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Chairman: Mr. Franco (Vice-Chairman) . . . . . (Colombia)

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In the absence of Mr. Mochochoko (Lesotho), Mr. Franco (Colombia), Vice-Chairman, took the Chair.

The meeting was called to order at 10.15 a.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. **Ms. Telalian** (Greece), referring to chapter V of the Commissions's report, said that the adoption of the draft articles on State responsibility in the form of a convention would contribute greatly to the prevention of internationally wrongful acts. Her delegation noted with satisfaction the progress made by the Commission on chapters III, IV and V of the draft articles. Her delegation was pleased with the Special Rapporteur's recasting of chapter IV and could go along with the Commission's decision to narrow the application of article 27 so that, if a State assisted another State in performing a wrongful act, its own responsibility would be entailed.

2. One of the most sensitive issues was the question of countermeasures, which was dealt with in chapter V, part one, and chapter III, part two. The institution of countermeasures existed in international law, as shown by State practice. The International Court of Justice had provided useful guidance on countermeasures in the *Case concerning the Gabcikovo-Nagymaros Project*, in which the Court had considered that countermeasures fell within the scope of State responsibility. In that judgement, the Court had examined the lawfulness of countermeasures from the standpoint of the conditions that must be met to avoid potential abuse on the part of the injured State. A basic element in that regard was the principle of proportionality, in the sense that countermeasures must be commensurate with the injury suffered. Another condition of lawful countermeasures was reversibility. The Commission should reflect upon such legal limitations in its consideration of circumstances precluding wrongfulness.

3. Her delegation supported the idea that countermeasures should be linked to compulsory arbitration, which would facilitate the peaceful settlement of disputes. Nevertheless, the issue raised many controversial questions, such as which State should have the right to commence arbitration.

4. Furthermore, countermeasures against an international crime, such as genocide or aggression, should entail the legal consequences arising under the collective security system established by the Charter of the United Nations. Indeed, the adoption of countermeasures should not be left to individual States, but should be the prerogative of the Security Council, acting under chapter VII of the Charter.

5. Her delegation considered the inclusion of the definition of State crimes in article 19 to be one of the Commission's major achievements.

6. The Commission's decision to divide internationally wrongful acts of States into "international delicts" and "international crimes" was at the core of the whole concept of State responsibility, which in turn was a pillar of international law.

7. Turning to the topic of reservations to treaties (A/54/10, chap. VI), she said that the definition of reservations contained in the report was a balanced one. The inclusion of unilateral declarations that concerned the treaty as a whole, and not just some of its provisions, was a positive step.

8. Cross-border declarations that excluded the application of the entire treaty under certain circumstances were really reservations and should be treated as such. The section of the Guide to practice that dealt with that issue clarified the ambiguity existing in the definition of reservations under the Vienna regime.

9. There had recently been an increase in unilateral declarations that excluded or limited the application of a treaty as a whole to certain categories of persons; it was unclear, however, whether such declarations could be identified as reservations. In the context of the European Framework Convention for the Protection of National Minorities, for example, States had submitted "declarations" concerning their understanding of the notion of national minorities. The legal effect of such declarations was not yet clear, and the Convention monitoring body would soon be confronted with that question.

10. Nevertheless, the monitoring bodies of the European Convention on Human Rights, particularly the European Court of Human Rights, had consistently treated such cross-border declarations as reservations and had examined their validity in the light of the special nature of the Convention.

11. The Guide also laid down criteria for determining whether a unilateral declaration was a reservation. That distinction was important in view of the legal consequences attaching to reservations. Moreover, States needed to know the legal character of a unilateral statement for the purposes of the application of the 12-month tacit

acceptance rule under article 20, paragraph 5, of the Vienna Convention on the Law of Treaties. The criterion of the content, rather than the form, of a unilateral declaration and that of the drafters' intention to modify or restrict the legal effect of certain provisions of the treaty were decisive in order to make that distinction.

12. Reservations to treaties, particularly human rights treaties, raised many difficult and controversial questions relating to their admissibility. Most human rights treaties did not contain a reservation clause, and reservations to them were subject to a test of compatibility with the object and purpose of the treaty. The confusion and uncertainty that existed in relation to the system of compatibility and opposability, as laid down in articles 19 to 23 of the Vienna Convention on the Law of Treaties, must be addressed on a priority basis. The competence of the human rights monitoring bodies to determine the compatibility and validity of reservations should also be explored.

13. With regard to nationality of natural persons in relation to the succession of States (A/54/10, chap. IV), the draft articles, which should be submitted to the General Assembly in the form of a declaration, contained many positive elements. She noted, however, that they were drafted mainly along the lines of national legislation governing procedural issues of nationality, rather than as rules or standards of international law.

