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Chairman: Mr. Politi. . . . . (Italy)

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The meeting was called to order at 10.10 a.m.

Agenda item 159: Report of the International Law Commission on the work of its fifty-second session (A/55/10)

1. **The Chairman**, acknowledging the exceptional contribution made by the Commission to the development and codification of international law, said that its recent session had been very productive and had made substantial progress on a number of topics. He was suggesting a thematic approach for the consideration of its report (A/55/10), beginning with the topic of State responsibility in chapter IV. The Committee would then take up chapters V and VI, on diplomatic protection and unilateral acts of States, and consider finally chapters VII, VIII and IX, dealing with reservations to treaties, international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) and other decisions and conclusions of the Commission.

2. **Mr. Yamada** (Chairman of the International Law Commission) said that the purpose of the first three chapters was to describe the membership and internal organization of the Commission, provide a brief summary of the Commission's work at its fifty-second session and, at the request of the Sixth Committee, to highlight the questions relating to substantive chapters of the report on which the views of Governments were particularly helpful to the Commission. He would begin his introduction of the report with the first substantive chapter, which was chapter IV on the topic of State responsibility.

3. The Commission had debated the third report of the Special Rapporteur on State responsibility. Its discussions were reflected in paragraphs 47 to 405 of its report, but were superseded to some extent by the work of the Drafting Committee, which had taken account of the views expressed in plenary session. The Drafting Committee had provisionally adopted on second reading the draft articles contained in the appendix to chapter IV. The Commission had decided to request comments by Governments on the draft articles, although they had not yet been finally adopted by the Commission and were not yet accompanied by a revised commentary.

4. In so deciding, it was departing from its usual practice because of the unusual circumstances relating to its work on State responsibility, which had now been in progress since 1955. Its provisional adoption of the draft articles on first reading had taken place over two decades, from 1973 to 1996. Because of the significant developments since that time in the law of State responsibility, however, it would be useful at the present stage to receive comments by Governments, either in the context of the debate in the Committee or preferably in writing, on the complete text of the draft articles provisionally adopted by the Drafting Committee, and especially on any aspect which required further consideration before the second reading was completed in 2001. For that purpose, the report of the Drafting Committee (A/CN.4/SR.2662), containing the entire draft articles and an introductory statement by the Chairman of that Committee, had been transmitted to Governments on 21 August 2000. Written comments should be submitted to the secretariat by 31 January 2001.

5. The 59 draft articles were divided into four parts. Part One, entitled "The internationally wrongful act of a State" contained articles 1 to 27 relating to the relevant general principles, the act of the State under international law, the breach of an international obligation, the responsibility of a State in relation to the act of another State, and the circumstances which might preclude the wrongfulness of an act. Part Two, adopted on first reading, had been divided into two parts. That had been done in order to separate the provisions dealing with the content of responsibility from those bearing on the invocation of responsibility, on the basis that secondary consequences might arise by operation of law from the commission of an internationally wrongful act, and there were ways in which such consequences might be mitigated. The first part of Part Two, entitled "Content of international responsibility of a State", contained draft articles 28 to 42, addressing the relevant general principles, the various forms of reparation, and serious breaches of international obligations to the international community. Part Two bis was entitled "The implementation of State responsibility". It contained draft articles 43 to 49, addressing the procedural and substantive aspects of the invocation of State responsibility, and draft articles 50 to 55, on the conditions and limitations relating to countermeasures. The general provisions concerning lex specialis and the various "without prejudice" clauses were contained in

articles 56 to 59 of a new Part Four, entitled “General Provisions”.

6. Part Two dealt with five major issues: the general principles relating to the notion of injury and the necessary causal link; satisfaction and interest in relation to the various forms of reparation; the content and consequences of serious breaches of essential obligations towards the international community as a whole; the definition of the injured State for the purposes of the draft articles; and the conditions and limitations relating to countermeasures.

7. Since there was no agreement as to the distinction between “injury” and “damage”, the Drafting Committee had decided, in article 31 [42], paragraph 2, to encompass in the definition types of injury which gave rise to obligations of restitution and compensation, together with those which might entail an obligation of satisfaction. The same paragraph dealt with the necessary causal link between the internationally wrongful act and the injury by referring to “[injury] … arising in consequence of the internationally wrongful act of a State”. The Drafting Committee had decided that it would not be prudent to insert an adjective qualifying the nature of the causal link, since the requirement to specify a causal link was usually addressed in the primary rules, and would not be the same for every breach of an international obligation.

8. The formulation of article 38 [45], on satisfaction, was based on the understanding that it was not a common form of reparation and would not be needed if injury caused by an internationally wrongful act of a State could be fully repaired by restitution or compensation. Satisfaction, granted for injury which could not be assessed in financial terms and which was an affront to the State, was an exceptional remedy and frequently symbolic in character. The words “another appropriate modality” in paragraph 2 emphasized the non-exhaustive character of the modalities of satisfaction listed, and the possible relevance of the breach in determining the appropriate form of satisfaction. The limitation on satisfaction set in paragraph 3 was intended to avoid unreasonable demands for satisfaction which were incompatible with the sovereign equality of States.

