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Chairman: Mr. Abdalla (Vice-Chairman) . . . . . (Sudan)
later: Mr. Lelong (Chairman) . . . . . (Haiti)

Contents

01-61324 (E)

In the absence of Mr. Lelong (Haiti), Mr. Abdalla (Sudan), Vice-Chairman, took the Chair.

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

Agenda item 162: Report of the International Law Commission on the work of its fifty-third session (*continued*) (A/56/10)

1. **Mr. Yamada** (Japan), referring to chapter IV of the report (A/56/10) welcomed the fact that, after half a century of dedicated efforts, the Commission had completed a set of draft articles on responsibility of States for internationally wrongful acts. Its Government strongly supported the recommendations made by the Commission in paragraphs 72 and 73 of the report. Although Japan fully appreciated that some Governments might wish to adopt a convention on the topic of State responsibility in the near future, it considered that such action would be premature and therefore believed that the ingenious two-stage approach suggested by the Commission reasonably satisfied both positions. The second-generation articles reflected recent developments in the law on State responsibility, which meant that States, courts and scholars needed time to study and appraise them.

2. His Government supported the overall text and was pleased that all reference to international crime had been expunged from it. His country recognized the existence of serious breaches and of qualitative differences between serious breaches and ordinary breaches and held that States should cooperate to suppress serious breaches. The development of international law in respect of such breaches would safeguard the interests of the international community as a whole. The moot point was whether the legal consequences flowing from serious breaches were different from those stemming from ordinary breaches. Even though Japan was not fully convinced that it was necessary to maintain the category of serious breaches, it understood and accepted the new provisions — which established that States had an obligation of non-recognition, non-assistance and cooperation to bring such breaches to an end — since they represented a delicate compromise among diverging opinions.

3. Although the Commission obviously intended to clarify and limit the scope of the rather vague concept of the "international community as a whole" by introducing the idea of peremptory norms, the latter term had been instituted and developed in the law of treaties; it was not necessarily intended to affect the law of State responsibility. Its inclusion in that law inevitably established a link with the law of treaties and might have unexpected results. While his Government was not opposed to the use of the term "peremptory norm" in article 40, it thought that extra caution was required in defining and developing the content thereof.

4. The introduction of a "without prejudice clause" in article 54 to replace the subrogation of the right of an injured State to take countermeasures was commendable, since it remained within the bounds of codification and progressive development, but did not exclude the possibility that States other than the injured State might at some time in the future play a role in re-establishing the legality of the norms that had been breached.

5. Fortunately the new text clarified the relationship between "damage" and "injury", because article 31, paragraph 2, indicated that "injury" was a wider concept than "damage". Furthermore, articles 42 and 48 and the commentary thereto elucidated the relationship between "injury" in article 31 and the notion of "injured" (as in "an injured State"). Moreover, it was implied that the entitlement of States other than injured States to invoke responsibility was based on a certain kind of affectedness falling short of injury. That notion was more suitable in multilateral legal relations than the concept of "infringement of rights", which had appeared in article 40 the first-reading text, and Japan basically supported that approach.

6. While article 42 was closely modelled on article 60 of the Vienna Convention on the Law of Treaties, it was intended to cover all international wrongful acts arising out of all kinds of obligations and it might therefore prove difficult to distinguish between the integral obligation implicit in article 42, paragraph b (ii) and the obligation established "for protection of a collective interest" referred to in article 48, paragraph 1 (a). Even though a category of integral obligations might be recognized in article 60 of the Vienna Convention, in reality it seemed hard to differentiate between an obligation of an interdependent character and an obligation established for protection of a collective interest, yet the distinction between those two categories of obligations was fundamental, because it determined whether a State was entitled to make claims for full reparation and to take countermeasures

as an injured State. His Government therefore called for caution in defining the notion of an integral obligation.

7. His observations were intended to prompt further reflection on a set of draft articles which would provide a valuable and reliable guide. For that reason, he hoped that the General Assembly would adopt a resolution as recommended by the Commission.

8. **Mr. Popkov** (Belarus) welcomed the completion of the Commission's work on the draft articles on responsibility of States for internationally wrongful acts, which were so important that they should take the form of a convention. To date, State responsibility had been regulated by customary international law and its implementation had therefore proved rather difficult. The strengthening of international legal rules relating to State responsibility through a binding international instrument would undoubtedly enhance the effective application of those rules as a whole. Moreover, the results of the Commission's work should, as a general rule, be embodied in legally binding instruments, as that was the only way in which the Commission could fully play its role in the codification and progressive development of international law. An international conference of plenipotentiaries should therefore be convened in order to secure the widest possible participation of States in the discussion of the articles with a view to concluding a convention on the topic. His delegation also supported the Commission's recommendation that the General Assembly should adopt a resolution on the draft articles.

9. The agreement reached on the need to include provisions on countermeasures in the draft articles would guarantee the genuine implementation of enforcement measures against responsible States and limit the possibility of abuses in that respect. For that reason, his delegation welcomed the approach to countermeasures in Part Three, which emphasized that such measures should be seen not as a means of punishing a State for wrongful conduct, but as a remedy for the infringement of international law.

10. It had been a mistake to disregard the possibility of adopting collective enforcement measures, such as sanctions, against States which had committed internationally wrongful acts, because the application of such measures by international organizations might be an efficacious means of bringing pressure to bear on the responsible State and persuading it to fulfil its obligations to another State, a group of States or the international community.

