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Chairman: Mr. Kawamura . . . . . (Japan)

Contents

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

Agenda item 155: Report of the International Law Commission on the work of its fifty-first session (*continued*) (A/54/10 and Corr.1 and 2)

1. **Mr. Klingenberg** (Denmark), speaking on behalf of the Nordic countries, said that those countries attached great importance to the conclusion of the consideration of the draft articles on State responsibility (chap. V), which, alongside the law of treaties and the law of the peaceful settlement of disputes, constituted the last major building block of the international legal order. It had taken 48 years for the International Law Commission to adopt the draft articles in first reading, and it was to be hoped that the Commission would complete the second reading by 2001, the date on which the term of office of its current members would expire. It would then be up to Member States to bring the topic to a conclusion in the General Assembly or at a diplomatic conference. The slow pace of the drafting process was not the fault of the Commission alone, but reflected lapses in the political will of States to move from words to deeds.

2. The Nordic countries appreciated and supported the efforts of the Special Rapporteur to streamline the draft articles by merging overlapping provisions and deleting articles which appeared to be outside the scope of the draft, particularly in chapters I to III. They therefore supported the deletion of articles 20, 21 and 23 concerning obligations of conduct, result and prevention insofar as the distinction between those three categories of obligation did not have any bearing on the consequences of their breach as developed in the part two of the draft. The Nordic countries also supported the proposal that the provision on the exhaustion of local remedies (art. 26 *bis*, former art. 22) should be formulated as a savings clause, since that rule operated as a prerequisite to an international claim in certain cases.

3. The Nordic countries had no comments to make about chapters IV and V at the current stage of the Commission's work, but could immediately support the inclusion of a provision (art. 34 *bis*) on the procedure for invoking a circumstance precluding wrongfulness as well as the addition of a provision dealing with cessation in article 35, on the consequences of invoking a circumstance precluding wrongfulness.

4. With regard to the specific issues listed in paragraph 29 of the report, the Nordic countries were not convinced that a distinction between a State or States specifically injured by an internationally wrongful act and other States which had a legal interest in the performance of the relevant obligations would serve a useful purpose given the uncertainty of the concept of "other States which have a legal interest". They considered the question of compensation to be an essential issue on which more detailed provisions were needed, particularly with regard to the assessment of pecuniary damage, including interest and loss of profits. The linkage between the taking of countermeasures and compulsory arbitration actually encouraged resort to such measures instead of limiting their use; if they were delinked, strict limitations would need to be imposed on the taking of countermeasures, including refusal by the wrongdoing State of an offer to settle the matter through a binding third party procedure, as a condition for resorting to such measures. A situation in which a plurality of States was involved in a breach of an international obligation or injured by an internationally wrongful act did not appear to necessitate a particular treatment in the draft articles, but could be covered in the commentaries.

5. The Nordic countries encouraged the Special Rapporteur and the Commission to continue their efforts to finalize the second reading of the draft articles during the next two sessions.

6. **Mr. Yamada** (Japan) said that his delegation hoped that the Commission would complete the second reading of the draft articles by 2001; his Government believed that the primary objective of the codification of international law on State responsibility, the subject of chapter V of the report, was to provide an effective legal framework for the resolution of disputes among States in that area. The work of the Commission must therefore be based on prevailing State practices rather than on abstract concepts. The Commission should not hesitate to revise the draft articles if necessary. His delegation wished to make a few comments on chapters III, IV and V.

7. The drastic rationalization of chapter III had helped make the text explicit and concise; his delegation hoped that the Commission would provide the necessary explanations, in the commentaries to the newly revised articles, for the changes it proposed. It was fortunate that the Commission had decided to postpone the decision on the question of the exhaustion of local remedies, which should be carefully studied in order to determine its placement, its function and its relation to the questions of diplomatic protection. As to draft article 19 concerning State crimes, the consideration of which had been deferred to a later stage, his delegation understood that there existed virtual consensus in the Commission not to include the

concept of the criminal responsibility of the State in the draft articles. The Commission should perhaps consider whether there should be a hierarchy of international obligations and whether any special legal consequences should be prescribed for the breach of such obligations. No useful purpose was served in categorizing international obligations unless different legal consequences were provided for breaching them. He reiterated his Government's opposition to the inclusion of the concept of State crimes in the draft articles.

8. His delegation highly appreciated the distinction made by the Commission in chapter IV of the draft between aid and assistance, direction and control, and coercion, a distinction which should be amply reflected in part II, dealing with accompanying responsibility. It also appreciated the Commission's effort to take into account precedents and current State practices and believed that it was appropriate to include article 29 *bis*, on compliance with a peremptory norm, in chapter V. With regard to the *exceptio* envisaged in the new article 30 *bis* (Non-compliance caused by prior non-compliance by another State) proposed by the Special Rapporteur, that concept could be included with either "*force majeure*" or "countermeasures", although it had a distinct legal character from either of them. In any event, that article must be clearly formulated, and the need for it must be properly assessed, when the draft articles on countermeasures were finally formulated.