9. Article 39, on interest, had been inserted in the draft in response to suggestions by a number of Governments. Interest might be required in certain cases in order to ensure full reparation. The payment of interest could not be combined with lost profits if that would result in a double recovery for the injured State.

10. Chapter III of Part Two dealt with the content and consequences of serious breaches of essential obligations to the international community as a whole. The Drafting Committee had decided to delete the reference to “international crimes” which had featured on first reading and which had proved controversial both in the Commission and among Governments. There had been no agreement as to whether it was justified to draw a distinction between two types of breaches of international obligations. Article 41 laid down three conditions applying to such breaches, and paragraph 2 defined a “serious” breach as one involving a gross or systematic failure by the responsible State to fulfil its obligation. The breach must also entail the risk of substantial harm to the fundamental interests of the international community as a whole. Article 42 [51, 53] addressed the consequences of such serious breaches. Paragraph 1 left open the question whether damages reflecting the gravity of the breach were additional to those owed by the responsible State under article 37 [44]. The cooperation required of other States, in paragraph 2 (c), to bring the breach to an end was qualified by the phrase “as far as possible”, in order to take into account circumstances such as legal obligations binding upon some States under the law of neutrality which might prevent them from cooperating.

11. Turning to the notion of an injured State, addressed in article 43 [40] and in article 49, paragraph 1, he explained that the definition contained in the first-reading text had been too broad and partly inconsistent. It would have allowed many States to claim to be injured and therefore entitled to claim the full range of remedies available under the articles. The identification of an injured State in any particular case depended to some extent on the primary rules and the circumstances of the case. In the context of the secondary rules, it was useful to distinguish between the broader category of States, those which were entitled to invoke responsibility, and the narrower category of States entitled to claim specific remedies. The Drafting Committee had decided to dispense with the term “State having a legal interest”, and to replace the term “obligations erga omnes” by “obligations towards the international community as a whole”. Subparagraph (a) concerned the breach of an obligation

in a bilateral relationship, for example under a bilateral treaty or a multilateral treaty creating a bundle of bilateral relations. Subparagraph (b) addressed obligations owed to a number of States or to the international community as a whole. The word "specially" emphasized the adverse effect of the wrongful act on the injured State, setting it apart from all other States affected. The same subparagraph dealt with the obligations in a multilateral relationship which were called "integral" obligations, because the breach of one of them would affect the enjoyment of the rights or performance of the obligations of all States belonging to the group in question. Article 43, subparagraph (b) (i), and article 49, paragraph 1, both referred to a wrongful act which affected different categories of States in a different way. Article 43 dealt with an injured State in its individual capacity, whereas article 49, paragraph 1, dealt with a State affected in its capacity either as a member of a group of States to which the obligation was owed, or as a member of the international community.

12. The fifth of the major issues he had mentioned, that of countermeasures, was addressed in article 23 [30] of Part One as well as in chapter II of Part Two bis. According to article 23, acts taken as countermeasures were wrongful per se, unless they were justified only in relation to the responsible State, and did not target third States. An act directed against a third State would not fall within the definition of a countermeasure and could not be justified as such. Secondly, countermeasures could be taken only under the conditions set out in articles 50 [47] to 55 [48].

13. Chapter II of Part Two bis dealt with the limited purpose of countermeasures and the conditions under which they could be taken, as well as with the limitations applying to them. The articles adopted on first reading were controversial in that they would have indirectly submitted disputes relating to State responsibility to compulsory settlement when countermeasures were taken. The Drafting Committee had therefore designed an operational system secured by conditions and limitations that were intended to maintain countermeasures within generally acceptable bounds.

14. Article 50 [47] defined the limited purpose of countermeasures and operated as a condition of article 23 [30]. Paragraph 1 limited the purpose of countermeasures to inducing the State responsible for an internationally wrongful act to comply with its obligations under Part Two. Consequently, countermeasures would not have a punitive purpose. It also set out the first condition for taking countermeasures, which was the failure of the responsible State to comply with its obligations under Part Two. Paragraph 2 indicated the temporary nature and the bilateral character of countermeasures by limiting them to the "suspension of performance" of one or more international obligations of the injured State "towards" the responsible State. Paragraph 3 addressed the reversibility of countermeasures by providing that, during its suspension of a treaty, a State must not take any action that would preclude the re-entry into force of such treaty. Countermeasures, however, could cause irreversible collateral damage without preventing the resumed compliance with the underlying obligation. The phrase "as far as possible" in paragraph 3 indicated that if the injured State had a choice between a number of lawful and effective countermeasures, it should select those which did not prevent the resumption of performance of the "obligations in question".