11. It was important to retain the provisions on dispute settlement, which had been contained in the first-reading text of Part Three, in a draft convention. The inclusion in a draft convention of a special section dealing with dispute settlement procedures was of fundamental importance to the implementation of an international regime of State responsibility, as was the incorporation of provision for mandatory international arbitration proceedings or reference to the International Court of Justice in the event of disputes connected with the adoption of countermeasures. The possibility of any abuses when countermeasures were taken should be precluded; arbitration would offer some safeguards against such abuses. The wary attitude of some States to binding arbitration was motivated by political, rather than legal considerations. The outcome of arbitration was less predictable than the solution of disputes by other means, especially for States in a strong political and economic position. For weaker States, however, the settlement of disputes by arbitration would be the best means of protecting their interests. The lack of any reference whatsoever in the draft articles to binding judicial procedures was a retrograde step running counter to the trend in respect of the settlement of international disputes. The whole question should therefore be reconsidered. Even if the provisions on the binding settlement of disputes did not apply to primary rules, a court or tribunal could solve a significant range of disputes regarding State responsibility.

12. There was no direct contradiction between Part Three of the text adopted on first reading or possible provisions on the mandatory settlement of disputes linked to the application and interpretation of an international convention on the one hand and the principle of the freedom to choose peaceful means of dispute settlement set forth in Article 33 of the Charter of the United Nations on the other.

13. Article 48 was progressive in nature in that it took into account the modern concept of *erga omnes* obligations. His delegation therefore looked forward to further discussion of that issue at a conference of plenipotentiaries, since the maintenance of provisions on that subject in an international instrument would depend on the political will of States.

14. He hoped that the Commission would once again focus its attention on the formulation of international

instruments dealing with the responsibility of international organizations, since article 57 did not cover either the responsibility of Member States for wrongful acts committed by those organizations or the scope or character of their responsibility.

15. *Mr. Lelong took the Chair.*

16. **Mr. Hoffmann** (South Africa), speaking on behalf of the States members of the Southern Africa Development Community (SADC) and referring to chapter IV of the report, said that most of the draft articles on State responsibility were supported by judicial authority and State practice over many years. Moreover, several of the articles had been cited with approval by the International Court of Justice. There were, however, articles dealing with the impact of concepts of *jus cogens* and obligations *erga omnes* which were innovations with less support in State practice.

17. SADC believed that, in principle, the draft articles should be referred to a diplomatic conference for adoption in treaty form. There were, however, special circumstances which made some delay desirable.

18. First, the draft articles covered a wide field and raised a number of complicated issues that required careful consideration by States. Second, most of the articles reflected customary international law and did not require translation into treaty form. Third, it was unlikely that a treaty reflecting the draft articles would be ratified by many States. The treaty would take years to come into force, and that would impair the authority and credibility of the draft articles. Fourth, the draft articles in their final form balanced competing rules, interests, values and principles. There was a real danger that a diplomatic conference, by amending or rejecting some of the articles, might undermine the integrity and coherence of the text.

19. For those reasons, SADC supported the Commission's recommendation that at the current stage, the General Assembly should take note of and annex the text of the draft articles to the resolution to be adopted. The Community believed, however, that the Sixth Committee should express its approval of the Commission's achievement by welcoming the draft articles and commending them to States for their consideration.

20. With regard to some of the more controversial aspects of the draft articles, he said that SADC welcomed the removal of article 19. While individual criminal responsibility for violations of international law had become accepted, to the extent that it formed the basis of the Rome Statute of the International Criminal Court, the international legal order was simply not yet ready for the concept of State criminal responsibility. No international court capable of trying or ordering the punishment of a State existed nor could the *mens rea* of a State, as opposed to that of an individual, be determined. As confirmed by the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Blaskić*, the general principles of criminal law were in practice difficult to apply to a State. It was therefore best to focus on individual criminal responsibility for the time being. The Commission had been wise, however, not to abandon the underlying foundation of article 19, namely that contemporary international law drew a distinction between "ordinary" violations of international law that affected only a particular State or States and more serious breaches that affected all States and the international community as a whole.

21. Article 40 provided that where there had been a serious breach by a State of an obligation arising under a peremptory norm of general international law, all States must cooperate in bringing the breach to an end and withhold recognition of the lawfulness of the situation. In particular, prohibitions on aggression, slavery, genocide, racial discrimination, apartheid, torture and denial of self-determination had a special status in contemporary international law, being norms of *jus cogens* whose violation concerned the international community as a whole. The provisions of article 41 thus had a special significance for SADC, since non-recognition and non-assistance had been the sanctions applied to South Africa's administration of Namibia and the Bantustan States and to Rhodesia.

22. Article 48 wisely gave States the right to invoke responsibility for breaches of obligations owed to the international community as a whole. The provision overruled the notorious decision of the International Court of Justice in the 1966 *South West Africa* case, in which the Court had held that Ethiopia and Liberia were not entitled to a finding that apartheid as applied in Namibia failed to promote the best interests of the people of Namibia, on the grounds that they lacked a legal interest in their welfare. The decision, which had

rightly been condemned by the international community, had been a major setback to the advancement of racial justice in southern Africa. SADC therefore welcomed the Commission's explicit repudiation of the decision, which accorded with the Court's decision in the *Barcelona Traction* case, recognizing that certain community interests affecting important values concerned all States.

