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

Contents

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The meeting was called to order at 10.15 a.m.

Statement by the President of the International Court of Justice

1. **Mr. Guillaume** (President of the International Court of Justice) said that he wished to draw the Committee's attention to a phenomenon of considerable concern to academics and legal practitioners: the proliferation of international judicial bodies and the impact of that proliferation on international law.

2. The Permanent Court of International Justice, created in 1920, had long been the only player on the international judicial stage. Its replacement by the International Court of Justice had more or less coincided with the development of other judicial forums, initially at regional, then at global level. The European Court of Human Rights had been established in 1950, the European Court of Justice in 1957 and the Inter-American Court of Human Rights in 1981. Over the past two decades still more courts had come into being. The International Tribunal for the Law of the Sea had become operational in 1996, as a result of the United Nations Convention on the Law of the Sea of 1982. In 1994 the Marrakesh Agreement establishing the World Trade Organization had provided for that body's quasi-judicial dispute settlement mechanism. Agreements currently undergoing ratification would in due course lead to the creation of an African Court of Human Rights and the International Criminal Court. A number of ad hoc tribunals had also been established, such as the Iran-United States Claims Tribunal or the International Criminal Tribunals for the former Yugoslavia and Rwanda.

3. Such a multiplication of international judicial bodies had to be viewed in the context of more far-reaching changes in international relations. The way in which States related to one another had expanded and diversified: they cooperated in such fields as security, education, economics, the environment, scientific research, communications and transport. Non-State players — commercial companies, non-governmental organizations and private individuals — also increasingly engaged in transnational activities, which themselves had become more diverse, following a trend that technological advances, for example in the field of telecommunications, would undoubtedly intensify. It was essential to make such activities subject to the rule of law, and thus the proliferation of courts could be perceived as a process of adaptation to fundamental changes.

4. International law had itself become more complex and diverse. Human rights, environmental law, economic law, the law of the sea or space law were all sometimes regarded as specialized branches of international law. At the same time, the need for certain types of inter-State disputes to be adjudicated by bodies sensitive to specific local conditions had led to the creation of regional tribunals. Although such tribunals were not designed with some of the new categories of player in mind, there was growing pressure on those players to participate in the judicial process. The pressure had not been without consequences in the economic field, as could be seen from the constitution of the Court of Justice of the European Communities or the decisions in which the body responsible for settling World Trade Organization disputes had recently accepted the intervention of a non-governmental organization as *amicus curiae*. The same had occurred in the human rights field. Natural persons, non-governmental organizations or groups of individuals could bring cases before the European Court of Justice.

5. It might appear that the proliferation of judicial bodies responded to recent developments in the international community; but it had been attended with unfortunate, possibly far-reaching consequences for the operation of international law, in terms of both procedure and content. First, jurisdictions increasingly overlapped. Even in the first half of the twentieth century, States had had the option of going to arbitration or taking their case to the Permanent Court of International Justice. The proliferation of courts had created a whole range of other possibilities and opened the way to a form of inter-institutional "competition". Thus the International Tribunal for the Law of the Sea could, under articles 287 and 288 of the Convention, be given jurisdiction to hear cases relating to the application of the Convention, even though the International Court of Justice also had jurisdiction in that area. Indeed, States had traditionally brought maritime disputes to the Court. A similar overlap had occurred in other areas of international law, with two main consequences: "forum shopping" and a problem with conflicting decisions.

6. The existence of several forums which could declare themselves competent to hear a particular

dispute enabled the parties — usually the applicant, acting unilaterally — to select the forum which best suited them, taking into account such considerations as access, the procedures followed, the court's composition, its case law and its power to make certain types of order. For example, it was entirely possible that in the *Blue Fin Tuna* case the applicant had chosen the International Tribunal for the Law of the Sea because he sought readily enforceable measures. In that context, it should be noted that the provisional measures granted by the Tribunal had subsequently been revoked by the arbitral tribunal to which the dispute had been referred. "Forum shopping" might foster the spirit of competition between courts and stimulate their imagination, but there were also negative consequences. The choice of court might, for example, be motivated by the fact that the case law of a particular court happened to be more favourable to certain doctrines, concepts or interests than that of another. Moreover, since every judicial body tended — consciously or not — to assess its value by reference to the frequency with which it was seized, courts could be tempted to tailor their decisions to ensuring an increased caseload, to the detriment of a more objective approach to justice. Such a development would be profoundly damaging.

7. A second worrying consequence of overlapping jurisdictions was that they increased the risk of conflicting judgements. Systems of national law, which had long had to deal with the problem, had solved it by two methods: by developing a clear hierarchy among the courts and by formulating rules on pendency and *res judicata*. The international system lacked such devices. International courts should therefore coordinate the exercise of their individual jurisdiction in cases where more than one court considered itself competent to hear a dispute. Such coordination depended greatly on the attitude of the judges and on their ability to determine their own competence while bearing in mind their position within the international framework. For example, the International Tribunal for the Former Yugoslavia had ruled on the legality of its own establishment. It would hardly have ruled against itself, however, and it might have been more appropriate for it to have asked the Security Council to seek an advisory opinion from the International Criminal Court. More generally, in a case where two courts, both fully competent, were seized of the same dispute, one of them should surely withdraw. That, however, gave rise to the question of the criteria for such a choice. Sometimes an overlap involved only one of the issues in dispute, for example. Above all, it was important to ensure coherence in relation to *res judicata* as between different forums so as to guarantee the integrity of the decisions rendered.