15. Article 51 [50] concerned obligations which were not subject to countermeasures. Paragraph 1 provided that countermeasures could not involve any derogation from the obligations listed in the article. Subparagraph (a) dealt with the prohibition of the use of force as embodied in the Charter of the United Nations. The wording concerned forcible countermeasures, while economic and political coercion was addressed by other provisions of the article, including subparagraph (b), which indicated that countermeasures should essentially remain a matter between the injured and the responsible States and have only minimal effects on private individuals by providing that "fundamental human rights" should remain inviolable.

16. Subparagraph (c) dealt with the obligations of humanitarian law with regard to reprisals and subparagraph (d) dealt with peremptory norms of general international law. Lastly, subparagraph (e) dealt with the inviolability of diplomatic or consular agents, premises, archives and documents, which was essential to the normal functioning of international relations. Paragraph 2 of the article dealt with applicable dispute settlement procedures in force between the parties and underlined the importance of compliance with those procedures when countermeasures were taken. Moreover, it implied that dispute settlement

mechanisms could not themselves be the subject of countermeasures.

17. Article 52 [49] addressed the principle of proportionality, which the text adopted on first reading had related to the gravity of the wrongful act and the injury suffered. Given that the purpose of countermeasures was to induce performance, the revised text related proportionality primarily to the injury suffered, while "taking into account" the two additional criteria of the gravity of the wrongful act and the rights in question. By implication, the latter meant the rights of both the injured State and the responsible State. Furthermore, the rights of other States, which might also be affected, could also be included under that wording. The words "taking into account" were not exhaustive; depending on the particular context of each case, other factors might also be relevant in determining proportionality.

18. In drafting article 53 [48] on conditions relating to resort to countermeasures, the Drafting Committee had taken into account the criticisms made of article 48 adopted on first reading because it had linked countermeasures to compulsory dispute settlement procedures. Paragraph 1 addressed the notification requirement and paragraph 2 required that, once the injured State had decided to take countermeasures, it should notify the responsible State and also "offer" to negotiate with it. Paragraph 3 dealt with the interim measures of protection referred to in the text adopted on first reading, now reworded to read "provisional and urgent countermeasures". Such countermeasures were not subject to the requirements of paragraph 2, but had to comply with the requirement of the notification of the injured State's claim under paragraph 1 and were subject to the same limitations as countermeasures. Paragraph 4 was intended to discourage countermeasures while the parties were negotiating in good faith, but did not apply to countermeasures under paragraph 3. Hence, the injured State was not barred from taking provisional and urgent countermeasures, even during negotiations.

19. Paragraph 5 dealt with the case in which the wrongful act had ceased and the dispute was submitted to a court or tribunal with the authority to make decisions binding on the parties. Once those conditions had been met, the injured State could not take countermeasures, or, if it had already done so, it was required to suspend them within a reasonable period of time. The paragraph assumed that the court or tribunal concerned had jurisdiction over the dispute and also the power to order provisional measures. Lastly, paragraph 6 was a general provision relating to the good faith obligation to comply with dispute settlement procedures agreed between the parties themselves.

20. New article 54 concerned the taking of countermeasures by States other than injured States that were entitled to invoke responsibility under article 49. When there was no injured State within the meaning of article 43 [40], it was necessary to make a distinction between breaches of obligations affecting several States or the international community as a whole, on the one hand, and serious breaches of obligations owed to the international community as a whole and essential for its protection as defined in article 41, on the other hand. Only with regard to the latter breaches could countermeasures by States that were not injured within the meaning of article 43 [40] be justified. With regard to the other breaches, countermeasures by a State entitled to invoke responsibility under article 49 could be taken only when there was an injured State.

21. The two above situations were addressed in paragraphs 1 and 2 of new article 54. When there was an injured State, any other State to which the obligation was owed could take countermeasures subject to certain conditions under paragraph 1; first, such countermeasures should be taken at the request and on behalf of the injured State; and secondly, that State should itself be entitled to take countermeasures. In the case of breaches within the scope of the definition of article 41, any State could take countermeasures in the interest of the beneficiaries of the obligation breached under paragraph 2, regardless of whether there was an injured State. The words "in the interest of the beneficiaries" were intended to include the interests of any injured State which would not have the same role as in paragraph 1, since the obligation breached concerned the fundamental interests of the international community as a whole. Lastly, paragraph 3 provided that States had a general obligation to cooperate when they took countermeasures with a view to ensuring that those measures, both individually and in their collective effect, complied with the conditions laid down in Chapter II of Part Two bis for taking countermeasures, including the requirement of proportionality.

22. Article 55 [48] concerned the termination of countermeasures and dealt with the situation in which

the responsible State had complied with its obligations under Part Two, as a result of which there was no ground for maintaining countermeasures which should be terminated.

