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Chairman: Mr. Lelong . . . . . (Haiti)
later: Mr. Marschik (Vice-Chairman) . . . . . (Austria)

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

Agenda item 162: Report of the International Law Commission on the work of its fifty-third session (*continued*) (A/56/10 and Corr.1)

1. **Mr. Biato** (Brazil) said that the significance of the Commission's completion of its work on responsibility of States for internationally wrongful acts could hardly be overstated. The draft articles, which provided a guideline for the continuing development of international law, sought to occupy the middle ground in the debate concerning the nature of obligations that accrued between States in response to the growing need for accountability to the international community as a whole. It was commendable that the Commission's work had taken account of the most recent comments by States, thus earning the draft widespread support.

2. On the question whether countermeasures should have a place in the draft articles, his delegation shared the doubts expressed by others, since State responsibility should surely be limited to reparation and the cessation of wrongful acts. It must be acknowledged, however, that, as reflected in article 22 and confirmed by the International Court of Justice in the *Gabčikovo-Nagymaros Project* case, lawful countermeasures precluded wrongfulness. If recourse to the practice could not be totally ruled out, therefore, the crucial issue remained of how injured States could defend their rights against the risk of abuse if adequate guarantees were not given. While there were necessarily limits to the degree of regulation that was possible in the absence of internationally sanctioned procedures and mechanisms, greater delimitation could nonetheless be achieved. His delegation attached great importance to the criteria for avoiding abuse, including the principle of proportionality. The omission of previous references to the right of a State other than the injured State to take countermeasures was also welcome. On the other hand, the criteria concerning urgency and the absence of good faith in resort to dispute settlement remained too subjective. His delegation would also have liked to see a more direct reference to the obligation of States to seek the peaceful settlement of disputes, as set out in Articles 2 and 33 of the Charter of the United Nations.

3. Equally important was the fact that the draft provided that countermeasures must not affect human rights or humanitarian law or involve recourse to the threat or use of force. In other words, countermeasures, if adopted at all, must not be punitive but simply seek to re-establish respect for the law. Ultimately it would still be for the injured State to assess the situation. That underscored the need both for effective mechanisms whereby other States and international organizations could scrutinize the application of countermeasures and for greater acceptance by States of binding jurisdiction.

4. The Commission had rightly left the issue of collective countermeasures for future development. While appreciating the distinction between an injured State and a State with a legal interest in the performance of an obligation, his delegation doubted whether the measures adopted by third States should be considered a matter of State responsibility. On the other hand, it would have welcomed greater guidance, in article 59, on whether the imposition of sanctions by an international organization should result in the immediate suspension of countermeasures on the part of individual States.

5. With regard to the difficult issue of international crimes, the draft articles referred, in a spirit of compromise, to the existence of "peremptory norms" and "obligations owed to the international community as a whole", thus reflecting the general recognition that the violation of *jus cogens* norms must not go without consequences. The text left open, however, the question of the definition of a serious breach and, just as importantly, who would decide in a given case. There was, after all, no agreement on a precise objective procedure for dealing with either question. The difficulty of establishing a clear distinction between peremptory norms and obligations owed to the international community as a whole justified the Commission's prudence on the issue of collective countermeasures. His delegation endorsed the decision to leave article 54 largely as a saving clause, reflecting the understanding that *jus cogens* obligations entailed the duty of non-recognition. That was clearly a field which should be left to the future development of the law.

6. With regard to the ultimate form of the draft articles, his delegation considered that, although they would undoubtedly become the most authoritative statement on the question of State responsibility, the most fitting outcome of half a century's labour would be their adoption as an international convention. In view of the concerns expressed about the need to

ensure that States had adequate time to evaluate and consider the text, however, his delegation was open to the suggestion that the General Assembly should adopt a step-by-step approach. The draft articles should thus be attached to a resolution containing a recommendation that as of 2002 an international convention should be negotiated on the basis of the finished text. He added that, with its well-known preference for the conventional format, his delegation would have preferred the draft articles to have included provisions on the peaceful settlement of disputes.

7. **Mr. Momtaz** (Islamic Republic of Iran) said that the draft articles constituted an unprecedented exercise in the codification and progressive development of international law. The commentary, too, which was furnished with examples of State practice and international jurisprudence, was of both practical and academic value.

8. He wished to draw attention to a number of points arising out of the draft articles. First, in attributing conduct to a State, article 8 established a distinction between the conduct of a person and that of a group of persons. In the first case, for the conduct to be attributable to the State, the person had to have acted on the State's instructions. In formulating the provision, the Commission had merely adopted the position of the International Court of Justice in the 1986 *Military and Paramilitary Activities in and against Nicaragua* case, where the Court had ruled that, for the conduct to give rise to legal responsibility of the United States, it would have to be proved that that State had "directed or enforced" the perpetration of the act concerned; and that had not been established. By contrast, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Tadić*, had accepted the criterion of effective control in the case of individuals acting alone but rejected it in relation to conduct of a group of persons. In such a case, the Chamber had held, it was enough in order to attribute responsibility to a State, for that State to exercise overall control over the Group. The Commission had opted for the Tribunal's criterion in preference to the criterion of "effective control" laid down by the International Court of Justice in the *Military and Paramilitary* case.

