articles on responsibility of States for internationally wrongful acts were most valuable in their current form had not changed since 2016. His Government was particularly concerned that the well-accepted rules documented in the articles and the commentaries thereto might be redrafted, questioned or undermined during the negotiation of a convention based on the articles. It was also too early to negotiate those articles that were not necessarily accepted by all States and represented the progressive development of international law. State practice was needed to ascertain whether those articles might gain broader acceptance and crystalize into customary international law or be disregarded.

26. New rules that were used by States in practice were much more likely to gain widespread acceptance than a convention negotiated under the pressure of a condensed timeframe. A convention would not enjoy widespread acceptance by States, because certain articles went beyond existing customary international law, resulting in confusion over an area of law that included both elements of settled customary international law and elements of continuing progressive development of law. Consequently, the best option was to allow the articles to continue to guide States and other litigants as to the content of settled law, and to assist States in the progressive development of law.

27. **Mr. Arrocha Olabuenaga** (Mexico) said that the compilations of decisions of international courts, tribunals and other bodies, and of information on the practice of States in relation to the articles on State responsibility prepared by the Secretary-General helped to show the relevance of the articles and to identify which of them needed to be studied further or to be updated in light of recent State practice and the decisions of international courts and tribunals. The compilations showed that a significant number of the articles reflected norms of customary international law. Mexico was well aware, however, that the process of formation of an international custom as a flexible source of law, which required generally accepted practice, gave rise to legal uncertainty, because such practice was difficult to determine and recognize. Mexico was therefore in favour of codifying the articles in the form of a convention, which would establish a regulatory framework that would regulate State responsibility and provide for legal certainty, enabling States to engage with each other, assume responsibility and find effective and peaceful solutions to their differences. That, in turn, would ensure the fulfilment of the objectives of the Charter of the United Nations for the benefit of the international community.

28. It was regrettable that the Committee was at an impasse in its discussion of the topic: while some States wished to pursue the elaboration of a convention based on the articles others did not consider doing so a priority. To break the impasse, the Committee should consider the topic on an annual basis, to allow for more substantive discussions than the triennial cycle allowed; States should address the substantive and procedural issues involved in the application of the articles, in order to determine those that were the source of the greatest disagreement among them and to find possible solutions thereto; and a discussion should be held on the practical aspects of convening a conference for the negotiation of a convention, including the forum, the rules of procedure and the manner in which the articles would be used as a starting point for the negotiations. The work of the working group to be convened to that end could contribute to moving the item forward.

29. Mexico was committed to the development and codification of international law and acknowledged the work done by the International Law Commission in that regard. The Committee's inertia could not be allowed to undo the time and resources invested by the Commission in the development not only of the articles on State responsibility but also instruments in other central areas of international law. The Committee needed to overcome its paralysis and to recognize that its work relating to the articles on State responsibility would have repercussions for other items on its agenda, including the new draft instruments that the Commission had adopted and submitted for its consideration.

30. **Ms. Guardia González** (Cuba) said that the topic of responsibility of States for internationally wrongful acts was of great importance for the progressive development of international law. Cuba supported all initiatives and proposals leading to negotiations on the adoption a convention on the basis of the articles adopted by the International Law Commission. Although the articles contained important norms of customary international law that enjoyed broad international recognition, efforts should still be made to elaborate a convention. The reports of the Secretary-General (A/74/83 and A/74/156) and information and

observations received from Member States showed that a number of States were reluctant to move ahead with codification of those norms, arguing that opening up the text to negotiation might jeopardize the current consensus on the binding nature and acceptance of the articles and upset the delicate balance in the text. There was also a risk that some States would not ratify or see any benefit in adopting such a convention. However, certain States were delaying the adoption of a convention simply as a way of continuing to evade their responsibility and to act with impunity, owing to the absence of clear international obligations on the topic. Court rulings in those same States were often ambiguous and contradictory, because decisions on such a crucial issue were left in the hands of judges who were free to interpret the articles as they chose.

31. Cuba continued to support a biannual consideration of the topic by the Committee and the elaboration of a convention on the basis of the articles which did not affect the delicate balance of the current text. An international instrument would enhance the effectiveness of the legal institutions envisaged in the articles, establish binding criteria for States and help curb the dangerous trend towards unilateral action by certain States, in violation of the Charter and the principles of international law. It would also help to protect States that were the victims of wrongful acts committed by other States, including acts of aggression and genocide. Her delegation urged States that were violating international law to sign an international convention on the topic and to lend greater support to judges in their pursuit of international justice.