23. Concluding the first part of his statement on the report of the International Law Commission (A/55/10), he re-emphasized the importance of comments by Governments on the draft articles on State responsibility appended to Chapter IV insofar as they would enable the Commission to reflect such views when it finalized the text at its next session.

24. **Mr. Hoffman** (South Africa), speaking on behalf of the South African Development Community (SADC), welcomed the attention devoted by the Commission to the draft articles on State responsibility, which had now been on its agenda for 40 years. While there was no place for countermeasures in an advanced system of law, they were a matter of considerable concern and even a necessary evil in the absence of a central law enforcement agency. As such, articles 50 to 55 were rightly concerned with the imposition of limits on countermeasures, and he welcomed the qualifications contained in those articles, as a result of which countermeasures would be marginalized and resorted to in exceptional cases only.

25. Former article 19, which distinguished between international crimes and delicts, had always been a source of controversy. Articles 41, 42 and 54 were the resulting compromise, avoiding as they did the use of the controversial term “crime”, while still recognizing that certain particularly serious wrongful acts might give rise to a community response. Consequently, a serious breach of obligation exposed the responsible State to damages reflecting the gravity of the breach. Other States, however, were obliged not to recognize the lawfulness of any situation created by the breach and to cooperate in bringing the breach to an end. Moreover, any State could take countermeasures in the interest of the beneficiaries of the obligation breached.

26. He appreciated that the decision to include a section on the settlement of disputes was dependent on the eventual form of the draft articles. The inclusion of such a section would be necessary if they took the form of a convention, which would not be the case if a restatement was contemplated. He therefore urged the Commission to give serious consideration to that question at its next session, during which he hoped that the project would be completed with a view to avoiding any further delay following the inevitable changes in the composition of the Commission after its election in 2001.

27. **Mr. Wood** (United Kingdom), concerned by the lack of contributions to enable young lawyers to attend the International Law Seminar, urged Governments to follow his own Government’s example of covering such a fellowship with a view to heightening awareness of, and enthusiasm for, the practice of international law. As for the Commission’s long-term programme of work, he saw particular merit in the proposed new topics in view of the potential need for clarification of the law in areas in which practical problems could arise, such as responsibility of international organizations and effects of armed conflicts on treaties. As for the final proposed topic of risks ensuing from fragmentation of international law, however, he wondered whether the points already discussed about the actual and potential conflicts stemming from the diversity of legal regimes and structures governing a particular situation lent themselves more to description and analysis rather than to an attempt by the Commission to find a solution. He suggested that the Commission might usefully reflect on that matter before taking action on the topic.

28. By way of preliminary remarks concerning the draft articles on State responsibility, in respect of which his delegation would submit more detailed views in writing before the end of January 2001, he said that he welcomed the streamlining of Part One, in regard to the issues of attribution to the State, of what constituted a violation of an international obligation and of the circumstances precluding wrongfulness. Its architecture was now more classical, and it was also clear that internationally wrongful acts of a State formed a single category. Nevertheless, he had questions and serious concerns about some of the provisions contained in Parts Two and Two bis relating particularly to the new category of “serious breaches” and to certain aspects of the proposed regime governing countermeasures, which departed from existing international law.

29. With regard to the first point, the revised draft appeared to introduce a special regime for serious breaches of obligations which were owed to the international community as a whole and which were essential for the protection of its fundamental interests. His delegation had doubts both about the content and scope of the new category and the consequences of

States' committing such serious breaches. As far as the content was concerned, the text of draft article 41 appeared to combine what were surely two different categories — obligations owed erga omnes and obligations arising from peremptory norms of international law — thus creating a new category of supernorm. If the intention was to codify the dietum by the International Court of Justice in the *Barcelona Traction* case, it could have been done more simply. There were, of course, certain obligations which States owed to all States. The expression currently used — "the international community as a whole" — was, however, potentially misleading. It might usefully be replaced by the phrase "the international community of States as a whole" or, even better, "all States".

30. It was generally accepted that all States had standing to bring a claim in respect of a breach of an obligation owed to all States. That was reflected in draft article 49, paragraph 1 (b), which, rightly, did not limit such standing to serious breaches. His delegation had doubts, however, about the three consequences specifically ascribed by the Commission to the category of "serious breaches". The first proposed consequence was the possibility of an award of damages reflecting the "gravity of the breach". To the extent that that referred to punitive damages, it was questionable whether such damages had a place in international law. If they did, they were surely potentially applicable to certain breaches of any international obligation. The second proposed consequence concerned the obligations arising for third States. The enumeration of such obligations in article 42, paragraph 2, was inspired, no doubt, by the Advisory Opinion of the International Court of Justice in the *Namibia* case. That case, however, had concerned the legal consequences for States of an occupation of territory declared by the Security Council to be illegal. Whether it was possible to speak of a single rule for all purposes was another matter. One way around the difficulty might be to provide a less prescriptive formulation, as in draft article 42, paragraph 1. An additional concern was that including such consequences in a separate chapter devoted to "serious breaches" would seem to imply that they could not apply to any other breaches of obligations, whatever the circumstances.