9. The Court had, as its President had informed the Commission in 2000, been disappointed by the Tribunal's decision. He had said that the fragmentation resulting from the Tribunal's judgement would lead to anarchy and chaos in international law. In fact, the point at issue in *Prosecutor v. Tadić* was not State responsibility at all but rather individual criminal responsibility, which was expressly excluded from the scope of the draft articles on State responsibility. It might therefore have been wiser for the Commission to have followed the jurisprudence of the Court in a case which had been directly related to State responsibility.

10. Secondly, the expression "serious breach of an obligation arising under a peremptory norm of general international law" had been formulated to replace the concept of State crimes, which had been the object of lively controversy in the Commission over the past few years. The reformulation had proved a most happy and welcome compromise. Equally, he welcomed the omission of any reference to punitive damages among the particular consequences of such a breach. The existence of such damages in positive international law was not confirmed in article 42 and to have included it would have raised considerable difficulties. Effectively, there was a very limited range of possible consequences: the obligation on States to cooperate to bring the breach to an end through lawful means, not to recognize the resulting situation as lawful and not to render aid or assistance in maintaining that situation. Clearly, other consequences would emerge with the further development of international law. It was most welcome that the draft article expressly referred to such an eventuality.

11. Some concern had been aroused by the Commission's work on countermeasures. It was legitimate to ask whether an exercise in codification in that area would not appear to be legitimizing countermeasures, which were an archaic practice that inevitably worked to the advantage of powerful States. Moreover, far from encouraging wrongdoing States to resume the path of legality, countermeasures generally poisoned relations between the injured and the responsible States, making them still more intransigent and thus impeding dispute settlement mechanisms. At a time when international society was better organized and the Security Council had been revitalized, recourse to countermeasures should be subject to strict regulation, and that had been the line adopted by the Commission. It must be said, however, that the proposed regime of countermeasures was not as rigorous or restrictive as might have been hoped.

12. It was regrettable that it was left to the State taking the countermeasures to determine whether an act

was unlawful. A party to the dispute could not also be the judge. Since it was essential to make sure that an internationally wrongful act had been committed, some in the Commission had striven to establish a link between countermeasures and the compulsory settlement of disputes. Countermeasures would then be taken only when validated by an independent and impartial tribunal. In that context, he welcomed the fact that article 52 prohibited States from taking countermeasures if the dispute, or potential dispute, in question was pending before a court or tribunal with the authority to make binding decisions. He wondered why a similar prohibition had not been extended to cases where the parties were subject to a compulsory dispute settlement procedure.

13. Countermeasures should also be reversible, enabling the parties to engage in dialogue, as reflected in the ruling of the International Court of Justice in the *Gabčikovo-Nagymaros Project* case. For countermeasures to be reversible, they should obviously not inflict serious or irreparable damage on the responsible State. Article 50 addressed that concern, but his delegation considered that more obligations should be added to the list of those that should not be affected by countermeasures; the article should prohibit any measures of economic or political constraint affecting self-determination, territorial integrity or even the political independence of the target State. The draft articles adopted on first reading had taken that concern into consideration.

14. His delegation welcomed the fact that the protection of fundamental human rights appeared in the list of obligations that should not be affected. It was generally agreed that the right to be free from hunger was a fundamental human right, as stated in the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights. On that basis, countermeasures that barred access to markets by a responsible State for which exports were the principal source of income should be prohibited.

15. Article 54 used the expression "lawful measures" instead of the word "countermeasures". The distinction was commendable, since the result was that only the injured State had the right to resort to countermeasures. That had been the approach adopted by the International Court of Justice in the *Military and Paramilitary* case. The Court had also rejected claims by some States to be exercising a so-called "*actio popularis*" on behalf of the international community, even though they had no mandate. The Commission had not, however, established a criterion to distinguish between countermeasures and "lawful measures", so there was still a risk of the procedure being abused.

16. With regard to the Commission's recommendation that the General Assembly should adopt the draft articles in the form of a resolution, he noted that in its 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* the International Court of Justice had ruled that General Assembly resolutions, while not binding, could have a normative value and could, in some circumstances, be important factors in establishing the existence of a rule or the emergence of an *opinio juris*. That would be the status enjoyed by the draft articles on State responsibility if they were adopted by consensus. It was to be hoped that they would at a later stage be adopted at a plenipotentiary conference in the form of a binding international convention. Meanwhile, they would be subjected to the test of State practice and international jurisprudence to establish whether they were acceptable to the international community as a whole.

17. **Mr. Špaček** (Slovakia) said that, at the end of its current quinquennium, it was gratifying to note that the Commission had been able to complete its work on three of the topics on its agenda. That was a remarkable achievement. The most important of the three, however, was State responsibility: the draft articles completed by the Commission filled a major gap in the codification of international law. They constituted a well thought out exposition of mostly customary international law with some proposals for its progressive development. The proposals were not radical or revolutionary; rather, they discerned the main trends of the possible future evolution of the international legal system. The commentaries, which drew heavily on State practice and the jurisprudence of international courts and tribunals, were most useful.

18. The Commission had been wise to abandon the controversial notion of State crimes. The alternative formulation of "serious breaches of obligations under peremptory norms of general international law" was far more satisfactory, since such norms, which were intended for the protection of the fundamental interests of the international community, enjoyed a very high status and any serious breach entailed particularly serious consequences. Although article 41 might seem

rudimentary, it allowed for the future development of international law.

19. His delegation supported the Commission's decision to retain a separate chapter on countermeasures, which were part of State practice and had been recognized as an institution of international law by the International Court of Justice. It was better to have the conditions relating to countermeasures clearly spelled out than to leave them in the grey area of customary international law.