9. Compensation for damage as a result of invoking circumstances precluding wrongfulness and the procedures for invoking such circumstances were not clearly stipulated; those aspects needed further review. His Government believed that in general the circumstances precluding wrongfulness must be strictly limited so that States could not take advantage of that excuse to evade their responsibilities. The Commission must take a clear stand that chapter V contained an exhaustive list of such circumstances. With regard to countermeasures, his delegation believed that a proper balance should be attained between the target State and the injured State.

10. His Government would submit comments in writing on some specific questions of State responsibility in response to the Commission's request in paragraphs 28 and 29 of its report.

11. **Mr. Winkler** (Austria) said that his Government considered State responsibility to be one of the most important topics on the International Law Commission's agenda and that it had offered extensive comments on chapter V of the draft articles prepared by the Commission. It believed that chapter V should provide firm guidelines to the States on the prevention and resolution of conflicts; assist States to behave in a way that avoided internationally wrongful acts; and take effect as soon as possible, since the work of codification should have been completed some time ago.

12. In regard to Article 29 on consent, he agreed with the Special Rapporteur that, from a doctrinal point of view, the issue could, in principle, be considered an element of the primary rule, but believed that it would be wise to retain the article in its present place. As for deleting paragraph 2 of article 29, which contained an exception based on general international law, his delegation recognized that certain peremptory norms of international law could be construed as containing an "intrinsic" consent element. Nevertheless, the inclusion of a provision containing a *jus cogens* exception to the general rule of consent was warranted.

13. In principle, he agreed with the proposed wording of the new article 29 *bis* entitled "Compliance with a peremptory norm". However, for the sake of clarity, he supported the proposal that some reference to Article 103 of the Charter of the United Nations should be made, possibly in the respective commentary.

14. He questioned the inclusion of article 30 *bis* "Non-compliance caused by prior non-compliance by another State" as a circumstance precluding wrongfulness. According to doctrine, *exceptio inadimpleti contractus* appeared to be a primary rule, although the distinction between primary and secondary rules had still not been clearly established. His delegation believed that any presumed interrelationship with secondary rules concerning countermeasures was a structural error and was not convinced that any reference to that *exceptio* was warranted, outside the framework of the Vienna Convention on the Law of Treaties.

15. In regard to article 31 on *force majeure*, he welcomed the changes proposed by the Special Rapporteur and approved by the Commission, especially the deletion of the reference to "fortuitous event" in the heading and all subjective elements of the text, as it had suggested. He believed that the current text of article 31 still contained a subjective element as it referred to an "unforeseen external event"; to avoid any misinterpretation, it would be preferable to use the word "unforeseeable". He also attached considerable importance to the mention of due diligence as a standard to be applied to the performance of the obligations of international law, which the Commission had been discussing for some time. Nevertheless, in view

of the advanced stage of the draft, it would be acceptable to include a "without prejudice" clause, as in article 73 of the Vienna Convention on the Law of Treaties. The due diligence standard could then be mentioned in the commentary.

16. In the case of article 33 on the state of necessity, his delegation noted that slight but quite important discrepancies existed between the text presented by the Special Rapporteur in the report being examined and the wording of draft article 33 adopted by the Commission's Drafting Committee, (A/CN.4/L.574). One of the most subtle changes made by the Drafting Committee related to the wording of paragraph 1, subparagraph (a), in which the criterion of "essential interest" was no longer limited by the reference to the State: [unless] "the act is the only means of safeguarding an essential interest of that State against a grave and imminent peril" having been changed to [unless the act] "is the only means for the State to safeguard an essential interest against a grave and imminent peril". The change entailed major consequences as it broadened the article's scope of application. The same was true of the quite pertinent reference to "the international community as a whole" in the text adopted by the Drafting Committee [para. 1(b)], which took into account obligations *erga omnes*. The changes in wording of article 33 should be examined carefully in view of their far-reaching effects and the potential for abuse. As for the very controversial issue of humanitarian intervention, his Government entirely shared the Special Rapporteur's opinion that the question of humanitarian intervention was governed by primary rules of international law, in particular article 2, paragraph 4, of the Charter of the United Nations and, consequently, was not governed by article 33. His delegation therefore trusted that the misleading wording in the commentary to article 33 would be amended.

17. Although the Commission had addressed a number of problems, others remained, in particular that of the injured State. His delegation was not satisfied with the current text of article 40, as the wording did not appear to reflect developments in contemporary international law. New approaches to the issue who was entitled to invoke State responsibility were necessary. Furthermore, international law was increasingly governed by rules whose structure no longer corresponded to the classic Westphalian system, based on reciprocity. The obligations resulting from such rules were directed at the community of States in their entirety or were of a standard-setting nature. Responsibility for the breach of *erga omnes* rules could not be treated in the same manner as those based on reciprocity. A distinction could therefore be envisaged between those States that suffered particular damage, on the one hand, and those entitled to take legal action against the wrongdoer, on the other. His delegation was aware that such an approach required the Commission to use considerable imagination, but believed it was the most appropriate way to solve the problem. Lastly, he recalled a closely related issue that the draft articles had not reflected: the relation between States entitled to invoke responsibility with regard to one and the same breach. For example, would one State's claim for reparation absorb the rights of the other States? The omission of applicable rules was of particular concern.