32. **Ms. González López** (El Salvador) said that the concept of State responsibility needed to crystallize as a principle of international law. In the context of globalization, State responsibility encompassed a variety of issues that should be regulated on the basis of State practice and relevant recognition by various international courts, such as the admission of State responsibility for activities that could cause third-party harm. The articles on responsibility of States for internationally wrongful acts rightly contained rules based on the progressive development of international law, such as the rule set out in chapter III, whereby international responsibility was entailed by a serious breach of an obligation arising under a peremptory norm of general international law, and the rule that all States had an obligation to cooperate to bring to an end through lawful means any such breach. That question was also of relevance to the Commission's work on the topic "Peremptory norms of general international law (*jus cogens*)". Consequently, States needed to agree on criteria for identifying such norms, in order to determine substantive notions that could be applied complementarily to the articles on State responsibility.

33. The adoption of the articles in the form of a legally binding instrument would provide a more solid basis for the different means of implementation of the international responsibility of a State. Once codified in a convention, they would become a source of law and have a greater constraining effect on national legal orders and a stronger impact on the practice of State organs.

34. Treaties remained the quintessential source of international law in the Salvadoran legal system. Once they were ratified, they became the law of the land and took precedence over domestic laws. Thus, any commitments arising from a future convention on responsibility of States for internationally wrongful acts could be easily incorporated into the country's existing legal framework.

35. It was not possible for a State to enter into or maintain a relationship with another subject of international law without any requirements as to its conduct or without its acts having any consequences. El Salvador thus reaffirmed its support for the convening of an international conference to elaborate a convention on responsibility of States for internationally wrongful acts, which would help in to establish a balanced framework of international law comprising existing primary norms in all their diversity and new norms regulating the consequences of non-compliance with those norms.

36. **Ms. Melikbekyan** (Russian Federation) said that State responsibility was one of the few foundational principles of international law that had not yet been codified in the form of a legally binding instrument. Although the articles on responsibility of States for internationally wrongful acts could serve as a basis for such an instrument, States had not yet agreed on future action on the articles, because some of the provisions of the articles represented the progressive development of international law. Despite the unresolved fate of the articles, both national and international courts often made reference to them. Her delegation believed, however, that any such references should be viewed with caution.

37. Certain aspects of the articles that represented the progressive development of international law needed further consideration, with the direct involvement of States. That applied in particular to the articles on countermeasures, which had often been cited by States that were not directly affected by the internationally wrongful acts of another State to justify the position that they had the right to eschew, as a countermeasure, their

international obligations that were not directly related to the alleged breaches. The same could be said of article 8 (Conduct directed or controlled by a State), according to which the conduct of a person was considered an act of a State under international law if the person was acting on the instructions of, or under the direction or control of, that State. In determining the level of control required for the conduct to be considered an act of a State, it would be important to bear in mind the judgment of the International Court of Justice in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*.

38. It would be valuable if the Secretariat continued to produce compilations of the views of States regarding the content and future form of the articles, and to stop producing compilations of court decisions, which could give the false impression that all the articles reflected customary international law. Notwithstanding the issues raised, her delegation continued to favour the elaboration of a universal convention on the topic and the convening of an international conference for that purpose. Such a convention could become a seminal instrument, on par with the Vienna Convention on the Law of Treaties, the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations.

39. **Mr. Kolliopoulos** (Greece) said that the articles on responsibility of States for internationally wrongful acts constituted a solidly reasoned and balanced text and had become the most authoritative statement available on the topic. They had gained considerable recognition and had been widely referred to in the decisions of the International Court of Justice and other international courts and tribunals. The articles codified customary rules on State responsibility, thus filling a large gap in existing international law. They strengthened the notion of the international community as a whole, promoted the notion of peremptory norms of international law, as envisaged in the Vienna Convention on the Law of Treaties, and the regime of responsibility for grave violations of such norms; they also dispensed with the notion of damage as a condition for the attribution of responsibility.

40. Those positive elements had been highlighted in State practice and international jurisprudence. As it stood, the text reflected a carefully achieved compromise and, ideally, it should take the form of an international convention in order to provide States with authoritative regulatory guidance. However, the elaboration of a convention should not jeopardize the delicate balance of the text, which must remain without any changes to its substantive provisions, some of which contained important compromises with regard to complex and at times controversial legal questions.

41. **Mr. Ahmad Tajuddin** (Malaysia) said that negotiations at the current juncture with a view to developing a convention on the articles on responsibility of States for internationally wrongful acts might upset the fragile balance of the text. Such a convention was unlikely to attract universal participation, thus defeating its very purpose. It was possible that no State would be satisfied with every aspect of the articles, which had been the product of intense negotiation and compromise. Some provisions, such as article 2 (Elements of an internationally wrongful act of a State), article 28 (Legal consequences of an internationally wrongful act) and article 31 (Reparation), lacked the necessary clarity and precision.

