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Chairman: Ms. Ramoutar . . . . . (Trinidad and Tobago)
later: Mr. Baja . . . . . (Philippines)

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The meeting was called to order at 10 a.m.

Agenda item 152: Report of the International Law Commission on the work of its fifty-fifth session (*continued*) (A/58/10)

1. **Mr. Ramadan** (Egypt) emphasized the great complexity of the topic of responsibility of international organizations, whose rules should be codified. He said that a reference to the "rules of the organization" should be included in the draft articles; since such rules normally took the form of a treaty and constituted international law, when they were violated international law was violated. The wording of the draft article on responsibility of international organizations should be similar to that of article 2 of the 1986 Vienna Convention, in the interest of achieving standardization and a form of codification that left no room for reopening discussion of issues on which agreement had already been reached.

2. In principle, the conduct of peacekeeping forces was attributable to the United Nations, but if the injured State demonstrated to the extent that it was able that a violation by peacekeeping troops was an infringement of their United Nations mandate, the conduct in question should be attributed to the contributing country.

3. With regard to draft article 1, paragraph 1, on the scope of the articles, a cause-and-effect relationship between the wrongful act and the harm caused should be established. Under paragraph 2 of article 1, on international responsibility of a State for the internationally wrongful act of an international organization, it was a requirement that it should be possible to demonstrate the responsibility of the State or the international organization possessing legal personality. If the organization acted independently of member States, it should be regarded as responsible. However, responsibility would be attributable to the State if it could be shown to have acted in bad faith and in its own interest. In such a case, to the extent that it was able, the injured State must provide the courts with evidence that that was so.

4. Draft article 2, entitled "Use of terms", referred to the legal personality of the organization. His delegation did not consider such a requirement necessary, because the essential element was the organization's independent will vis-à-vis the will of States. United Nations decisions attributing responsibility to international organizations took account of the fact that the general rules of the organization were normally laid down in treaties that had been codified and formed part of international law. Delegations that maintained that national courts could take up the issue of responsibility of an international organization should take into account the Commission's view that the conduct of international organizations could be seen only in the context of international law. The Commission should therefore consider the matter and decide whether the International Court of Justice was competent to deal with matters relating to the United Nations and its specialized agencies and other bodies in the United Nations system. If the Commission concluded that the Court was competent to deal with disputes in such a tricky field of law, that could give rise to other questions. For example, if the Security Council did not take a decision because a State had used its veto, such an omission could be regarded as a violation of international law, and the matter should be taken to the Court. That could have certain implications if the injured State claimed that a State had used its veto in its own interest, and if it proved that that was so. The question of the Court's competence in matters relating to the United Nations was important, and such issues could not just be set aside or be entrusted to national courts.

5. **Mr. Masud** (Pakistan) said that responsibility of international organizations was indeed a complex subject, and he agreed with those representatives who had emphasized the need for extensive study of the limited case law on the subject, as well as practice. With regard to draft article 1, he considered paragraph 1 quite satisfactory. Paragraph 2, however, needed to be clarified: in order to assume responsibility for the acts of an international organization, a State had to be a member State, which was a matter that was not dealt with in that paragraph. He therefore proposed that the term "a member State" should be used instead of "a State".

6. Draft article 2 raised the issue of how to define an international organization; the organizations covered by the articles should be of an intergovernmental nature. Some organizations had as members entities that were not States; the issue of the responsibility of such entities would therefore have to be addressed so as to determine, for example, whether they had legal

personality and whether they could undertake international obligations.

7. The text of draft article 3, on the attribution of conduct to an international organization, was satisfactory. It would be necessary to decide whether a general rule should contain a reference to the "rules of the organization", as defined in the Vienna Convention. It would therefore be necessary to clarify whether international organizations had limited or full legal personality. Some judgments of the International Court of Justice indicated that their powers were limited to those vested in them by States, and the limits of those powers were determined by the common interests whose promotion States entrusted to the international organizations.

8. There was no case law on the issue of responsibility for the conduct of peacekeeping forces, because the Charter had no provisions on peacekeeping operations and did not envisage any use of force by the United Nations against States. There had been a legal controversy relating to the competence of United Nations organs to take decisions relating to the establishment of peacekeeping operations and the obligation of States to contribute to such operations. In the absence of a clear provision in the Charter, it was difficult to determine whether the conduct of peacekeeping forces was attributable to the troop-contributing State or to the United Nations.

9. *Mr. Baja (Philippines) took the Chair*.

10. **Mr. Shi Jiuyong** (President of the International Court of Justice) said that the work of the Sixth Committee was of the highest importance and relevance to the International Court of Justice. The Court was the principal judicial organ of the United Nations. Its role consisted in deciding disputes that were submitted to it under international law. Since the Sixth Committee was charged with the development of international law and its codification, the link between the two institutions within the framework of the United Nations was self-evident. Since both bodies worked towards the same goal, it was their duty to perform their tasks in permanent awareness of each other's activities. The follow-up of the Committee's work was facilitated by its press releases and publications. As for the work of the Court, it was widely publicized and accessible to all through the Court's web site and its annual reports to the General Assembly.

11. The programme of work before the Sixth Committee was heavy and diverse. Many of the items on the Committee's agenda for the fifty-eighth session, such as the convention on jurisdictional immunities of States and their property, strengthening the role of the United Nations, following up on the International Criminal Court and the study of measures to eliminate international terrorism, were extremely important for the international community and the development of international law. The International Court of Justice would remain very attentive to the work of the Sixth Committee.

12. **Mr. Isong** (Nigeria), referring to the responsibility of international organizations, said that articles 1-3, which had been provisionally approved, the commentary thereto, the related conceptual clarifications and the envisaged linkages with relevant articles on the responsibility of States for internationally wrongful acts were bound to facilitate future deliberations and exchanges of ideas.

13. With regard to draft articles 17-22, a State was entitled to exercise diplomatic protection in respect of an injury to a corporation that had the nationality of that State. However, adequate guarantees should be provided for foreign investments, taking into consideration the concerns of the investing corporation and its shareholders, regardless of their nationalities. Nigeria had therefore put in place an investment regime aimed at creating, through the activities of a series of institutions established for that purpose, a stable and secure environment intended to protect foreign investors while ensuring delivery of quality services to the country.