8. Although the proliferation of courts had led to a larger number of cases coming before the courts, thus contributing to the development and enrichment of international law, there was also a serious risk of inconsistency within the case law. The courts had, admittedly, shown themselves anxious to avoid such inconsistency. Thus the International Court of Justice kept track of the judgements rendered by other courts and increasingly referred to them. In all, some 15 judgements of the Court contained such references. For example, in the *Land, Island and Maritime Frontier Dispute* between El Salvador and Honduras, the Court had in 1992 referred to a 1917 judgement of the Central American Court of Justice. In 1993, in the case concerning *Maritime Delimitation in the Area between Greenland and Jan Mayen*, the Court had analysed an award handed down in 1977 by the Anglo-French Arbitral Tribunal regarding the *Mer d'Iroise* case, adopting the award's reasoning. More recently, in the *Kasikili/Sedudu Island* case between Botswana and Namibia, the Court had found support for its decision in the arbitral award rendered in the *Laguna del Desierto* case between Chile and Argentina.

9. By the same token, certain specialized courts had frequently drawn on the jurisprudence of the Court or its predecessor. The Inter-American Court of Human Rights had quoted abundantly from the *Chorzów Factory, "Lotus"* and *Corfu Channel* cases, while the International Tribunal for the Former Yugoslavia had made a number of references to the Court's decision in the *Barcelona Traction* case. The body responsible for settling disputes of the World Trade Organization had made frequent reference to the Court's case law. Thus, in its recent decision on *European Community measures concerning Meat and Meat Products (Hormones*), it had taken account of the Court's findings in the *Gabčikovo-Nagymaros Project* case between Hungary and Slovakia regarding the existence of the precautionary principle. The Iran-United States Claims Tribunal had also relied on the Court's jurisprudence to a considerable degree.

10. The risk of inconsistency nonetheless remained substantial. In academic circles, there had been a lengthy debate as to whether or not the Chambers of

the International Court of Justice, whose composition could vary according to the wishes of the parties, were at risk of developing their own separate case law, with potentially chaotic results. That issue had virtually ceased to be of concern, with States tending to prefer to have their cases heard by the full Court. In any case, separate courts having to apply the same rules of law ran a far greater risk of a conflict of case law than separate entities established within the same forum.

11. Such conflicts were particularly likely to occur in specialized courts, which were inclined to favour their own disciplines. For example, in the case of *Loizidou v. Turkey*, the European Court of Human Rights had taken a position different from that of the International Court of Justice on the question of territorial reservations in declarations of compulsory jurisdiction. The International Court, like its predecessor, had consistently held that such reservations were legal and must be upheld, whereas the European Court had adopted a different solution. Admittedly, the latter's decision could be regarded as an instance of *lex specialis*, being founded on the specific characteristics of the system of the European Convention on Human Rights. It did, however, diverge from the case law of the International Court in its reference to the Vienna Convention on the Law of Treaties.

12. Still more to the point, the International Tribunal for the Former Yugoslavia, in rendering its judgement on the merits in the case of *Prosecutor v. Dusko Tadic* in July 1999, had expressly criticized and declined to follow a decision of the International Court of Justice. In order to determine its competence, the Tribunal had had to establish that there was an international armed conflict in Bosnia and Herzegovina by showing that certain of the participants in the internal conflict were acting under the control of a foreign Power, namely Yugoslavia.

13. In its analysis of the question, the Tribunal had referred to but not followed the Court's decision in the case concerning *Military and Paramilitary Activities in and against Nicaragua*. In that case, the Court's test of whether the United States of America had effectively controlled the activities of the *contras* had been rejected by the Tribunal, which had adopted a new interpretation of international law on State responsibility. It had opted for a less strict criterion in relation to the imputation of responsibility, holding that, in the case of organized groups of combatants, it was sufficient to demonstrate that the groups as a whole were under the overall control of a foreign State. That criterion made the State responsible for the group's activities, according to the Tribunal, irrespective of whether each individual act had been specifically imposed, requested or directed by the State in question.

14. Those examples showed that the growing specialization of international courts carried with it the serious risk that the overall perspective would be lost. Certainly, international law must adapt itself to prevailing circumstances, as national law had always done, and to local and regional requirements. Nonetheless, it should preserve its unity. The question was therefore how the proliferation of courts could be a source of enrichment rather than anarchy.

15. First of all, before a new court was created, consideration should be given to whether the functions could not be carried out by an existing body, as had happened with the Administrative Tribunals of the United Nations and the International Labour Organization. There was also the question of how to deal, within the current system, with the absence of a structured relationship between the various courts: whether it should be left to the wisdom of the judges or whether some form of structural change should be undertaken. As a judge himself, he would wish to be able to leave it to the wisdom of judges, who should be aware of the dangers of legal fragmentation and of inconsistency in case law. Such a minimalist solution was not, however, sufficient. Every institution had a tendency to go its own way. What was needed, therefore, was to institutionalize relations between the various courts.

16. The International Court of Justice remained the principal judicial organ of the United Nations and the only court with a universal, general jurisdiction; moreover, its age endowed it with special authority. The mechanisms to enable the Court to assume that role, however, remained extremely limited. Thus, although it could act as a court of appeal from the decisions of the Council of the International Civil Aviation Organization, that procedure was very seldom used. Moreover, its power of review over the decisions of international administrative tribunals had also recently been restricted. Indeed, the possibility of seeking an advisory opinion from the Court was currently restricted to certain bodies and specialized agencies of the United Nations. Perhaps its powers had been limited too far.

17. It had been suggested that the Court should be entrusted with the task of acting as a court of appeal or review from judgements rendered by other international courts. That would, however, require a strong political will on the part of States and far-reaching changes in the Court, which would need to be given substantial resources. It was doubtful whether such a will existed. An alternative solution put forward by the President of the International Court in his address to the General Assembly in 1999 was that, in order to reduce the possibility of conflicting interpretations of international law, other international courts should be encouraged to seek the Court's opinion on doubtful or important points of general international law raised in cases before them. Such a procedure existed in European Community law under article 234 of the Treaty of Rome (formerly article 177), enabling — and sometimes requiring — national courts of member States of the European Union to refer preliminary questions to the European Court of Justice. The unity of Community law was thus assured.