42. The articles had proved to be useful in their current, non-binding form as a guide for States and international courts and tribunals. States should continue to acquire even wider experience with the application of the articles in practice. Meanwhile, the existing mechanisms of the International Court of Justice and Security Council resolutions aimed at combatting internationally wrongful acts should be strengthened.

43. **Ms. Cerrato** (Honduras) said that State responsibility was a foundational element of international law. The question of a convention or other appropriate action on the basis of the articles on responsibility of States for internationally wrongful acts merited close consideration. Honduras therefore supported the establishment of a working group for that purpose. It believed that there was already State practice and case law relating to the articles and that a convention might be negotiated with a view to establishing clear rules on the responsibility of States for internationally wrongful acts, such as the threat or use of force in violation of the Charter of the United Nations and of human rights.

44. Honduras welcomed the widespread use as a reference of the articles by international and domestic courts and tribunals, in particular by the Inter-American Court of Human Rights, which had played an active and important role in the development of the concept of the international responsibility of States for acts committed by individuals in violation of human rights as enshrined in the American Convention on Human Rights, thus contributing to the development of international human rights law.

45. Her delegation welcomed the Secretary-General's useful reports containing the compilation of decisions of international courts, tribunals and other bodies

(A/74/83) and the comments and information received from Governments (A/74/156), and encouraged the continued production of such reports. Honduras would continue to take part in the debate on the topic with the aim of achieving agreement among States to hold an international conference with a view to negotiating a convention on responsibility of States for internationally wrongful acts, and called on other Member States to also work towards that goal.

46. **Mr. Nyanid** (Cameroon) said that the articles on responsibility of States for internationally wrongful acts addressed one of the most difficult areas of international law and provided valuable guidance to Governments and courts and tribunals, and reflected the crystallization of State responsibility as a rule of international law. However, States remained at an impasse as to the fate of the articles, with some States in favour of a convention based on the articles, and others against it. That impasse could signal that the community of States was uninterested in the topic or found it irrelevant. The seventy-fifth anniversary of the United Nations would provide an excellent opportunity to send a positive signal in that regard. Accordingly, the upcoming debate must be focused on analysing and addressing openly the points of disagreement between the two groups of States and finding solutions to overcome them, instead of restating well-known principled positions.

47. Cameroon acknowledged the concerns expressed by some States about the potential uncertainty of convening a diplomatic conference and the possible negative impact that a negotiation process might have on the text of the articles as they stood. Nonetheless, remarkable as they might be, the articles were not untouchable and States could negotiate some of them, if they wanted to. Still, those dangers could be minimized by defining very clearly the scope of the conference – negotiating only those articles that were not qualified as customary international law and that were not consensual – and by conducting comprehensive and participatory preparatory work. A negotiating process was the best way to address outstanding substantive issues and close potential gaps, and give all States a sense of ownership of the final outcome of the process.

48. His delegation reaffirmed its support for the convening of an international conference for the purpose of elaborating a convention on the responsibility of States for internationally wrongful acts. A convention would have more lasting and beneficial effects than a non-binding instrument could have. However, the project of a convention should only be pursued if there were sufficient assurances that the current structure and balance of the draft articles would be maintained and a renewed discussion of their substantive provisions could be avoided, and if there were realistic prospects for wide ratification and acceptance of such a convention.

49. **Mr. García López** (Spain) said that his Government's unwavering interest in the work of the General Assembly on the articles on responsibility of States for internationally wrongful acts had to do with the structural role that the articles played in public international law, as they established the consequences of a breach by a State of any obligation arising from a rule of public international law, traditionally referred to as "secondary norms", the keys to stability and certainty in any legal system, not only in international law.

50. His Government continued to support the convening of a diplomatic conference of plenipotentiaries to elaborate a convention based on the articles. While some Member States were concerned that such a course of action might weaken or even lead to a reopening of some of the articles which had already been reflected in court decisions at all levels and in the practice of States, it should be borne in mind that inaction might also generate concerns with regard to the future development of that area of international law. One such concern was that the decentralized application of the rules relating to the consequences for States arising from internationally wrongful acts could have undesirable effects.