14. Nigeria continued to live with the painful memory of the 1988 dumping in its territory of between 40 and 50 tons of radioactive industrial waste that had caused great damage to the health of the population and the environment. The Nigerian Government had had difficulty in dealing with the problem at the time, because no relevant international legal instrument had been available. Nigeria therefore welcomed the work done on international liability for injurious consequences arising out of acts not prohibited by international law, and appreciated particularly the attention paid to the definitions and interpretations of the terms "prevention", "liability", "compensation" and "allocation of loss" and the links between them. The rigorous examination of the legal regime on the allocation of loss and the analysis of

liability under various regimes would no doubt facilitate the Commission's work.

15. Nigeria was in favour of a study to determine the extent to which recent environmental disasters were the result of a violation of the duty of prevention. The dumping of all forms of hazardous waste continued to constitute one of the cardinal socio-economic and security threats to the world, particularly to developing countries, and made such a study all the more necessary.

16. His Government endorsed the Special Rapporteur's intention to embark on a study of State practices with respect to uses and management of shared natural resources, including pollution prevention and cases of conflicts, as well as national and international rules. Nigeria saw merit in the Special Rapporteur's emphasis on undertaking further study of the technical and legal aspects before making a final decision on that matter, and requested the Commission to consider the technical needs of developing countries with a view to enhancing their capacity to participate effectively in work on the topic. The title of the topic had to be unambiguously defined in order to shed more light on the meaning of the word "shared". Cognizant of the crucial concerns relating to the topic, Nigeria continued to consider the report and would make its reactions available to the Commission at a later date.

17. **Mr. Candioti** (Chairman of the International Law Commission) said that in the current year the Drafting Committee had focused on the draft articles relating to the exhaustion of local remedies rule. Subsequently, on the proposal of the Drafting Committee, the Commission had adopted draft articles 8 [10], 9 [11] and 10 [14], together with the relevant commentaries.

18. Article 8 [10], entitled "Exhaustion of local remedies", codified the customary international law rule under which the exhaustion of local remedies was a prerequisite for the presentation of an international claim. The provision should be read together with article 10 [14], laying down the circumstances in which local remedies did not need to be exhausted. Paragraph 2 was of necessity expressed in general terms, referring to remedies which were "as of right open to the injured person before the judicial or administrative courts or bodies, whether ordinary or special". It had not been possible to provide an exhaustive list of specific remedies, since they were subject to variation from State to State.

19. Article 9 [11], entitled "Category of claims", dealt with the classification of claims for purposes of the applicability of the exhaustion of local remedies rule. It gave effect to the basic proposition that the exhaustion of local remedies rule applied only to cases where the claimant State had been injured "indirectly", typically through its national, not where it had been injured "directly" by the wrongful act of another State. However, it had been recognized that it was not always clear whether a claim was "direct" or "indirect". The Commission had considered several possible tests and settled for the preponderance test. Hence, for a claim to be "indirect" in nature, it had to be brought "preponderantly on the basis of an injury to a national" or other person entitled to diplomatic protection under draft article 7 [8]. In addition, the provision applied both to the bringing of international claims and in respect of requests for declaratory judgements.

20. Article 10 [14] recognized four exceptions to the exhaustion of local remedies rule: where the remedies provided no possibility of effective redress; where there was undue delay in the remedial process attributable to the State alleged to be responsible; where there was no relevant connection between the injured person and the State alleged to be responsible or the circumstances of the case otherwise made the exhaustion of local remedies unreasonable; and where the State alleged to be responsible had waived the requirement that local remedies be exhausted.

21. It should be remembered that the issue had been exhaustively debated in 2002, especially in regard to the requirement of a "voluntary link": eventually, it had been decided to abandon any reference to a "voluntary" link in paragraph (c) in favour of a more general provision dealing with the question of reasonableness, while including a reference to the existence of a "relevant connection between the injured person and the State alleged to be responsible".

22. The Commission had considered and sent to the Drafting Committee draft articles 17 to 22, dealing with the diplomatic protection of legal persons. The main issue in the discussion of draft article 17, which recognized the right of States to exercise diplomatic protection in respect of an injury to a corporation which had the nationality of that State, had focused on the criterion for establishing the "nationality" of a

corporation. Various suggestions had been made, including: the nationality should be that of the State of incorporation, the place of the registered office, the place of domicile or *siege social*, or a genuine link criterion. While that draft article established the basic principle that it was for the State of nationality of the corporation to exercise diplomatic protection, the Special Rapporteur had proposed several exceptions to that rule in draft article 18, namely that the State of nationality of the shareholders could exercise diplomatic protection where the corporation had ceased to exist in the place of its incorporation, or where the corporation had the nationality of the State responsible for causing injury to it. The latter exception had occasioned the most debate in the Commission, where varying views had been presented, ranging from expressions of concern that its inclusion would be highly controversial and potentially destabilizing to expressions of support for the policy rationale for its inclusion.

23. Draft article 19 contained a saving clause designed to protect the rights of shareholders whose own rights, as opposed to those of the company, had been injured by an internationally wrongful act. The basic principle was that such shareholders retained the independent right of action in such cases, and hence qualified for diplomatic protection in their own right. That draft provision had met with general approval in the Commission.

24. Draft article 20 established the principle of continuous nationality in the context of diplomatic protection of legal persons, and was the counterpart to article 4 [9], adopted in 2002, which dealt with the same issue in the context of natural persons. That provision had not caused much difficulty for the Commission and had been referred to the Drafting Committee, on the understanding that it should be harmonized with article 4 [9].

25. One of the main issues raised during the Commission's discussion of the topic had been the treatment to be given to bilateral investment treaties, a common feature of which was the exclusion of the rules of customary international law relating to diplomatic protection. The Special Rapporteur had proposed the inclusion in draft article 21 of a *lex specialis* provision making it clear that the draft articles did not apply to the special regime provided for in bilateral and multilateral investment treaties. That draft article had been the subject of some debate and the Commission had eventually decided that the Drafting Committee should reformulate it as a "without prejudice" cause, to be included in the final version of the draft.

26. With regard to draft article 22, it should be noted that in addition to corporations, which were the most common example of a legal person that had in the past enjoyed diplomatic protection, other legal persons created under domestic law engaged in cross-border activities and might be victims of an internationally wrongful act. Since it would not be feasible for the Commission to formulate rules for each and every type of such entities, article 22 contained a mutatis mutandis clause extending the rules applicable in the case of corporations to other legal persons.