23. Although, under article 48, paragraph 2, a non-injured State could claim from the responsible State cessation of the wrongful act, assurances of non-repetition and reparation in the interest of the injured State or other beneficiaries, he wondered whether such a State could go further and take non-forcible countermeasures, either on its own or jointly with others, to bring the breach to an end and secure reparation for the injured State or other beneficiaries. There was clearly support for such action. For example, in 1986 the United States had violated treaty obligations owed to South Africa when it had suspended the landing rights of South African Airways in the United States to compel South Africa to abandon apartheid. Similarly, Great Britain had violated its aviation agreement with Yugoslavia in 1998 as a countermeasure to Yugoslavia's oppression of the Albanians in Kosovo. The practice was, however, still at an early stage and the Commission had wisely refrained from endorsing it. Article 54 left the matter to be resolved by the further development of international law.

24. The whole issue of reprisals or countermeasures was controversial. They had no place in a developed and centralized legal system, but, unfortunately, international law had not yet progressed to that stage. The draft articles recognized the reality but sought to ensure, by subjecting the application of countermeasures to stricter conditions and limitations, that they would not be abused. SADC reluctantly agreed that currently that was the only course that could be adopted.

25. Article 8, which attributed responsibility to a State for the conduct of persons if they were under the direction or control of that State in carrying out their actions, was of particular importance. In its commentary, the Commission rightly pointed out that whether a State exercised control over the conduct of a given person was a question of fact, to be determined in each case. It had therefore been unnecessary for the International Criminal Tribunal for the Former Yugoslavia to disagree, in its ruling in the *Prosecutor v. Tadić* case, with the decision by the International Court of Justice in the Nicaragua case.

26. SADC considered that the commentaries to the draft articles constituted a major contribution to the literature on State responsibility, being readable, informative and practical. Tribute was due to the Special Rapporteur, who had struck a happy balance between the brevity of other commentaries and the prolixity of the Ago commentaries on the articles adopted on first reading.

27. **Mr. Lammers** (Netherlands), referring to the form that should be chosen to give the articles maximum effectiveness, said his delegation fully endorsed the Commission's recommendation (A/56/10, para. 72), that the General Assembly should take note of the draft articles in a resolution. As for the recommendation (para. 73), that an international conference might be convened at a later stage with a view to concluding a convention, his delegation, while not excluding the possibility altogether, was as it had indicated in its written observations on previous drafts, doubtful about the usefulness of a convention. There was the risk of jeopardizing much of the *acquis* in the text of the articles, the danger that ratifications would not be forthcoming and the intricacies surrounding the inclusion in the articles of a dispute settlement mechanism. On the other hand, a General Assembly resolution, taking note of — or, preferably, "welcoming" — the articles would have no such disadvantages. After all, the draft articles largely reflected customary international law, so not much would be added to the development of international law by incorporating them in a convention.

28. As far as the Commission was concerned, the text of the draft articles was final and he had no intention of proposing any amendments. He noted, however, that, although — as his Government had already noted in its written observations — the replacement of the concept of "international crime" by the concept of "serious breaches of obligations under peremptory norms of general international law" might have been necessary in order to reach consensus within the Commission, it was, nonetheless, regrettable that the list of examples of international crimes contained in the previous draft had also been abandoned. All that was left was a framework which would need to be filled in by case law and development of the law in general. Furthermore, while recognizing that the introduction of

the concept of "serious breaches" was an acceptable compromise, the specific legal consequences of the commission of such a breach were still insufficiently elaborated, compared with the consequences included in the draft articles as adopted on first reading. His delegation would have welcomed a provision to the effect that in the event of serious breaches the legal consequences for the responsible State would be correspondingly serious.

29. He commended the fact that the scope of the entitlement of a State other than the injured State to claim performance of the obligation of reparation in the interest of the injured State or other beneficiaries had been extended to reparation for serious breaches, if his interpretation of the amendment to article 48, paragraph 2 (b), which had replaced the previous wording with a reference to the "preceding articles", was correct.

30. As for the legal regime of countermeasures, the draft had struck the right balance between the use of countermeasures and the provision of appropriate safeguards against their misuse.

31. Although his delegation had some reservations with regard to the final text of the draft articles, overall it considered that the finalization of the text must be seen as a landmark in the codification and further development of international law, on which he congratulated the Commission and its last Special Rapporteur on State responsibility. On their adoption by the General Assembly, the articles would undoubtedly be a useful mechanism in improving international relations between States at both the bilateral and the multilateral level.

32. **Mr. Al-Baharna** (Bahrain) referring to chapter IV of the report, said that the draft articles on State responsibility made a significant contribution to the progressive development and codification of international law. With regard to the concept of serious breaches of obligations to the international community as a whole, he considered that its acceptance had been the price paid for the agreement to abandon the concept of international crimes, appearing in former article 19, which had been criticized by many Governments as being inconsistent with current State practice and jurisprudence. That had been a compromise, but subsequently the Commission had decided that the former paragraph 1 of draft article 42, which had dealt with damages reflecting the gravity of the breach, should be deleted and that the concept of serious breaches of obligations should be replaced by the concept of serious breaches of peremptory norms of international law.

33. Different views had been expressed within the Commission about the provisions concerning countermeasures. Some had considered that the concept was an undeniable part of international law, while others thought that the chapter on countermeasures should be deleted, inasmuch as the regime of countermeasures under customary international law was only partly developed. It had finally been decided to retain the chapter on countermeasures but to delete the previous article 54, which had dealt with countermeasures by States other than the injured State. On the other hand, the current article 54, which dealt only with lawful measures taken by States, had been reformulated in the form of a saving clause.