18. A comparable procedure could be used in general international law. Since the International Court was competent to hear requests for advisory opinions from the Security Council and the General Assembly, it would be possible for international courts which were organs of the United Nations to ask the Security Council to seek advisory opinions on their behalf from the Court. The same solution could be adopted with regard to international courts which were not organs of the United Nations, such as the International Tribunal for the Law of the Sea or the future International Criminal Court. The Council of the League of Nations had sought opinions from the Court on behalf of other international bodies, even though the Covenant of the League of Nations had made no provision for such a practice. It was open to the General Assembly to act likewise on behalf of various judicial bodies.

19. John Donne had said: "No man is an island, entire of itself". The image was apposite for the current position of international law. Every international judicial body should become aware that it was but part of a whole and never an end in itself. The relative positions of new judicial bodies must be determined and new links between them established if the law was to remain coherent and to continue to operate to the benefit of all members of the international community.

20. **Mr. Leanza** (Italy) said that the President of the International Court of Justice had rightly stressed the risks of conflicts of jurisdiction resulting from the multiplicity of international judicial bodies. While a more structured dialogue among the different international tribunals would be helpful, it was difficult to envisage mechanisms for enhancing that dialogue. A balance must be found between the need for coherence in judgements and the need to safeguard the independence of the various tribunals. In particular, he would be grateful for clarification of whether the mechanism of requesting an advisory opinion from the Court through the Security Council or the General Assembly might not entail the risk of political control over the international judicial bodies, since the Council and the Assembly would always be free to decide whether or not to request the said opinion.

21. **Mr. Rao** (India) said that the various tribunals had been set up under different treaties to which different States were parties. What was done could not be undone. It had been suggested that judicial links should be established between the tribunals in order to avoid overlapping and to ensure review at higher levels, but it was difficult to see how that could be accomplished, given that not all States appointed representatives to the same bodies.

22. **Mr. Kamto** (Cameroon) said that during the last decade of the twentieth century, the Court had undoubtedly acquired an unprecedented degree of credibility and authority. The surge in its caseload clearly reflected that.

23. The diverse geographic origins of the parties showed that the Court had been able to inspire greater confidence among the States under its jurisdiction and to dispel the suspicions that had clouded its image following the judgements rendered in the *South West Africa* cases in 1966. Nearly all its decisions were models of clarity and precision, as well as outstanding contributions to the science of international law.

24. Nevertheless, justice delayed was justice denied. The delay in settling certain disputes that were before the Court rendered some situations irreversible and allowed others to deteriorate. That was particularly true of disputes involving armed conflict.

25. On various occasions the successive Presidents of the Court had indicated that the procedural delays were as much the fault of the parties as of the Court itself. The Court made constant efforts to improve its working methods in order to save time, and it called on the parties to do likewise. However, States parties to a

proceeding before the Court would certainly await the final decision with greater patience if the provisional measures ordered by the Court were binding on the parties and could therefore be implemented effectively on the ground.

26. He was aware of the difficulties which the Court faced in carrying out its work. The President had reviewed them in detail on other occasions, citing figures. There was a huge gap between the work that States expected the Court to perform and the modest resources at its disposal. He hoped that the Court would be provided with the material and financial means that it required in order to fulfil its mandate under the Charter of the United Nations.

27. That would not, however, solve the problem of the legal force of the provisional measures ordered by the Court. The Court itself had refrained from giving a clear answer on the subject, and legal opinion was divided. He failed to understand, however, how parties to a proceeding could commit their energies and resources, either to support the declaration of such measures or to combat them, if they would have no legal effect or practical consequences. Nor, under those circumstances, did it make sense for the Court to be required to suspend its consideration of all other cases in order to consider requests for the declaration of such measures. It was difficult to explain how the orders of the principal judicial body of the United Nations, which had a mandate to contribute to the maintenance of peace through law, were nothing more than non-binding requests, since there could be no resort to Article 94 of the Charter to enforce them.

28. The President of the Court had correctly stressed the risk of conflicts of international jurisdiction resulting from the proliferation of tribunals. He wondered, however, whether it might not be appropriate to compare the working methods and rules of procedure of the various judicial bodies. The International Court of Justice was the only international tribunal in which the notion of urgency that justified the declaration of provisional measures had no meaning. Even in the International Tribunal of the Law of the Sea, summary judgements were imposed on the parties. Consideration should be given to that issue if and when the Statute of the Court was revised.

29. **Mr. Wood** (United Kingdom) said that it was important not to exaggerate the difficulties arising from the multiplicity of international courts, which in his view were more potential than actual. A more serious problem was forum shopping and the possibility that aspects of the same dispute might be heard before different tribunals. When suggestions were made for new international bodies, consideration should be given to whether they were necessary. In addition, greater confidence should be placed in the wisdom of judges.

30. He shared the concern of the President of the Court at the possibility that specialization might lead to a lack of regard for the basic principles of international law. There were more and more specialists who did not have a deep background in public international law.

31. It was unclear whether it was realistic to expect other tribunals to suspend proceedings and refer questions to an international court. Such a mechanism was likely to be used only on a very exceptional basis.

32. **Mr. Ekedede** (Nigeria) said that he would appreciate clarification of whether the International Criminal Tribunal for Rwanda and the International Tribunal for the Former Yugoslavia, as well as the International Criminal Court, once it was established, might be allowed to refer cases to the International Court of Justice, acting as an appellate jurisdiction, and whether that would involve amending the Court's Statute.

33. Further details should also be provided on why the Court conducted its business only in English and French, since the United Nations had six official languages.