14. Furthermore, article 19, which gave third States the right to intervene in a matter in which they had no competence, should not be included in the text.

15. The right of option, which was granted only in part two and not in part one, raised many questions. Her delegation failed to understand the reasoning behind article 26, whereby the predecessor State gave a right of option even to that part of its population which had not been affected by the succession.

16. Lastly, her delegation noted with satisfaction that former article 27 had been deleted from the draft. Current article 3 was well drafted and in line with the principles of international law. Her delegation objected strongly, however, to the inclusion in the commentary on that article of the ideas that had been contained in former article 27. Indeed, the last paragraph of the commentary might lead to the conclusion that the aggressor might give his nationality to the victim population. Such a solution was also contrary to the two Vienna conventions on succession of States.

17. Notwithstanding those comments, her delegation believed that the draft articles could serve as useful guidelines for States.

18. Turning to the topic of international liability for injurious consequences arising out of acts not prohibited by international law (A/54/10, chap. IX), she said that her delegation supported the Commission's decision to focus first on the question of prevention of transboundary damage before embarking on the issue of compensation for harm caused. The latter issue was, however, a very important element of the topic of prevention and should not be separated from it. Moreover, a future international instrument on prevention should also contain the obligation of reparation for damage caused. The Commission should undertake an examination in depth of that question.

19. **Mr. Dufek** (Czech Republic), referring to chapter VIII of the report, said there was no doubt that States frequently entered into political and legal commitments by means of unilateral acts. Such acts were often of considerable importance in international relations, yet they remained ill- defined in international law. Accordingly, the Commission's efforts to bring a degree of certainty and predictability to the functioning of unilateral acts were of great value. His delegation noted with satisfaction that the Secretariat had recently circulated a questionnaire to Governments concerning their practice in that area.

20. His delegation agreed with the Commission that at the current stage the scope of the study on the topic should be confined to unilateral acts of States. While other subjects of international law, particularly international organizations, were also able to carry out unilateral acts, it would be very difficult to formulate general principles relating to both States and international organizations. There was no legal regime common to all international organizations, and it was difficult to define general rules even with regard to the organizations themselves.

21. His delegation believed that the Vienna Convention on the Law of Treaties of 1969 should serve as a model for the elaboration of the draft articles on unilateral acts. The Convention appeared to have been especially helpful in the drafting of articles 4 and 7 proposed by the Special Rapporteur.

22. Nevertheless, his delegation had misgivings regarding article 6. While rules on the expression of consent to be bound by an obligation were undoubtedly very important, his delegation was not convinced that it was necessary in that instance to abide strictly by the Vienna Convention, particularly article 11 thereof. In its view, all

the essential rules could be derived from the definition of unilateral legal acts in draft article 2, and no specific provision was necessary in that regard.

23. Concerning draft article 2, his delegation preferred the term "unilateral act" to "unilateral declaration", since it understood the term "declaration" to mean the form in which an act was formulated.

24. Concerning draft article 3, it was self-evident that all States had the capacity to formulate unilateral legal acts; hence, the provision was unnecessary.

25. The Czech delegation shared the majority view in the Commission that it was inappropriate to deal with the issue of reservations in connection with unilateral acts. Reservations were a specific kind of unilateral act which could be discussed only in the context of the law of treaties.

26. **Mr. Keinan** (Israel), referring to chapter VIII of the report, reiterated his delegation's concern that any attempt to classify unilateral declarations within strict categories would run counter to international practice, with the inevitable result that ways would be found to bypass the restrictions. Nevertheless, in the light of the general trend towards proceeding with consideration of the topic, he would concentrate on the issues referred to in the opening statement by the Chairman of the Commission.

27. His delegation shared the view that in the search for an adequate definition of unilateral acts of States, it would be beneficial to draw parallels with the law of treaties and to utilize that law, *mutatis mutandis*, as a guide.

28. His delegation was also of the view that unilateral acts of States should not be subject to specific formal criteria. The problem resided in the interpretation of the State's intention and the circumstances in which the declaration was made, as well as the content of the declaration. Such matters could not be settled strictly by general rules.

29. The Special Rapporteur's suggested focus on the intention of the performing State as a criterion for determining the possible legal consequences of a unilateral act was problematic, in view of the difficulty of evaluating a manifestation of the will of a State. The line between acts intended to produce legal consequences and those falling within the realm of politics was often blurred. Statements of intent were not necessarily meant as legally binding commitments unless the surrounding circumstances made that clear. Accordingly, emphasis should be placed on defining unilateral acts of States on the basis of circumstances from which the legal nature of the act could be inferred.