27. Delegations might consider commenting on the questions raised in chapter III of the report on the diplomatic protection of members of a ship's crew by the flag State and the diplomatic protection of nationals employed by an intergovernmental international organization. The Special Rapporteur intended to produce in 2004 a final report covering those two issues so that the first reading could be completed at the same session. Governments might also wish to comment on other issues that merited consideration and were not covered by the draft articles.

28. With regard to chapter VI of the report, he noted that following the adoption in 2001 of the draft articles on prevention of transboundary harm resulting from hazardous activities, the Commission had in 2002 resumed its consideration of the liability aspects of the topic and had established a Working Group which had considered the conceptual outline and set out some initial understandings on the topic. In adopting the report of the Working Group, the Commission had endorsed its recommendations that: (a) the scope of the topic of liability should be limited to the activities covered by the draft articles on prevention, namely activities not prohibited by international law which involved a risk of causing significant transboundary harm through their physical consequences; the Commission should concentrate on harm caused for a variety of reasons not necessarily involving State responsibility for wrongful acts; (c) the topic should be dealt with as an issue of allocation of loss among different actors involved in the operation of the hazardous activities; and (d) the topic should cover loss to persons, property, including the elements of State

patrimony and natural heritage, and the environment within natural jurisdiction.

29. At its 2003 session, the Commission had considered the first report of the Special Rapporteur dealing with the legal regime for the allocation of loss in case of transboundary harm arising out of hazardous activities, according to which: (a) each State must have as much freedom of choice within its territory as was compatible with the rights and interests of other States; (b) the protection of such rights and interests required the adoption of measures of prevention and, if injury nevertheless occurred, measures of reparation; and (c) insofar as might be consistent with the two preceding principles, the innocent victim should not be left to bear loss or injury. In the view of the Special Rapporteur, while the draft articles on prevention had addressed the first objective and partially the second objective, the Commission still had to address the remaining elements of the policy. To that end, States should be encouraged to conclude international agreements and to adopt suitable legislation and implementing mechanisms for prompt and effective remedial measures, including compensation for activities involving a risk of causing significant transboundary harm. Although any regime of liability and compensation should aim at ensuring that as far as possible the innocent victim was not left to bear the loss resulting from transboundary harm arising from hazardous activity, it might not be possible to obtain full compensation in each case, given problems with the definition of damage, difficulties relating to proof of loss, problems relating to the applicable law, limitations on the operator's liability and the limitations within which contributory and supplementary funding mechanisms operated.

30. The report reviewed sectoral and regional treaties and other instruments for allocation of loss in case of transboundary harm, on the basis of which the Special Rapporteur had drawn attention to their common features and had noted in particular that the legal issues involved in a civil liability system were complex and could be resolved only in the context of each specific case, depending on the jurisdiction in which the case was instituted and the applicable law. Furthermore, although it was possible to negotiate specific treaty arrangement to settle the legal regime applicable for the operation of an activity, the Special Rapporteur had refrained from drawing any general conclusions on the system of civil liability. The Special Rapporteur had concluded by making several submissions for consideration by the Commission, which, if found generally acceptable, could constitute a basis for drafting more precise formulations.

31. During the debate, the members of the Commission had expressed different views on the viability and conceptual framework of the topic, on the terminology used and the various issues raised by the Special Rapporteur in his report, including the general scope of the topic, the threshold of liability, the relevance of civil liability regimes and the instruments analysed. The Commission had also made specific comments on the summation and submissions of the Special Rapporteur, including the nature of a future instrument. Although the topic remained conceptually confounding, the Commission might be able to achieve a realizable objective, and would be assisted in its work by the comments of Governments on the various elements referred to in paragraph 174 of the report. Since the operator was likely to bear the primary liability, comments would be particularly useful on the following points: the various procedural and substantive requirements that the State should place on an operator; the basis of any liability system (whether it should be strict, fault-based, both or neither of the two); the limits to allocation of the loss to the operator; and supplementary sources of funding, including the nature and extent of State funding. Comments would also be welcome on the extent to which damage to the environment per se should be covered by the topic, as well as on the final form that the work should take.

32. **Mr. Popkov** (Belarus), referring to international liability for injurious consequences arising out of acts not prohibited by international law, said that the Commission must consider the topic because of the risk of transboundary harm arising out of the use of very dangerous resources. Belarus, which had suffered the consequences of the Chernobyl disaster, was well aware of the problem facing States affected by transboundary harm when it came to remedying the consequences and restoring the environment. Without corrective measures or sufficient financial resources, those States could not deal with such complicated problems single-handedly. Consequently, a comprehensive convention should be drawn up regulating the prevention of harm and the corrective measures to be taken, especially for the elimination of the harm and the compensation of those affected. The future convention should provide for liability of the

operator irrespective of fault, as had been done in various international agreements on liability for harm caused by specific types of lawful hazardous activities. Since the use of technology capable of causing transboundary harm might have serious consequences for the functioning of economic systems and other social systems, and affect substantial individual interests, limits had to be established for the attribution of harm to the operator. The part of the harm not covered by the operator should be covered by the State to which that operator belonged. Similarly, special compensation funds should be established with contributions from the States concerned. The future convention should guarantee to the maximum compensation for harm caused to individuals and the environment.

33. The draft articles should not include rules providing for the diplomatic protection of members of the crew of ships, aircraft or space vehicles who were not nationals of the flag State or the State of registration. The question of the protection of crews by States could be resolved within the context of special international treaties, as provided, for example, in article 292 of the United Nations Convention on the Law of the Sea.

34. With regard to the advisory opinion of the International Court of Justice in the *Reparation for Injuries Suffered in the Service of the United Nations* case, there was no need to examine in the draft articles the problem of international organizations which protected their personnel, since that involved functional responsibility, which was linked to the specific rights and interests of those organizations. However, there was no reason why the rules of diplomatic protection should not be applied to that case by analogy.

35. A special article should be included on the application, mutatis mutandis, of the provisions on diplomatic protection of corporations to other legal persons. That article should emphasize that diplomatic protection could only be offered to other legal persons for the purpose of defending their property and commercial rights vis-à-vis third States. There were good reasons for setting aside the possibility of applying the articles on diplomatic protection to non-governmental organizations, which in most cases did not maintain sufficient links with the State of registration in the exercise of their international functions and therefore could not request protection.