18. **Mr. Wee** (Singapore), commenting on chapter IV "nationality in relation to the succession of States", welcomed the expeditiousness and clarity of the Commission's work on an issue that interested many States, as indicated by the numerous statements. He supported the Commission's decision to recommend concluding discussion of the topic and noted that it was an excellent precedent for future work. The Commission was uncertain what form the draft articles should take. A declaration of the General Assembly would appear to provide a degree of flexibility in the application of the provisions. It was unfortunate that the Commission itself had given no indication as to the form, and his delegation awaited further discussion with interest.

19. Turning to chapter VII "Jurisdictional immunities of States and their property", he emphasized the usefulness of the work done by the Working Group. In particular, it had described how the work had evolved and had suggested future approaches. It was a potentially controversial topic, in so far as some States were not prepared to accept the concepts emphasized by the Commission. It was uncertain whether the Working Group's suggestions would be sufficient to reconcile the differing points of view and the suggested provisions would have to be examined further. To that end, the suggestion of the United Kingdom and Australia on the possibility of drafting a model law on the issue was most interesting and worth serious consideration.

20. On the subject of chapter V, State responsibility, his delegation took note of the significant progress made during the fiftieth and fifty-first sessions of the Commission. It also noted that the Commission had requested the opinion of Governments on several questions raised by the draft articles. That was an excellent way of initiating a dialogue with Governments on specific issues, and his delegation would endeavour to reply. The Commission had also adopted a broader perspective on the draft articles and commentaries and had the excellent idea

of deleting or simplifying certain provisions, in particular in the chapters examined during its most recent session.

21. With regard to the final form of the draft, he recalled article 1, paragraph 1, of the 1947 statute of the International Law Commission, which provided that the Commission should have for its object the promotion of the progressive development of international law and its codification. Article 15 defined progressive development as meaning the preparation of draft "conventions on subjects which have not yet been regulated" and codification as "the more precise formulation" and systematization "of rules of international law in fields where there already has been extensive state practice". That distinction highlighted the form the Commission's drafts might eventually take, which was certainly not limited to multilateral conventions, because where State practice was extensive but also divisive such a solution was not necessarily the most appropriate means of ensuring the progressive development of the law. The Special Rapporteur had been quite right to suggest postponing discussion of that issue.

22. His delegation encouraged the Commission to continue to make a clear distinction between principles already established under international law and those that were still evolving or developing. Where State responsibility was concerned, that distinction was vital in order to avoid controversy. A clearly drafted commentary which took into account that distinction, particularly for revised or additional articles, would be a most useful guide for State practice and would be in keeping with the Commission's mandate under its statute. That approach would also ensure that the Commission's work continued to represent the most exhaustive restatement of the law on that topic and would provide a balanced and objective elaboration of the principles articulated therein.

23. **Ms. Quezada** (Chile) said she hoped that the draft articles on State responsibility (chap. V) would be adopted in the form of a convention during a special conference and was surprised that the assurances and guarantees of non-repetition were contained in the part of the text dealing with reparation for injury caused. Unlike restitution in kind, indemnification or satisfaction, which tended to cancel or attenuate the injury, assurances and guarantees of non-repetition referred rather to injury which could be caused in the future and were therefore more closely related to precautionary measures.

24. With regard to the determination of injury, it would be preferable to establish a general rule which would take into account the obligation breached, its seriousness, the interests of the international community as a whole, the effective application of international law and of justice and finally, the proportionality of any compensation to the damage caused and to the advantages which would accrue to the injured State as well as to the real economic or other capacity of the offending State. Compensation should never have the effect of depriving the population of a State of its means of subsistence, which would be excessive. Any indemnification must certainly include interest and, if necessary, loss of income, as provided for in the Commission's draft, as well as moral prejudice. The question of the origin of that indemnification must also be dealt with in all cases.

25. The inclusion in the draft of rules applicable to countermeasures could be a source of confusion or even opposition to the planned text, because in some cases such measures could be lawful and in others they could be compulsory for the State taking them, and they would not therefore be internationally wrongful. At the current stage of the Commission's discussions on that question, it appeared that countermeasures should indeed be included on condition that the draft stated clearly that countermeasures must be in accordance with international law, adopted in good faith, proportional to the seriousness of the internationally wrongful act which had motivated them, must imply acceptance that a dispute existed between the States in question, requiring them to reach a peaceful settlement in accordance with international law. They must also be considered legitimate in the meantime and must in no case affect the rights of third party States.

