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Chairman: Mr. Machochoko . . . . . (Lesotho)

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The meeting was called to order at 10.20 a.m.

Agenda item 155: Report of the International Law Commission on the work of its fifty-first session (*continued*) (A/54/10 and Corr.1 and 2)

1. **Mr. Kerma** (Algeria) said that the new proposals of the Commission's Working Group on jurisdictional immunities of States and their property concerning the concept of State for purposes of immunity, having taken account of the diverse positions on the subject, were likely to diminish the difficulties previously associated with that definition, thus opening the way for a possible decision on the matter. The formula suggested by the Working Group in connection with the criteria for determining the commercial character of a contract or transaction was likely to receive general approval, attempting as it did to strike a balance between the nature criterion and the purpose criterion. He hoped, however, that such a compromise on that crucial point would not lend itself to varying interpretations, thereby conflicting with the objectives of codifying the law on the subject. Similarly, the suggestions of the Working Group concerning the concept of a State enterprise or other entity in relation to commercial transactions smoothed away the related difficulties by successfully bringing together the different positions on that issue. As for the fundamental question of measures of constraint against State property, he reiterated his position that to accord a State the same treatment as an individual before a foreign court, thereby reducing its status, called into question the established principle of international law of immunity from measures of constraint, which was a corollary of the principle of State sovereignty. A lax solution to the problem would simply create difficulties between States, particularly if interim measures of protection or prejudgement measures of constraint, both of which he deemed inappropriate, were permitted. The interesting new proposals of the Working Group, however, could serve as a basis for further thought with a view to bridging the gap between the initial positions expressed on the sensitive issue in question and finding an acceptable compromise.

2. The appendix to the report of the Working Group (A/54/10, annex) concerned the important question of whether jurisdictional immunity existed in the case of violations of norms having the character of *jus cogens*, taking into account the recent developments of State practice and other factors related to the issue. Bearing in mind the sensitivity of the matter, however, he believed that a discussion of the issue in the context of the jurisdictional immunities of States would be premature.

3. In conclusion, he said that the suggestions of the Working Group were generally balanced and realistic and should thus help to eliminate any apprehensions concerning the conclusion of an international convention on jurisdictional immunities of States and their property. Given the importance and complexity of the topic, however, it was important to take into account the concerns of all categories of States, bearing in mind the diversity of legal systems, the legitimate interests involved and the economic interests of each category.

4. **Mr. Abraham** (France) said that the draft articles on jurisdictional immunities of States and their property constituted an acceptable basis for the elaboration of a convention that would be very useful in limiting the multiplication of national legal rules on the subject and in clarifying and supplementing international law. However, various technical and drafting aspects of the draft articles required further attention from the working group established by General Assembly resolution 53/98, which he hoped would be able to meet for a longer period during the year 2000. In regard to the concept of State for purposes of immunity, he questioned the meaning of draft article 2, paragraph 1 (b) (iii), which, in his view, might overextend the concept of immunity. He was satisfied with draft article 2, paragraph 2, in that it took into account the criterion of the purpose of a contract or transaction, and also welcomed draft article 11, on contracts of employment, whereby a State could invoke jurisdictional immunity if the contract was related to the exercise of governmental authority. He wished to point out, however, the general practice in France whereby a foreign State could invoke such immunity only if the beneficiary of the contract worked in the civil service and exercised particular responsibilities in that service. As for measures of constraint against State property, the French practice was similar to that mentioned by the Working Group. In other words, French courts were reluctant to order measures of constraint against State property that was essential to the exercise of sovereign functions. Such measures could be taken, however, against State property that was used in an economic or commercial activity which came under private law.

5. He noted with regret that virtually all the decisions mentioned in the summary of recent relevant case law referred to in paragraph 18 of the report of the Working Group had been delivered by common law courts. They therefore did not fully reflect international practice and he wished to transmit to the Secretariat information

concerning decisions pronounced by French courts during the period covered, together with references to works which described French practice in regard to jurisdictional immunities of States and their property.

6. **Mr. Leanza** (Italy), referring to the question of specific issues on which comments would be of particular interest to the Commission, said that it would be useful to take into account the results of debates on themes relating to international law conducted by international organizations other than the United Nations, particularly since the concept of State practice should include both the practice of individual States and the collective practice of States.