36. **Mr. McDorman** (Canada) said that the diplomatic protection of the crew and passengers of a ship who were not nationals of the flag State was a complex issue of international law which was being studied by his country. The Special Rapporteur's final report would also cover the diplomatic protection of nationals employed by intergovernmental organizations in the context of the advisory opinion of the International Court of Justice in the *Reparation for Injuries Suffered in the Service of the United Nations* case. With regard to the diplomatic protection of corporations and shareholders, the Special Rapporteur had proposed that the *Barcelona Traction* rule should be adopted, and in that regard it had to be determined whether that rule was an accurate statement of customary international law or whether international law had evolved since the adoption of the decision. Canada had relied on that rule in past litigation as being a correct statement of the current state of customary international law.

37. Another issue to be considered was whether the development and prevalence of bilateral and multilateral investment treaties had moved customary international law away from the *Barcelona Traction* rule to a point where the State of the shareholder had an independent right of action. As the Special Rapporteur had noted, in the *Barcelona Traction* case investment treaties had been treated as *lex specialis* and if they had not become part of customary international law they should continue to be treated as such. It could be argued that the fact that tribunals still considered the *Barcelona Traction* rule to be a true statement of customary international law was the driving force behind the desire of States to enter into bilateral or multilateral investment treaties. Canada therefore agreed with the approach taken by the Special Rapporteur in developing the articles on diplomatic protection of corporations and shareholders.

38. **Mr. Winkler** (Austria) referring to draft article 9, entitled "Category of claims", questioned whether the specific reference to a "request for declaratory judgement" should be retained. The sole decisive criterion in that context was whether or not there was direct injury to the State, and the introduction of a possible further criterion would only create confusion. The text seemed to suggest that a "request for a declaratory judgement" was to be distinguished from any other "international claim". He therefore suggested that that criterion should be deleted from the text of

draft article 9 and dealt with exclusively in the commentary.

39. He wished to make two comments on draft article 10. First, for the sake of uniformity, paragraph (a) should contain a reference to the *availability* of local remedies similar to that in article 44, paragraph (b) of the Commission's articles on State responsibility. Second, draft article 10, paragraph (c), could include the requirement that there should be a "relevant connection" between the injured individual and the State alleged to be responsible. The examples cited by the Special Rapporteur in his commentary were striking, but even outside the field of transboundary environmental harm there were numerous situations where acts of States had extraterritorial effects and caused injury to individuals abroad. The current wording of paragraph (c) and the commentary left a number of questions unanswered, and the Commission could prepare a more precise definition of the term "relevant connection".

40. In the draft articles on the diplomatic protection of corporations and shareholders, there was an inconsistency between draft article 17, paragraph 2, from which the reference to the criterion of incorporation for defining the nationality of corporations had been deleted, and draft articles 18 (a) and 20, in which the references to that criterion had been maintained.

41. With regard to the question whether new issues should be dealt with, in addition to the nationality of ships and crews and the diplomatic protection of officials of international organizations, Austria considered that the Commission should focus on the issues currently under consideration.

42. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, and more specifically the procedural and substantive requirements that the State should place on the operator, he considered that in the case of damage caused by hazardous activities, no strict proof of cause or connection should be required, since such activities involved complicated scientific and technological elements. Furthermore, the requirement of strict proof of cause or connection would place a heavy burden on victims, which would limit the effects of a liability regime and even give rise to questions regarding the usefulness of a specific liability regime for hazardous activities.

43. With regard to the basis and limits of allocation of loss to the operator, "allocation of loss" was a new concept which did not appear in other instruments dealing with liability. Although that term made it possible to overcome certain conceptual difficulties, it needed to be further clarified and its implications understood in regard to traditional liability regimes, which were based on the term "damage". Moreover, the objective of liability regimes was not actually allocation of loss but allocation of the duty to compensate for damage deriving from acts not prohibited by international law.

44. Concerning the extent to which damage to the environment should or should not be covered, he believed that the definition of "damage" eligible for compensation should be understood in the traditional sense as damage to persons and property, and that the Special Rapporteur's proposal provided a good working basis in that regard. The threshold of liability should be the same as that used in the draft articles on prevention, namely "significant harm".

45. Lastly, it would be premature to discuss the final form of the Commission's work on the topic, since the solution would depend on the development of specific liability regimes in the future. However, the outcome of the Commission's work could also take the form of a "checklist" enumerating the issues which needed to be taken into consideration in future negotiations on the establishment of liability regimes for specific activities.

46. **Mr. Bennouna** (Morocco) said that diplomatic protection was a topic on which abundant international practice existed, on which an *opinio juris* had emerged over the centuries and on which there were many judicial decisions. The time had therefore come to codify it so that it would acquire the certainty and precision of written law and be adapted to the developments that had occurred in relations between States, especially in the economic and trading spheres. With regard to the discussion on paragraph 2 of article 17, concerning the definition of the State of nationality of the legal person and the resulting possibility of protecting it internationally when it suffered an injury caused by another State, Morocco understood that the criterion followed by the International Court of Justice in the *Barcelona Traction* case should be adapted to the current state of international economic relations. It was not sufficient simply to use the formal criterion of the law of the country where the corporation had been

incorporated, and Morocco therefore considered it important that there should exist a genuine link between the corporation and the country under whose law it had been incorporated. That link did not necessarily have to be related to the volatile majority of its shareholders.

47. With regard to the exceptions to the application of the law of the State of nationality of the corporation that would allow the State of nationality of the shareholders to exercise diplomatic protection, Morocco supported the provisions of article 18, which was based on the precedent established in the *Barcelona Traction* case and designed to avoid shareholders being left unprotected when the legal person had ceased to exist or when it had the nationality of the State responsible for causing injury. With regard to the first exception, the text should specify what was meant by disappearance of the legal person and establish a time limit for the exercise of diplomatic protection on behalf of the shareholders. The second exception would apply when a corporation's shareholders had been directly injured by the internationally wrongful act of another State. Morocco would have preferred it if the Special Rapporteur had not distinguished between direct and indirect injury but had taken as a reference point the distinction between rights and interests of shareholders. In the cited judgement, the International Court of Justice had defined rights as "legally protected interests" and had given as an example the rights of shareholders to participate in corporate bodies and the right to dividends. In any case, it was perfectly feasible to combine the two exceptions mentioned in a single article.