34. **Mr. Tomka** (Slovakia) read out article 6 of the draft articles on State responsibility submitted by the International Law Commission (A/55/10, chap. IV), which provided that the conduct of a person or group of persons should be considered an act of the State if the person or group of persons was acting on the direction or control of the State. The text did not refer to "effective control" or "general control"; however, the International Court of Justice had used the term "effective control" in its judgement in *Nicaragua v. United States of America*, while the International Tribunal for the Former Yugoslavia had, in its recent jurisprudence, referred to "general control". Perhaps the Special Rapporteur could state his views in the matter. It would also be helpful if he would clarify the Court's practice of deciding cases without taking a position on all the legal arguments invoked by the parties.

35. **Mr. Kanu** (Sierra Leone) said that his delegation would support any demand for increased resources for the Court.

36. It had been his understanding that since the Court was the principal judicial body of the United Nations, its judgements and orders were binding on all other judicial bodies. It appeared, however, that that was not the case. Further information would be appreciated.

37. **Mr. Abdalla** (Sudan) agreed that, with the proliferation of international courts, there was a real danger of several courts hearing the same case. Not only would that obscure the necessary clarity of law, but it would divert resources from the already restricted budget of the International Court of Justice. It was a question of political will. Those States which ignored the Court and took their cases to other courts did so for political reasons.

38. **Mr. Guillaume** (President of the International Court of Justice), replying to the points raised, said that the Court's official languages, French and English, were those laid down in Article 39 of its Statute, which was an integral part of the Charter of the United Nations. However, the Court was aware that its work should be widely known, and for that reason its "blue book", giving an account of its functioning and case law, was published in all the official languages of the United Nations. The Court's Internet site included some material in Spanish. The Court could also, under its Statute, authorize the use of a language other than French and English, and would do so at the request of a party provided that party provided the necessary translation and interpretation services. In 1923 the Permanent Court of International Justice had permitted Germany to use German in the *Wimbledon* case, and more recently the present Court had permitted the use of Spanish by Spain in the *Barcelona Traction* case.

39. The representative of Cameroon had mentioned the provisional measures contemplated in Article 41 of the Statute. The question whether such measures were binding had not yet been finally settled but soon might be, because it had been raised in a pending case between Germany and the United States of America.

40. As to whether the Court's authority would be enhanced if it were to deal more fully with the arguments raised by the parties to cases before it, instead of basing its judgements on its own reasoning, it was normal practice for courts to decide only those issues pertinent to a dispute. Moreover, focusing on those issues made it easier to reach a unanimous and reasoned conclusion. For instance, in the *Territorial Dispute* case between Chad and Libya the Court had found, in a judgement of only 32 pages, that the disputed frontier had been fixed in a treaty between France and Libya. The memorials filed in that case ran to 25 volumes. The Court's decision, which was virtually unanimous, had been executed within three months, under the supervision of the Security Council. If it had entered into the history of the matter prior to the conclusion of the treaty in question, such unanimity and speed of execution could hardly have been achieved. The Court had to strike a balance between developing international law and deciding the cases before it.

41. Turning to the question of the Court's authority in relation to other international courts, he said the very multiplicity of those courts was the nub of the problem. There was a positive benefit, in that the law could be developed in a variety of ways. However, the negative side was that the jurisprudence could also vary unaccountably, and in the case of the tribunal for the former Yugoslavia, the difference had been an actual discrepancy with the established case law of the Court. His own preferred solution to that problem had already been given; naturally, it raised problems of its own. The representative of Italy had queried whether the use of the advisory opinion procedure by other international courts would restrict their independence. If that were the solution adopted, the procedure would have to be laid down in advance, and neither the Security Council nor the General Assembly would have any authority to alter the question put by the applicant courts. In any event, the advisory opinion procedure was only intended for exceptional circumstances. It certainly did not appear at present that any other solution was forthcoming to the problem of conflicting jurisprudence.

42. Concerning the question raised by the representative of India, it was for States to effect the proper linkages among the different jurisdictions, not an easy matter since not all States were bound by the same treaties. It was a question of political will on their part.

43. As for the question raised by the representative of Sierra Leone, according to Article 59 of its Statute the Court's decisions had no binding force except between the parties and in respect of a particular case, although the *res judicata* did bind intervening States where the

case turned upon the interpretation of a treaty. However, the reasoning of the Court's decisions wielded considerable moral authority, and he hoped other international courts took due account of it. That did not mean that he was looking for the Court to become an appellate jurisdiction, which would require thoroughgoing changes in the present system.

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

44. **Mr. Troncoso** (Chile), commenting on chapter IV of the report, said there should now be a combined effort to achieve consensus on the draft articles on State responsibility, in the form of a draft convention. A treaty would be binding and would offer maximum legal certainty. Moreover, to be fully effective many of the mechanisms and institutions envisaged in the draft articles would have to be laid down in treaty form. However, he urged a flexible approach and did not exclude the possibility of the draft articles being provisionally adopted by a resolution of the General Assembly, thus providing some guidance to States and to the International Court of Justice and other international tribunals. A solution along those lines should be regarded as a starting point for eventual codification of the topic in the form of a treaty.

45. On the question of obligations *erga omnes*, his delegation would have preferred to maintain the distinction between international delicts and international crimes, which was a valuable contribution to the development of international law. However, in order to achieve consensus it had been appropriate to delete the former draft article 19 and replace it by a new draft article 42 on the consequences of breaches of obligations towards the international community as a whole. That concept had arisen in international law in conjunction with the development of the concept of peremptory norms of general international law or *jus cogens*, culminating in the adoption of articles 53 and 64 of the Vienna Convention on the Law of Treaties. In the *Barcelona Traction* case, the International Court of Justice had distinguished such obligations from those stemming from a relationship with other States in the context of diplomatic protection. The concept of "the international community of States as a whole" should be retained, in order to exclude international organizations and other international actors, such as non-governmental organizations and even individuals. At the same time, the concept of the international community of States appeared to be less exacting than that of "all States", because the obligations towards the former should not necessarily be regarded as peremptory norms for each State individually, provided they were recognized by a broad majority. That ensured that the veto of a minority could not prevent the obligations from arising.