7. On the topic of nationality of natural persons in relation to the succession of States, he remarked that the draft articles would promote uniformity and establish a set of fundamental legal principles. In particular, they would not exclude the attribution of nationality from the internal jurisdiction of States, but would limit the discretionary power of States in that connection with the aim of protecting the right to nationality, which was an issue of substantial importance in view of the civil and political rights attached to it. In fact, the focus on the protection of human rights was one of the merits of the draft articles, the original version of which had been simplified and brought into line with other conventions in order to avoid contradictions.

8. With regard to the specific changes made in the draft articles, it had been appropriate to move former article 27, limiting the application of the articles to a succession of States occurring in conformity with international law, to the position of article 3, next to other articles of a similarly general nature. Less welcome was the deletion of former article 19, since its removal seemed to place parts I and II on the same footing, whereas there was in fact a clear hierarchy, part I containing the general principles and part II the application of those principles to specific circumstances.

9. His delegation fully supported the changes made in article 7 (formerly article 6) concerning the retroactive attribution of nationality to the date of succession for persons who would otherwise be stateless. The right to a nationality was so fundamental that it justified derogation from the general legal principle of non-retroactivity.

10. In general, his delegation was pleased at the changes made with the aim of simplifying and clarifying the wording of the articles. In codifying international law, exhaustive detail tended to reduce legal certainty. Moreover, the Commission had managed to adhere to its specific task of addressing the effects of the succession of States on nationality and had avoided the temptation to draft a text on the succession of States in general or a text on the right to a nationality. That appeared to be the thinking behind the re-wording of articles 16, 20, 22 and 24.

11. The Commission had recommended to the General Assembly that the draft articles should be adopted in the form of a declaration. His Government generally preferred the adoption of a convention open to signature or subsequent accession by States. In the present case, since the draft articles were essentially intended for the protection of human rights, it was all the more important to make an effort to adopt them as an international agreement, in order to underline the binding nature of the provisions and the need for legal certainty. Furthermore, whereas some other drafts developed by the Commission were closely linked with conventions already adopted or in force, so that they could appropriately take the form of a declaration or guidelines, the draft articles on nationality and State succession stood alone.

12. His Government was not in favour of abandoning the question of the nationality of legal persons in relation to the succession of States. The growing phenomenon of multinational companies made it essential for the Commission to be involved in the development of international law in that field.

13. With regard to jurisdictional immunities of States and their property, it was clear that since the Second World War the general trend in State legislation and practice had been to turn away from the tradition of absolute immunity and restrict the civil immunity of States. That change had come about as States increasingly engaged in economic activities *jure gestionis* in addition to their traditional sovereign or governmental activities *jure imperii*. The distinction, however, was often difficult to apply. The draft articles on jurisdictional immunities of States and their property adopted by the Commission on second reading in 1991 needed to be reformulated with a view to achieving greater clarity and closer correspondence to current international practice.

14. The suggestion of the Commission's Working Group on the topic to delete any reference to the nature or purpose of State activities in determining whether the activities should be considered commercial transactions, and thus subject to the internal jurisdiction of another State, touched upon one of the most controversial points in the entire draft. The 1991 text, in an attempt at compromise, had included a purpose test as a supplementary criterion. That

solution was not truly satisfactory, because it introduced an element of subjectivity; it could lead to the extension of immunity beyond the limit recognized under current international law and would thus be a step backwards. Eliminating any reference to nature or purpose, however, would not guarantee that uniform objective criteria would be applied, despite the guidance available to national courts in the recommendations of the Institut de Droit International. The choice not to define any criteria for identifying commercial transactions ought at least to be made in a consistent context compatible with the basic rationale for recognizing restrictive immunity, namely, the distinction between activities *jure imperii* and *jure gestionis*.

15. With regard to the topic of State immunity from measures of constraint, particularly execution against property of a State, in the light of the fundamental distinction between activities *jure gestionis* and *jure imperii*, the court should be able to proceed without limitation against property not destined for the fulfilment of sovereign functions. It might be appropriate, as the Working Group had suggested in alternative I, to grant the State a grace period of two or three months to designate property available for execution, thereby avoiding doubts as to the intended use of the property. If the State did not comply within the grace period, it would be for the national court to ensure that execution was not levied against property destined for the fulfilment of sovereign functions. There was no reason to resort automatically to inter-State dispute settlement, as suggested in alternative II.

16. Since it was the nature of the activity that determined whether immunity applied, commercial transactions should not be immune from local jurisdiction even in the case of transactions between States; the exception to that effect should be eliminated from the draft articles.

