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Chairman: Mr. Lelong . . . . . (Haiti)

Contents

01-62506 (E)

The meeting was called to order at 3.15 p.m.

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

1. **Mr. Kabatsi** (Chairman of the International Law Commission) introduced chapters VII, VIII and IX of the report of the International Law Commission on the work of its fifty-third session (A/56/10). With regard to chapter VII, concerning diplomatic protection, he said that the Commission had considered the addenda to the first report of the Special Rapporteur, which focused on the issue of continuous nationality and the transferability of claims. Article 9 dealt with continuous nationality. In the view of the Special Rapporteur, the traditional approach to that rule, which had come under criticism, should be replaced by a more flexible approach. As outlined in paragraph 170 of the report, the text proposed by the Special Rapporteur would allow a State to bring a claim on behalf of a person who had acquired his or her nationality in good faith after the date of the injury attributable to a State other than the previous State of nationality, provided that the original State had not exercised or was not exercising diplomatic protection in respect of that injury. Safeguards would ensure against abuse.

2. The debate in the Commission had indicated some support for the Special Rapporteur's approach. At the same time, it had been noted that the Rapporteur had set himself the difficult task of challenging an established rule of customary international law. While it had been conceded that such a customary rule existed, it had also been stated that even well established rules could be changed when they no longer conformed to developments in the international community, and that it was within the Commission's mandate to propose such changes. Support had also been expressed, however, for maintaining the traditional rule, particularly since the reasons in favour of the traditional approach, such as the concern to avoid abuse on the part of individuals or States, were still applicable. Moreover, the strength of State practice and the lack of evidence of an emergent principle or new practice militated against changing the rule.

3. A key issue in the debate had been the relationship between diplomatic protection and the protection of individuals under international law. According to one view, the rule of continuous nationality had outlived its usefulness, as individual rights were clearly now recognized by international law. The view had also been expressed that the general trend in international law of protecting individuals was not sufficient justification for changing the rule on continuous nationality. At the same time, there had been agreement that the rule needed to be made more flexible so as to avoid inequitable results. Accordingly, a strong preference had been expressed for adopting a middle course, whereby the traditional rule would be retained, albeit subject to certain exceptions aimed at those situations where the individual would otherwise have no possibility of obtaining protection by a State. Lastly, it had been proposed that the Commission should consider some additional issues relating to the nationality of claims (A/56/10, para. 183).

4. Articles 10 and 11 concerned the rule of exhaustion of local remedies. Article 10 established the context for the subsequent articles on that rule. In the view of the Special Rapporteur, it was not always possible to maintain the distinction between primary and secondary rules throughout the draft articles on diplomatic protection. In particular, the concept of denial of justice had featured prominently in most attempts at codification of the local remedies rule and should also be considered in the current context. The Special Rapporteur had further noted that the term "legal remedies" included all judicial remedies available under the municipal system, as well as administrative remedies, where they were available as of right but not where they were discretionary or available as a matter of grace. It had also been observed that there was the matter of the claimant's requirement to exhaust the "procedural facilities" available in municipal courts, a matter raised by the *Ambatielos* case, as well as the issue of the requirement to raise before the domestic courts all the arguments that a claimant intended to raise at the international level.

5. Support had been expressed in the Commission for the Special Rapporteur's approach of dealing with the topic in several articles, instead of one lengthy article. It had been noted that the exhaustion of local remedies rule was a well established rule of customary international law. It had, however, been suggested that the article should be reformulated as a synthetic definition of the rule to be followed by more specific provisions. At the same time it had been observed that

there was a limit to which specificity should be required, since the application of the local remedies rule was highly contextual. Different views had also been expressed in the Commission regarding adherence to the strict distinction between primary and secondary rules. One view had supported the inclusion of the concept of denial of justice. Another view had considered that there was no need to introduce a provision on denial of justice, since it was an example, among others, of cases in which local remedies were not "effective".

6. Other comments on the article had included the concern that without the addition of the qualifier "effective", the reference to "all" available local remedies would be too broad and would impose an excessive burden on the injured person. As to the definition of "local legal remedies", it had been suggested that the purpose of the remedies to be exhausted should be stated, and that the term "legal" could include all legal institutions from which the individual had a right to expect a decision, a judgement or an administrative ruling.

7. With regard to article 11, which dealt with the distinction between "direct" and "indirect" claims for the purpose of the local remedies rule, the Special Rapporteur had noted that the provision was necessary so as to ascertain which cases fell within the scope of the draft articles. The basic principle was that the rule applied only where there had been an injury to a national of the State, i.e., where it had been "indirectly" injured through its national. It did not apply where there had been a direct injury to the State itself. As outlined in paragraph 201 of the report, the Special Rapporteur had proposed two criteria for determining the type of injury involved: (1) a preponderance test and (2) a sine qua non test. He had suggested that it might be sufficient to adopt only one of the tests. The Special Rapporteur had observed that other criteria had also been proposed in the literature, including the "subject" of the dispute, the "nature" of the claim and the nature of the remedy sought. Lastly, the Special Rapporteur had noted that three additional factors might be considered in deciding whether the claim was "preponderantly" direct or indirect and that those could be introduced into the text.

8. The Commission in general had supported article 11, which was considered to reflect prevailing practice. It had been noted, however, that further reflection was needed. It had been proposed to merge articles 10 and 11. It had also been observed that the terms "direct" and "indirect" injury were misleading. With regard to the two tests, the view had been expressed that the main difficulties related to the evaluation of the "preponderance" in a situation of a mixed claim. It had further been pointed out that there might be cases where a test of preponderance could not be applied because the injury suffered by the State was equivalent to that suffered by the individual. The view had also been expressed that the two tests should not be seen as applying cumulatively, nor should it be required that the preponderance test be applied before the sine qua non test.