20. The reason for the Commission's decision not to include provisions for dispute settlement machinery was understandable. If the draft articles were eventually adopted as a convention, it would be wiser to deal with compulsory dispute settlement procedures in an optional protocol to that convention than in the convention itself. The fact that only 64 States — one third of the Organization's membership — had so far recognized the compulsory jurisdiction of the International Court of Justice, and, that several of them had made substantial reservations, clearly demonstrated that the inclusion of such procedures in the convention itself would not guarantee wider ratification of or adherence to it.

21. Since the Commission had, rather unusually, consulted extensively with States on the text provisionally adopted by the Drafting Committee and since more than 40 delegations had spoken and 14 had sent written comments, with the result that some outstanding issues had been resolved, his delegation did not consider it useful to embark on another round of comments. On the contrary, the text should be left as it was for some years and its impact on State practice should be observed to see whether States relied on it in their relations with other States and whether international courts used it, referred to it, or, perhaps, expressed disapproval of some aspect of it. The General Assembly should adopt the Commission's recommendation. Later — perhaps in five years — it could return to the topic and, if appropriate, consider convening a diplomatic conference to adopt the text as a convention.

22. *Mr. Marschik (Austria), Vice-Chairman, took the Chair.*

23. **Mr. Lavalle-Valdes** (Guatemala), expressing appreciation of the Commission's work on State responsibility, said that some of the draft articles called for either formal or substantive changes. In article 2, following the word "when", he suggested the insertion, between commas, of the phrase ", in the absence of any of the circumstances precluding wrongfulness according to chapter V of this Part".

24. In article 10, it might be appropriate to restore paragraph 1 of article 14 of the text adopted on first reading. He agreed with the observations of the representative of Australia on the current wording of article 10. Paragraph 1 did not seem to apply to movements other than insurrectional ones, although there seemed no reason why such a movement could not achieve control of the entire territory of a State and then establish a new State. In paragraph 1, the words "or other" should therefore be inserted after "insurrectional".

25. In article 15, paragraph 1 would express the intention of its authors better if the phrase "defined in aggregate as wrongful" were replaced by "which has to be considered in aggregate as wrongful".

26. Article 18 (a) implied that a coerced State was not responsible for its acts while under coercion. That need not be said in article 18, because of the provision in article 23, but there should be a provision to the same effect in chapter V of Part One.

27. In article 49, paragraph 3, the final words "the resumption of performance of the obligations in question" should be replaced by "the subsequent performance or resumption of the obligations in question", to take account of obligations, such as the surrender of specific items, which could be performed immediately. The article should also contain an express prohibition of countermeasures involving intervention in the external or internal affairs of States, on the lines of the prohibition against "intervention in the domestic jurisdiction" of the responsible State found in the former draft article 50.

28. Article 42 (b) (ii) seemed to apply only in the context of treaty law. If so, the provisions of article 55 made it unnecessary and it could be deleted. In the latter article, the words "or circumstances precluding wrongfulness" should be inserted after "existence", to reflect the applicability to treaties of the rule of *inadimplenti non est adimplendum*, which was part of *lex specialis*.

29. Turning to substantive issues arising from the draft articles, he said that the rules in articles 16, 17 and 18 were really primary rules, though presented as

secondary ones, and he wondered whether the chapter in which they appeared (chapter IV) should be retained at all. Moreover, if the chapter was intended to cover the whole of the subject indicated by its title, it should contain a rule on the effects of a guarantee given by one State for the international obligations of another. The conditions in articles 16 and 17 governing the wrongfulness of an act of a State did not seem entirely satisfactory. He could imagine a situation in which a wrongful act was perpetrated against State C by State B, a State assisted or directed and controlled by State A, and in which paragraph (a) of both articles would apply but not paragraph (b). Assuming the actions of State A to be completely free and unconstrained by the need to comply with any rule of international law, State C would be unable to invoke the responsibility of State A; it would merely be able to claim that the latter's conduct was unfriendly, and might well break off diplomatic relations with it. That might lead to a situation such as that contemplated in Article 34 of the Charter of the United Nations, and ultimately to a threat to peace. He also found it unacceptable that, according to article 16, a State which aided or assisted another State in the commission of an internationally wrongful act could be exempt from responsibility if the breach of international law committed by the State benefiting from the aid and assistance could not have taken place without it. In such a case, the State providing the aid and assistance would be the co-author of the breach, according to article 47 and paragraph (10) of the commentary to article 16. However, that did not seem compatible with the provisions of either article 2 (b) or article 13.

30. With regard to article 48, which provided for the invocation of responsibility by a State other than an injured State, unless the State invoking responsibility was doing so as the proxy of the injured State, which seemed highly improbable, the procedure in question would be a kind of *negotiorum gestio*. However, it might be wise to limit it to cases in which the injured State, without losing its right to invoke responsibility under article 45, was not in a position to do so.

31. As for the form the draft articles should take, he queried whether the Commission's recommendation, in paragraphs 72 and 73 of its report, meant that the observations made by delegations in that connection would be disregarded. They could certainly be taken into account by a conference of plenipotentiaries, if one was held for the purpose of adopting a convention. However, it would seem more appropriate for the Committee to continue year by year its study of the proposals made, and for a conference to be convened once consensus was achieved. Such a procedure, though unorthodox, would ensure maximum efficiency. In that light, he supported the proposal by the representative of Mexico that the General Assembly should confine itself to noting with appreciation the work of the Commission on the topic, and including in the agenda of its next regular session an item entitled "Responsibility of States for internationally wrongful acts". He proposed, in addition, that the Assembly should request States to submit written comments on the draft articles for consideration at the fifty-seventh session.