26. The establishment of a link between countermeasures and the settlement of disputes tended to modify the nature of the former because the obligation to settle by peaceful means disputes linked to a wrongful act took precedence over all other obligations. Moreover, the rules applicable to the settlement of disputes did not come under the heading of State responsibility because their objective was the peaceful settlement of disputes arising out of the application or interpretation of primary or substantive rules, and secondary rules or those involving attribution of responsibility. They therefore required special, more detailed provisions. Including them in the draft added nothing new and could even pose problems for the adoption of the proposed text by the Commission as well as for its eventual implementation in the form of a convention. Thus, in the area of countermeasures, the compulsory arbitration required in such cases could at times aggravate the dispute which they were intended to resolve and even create new tensions between the States. The draft must therefore indicate that arbitration depended not only on legal

considerations but also on political factors, since it affected justice and international peace and security. The proposed provisions relative to the settlement of disputes were in fact intended to make international responsibility effective and could therefore be described as "tertiary rules" which contributed to the implementation of the secondary rules. It would therefore be preferable to refer in general to the obligation of States to seek a peaceful solution to disputes falling under the regime of international responsibility. Finally, the creation of a supplementary authority to rule on the validity or non-validity of arbitration decisions would inevitably affect the weight given those decisions, thereby destabilizing international relations and making the International Court of Justice the final authority for arbitration questions, which was not an acceptable solution.

27. **Ms. Škrk** (Slovenia), turning to chapter VII of the report under consideration, on jurisdiction and immunities of States and their property, said that she had carefully studied the report of the Working Group of the International Law Commission on the question and believed that the five main issues addressed by the Working Group reflected the core issues which domestic courts had to consider in cases involving the concept of the sovereign immunity of a foreign State. In view of the proliferation of commercial activities, the adoption of universally acceptable legal standards on jurisdictional immunity was of the greatest importance. Since a growing number of States gave a restrictive interpretation to the concept of immunity, the course of action adopted by the International Law Commission in order to reach a compromise solution seemed realistic and wise. Her delegation agreed with the new definition of the State proposed by the Working Group, particularly in relation to the federal State and its constituent units. Indeed, the adoption of an imprecise definition which the constituent units of a State could invoke in order to claim jurisdictional immunity of their own would be dangerous and would not contribute to the stabilization of international commercial or other relations. The International Law Commission, having had to consider the capacity of federal units to conclude treaties, had already decided that that capacity could be exercised only by a composite State as an international legal person that was internationally responsible for treaty relations under the Vienna regime on the law of treaties. The same course of action should be followed in respect of jurisdictional immunities.

28. How to define a contract or commercial transaction of a State was the question most frequently raised in domestic courts in respect of granting or waiving the jurisdictional immunity of a foreign State. The proposal of the Working Group, which had had to choose between the two main criteria applied in that regard — nature and purpose — and was, in fact, to preserve the definition of commercial transaction from the 1991 draft, seemed reasonable. In practice, however, it might leave room for different interpretations.

29. Her delegation had no objection to the Commission's proposed redrafting of the concept of a State enterprise in relation to commercial transactions. The fact was that, in the past decade, numerous States of Central and Eastern Europe had shifted to a market-oriented economy, which had led to a reduction in the number of State companies and entities involved in international commercial relations; however, the frequency with which States, through their entities, became parties to international transactions or contracts had not diminished. It was therefore as important as ever to arrive at a definition of State organs and bodies involved in such activities.

30. The Commission's decision to leave the primary jurisdiction for contracts of employment to the state of the forum seemed wise, since it preserved the delicate balance that should exist between the protection of rights of local employees and respect for the immunity of the foreign State. Likewise, it supported the Working Group's proposed approach to prejudgment or post-judgement measures. On the other hand, the term "prejudgment measures" contained in the report of the Working Group could easily be replaced by the better known term "interim measures". It would also be useful to add a non-discrimination clause in the portion of the draft on measures of constraint against a foreign State's property.

31. Her delegation had studied with great care some recent developments in State practice mentioned in the annex of the report of the Working Group, particularly the Pinochet case and the theory that jurisdictional immunity should be waived in the case of death or personal injury resulting from acts committed by a State in violation of *jus cogens* human rights norms. Those new trends should not be ignored.

32. With regard to State responsibility, which was discussed in chapter V, Slovenia supported the approach taken by the Special Rapporteur, who believed that the draft adopted on first reading should be updated in the light of contemporary State practice; decisions and advisory opinions of the international tribunals, particularly the International Court of Justice; and the literature. It agreed with the Special Rapporteur that the Commission's work on the question of international responsibility should,

above all, deal with the secondary obligation arising from the breach of an international obligation and believed that it was reasonable to consider deleting or merging certain articles for the sake of simplicity and clarity. Her delegation was not entirely satisfied with the distinction drawn between obligations of conduct and obligations of result in draft article 20. If the Commission was unable to arrive at a suitable formulation for that difference, it should take into account the general principles of law and the jurisprudence of international tribunals rather than adopt a solution that was significant for some internal legal regimes only. In Slovenia, for example, the obligation of result was rare. Moreover, an obligation of result referred to a different concept from that of respect for due process of law. Thus, a State might not always be held internationally responsible for the result of proceedings on the legal protection of a natural or legal person; however, it could be internationally responsible for guaranteeing due process of law on behalf of its competent organs and courts, particularly in the case of an abuse of recognized rights and a denial of justice.

33. As for "completed and continuing acts", she agreed with the Special Rapporteur that it was a highly political issue. There were no legal grounds for arguing that the deprivation of property after the Second World War by nationalization or expropriation, for which no compensation had been paid should be considered acts of continuing character and treated as such under the European Convention on Human Rights. First, it gave a retroactive effect to the Convention, which was contrary to the provisions of the Convention itself and to the law of treaties in general and, second, in the 1990s, the States concerned had adopted laws concerning the restitution of confiscated property or compensation, which had become effective (*ex nunc*) from the date of the restitution or compensation, and not from the date when the deprivation of property had taken effect.