31. The most difficult issue of all concerned the provision of draft article 54, paragraph 2, permitting a State to take countermeasures "in the interest of the beneficiaries of the obligation breached". Even accepting the proposition, on the basis of the *Barcelona Traction* case, that States at large had a legal interest in respect of violations of certain obligations, it did not necessarily follow that all States could vindicate those interests in the same way as directly injured States. As they stood, the proposals were potentially highly destabilizing of treaty relations. He questioned whether a State should really be able to contravene any of its treaties, including, for example, those of a technical nature, such as postal service agreements, in response to any serious breach by another State of any erga omnes obligations. It should also be asked what would happen if the State most directly affected did not want countermeasures to be taken and how the principle of proportionality would operate in such a situation.

32. It was a difficult problem, and the solution was not obvious. One possibility might be the use of some form of saving clause. Chapter III of Part Two and draft article 54, paragraph 2, could be replaced by a clause to the effect that the draft articles were without prejudice to any regime that might be established to deal with serious breaches of obligations erga omnes. Such an approach would not harm the structure or objectives of the draft articles as a whole.

33. His delegation welcomed the inclusion of an article (draft article 23) recognizing the taking of lawful countermeasures as a circumstance precluding wrongfulness. Countermeasures played an important role in inducing compliance with international law, and their validity had been recognized by international tribunals. Some of the provisions regulating the resort to countermeasures proposed in Part Two bis, chapter II, gave rise to serious concern, however, insofar as they departed from existing law. It was true, for example, that there existed obligations the performance of which could not be suspended by way of countermeasures. Care should, however, be taken in the way that proposition was reflected in draft article 51, the chapeau of which was perhaps misleading in asserting that countermeasures would not involve "any derogation" from the enumerated obligations.

34. Some of the relevant provisions, such as those for the protection of fundamental human rights, specifically allowed derogation in certain circumstances. In some instances, moreover, States had entered reservations preserving the right to take countermeasures. It would be preferable to say that

countermeasures must not involve the breach of those obligations of a State listed in the draft article. Indeed, the Commission should look rigorously at the list. Since the objective of the provisions must be to facilitate the resolution of disputes rather than to complicate them, vagueness and duplication should be avoided.

35. As to the conditions relating to resort to countermeasures, as set out in draft article 53, paragraphs 2 to 5, his delegation found the approach to be misconceived. The alleged duty to offer to negotiate before taking countermeasures, and to suspend countermeasures while negotiations were pursued, did not reflect the position under general international law. The arbitral tribunal in the Air Services Agreement case between France and the United States had stated its belief that it was impossible, in the current state of international relations, to lay down a rule prohibiting the use of countermeasures during negotiations; and that position had not changed. Nor would such a rule be either practical or desirable de lege ferenda. It would force the victim State to have recourse to one particular method of dispute settlement; it might be inconsistent with Article 33 of the Charter of the United Nations; and it might encourage States to break their obligations in order to force another State to the negotiating table.

36. Moreover, it was hard to see what scope to negotiate existed when genocide, for example, was being committed. Paragraph 3 did not solve the matter. The alleged duty, referred to in paragraph 5 (b), not to take countermeasures, or to suspend them, if the dispute had been submitted to arbitration or judicial settlement was equally ill-founded. It, too, found no support in general international law; it could discourage recourse to third-party dispute settlement, and it failed to take account of the possibility that jurisdiction might be disputed. His delegation encouraged the Commission to revise the provisions in order to reflect existing law on the subject.

37. His delegation shared the view, which seemed widespread within the Commission, that the aim should not be to adopt a multilateral convention on the topic. That would be neither realistic nor appropriate. The value of the Commission's work was inherent; it had already made a major contribution to the law of State responsibility by the mere fact of producing a set of articles and commentaries. The International Court of Justice had already had recourse to the Commission's work.

38. **Ms. Xue** Hanqin (China) said that her delegation was gratified that after some 40 years the task of formulating a comprehensive set of legal rules governing State responsibility was near completion. Some questions remained, however. The issue of countermeasures had long been one of the most controversial aspects of the regime of State responsibility. Countermeasures were a legitimate means available to a country injured by an internationally wrongful act to redress the injury and protect its interests. In view of past and possible future abuses, however, the recognition of a country's right to take countermeasures must be accompanied by appropriate restrictions on their use.