9. Articles 9, 10 and 11 had been submitted to the Drafting Committee for further consideration. The Drafting Committee had not had time to consider any of the draft articles referred to it on the topic in the past two years, and it intended to address them at its next session. In that connection, he drew attention to paragraphs 27 and 28 of the report, on which the views of Governments were particularly welcome.

10. Chapter VIII of the report, concerning unilateral acts of States, dealt with two fundamental issues: the elaboration of criteria upon which to proceed with a classification of unilateral acts and the interpretation of unilateral acts, in the context of rules applicable to all such acts, regardless of their material content.

11. The Special Rapporteur proposed to proceed with a classification of unilateral acts based on the legal effects criterion. The Special Rapporteur had also expressed the view that silence in relation to unilateral acts could not be defined as a legal act in the sense being dealt with by the Commission. With regard to interpretative declarations, the Special Rapporteur had further indicated that where the declarations went beyond the obligations contained in the treaty, the declarations would become independent acts whereby a State could assume international commitments; those interpretative declarations would thus be included among the unilateral acts falling within the scope of the topic. On the contrary, countermeasures could not be considered within the same context because they constituted a reaction by a State, thus lacking the necessary autonomy, and because they were not expressly formulated with the intention of producing legal effects.

12. The Commission had been having difficulty in conceptualizing the topic; that had been evident in its

discussion. While some members considered the topic important and suitable for codification, others found it unfit for codification, especially in the light of the difficulties encountered in defining and classifying the acts. It had, however, been agreed that the topic should be approached in a less theoretical and more practical way. In general, there had been support for maintaining a restrictive definition of unilateral acts encompassing acts which created rights and obligations as a source of international law.

13. During the discussion in the Commission, comments had been made that in some cases, such as effective occupation, a series of unilateral acts were needed in order for legal effects to occur, and that therefore the analysis of the topic should not be restricted to single unilateral acts. Doubts had also been expressed with regard to the proposed classification of unilateral acts. Some members had shared the Special Rapporteur's view that the provisions of the 1969 and 1986 Vienna Conventions could serve as a basis for developing rules of interpretation for unilateral acts. Others had felt that the provisions of the two Conventions were too general to be of use for that purpose. The point had been made that a reference to the object and purpose of a unilateral act should not be omitted for the purposes of interpretation.

14. The Commission had agreed with the Special Rapporteur that research in that area was very difficult. For that reason, the Commission had agreed with the recommendation of the Working Group that the Secretariat should circulate a questionnaire to Governments inviting them to provide further information regarding their practice of formulating and interpreting unilateral acts. The Commission urged Governments to reply to the questionnaire, which had been circulated to all States on 31 August, as soon as possible.

15. Chapter IX of the report dealt with other decisions and conclusions of the Commission. As requested by the General Assembly, the Commission had made an effort to implement cost-saving measures by organizing its programme of work in such a way as to set aside the first week of the second part of its session for the Working Group on the commentaries to the draft articles on State responsibility. The Working Group was composed of only 12 members of the Commission, thus resulting in a substantial saving through the non-attendance of the other 22 members.

16. As in the past, the Commission had cooperated with other bodies. The Commission had held an informal exchange of views with members of the legal services of the International Committee of the Red Cross on topics of mutual interest.

17. As detailed in chapter IX, section E, the thirty-seventh session of the International Law Seminar had been held at the Palais des Nations with 24 participants of different nationalities, mostly from developing countries.

18. **Mr. Lavalle-Valdés** (Guatemala), referring to chapter VIII of the report, said that one difficulty which might arise with regard to the two new articles was that it might not be possible for all unilateral acts to be subject to the same rules of interpretation. There might be two levels of interpretation in that area. There was what might be called the first-level or basic interpretation, the purpose of which was to determine whether a particular unilateral act fell within the category of acts to be regulated — in other words, whether, in carrying out the act, the State had intended it to produce legal effects. A protest, for example, could only be made with the intention of producing legal effects, while in the case of a promise it would be necessary to determine whether or not it had a purely political motivation. The second level of interpretation, which came into play once it had been concluded that an act was intended to produce legal effects, consisted of dispelling any doubts as to the substance of the act. It was unclear whether the same rules of interpretation should apply to the two levels. Moreover, with regard to the second level of interpretation, the rules might vary depending on the type of act involved: for example, a waiver should be interpreted more strictly than a protest.

19. Turning to the question of the further treatment of the topic, he said that the Commission should refrain from elaborating any more articles until it had completed six priority tasks. First, it should agree on a typology, or more precisely, a list, covering all categories of unilateral acts of States, a task that should run parallel to the adoption of a suitable terminology. Second, the Commission should decide whether it was appropriate to add a residual, or open, category to the list, containing all unilateral acts that did not fit within the previous categories and that overall might be termed "innominate unilateral acts". Third, there was a need to determine whether all categories of specific acts which appeared on the list should be retained, or

only some of them. If it was agreed to include the residual or open category mentioned earlier, then acts which would thus be excluded would automatically fall into that category. Fourth, it had to be decided whether each of the specific categories of acts on the final list would be governed by the general rules featured in the final text, on the understanding that special rules would have to be devised for each category of acts to which the general rules did not apply. However, the residual category of innominate acts could only be governed by general rules. Fifth, for each of the specific categories of acts to which the general rules applied it would be necessary to determine whether the general rules would suffice, or whether special rules would be required to deal with some of their aspects. It was conceivable that a specific category of acts might be governed entirely by special rules. Sixth, agreement would have to be reached on the categories among which the general rules would be distributed. They would necessarily include the legal effects and revocability of unilateral acts.