32. **Mr. Lindenmann** (Observer for Switzerland) expressed support for the Commission's recommendation that for the time being, the General Assembly should merely "take note" of the draft article, the possibility of convening an international conference of plenipotentiaries being left for a later stage. The draft articles were carefully balanced, and the consistency and unity of the text could be disrupted by negotiations if such a conference was called immediately. In the meantime, the draft articles and the commentaries thereto would certainly provide guidance for State practice. In the longer term, however, a legally binding instrument would be preferable, and once achieved would form a pillar of international law.

33. Turning to the issues in the draft articles on which his delegation still had some doubts, he said that the question of State responsibility for the acts of another State had not yet been satisfactorily resolved. Article 18, dealing with coercion of another State, failed to take account of the international obligations of the coercing State. As a result, a State subject to an international obligation could escape it by coercing another State not subject to the same obligation to commit an internationally wrongful act on its behalf. In any case, international law should help to prevent States from exercising coercion on one another.

34. He welcomed the inclusion, in the new chapter III of Part Two of the concept of peremptory norms of general international law which was already familiar from article 53 of the Vienna Convention on the Law of Treaties, and which emphasized the normative or binding character of the rules in question. The new chapter was itself a welcome feature. Article 41, paragraph 11, did not define the form or extent of the

duty of States to cooperate, except insofar as their cooperation must be "through lawful means". However, the scope of their duty in that sense was relative both to the means they possessed and to the circumstances of the case. That idea could be expressed by qualifying the means as "appropriate", "reasonable" or "adequate". Of course, in the exceptional circumstances contemplated in article 40, States must endeavour to cooperate as fully as possible.

35. The inclusion of provisions on countermeasures in Part Three, chapter II, did nothing to reduce the existing inequality among States. That inequality sprang from an imbalance in their power relationships which would persist as long as there was no international authority to monitor the invocation and application of the provisions on countermeasures. However, Switzerland favoured the inclusion of the articles on countermeasures, if only because it was better to regulate them than to ignore the issue altogether. The reference to proportionality in article 51 represented a considerable gain. However, the provisions on countermeasures should not feature in the same chapter as those governing invocation of the responsibility of a State. The structure of the draft should reflect more clearly the subsidiary character of countermeasures. As matters stood, one had the impression that they were one of the two kinds of consequences which followed from international responsibility.

36. Concerning the absence of any provision for dispute settlement, he pointed out that since the draft was concerned only with secondary rules, and States involved in a dispute concerning a question of international responsibility would need to resolve the dispute as a whole, it was not strictly necessary to include any provision concerning a dispute settlement mechanism. He therefore agreed with the Commission's decision to dispense with such provisions at the current stage, although a future international convention must in principle include them.

37. **Mr. Hinestrosa** (Colombia) recalled that the Secretary-General, in his report on the work of the Organization (A/56/1, para. 9) had said that the quest of the United Nations to build a world of order and justice could be achieved only through respect for the rule of law in international affairs. The work of the Commission had done much to build security and confidence in international relations, and adoption by the General Assembly of the two sets of draft articles recently completed by the Commission would again show the determination of the international community to conduct itself within the framework of international legal norms.

38. The draft articles on State responsibility, once adopted in the form of a legally binding convention, would form a bulwark of the international legal system, alongside the Vienna Convention on the Law of Treaties and the law relating to the peaceful settlement of disputes. The draft embodied State practice and also contained elements of progressive development. Its structure clearly reflected the separate elements of State responsibility and their interaction, as well as the difference between the consequences of an internationally wrongful act and the means available to deal with it.

39. It would have been preferable to include general guidelines for the conduct of States with regard to the settlement of disputes. Such a move would not have undermined the principle of free choice established in Article 33 of the Charter, or weakened special rules on the subject.

40. The serious reservations his delegation had expressed the previous year about the application of countermeasures were even more valid, since the section relating to dispute settlement had been deleted from the final text of the draft articles. Resort to countermeasures was not a right under international law, but a barely tolerated practice in exceptional cases covered by partially developed customary law. The Commission had progressively developed international law regarding an institution based on failure to honour an international obligation by a State which considered that its interests had been affected and was trying to obtain reparation. Hence an attempt was being made, through the progressive development of international law, to legitimize a practice which would alter the security system resting on the Charter of the United Nations and would be superposed on it in the event of collective countermeasures. Even though the draft articles laid down stringent criteria for the use of countermeasures, States' margin of discretion in that respect was much too wide and upset the requisite balance of the articles. Countermeasures were not a logical, automatic consequence of State responsibility and therefore had no place in the law on the responsibility of States.

41. Although Colombia would prefer the draft articles ultimately to take the form of a legally binding convention, because that would guarantee full compliance with the institutions they established, it realized that many obstacles still impeded the achievement of that goal and therefore supported the recommendations made by the Commission in paragraphs 72 and 73 of its report.

42. Turning to chapter V of the report, he said that, with regard to the fulfilment of the obligation of due diligence, which governed the principle of prevention, special consideration should be paid to the socio-economic development of the parties, the scientific and technological facilities available and the practical realities of the context in which activities liable to cause transboundary harm were carried out.