30. With regard to the definition of unilateral legal acts in draft article 2, his delegation agreed that the expression of will must be demonstrated unequivocally. That did not imply that the content of the declaration could not be vague or subject to conditions. Indeed, there might be instances where declarations of that kind would also entail legal consequences. The term "unequivocally" should be defined as distinguishing between unilateral acts that used the language of obligation in respect of future conduct and those in which a State only "intended" or "planned" to take action.

31. Moreover, the expression of will should be formulated with the intention of acquiring or maintaining international legal obligations or rights, rather than legal obligations alone.

32. His delegation shared the view that the requirement of an autonomous expression of will was of great importance, although the terminology might be confusing, as the Special Rapporteur had also intended it to encompass the notion of being independent of pre-existing treaty or customary norms. His delegation had doubts as to whether such a requirement was practical, in that unilateral acts of States were often formulated in relation to treaties, while still preserving their autonomous nature. In any event, if such a distinction was to be made, it should be referred to separately and explicitly.

33. In that connection, his delegation wished to comment on the Special Rapporteur's assertion that the content of a unilateral act could not be subject to conditions, as such acts were presumed to fall within the treaty sphere. While conditions that required the acceptance of another State would strip the unilateral act of its autonomous nature, in the sense in which that term was understood in the current draft, other kinds of conditions might be permissible, for instance, in cases where a State undertook to act in a certain way, provided that no change in circumstances took place or that certain natural events occurred.

34. As to the element of publicity, his delegation shared the view that such a requirement should be understood in the strictest sense, and that a unilateral act must be notified explicitly by the performing State to the addressee of the act in order for it to produce legal effects. Any other interpretation would run counter to the concept of informal consultations and confidential negotiations, which were essential in the international arena.

35. As to the capacity to formulate unilateral acts, his delegation agreed that for a unilateral act to produce international legal effects, it must be formulated by a representative empowered to engage the State in its

international relations, such as heads of State, heads of Government and ministers for foreign affairs. Other representatives, such as ministers, diplomats and official experts, should not be considered as competent organs of a State for the purpose of formulating legally binding unilateral acts.

36. Despite the considerable impact of unilateral acts of States on the development of customary international law, State practice was not uniform, and it provided only a limited number of cases in which a unilateral act had been recognized as binding. The utmost care should be used in defining that element, as absurd situations would otherwise result in which States would be compelled to designate a legal adviser to examine the possible legal ramifications of every public statement made by their officials.

37. Lastly, his delegation urged the Commission to examine additional elements not discussed in the reports of the Special Rapporteur, such as the duration of validity of unilateral acts of States, the capacity to annul a unilateral act in force and the validity of conflicting unilateral acts made by different official representatives of a State.

38. **Mr. Martens** (Germany), referring to chapter VIII of the report, said that the draft articles on unilateral acts of States provided a sound basis for further discussion. His delegation agreed with the Commission, however, that as the item was still relatively new, it would be a good idea to gather evidence of State practice in that area.

39. With regard to draft article 2, there was probably room for improvement in the definition of unilateral acts of States. The circumstances under which a unilateral act created legal rights and obligations must be clarified. State practice could help to distinguish between acts intended to produce legal effects and those formulated for political purposes only.

40. The draft articles should also address the relationship between unilateral acts and customary international law and treaty obligations. Article 7, paragraph 6, which concerned the relationship between unilateral acts and peremptory norms of international law, should be expanded in order to clarify possible conflicts between unilateral acts and customary law, treaty obligations and Security Council or General Assembly resolutions. On the other hand, his delegation saw no reason to include in draft article 6 a rule governing situations in which domestic law prohibited State representatives from unilaterally making legally binding commitments on behalf of a State.

41. Turning to chapter X of the report, he said that the introduction of split sessions of the Commission was apparently viewed as helpful by its members. If split sessions increased attendance at meetings of the Commission and enhanced their productivity, his delegation could support them, at least for the following year. His delegation had been informed, however, that a single split session of the Commission resulted in an additional expense of $110,000, an amount equivalent to the annual salary of a legal officer of the Secretariat. The expense could be offset, at least in part, if the length of the Commission's sessions was reduced by one week. That would mean a total of 11 weeks of meetings, rather than 12. In view of the enhanced productivity of split sessions, such a reduction would not necessarily curtail the Commission's output or the quality of its work.

42. The Secretariat should provide detailed information about the financial implications of split sessions of the Commission to the Sixth Committee, which, as the main committee of the General Assembly primarily responsible for the Commission, had as much need to be informed as the Fifth Committee.

43. Close cooperation with States, international organizations and other bodies was undoubtedly necessary, and he assumed that all comments made in the Sixth Committee were duly recorded and transmitted to and taken note of by the Commission.