20. Once those six tasks were completed, the seven articles already dealt with by the Commission could be provisionally adopted, and the Commission could proceed in the light of the criteria already followed, and the views of States, to develop the subsequent articles. In the final analysis, it must satisfy itself that the set of draft articles formed a sufficiently comprehensive and harmonious whole. Needless to say, the tasks he had described, and especially the first, were far from easy. There appeared to be general agreement that silence and estoppel should be excluded from the list; however, that would not do away with all the difficulties, because there was a considerable variety of views on the classification of unilateral acts. According to some, declarations and notifications should be included in the list, whereas he and others would prefer to exclude them.

21. **Mr. Hoffmann** (South Africa), speaking on behalf of the member States of the Southern African Development Community (SADC), said that diplomatic protection was directly related to the topic "State responsibility". The final draft articles on State responsibility left both the nationality of claims and the local remedies rule to be dealt with under the topic "Diplomatic protection". Codifying diplomatic protection was largely a matter of choosing between competing rules. In its traditional form, the rule of continuous nationality required a claimant State to prove that the injured individual was a national at the time of the injury, at the time when the claim was presented and throughout the period between the injury and the presentation of the claim. He agreed with the Special Rapporteur that there were serious concerns about the rule in its current form. It could cause great injustice where a person after sustaining an injury had undergone an involuntary change of nationality as a result perhaps of State succession or marriage. The content of the rule was itself unclear, because the concept of the date of the injury and the date of presentation of the claim had not been clarified. The rule was moreover difficult to reconcile with the Vatellian fiction underlying diplomatic protection, that an injury to a national was an injury to the State. According to that principle, the date of injury to the national should be the only critical date. Furthermore, the rule had not been consistently upheld by judicial decisions, doctrine or attempts at codification and was difficult to reconcile with developments in the field of human rights.

22. Despite those concerns, SADC believed that the rule of continuous nationality was still the best way of preventing individuals and corporations from changing nationality in order to find a State prepared to bring a claim on their behalf. The rule should be retained, but exceptions should be made where the individual had undergone an involuntary change of nationality following the injury.

23. The local remedies rule was an essential feature of diplomatic protection and a clearly accepted rule of customary international law. The Special Rapporteur had rightly decided to deal with it in several distinct articles. He agreed with the Commission's definition of the local remedies to be exhausted, including judicial and administrative remedies, but excluding political favours. However, article 10 should make it clear that the local remedy must be not merely available, but effective.

24. In practice, diplomatic claims were often mixed, involving both a direct injury to the State itself and an indirect injury to the State by virtue of an injury to its national, as in the case concerning *United States Diplomatic and Consular Staff in Tehran*. In such cases, it was difficult to lay down a general rule, but article 11, in the wording "preponderantly" and "but for the injury to the national", offered a test which might well prove satisfactory for the purpose.

25. The Commission had still to decide whether the local remedies rule was a rule of substance or of procedure. Moreover, the Special Rapporteur had queried whether the concept of denial of justice, which was clearly a primary rule, ought to feature in the draft. Another outstanding issue was the former "Calvo clause" and the question whether the Commission ought also to consider it.

26. While satisfied with the progress so far made on the draft articles, he hoped they would be confined to broad principles, so that they could be completed within the next five years.

27. **Mr. Kolby** (Norway), speaking on behalf of the Nordic countries, said he wished to address the topics "Diplomatic protection" and "Unilateral acts of States". The Nordic countries agreed with the Commission that the topic "Diplomatic protection" was of great practical significance; it had not become obsolete, despite the institution of dispute settlement mechanisms, and was ripe for codification. He welcomed the Commission's approach to the topic and to the general issues involved, and the Special Rapporteur's decision to tackle the most controversial issues at an early stage.

28. It was important to focus on practicalities, with a view to producing a kind of guide for practitioners. Rules of diplomatic protection were closely related to the basic principles and structure of inter-State relationships, helping to divide competences among States and to ensure respect for international law, without prejudice to other relevant rules such as those governing human rights or investment protection. Diplomatic protection was the prerogative of the State of nationality of the individual concerned, to be exercised at its discretion. The individual concerned should be regarded as a beneficiary of international law. However, the State had no obligation to present a claim on behalf of an injured national, nor was diplomatic protection a human rights institution.

29. Concerning article 9, the Nordic countries supported the view that the rule of continuous nationality enjoyed the status of customary international law, and that the current trend towards protecting individuals did not justify a change in the continuity rule. Diplomatic protection was a discretionary right of the State, which in exercising it was in reality asserting its own rights. The traditional rule as expressed in article 9 should be retained, but should be made more flexible and subject to exceptions for cases in which the individual would otherwise be unable to secure the protection of a State. The main exception should be an involuntary change of nationality.

30. He could agree with the rule in articles 10 and 11 on the exhaustion of local remedies, which was a well-established rule of customary law. However, the addition of "effective" to "available local legal remedies" in article 10 would better reflect the prevailing view in international law. Otherwise, the term "all" in reference to local remedies would be too broad, and would impose an excessive burden on the injured individual.

31. On the question of dual or multiple nationality, dealt with in article 6, the Nordic countries considered that the State with the dominant and effective link was the one entitled to act on behalf of its national. Such a State should have that right even where the protection was aimed against the State of the other nationality.

32. Turning to the topic "Unilateral acts of States", he explained that the Nordic countries could support the new draft articles (a) and (b), but felt that paragraphs 1 and 2 of article (a) could well be merged. However, there should be no need for a comprehensive set of rules on the topic. The Nordic countries would welcome a more focused approach, limiting the topic to a few general rules and a study of certain particular situations.