43. Some provisions of the draft articles should be strengthened with a view to establishing clearly the relationship between the effective application of the principles of prevention and due diligence on the one hand and, on the other, conditions in the developing world, international financing mechanisms and the need to promote technology transfers to, and capacity-building in, the developing countries. It was essential to bear those aspects in mind when formulating rules and putting them into practice.

44. There was no need to hurry to adopt an international convention based on the draft articles; States were already under an obligation to adopt specific measures to regulate harmful activities. It therefore seemed more appropriate first to adopt the draft articles as a set of criteria or guidelines which could serve as the foundation of more detailed regional or bilateral agreements between interested parties. The draft articles would be a good starting point for future work in the field of environmental law.

45. It was to be hoped that States would display enough political will to take decisions concerning the final form of the two sets of draft articles that would not disappoint the members of the Commission, who strove to provide a legal framework for international relations while taking account of practical realities.

46. **Mr. Hafrad** (Algeria) said that the codification of State responsibility was vital to harmonious international relations, because it offered an alternative to the use of force as a means of settling disputes between States and constituted the best guarantee for the maintenance of international peace and security.

47. In the past, his delegation had feared that the inclusion of countermeasures in the draft articles might offer certain States justification for taking unilateral action to restore the status quo ante on the grounds that it had been altered by a wrongful act. That practice, which was followed by some very powerful States, should not become universal and could be codified as a rule of international law only subject to the strictest precautions. For that reason, the codification of a legal regime of countermeasures which did not take into account the de facto inequality between States would merely give the legal seal of approval to a highly questionable practice and might even turn countermeasures into a legitimate means of coercion individually exercised by certain Powers.

48. While it was difficult to challenge the existence in customary international law of a rule which authorized a State to breach a legal obligation to a State which had committed a wrongful act towards it, very close attention must be paid to the conditions relating to resort to countermeasures. Article 50 was therefore most welcome, since it listed a number of countermeasures which were prohibited. Obviously the State taking countermeasures had to respect other procedural obligations set forth in paragraph 2 of that article. The fact that all countermeasures in breach of those obligations were banned under that article was therefore grounds for satisfaction.

49. He was pleased to note that resort to countermeasures was subject to the conditions laid down in article 52 and that, even though article 49 established the principle that countermeasures were lawful, it limited their scope. Proportionality, the principle clearly affirmed in article 51, must refer only to the level of measures required to secure respect of the obligations of the State responsible for the wrongful act.

50. On the whole, the articles on countermeasures seemed well-balanced and Algeria generally supported them. The aim of countermeasures could only be the cessation of the wrongful act, the restoration of international law and reparation for the injury caused without jeopardizing international peace and security.

51. Turning to chapter VII of the report, he said that diplomatic protection was usually the way in which the international responsibility of States was implemented, but history had shown that the exercise of such protection had been largely subject to considerations of

political advisability. Although it was a deeply rooted traditional principle that a Government could exercise diplomatic protection only on behalf of its own nationals, there were still wide divergences of opinion as to the basis and scope of the rule. The requirement that a link of personal dependence should exist between the claimant State and the injured individual was still to some extent justified by the notion that an injury to an individual was an offence against the State of which that person was a national. Nevertheless, when exercising diplomatic protection, a State had no justification whatsoever for resorting to the threat or use of armed force, save in a case of self-defence, as provided for in Article 51 of the Charter of the United Nations. Such an eventuality could be contemplated only in response to armed aggression, but not in the context of diplomatic protection.

52. When drafting article 9, the Commission had had to choose between several existing rules, rather than creating new ones. Since the classic theory of diplomatic protection, where the State gave diplomatic protection to a national when it was injured in the person of that national by the wrongful act of another State, was a crucial principle on which any effort to codify the subject material should rest, the general trend in international law to protect persons did not warrant any change in the rule of the continuity of nationality, although it could be made more flexible through the introduction of some exceptions in the event of a change in nationality due to State succession, marriage or adoption.

53. With regard to article 10, paragraph 2, his delegation supported the Special Rapporteur's view that non-legal or discretionary remedies should be excluded from the ambit of the local remedies rule.

54. **Ms. Todorova** (Bulgaria) observed that in drawing up the draft articles on the responsibility of States for internationally wrongful acts the Commission had wisely focused on the secondary rules of responsibility rather than endeavouring to define the content of international obligations. Modern notions of international law had been incorporated in the text and, for that reason, the draft articles and the commentary thereto would certainly constitute a major contribution to the progressive development and implementation of international law.

55. The draft rules did, however, require more detailed analysis by Governments in order to determine, for example, the precise content of the notion of serious breaches and the subjects of law forming the international community as a whole. There were also questions surrounding the probable legal connection between serious breaches of obligations flowing from the peremptory norms of general international law and the entitlement of the international community as a whole to invoke State responsibility. Bulgaria therefore considered that the action recommended by the Commission in paragraphs 72 and 73 of its report was appropriate.

56. With regard to chapter V of the report, her Government had consistently maintained that prevention offered the strongest basis for environmental protection and sustainable development, and it was therefore in favour of the draft articles on international liability, which reflected the principle that prevention was an obligation and provided for procedures to deal with the harmful consequences of activities not prohibited by international law. The best features of the articles were the provisions on due diligence and on the obligation to cooperate in good faith, as well as the attempt to strike a balance between interests. Similarly the commentary was apposite and useful. She was pleased that the observations made by her delegation in the Sixth Committee had been taken into account by the Commission. Bulgaria therefore supported the draft articles and the Commission's recommendation that a convention should be elaborated on basis of the articles.