34. Turning to the implication of a State in the internationally wrongful act of another State and circumstances precluding wrongfulness, she said that her delegation agreed with the course of action pursued by the Special Rapporteur and the Commission but reserved the right to express its views on the question at a later date or when the draft was considered on second reading.

35. With regard to chapter VI on reservations to treaties, she said that her delegation firmly supported the Commission's view that the basic provisions on reservations to treaties were to be found in the Vienna regime, in other words, the Conventions of 1969, 1978 and 1986. As a recent successor State, Slovenia welcomed, in particular, the definition of reservations contained in the draft Guide to Practice which included the case of unilateral statements by States, which made a notification of their succession to a treaty, thereby ensuring full respect for the sovereign equality of States in the treaty-making process. The draft guide which the Commission had just adopted on first reading proposed numerous practical solutions and clarifications in respect of reservations to treaties and interpretative declarations in multilateral and bilateral treaties. The International Law Commission should continue to elaborate the draft Guide with a view to considering it on second reading.

36. **Mr. Dufek** (Czech Republic), referring to chapter V of the report under consideration, on State responsibility, welcomed the efforts being made by the Commission to group together provisions and articles that were related to each other and to delete those that were superfluous or added nothing new. That simplified and enhanced the organizational structure of the draft articles. He supported the Special Rapporteur's proposal to merge articles 16, 17 and 19, paragraph 1, into a single article, and combine articles 18, paragraphs 3 and 5 and 24, 25 and 26 in two separate articles. Articles 18, 24, 25 and 26 had been considered too vague by some States and too analytical by some others. The definition of "continuing wrongful acts" and "composite acts" in the draft articles might appear to be too abstract and not very helpful. Nevertheless, that type of theoretical approach was of undeniable value in practice and might play a key role in determining the responsibility of a State or the reparation it was liable for. The inevitably abstract nature of those provisions, which should be retained in the draft articles, could be offset by a commentary. On the other hand, the deletion of articles 20 and 21 was justified, because the distinction that they made between obligations of conduct and obligations of result had no bearing on the consequences of a breach and did not fall within the realm of responsibility.

37. Article 27 should be retained but its wording should be reformulated. The concept of a State's responsibility for the aid and assistance it provided to another State in the commission of an internationally wrongful act could not be accepted without taking into account the subjective element, namely, the wrongfulness of the act, which would be sufficient in that case. The new element introduced by the Special Rapporteur in his second report, namely that the responsibility of an assisting State should be confined to completed acts that would have been wrongful had they been committed by the assisting State itself, was also very satisfactory.

38. As far as article 31, which dealt with *force majeure* was concerned, he supported the proposal to delete the provisions dealing with knowledge of wrongfulness of the act committed, because they could be misleading and were contrary to the notion of general elements required for the establishment of a State's responsibility. With respect to article 32, his delegation was not in favour of extending the scope of distress to cases where honour or moral integrity were at stake, since widening the scope of application could be dangerous and open up possibilities of abuse. Distress should be invoked only when human life was at stake.

39. **Mr. Thayeb** (Indonesia), commenting on chapter V of the report under consideration, on State responsibility, noted that the Commission had made further progress on that topic. Concerning the breach of an international obligation, particularly the distinction between primary and secondary obligations, the Commission had followed the realistic approach taken by the Special Rapporteur, which made it possible to identify the relationships among the different articles and parts of the draft.

40. As far as article 16 was concerned, the relationship between the law of State responsibility and the law of treaties had been generally acknowledged. In order to resolve the problem of a treaty obligation that was in conflict with general international law, article 62 of the Vienna Convention on Treaties (fundamental change of circumstances) could be invoked to lessen the impact of *jus cogens* in articles 53 (treaties conflicting with a peremptory norm of general international law) and 64 (emergence of a new peremptory norm of general international law) of the Convention. In any event, the Vienna Convention was concerned with treaties and, in case of inconsistencies, the effect of *jus cogens* would override the validity of a treaty as a whole. Furthermore, the suggestion for the draft articles to contain a provision containing a hierarchy of the different norms of international law, had merit.

41. His delegation was willing to consider other ideas to tackle the issue of conflicting international obligations. Concerning article 30 on countermeasures, the Commission rightly recognized that it was a controversial subject, and that the possibility of abuse required that the application of such measures should be strictly regulated.

42. As far as the topic of nationality in relation to the succession of States (chapter IV) was concerned, the draft preamble and the set of 27 draft articles established a legal framework that provided the best juridical security not only for natural persons but for States as well. The second preambular paragraph had rightly pointed out that nationality was essentially governed by internal law within the limits set by international law. It would also be important to facilitate the exchange of information between States so that the negative ramifications of a particular succession of States were identified with regard to the nationality of individuals as well as to other issues linked to nationality.