33. **Mr. Al Baharna** (Bahrain) said that diplomatic protection was one of the most controversial subjects in international law, partly because of the human rights dimension. However, it should not be treated as a human rights issue. Diplomatic protection was exercised basically at the discretion of the State to which the individual in question belonged, but it was not certain whether the State exercising it was seeking to ensure its own rights or to protect its nationals. Some claims were mixed. A flexible approach was needed, in order to strike an equitable balance between the interests of the State and those of its nationals. He believed the Commission could formulate new rules from the conflicting sources of law on the topic, and felt that it should adopt a liberal and progressive approach, rather than a conservative one.

34. Article 9 departed from the traditional rule of continuous nationality, which had been cast into doubt because of current trends in State practice,

jurisprudence and doctrine. The report of the Commission mentioned certain exceptions to the customary rule, relating to situations, such as an involuntary change of nationality, in which the individual would otherwise be unable to obtain the protection of a State. In article 9, the Special Rapporteur had chosen a new approach, attributing to the State whose nationality the injured individual had acquired since the injury the right to espouse a claim on his or her behalf, subject to certain safeguards in favour of the original State of nationality. He agreed that the rule of continuous nationality should be made more flexible, so as to avoid the exceptional cases in which injured individuals might otherwise have no means of presenting a claim. He favoured a middle course, maintaining the rule while making provision for involuntary changes of nationality and other cases where different nationalities were involved as a result of changes to the claim arising from inheritance and subrogation.

35. With regard to articles 10 and 11, dealing with the exhaustion of local remedies rule, which was well established as a customary rule of international law, it seemed from the Commission's report that the concept of the denial of justice would be embodied in the draft articles, with no distinction made between primary and secondary rules. His delegation favoured that approach, since no injury would be attributable to a State without proof that justice had been denied.

36. Article 10, paragraph 2, described local remedies as being "judicial or administrative courts or authorities whether ordinary or special". However, the article should contain a comprehensive definition of the remedies to be exhausted. The reference to "administrative courts or authorities" went beyond the scope of legal remedies, since such authorities could have a connection with the political organs of the State. Moreover, the phrase "ordinary or special" was ambiguous and needed clarification, while the phrase "local legal remedies" should apply strictly to judicial and administrative remedies, in accordance with the constitutional system of each State concerned, and not to non-binding discretionary or recommendatory decisions by public authorities or tribunals. His delegation also supported the suggestion made in the Commission that the word "effective" should be added to the phrase "all available local legal remedies" in paragraph 2, to accord with the usual terminology.

37. It was doubtful whether the reference to a "natural or legal person" in article 10, paragraph 1, was necessary, since in practice diplomatic protection was generally exercised on behalf of both categories of person. An explanation in the commentary would suffice. The question of when and at what period an individual's claim became an international claim also needed clarifying.

38. Article 11, on the exhaustion of local remedies, adopted the preponderance test which was supported by a number of cases decided by international courts, such as the *Interhandel* and the *Elettronica Sicula (ELSI)* cases. In accordance with that test, the Special Rapporteur drew a distinction between direct and indirect claims, stating that the rule applied only where there had been a direct injury to a national of a State and thus indirectly to the State. The exhaustion of local remedies rule would not, on the other hand, apply where there had been a direct injury to the State itself, since there the principles of State responsibility would apply. Although it was difficult to decide whether a claim was direct or indirect, that decision should be left to the court or tribunal.

39. The reference in article 11 to a "request for a declaratory judgement" could be considered an indication that an injury was direct so far as the State was concerned. The cases referred to in the Special Rapporteur's second report (A/CN.4/514 and Corr.1 and 2 (Spanish only)) illustrated the fact that States sometimes sought both declaratory reliefs and compensation for injuries to their nationals. Although the report stated that the courts had to decide which was the preponderant factor, the article did not clearly reflect the precedents regarding the application of the preponderance test, especially in mixed cases. Nor did the article deal with cases where a request for a declaratory judgement or order might not apply. A separate article dealing with the two issues might be needed. Other factors such as the subject of the dispute, the nature of the claim and the remedy claimed, should also be considered when assessing whether a claim was predominantly direct or indirect. Indeed, there was a case for deleting the square brackets around the last sentence of article 11, although the sentence could with advantage be redrafted in order not to appear to be setting out examples rather than criteria. Lastly, article 11 appeared to reflect not only the preponderance test but also the sine qua non test. His delegation had no

objection to applying both tests so long as they helped to clarify the content of the article.

40. **Mr. Guan Jian** (China), referring to the topic "Diplomatic protection", noted that article 9, which was concerned with continuous nationality, had given rise to heated debate in the Commission. The Special Rapporteur had proposed abandoning the traditional rule of continuous nationality, since it was not favourable to the protection of the rights of individuals who had changed nationality in good faith, as a result, for example, of State succession, marriage or adoption. Most members of the Commission believed, however, that the rule deserved to be maintained, because it enjoyed the status of customary international law and effectively prevented "forum shopping". The key issue of the debate in the Commission had been the relationship between diplomatic protection and individual rights. In his view, diplomatic protection was, as a feature of international law, essentially a mechanism that regulated inter-State relations. The right of diplomatic protection belonged to the State, not to the individual. A necessary condition for a State to exercise that right was the existence of a legal relationship between the State and the individual, based on his or her nationality. His delegation therefore supported the majority view in the Commission that the rule of continuous nationality should be maintained and should become a basic standard rule governing the exercise of diplomatic protection, allowance being made for exceptional cases in which individuals had changed nationality involuntarily and been left with no diplomatic protection from any State. Such cases should be dependent on certain requirements: the acquisition of nationality leading to the loss of the original nationality should have been undertaken in good faith and there should be a substantial link between the individual and the subsequent nationality.