39. When commenting on draft articles 30, 47 and 48 on first reading, her delegation had pointed out the need to clarify and improve on the provisions they contained. Some improvements had indeed been made. For example, the ambiguous reference to "interim measures of protection" had been deleted and qualifying phrases had been added to the wording of article 23 (formerly article 30), while other provisions clearly set out both the aims of and limitations on the resort to countermeasures. There was, however, room for further improvement.

40. The desirability of the newly added draft article 54 on countermeasures by States other than the injured State, together with the related draft article 49, remained to be determined. The provisions they contained would obviously introduce elements akin to "collective sanctions" or "collective intervention" into the regime of State responsibility, broadening the category of countries with the right to resort to countermeasures and establish so-called "collective countermeasures". That would, however, run counter to the basic principle that countermeasures should and could be taken only by a country injured by an internationally wrongful act. More ominously, "collective countermeasures" could provide a further pretext for power politics in international relations. The reality was that only powerful States and blocs were in a position to take countermeasures, usually against weaker nations.

41. Moreover, "collective countermeasures" were inconsistent with the principle of proportionality enunciated in draft article 52, for they would become

tougher when non-injured States joined in, with the undesirable consequence that countermeasures might greatly outweigh the extent of the injury. Draft article 54 further complicated the already complex question of countermeasures, so the best solution would be to delete both draft articles 49 and 54. The existence of draft article 56 did not provide enough of a safeguard.

42. Another controversial issue was that of State "crimes". Introducing the concept into international law would encounter insurmountable obstacles in both theory and practice. In an international community made up of sovereign States, *par in parem imperium non habet* was a basic legal principle. Furthermore, Roman criminal law stated that *societas delinquere non potest.* At the same time, rejecting the concept would in no way diminish the personal legal responsibility of a person committing an internationally wrongful act. That was why her delegation had shared the view that the provisions relating to State "crimes" in the draft on first reading should be amended. To some extent the suggestions had been heeded. Part Two of the new text replaced the concept with that of "serious breaches of essential obligations to the international community", and it differentiated between varying degrees of gravity of a breach. Her delegation favoured that differentiation.

43. Two further points, however, should be clarified in relation to draft article 42. First, the phrase "international community as a whole" should be defined in order to prevent any dispute. Secondly, given the importance of the Security Council within the United Nations collective security system, the question of whether the imposition of an international obligation on States would be automatic or would ensue only after a Security Council decision must be settled.

44. All nine articles dealing with dispute settlement procedures in the draft text adopted on first reading, which had been excessively detailed in some respects, had been deleted. Her delegation conceded the need to amend the provisions, since Article 33 of the Charter of the United Nations gave parties to a dispute a range of means of peaceful settlement, but not their wholesale deletion. Some provisions were required. It was to be hoped that the Commission could reconsider the matter and submit a revised text as part of a complete text of draft articles for second reading.

45. **Mr. Manongi** (United Republic of Tanzania), after endorsing the statement made by the representative of South Africa on behalf of the Southern African Development Community, said that he wished to express his delegation's concern regarding countermeasures as part of the regime of State responsibility. It was encouraging that even the Special Rapporteur had appreciated the potential imbalance in the application of countermeasures as an instrument of compliance or redress. Indeed, he had rightly drawn the Commission's attention to the fact that States from Africa or Asia, for example, had seldom taken collective action, pointing out that it was more common among western States. It was therefore not surprising that some non-western States should consider the draft text as primarily seeking to legitimize such a practice, through the development of legal rules on State responsibility based on western practice.

46. It could hardly be refuted that countermeasures were a threat to small and weak States. It was thus misleading to claim that their only purpose was to induce compliance by a wrongdoing State. It was patently clear from the commentary that countermeasures could be punitive in order to satisfy the political and economic interests of the State claiming to be injured. The degree of subjectivity in the application of countermeasures must therefore be a matter of concern.

47. It was of little comfort that, while the Special Rapporteur had not wished to express a view on whether, in the light of State practice, shared perceptions of egregious breaches corresponded to the facts, he had nonetheless observed that "States taking counter-measures do so at their peril, and the question whether they are justified in any given case is one for objective appreciation". An objective appreciation could presumably be attained only through a judicial process, which could generally be instituted only by the alleged offender. The cost of doing so, however, might well be far beyond the immediate capacity of some allegedly responsible States so the question whether the countermeasures were indeed justified and proportional was likely to be left unanswered. Yet, if justice was to be done, even an alleged offender should be guaranteed recourse to due process. In that context, his delegation awaited with interest the Commission's proposals on dispute settlement mechanisms.

48. There were inherent weaknesses in the proposed regime of countermeasures. A wrongful act committed by a State could not be taken to justify an action,

whether by the injured State or any other, which, while initially legitimate, might itself have far-reaching consequences. The interests of third States should also not be discounted. It was disturbing that a right of which the potential spillover was not fully addressed had been formulated.