51. The best way to correct for the lack of certainty as to the substantive consequences of an internationally wrongful act, and to remedy the most objectionable effects of a decentralized application of such rules, was to progressively develop dispute settlement mechanisms by means of a treaty. The inclusion of a dispute settlement system in a treaty regulating the international responsibility of States would have a far-reaching effect, in that, while leaving other special treaty regimes unaffected, it would make the treaty applicable to any breach of a rule of international law. The same could not be achieved by the articles in their present form.

52. Spain therefore supported the progressive development of dispute settlement mechanisms relating to the international responsibility of States and was willing to accept mandatory recourse to international arbitration, or to the International Court of Justice, in respect of any dispute arising from the interpretation or application of the provisions of a treaty governing international responsibility that could not be settled by negotiation or by any other means of dispute settlement freely accepted by the parties to the dispute. In such case, however, and to achieve a high number of ratifications of said treaty, Spain might accept the formulation of reservations to the provisions governing mandatory recourse to international arbitration or to the International Court of Justice.

53. As a State member of the European Union, Spain was firmly committed to democracy, the rule of law and respect for human rights. An international treaty regulating State responsibility based on the articles elaborated by the International Law Commission would provide greater legal certainty and make a valuable contribution to the consolidation of the rule of law in international relations. In order to achieve those benefits without incurring the risks that some delegations legitimately saw in altering the current status of the articles, the members of the Committee should work together to explore the possibilities of properly delimiting the work of the General Assembly on the articles as set forth in General Assembly resolution 71/133, and consider all options for making it possible to regulate the matter, with the cooperation of all States, in a treaty.

54. **Mr. Chrysostomou** (Cyprus) said that in adopting the articles on State responsibility, the International Law Commission had codified customary international law, a view confirmed by the plethora of recent decisions of international and regional courts and abundant State practice. An issue as serious as the responsibility of States for internationally wrongful acts must be governed by clear written rules. The articles should therefore be formally codified in a multilateral treaty as quickly as possible, notwithstanding their customary character and universally binding nature. His delegation believed strongly in the universally binding force of the rules of customary international law and that no State should be able to opt out of those rules.

55. With regard to the topic of State responsibility generally, his delegation had observed that the discussions in the Committee were increasingly drifting to include elements that went beyond holding States accountable for wrongful acts against other States or the international community as a whole. It called on the Committee to keep the focus clearly on the consequences of wrongful acts, including on judicial and other objective means for assessing and remedying the violations, in line with the work of the International Law Commission on the topic.

56. **Ms. Weiss Ma'udi** (Israel) said that the articles on State responsibility, in their current, non-binding form, enhanced the rule of law and stability in inter-State relations and were a useful tool for international courts, tribunals and other bodies seeking to resolve sensitive issues of international law. Although the articles could serve as a guide for Governments and international bodies, taken as a whole, they did not necessarily reflect customary international law. Her Government continued to oppose the commencement of negotiations aimed at formulating a convention on the basis of the articles, because it believed that such negotiations were likely to disturb the delicate balance struck in the wording of the articles.

57. **Mr. Nasimfar** (Islamic Republic of Iran) said that State responsibility was the backbone of international law. The extensive reliance of international courts and tribunals on the articles on responsibility of States for internationally wrongful acts was indicative of the high value of that work. Most of the provisions of the articles were an expression of customary international law. Article 50, paragraph 1 (a), for example, specified that countermeasures must not affect the obligation of States to refrain from the threat or use of force, a principle embodied in the Charter of the United Nations. That provision not only reflected existing international law but was also consistent with a number of authoritative pronouncements in international case law, including the judgments of the International Court of Justice concerning the *Corfu Channel* and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* cases. Article 50, paragraph 1 (b), which stipulated that countermeasures must not affect the obligation of States to protect fundamental human rights, could bring more assurances concerning respect for the fundamental needs of individuals living in the State, including in health care and education.

58. On the other hand, article 48, for instance, reflected the progressive development of international law. His delegation had taken note of the position of some countries which had challenged the customary nature of that provision during the debates on the topic in the Sixth Committee in 2016. It had also taken note of the separate opinion of Judge Skotnikov in the 2012 judgment of the International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, where he had noted that State practice in that regard was absent and that there was no precedent in which a State had instituted proceedings before the Court or any other international judicial body in respect of alleged violations of an *erga omnes partes* obligation simply on the basis of it being a party to an instrument similar to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

59. With regard to future action, the only way of ensuring that the rules of State responsibility were clear and known to all subjects of international law was by crystallizing the articles in the form of a legally binding treaty. A convention could contribute to legal certainty and better application and promotion of international law. The time was ripe to convene a diplomatic conference to negotiate and adopt such an instrument. A

dispute settlement mechanism should also be included in the future convention, to bring certainty and predictability to the application of the convention and prevent abuse in the form of excessive or unjustified invocation of countermeasures against other countries.