41. The exhaustion of local remedies rule, which was covered by article 10, had been widely accepted as part of customary international law and the draft submitted by the Special Rapporteur had not caused much controversy in the Commission, although it was to be hoped that the Drafting Committee would make further improvements.

42. With regard to article 11, diplomatic protection was exercised by a State when its national was injured. If an international claim was brought on the basis of a direct injury to a State rather than to its national, therefore, it went beyond the scope of diplomatic protection and the exhaustion of local remedies rule had no relevance. The text proposed by the Special Rapporteur thus seemed unnecessary, although his delegation was willing to listen to the views of others.

43. The diplomatic protection of companies should also be predicated on a legal relationship between the State and the company, based on its nationality. The latter could, as was the prevailing practice in many countries, including China, be based on where the company was incorporated or registered. The company, and its shareholders were, however, two different legal concepts. An injury to a company caused by a State did not necessarily give claim rights to shareholders. Only the State whose nationality a company had acquired through incorporating or registering in it had the right to give it diplomatic protection. In addition, it was not appropriate for a State whose nationals were shareholders to exercise diplomatic protection vis-à-vis the State in which the company was incorporated or registered. If an individual foreign shareholder of a company was injured by the internationally wrongful act of a State in which the company was incorporated or registered, the State of nationality of the individual shareholder had the right to provide diplomatic protection; but that applied to individuals rather than companies.

44. Having concluded its consideration of the draft articles on State responsibility, the Commission should give priority to the topic "Diplomatic protection" at its next session, since it was of both theoretical and practical significance for State-to-State relations.

45. With regard to unilateral acts of States, such acts were becoming increasingly important and the codification and progressive development of the law relating to them were essential, difficult though the process would be. After taking into account the views expressed by States, the Special Rapporteur had essentially grouped such acts into two categories: those whereby the State undertook obligations and those whereby it reaffirmed a right. The draft articles themselves might follow the same pattern. The classification of unilateral acts was desirable, but further consideration should be given to whether the two proposed categories were appropriate. Traditionally, unilateral acts consisted of promise, recognition, waiver and protest. Each had its own characteristics and legal effects and problems could arise if only two categories were retained. Promise, which could be listed as an act performed to fulfil an

obligation, and waiver, which could be taken to be a waiver of rights, presented no difficulty. Recognition and protest, on the other hand, were difficult to place in either of the proposed categories. Recognition was the acceptance of a fact or situation that related to the rights and obligations of concerned parties, while protest was the expression of disagreement with regard to a situation or a legal relationship. Thus an act to declare neutrality might represent a situation either where a State was fulfilling its obligation to be neutral or where it was confirming that its right to remain neutral was not to be violated, as in the case of a declaration of war. That being so, perhaps a third category should be added, namely, acts that accepted or rejected a certain situation or legal relationship. Traditional recognition, protest and declaration of neutrality could be listed in that category.

46. For the time being, the Commission should concentrate on formulating and considering the general rules applicable to all unilateral acts. Once the universality and significance of each kind of act had been established, rules concerning each category could be formulated according to the specific situation and needs, at an opportune time, with detailed provisions on the establishment of elements and legal validity. If classification was necessary at all, the Commission could give due consideration to his delegation's proposal and also to the Italian proposal for three categories of unilateral acts.

47. The interpretation of unilateral acts was very important, but it was not yet time to consider the issue. His delegation's initial view was that, when formulating the rules on interpretation, the Commission could refer to the relevant provisions of the Vienna Convention on the Law of Treaties. Specific circumstances should be taken into account when the true intention of the State taking the action was considered and a good faith interpretation should be made. At the same time, the particular characteristics of the unilateral act itself should be considered and the Vienna provisions should not be simply duplicated or copied.

48. **Mr. Peersman** (Netherlands) referring to the topic "Diplomatic protection", said that, at its fifty-second session, the Commission had discussed article 8, which provided for the exercise of diplomatic protection on behalf of stateless persons or refugees. In its response to the Commission's questionnaire on the topic, his delegation had provided an affirmative answer both to the question whether a State in which a stateless person had his or her lawful and habitual residence was entitled to protect that person and to the corresponding question with regard to refugees, although exercising diplomatic protection on behalf of a refugee vis-à-vis a State of which he or she was a national would probably not be very effective. From a human rights perspective, a system of protection analogous to diplomatic protection should be set up for the benefit of stateless persons and refugees.

49. Another item of particular interest to his delegation was the legal question of whether — subject to the requirement of continuous nationality — a State of nationality might exercise diplomatic protection on behalf of an injured national against another State of which he or she was a national, where the dominant or effective nationality was that of the former. According to the current text of article 6, the Commission had answered that question in the affirmative; and his delegation concurred with that approach. Although there were doubts as to the pertinence of the practice cited by the Special Rapporteur, article 6 represented a desirable solution and, if existing practice proved insufficient, the article could be regarded as an example of the progressive development of the law.

50. Some months earlier, his Government had raised with the Secretariat of the Council of the European Union's Working Party on Public International Law the issue of consular assistance to detainees with dual nationality whose dominant nationality was that of the State providing the assistance. The reason for raising the issue had been the problems experienced by Netherlands consular officers in a certain country in gaining access to Netherlands detainees whose dominant nationality was undoubtedly that of the Netherlands, although they also had the nationality of the State of detention. Although the issue related to consular assistance and not diplomatic protection, since the State of detention had — to the best of his knowledge — not committed any internationally wrongful act either in the administration of justice or with regard to the conditions of detention, the principle was the same: a dominant nationality could take precedence over a nationality with a weaker link.