57. **Mr. Setiabudhi** (Indonesia), referring to chapter IV of the report, said that he agreed with the Commission's decision to change the title of the topic to "responsibility of States for internationally wrongful acts", so as to distinguish from the responsibility of the State under internal law. The new provision on peremptory norms in Part Two, chapter III, was useful, as the notion of peremptory norms stemmed from the Vienna Convention on the Law of Treaties. His delegation therefore believed that the provision in question referred only to serious breaches of peremptory norms and excluded minor infringements of them.

58. If the chapter on countermeasures were to be retained, it should be amended so as to avoid the possibility of more powerful countries coercing weaker ones. On the other hand, it had been wise to drop the provisions on dispute settlement, since that was a matter which could be decided later.

59. His delegation was in favour of convening an international conference of plenipotentiaries to examine the articles with a view to concluding a convention.

60. **Mr. Crawford** (Special Rapporteur on responsibility of States for internationally wrongful acts), replying to questions raised during the debate, said that it was satisfying to note the high level of support in the Committee for the final text of the draft articles on State responsibility. In particular, he was pleased that the balance struck, with regard to the highly controversial subject of countermeasures had met with general approval, including that of some Governments which had been critical of the articles on countermeasures in previous years. There was also a high level of agreement on the removal from the text of any punitive elements of State responsibility.

61. He wished to address three issues raised by delegations in order to avoid any misunderstandings in the further consideration of the text.

62. First, with regard to the relationship between articles 41 and 48, the distinction drawn by the Commission between peremptory norms, or substantive obligations, and the provisions in respect of invocation in the collective interest already existed in the jurisprudence and literature. While it might have been preferable for the International Court of Justice to have used the formula "peremptory norms" in 1970 and to have developed the invocation aspects of the issue in that framework, the Court had not done so; it had instead used the phrase "obligations *erga omnes*" or "obligations to the international community as a whole" on a number of occasions since then. It had seemed to the Commission that the best approach was to treat the question of peremptory norms as governing issues relating to obligations between States, and questions of obligations *erga omnes* as being concerned with invocation — precisely the context in which those obligations had been at stake in the *Barcelona Traction* case and elsewhere. Thus, the distinction seemed appropriate in the light of the existing development of international law.

63. The second point concerned the limitation of articles 40 and 41 to the most serious breaches. While it was true that any breach of a peremptory obligation was serious by definition, some peremptory obligations covered a wide spectrum of possibilities. That was obviously not true for genocide; there was no such thing as a trivial genocide. The same might be said of crimes against humanity. War crimes, however, while serious, might not be at the level of seriousness that brought Part Two, chapter III, into operation. Another example might be an isolated act of torture committed by a junior state official contrary to orders. The idea that the State itself should be subject to a regime having strict consequences in respect of isolated acts of that nature seemed undesirable, and most delegations had approved of the Commission's choice in the matter.

64. Third, with regard to article 54, the Commission had listened carefully to all the comments made, particularly the strong criticism of the article in the previous year, and had decided to leave the matter open. Article 54 did not use the word "countermeasures"; it used the term "lawful measures". The matter would be subject to the development of general international law, there being no intention on the Commission's part to favour one view or the other.

65. The Committee currently faced only one issue in its handling of the Commission's recommendation. It was obvious that the draft articles and the commentaries would require further study by Governments before they could be endorsed in a manner implying commitment. The question was whether the Committee wished to reopen a substantive debate on the draft articles on an article-by-article basis. The difficulty was that reopening debate on any one of the articles would lead to re-examination of the entire text, which would be a lengthy process. While the members of the Commission were divided as to whether the draft articles should take the form of a convention, they felt strongly that the right move was simply to annex the text to a draft resolution and commend it to Governments for their consideration at the proper time. He too endorsed that approach.

66. **The Chairman** expressed appreciation to the Special Rapporteur for his valuable contribution to the successful completion of the draft articles on State responsibility.

67. **Mr. Kabatsi** (Chairman of the International Law Commission), introducing chapter V of the report, said that the Commission had completed its second reading and adopted the final text of the draft articles on prevention of transboundary harm from hazardous activities.

68. He drew attention to paragraph 94 of the report, in which the Commission recommended to the General

Assembly the elaboration of a convention by the Assembly on the basis of the draft articles.

69. The Commission had made a slight change in the title of the topic in view of the fact that the draft articles spoke of transboundary "harm" and not of transboundary "damage". The title therefore read "Prevention of transboundary harm from hazardous activities". That change did not affect the French, Spanish or Russian versions of the title.

70. The Commission in principle did not include preambles to the texts that it prepared. Nevertheless, it was of the view that the inclusion of some principles in the preamble might better project the balance of interests test, which had been the underlying theme of the entire set of draft articles on the topic. The preamble referred to the principle of permanent sovereignty of States over their natural resources and to the countervailing principle that the freedom of States to carry on or permit activities in their territory or otherwise under their jurisdiction or control was not unlimited. Those principles were rooted in the Stockholm and Rio Declarations, which had been among the important documents guiding the Commission's work on the topic.

71. The text comprised 19 draft articles, beginning with article 1 on the scope. It spoke of "activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences". Some had favoured deleting the words "not prohibited by international law". Nevertheless, the Commission had retained that wording, which was intended to separate the topic from the topic of State responsibility, which dealt with wrongful activities and, as such, prohibited activities. It was the understanding of the Commission, however, that the lines separating activities which were not prohibited by international law and those which were prohibited were not always clearly visible and that the invocation of these articles should not per se bar a claim that an activity in question was a wrongful act.