46. Reference should also be made to the other side of the coin of obligations *erga omnes*, namely, the concept of *actio popularis* by States. A consequence of breaching obligations of that kind was that responsibility could be invoked by any State member of the international community, whether or not it was a direct victim of the wrongful act, and that was a development which his delegation would like to see.

47. With regard to the settlement of disputes, a distinction should be drawn between disputes governed by the ordinary rules applicable to an internationally wrongful act entailing State responsibility, and disputes arising from the application or interpretation of rules in any future Convention. The former, in his view, lay outside the scope of State responsibility and were governed by general international law; they should not be covered in the draft articles except in respect of countermeasures. The latter should be covered by a provision for the settlement of disputes arising from the interpretation or application of a future Convention.

48. The limitations now placed in the draft articles on countermeasures seemed appropriate in light of the decentralized character of international society and the power relationships among States. However, countermeasures were effective instruments of law, and the restrictions should not be such as to deprive them of their usefulness. Such measures would not be admissible in the case of regimes which incorporated established mechanisms to be brought into play if their provisions were violated. Where more than one State was entitled to use countermeasures, it was necessary to decide whether the concept of proportionality applied to the measures employed by each State separately against the violator, or to all the countermeasures taken together. Draft article 54 appeared to opt for the latter solution, but the principle should be expressed more clearly in order to avoid future problems of interpretation of what was an extremely significant rule.

49. He endorsed the content of draft article 51. It had been said that in the event of countermeasures derogations would be possible from certain human rights. That was correct, but the draft article also indicated that human rights, even those which were derogable in extreme situations, could not be infringed by way of countermeasures. It would be desirable to include among the obligations which could not be affected by countermeasures those which prohibited the use of extreme political or economic measures such as to endanger the survival of a State.

50. With regard to draft article 53, paragraph 2, he did not believe that the wronged State necessarily had to offer to negotiate in all instances. In very serious cases, such as grave and systematic breaches of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, there might be little room for negotiations, the only licit alternative being a complete cessation of the behaviour in question. Generally speaking, it would be better to place the duty to negotiate on the perpetrator rather than the victim. Finally, he felt a distinction could usefully be drawn between the countermeasures which a State was empowered to adopt because of a wrongful act of another State, and those based on a wrongful act arising from failure by the other State to comply with a decision of an international court. In the former case, the appraisal of the act was made unilaterally; in the latter case, the unfulfilled obligation emanated from a third, impartial source which the disputing parties had undertaken to respect.

51. Turning to the question of diplomatic protection, in chapter V of the report, he said the topic should remain part of general international law, despite the growing capacity of individuals to enforce their rights, such as human rights and the protection of investments, at the international level. There were still cases in which individuals had to have recourse to their own States, rather than international bodies, for the protection of their rights. The rule laid down in the *Nottebohm* case, that there must for that purpose be a genuine and effective link between the individual and the State, should not be understood in absolute terms. Proof of an effective link should normally be deemed sufficient for the purposes of diplomatic protection if the juridical link of nationality reflected a genuine connection with the State seeking to exercise the protection. Thus the rule would be satisfied if an individual had the nationality of the State in question, and proof need only be furnished if, in the event of naturalization or dual nationality, the State from which protection was sought had objected.

52. With respect to whether a State could exercise diplomatic protection on behalf of one of its nationals who maintained an effective link with that State while maintaining weaker links with another State of which the person was also a national, that situation met the requirement that the person must have an effective link with the State exercising diplomatic protection, as well as the criterion of stronger de facto linkage. Thus, the weaker link that such a person might have with another State was insufficient for the exercise, by that State, of diplomatic protection, and therefore would not result in a situation where more than one State could exercise such protection on behalf of the same person. With respect to whether a State could protect one of its nationals with dual nationality against a third State of which the injured person was not a national, without having to prove that there was an effective link between it and that person, it should be assumed, in principle, that either of the two States of nationality could exercise such protection without having to prove such linkage. Such an assumption could be rebutted, but only when the third State impugned the existence of an effective link between the person and the State exercising diplomatic protection.

53. With respect to draft article 8, he said that diplomatic protection of stateless persons was justified in view of the latter's precarious legal situation. Therefore, such a rule was appropriate, provided that the person in question not only was ordinarily a legal resident of the State exercising protection but also had other genuine links with that State, such as those concerning his or her family ties, centre of interests and professional activities. Similar provision should be made for refugees, since they could not expect protection from the State from which they had fled owing to justified fears of persecution.

54. He doubted whether draft article 2 was relevant to the issue of diplomatic protection. The content of that article should be dealt with in relation to humanitarian intervention. His delegation was interested in the conduct of a study on the subject, which was being considered in other United Nations forums with the active participation of his country. He agreed with the Commission that draft article 2 should not be included. In subsequent reports, the Special Rapporteur should discuss the issue of initiative in the exercise of

diplomatic protection, so as to establish whether such protection should be exercised at the initiative of the individual or of the State concerned.

55. He welcomed the work of the Commission and of the Special Rapporteur on the draft articles on unilateral acts of States. Such acts were frequent in international relations and should therefore be regulated by means of a consensual legal instrument. The 1969 Vienna Convention on the Law of Treaties was an important point of departure for such an instrument; some of its provisions, particularly those concerning the capacity of States, persons representing the State, non-retroactivity, invalidity and, to some extent, termination and suspension, could apply mutatis mutandis to the formulation of unilateral acts.