51. With regard to the Commission's discussion of the exhaustion of local remedies, he noted that it had been suggested that the phrase "available local legal remedies" in article 10 required closer scrutiny and that the criterion of effectiveness was lacking. The

definition of local remedies should be as precise as possible. The word "available" should therefore be subject to further qualification with terms such as "legally" and "practically". Moreover, contrary to the view of some members of the Commission, he would favour adding the word "effective". The requirement to exhaust local remedies should be subject to strict conditions in order to prevent a defendant State from making an unjustified plea in that regard. His delegation looked forward to seeing how article 14, which would contain an overview of situations where there was no need to exhaust local remedies, would be formulated. Among the grounds for dispensing with that need, the Special Rapporteur had rightly included the absence of a voluntary link between the injured individual and the respondent State, for example where instances of transboundary pollution occurred.

52. **Mr. Horinouchi** (Japan) said that the draft guidelines on reservations to treaties might prove to be too detailed and complex for use. The conceptual distinctions between different categories would be meaningful only if they were accompanied by adequate clarification of the legal effects of each category. It was questionable whether late formulation of a reservation to a treaty really fell within the scope of the topic "Reservations to treaties". Japan shared the concern expressed by a number of States that if it became possible to make late reservations, the integrity of treaties could be placed in jeopardy and the regime of reservations established under the Vienna Convention on the Law of Treaties undermined. The presentation of a late reservation was not consistent with article 19 of the Vienna Convention. What was termed a reservation in the draft guidelines was in fact a declaration, an essentially new type of agreement or a modification to a treaty.

53. On the other hand, State practice did encompass some instances in which a reservation had been formulated after the conclusion of a treaty. Hence it was legitimate to study how that practice could be accommodated in the law of treaties. The act in question could be regarded as an agreement by the contracting States that the treaty concerned was modified only with respect to the State entering the late reservation and to the extent of the reservation, or with respect to that State and the Parties agreeing to such modification. Since States were free to conclude any agreements they wished, there was no reason why a State should not be allowed to derogate from some treaty obligations, provided that all the parties consented to it. It was, however, not axiomatic that failure to raise an objection within twelve months should be regarded as acceptance.

54. Since late reservations were undesirable and should be avoided whenever possible, the Commission should be requested to continue its study of the matter in order to determine whether there were enough examples to justify the formulation of general rules, whether such State practice came within a regime of specific treaties and, if so, whether the rules pertaining to them should be established in a text on reservations to treaties.

55. The draft articles on diplomatic protection should reflect the progressive development of the law, but they should not depart too far from customary international law. Although human rights constituted one of the most important areas of international law in need of strengthening, it was inappropriate to incorporate a human rights dimension in the draft articles on diplomatic protection, since it was an issue which should be addressed through primary rules.

56. It was important to reflect State practice when drafting articles on unilateral acts of States and it was necessary to determine which unilateral acts of States had legally binding effects. Since it might be difficult to cover every kind of unilateral act, it would be wise for the Commission to focus on the more highly developed areas of State practice.

57. **Ms. Cavaliere de Nava** (Venezuela), referring to chapter V of the report, said that the prevention of transboundary harm was of the utmost importance; carefully drafted, well-balanced articles on the topic would help to promote good relations between neighbouring States. The draft articles prepared by the Commission were, generally speaking, acceptable to her delegation. The activities covered by the article should not be enumerated, not even in a flexible, non-exhaustive list. The Commission's definition and qualification of the term "harm" was apt. Article 3, which should be considered in conjunction with articles 9 and 10, laid down the obligation of prevention, which was the cornerstone of the draft articles. The words "or at any event" implied that priority should be given to prevention. It was right to make the article broad in scope, so that the State of origin had wide discretion to take whatever action was necessary, including legislative and administrative measures. The obligation

of due diligence with regard to environmental protection was embodied in a number of international instruments and had been a factor taken into consideration in a number of cases heard by international tribunals.

58. Article 4 was equally important, because the obligation to cooperate was essential to risk prevention and provision had to be made for it in both the planning and the execution phases. Similarly, the obligation to seek authorization for an activity imposed by article 6, was vital and such authorization should be based on environmental impact studies, because the adoption of the requisite preventive measures depended on an assessment of potential transboundary harm. Article 8 complemented article 4. It was essential that the State of origin should notify other States of the potential risks of an activity, if they might be affected by it.

59. Article 19 was most apposite in that it embodied the principle of mutual agreement to dispute settlement machinery, although it also made provision for an impartial fact-finding commission which could present findings and recommendations. Her Government found that quite acceptable. Since the prevention of transboundary harm was closely bound up with the international responsibility of States, the Commission and States should view it in that context in the future.

60. With regard to chapter VII of the report, her delegation hoped that the Commission would submit some of the draft articles on diplomatic protection to the Drafting Committee for consideration the following year. The rule of continuous nationality dealt with in article 9 was still a valid rule of customary law. A person should not be able to request the diplomatic protection of a State unless there had been a continuous relationship between them between the time of injury and the time of presenting the claim, even if the nationality of the requested State had been acquired in good faith. The exceptions to the rule proposed by the Special Rapporteur, especially those relating to involuntary changes of nationality, deserved careful scrutiny. Such exceptions should be limited to cases in which nationality had been acquired involuntarily, for example, as a result of State succession.

61. The Commission should examine the international responsibility of international organizations and shared natural resources the following year. To that end, it should appoint two new Special Rapporteurs who should present reports in 2003. In 2002, the Commission could set up working groups to begin consideration of those topics and to guide the Special Rapporteurs.

62. **Ms. Telalian** (Greece) said that her delegation supported the draft articles on prevention of transboundary harm from hazardous activities, which contained principles of great value for the codification and progressive development of international law in that field. She welcomed the approach adopted in the preamble, which reconciled the freedom of States to carry on or permit activities involving risk within their territories with their duty not to cause harm in the territory of another State, an approach inspired by Principle 21 of the Stockholm Declaration, reaffirmed by Principle 2 of the Rio Declaration and confirmed by the International Court of Justice in its advisory opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons* case.