17. In the case of contracts of employment, his delegation agreed with the suggestion of the Working Group that the provision excluding local jurisdiction when the employee was neither a national nor a habitual resident of the State of the forum should be deleted, as contrary to the principle of non-discrimination based on nationality.

18. Since the draft articles were intended as a guide for national courts, his delegation shared the view that the provisions relating to constituent units of federal States and political subdivisions of States needed to be re-worded for the sake of clarity. The definition of a State for purposes of State immunity should not differ widely from the definition for purposes of State responsibility. For that reason, he could concur with the suggestion of the Working Group to refer to "governmental authority" rather than "sovereign authority". However, the proposed new wording specifically mentioned "constituent units of a federal State and political subdivisions of the State", whereas the State responsibility articles did not. His delegation felt that the most appropriate solution would be the one adopted by the European Convention on State Immunity, whereby the immunity of a constituent unit could be recognized on the basis of a declaration by the State. That approach would allow greater flexibility, in the light of differences between national systems, while facilitating application of the provisions by national courts.

19. **Mr. Andrews** (United States of America), referring to chapter IV of the report, said that the completed draft admirably addressed the sometimes complex nationality issues that arose in succession situations, by placing emphasis on ensuring that individuals in such situations did not find themselves without any nationality. His delegation's experts on nationality matters were giving it careful consideration.

20. While the Commission had done its work with the experience of the former Soviet Union and Eastern Europe fresh in mind, current developments elsewhere were a reminder that the issues involved were recurring ones, so that any text must be appropriate for the full range of possible situations.

21. For the most part, the articles articulated useful rules of general applicability. The overall approach of ensuring that all persons concerned had at least one nationality of a surviving State, while permitting States concerned to adopt measures to limit multiple nationalities, was sound. The articles also gave appropriate weight to the criterion of habitual residence of persons concerned.

22. His delegation was examining with particular interest the provisions identified by the Commission as areas of progressive development. In general, they were a step in the right direction. There were, however, some matters of potential concern. One involved the narrow issue of the treatment of stateless persons by third countries and the meaning of draft article 19. There should be no implication that a third country could not deport a stateless person to a successor State whose nationality he could acquire. There was also a need to reflect on issues of rights of habitual residence and their bearing on attribution of nationality and on the implications of limiting the articles to situations of succession in accordance with international law, and to ensure that successor States implemented nationality rules in a harmonious way. Nationality protection might be of greatest importance to persons involved in irregular

situations. Lastly, his delegation recognized a right of expatriation, even if it resulted in statelessness. United States law also made it possible to revoke fraudulently obtained naturalization, even if the individual became stateless as a result.

23. His delegation looked forward to further work with a view to implementing the Commission's recommendation to the General Assembly that the text should be adopted as a formal declaration.

24. Turning to chapter V of the report, he said that while the Commission's work on the topic of State responsibility had the potential to play a historic role in the codification and progressive development of international law, the success of that work was not yet guaranteed.

25. His delegation particularly appreciated the Commission's way of grappling with difficulties that many Governments, including his own, had noted in their comments. Many members of the Commission appeared to agree that the articles would have a lasting impact only if they were crafted in such a way as to be widely acceptable to States and to mirror State practice.

26. His delegation commended the Special Rapporteur on his proposals for simplifying and clarifying part I. Nevertheless, given the complexity of the issues, the United States delegation wished to study the proposed revisions to part I more carefully.

27. With regard to the specific issues raised in paragraph 29 of the report, his delegation had four points to make.

28. First, a distinction should be drawn between those States specifically injured by an internationally wrongful act and other States which had a legal interest in the performance of the relevant obligations, but did not suffer economically quantifiable injury. Most treaty regimes and legal norms provided that only the specifically injured State should have the right to seek reparations. The draft articles should reflect that principle.

29. Secondly, it was a long-established principle of customary international law that a wrongdoing State must provide compensation to the specifically injured State. Both State practice and the literature supported the principle that such compensation included interest in addition to the principal amount; otherwise, the injured State could not be made whole. In order for current draft article 44 (Compensation) to reflect existing law, it should provide that interest "shall", rather than "may", be included in any compensation award.

30. Thirdly, with regard to countermeasures, his delegation welcomed the Commission's recognition that they played an important role in the regime of State responsibility; it believed, however, that the draft articles in part II contained unwarranted restrictions on their use. If the current text was substantially revised to address the concerns expressed by his delegation in its written comments, it might be desirable to include provisions on countermeasures in the draft articles, although not necessarily in part II. Countermeasures were an extremely important issue, and the Commission must find a satisfactory solution regarding them if the draft articles were to be generally acceptable.