34. With regard to dispute settlement procedures, it had ultimately been decided merely to draw the General Assembly's attention to the dispute settlement mechanism in Part Three of the draft articles adopted on first reading. Should the General Assembly decide to elaborate a convention, therefore, it would have to decide what form provisions for dispute settlement would take. His delegation had been in favour of including such provisions in the draft articles, especially since the dispute settlement mechanism would effectively prevent any abuse of countermeasures. Failing that, he endorsed the Commission's recommendation to the General Assembly, but the draft articles would be incomplete unless they contained a dispute settlement procedure. The draft articles should take the form of an international convention, for the following reasons: first, like the 1969 Vienna Convention on the Law of Treaties, the principles of State responsibility, which comprised an important part of the structure of international law as a whole, deserved to be embodied in the solid and binding form of an international convention; and, secondly, codifying the rules of State responsibility in the form of a convention would ensure their stability, continuity, reliability and binding force.

35. Commenting on specific articles, he observed that in the new articles 40 and 41, the concept of a serious breach by a State of an essential obligation owed to the international community as a whole had been reformulated as "a serious breach by a State of an

obligation arising under a peremptory norm of general international law". Those articles were thus much weaker than the articles they replaced, in which the obligation had been defined as being essential for the protection of the fundamental interests of the international community. The removal from article 40, paragraph 2, of the phrase "risking substantial harm to the fundamental interests protected thereby", contained in the former article 41, diluted the effect of that paragraph and rendered the obligations under it incomplete. The new article 41 likewise watered down the stringent requirements of the former article 42, and did not provide for the payment of "damages reflecting the gravity of the breach", a provision which had appeared in paragraph 1 of the latter article. The result was to deprive the injured State of its entitlement to special damages reflecting the gravity of the breach. Since other consequences of a serious breach, spelt out in article 41, paragraphs 1 and 2, dealt only with the obligations of States other than the responsible or the injured State, no remedies were available to the injured State as a consequence of the serious breaches in question. He therefore preferred the former articles 41 and 42.

36. With regard to Part Two, chapter III, of the draft articles as a whole, he agreed with the remarks of the Special Rapporteur, in paragraph 49 of his fourth report, about the concept of peremptory norms of international law. Despite the Special Rapporteur's observation that only a few rules of international law could be considered peremptory, or give rise to obligations to the international community, the Commission had decided, in articles 40 and 41, to adopt the concept of peremptory norms in preference to the much more widely accepted principle of obligations owed to the international community as a whole.

37. With regard to Part Three, chapter I, of the draft articles, article 42 was a great improvement on its predecessor, the former article 43. It drew a clear distinction between the injured State to which the obligation breached was directly owed, and other States or the international community as a whole. However, it seemed to be unduly crowded with a number of provisions which could give rise to misunderstanding. In the new article 43, it would have been preferable to retain the title of the former article 44 (*Invocation of responsibility by an injured State*) because the act of giving notice of a claim should logically follow the act of invoking responsibility. That title would also be consistent with the title of article 48. In article 45, paragraph (b), the words "to be" should be omitted.

38. According to paragraph (2) of the commentary, article 48 was based on the principle that any State, other than an injured State, had the right to invoke the responsibility of another State if the obligation breached was owed to a group of States to which it belonged and was established to protect the collective interests of that group. Despite the ruling of the International Court of Justice in the *Barcelona Traction* case that "all States can be held to have a legal interest" in the performance of obligations towards the international community as a whole, article 48 did not mention the interest of the international community. He therefore suggested that the words "and is established for the protection of its collective interest" should be added at the end of paragraph 1 (b). In paragraph 2 (b), he supported the inclusion of the phrase "or of the beneficiaries of the obligation breached", which was in line with the provision in article 33, paragraph 2, extending the rights under Part Two of the draft "to any person or entity other than a State". In the *South-West Africa* cases, the International Court of Justice had found that the injury complained of was suffered by the people. Article 48, although controversial, was a useful and important provision. As stated in paragraph (12) of the commentary to that article, a claim made in the interest of the injured State, if any, or of the beneficiaries of the obligation breached, involved a measure of progressive development.

39. He approved of Part Three, chapter II, which set out the necessary conditions for mitigating the harsh effects of countermeasures. Article 49, paragraph 2, used the term "non-performance" instead of "suspension of performance", which he preferred, and which had featured in the former article 50. However, the positive wording "to permit the resumption of performance" in paragraph 3 was preferable to the negative "not to prevent the resumption" in the latter article. Article 49, based on the finding by the International Court of Justice in the *Gabčikovo-Nagymaros Project* case that a countermeasure must be taken in response to a previous international wrongful act of another State, and must be directed against that State was broadly acceptable. So was article 50, which provided further guarantees and limitations on countermeasures and transferred the provision concerning the obligations of States taking