72. Article 2 defined six terms commonly used in the draft. Some of the subparagraphs had much more substantive functions than simply defining a term; they set a threshold, clarifying the scope of the topic further. For example, subparagraph (a) defined the concept of "risk of causing significant transboundary harm". The intention in that definition was to refer to the combined effect of the probability of occurrence of an accident and the magnitude of its injurious impact. It was therefore the combined effect of "risk" and "harm" which set the threshold.

73. Article 3 set out the general obligation of prevention on which the entire set of draft articles was based. The primary objective of the measures to be taken by States was the prevention of significant transboundary harm, while the minimization of risk would constitute a secondary option if the objective of prevention could not be attained. The commentary explained that the phrase "all appropriate measures" included the obligation of States parties to, inter alia, adopt national legislation incorporating accepted international standards. Those standards would constitute a necessary reference point to determine whether the measures adopted were suitable. Furthermore, it should be noted that article 3 was complementary to articles 9 and 10 and that they formed a harmonious whole. Article 4 dealt with cooperation among the States concerned. That principle constituted an essential part of designing and implementing effective policies to prevent transboundary harm or minimize the risk thereof.

74. Article 5 stated the obvious, namely, that once a State became a party to the draft articles, it would be required to take the necessary measures to implement them. The use of the term "other action" was intended to cover the variety of ways and means by which the States could implement the articles. Article 5 mentioned some measures expressly only in order to give guidance to States. The obligation of a State to take necessary measures could be limited to establishing the appropriate regulatory framework and applying it, thus precluding State involvement in operational issues relating to activities to which article 1 applied.

75. Article 6 set forth the fundamental principle that the prior authorization of a State was required for activities falling within the scope of the articles. The article made the requirement of prior authorization also applicable to pre-existing activities and to any major change to an activity already taking place.

76. Article 7 required prior assessment of the risk of an activity causing significant transboundary harm before authorization was granted. That requirement was consistent with contemporary trends in international law of requiring environmental impact assessment of any activity which might cause

significant environmental harm. In view of the novelty of that requirement, the words "in particular" had been added to highlight its importance. The question of who actually conducted the assessment and what its content ought to be was a matter left to the domestic laws of States.

77. Article 8 dealt with a situation in which the assessment undertaken in accordance with article 7 indicated that the activity planned did indeed pose a risk of causing significant transboundary harm. Article 8, together with articles 9 and 10, provided for a set of procedures essential to balancing the interests of all the States concerned by giving them a reasonable opportunity to find a way to undertake appropriate preventive measures. Article 8 followed the approach taken in other similar conventions.

78. Article 9 dealt with consultations on preventive measures. It required the States concerned to enter into consultations in order to agree on the measures to prevent significant transboundary harm, or at any event to minimize the risk thereof. Consultations might be held prior to authorization of an activity or during its performance.

79. The purpose of article 10 was to provide some guidance for States in their consultations to achieve an equitable balance of interests. In order to attain such an objective, all the relevant factors and circumstances should be taken into consideration. The article drew its inspiration from article 6 of the Convention on the Law of the Non-navigational Uses of International Watercourses.

80. Article 11 addressed the situation in which a State, in the absence of notification, became aware that an activity planned or carried out in a State of origin carried a risk of causing significant transboundary harm. If the concerns of the State were based on reasonable grounds, it requested the State of origin to apply article 8.

81. Article 12 dealt with steps to be taken after an activity had begun, with the purpose of preventing significant transboundary harm or minimizing the risk thereof. The wording of the provision envisaged a possible continuation of the exchange of information even once the activity had ceased. That was a recognition of the fact that the consequences of certain activities continued to pose a significant risk of transboundary harm even after they were terminated.

82. Article 13, dealing with information to the public, was inspired by the new trend of seeking to involve in a State's decision-making process individuals whose lives, health, property and environment might be affected, by providing them with a chance to present their views and be heard by those responsible for making the ultimate decisions.

83. Article 14 provided a narrow exception to the obligation of States to provide information under other articles. The exception covered information considered vital to national security or to the protection of industrial secrets or intellectual property, although the provision also called for good faith cooperation in providing as much information as possible.

84. Article 15 was based on article 32 of the Convention on the Law of the Non-navigational Uses of International Watercourses. It set out the basic principle that the State of origin was to grant access to its judicial and other procedures without discrimination on the basis of nationality, residence or the place where the harm occurred.

85. Article 16, dealing with emergency preparedness, was based on article 28, paragraph 4, of the Convention on the Law of the Non-navigational Uses of International Watercourses. The article had been included during the second reading of the topic. It required the State of origin to develop contingency plans for responding to emergencies, in cooperation, where appropriate, with the State likely to be affected and competent international organizations.

86. Article 17 (Notification of an emergency) was also new and was based on article 28, paragraph 4, of the Convention on the Law of the Non-navigational Uses of International Watercourses. It required the State of origin to notify the State likely to be affected as expeditiously as possible of emergencies concerning an activity together with all relevant and available information.

87. Article 18 established the relationship between the rights and obligations of States under the draft articles and other international obligations, whether treaty-based or based in customary international law. The provisions stipulated that the articles were without prejudice to any obligation incurred by States under international law. It did not purport to resolve the issue of an overlap between the obligations under treaties and customary international law and obligations under the draft articles.