56. He supported the current definition of unilateral acts, as contained in draft article 1, insofar as it expressly included the "intention" of the author and the legal effects which the act must produce. The idea of autonomy, understood as both independence vis-à-vis other pre-existing legal acts and freedom of the State to formulate the act, should also be included. He supported draft article 2 as proposed by the Special Rapporteur. With respect to draft article 3, which concerned persons authorized to formulate unilateral acts on behalf of the State, the corresponding provision of the 1969 Vienna Convention should be applied restrictively with respect to unilateral acts. Thus, while paragraph 1 of draft article 3 was acceptable, paragraph 2, which referred to the practice of States and other circumstances, was problematic owing to the difficulty of proving the existence of such practice or circumstances.

57. Draft article 4 referred to a situation that was perfectly conceivable in international relations, since persons other than those mentioned in draft article 3, paragraph 1, could formulate acts that entailed obligations for their States. In view of the exceptional nature of that provision, the requirement that subsequent confirmation must be given expressly was essential; the draft article should also specify that such confirmation should be made in writing to ensure that it could be proved. Draft article 5, which concerned invalidity of unilateral acts, was generally acceptable. However, the ground for invalidity laid down in paragraph 8 should include requirements similar to those of the 1969 Vienna Convention; otherwise, it could afford States too broad an opportunity to avoid international obligations. That ground for invalidity would be acceptable if it provided that the violation it referred to must be manifest.

58. With respect to reservations to treaties, the Vienna Conventions of 1969, 1978 and 1986 formed an effective basis for their regulation. However, experience had shown that some issues in that area were not adequately covered. That did not mean that the provisions of the Vienna Conventions should be altered; rather, efforts should focus on filling gaps in the existing regime by means of a guide to practice. Any amendments to the existing provisions could result in unnecessary instability or questioning of the current regime.

59. The draft guidelines on reservations to treaties helped to clear up doubts about the nature of certain unilateral statements concerning treaties. A clearer guideline should be introduced on the criteria for distinguishing between a reservation and an interpretative declaration to address the problems that arose in practice. That distinction should hinge on the effects, rather than the names, of such statements. Draft guideline 1.3.1 referred to the "intention of the State or the international organization" as a factor to be taken into account in making that distinction. However, the criteria should be as objective as possible and should refer to the effects of the two types of statements.

60. Late reservations were an interesting concept but should be very strictly regulated in cases in which they were not authorized by the treaty itself. Traditionally, reservations could only be made at the time of expression of consent to be bound, since they altered the legal effects of treaties. While that should continue to be the general rule, it was not a peremptory norm that could not be changed by the will of the parties to a treaty, which were, in a sense, the masters of the legal regime created by the treaty. Therefore, in respect of treaties that made no reference to late reservations, the admissibility of such reservations should be subject to certain conditions, such as unanimous acceptance by the parties. That unanimity requirement would be a sufficient guarantee to prevent possible abuses.

61. **Mr. Niehaus** (Costa Rica) said that the draft articles on State responsibility provisionally adopted on second reading were generally balanced and realistic. They represented a suitable codification of customary law on the subject, while including innovative elements aimed at ensuring that the regime

governing State responsibility was fair in the light of new realities in international relations.

62. He welcomed the distinction, in the draft articles, between the principles applicable to serious breaches of States' obligations to the international community as a whole and the principles applicable to less serious breaches. Likewise, he welcomed the specific distinction between the rights of States affected by serious breaches of obligations to the international community and the rights of States injured by the breach of a bilateral obligation. He also supported the inclusion of draft article 49, since it would allow any State having an interest in the fulfilment of an obligation established for the protection of a collective interest of the international community to invoke the responsibility of a State having committed an internationally wrongful act, and would also allow such a State to seek reparation of the injury suffered by the beneficiaries of the obligation breached. That rule was necessary if the regime governing international responsibility was to apply to the human rights and international humanitarian law provisions having the force of *jus cogens*, and it would strengthen the international regime for the protection of human rights.

63. The provisions on serious breaches of States' obligations to the international community as a whole should concern obligations that were essential for the protection of the international community's fundamental interests. The inclusion, in draft article 41, paragraph 2, of the additional requirement that the failure to fulfil the obligation must be gross and systematic was therefore inappropriate. In principle, the consequences stipulated in draft article 42 and draft article 54, paragraph 2, were acceptable. However, he wondered whether article 42, by establishing the obligation to pay damages, included an unnecessary punitive element. It would be preferable to indicate simply that such breaches entailed an obligation to make reparation in accordance with draft articles 35 et seq. The obligations enumerated in draft article 42, paragraph 2, could be misinterpreted, since they seemed to permit any type of cooperation aimed at ending a breach of a peremptory norm of international law. The paragraph should refer directly to countermeasures, in accordance with draft article 54, paragraph 2, and the commentary should clarify that the rule in no way legitimized the use of force except in full conformity with the letter and spirit of the Charter of the United Nations.

64. With respect to the admissibility of claims, he was pleased that draft article 45 (b), provided that only available and effective local remedies must be exhausted in order to satisfy the rule of exhaustion of local remedies, thereby reflecting, in a concise but effective way, the exceptions to that rule incorporated into customary law. He strongly supported the Commission's decision to limit the use of countermeasures as far as possible and to use them as a means of promoting negotiation, but would have preferred a complete ban on the use of countermeasures, which were unfair because they were effective only in the hands of great Powers, while countries with fewer resources and less influence could be victimized by their abuse. However, since the international community did not yet have a central authority to enforce the fulfilment of States' obligations, the usefulness of countermeasures must be acknowledged. He welcomed the balance achieved in the draft articles between customary law and innovative elements aimed at promoting the progressive development of international law.