48. The requirement of continuity of nationality up to the date of the presentation of the claim, established in article 20, was a rule that had arisen in connection with individuals and that, for reasons of juridical logic, should be extended to legal persons. On the other hand, there was no need for draft article 21 concerning *lex specialis*. Since the right to diplomatic protection was not peremptory in nature, it was the special regimes on investments or human rights that should indicate the preeminence to be given to the remedies that they envisaged in favour of individuals or of States. That being said, it was perfectly possible to include in the draft articles a saving clause on special protection regimes. With regard to article 21, concerning the protection of legal persons other than corporations, Morocco considered that, although the provisions on corporations should apply mutatis mutandis to other legal persons, a more in-depth analysis should be made of the structure and operating arrangements of non-governmental organizations before opening the way for their diplomatic protection by a State of nationality. The issue should be analysed more carefully before such a vague and broadly applicable rule as that contained in draft article 21 was established. In addition, it was not certain that such organizations would willingly accept the idea of protection by their State "of nationality", since many of them based their credibility on their complete independence from States.

49. **Mr. Fife** (Norway), speaking on behalf of the five Nordic countries (Denmark, Finland, Iceland, Sweden and Norway), recalled that it had been suggested that the study of international liability for injurious consequences arising out of acts not prohibited by international law (a topic that was difficult to distinguish from State responsibility *de lege lata*) was merely an attempt to construe artificial rules complementary to the classic theory of responsibility, whereby residual responsibility of a State could be established when it had not actually been proved that an internationally wrongful act existed. The Nordic countries believed that there were no grounds for such criticism.

50. The study of the topic was designed to identify obligations of States, including the obligation to act with due diligence in order to prevent transboundary harm from hazardous activities or to take active precautionary measures against such harm. A breach of those obligations naturally had consequences as regards responsibility. The preventive principle of good neighbourliness and cooperation and the customary obligation of the precautionary approach had been incorporated in a number of international instruments and were a corollary to the objective of sustainable development. That obligation could be summed up in the following manner: "Should there be a risk of serious or irreversible harm, an absence of absolute scientific certainty must not serve as a pretext to defer or postpone measures with a view to preventing damage". From that principle followed the obligation to conduct adequate studies to satisfy what, in certain situations, amounted to a reverse burden of proof. The general principles of law common to various legal systems and embryonic customary obligations related to the "polluter pays" principle, particularly those

articulated in principle 16 of the Rio Declaration, could provide guidance on primary obligations of States. Moreover, principle 2 of that Declaration reiterated the common conviction that States had the responsibility to ensure that activities within their jurisdiction or control did not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

51. The Nordic countries believed that the goal of ILC was not only to prevent the injurious consequences of certain activities but also to draft an instrument that could protect innocent victims when harm occurred. Certain activities carried such risks, which experience showed could not be left solely to national civil liability mechanisms to resolve. Those who asserted the contrary were either supporting the current state of affairs which left innocent third parties unprotected or giving up attempts to clarify international rules in that area. The Nordic States understood the reluctance of some States to accept a system of allocating risks and losses to States rather than continuing to rely on rules of due diligence to provide a basis for liability. Nevertheless, a debate was essential in order to achieve effective protection and to protect innocent victims.

52. The Nordic countries believed that States should be given the necessary flexibility to develop schemes of liability suited to their particular needs. Such schemes should also take fully into account the particular needs of other States and of innocent victims of hazardous activities. To link liability to the person most in command and control of the hazardous activity was in line with the "polluter pays" principle. Relevant losses should be borne by the operator or shared by the operator and other actors; however, it was clear that a system based solely on the liability of operators or other players might not be sufficient to protect victims from aggravated loss, and the regime should therefore also include absolute State liability in cases where the operator was unable or unwilling to cover such loss. The Nordic countries agreed that liability should arise once the harm could reasonably be traced to the activity in question and that it was not necessary to rely on proof of causal connection between the harm and the activity. Damage to the environment per se must be compensable even if no direct loss had been identified and non-economic losses should also be included. That would offer the best environmental protection because those responsible would have a stronger incentive to take appropriate preventive and precautionary measures. As to the final form of work on the topic, the Nordic countries believed that a convention might be preferable, at least for the liability part.

53. With regard to mechanisms for funding loss and reparation, it had been proposed to base such funding on contributions from beneficiaries of the activity in question and from earmarked State funds. Such mechanisms might contribute to the protection of the victim and ease the burden on the liable operator or State. However, the main point was that losses derived from certain hazardous activities must not be allocated simply to innocent victims abroad, which implied that the liable State should bear the burden if the established funding was not sufficient. If strict liability of the responsible State was established as the overriding principle, it would be best for States themselves to develop formulas for allocation of loss and mechanisms for funding.

54. **Mr. Lammers** (Netherlands) said that the ruling of the International Court of Justice in the *Barcelona Traction* case should serve as a basis for the draft articles on diplomatic protection of legal persons, although his delegation believed that the rules set out in that case were not entirely satisfactory; however, his country had tried to remedy those imperfections by concluding bilateral and multilateral investment treaties.

55. Regarding article 17, he supported the position of the Working Group not to follow the "genuine link" doctrine, since the lifting of the "corporate veil" would create difficulties for courts and States of investment and it was necessary to avoid a formula that might suggest that a tribunal considering the matter should take into account the nationality of the shareholders controlling the corporation.

56. The Netherlands welcomed the subsidiary right of the State of nationality of the shareholders expressed in draft article 18 (a). It agreed that the State of nationality of the shareholders in a corporation should be entitled to exercise diplomatic protection on behalf of such shareholders if the corporation had the nationality of the State responsible for causing injury to the corporation. That exception to the rule should be considered favourably in the context of the progressive development of international law in that area.

57. His delegation supported the Special Rapporteur's proposal to delete draft article 21 and leave the issue of the *lex specialis* to the commentary.

There was no need to follow blindly the draft articles on responsibility of States for internationally wrongful acts. One possibility would be to reformulate the last part of the draft article, for example in the following wording: “without prejudice to special rules of international law”.

58. With regard to draft article 22, although it was feasible to recognize the problem of protection of legal persons other than corporations, it would be preferable to make a more thorough examination of the issues involved, in view of the lack of State practice in that regard.