88. Lastly, article 19 provided a basic rule for the settlement of disputes arising from the interpretation or application of the regime of prevention set out in the draft articles. It was based on the provisions of article 33 of the Convention on the Law of the Non-navigational Uses of International Watercourses.

89. **Mr. Al Baharna** (Bahrain) said his delegation believed that the draft articles would ensure an equitable balance between the interests of the State of origin and those of the State likely to be affected.

90. The expression "significant transboundary harm", used in articles 1, 2 and 3, had been accepted as the most appropriate for the topic, and was used in the Convention on the Law of the Non-navigational Uses of International Watercourses. His delegation felt that the commentary to article 2 provided an acceptable explanation of the expression "risk of causing significant transboundary harm" which could alleviate the criticism of paragraph (a) of that article. The definition in paragraph (3) of the commentary to article 2 distinguished between a high probability of causing significant harm and a low probability of causing disastrous harm; that reasoning seemed logical.

91. Articles 1, 2, 3 and 4, which dealt with the core issues of the topic, were acceptable. The expressions "activities not prohibited by international law" and "significant transboundary harm" were used appropriately in article 1; the former expression provided the basis for the distinction of the topic of international liability from the topic of State responsibility, and there did not appear to be a better alternative to the latter expression.

92. In article 3, which complemented articles 9 and 10, the obligation to take "all appropriate measures" to prevent significant transboundary harm, or minimize the risk thereof, had been interpreted in a wider context, so that it would be equivalent to due diligence, thereby ending the controversy about that term.

93. Article 4 introduced the internationally accepted principle of cooperation in good faith between States concerned in order to prevent significant transboundary harm, or, at any event, to minimize the risk thereof.

94. His delegation supported articles 5 to 18, which were essentially procedural in nature, serving to implement the obligations undertaken in cooperation between the State of origin and the State likely to be affected. In particular, it welcomed the drafting improvements and modifications made by the Commission in respect of articles 6, 7, 9 and 10.

95. His delegation believed that the issue of international liability should be taken up as soon as possible. The Commission should draw on the abundant material which was available on that issue, both in State practice and jurisprudence and in international agreements, as well as the many useful ideas developed by the former Special Rapporteur, Mr. Barboza, in his reports on the topic. His delegation looked forward to the preparation by the Commission of an integrated text of a convention combining the two aspects of the topic, prevention and liability, in a single framework convention, under the current title.

96. Article 19, on the settlement of disputes, needed to be more comprehensive and exhaustive. Although it was based on article 33 of the Convention on the Law of the Non-navigational Uses of International Watercourses, it stopped short of providing for the arbitration and judicial procedures envisaged in that article. On the other hand, it had the advantage of incorporating the internationally recognized principle of good faith, in paragraph 6; his delegation felt that that paragraph should go further by providing for the option of submitting a dispute, by mutual agreement, to arbitration or judicial settlement, following non-implementation by the parties to the dispute of the findings and recommendations of the fact-finding commission.

97. **Ms. Xue** Hanqin (China) said that at a time when the ecology of the Earth and the natural environment were of increasing concern, all States had a responsibility to seek effective means of preventing transboundary harm from hazardous activities. A number of international environmental treaties had been concluded on specific topics, so that a preliminary international legal regime for the protection of the environment had been put in place. However, many areas were not covered by applicable laws, and much work remained to be done by the international community. The draft articles represented a very useful attempt to fill existing gaps, and were the first articles ever to deal with the prevention of transboundary harm by means of general rules of international law. Her delegation believed that the implementation of the measures set forth in the draft articles would contribute to the prevention and minimization of transboundary harm from hazardous activities and would serve as a practical guide for the elaboration of international legal

instruments dealing with specific topics of environmental protection.

98. As the largest developing country, China had always been very concerned about the prevention of transboundary harm from hazardous activities; it stood ready to work with all other countries in the establishment of an international legal regime in the area of environmental protection.

99. **Mr. Lammers** (Netherlands) said that the completion of the draft articles had been made possible by the Commission's decision in 1992 to divide the work into two stages: prevention and liability, and, in 1998, to separate those distinct, though related issues. However, his delegation felt that it would be premature for the draft articles to be taken up at the diplomatic level in the form of a convention; before taking that step, the Commission must complete its work on liability, or at least make significant headway.

100. Although many multilateral environmental agreements were concerned with prevention and provided for the elaboration of liability rules at a later stage, it should be noted that that separation had not been very successful: many such agreements had not entered into force or had not attracted wide participation. His delegation was therefore in favour of developing a convention that covered both prevention and liability as a package.

101. His delegation believed that the General Assembly should take note of the draft articles, which broadly reflected customary international law and, as such, were applicable to States; urge the Commission to continue work on the topic and complete it as soon as possible; and refer to the future transposition of the draft articles into a convention, taking into account the Commission's further work on the topic.

102. Article 15 could be a useful starting point for further work on part two of the topic. His delegation suggested that the Commission should develop procedural standards on access to justice and substantive standards on liability and redress for harm suffered. Such standards would ensure that domestic and foreign victims could avail themselves of effective legal remedies and would generally obtain redress for any losses incurred. The provision of adequate means for obtaining appropriate compensation, especially for those who sustained transboundary, injurious consequences of activities without reaping their benefits, was a matter of elementary justice to which the Commission could make an important contribution.

The meeting rose at 1.05 p.m.