60. **Mr. Kowalski** (Portugal) said that the regime of responsibility of States for internationally wrongful acts made existing international law effective and more operational. The articles on State responsibility established secondary rules, which set out the general conditions for a State to be considered responsible for wrongful acts and the corresponding legal consequences. Those rules were fundamental for a robust international legal system.

61. By continuing to postpone the negotiation of a convention based on the articles, the Committee was signalling a lack of interest in, or even the irrelevance of, the articles, which could negatively affect their organic development. Inaction by States was also contributing to the fragmentation of jurisprudence, which might represent a step back in the codification and consolidation of the law on State responsibility. His delegation believed that the reports presented by the Secretariat at the current session had formed an important basis for and made an important contribution to the Committee's discussions. It also believed, however, that the Committee should request that the Secretariat also prepare a report on all procedural options regarding possible action on the basis of the articles, as stated in General Assembly resolution 71/133. His delegation hoped that the aforementioned elements would help the Committee to overcome the current impasse.

62. While some States were concerned that a failed negotiating process for the elaboration of a convention on the basis of the articles might have a negative impact on the text of the articles, thereby damaging the work of the International Law Commission on the topic, Portugal was of the view that such risks could be minimized by clearly defining the scope of a conference aimed at negotiating the convention and by carrying out comprehensive and participatory preparatory work. The resulting convention would provide the international legal system with clear rules about State responsibility for internationally wrongful acts, in particular those that had serious effects on other members of the international community, including the threat or use of force, human rights violations and illegal exploitation of natural resources. The negotiating process was the best way to address the outstanding substantive issues, close potential gaps in international law and ensure that all States had ownership of the final outcome.

63. **Mr. Mulalap** (Federated States of Micronesia) said that the articles on responsibility of States for internationally wrongful acts were an authoritative codification of international law and an insightful progressive development of certain concepts and approaches relating to State responsibility. His Government had favourably referenced the articles as a whole and individually in formal and public statements and in the context of international dispute settlement and intergovernmental negotiations of legally binding instruments.

64. The General Assembly's failure to act on the Commission's recommendation that it consider convening an international conference to examine the articles with a view to adopting a convention on the topic signalled that the Assembly did not accord the articles sufficient respect as a whole, even as various States continued citing specific articles in various settings. It was important for the international community to give the articles surer footing in international law and to reflect their maturation, rather than leave them to be selectively and sometimes contradictorily applied by States, courts, tribunals and other bodies.

65. Micronesia was open to idea of the General Assembly requesting the Secretary-General to present options for carrying the discussion of the matter forward, including the convening of an intergovernmental conference. In any such exercise, however, it was critical to recognize that the articles had been carefully crafted to achieve a balance between codification and progressive development, and that their four-part structure was central to their legitimacy and utility. It was also important to avoid renegotiating the substantive provisions of the articles, unless warranted by significant developments in State practice since their finalization in 2001.

66. Indeed, there had been significant State practice regarding the special circumstances of small island developing States that should be taken into account in any future consideration of the articles. For example, the articles were silent about the special circumstances of small island developing States like Micronesia with limited capacity to monitor the unlawful conduct of foreign or private persons or entities exercising apparent governmental powers of regulation without authorization, including those pertaining to the marine environment. Attribution of responsibility to such States must be reflective of their capacity to prevent such unlawful behaviour.

Agenda item 80: Diplomatic protection (A/74/143)

67. **Ms. Bierling** (Norway), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that the articles on diplomatic protection adopted by the International Law Commission were generally acceptable to the Nordic countries. Through them, the Commission had made an important contribution to general international law in the area of diplomatic protection. The General Assembly should follow the Commission's recommendation and elaborate a convention on the basis of the articles. Such a convention would enhance legal clarity and predictability in that important area of law.

68. However, in view of the divergence of opinion among Member States with respect to the articles, including whether they should be used as the basis for a convention, attempts to negotiate a convention at the current juncture might undermine the substantial contribution the articles had already made to general international law. Nonetheless, the elaboration of a convention at a later date should not be ruled out. The General Assembly should therefore commend the articles to the attention of Governments once more and decide to revisit the question of a convention on diplomatic protection, or any other appropriate action, on the basis of the articles at a later session. States should continue to utilize the articles as a source of inspiration and guidance when exercising their right to diplomatic protection.