63. There was no reason to limit the scope of article 1 to activities "not prohibited by international law" and those words should therefore be omitted. In view of the contents of article 18, the draft articles should apply to all activities giving rise to significant transboundary harm, irrespective of whether that harm was caused by a lawful activity or a breach of an international obligation of the State concerned.

64. The clarification given in the commentary to the effect that article 3 complemented articles 9 and 10 was most welcome, since the obligation to take appropriate measures included the obligation of due diligence and that of seeking solutions based on an equitable balance of interests. Article 6 was well-balanced and closely related to article 7, a key article, which incorporated principles established in the context of other environmental agreements and in State practice. It should, however, take account of the fact that the evaluation of the possibility of an activity causing significant transboundary harm was the object of the impact assessment.

65. Her delegation fully supported the notification and consultation procedures mentioned in articles 8 and 9, because those requirements were well-established principles reflected in international jurisprudence and incorporated in many international instruments designed to prevent transboundary harm. Article 10 enumerated some very important factors which might offer useful guidance to States participating in

consultations aimed at achieving an equitable balance of interests. It would, however, be better to combine paragraphs (a) and (c) and to include in the new paragraph the principle of precaution, which figured in many international instruments on environmental protection.

66. The dispute settlement procedures provided for in article 19 were unsatisfactory, because the highly complicated nature of environmental disputes called for a binding dispute settlement mechanism similar to that contained in article 33 of the Convention on the Law of the Non-navigational Uses of International Watercourses.

67. Greece supported the Commission's recommendation that the Assembly should elaborate a convention on the basis of the draft articles. The Commission should, however, remember that a comprehensive liability regime required not only the adoption of measures of prevention, but also the establishment of an adequate regime of compensation and should therefore embark upon a thorough examination of existing liability regimes and should try to elaborate its own general principles of State liability. Some major developments in international law had taken place in the context of civil liability agreements for transboundary injury, which ensured that compensation for damages would be available through a mechanism funded in a variety of ways. It was interesting to note that some of those liability conventions also provided for an international supplementary fund to be established by the financial contributions of member States, a certain amount of which was reserved for transboundary damage. All those possibilities ought to be explored.

68. On the issue of reservations to treaties, her delegation felt that although the possibility of making reservations could secure a broader participation of States in international human rights instruments, it could seriously impair their integrity, unity and effectiveness, undermine equality among States parties, and thwart the basic aim of harmonizing State action in the field of human rights protection.

69. Draft guideline 2.3.1 set forth a rule which would ensure legal certainty, given the serious effects of reservations on treaty relations; the rule was in keeping with the principle *pacta sunt servanda*, which would otherwise be circumvented if States could formulate reservations at any time.

70. With regard to draft guideline 2.3.2, her delegation noted that, although it reflected current practice followed by depositaries, that practice related to borderline cases; moreover, existing practice showed that late reservations were usually permitted in the context of treaties which specifically authorized reservations. Her delegation could support the guideline as long as resort to such reservations was made only in very exceptional cases. The practice of late reservations was hardly compatible with human rights treaties; the Commission should give further consideration to State practice in that field.

71. On the issue of interpretative and conditional interpretative declarations, her delegation supported the definition of interpretative declarations in guideline 1.2; although the Vienna Convention on the Law of Treaties was silent on the question of interpretative declarations, it was apparent that those declarations aimed only to interpret a treaty and not to modify its legal effect. The problem that arose was how to distinguish them from reservations, particularly when the intention of the author State was not clear. Her delegation felt that the legal effects of conditional interpretative declarations as defined in guideline 1.2.1 were the same as those of reservations and for that reason they should be treated as reservations, so that it was not necessary to deal with them specifically in the draft guidelines.

72. **Mr. Lobach** (Russian Federation), referring to the topic of "Reservations to treaties", said his delegation supported the work on the Guide to Practice, and agreed that it should be exclusively utilitarian, rather than normative, in nature, and should not contradict the letter and spirit of the Vienna Conventions. It hoped that the Commission would seek ways of accelerating work on the topic, which was of great practical interest.

73. His delegation agreed that conditional interpretative declarations were covered by the same rules as reservations and that it should be possible to have a single guideline on such declarations, which would provide that the reservations regime was applicable to them, mutatis mutandis. That approach was justified because conditional interpretative declarations were fairly rare, so that it was very difficult to make generalizations about them; however, the issue should not be finalized until the Commission had considered the effects of reservations and of conditional interpretative declarations.

74. On the issue of late formulation of reservations, his delegation believed that the Guide to Practice should not contradict the regime established by the Vienna Conventions. It would be unwise to include provisions in that respect since that could encourage late formulation of reservations and have an adverse effect on the observance of the basic principle *pacta sunt servanda*. In any case, such declarations were rarely found in practice and, as a rule, only in cases when such a possibility was directly envisaged in the treaty.

75. The norm that a reservation could not be formulated after a State's expression of its consent to be bound by a treaty was not absolute, and States parties could always provide for the possibility of late reservations. Late reservations were of interest both at the doctrinal level, and from the point of view of the study of conventional practice. A number of issues arose in that connection which had not been covered in the commentary, in particular, the issue of whether the absence of objections to the late formulation of reservations was applicable only to a concrete situation, or could be interpreted broadly as consent in principle, allowing all States parties to formulate such reservations at a later stage. The second alternative would raise the question of making amendments to the text of a treaty, which would have to be in writing, and of whether the treaty would be amended for all or only some of its parties. In that context, the question raised in paragraph (21) of the commentary as to whether a distinction should be made between the absence of objections to the formulation of late reservations and the adoption of reservations within the sense of the Vienna Conventions needed to be considered in more detail.