countermeasures in respect of the inviolability of diplomatic or consular agents from paragraph 1 to a more suitable place in paragraph 2. Article 51, based on the principle enunciated in the *Gabčikovo-Nagymaros Project* case that the effects of a countermeasure must be commensurate with the injury suffered, was well balanced. The procedural conditions laid down in article 52, paragraph 1, were consistent with general practice, as supported by the Tribunal in the *Air Services* arbitration. However, the provision in paragraph 2 allowing the injured State to "take such urgent countermeasures as are necessary to preserve its rights" was too broad and arbitrary, since it would be left to the injured State itself to define what was meant by urgent countermeasures. There was a risk of the injured State taking ordinary countermeasures and calling them "urgent", while complying with its obligations under the article to notify and offer to negotiate. Consequently, he could not accept paragraph 2 unless it was redrafted to spell out which urgent measures could be taken. The paragraph could be reformulated to read: "Notwithstanding paragraph 1 (b), the injured State may, on a temporary basis, take such urgent measures as freezing bank accounts and assets of the responsible State, as may be necessary to preserve its rights." In paragraph 3, the word "may" should be replaced by "shall", to make the provision stronger. As for paragraph 4, since the draft contained no separate dispute settlement procedure he suggested that the words "in accordance with the provisions of article 50, paragraph 2 (a)" should be added at the end of the paragraph. Article 53 provided a further safeguard against the indefinite continuation of countermeasures. It would be preferable to delete article 54, which might lead to confusion about the difference between "lawful measures" and countermeasures.

40. Articles 55 to 59 were generally acceptable. He welcomed especially article 58, confirming that the individual responsibility of State officials for crimes against international law was distinct from the issue of State responsibility. As explained in paragraph (3) of the commentary, that principle was currently reflected in article 25, paragraph 4, of the Statute of the International Criminal Court.

41. **Mr. Perez Giralda** (Spain), welcoming the conclusion of the Commission's work on the topic of State responsibility and the signal contribution of its Special Rapporteur, endorsed its recommendation (A/56/10, para. 72) that the General Assembly should in a resolution take note of the draft articles and annex the text of the articles to the resolution. International law should contain a binding instrument on State responsibility, even though the discussions in the Committee at its previous sessions had not produced a consensus for one. The Commission had now made a realistic proposal, and it could be anticipated that the practice of States and of the international courts would shape the rules governing the topic and enable States to negotiate their content, so that they could be made binding in future. The draft adopted on second reading was a means to that end, representing the minimum common denominator so far agreed among Governments. His own delegation was anxious to contribute to a consensus, even though some of the preferences it had so far expressed were not reflected in the current draft: for instance, there was no special regime of responsibility for the most serious breaches of international law, nor was there any dispute settlement mechanism, which was especially relevant to countermeasures.

42. Referring to chapter VI of the Commission's report, he welcomed the proposals of the Special Rapporteur on reservations to treaties, especially with regard to the functions of depositaries. There was no reason why the guidelines produced by the Commission should depart from the provisions of the Vienna Convention on the Law of Treaties, especially its article 77.

43. Turning to chapter VII, he expressed approval of the remarks of the Special Rapporteur in his second report on diplomatic protection, concerning the legal regime for the exhaustion of local remedies, which treated it as simply a requirement for the admissibility of international claims. Admittedly, that approach was not entirely consistent with the solution adopted in the draft on State responsibility, article 44 of which referred to the rule solely in the context of admissibility. As for the question of continuous nationality, he favoured retaining the traditional rule, with certain exceptions.

44. With regard to chapter VIII, he considered that the fourth report on unilateral acts of States was a valuable contribution to the examination of the topic, which was a difficult one, as evidenced by the frequent discussions in the Commission about the feasibility of codifying it and the problems which States seemed to have in identifying their practice in that area. It would

be desirable to concentrate on certain typical unilateral acts and the legal regime which should apply to each. The elements of interpretation which had to be brought to bear in determining whether an act or omission constituted a unilateral act would themselves play a role in its classification. That process should precede the process of interpreting the specific character of an act already identified as unilateral, but the content and scope of which were doubtful. He shared the inclination of the Special Rapporteur to adopt the rules of interpretation contained in the Vienna Convention on the Law of Treaties, which emphasized the intentions of States.

45. **Mr. Bliss** (Australia) said the completion of the Commission's work on State responsibility was a monumental achievement. Since the time when it began work on the topic, public international law had expanded beyond all expectation, yet its structure still rested on the key foundation of State responsibility, on which its continued development would also rely. The commentary to the new set of draft articles was clear and useful. While each of the Special Rapporteurs had made their contribution to the work, the contribution of the current Special Rapporteur, was outstanding and had enabled the Commission finally to adopt the draft articles and their accompanying commentary. The draft had also benefited from the comments by States on previous versions, resulting in a final text more acceptable to States than would otherwise be the case.

46. He welcomed the use in article 42 of the phrase "the international community as a whole", which was sufficiently broad to cover not only States, but also international organizations and other persons and entities. He was also pleased that the concept of an "integral obligation" which had figured in the earlier draft, had been replaced by the definition of a breach of an obligation found in paragraph (b) (ii) of that article. He likewise welcomed the definition of injury in article 31, paragraph 2, which included but was not limited to damage, thereby allowing for a range of potential types of damage.

47. He approved of the inclusion in the text of a countermeasures regime. Australia had argued that although it was important to ensure that countermeasures were not abused, the regime should not be unduly restrictive. Article 53, paragraph 4, provided an important caveat in that respect.

48. Article 10 had not been amended to reflect his country's concern that the link envisaged in the draft between the conduct of an insurrectional movement and the responsibility of a new State which emerged from such a movement was too open-ended. It would have been useful to have further clarification of the degree of proximity, or the time frame required, for the conduct of the movement to be considered an act of the new State.

49. He welcomed the Commission's work on defining the "injured State" and the "other State", and its amendments in article 48, paragraph (1) (a), to the term "collective interest". The overall balance of article 48 was satisfactory, but the phrase "beneficiaries of the obligation" in paragraph 2 (b) might create some uncertainty concerning the scope of that article in relation to the provision in article 54 for measures taken by States other than the injured State.