69. **Mr. Nagy** (Slovakia) said that diplomatic protection was an institution of customary international law. The articles on diplomatic protection reflected rules of customary law and also contained some useful elements of progressive development of international law. In their current form and status as a legally non-binding text, the articles could help to consolidate the relevant norms of international law and to influence the practice of States. The most natural way for the articles, and especially for those aspects that represented the progressive development of international law, to gain wider recognition within the international community was to allow several decades to pass, to give them time to become authoritative by being used by States in their practice and by being referenced by courts and tribunals, as was the case in the judgment of 24 May 2007 of the International Court of Justice in the case of *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*.

70. Furthermore, the articles could be viewed as a set of rules regulating special cases of responsibility of States for internationally wrongful acts in situations where the injury was caused to an individual who was a national of another State. Therefore, the legal form of the articles should be in line with that of the articles on responsibility of States for internationally wrongful acts. It was therefore premature at the current stage to enter into negotiations on an international convention on diplomatic protection based on the articles.

71. **Mr. Tang** (Singapore) said that insofar as the articles on diplomatic protection reflected State practice and were consistent with customary international law, they provided welcome clarity on the state of that area of law. The articles that represented the progressive development of the law provided a useful basis for further discussion among States and a useful reference point for practitioners of international law. Any future action on the topic should track the developments on the closely related topic of responsibility of States for internationally wrongful acts.

72. **Mr.** Elsadig Ali Sayed **Ahmed** (Sudan) said that diplomatic protection had evolved considerably due to changes in international law over the past century, but it had the merit of having been developed on the basis of the affirmation of the equality of States as a way of ensuring recognition of and reparation for injury caused to the nationals of another State. Although diplomatic protection had emerged at a time – since past – when individual rights were not being recognized at the international level, it remained an effective tool for protecting the rights of both individuals and States in the contemporary legal context. The articles on diplomatic protection helped in particular to strengthen the rule of law at the national level, since they stipulated that all local remedies must be exhausted before diplomatic protection could be exercised. An international convention on diplomatic protection would strengthen the right of a State to invoke, through diplomatic action or other means of peaceful settlement, the responsibility of another State for an injury caused by internationally wrongful act.

73. The articles on diplomatic protection were closely linked to the articles on State responsibility. The purpose of diplomatic protection was to protect the rights of individuals in the event of an internationally wrongful act of another State, the latter being set out in the articles on State responsibility. Accordingly, both sets of articles were of equal importance in ensuring better compliance with international law.

74. Some of the articles could not be said to reflect customary international law. For instance, articles 7 (Multiple nationality and claim against a State of nationality) and 8 (Stateless persons and refugees) had been formulated either on the basis of the case law of regional tribunals or of sui generis tribunals, which

could hardly reflect existing general international law. Furthermore, although the International Law Commission had pointed out in its commentaries that the articles would deal with primary rules, the wording of some provisions suggested otherwise. For instance, it was for each State to decide in accordance with its laws who its nationals were. In that context, the final phrase in article 4, pursuant to which the acquisition of nationality must not be inconsistent with international law, as well as the example cited in the commentary thereto, were not clear.

75. It would be possible to adopt the articles as a binding international instrument, provided that the need to strengthen the protection of human rights and to guarantee the right of States to protect their nationals was recognized. Nonetheless, his delegation was amenable to adjustments being made to the text, to make it more effective, as the adoption of such a convention would make it possible to harmonize existing practices and jurisprudence on the topic, including the decisions of the International Court of Justice. The Sudan attached great importance to those articles, particularly if adjustments were made in order to allay its concerns and reflect the norms and principles of customary State practice.

76. **Mr. Simcock** (United States of America) said that his Government continued to be of the view that, where the articles on diplomatic protection reflected State practice, they represented a substantial contribution to the law on the topic and were thus valuable to States in their current form. However, certain articles were inconsistent with well-settled customary international law. His delegation had detailed those concerns in a statement to the Committee, as reported in document A/C.6/62/SR.10.

77. One significant remaining concern related to article 15 (Exceptions to the local remedies rule), under which a claimant was not required to exhaust local remedies where no local remedy for effective redress was reasonably available or where the local remedies provided no reasonable possibility of such redress. That standard was too lenient. Under the customary international law standard, the exhaustion requirement was excused only where the local remedy was obviously futile or manifestly ineffective. His Government disagreed with the Commission's view, as expressed in its commentary to article 15, that the customary international law rule was too burdensome to the claimant. Any articles considered in a convention on diplomatic protection should reflect well-established customary international law.

78. His Government's similar concerns regarding articles 10 and 11 had also been detailed in previous written submissions and in his delegation's statement in 2007. His Government also remained concerned that the negotiation of a convention on diplomatic protection risked undermining the significant contributions already made by the articles.