49. It would be preferable for the Commission to discourage countermeasures by prescribing limits rather than leaving them open-ended and liable to abuse. Similarly, in order to alleviate the concern of small States, the Commission should restore former draft article 50 on "prohibited countermeasures", which had been elaborate and clear. There was no compelling justification for deleting the provision prohibiting an injured State from resorting to "extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed the internationally wrongful act", which was language commonly used in the General Assembly and contained a principle important to developing States. That principle constituted a necessary balance in any regime of countermeasures.

50. With regard to the text of former draft article 19, his delegation conceded that it might not be necessary to make explicit reference to the notion of "international crimes"; the substance of the draft article remained relevant, however, and there was no reason why examples of serious breaches, which were helpful in clarifying incidents of internationally wrongful acts, should not be reflected in the draft articles.

51. **Mr. Westdickenberg** (Germany), referring to Part Two, Chapter III, of the draft articles, welcomed the deletion of former article 19. By referring to "international crimes", that draft article would have blurred the distinction between State responsibility and individual responsibility; the latter was not covered by the draft articles, as stated in article 58. Decisions on individual criminal responsibility should clearly be reserved for national courts, the international ad hoc tribunals and the future International Criminal Court.

52. Having stated that his delegation acknowledged the existence of fundamental norms of international law, breaches of which were so grave that their effects went beyond the directly injured State. Article 41 as proposed by the Special Rapporteur was a step in the right direction. Nevertheless, his delegation saw the need for a more precise definition, taking into account the special quality of breaches of erga omnes obligations. His delegation also shared the doubts expressed concerning the possible inclusion of punitive damages relating to article 41.

53. The concept of erga omnes obligations and their effects on States not directly injured entailed further problems. The indirect character of the injury must be taken into account in a way that narrowed the options of the State indirectly injured as compared with the State suffering direct injury. In order to distinguish between directly and indirectly injured States, it was necessary to ensure consistency between article 41, paragraph 1, article 49, paragraph 1 (b), and article 50, paragraph 1.

54. While the trend in international law was towards stronger protection of the rights of the individual, if the notion of "interest of the beneficiaries" was meant to limit the scope of possible countermeasures, article 54, paragraph 1, must be interpreted cautiously. Pursuant, to that article, beneficiaries of the obligation breached could be either States or non-States; accordingly, there was a danger that disproportional unilateral acts, which in reality were not justified by the interest they sought to protect, might be disguised countermeasures. That would threaten the credibility of the concept.

55. With regard to the proportionality of countermeasures, it was his delegation's understanding that the three criteria laid down in article were not exhaustive. Furthermore, his delegation welcomed the fact that article 53 set out limits to countermeasures by calling for prior negotiations between the States concerned. That applied also to the provisional measures mentioned in article 53, paragraph 3.

56. Moreover, his Government reiterated its conviction regarding the need to define more clearly peremptory norms of international law that protected fundamental humanitarian values. Articles 21 and 23 must be interpreted in that light. His delegation therefore welcomed the reordering of article 51, paragraph 1, to make it clear, first, that the prohibition against the threat or use of force, the protection of fundamental human rights and the obligations rising from humanitarian law were peremptory norms of international law and, second, that the list was not exhaustive.

57. Lastly, with regard to the obligation of the wrongfully acting State to offer appropriate assurances and guarantees of non-repetition (art. 30 (b)), it was his delegation's understanding that such an obligation

arose as a function of the risk of repetition, the gravity of the wrongful act and the nature of the obligation breached.

58. While his delegation shared the United Kingdom's view that the draft articles should not take the form of a convention, it was open to suggestions.

59. **Mr. Yachi** (Japan) noted with satisfaction that the new draft articles were generally more logical and clearer than those adopted on first reading. International obligations were divided into three categories: bilateral obligations, regardless of their source, multilateral obligations and obligations to the international community as a whole. When it came to invoking State responsibility, the draft distinguished between "an injured State" and a "State other than an injured State" that had an interest in the implementation of the obligation breached. Accordingly, it was now clear that the draft articles were intended to regulate the relations among three parties, namely, responsible States, injured States and States other than injured States.

60. Part Two had been revised to cover the obligations of the responsible State. A new Part Two bis had been added in which content of responsibility was clearly distinguished from invocation of responsibility. While welcoming the enhanced clarity of the draft articles, he wondered whether they were not too innovative. His delegation understood that the general intention behind the draft was to reflect the progressive development of international law. Nevertheless, in order to make a fair judgement of the changes reflected in the draft articles, it was necessary to bear in mind the final form that the draft would take. His delegation supported the general trend in the Commission towards finalizing the draft articles as a non-binding guideline for declaration. In his delegation's view, the draft articles should function in two ways: to inform a State of its rights and obligations if it committed an internationally wrongful act or if another State breached its obligation towards the first State and, more importantly, as a general standard to which international courts could refer in international disputes. In the light of the functions expected of the draft articles, his delegation believed that they should not be adopted as an innovative guideline that did not reflect State practice in international law.