65. Draft article 51 should contain an indication of exactly what countermeasures were prohibited. Those should include countermeasures that contravened existing rules applicable to the non-use of force, human rights and international humanitarian law, together with other peremptory norms of international law. Draft article 52 should indicate not only that countermeasures must be commensurate with the injury suffered, but also that they should be designed to induce the State concerned to fulfil the obligation in question. The Commission should consider ways of dealing with States that abused countermeasures or did not impose them in good faith. He supported the requirement, in draft article 53, that States must offer to negotiate before imposing countermeasures. Paragraph 5 of that draft article should be a separate draft article and should stipulate that, when countermeasures were suspended, those which were necessary for preserving the rights of the injured State could be maintained until the court or tribunal imposed provisional measures. He wondered whether the conditions imposed on the use of countermeasures were applicable in the case of breaches of obligations *erga omnes* or peremptory norms of international law. The negotiation requirement should be excluded in those cases.

66. He welcomed the flexibility of draft article 39, since international practice and jurisprudence had not unanimously confirmed the existence of an obligation to pay interest in all cases. Draft article 37, paragraph 2, should be redrafted to incorporate greater flexibility. He doubted the usefulness of the obsolete requirements that States should give satisfaction and guarantees of non-repetition, which were mentioned in draft articles 38 and 30 (b).

67. Although he would prefer that the draft articles should be adopted as a legally binding instrument, he would not object to their adoption as a non-binding declaration of the General Assembly to serve as a guide, in the interest of ensuring that the text would not be abandoned altogether as a result of the obstacles inherent in the negotiation of a binding instrument.

68. **Mr. Winkler** (Austria) said that the time had come to complete the work on State responsibility and to determine what form the draft articles should take. Recent practice showed a tendency to prefer General Assembly resolutions over the traditional form of a legally binding instrument. Although the latter had the advantage of legal security, it could also be unhelpful or even counterproductive in cases where a significant number of States, or States representing major regional legal systems, failed to ratify a given instrument, or where State practice developed in a different direction in the long run.

69. Considering the complexity of issues of State responsibility, negotiations on a legally binding text would undoubtedly be difficult and could endanger the delicate balance achieved in the Commission's current text. Austria was therefore in favour of adopting the draft articles as part of a General Assembly resolution. The circumstances of the adoption of such a resolution, the terminology chosen and the degree of genuine consensus would be of practical consequence for the implementation of the articles. In the resolution, the General Assembly should take note of the articles as a restatement of international law; it should not engage in any redrafting of the articles. Thus, the moral and practical force of the Assembly's endorsement would add to the professional authority of the Commission. Should that course of action be taken, some of the draft articles would have to be adapted and those on dispute settlement would have to be deleted. However, it would always be possible to resort to existing mechanisms for dispute settlement. He supported the comments of the President of the International Court of Justice on that subject.

70. The current version of the draft articles was more streamlined and balanced than previous versions. The elimination of references to certain remote possibilities had made the text more realistic, and therefore more acceptable and more likely to influence policy decisions and State practice. The deletion of some draft articles concerning primary rules of international law also represented an improvement.

71. Among the specific provisions that should be looked at more closely were those dealing with the issue of compensation for moral damage. According to most textbooks on international law, there was no material reparation for moral damage suffered by States, merely satisfaction. However, the draft articles, particularly article 31, paragraph 2, article 37 and article 38, paragraph 1, could be interpreted differently. Article 37, paragraph 2, stated that compensation should cover any "financially assessable damage". Under some legal systems, moral damages were considered financially assessable, so that lawyers from such States would interpret the provision as obligating the responsible State to pay compensation for moral damage. Such an interpretation appeared to be supported by article 38, paragraph 1, which provided for satisfaction insofar as the injury could not be made good by restitution or compensation. A change in international law introducing compensation for moral damage required a deliberate decision; his delegation doubted that such a change was warranted or practical.

72. With regard to serious breaches of essential obligations to the international community, he endorsed the change of direction away from any reference to "international crimes" and towards a more restrictive understanding of obligations *erga omnes*. The defect of the new solution was that, by defining serious breaches in article 41, paragraph 2, as those involving a gross or systematic failure to fulfil the obligation, it provided no objective way to draw the line between serious and other breaches, particularly in the areas of human rights and environmental protection, where the concept was of the most practical significance. Serious breaches entailed obligations for all States, including the obligation in article 42, paragraph 2 (c), to cooperate as far as possible to bring the breach to an end. It was unclear whether that was intended to relate to cooperation in taking countermeasures under article

54 or was a separate obligation, and whether it was subject to limitations.

73. Under article 43 (b) (ii), the notion of "injured State" was extended to "all the States concerned" in certain situations, which presumably covered some *jus cogens* norms and global agreements on environmental protection. It must be clarified, however, whether the provision was also intended to cover international human rights instruments, specifically excluded from the equivalent provision of article 60, paragraph 5, of the 1969 Vienna Convention on the Law of Treaties.

74. One of the Special Rapporteur's achievements had been to reduce the concept of obligations *erga omnes* to a viable, realistic level. The new article 49 provided for invocation of responsibility by States other than the injured State if the obligation breached was owed to a group of States, such as the parties to a multilateral treaty on human rights or the environment, or to the international community as a whole, in situations of *jus cogens* or a very few treaties of a nearly universal character.

75. Under the new article 49, States other than the injured State could request cessation of the internationally wrongful act and guarantees of non-repetition; they could even demand compliance with the obligation of reparation in the interest of the injured State or beneficiaries of the obligation breached. The concept was worth pursuing but required further thought. Since there was no provision for cooperation, various States might formulate inconsistent or even contradictory requests, and compliance with one such request and not others might further complicate the situation. At the least, article 49, paragraph 3, should include a provision on cooperation similar to that contained in article 54, paragraph 3, concerning cooperation in the taking of countermeasures. An even better solution would be to establish an obligation on the part of all States interested in exercising their rights under article 49, paragraph 3, to agree on joint requests.