59. On another subject, it was necessary to determine whether protection given to crew members who held the nationality of a third State was a form of protection already covered by the Convention on the Law of the Sea or whether there was a need for recognition of the right to diplomatic protection vested in the State of nationality of the vessel. Firstly, under that Convention the flag State was competent to institute proceedings with a view to the prompt release of the vessel and all crew members, irrespective of their nationality. Secondly, the limited protection to be exercised by the flag State did not affect the right of the States of nationality of the crew members who did not have the nationality of the flag State to exercise diplomatic protection on their behalf. For that reason, the Netherlands believed that the current regime adequately covered the protection of crew members and that it was not necessary to include that question in the draft articles.

60. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, his delegation believed that such liability also arose in the event that a State had complied with its international obligations relating to an activity carried out under its jurisdiction or control, and agreed with the Special Rapporteur that States had an obligation to conclude international arrangements or adopt legislation to guarantee equitable allocation of loss within their domestic legal system. The model of allocation of loss to be developed by ILC should be general and residual in character and consist of a set of procedural minimum standards and substantive minimum standards. The former should address standing to sue, jurisdiction of domestic courts, designation of applicable domestic law, and recognition and enforcement of judgements. The substantive minimum standards should include the concept of damage, causal connection between damage and damage-causing activity, standard of liability (fault liability, strict liability, absolute liability), identification of liable persons, including the possibility of multiple tiers of liability, limits of liability (time limits, financial limits) and coverage of liability.

61. **Mr. Fyfe** (New Zealand) stressed the importance of the work on prevention and liability, since the two aspects were complementary. The Commission’s work had addressed the duty of a State to take preventive action where hazardous activities in its territory or in areas beyond its territory but under its jurisdiction could cause adverse consequences for another State. However, it had to be recognized that, despite such preventive measures, accidents could happen that caused transboundary harm and economic loss. The Commission therefore needed to fill the gap by developing a series of articles which would match those prepared by it on the topic of prevention and would identify how to secure the provision of compensation and adequate allocation of loss in situations where no wrongful act was involved. That set of provisions should be of a residual and general character and would help to shape more detailed regimes for particular forms of specially hazardous activity.

62. The provisions should contain some general principles indicating that, to the extent feasible and practical in the circumstances, victims of transboundary harm from a hazardous activity should be helped to bear their losses; some provisions reflecting the fact that the operator, as the main beneficiary of the activity, the creator of the risk and the entity in the best position to manage the risk, should assume the first and principal responsibility for redressing any harm caused; an indication that strict liability on the part of the operator should be backed by insurance cover, with residual responsibility on the part of the relevant governments; and, lastly, appropriate dispute settlement arrangements.

63. With regard to the question of damage to the environment, thought should be given to the harm caused to the global commons. Compensation for such harm should not be limited to the cost of measures to restore the environment, which might not be possible and were difficult to quantify, but the possibility of compensation for the loss of intrinsic values should not be excluded.

64. With regard to economic loss where a person's ability to derive income was affected by an incident, the concept of economic loss should extend to loss incurred as a direct result of the perceived risk of physical consequences flowing from an incident.

65. Lastly, the instrument could take the form of a draft set of articles encompassing the actions expected of States and private actors, starting with prevention, including response and ending with liability. That would provide a general legal regime setting out the obligations of States in relation to hazardous activities which, while not unlawful, might cause harm and economic loss.

66. **Mr. Gandhi** (India), referring to the topic of responsibility of international organizations, said that the definitions in the 1975, 1978 and 1986 Vienna Conventions were specific to those instruments and that it was therefore necessary to develop a more precise definition for the current topic. Any definition of international organization included intergovernmental organizations, although non-State entities could also become members of international organizations in some cases. In that context, the Rapporteur had correctly suggested that non-governmental organizations should be excluded from the scope of the topic because they did not perform any governmental functions. Rather than the existence of a constituent instrument, it was the function of an international organization that should form the basis for its identification. The Rapporteur had rightly pointed out that it was more important that the organization should be performing functions as a legal entity in its own right and under its own responsibility, independently and separately from its members, so that the obligations and the wrongfulness of any impugned conduct could be attributed to that organization.

67. His delegation agreed with the recommendation made by the Special Rapporteur that the study should be concerned only with responsibility under international law and not with issues concerning international liability of international organizations, insofar as they involved issues relating to civil liability. In addition, the text of articles 1, 2 and 3 adopted by the Drafting Committee was acceptable to his delegation.

68. With regard to the question of liability regimes, the scope of the topic and the triggering mechanism should be the same as for prevention, since prevention and liability for allocation of loss were related and were sub-topics of the larger subject of international liability for injurious consequences arising out of acts not prohibited under international law. In order to address that type of liability, States generally preferred civil liability regimes that were sectoral in nature; however, the merit of having a strict liability regime could not be overemphasized. The discussions in ILC on an approach to liability that included payment of residual compensation by States appeared to be interesting; however, it must be remembered that not all States authorizing lawful hazardous activities had the means to pay residual compensation.

69. It should be borne in mind that the work of the Commission on allocation of loss suffered by innocent victims involved a fine balance between loss allocation to the victim of transboundary harm and the right of the State to claim reparation under rules of State responsibility. In that context, the recommendation made by the Special Rapporteur in his first report that States should have the flexibility to develop schemes of liability to suit their particular needs was very useful. The model of loss allocation proposed by the Commission should be of a general and residual nature, not impinging upon the remedies available at the domestic level or under rules of private international law.

70. India also supported the Special Rapporteur's recommendation that the primary liability should be that of the operator. In certain well-defined cases, State liability of a residual character might be of some use. State liability was largely an exception to State responsibility reflected in very few convention regimes, such as those governing space activities.

71. The establishment of a Working Group to fine tune some of the ideas in the Special Rapporteur's first report was a welcome move, and it was to be hoped that it would contribute to the early completion of work on that important subject.

72. **Ms. Secaira** (Guatemala) said that in paragraph (c) of article 10 [14] of the draft articles on diplomatic protection, the words "or impossible" should be inserted after "unreasonable", in order to take into account the case mentioned in paragraph (11) of the commentary, where a State denied an injured alien entry to its territory. The term "criminal conspiracies" was also unclear and should be replaced by "criminal activities". At the end of paragraph (3) of the

commentary, the phrase “or the respondent State does not have an adequate system of judicial protection” should be replaced by “or the judicial system of the respondent State is virtually ineffective or there are serious procedural irregularities in the case”.