43. His delegation had followed with interest the evolution of the topic on jurisdictional immunities of States and their property (chap. VII). The doctrine in that regard was traced back to the maxim "*parem non habet imperium*". With progress in international trade, contemporary international law on the jurisdictional immunity of States appeared to be based on two widely accepted concepts. According to the first, classical theory, a sovereign State could not be made a respondent in the national courts of another State without its consent. The second concept, which was restrictive, recognized the immunity of a State for public acts (*acta de jure imperii*) but not for private acts (*acta de jure gestionis*). Hence, a text that reconciled those two divergent views needed to be formulated. Having said that, his delegation believed that sovereign States should be immune from legal proceedings for their acts, whether they were of private or public nature. That was a key principle to be taken into account in the provisions of bilateral, regional and multilateral agreements governing the jurisdictional immunities of States and their property.

44. He welcomed the suggestions of the Working Group with respect to five main issues, namely: the concept of a State for purposes of immunity; criteria for determining the commercial character of a contract or transaction; concept of a State enterprise or other entity in relation to commercial transactions; contracts of employment; and measures of constraint against State property. It looked forward to the Commission's conclusions on those points.

45. As far as the topic of reservations to treaties was concerned (chap. VI), his delegation was satisfied with the text of the draft guidelines with commentaries thereto adopted at the fifty-first session of the Commission. It welcomed the progress achieved, and it stood ready to assist international institutions as well as States in resolving the topic of reservations and, thus, contributing to minimizing the dangers of disputes in the future.

46. As far as the working methods of the Commission were concerned (chap. X), his delegation would support a more intensive dialogue between the Commission and the Sixth Committee. Moreover, the recommendations made

by the former to the latter were useful in that they contributed to more focused deliberations of the General Assembly. Another development was the presentation of the report by the Chairman of the Commission in two or three parts, which also contributed to enhancing the clarity of discussions between the Sixth Committee and the Commission. The same held true for the direct dialogue between the Chairman of the Sixth Committee, the Chairman of the Commission and the special rapporteurs of the Commission. Lastly, he welcomed the fact that the Commission's documents were posted on its Web site, which gave delegations adequate time to study them.

47. **Mr. Varso** (Slovakia) described the approach that he thought the Commission should take in dealing with State responsibility (chapter V), a topic which comprised two major elements: breach of an international obligation and restoration of the rule of law. The Commission should establish the links between the first and second element. Having established that framework, the Commission should analyse the main or constituent elements of legal relationships, namely the issues raised by the subject of law, issues relating to legal relationships between subjects of law, issues concerning the restoration of observance of obligations by subjects of law and the means of settling disputes arising from an international responsibility.

48. Article 16 (existence of a breach of an international obligation) addressed possible conflicting international obligations and the relationship between wrongfulness and responsibility. As far as the hierarchy to be established between the obligations arising from treaties and determined by the peremptory obligations under international law were concerned, it was not sufficient to indicate that the latter had a hierarchically higher status. It would be useful for the Commission to indicate what those peremptory norms were, if only in the commentary. The notions concerning the relationship between wrongfulness and responsibility should be considered within the framework of the common provisions covering the beginning, continuation and cessation of responsibility, in relation to article 18 and articles 24 and 25.

49. Article 18 (Requirement that the international obligation be in force for the State) had two distinct aspects: whether the breach of an obligation was linked to a given State or not and, once that link had been established, the issue of non-compliance with the obligation in question. Article 20 (Obligations of conduct and obligations of result) should be placed in a framework of material and procedural rules. Paragraphs 1 and 2 of articles 24 and 25 (Completed and continuing wrongful acts) should be dealt with in succession with regard to responsibility and the object of the obligation; paragraph 3 of article 24 should be included among the provisions having to do with the object of the responsibility. Article 26 *bis* (Exhaustion of local remedies) raised the interesting question of the beginning of the obligation in relation to the exhaustion of local remedies. On that point, his delegation agreed with the Special Rapporteur that the Commission must clearly indicate that, in certain situations, responsibility may not be invoked before the exhaustion of those local remedies.

50. The articles in chapter IV of the draft used juridical terminology drawn from domestic criminal law. His delegation believed that the State responsibility which was indirectly involved in a breach of international obligation (aid, assistance, direction, control or coercion) should be treated in the same way as State responsibility which was a direct breach of that obligation. That was the basis for its interpretation of the content of articles 27 and 28. Article 28 *bis* would be superfluous if it was clearly stated that the responsibility of the party in direct breach of international obligation was never in doubt.

51. The discussions in the Commission concerning chapter V of the text (Circumstances precluding wrongfulness) had tended to increase the number of exceptions. He feared that such an approach would have negative consequences on the sacred principle of *pacta sunt servanda*. Each exception tended to weaken that principle; the stability of the basis for international relations could be seriously compromised as a result.

52. Although he understood why article 29 (Consent) had been included in the draft, he felt that it was essential to define the criteria for its application in the article itself and in the commentary. Article 29 *bis* (Compliance with a peremptory norm) should at least specify some of the peremptory norms of international law. Self-defence, which was the subject of article 29 *ter*, certainly belonged among the circumstances exonerating from responsibility, on condition that it remained within the limits set in the Charter of the United Nations.