50. One delegation had noted that the draft articles were not perfect; however, any form that made them more acceptable from one perspective would inevitably have made them less so from another. Clearly, a process of accommodation and compromise had been required within the Commission, and the Committee should take a similarly constructive approach. He endorsed the recommendation that the General Assembly should take note of the draft articles in a resolution and annex them thereto (A/56/10, para. 72); the Assembly should also welcome their completion. Such a resolution, to the extent that it was neutral as to the content of the draft articles, should not be controversial and would be a fitting and timely acknowledgement of the Commission's major achievement.

51. However, he did not support the Commission's further recommendation that the Assembly should consider, at a later stage, the possibility of convening a conference with a view to concluding a convention on the topic. While that might be seen as a modest outcome after fifty years of work, his delegation believed that a diplomatic conference would inevitably lead to painstaking renegotiation of each article, whereas the adoption of a declaration would ensure the integrity of the draft articles and give them a universality of application unlikely to be achieved if an attempt were made to incorporate them into a convention. Such an approach would render the draft articles more, rather than less, relevant, persuasive and prominent and would not preclude international

tribunals from referring to them as, in fact, the International Court of Justice had already done. It would be preferable for the General Assembly to adopt a resolution that would enable it to return to the issue in 4 or 5 years' time, at which point it could consider whether any further action could be taken.

52. Lastly, he did not believe that the articles, whatever form they took, should contain a dispute settlement provision. If they were adopted as a non-binding code or declaration, there would be no need for such a provision, while if they were adopted as a treaty, the latter's application would be so broad that a general provision on compulsory dispute resolution could not be realistically concluded. Reliance should rather be placed on existing dispute settlement provisions, including application of the Optional Clause under the Statute of the International Court of Justice and recourse to other relevant tribunals, such as the compulsory jurisdiction of the International Tribunal for the Law of the Sea.

53. **Mr. Chik** (Singapore) said that the topics on the Commission's agenda took on even greater significance in the light of the destabilizing events of September 2001.

54. He welcomed the measures taken to simplify the language of the report by relegating explanations and detailed clarifications to the commentary, which would provide authoritative guidance in interpretation. The many cross-references to old and new legal materials and decisions of the International Court of Justice and the continued consultations with Governments and other organizations were a sign of mutual cooperation between law-making bodies that would lead to an increased codification and recognition of, and adherence to, international law.

55. With regard to chapter IV of the report, he congratulated the Commission and all the Special Rapporteurs and, in particular, Mr. James Crawford, on their milestone achievement on the important and sensitive topic of State responsibility. Their realistic expectations, and the acknowledgement that the Commission's work was part of the development of international law, had produced an instrument that would be acceptable to States. He endorsed deferment of the provisions on a dispute settlement mechanism, which were more suited to consideration in the context of a treaty, and the emphasis on peaceful settlement of disputes and on assurances and guarantees (article 30 (b)), which were valuable to the restoration and maintenance of good relations between States. The inclusive approach to a definition of injury would help to resolve problems associated with that elusive, shifting concept. Lastly, the approach to the controversial issue of countermeasures and, in particular, the saving clause for lawful measures taken by States other than an injured State, a matter not yet ripe for codification, were generally acceptable; the effort to avoid premature drafting in potentially destabilizing areas of law was laudable.

56. With reference to chapter V, he was pleased to note that the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary harm from hazardous activities) focused on the practical issue of risk management as an aspect of prevention. The emphasis on good faith cooperation and consultation among States showed a sensitivity to the problems that many countries faced in controlling transboundary harm emanating from their territories and concentrated on problem-solving rather than finger-pointing. He thanked all the Special Rapporteurs and, in particular, Mr. Rao, for their work on the text.

57. Concerning chapter VI, the late formulation of reservations to treaties (draft guideline 2.3.1) was a relatively new practice developing out of the need of some States or organizations to change certain aspects of their rights and obligations in relation to a convention to which they were parties. His delegation did not believe that tolerance of the practice would lead to its abuse; late formulations would be made only in light of changed needs or circumstances or to remedy an oversight. The practice of requiring unanimous non-objection from parties notified of the reservation would deter flagrant or frequent late filings and would be preferable to forcing States to take the more drastic measure of denouncing the convention in question.

58. He could accept the use of the term "objections" — which in the Vienna Convention meant opposition to the content of a reservation — to mean opposition to the procedure of a reservation, but felt that use of an alternative term such as "rejection" or "refusal" might avoid confusion. Depositories should communicate late reservations, together with a notice of their lateness and a reference to draft guidelines 2.3.1 to 2.3.3; if there was no objection to the content or late formulation of the reservation within the stipulated period, it could be formally filed. He hoped

that States and organizations would not make objections routinely on the sole ground of late formulation.

59. **Mr. Westdickenberg** (Germany), commenting on chapter IV of the report, said that in the light of the remaining areas of controversy, it was all the more admirable that the Commission had succeeded in finalizing the draft articles on State responsibility. Many States were still in the process of analysing the draft; he therefore suggested that the topic of State responsibility should be placed on the agenda of the General Assembly at its fifty-seventh session and that interested States should be invited to communicate their views.