73. With regard to articles 17 to 22 on protection of corporations and other entities, diplomatic protection was complicated by two factors, namely, the existence of transnational corporations, whose activities, by definition, encompassed several countries, and the fact that shares of corporations changed hands very rapidly, with the resulting change of nationality of the shareholders. It was to be hoped that it would be possible to work out issues relating to diplomatic protection of companies in a satisfactory manner.

74. In some national legal systems there was no concept of “incorporation”; it was therefore correct to have deleted the term from article 17 as proposed by the Working Group and contained in paragraph 92 of the report. That would make for much better concordance among the English, Spanish and French versions. Her delegation proposed the following text, based on the Working Group’s proposal: “For the purposes of diplomatic protection, in respect of an injury to a corporation, the State of nationality is that according to whose law the corporation was formed and with which it has a close and permanent connection”. Nevertheless, that text should be expanded to take into account the case of a corporation which had a closer connection with a country other than the country according to whose law it was formed. To that end, the following phrase could be added to article 17: “If a corporation has a closer and more permanent connection with a State other than the State according to whose law it was formed than with that latter State, for the purposes of diplomatic protection its State of nationality shall be the first-mentioned State”. Even with that addition, the drafting of the article was not entirely satisfactory, as it did not state which connections should be taken into account for the application of paragraph 2. On the basis of the suggestions contained in paragraph 85 of the report, her delegation recommended the addition of a third paragraph, which would read as follows: “For the purposes of the preceding paragraph, the nationality of the shareholders, the State in which the corporation has its basic economic activity or any other element which reflects the existence of a genuine link between the corporation and the State in question shall be taken into account”.

75. With regard to the phrase in brackets contained in paragraph 2 of article 17, if the brackets were deleted, the following problem would arise: where the State in which the corporation was formed was different from the State in whose territory it had its registered office, the corporation would lack a State which could exercise diplomatic protection on its behalf. On the other hand, if the brackets were deleted, but the word “and” was replaced by “or”, the result would be that if a corporation had its registered office in the territory of a State other than the one in which it was formed, there would be two States entitled to exercise diplomatic protection on behalf of the corporation. The best solution would be to delete the brackets and replace “and” by “or”, on condition that a provision was added stating that, if the State in which the corporation was formed and the State in whose territory it had its registered office were different, the State entitled to exercise diplomatic protection on its behalf would be the one with which the corporation had the closest connection.

76. Article 18 would be easier to understand if it began as follows: “The State of nationality of the shareholders in a corporation shall be entitled to ...”. It was doubtful whether article 18 would apply if the State of nationality of the corporation was not the same as the State of nationality of the shareholders. It would seem logical that article 17 could not apply in such a case, since it was inconceivable that an entity which did not exist could be protected. Nevertheless, it might be appropriate to state in the commentary on article 17 that the article would cease to apply to a corporation when the latter ceased to exist. The same statement could appear in the commentary on article 18, which would clarify the temporal connection between article 17 and article 18, paragraph (a).

77. Since article 18 referred to cases where the State of nationality of the shareholders could exercise diplomatic protection on their behalf, that article should not be mentioned in article 19. Moreover, it might be advisable to take into account the suggestion contained in paragraph 111 of the report, namely, that article 19 could be incorporated into article 18. Article 20 should not refer to a corporation incorporated under the laws of a State, but to a corporation having its nationality. With regard to article 21, the observation

contained in the last sentence of paragraph 131 of the report seemed pertinent.

78. **Mr. Shin** (Republic of Korea) said that he supported the initiative by Austria and Sweden to rationalize and revitalize the debate on the report of the International Law Commission and added that the advisory opinion of the International Court of Justice on the *Barcelona Traction* case was the basis for the current rules and practices governing foreign investments.

79. With regard to article 17, the State of incorporation was entitled to exercise diplomatic protection in respect of an injury to a corporation. With regard to the criterion for determining the nationality of a corporation, it would be preferable to delete the bracketed phrase in article 17, paragraph 2. Moreover, he saw no need for a genuine link requirement or for any requirement implying economic control. No genuine link had been required in the *Barcelona Traction* case, the Commission had not imposed a genuine link requirement on natural persons and, in light of the discretionary nature of the right of diplomatic protection, the genuine link was one of the factors that a State took into account when deciding whether to endorse the claims of the corporation against the State that had caused the injury.

80. His delegation had little difficulty with article 18, but it wished to point out that the situation envisaged in paragraph (b), concerning injury caused by the State of incorporation itself, had been a major concern for investing States and was now mainly addressed by bilateral investment treaties. With regard to article 21, he supported the Commission's decision to have the provision reformulated and located at the end of the draft articles as a "without prejudice" clause. Diplomatic protection should not be entirely excluded from bilateral investment treaties so that corporations and individuals might receive the maximum protection.

81. With regard to diplomatic protection of members of a ship's crew by the flag State, it was important for the draft articles not to prejudice the rules of the United Nations Convention on the Law of the Sea or the jurisprudence of the International Tribunal for the Law of the Sea in the Saiga case. The flag State should be entitled to exercise diplomatic protection for any injury suffered by members of the crew, irrespective of their individual nationalities, if the injury occurred in a situation in which the ship was considered a unit. As for the diplomatic protection of nationals employed by an intergovernmental international organization, the 1949 decision of the International Court of Justice in the *Reparation for Injuries* case should be fully respected. An international organization should be able to exercise functional protection on behalf of a person acting in its name in respect of any injury suffered during the performance of his or her duties. The right to functional protection should be justified by the need to ensure the independence of the international organization. The agent through whom the international organization acted should not be allowed to rely on the protection of his or her own national State, otherwise the agent's independence might be compromised. However, since functional protection was based not on the nationality of the victim but on his or her status as an agent of the international organization, any claim for injury not related to such status should be taken up by his or her State of nationality.