61. His Government had consistently objected to the introduction of the ambiguous notion of "international crime", which was not established in international law. It therefore welcomed the deletion of that term from the draft.

62. Nevertheless, vestiges of the concept remained in the text. Article 41 created a new category, that of a "serious breach by a State of an obligation owed to the international community as a whole". If an obligation fell within that category, then its breach entailed special consequences under article 42. Such consequences involve might include, for the responsible State, damages reflecting the gravity of the breach. It was the obligation of every State to refrain from recognizing as lawful the situation created by the breach, and under article 54, paragraph 2, any State could take countermeasures "in the interest of the beneficiaries of the obligation breached", regardless of the existence or intent of an injured State.

63. Thus, "serious breach" was just another term for "international crime". The core question was whether there was a hierarchy among international obligations and, if so, whether a different regime of State responsibility could be applied to more serious breaches than were applied to less serious ones. While the question related to jus cogens and erga omnes obligations, the content of those concepts had not been sufficiently clarified, nor was there a clear relationship between them and the concept of serious breaches. Accordingly, it might be overly optimistic to assume that current international law had developed to the extent that it was possible to specify what kind of obligations fell into that category.

64. From the standpoint of the structure of the text, the reason for including a provision on serious breaches was to lay the groundwork for the provision on consequences. In other words, if the consequences prescribed for serious breaches were unnecessary, there was no point in stipulating a special category of obligations. Looking closely at the consequences referred to in article 42, it could be stated that the obligation not to recognize the lawful situation created by the breach did not result exclusively from serious breaches. As a matter of course, no internationally unlawful acts should be recognized as lawful or be assisted. Moreover, the obligation to cooperate was not limited to cases of serious breaches.

65. "Damages reflecting the gravity of the breach" seemed scarcely different from the concept of punitive damages, which was not established in international

law. An effort had apparently been made to avoid the problem by inserting the word “may” in article 42, paragraph 1. However, it was not clear who would decide whether a certain obligation “may” involve damages reflecting gravity.

66. Thus, the special consequences in article 42 which provided the raison d’etre for creating a category of serious breaches were neither special nor appropriate. As a matter of law, there was no consensus on which obligations fell into the category covered by article 41. Nor was there agreement on whether, if serious breaches of such obligations occurred, special measures could be taken and, if so, which ones. The creation of such obligations, and their corresponding special consequences was not a task to be undertaken in the context of general, secondary rules, but in the context of primary rules. His delegation believed that articles 41 and 42 had not succeeded in departing from the concept of “international crime” and had no place in the draft.

67. The taking of countermeasures by “States other than injured States” was problematic. Such a provision might be pertinent, in that unlawful situations would not be left unresolved in cases where an injured State was not able to take countermeasures on its own. However, the risk of abuse could outweigh the benefits.

68. His delegation also noted with concern the procedural requirements for taking countermeasures under article 53, pursuant to which injured States had to offer to negotiate with responsible States, and could not take countermeasures while negotiations were being pursued in good faith. Since the responsible State was likely to accept an offer to negotiate, it seemed quite difficult in practice for a State to resort to countermeasures. Accordingly, if a State needed to take countermeasures, it could easily resort to provisional measures while avoiding formal countermeasures, thus making formal countermeasures a hollow procedure.

69. Since the objective of countermeasures was defined as inducing a responsible State to comply with its obligations under Part Two, countermeasures should be allowed to the extent necessary. In accordance with draft article 52 on proportionality, however, “countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question”. His delegation was concerned that that criterion did not necessarily serve the purpose of countermeasures. It might not allow for countermeasures strong enough to induce compliance, or it might allow for excessive countermeasures. Moreover, the element of “gravity” of the wrongfulness was yet another echo of the concept of “international crime”.

70. Lastly, with regard to the concept of injury, it was important to distinguish between an injured State and an interested State, since that determined whether a State could seek reparation. In the new text, that distinction was made automatically, based on the category of the obligation breached. As a result, it was difficult to make a distinction between a collective obligation as defined in article 43 and an obligation established for the protection of a collective interest, as referred to in article 49. Since nearly all multilateral treaties established certain collective interests, the question was whether such a distinction was really possible without the notion of injury. One of the reasons why the notion of injury had been dropped was that the breach of a collective obligation as defined in article 43 (b) (ii) could hardly be explained by the traditional notion of injury. It might also be because the draft faithfully pursued a systematic construction of the law of State responsibility based on the type of obligation breached. However, the cost and benefits of pursuing such a highly theoretical approach must be examined carefully. It was unclear whether the notion of a collective obligation had become accepted in international law to the extent that the omission of the concept of injury was justified. The distinction between a collective obligation and one established for the protection of collective interests should be clarified in the commentary.

The meeting rose at 12.30 p.m.