76. Countermeasures as a means of obtaining compliance for obligations *erga omnes* presented a thorny problem. The draft had evolved considerably since its first reading. As it stood, States other than the injured State were not entitled to take countermeasures, unless requested to do so by the injured State, for non-serious breaches of *erga omnes* obligations. They might call for cessation and non-repetition under article 49, paragraph 2, but could do nothing to induce compliance. He doubted that that was the desired result.

77. In the case of serious breaches as defined in article 41, however, under article 54, paragraph 2, any State might take countermeasures in the interest of the beneficiaries of the obligation breached. The provision was confusing, because it covered two different situations. If the serious breach met the conditions of article 43 (b), any State concerned was an injured State and entitled as such to take countermeasures, but not, as the draft articles stood, to make requests in the interest of the beneficiaries. It would seem inappropriate for such a State to be able to take countermeasures on behalf of the beneficiaries without first having sought compliance on their behalf. To correct the situation, a provision similar to that in article 49, paragraph 2, concerning requests in the interest of the beneficiaries should be included under article 44, paragraph 2.

78. Moreover, as presently drafted, the provision in article 54, paragraph 2, created the impression that in case of a breach under article 41, any State could take countermeasures without first having made requests in accordance with article 49, paragraph 2 (b). It was arguable that such an interpretation was excluded by article 53, paragraph 1, but he felt the connection should be made explicit.

79. The cooperation in taking countermeasures referred to in article 54, paragraph 3, complicated adherence to the principle of proportionality laid down in article 52. A possible solution might be to add a provision to article 53 requiring all States intending to take countermeasures to mutually agree on them before taking them. The article, which concerned conditions relating to resort to countermeasures, needed redrafting in any event, because it referred only to the injured State. Nothing in the draft articles as they stood required a State other than the injured State to negotiate with the responsible State before taking countermeasures.

80. As worded, article 59 on the relation to the Charter of the United Nations was ambiguous. It was not clear whether it referred to the obligation to refrain from the threat or use of force or to the competence of the organs of the United Nations to deal with breaches of an obligation, and, in the latter case, whether it was attempting to establish the United Nations prior right

or parallel right to act. The text did not specify whether a Security Council objection to countermeasures as a threat to peace should prevail. The article should make it clear that countermeasures taken within the United Nations system must also be subject to the rule of proportionality.

81. **Ms. Dascalopoulou-Livada** (Greece) said that the work done on State responsibility in the past year constituted a great leap forward on the most important work of codification the Commission had ever undertaken. She firmly believed that its final form should be that of a convention. A legally binding instrument, even without a wide participation initially, was bound to have far more impact than a declaration.

82. Elimination of the articles on peaceful settlement of disputes had created a vacuum. An instrument dealing with breaches of international obligations demanded a system of dispute settlement, ideally one which provided for compulsory third party settlement with a binding outcome.

83. She regretted that the Commission had struck out article 19, which had been adopted on first reading, on the notion of an international crime committed by a State. The term "international crime" had an intrinsic deterrent value lacking in the term "serious breach of an obligation owed to the international community as a whole". Moreover, the notion of "injured State" in the draft adopted on first reading was clearer and more direct than the notion of a "State entitled to invoke responsibility" used in the current draft in connection with such serious breaches.

84. The Commission had made commendable efforts to fill the gap with new provisions in articles 34, 41, 42, 49 and 54. Although it was unfortunately not clear whether article 41 referred to obligations *erga omnes* as defined by the International Court of Justice in the *Barcelona Traction* case, or to obligations with a *jus cogens* character or to some other more limited circle of actions that would constitute State "crimes", the question was not crucial. The more important article 42, concerning the consequences of serious breaches of obligations to the international community as a whole, should be amended slightly in paragraph 2 (c) to indicate that other States should cooperate with one another as well as with the injured State to bring the breach to an end.

85. She believed that countermeasures constituted an archaic notion, one which favoured more powerful States and thus had no place in an international community based on the sovereign equality of nations. She was particularly troubled by the concept of provisional countermeasures in article 53, paragraph 3, whereby the injured State could dispense with negotiations and proceed immediately to unilateral action. The concept should be eliminated, and article 53, paragraph 4, should be made applicable in all cases. In addition, a mechanism for dispute settlement prior to imposition of countermeasures should be specifically provided for. Moreover, countermeasures should not be taken unilaterally by any State if the organized international community was seized of the matter through the Security Council. A suitable place for a provision to that effect would be in article 54, paragraph 2.

86. With regard to specific articles, the phrase in article 50, paragraph 1, "to comply with its obligations under Part Two" and the similar phrase in article 53, paragraph 1, "to fulfil its obligations under Part Two" should both be replaced by the phrase "to comply with its obligations under international law". Article 39, on interest, appeared to be sufficiently covered under article 37, paragraph 2, which stated that compensation should cover "any financially assessable damage"; a special provision on interest could therefore be dispensed with.

87. Under article 53, countermeasures might not be taken or must be suspended while negotiations were being pursued or if the dispute had been submitted to a court or tribunal with the authority to make binding decisions. However, no such provision had been made for other dispute settlement procedures, such as mediation or conciliation, which, in her view, should also cause the suspension or postponement of countermeasures.

88. She favoured retaining the term "international community as a whole" in article 34, paragraph 1, article 41, paragraph 1, article 43 (b) and article 49, paragraph 1 (b). The concept existed in international law and appeared in the Statute of the International Criminal Court.

89. Of the new topics recommended for inclusion in the long-term programme of work of the Commission, she was most interested in the topic of responsibility of international organizations. The proliferation of international organizations and their activities made the delineation of their responsibility necessary. The effect

of armed conflict on treaties also merited attention. The topic of shared natural resources of States might be suitable for consideration by the Commission as long as it did not overlap with already existing conventions or texts. Overlap could be avoided by taking a quantitative rather than a qualitative approach. The last topic proposed, risks ensuing from fragmentation of international law, although extremely interesting, did not lend itself to codification.

The meeting rose at 1.05 p.m.