79. **Ms. Guardia González** (Cuba) said that the adoption of a convention based on the articles on diplomatic protection would make it possible to harmonize existing practices and jurisprudence on the topic, including the decisions of the International Court of Justice. Cuba attached great importance to those articles, which would also reflect the norms and principles of customary State practice. Such a convention would contribute to the codification and progressive development of international law, in particular the consolidation of the norms concerning criteria that must be met before diplomatic protection could be requested.

80. Unfortunately, not all States used diplomatic protection appropriately as a subsidiary mechanism for protecting the rights of their nationals; indeed, some States sometimes used it as an instrument to apply pressure on certain specific States and to promote their transnational economic interests. The exercise of diplomatic protection was a sovereign right of States and a vital tool for promoting the rule of law at all levels and protecting human rights and fundamental freedoms more effectively. The recognized applicability of diplomatic protection to refugees and stateless persons was invaluable in protecting the rights of those vulnerable groups. However, not all States had signed the international instruments on refugees, which should be taken into account when elaborating a future convention. It would be advisable for a future convention to specify whether the State possessing capacity to claim, in the case of an individual with multiple nationalities, was the State with which the individual had an effective link.

81. The articles on diplomatic protection helped in particular to strengthen the rule of law at the national level since, as the articles stipulated, all local remedies must be exhausted before diplomatic protection could be exercised. That matter should be included in a future convention. Clear consideration should also be given as to whether the conduct of the individual in respect of whom the right to protection was being exercised had been contrary to the domestic law of the State against which the claim was being brought or contrary to international law, since those factors could influence protection and the consequences of that protection. It was significant that the articles did not specifically

cover one of the requirements that must be met before a State could offer diplomatic protection, according to both doctrine and jurisprudence, which was that the individual in question must have acted transparently and must not have committed a wrongful act that could justify a legitimate reprisal by the State.

82. The articles on diplomatic protection were closely linked to the articles on State responsibility. The purpose of diplomatic protection was to protect the rights of individuals in the event of an internationally wrongful act of another State, the latter being set out in the articles on State responsibility. Accordingly, both sets of articles were of equal importance in ensuring better compliance with international law.

83. Cuba believed that the working group should continue examining the articles in order to gain a wider consensus on its proposals. The working group should also work out the details of the future convention on diplomatic protection, in order to improve the text and ensure the broadest possible consensus among Member States.

84. **Ms. Haile** (Eritrea) said that diplomacy was the foundation of international cooperation for peace and development. The obligation to protect diplomatic and consular missions and staff was sacrosanct under international law, including under the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations. The purpose of protecting diplomatic and consular missions and respecting their immunity was to ensure that proper relations were maintained among States. It was therefore in the best interest of all States to continue enhancing their efforts to protect diplomatic missions.

85. Eritrea condemned all acts, whether by host Governments or by non-State actors, that undermined the safety, security and functioning of diplomatic and consular missions and their staff. Eritrea strictly complied with its obligations under both Vienna Conventions and continued to take measures to ensure the safety and security of such missions and their representatives which it hosted. It requested all States hosting Eritrean diplomatic and consular missions to accord them similar protection.

86. **Ms. Melikbekyan** (Russian Federation) said that the articles on diplomatic protection contributed greatly to the clarification and development of the rules of customary international law that allowed a State to protect its citizens against the wrongful acts of another State. The articles also contained useful provisions on the protection of legal persons, refugees and stateless persons. They struck a good balance between codification and progressive development of international law and clarified such issues as the definition and scope of diplomatic protection, the right of States to exercise diplomatic protection, the nationality of persons subject to diplomatic protection, and the diplomatic protection of corporations. They were a good complement to the articles on State responsibility and could serve as a basis for the elaboration of an international convention on diplomatic protection.

87. **Mr. Kowalski** (Portugal) said that the International Law Commission had adopted the articles on diplomatic protection in 2006, less than 10 years after the topic had first been identified as suitable for codification and progressive development, proving that it was indeed ripe for codification. Portugal welcomed that development, as it had always supported the Commission's recommendation to the General Assembly regarding the elaboration of a convention on the basis of the articles. Although there was a recognizable trend for individuals and groups of individuals to ensure that their own rights, States still had an important function to perform in that regard by using the instrument of diplomatic protection to protect their nationals whose human rights had been violated abroad. Diplomatic protection was also one of the pillars of the principle of sovereign equality of States.