82. **Mr. Wada** (Japan) said that when discussing the issue of diplomatic protection in cases involving foreign investments, it was necessary to take into account developments in bilateral investment treaties as well as international and regional frameworks on the subject. The Commission had acted prudently in referring draft article 21 to the Drafting Committee for further consideration. Draft article 21 as proposed by the Special Rapporteur might not have been adequate to resolve the important question regarding the relationship between general rules of customary international law on diplomatic protection and the special law pertaining to bilateral and other investment treaties. The proposed article would totally deprive a party of the possibilities of invoking the right of diplomatic protection; that issue required further careful analysis. For instance, even if two countries had agreed to settle a dispute over investment in accordance with their bilateral agreement, if the dispute settlement process upon which they had agreed did not assure a fair and effective solution of the problem, there would be good reason for either party to seek an additional avenue in law to settle the matter. The bilateral agreement between the two parties might be interpreted as denying either party such an additional avenue and, for that reason, the issue must be considered on a case-by-case basis. The issue of *lex specialis* could be better resolved by placing the relevant provisions at the end of the draft articles,

rather than confining its scope to disputes related to foreign investment and legal persons.

83. With regard to the State of nationality of an enterprise, it was not appropriate to use the criterion of genuine or effective links. In the era of globalization when numerous multinational enterprises were operating in many countries while accepting investments from around the world, it might be difficult to determine which country had a genuine link. There was some risk that those countries might be left without diplomatic protection if a genuine link to a particular country could not be found; accordingly, the course of action taken by the Commission was, in his delegation's view, the correct one.

84. With regard to the diplomatic protection of legal persons other than corporations, the idea expressed by the Special Rapporteur in article 22 — of applying the principles expounded in regard to corporations mutatis mutandis to other types of legal persons — seemed to be acceptable. Since it would be difficult to cover all the various legal entities in one article, he said that it would be more practical to draft an article that would permit a certain degree of flexibility in its application rather than to attempt to categorize the variety of legal persons stipulated in the domestic laws of many countries.

85. With regard to the protection of crews by the flag State, in the M/V Saiga case, the International Tribunal for the Law of the Sea had ruled that the flag State represented claims for the vessel, crew and shipments and that such claims were based not on the right of diplomatic protection but on the basic principle of flag of nationality. In view of that judgement, the question raised in chapter III of the Commission's report on "the diplomatic protection of members of a ship's crew by the flag State" might be misleading and he proposed that it would be more appropriate to describe the issue simply as "the protection of members of a ship's crew by the flag State". At the same time it should be noted that there had been some cases in the past of concurrent or mixed claims being made based both on the exclusive jurisdiction of the flag State and on diplomatic protection. In cases in which an aircraft had been shot down there had been instances in which the registered State of the aircraft as well as the States of nationality of crew members and of passengers had simultaneously filed claims against the country which had caused the incident.

86. With regard to diplomatic protection of nationals employed by international organizations, the advisory opinion of the International Court of Justice concerning reparation for injuries suffered in the service of the United Nations acknowledged the status of the United Nations as a legal person and recognized the functional protection of the United Nations to file a claim for the damage sustained by its employees. It did not, however, specify the criteria for, or means of, adjustment between the functional protection exercised by the United Nations and the diplomatic protection that could be exercised by the State of nationality of the injured person. On that point, it could be said that when the rights of the injured person could not be remedied by the functional protection of the United Nations, there might be some room for the State of nationality to exercise its right of diplomatic protection for the injured person.

87. **Mr. Troncoso** (Chile), referring to the diplomatic protection of legal persons, said that in the *Barcelona Traction* case, the International Court of Justice had expounded as a general rule that, when a corporation suffered an injury, the State under the laws of which that corporation was incorporated and in whose territory it had its registered office had the right to exercise diplomatic protection. That decision, in respect of which the judges had expressed a number of dissenting opinions, had been criticized, in particular because it had not recognized the need for a genuine link between the State exercising protection and the legal person whose interests had been injured, a need that had been previously affirmed in a number of treaties providing for the direct protection of shareholders but which the Court had regarded as *lex specialis* in the *Barcelona Traction* case. The Rapporteur had stated that it fell to the International Law Commission to decide whether or not to follow the Court's decision in *Barcelona Traction*, particularly since, in the *ELSI* case, one of its Chambers had, to a certain extent, bypassed that decision by acknowledging the need for a genuine link of nationality between the shareholders. In those circumstances, it seemed possible to assert that, in addition to the State of incorporation, the State with which the company had a genuine link, whether that link derived from the nationality of the shareholders, economic control or the *siège social*, might exercise diplomatic protection, given that in the absence of that link, there would have been little point in incorporating the company in that country. In that case, States would

refuse to exercise protection and the rule could not be applied in practice.

88. With regard to the articles proposed by the Rapporteur, his delegation endorsed the wording of article 17, which laid the foundations for the protection of legal persons by the State or, in other words, the right to exercise protection in respect of the company holding its nationality. Likewise, the Chilean delegation agreed with the proposal for article 18, pursuant to which the State of nationality of the shareholders was entitled to exercise diplomatic protection when the corporation had ceased to exist in the place of its incorporation or when that corporation had the nationality of the State responsible for causing injury to the corporation. The report of the Special Rapporteur provided sufficient arguments in favour of the exercise of that right by the State of nationality of the shareholders.

89. With regard to the proposal for article 21, which addressed *lex specialis*, the Chilean delegation believed that, for reasons of legal certainty, it was appropriate to include a provision clarifying the relationship between the articles at issue and the rules laid down in international treaties on the settlement of disputes between investors (companies) and States. That provision must also appear in the specific chapter on legal persons and not in the general rules on diplomatic protection, since that particular aspect of disputes relating to legal persons had been given special treatment. Lastly, turning to the rule for the protection of legal persons proposed in article 22, he agreed with the Rapporteur that the other legal persons mentioned might also require diplomatic protection. Indeed, bearing in mind that the vast majority of the agreements concluded by States in the area of investments provided for a special system for the settlement of disputes, such other legal persons might, in the future, constitute the main subject of diplomatic protection. Chilean law recognized many non-corporate legal persons which might require such protection, in particular non-profit organizations, and for that reason, he agreed with broadening the scope of the rule. Nevertheless, the Commission should consider more carefully the possibility that certain persons, such as non-governmental organizations, which often had an international membership and hence no greater links with the State in which they were incorporated or in whose territory they had their *siège social*, might have recourse to that law.

90. With regard to the diplomatic protection of ships' crews, his delegation maintained its view that the Commission should address the issue by studying the differences between the provisions of article 292 of the United Nations Convention on the Law of the Sea and the exercise of diplomatic protection that the Commission was attempting to rule upon, and the unique features that such protection might present with regard to ships' crews.

The meeting rose at 1 p.m.