53. His delegation approved of the approach adopted by the Special Rapporteur concerning article 30 (Countermeasures): countermeasures must be considered to be an instrument for guaranteeing the execution of the obligation, reparation or cessation, and were linked to implementation of international responsibility. That question should therefore be dealt with within the framework of the provisions relating to the re-establishment of compliance with obligations. The idea underlying article 30 *bis* (Non-compliance caused by prior

non-compliance by another State) was at the limits of juridical speculation. That provision envisaged a concatenation of obligations, a situation dealt with in article 16 and article 30. His delegation, at the current stage of discussions would support the proposal made in the report that a decision on whether that was a special case would be taken at a later stage during the study of the question of countermeasures.

54. Article 31 (*Force majeure*) also belonged among the circumstances precluding responsibility, but the concept of *force majeure* needed to be more clearly defined by making a distinction between material or actual inability to comply and circumstances making such compliance more difficult.

55. With regard to article 32 (Distress), his delegation shared the concerns expressed in the report that the text currently stressed a subjective element rather than objective criterion, which could lead to abuses. He agreed with the content of article 33 (Necessity), especially in light of the decision of the International Court of Justice in the *Gabčikovo-Nagymaros Project* case.

56. Article 34 *bis* (Procedure for invoking circumstances precluding wrongfulness) should be included in the section dealing with measures for the settlement of disputes arising out of international responsibility. Those measures could create a kind of bridge between the state of wrongfulness and the re-establishment of lawfulness. In that context it would also be worthwhile to specify that contractual obligations questioned by one of the contracting parties remained valid until an independent body had made a decision.

57. Article 35 (Consequences of invoking a circumstance precluding wrongfulness) could be included in the part dealing with the re-establishment of a lawful state. With regard to the substance, more thought must be given to the idea that, if the previous behaviour of the State affected by the act was wrongful, there was no justification for indemnifying it, while the innocent State must be indemnified by the State which had breached its rights and harmed its interests. The question of the indemnification of the affected State should also be dealt with in that context.

58. With regard to the subject of nationality in relation to succession of States (chap. IV), his delegation found the suggested draft articles satisfactory. They reflected the fact that nationality was essentially a question of local law, which implied the principle of the need to adopt domestic legislation, although international law also had a role to play, for example, the principle of the prevention of statelessness. His delegation also agreed with the Commission's recommendation concerning the form that the draft article should take: a declaration by the General Assembly which would remind States of the general principles concerning nationality in cases of State succession and would guide their behaviour in that area.

59. His delegation wished to participate fully in drafting the text for that declaration, including the preamble, an integral part of any international document which had a real effect on its implementation and interpretation.

60. Finally, he noted the Commission's recommendation concerning the conclusion of work relating to nationality in relation to the succession of States, given that States did not seem interested in the study of the second part of the topic, on nationality of natural persons in relation to the succession of States.

61. **Mr. Sun Guoshun** (China) welcomed the changes made to the first part of the draft articles on State responsibility (chap. V). He recalled that the Commission had been very divided about how to approach article 20 (Obligations of conduct), article 21 (Obligations of result) and article 23 (Obligations of prevention). Some members had believed that those three articles were unnecessary categories and should simply be deleted. The others had felt on the contrary that they were worthwhile because they would help tribunals determine whether there had been a breach of an international obligation and would serve to affirm the regime of State responsibility.

62. His delegation believed that the distinction between the three types of obligation should be retained in some form or another. The distinction between the obligation of conduct and the obligation of result had become a commonly accepted aspect of legal terminology. The Commission should therefore be very cautious in considering the complete deletion of articles 20 and 21. The obligation of prevention could be dealt with in the framework of the obligation of result. He nevertheless supported the simplified version of article 20 proposed by the Special Rapporteur and, in a spirit of compromise, would be ready to simply have that distinction mentioned in article 16, on condition that there be a detailed explanation in the commentary.

63. With regard to article 22 (Exhaustion of local remedies), he believed that rule was already firmly established both in treaty law and in customary law. That provision was an essential component of the law of State responsibility in that it specified that a State was only in breach of an international obligation when the other party could not succeed in obtaining from that State a behaviour

corresponding to the international obligation in question, after exhausting all local remedies or as a result of a denial of justice. The content of that article must therefore be maintained either in the third part of the draft articles or in the first part, as was currently the case.

64. Chapter IV of the draft, dealing with the implication of a State in the internationally wrongful act of another State, included article 27 (Assistance or direction to another State to commit an internationally wrongful act) and article 28 (Responsibility of a State for coercion of another State), which in his opinion contained some ambiguities. The words "directs and controls" and "coercion" were not identical in meaning; in addition those three concepts shared some aspects of the meaning of "aids or assists". He therefore agreed with the Commission's decision to redraft the two articles in three distinct articles. The new title for chapter IV of the draft (Responsibility of a State for the acts of another State) was more appropriate than the original title. He nevertheless felt that the title should also contain the notion of wrongfulness.

65. Chapter V listed the circumstances precluding wrongfulness. With regard to necessity in particular his delegation wished to point out, as the International Court of Justice had done in the *Gabčikovo-Nagymaros Project* case, that, although necessity could justify non-compliance with a treaty, that did not mean that the treaty ceased to exist. As soon as the state of necessity ceased, the duty to comply with the treaty revived.