60. He was glad that the term "international crimes", which would have created unwarranted confusion between States' responsibility to provide restitution or reparation and individuals' personal responsibility for their actions, had been replaced by "serious breaches of obligations under peremptory norms of general international law". The prohibition of torture and aggression, and the basic rules of international humanitarian law, mentioned in the commentary, were rules of paramount importance that merited the special treatment afforded them in articles 40 and 41. He also welcomed deletion of the suggestion that the gravity of the breach should be reflected in the damages due; that notion might have led to the awarding of punitive damages, which were alien to the purpose of reparation. It would be preferable if the rules were to become an annex to a General Assembly resolution rather than an international convention in order to ensure their broadest possible acceptance and avoid the danger of unravelling the text.

61. With regard to chapter V, transboundary pollution was not a new problem; however, with the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law, the Commission had entered uncharted territory, since international liability had traditionally been based on the wrongfulness of an act or conduct under international law. The implications of the new rules were potentially very broad and it would be difficult to achieve an equitable balance of interests; it would therefore be necessary to continue discussion of the draft on the broadest possible basis in order to ensure that all relevant interests were adequately taken into account.

62. In relation to chapter VI, he noted that the exclusion of reservations to a multilateral treaty was invariably aimed at preserving the integrity of the instrument, perceived as an indivisible whole; while that approach could be somewhat inflexible, it could also ensure the integrity of a complicated system of rules and values, particularly in fields such as human rights, where the international community's commitment to universality and indivisibility should not be eroded. The recent trend towards reservations that subjected a treaty system as a whole to another system of norms and values which was considered superior in rank by the State making the reservation tended to deprive a multilateral convention of much of its value, which, after all, consisted in defining common standards. A way must be found to reconcile national legal systems with obligations under international law.

63. Concerning chapter VII, he commended the open-mindedness with which the Special Rapporteur on Diplomatic Protection had addressed possible new solutions to an old problem. There were good reasons, rooted in both doctrine and practice, for the old rule that if a person suffered an injury through a foreign State's breach of international law and subsequently changed his citizenship, only the State whose nationality he had held at the time of the injury was entitled to exercise diplomatic protection; that rule allowed the State in question to assert its own rights and prevented "protector shopping" by injured individuals. However, there were cases where application of that rule might lead to unwarranted hardship, such as those involving an involuntary loss of nationality through State succession, marriage or adoption.

64. The Special Rapporteur and the Commission should also be commended on their treatment of the exhaustion of local remedies; the guiding criterion for "remedy" in that context should be that it was sufficient and available to everybody, thereby excluding purely discretionary remedies. It did not matter whether the authority from which the individual expected a ruling was judicial or administrative. Local remedies applied only in the case of claims made by a State because one of its nationals had been injured rather than in pursuit of reparation for an injury done to the State itself; making that distinction would be a difficult, but not an impossible, task.

65. With reference to chapter VIII, he felt that in the light of the vast variety of possible unilateral acts of States, international law might best be served by listing the more-frequently-encountered such acts and the rules by which they were governed.

Statement by the President of the International Court of Justice

66. **Mr. Guillaume** (President of the International Court of Justice) said that the situation with regard to the proliferation of international judicial bodies and its impact on international law had not improved since the previous year and indeed, as the swordfish stocks dispute between Chile and the European Union and the Southern Bluefin Tuna cases had shown, the risks of "forum shopping" had become worse.

67. The risks of conflicting case law had also grown and the Court had just been seized of an application by Liechtenstein instituting proceedings against Germany in respect of a case, certain aspects of which had been heard and decided by the European Court of Human Rights.

68. The proliferation of international judicial bodies could endanger the unity of international law. International lawmakers and judges should exercise great caution in that field in the future, although such caution might not suffice and procedures would have to be established to enable the Court to rule on questions submitted to it for a preliminary ruling by specialized international courts.

69. On 16 March 2001 the Court had decided a territorial dispute between Qatar and Bahrain concerning sovereignty over certain islands and the maritime delimitation to be established between the two States.

70. Delimitation of maritime areas had long been considered a secondary question involving the fixing of the boundaries between narrow territorial areas. In the past 30 years, however, it had become one of the main territorial issues, owing to technological developments and the extension of State jurisdiction to the high seas.

71. In making such delimitations, two methods had been recommended. Some had looked to the "equidistance method", pursuant to which the maritime boundary between States must follow the median line every point of which was equidistant from the nearest points on the coasts. Others had pointed out that, while the equidistance method was acceptable for the delimitation of the territorial seas between States with opposite coasts which were comparable in length, it could yield inequitable results in other circumstances. Accordingly, they had advocated maritime delimitations based on equitable principles or producing equitable results.

72. The boundary between the territorial sea and the high seas had traditionally been fixed at three nautical miles from the coasts (currently often increased to 12 nautical miles). The question, however, was which coasts should be taken into account in fixing the boundary in order to ensure appropriate delimitation. There were two methods for identifying the starting-points of the territorial sea: the normal baseline method and the straight baseline method.

73. The normal baseline ordinarily used for measuring the breadth of the territorial sea was the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State. Nevertheless, the Court, in its Judgment of 18 December 1951 in the *Anglo-Norwegian Fisheries* case, had preferred the straight baseline method to the traditional one. While noting that the normal baseline method could be applied without difficulty to an ordinary coast which was not too jagged, the Court had added that where a coast was deeply indented and cut into or was bordered by an archipelago, the baseline became independent of the low-water mark and could only be determined by means of a geometrical construction. For those situations the Court had adopted the straight baseline method, which had later been incorporated into the 1958 Convention on the Territorial Sea and the Contiguous Zone and then into article 7, paragraph 1, of the United Nations Convention on the Law of the Sea. In its Judgment of 16 March 2001, the Court had had its first opportunity to apply those provisions, which it deemed to be part of customary law.