88. The articles were suitable for an international convention, although his delegation disagreed with certain aspects of the articles, in particular those relating to their scope and some of their specific provisions, which could be discussed by the body elaborating the convention. However, as the topic of diplomatic protection traditionally went hand-in-hand with that of responsibility of States for internationally wrongful acts, Portugal hoped that the articles on the two topics would lead to the drafting of two parallel conventions, which would represent a major step for the consolidation of the law on international responsibility.

89. **Mr. Nyanid** (Cameroon) said that diplomatic protection was a mechanism that allowed for the recognition and reparation of injury caused to the nationals of another State where no other effective means were available. The exercise of diplomatic protection was a sovereign right of States and diplomatic protection was a vitally important institution for promoting the rule of law at all levels. It existed alongside other concepts, such as the law of State responsibility and the jurisdiction of international tribunals.

90. Although the international avenues available to individuals for the protection of their rights greater than ever before, diplomatic protection remained an important weapon available to States to protect the

rights of their nationals. States differed, however, on the use of diplomatic protection, notably when it came to the protection of human rights. In response to the idea of forcing States to agree to the use of diplomatic protection as a pretext to help their nationals in the event of serious violations of *jus cogens* norms, aimed notably at the protection of human rights, some States questioned the very relevance of the concept of *jus cogens* which, in their view, was not universally accepted. Other States believed that a distinction needed to be made between diplomatic protection and human rights, as any confusion would only make matters worse. Still others believed that diplomatic protection was a process for the peaceful settlement of disputes among States that delegitimized all use or threat of use of force.

91. His Government was of the view that diplomatic protection must be properly circumscribed, so that it could not be used as a pretext to interfere in the internal affairs of sovereign States, in the name of human rights protection. Difficulties arose in international practice, particularly when it came to determining the conditions for the exercise of such protection. For example, problematic cases might be identified in practice with regard to the nationality of the individual, such as cases involving persons who did not have a formal link of nationality with the State in which they habitually resided, and cases where the individual concerned had dual nationality, as well as cases involving the continuous nationality criterion that must be taken into consideration before a claim could be presented. Another question that arose in practice and that needed to be addressed was that of the nationality of legal persons, specifically, the definition of the criteria of incorporation and effectiveness for the purpose of determining the nationality of such persons.

92. Cameroon reiterated its support for the continuation of work towards the adoption of a draft convention on diplomatic protection, which would represent an agreement governed by international treaty law, with legal effects that would ensure greater certainty and use of diplomatic protection. It would be advisable for the future convention to specify whether the State possessing capacity to claim, in the case of an individual with multiple nationalities, was the State with which the individual had an effective link. Clear consideration should also be given as to whether the conduct of the individual in respect of whom the right to protection was being exercised had been contrary to the domestic law of the State against which the claim was being brought or contrary to international law, since those factors could influence protection and the consequences of that protection.

93. The recognized applicability of diplomatic protection to refugees and stateless persons was invaluable in protecting the rights of those vulnerable groups. However, not all States had signed the international instruments on refugees, which should be taken into account when elaborating the future convention. His delegation had also noted with satisfaction that the draft articles annexed to General Assembly resolution 62/67 contained a number of provisions that allowed for the refinement of the notion of diplomatic protection. Examples included draft article 5, which contemplated the continuous nationality of a natural person; draft article 8, which referred to cases in which a State might exercise diplomatic protection in respect of a stateless person or a person recognized as a refugee; and draft article 9, which set out, as a general rule, the criterion of incorporation as a means of determining the predominant nationality of a legal person and, subsidiarily, the criterion of effectiveness. With regard to draft article 2, however, his delegation believed that it was necessary to establish more directly that the right to exercise diplomatic protection should be in accordance with the conditions set out in draft article 19, which established the recommended practice for States.

94. **Ms. Ruhama** (Malaysia) said that her Government reiterated its commitment to ensuring that its nationals were fairly treated abroad, and upheld its entitlement to guard its nationals from injuries suffered from the internationally wrongful acts of other States. Malaysia nonetheless believed that the right to exercise diplomatic protection should remain a sovereign prerogative and at the integral discretion of a State. Malaysia aligned itself with the prevailing position under international law, as reflected in articles 2 and 3 of the articles on diplomatic protection, that a State was not obliged to exercise diplomatic protection on behalf of a national who had been injured by an internationally wrongful act. It also considered the recommendations contained in article 19 (Recommended practice) as premature, even from the point of view of progressive development of international law. Since the articles on diplomatic protection had originally been drafted as part of the study on responsibility of States for internationally wrongful acts, the Committee should not continue its deliberations on the current topic until it had concluded its work on the topic of responsibility of States for internationally wrongful acts.

The meeting rose at 1.05 p.m.