66. As the Special Rapporteur had made clear, article 33 could not be used as an excuse for violating the peremptory norm of non-use of force. Given the controversy generated by the concept of humanitarian intervention there was every reason to emphasize that point, which should be explained in the commentary to the article in order to prevent any misuse.

67. **Mr. Zellweger** (Observer for Switzerland) said that his delegation was satisfied with the changes which the Commission had made in chapter III of the draft articles on State responsibility (chap. V of the report under consideration). In the drafting of legal rules terminological distinctions had meaning only to the extent that the subsumption of an act under one or another of the concepts in question had distinct legal consequences. It was nevertheless true that the theoretical differentiation between obligations of conduct and obligations of result was important even if it should not necessarily appear in the text of the draft articles.

68. With regard to the distinction between "composite acts" and "complex acts", his delegation had noted the Commission's intention to remove any reference to "complex acts". The reasoning behind that approach was understandable, but the removal of the reference might make it more difficult to understand article 25 as proposed by the Special Rapporteur.

69. The combination of paragraphs 3 to 5 of article 18 with articles 24 to 26 raised a number of questions. His delegation fully endorsed the concern to distinguish completed acts from continuing ones; however, it drew attention to the repeated use in articles 24 and 25 of the phrase "remains not in conformity with the international obligation" to state a condition of the applicability of the provisions in question. It wondered whether, apart from the question of the temporal link of a violation to specific conduct of a State, there might not also be an intertemporal problem to deal with. The phrase appeared to refer to what happened when the legal ground of the responsibility, the primary obligation, underwent a change while the conduct in question was continuing. For the sake of clarity it would be useful to draw a sharper distinction between those two problems, i.e. the question of the temporal link of a violation and the intertemporal question, which affected the legal foundation of the violation itself.

70. His delegation was glad that chapter IV of the draft articles (Implication of a State in the internationally wrongful act of another State) had been retained. Attribution within the meaning of article 3 (a) and of chapter II was indeed one of the most important issues.

71. Switzerland understood that the problem of the responsibility of a State which acted jointly with an international organization could not be solved in the draft articles under consideration. However, some thought might be given to adding, for example in chapter II, a provision to the effect that wrongful conduct could be attributable to several States in a situation in which they participated or engaged jointly in wrongful conduct. Such a reference might prevent the article's silence on that question from being interpreted in the opposite sense.

72. His delegation was satisfied with the way in which the Commission had dealt with the rule *pacta tertiis nec nocent nec prosunt* by rightly stressing the fact that a State which helped another State to commit an internationally wrongful act was responsible only when it was itself bound by the obligation in question.

73. With regard to the possible combination of article 27 (Assistance or direction to another State) with paragraph 1 of article 28 (Responsibility of a State for coercion of another State), the two cases were quite different and perhaps should not be subject to the same legal regime. The

exercise of direction or control was a kind of intermediate case between aid and assistance on the one hand and coercion on the other. Switzerland fully approved the approach of avoiding any discussion of the legitimacy of the coercion exercised by a State on another State; the decisive point appeared to be that a State forced the hand of another State in order to commit by that means an internationally wrongful act. The coercing State was the true perpetrator, for it was using another State as its tool. The question therefore arose as to whether it was correct to require that the act committed by the coercing State should constitute an internationally wrongful act of that State. International wrongfulness could result just as much, if not more so, from a violation of an obligation of the coercing State. The wording proposed by the Special Rapporteur might prompt a State wishing to escape an international obligation to compel another State not bound by the same obligation to commit the violation in its stead. When there was constraint the wrongfulness resulted not only from the obligations of the coerced State but also from the obligations of the coercing State.

74. The decisive criterion for the exercise of direction or control might be the fact that the directed or controlled State was not entirely under the influence of the other State. It always enjoyed some room for manoeuvre, a fact which rendered the two States jointly responsible for their respective conduct. Thus, for the State exercising direction or control, the wrongfulness derived from violation of an obligation which bound that State itself, regardless of the fact that the conduct of the State subject to its direction or control constituted a violation of its own obligation.

75. If that reasoning was correct, the responsibility of a State implicated in the wrongful act of another State would be engaged differently depending upon the case: in the case of aid or assistance its responsibility was engaged if the wrongfulness of the act resulted from a violation of an obligation of both States; in the case of exercise of direction or control it was engaged if the source of the wrongfulness lay in the violation of an obligation of the State exercising the direction or control; in the case of coercion it was engaged if the wrongfulness was based on the violation either of an obligation of the coercing State or of an obligation of the coerced State.

76. Turning to chapter V, entitled “Circumstances precluding wrongfulness”, he said that it would be useful to revise the title, because it was not so much a question of determining whether the wrongfulness was precluded than of knowing the particular circumstances in which responsibility was not engaged. The title should therefore refer to the legal result of the application of the provisions, i.e. release from responsibility. His delegation therefore proposed to title the chapter “Circumstances eliminating responsibility”.

The meeting rose at 5.20 p.m.