76. On the role of the depositary, his delegation believed that guideline 2.1.7 should be maintained in its current form, reproducing the formulation of the corresponding articles of the Vienna Conventions. The issue of whether the depositary was authorized to refuse to transmit notifications of reservations had already been considered at the time of the drafting of the Vienna Convention on the Law of Treaties, and as a result, a reference to the right of the depositary to consider the validity of reservations had been removed from article 77 of the draft Convention. His delegation believed that, unless otherwise provided in a treaty, the depositary could not assume the right to make decisions as to whether a reservation corresponded to the purpose and objectives of a treaty, since that was within the competence of the contracting States. However, in cases where a treaty prohibited reservations or certain types of reservations, the depositary was entitled to reject documents containing such reservations, after informing the State concerned of the reason for refusal.

77. With regard to the topic "Diplomatic protection", one of the key questions was whether the Commission should be concerned primarily with codification or with the progressive development of international law. His delegation felt that, at least at the current stage, the Commission should focus on codification. Diplomatic protection was one of the oldest and least studied areas of international law, and the adoption of a conservative approach, based on a comprehensive study of State practice and judicial decisions, would be the best, and would make it possible to formulate rules acceptable to the majority of States.

78. With regard to article 9, the rule of continuous nationality had been widely confirmed in judicial practice and was an established norm of customary international law; even the positive trend to ensure protection of the rights of individuals could hardly serve to justify changing that rule. However, observance of that rule should not lead to unjust results: it was unacceptable that a person who had undergone an involuntary change of nationality should be deprived of diplomatic protection. His delegation supported the idea of maintaining the traditional rule, along with special exceptions, particularly for cases of involuntary change of nationality.

79. His delegation supported the inclusion of articles 10 and 11, which related to one of the most complex and contradictory aspects of diplomatic protection. The definition of local legal remedies seemed adequate and did not need further clarification or expansion, at least in article 10 itself; that formulation meant that such remedies must be available in practice. The criterion of effectiveness could give rise to subjective interpretation.

80. His delegation supported the continued consideration of the topic "Unilateral acts of States", and shared the view that a more pragmatic approach was needed. It believed that the Special Rapporteur's intention to classify such acts on the basis of their legal effects was generally correct. However, the inclusion of interpretative declarations was questionable;

although such declarations gave rise to additional obligations for the author, they differed from other unilateral acts because they were treaty-based, and should clearly be considered in the context of reservations. The object and purpose of a unilateral act needed to be taken into account for the purposes of interpretation; that was the foundation for one of the basic rules of interpretation, the rule of effectiveness, the significance of which had been stressed on a number of occasions by the International Court of Justice.

81. With regard to new topics, his delegation believed that the Commission should take up the topic "Responsibility of international organizations", but felt that it would be premature to take up the issue of the fragmentation of international law.

82. **Ms. Odaba** (Kenya) said that her delegation welcomed the Commission's completion of its work on State responsibility, but would have liked more time to study the draft articles and the commentaries thereto. Her Government supported the Commission's recommendation that the General Assembly should take note of the draft articles in a resolution and should consider, at a later stage, the possibility of convening an international conference of plenipotentiaries; it urged the General Assembly to take action on the draft articles as soon as possible, given the importance of the subject.

83. On the topic "Reservations to treaties", her delegation believed that the existing regime of reservations set forth in the Vienna Conventions should not be modified; the guidelines should aim to fill any lacunae that might exist and further clarify the scope of application of the provisions of the Vienna Conventions.

84. With regard to conditional interpretative declarations, her Government agreed that there was a need to study the effects of reservations and of conditional interpretative declarations before determining whether the guidelines relating to reservations should apply mutatis mutandis to conditional interpretative declarations. Current State practice did not draw a clear distinction between conditional interpretative declarations and reservations.

85. Her delegation called for caution in endorsing a regime that permitted the formulation of late reservations. Although the principle followed established practice, it ran counter to the provisions of the Vienna Conventions, and the inclusion of guidelines on the subject would have the undesired effect of encouraging late reservations. Further study was needed in that respect. In the long run, it might become necessary for States to consider the question of whether late formulation of reservations would be preferable to total denunciation. Her delegation reiterated the longstanding principle that States had an obligation to ensure that their reservations were consistent with the purpose and object of the treaty.

86. Her delegation supported the view that the power of the depositary to reject reservations to treaties should be limited to situations where there was a prima facie prohibition of reservations or of reservations other than specified reservations as stipulated in article 19 of the Vienna Convention on the Law of Treaties. However, the determination of whether or not a reservation was incompatible with the object and purpose of the treaty should be left to the contracting States. Her delegation felt that the role of the depositary should be limited to communicating to the States concerned the contents of the reservations; any questions on the validity of such reservations should be left to the contracting parties.

87. With regard to the topic "Diplomatic protection", her delegation did not wish to erode the importance of the rule of continuous nationality, which was a longstanding rule of customary international law. It therefore supported the view that article 9 should be recast to give greater emphasis to that rule, while at the same time providing certain exceptions relating to State succession, marriage and adoption. It agreed that a distinction should be drawn between voluntary and involuntary change of nationality, which could be used as a guideline for drawing up such exceptions and serve to reduce incidents of "claim shopping" and "forum shopping".

88. On the question of diplomatic protection for legal persons, her delegation noted that although general rules of international law supported the view that a State could exercise diplomatic protection only if a company was incorporated or registered in its territory, State practice was not clearly established; it therefore wished to study current trends and evolving practice before giving substantive comments to the Commission.

The meeting rose at 5.50 p.m.