31. Lastly, questions that arose when several States were involved in producing an internationally wrongful act should be dealt with in the framework of the draft articles. Assistance to another State should constitute a wrongful act where the assisting State intended to assist in the commission of the act. Accordingly, his delegation supported the Special Rapporteur's proposed revision to draft article 27, incorporating an intent requirement.

32. On the topic of reservations to treaties (A/54/10, chap. VI), his delegation found great merit in the Commission's concept of a Guide to practice, rather than a more formal document. The work on reservations properly recognized and built upon the strengths of the universal regime of reservations under the Vienna Convention on the Law of Treaties.

33. With regard to chapter VII of the report, since the Commission's completion of the draft articles on jurisdictional immunities of States and their property in 1991, the Committee had never come close to consensus on either the draft articles or possible revisions to them. As reflected in the report of the Working Group on jurisdictional immunities of States and their property (A/54/10, annex), the Commission had devoted substantial effort at its most recent session to considering the core issues.

34. By presenting alternative options on provisions dealing with commercial transactions and measures of constraint against State property, the Commission had provided useful focal points for discussion in the Working Group of the Sixth Committee. Unfortunately, it was also clear that State practice in the key areas of disagreement remained widely divergent. While his delegation looked forward to discussing those issues in the Working Group, it questioned whether agreement could be reached in the near future.

35. As to chapter VIII of the report, his delegation remained concerned about certain aspects of the topic. It did not believe that the rules of the Vienna Convention on

the Law of Treaties provided an appropriate framework for analysing the legal effects of unilateral acts.

36. Lastly, with regard to chapter IX of the report, his delegation concurred with the Commission's decision to suspend work on international liability, pending the completion of its second reading of the draft articles on prevention of transboundary damage from hazardous activities.

37. Notwithstanding the difficulty of the task and the time that had been required, his delegation believed that the Commission had made useful contributions in that area since beginning its work in 1978. The Commission had done a comprehensive and thorough review of the issue of prevention and the obligation of due diligence.

38. Following the completion of the second reading and the submission to Governments of any resulting text, a pause in the Commission's work might be appropriate in order for international practice to develop in that area. His Government believed that international regulation in the area of liability should proceed through careful negotiations on particular topics, such as oil pollution or hazardous wastes, or in particular regions, and not by attempting to develop a single global regime. Once State practice had developed further, the Commission might be asked to resume its work in the light of the precedents established.

39. **Mr. Pham Truong Giang** (Viet Nam), referring to chapter VII of the report, said that the topic of jurisdictional immunities was of great interest to his delegation. Rapid economic and commercial development and globalization had brought various actors into play, including States, entities and individuals. The question of whether States were entitled to absolute or restrictive immunity in their economic and commercial transactions remained controversial. The attention of the international community was increasingly drawn to the elaboration of an international legal framework governing such activities in accordance with international law and practice. His delegation was highly appreciative of the results achieved by the Working Group of the Commission in that area.

40. Nevertheless, his delegation believed that business transactions, the key element of the text, should be defined clearly. Accordingly, the objective and nature of such transactions must be taken into consideration. Equality between the entities participating in commercial activities must be ensured, and the practice of developing countries should be taken into account.

41. Turning to chapter IX of the report, he said that, in a world characterized by constantly developing science and technology and growing interdependence, an activity carried out in the territory or under the jurisdiction of a State might cause harm or damage to other States. Any such activity, even if not prohibited by international law, should be regulated in accordance with the basic principles of international law, namely, State sovereignty, sovereign equality and the peaceful settlement of disputes. His delegation therefore attached great importance to the topic.

42. First and foremost, the definition of those activities not prohibited by international law to which the draft would apply, as well as the scope of the instrument, must be clarified. Without such clarification, broad acceptance of the instrument would be in doubt.

43. His delegation concurred with the idea that States should take all appropriate measures to prevent or minimize the risk of causing harm or damage to other States. If harm was unavoidable, and if it actually occurred, the originating State should assume responsibility. It had been suggested that States should only take measures to prevent or minimize the risk of causing "significant" harm. If that criterion was adopted, the concept of significant harm must be carefully elaborated.

44. The requirement of prior authorization and consultations should be stipulated in the draft.

45. It was self-evident that compensation should be paid in the event that an activity caused actual harm or damage. The nature and extent of liability for such activity should also be clearly defined.

The meeting rose at 11.30 a.m.