74. Bahrain had contended that the various maritime features lying off the coast of its main islands could be regarded as similar to a fringe of islands constituting a whole with the mainland. It had concluded that it was entitled to draw straight baselines connecting those features.

75. The Court had disagreed with Bahrain on that point. While recognizing that the maritime features in question were part of Bahrain's overall geographical

configuration, it had observed that they were not part of a deeply indented coast, that they could not be characterized as a fringe of islands, and that the situation was therefore different from the one described in the United Nations Convention on the Law of the Sea. It had concluded that Bahrain was not entitled to draw straight baselines and that, accordingly, the equidistance line between Bahrain and Qatar must be drawn by reference to normal baselines. Bahrain's internal waters had been reduced accordingly.

76. In addition to clarifying the rules for fixing the external limits of territorial seas, the Judgment also addressed the question of the delimitation of the territorial waters of neighbouring States. That question was governed by customary law as codified by the Geneva Conventions and the United Nations Convention on the Law of the Sea. Article 15 of that Convention established the principle that territorial seas must be delimited in accordance with the equidistance method, but added that the equidistance provision did not apply where special circumstances made it necessary to delimit the territorial seas of the two States in a different way.

77. In the case between Qatar and Bahrain, the Court, confirming its case law, had refused to apply the method of mainland-to-mainland calculation in drawing the equidistance line. It had identified each of the maritime features having an effect upon the course of the equidistance line and had fixed that line by reference to the appropriate baselines and basepoints. To that end, it had identified the islands and islets under the sovereignty of each of the States.

78. A new difficulty had arisen, however, as a result of the presence in the area of low-tide elevations. As defined by the United Nations Convention on the Law of the Sea, a low-tide elevation was a naturally formed area of land which was surrounded by and above water at low tide, but submerged at high tide. Pursuant to the Convention, where a low-tide elevation was situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation might be used as the baseline for measuring the breadth of the territorial sea. Where a low-tide elevation was wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it had no territorial sea of its own.

79. In the case between Qatar and Bahrain, certain low-tide elevations were situated in the area where the territorial seas of the two States overlapped. In principle, therefore, each of them had a right to use the low-water line of those low-tide elevations for measuring the breadth of its territorial sea. For the purposes of delimitation, the competing rights of the two States had appeared to cancel each other out. Nevertheless, Bahrain had contended that it had taken possession of the majority of the low-tide elevations, which had thus come under its sovereignty, and that it alone was permitted to take them into account for purposes of fixing the equidistance line.

80. The Court had not accepted that argument. It had held that a State could not acquire sovereignty by appropriation over a low-tide elevation situated within the limits of its territorial sea where the same low-tide elevation was also situated within the limits of the territorial sea of another State. Accordingly, it had concluded that those low-tide elevations could not be used for determining the basepoints and drawing equidistance lines.

81. With regard to the delimitation of the continental shelf and the exclusive economic zone, the Court had also established a case law which was now authoritative. In the *North Sea Continental Shelf* case (1969), the Court had initially inclined towards a delimitation of that shelf in accordance with equitable principles, taking account of all the relevant circumstances. The same approach had been adopted in subsequent cases. Those decisions had influenced the solution adopted by the United Nations Conference on the Law of the Sea, as reflected in articles 74 and 83 of the United Nations Convention. At that stage, however, case law and treaty law had become unpredictable, prompting the Court to develop its case law in the direction of greater certainty.

82. A new stage had been reached in the Judgment rendered on 14 June 1993 in the case between Denmark and Norway concerning the maritime delimitation in the area between Greenland and Jan Mayen. In that case it had been proposed to delimit the continental shelf in accordance with the 1958 Geneva Convention on the Continental Shelf (equidistance/special circumstances) and the fishing zones in accordance with customary law (equitable solution, having regard to relevant factors). The Court had stressed that, in both cases, an equitable result must be reached. To that end, it had held that it was appropriate to start from the

equidistance line, subsequently making all the necessary corrections to it, having regard to the relevant factors. Lastly, it had stated that those factors were comparable to the special circumstances envisaged by the 1958 Convention. On that basis, the Court had arrived at a single delimitation line for the continental shelf and the fishing zone, and had drawn that line to the east of the median line.

83. The solution arrived at in the case between Denmark and Norway had been applicable from then on with regard to the delimitation of the continental shelf and the fishing zones of States with opposite coasts. It had remained to be seen whether the same would apply in the case of adjacent coasts.

84. The Court had ruled affirmatively on the matter in the case between Qatar and Bahrain, again deciding that an equidistance line should first be provisionally drawn, consideration then be given to whether there were relevant circumstances leading to an adjustment of that line. In the event, it had ruled out a number of circumstances invoked by the parties and had retained only one, concerning a maritime feature known as Fasht al Jarim, which constituted a projection of Bahrain's coastline in the Gulf area. The Court had decided that, given the circumstances of the case, equity required that Fasht al Jarim should have no effect in determining the boundary line.

85. It was encouraging to note that the law of maritime delimitations, by means of the developments in the Court's case law which he had described, had reached a new level of unity and certainty, while maintaining the necessary flexibility. In all cases the Court must, as States also did, first determine provisionally the equidistance line and then ask whether there were special circumstances requiring that line to be adjusted with a view to achieving equitable results. In the case between Qatar and Bahrain, the parties had thanked the Court for managing to reconcile law and equity.

The meeting rose at 1 p.m.