44. Careful evaluation of States' comments in the Sixth Committee might eliminate the need for extensive detailed questionnaires from the Commission, which could be a strain on resources, and were sometimes forwarded to universities and other academic institutions. Instead of issuing questionnaires, the Commission could increase its direct cooperation with the relevant academic institutions. A close dialogue had already begun with international institutions such as the Committee of Legal Advisers on Public International Law within the Council of Europe.

45. Caution should be exercised in relation to new areas of work, to avoid duplication of the work of other, possibly more specialized, international bodies. In view of the present heavy workload of the Commission, new codification endeavours in the field of environmental law might be better left to the various organs and institutions specialized in environmental problems.

46. **Mr. Baena Soares** (Brazil) said that objective consideration of the subject of unilateral acts of States would ensure that the final product was effective and free from abstractions. The definition provided in paragraph 589 of the Commissions's report as a basis for discussion

contained some indispensable elements, and omitted some ideas which had been included in the Special Rapporteur's initial proposal, including the term "unequivocal" to describe the manifestation of the will of a State. The Commission had already accepted that the interpretation of unilateral acts should be one of the points to consider in the short term. The condition of public formulation of the unilateral act had also been omitted, while it was still specified that the act should be made known to the other State or international organization through notification or in some other way.

47. As the Special Rapporteur had explained, the declaration was indeed the basic instrument in the law governing unilateral acts, and the concept of "reservation" should not be applied in that context.

48. Although the concept of autonomy had been included in the original definition, with a clear purpose, Brazil had no strong objection to its provisional exclusion.

49. It was appropriate to request the Secretariat to prepare a typology of the various forms of unilateral acts which could be identified in the practice of States.

50. Responding promptly to the questionnaire mentioned in paragraph 594 of the report would be an effective means for Governments to cooperate with the Commission and the Special Rapporteur in that area. The questions were well-formulated, and of particular interest was the question related to the capacity to act on behalf of the State to commit it by means of a unilateral act. The question about the rules of interpretation applicable to unilateral acts also required special attention.

51. In relation to the future work of the Special Rapporteur, his delegation endorsed the comments made in paragraph 597 of the Commission's report as appropriate.

52. Turning to chapter IX on international liability for injurious consequences arising out of acts not prohibited by international law, he said his delegation supported the second option proposed by the Special Rapporteur relating to future work in that area, namely deferring consideration of the question of international liability until the Commission had completed the second reading of the draft articles on prevention of transboundary damage from hazardous activities. More rapid progress could be made on the topic if Governments would present their comments in writing as soon as possible.

53. **Mr. Al-Baharna** (Bahrain) referring to the subject of nationality in relation to the succession of States, said that his delegation had no substantive objections to the draft articles on nationality of natural persons in relation to the succession of States, and wished to commend the adoption of a series of draft articles which highlighted principles reflected in a number of human rights instruments.

54. The topic of reservations to treaties was one of the fundamental aspects of international law and a basic element in the contemporary practice of States in relation to the conclusion of multilateral treaties. The draft guidelines on reservations were a great stride forward in the Commission's task in that area.

55. Guideline 1.1.1 on the object of reservations could give rise to doubts about the possibility of making a reservation to a "treaty as a whole". The first two lines of the guideline could be revised to read: "A reservation purports to exclude or modify the legal effect of certain provisions of a treaty or of certain specific aspects of the treaty as a whole".

56. Guideline 1.3.3 would be clearer if divided into two guidelines: one relating to a treaty prohibiting reservations to all of its provisions, and the other relating to a treaty prohibiting reservations to certain of its provisions. The last three lines could be revised to read: "... except when it purports to exclude or modify the legal effect of certain provisions of the treaty or of certain specific aspects of the treaty as a whole, in their application to its author".

57. Guideline 1.4.3 was unclear, as a number of States had referred to their statements of non-recognition as reservations. If such statements were not reservations, it might be asked how the obligations of the authors of such statements towards the non-recognized entities which were parties to the treaty could be reconciled. Naturally, the State making the statement, whether it was termed a reservation or a statement of non-recognition, would not accept to be bound by any obligation arising from the treaty concerned vis-à-vis the non-recognized entity party to the treaty. The legal effect of the term "statement of non-recognition" on the obligations of States should be explained.

58. In guideline 1.4.1, one might ask what the legal effect of a "unilateral commitment" was, whether a unilateral commitment would be binding on the author of such a statement in the context of the guideline, and whether it would be enforceable against its author even though such a statement purported to impose upon its author obligations which transcended those imposed on it by the treaty. Except for its connection with the obligations arising from the treaty, such a statement of commitment would no doubt resemble a unilateral act.

59. Guideline 1.6. on the scope of definitions would be better placed at the beginning of the set of guidelines, immediately after guideline 1.1.1.

60. All the new terms in the guidelines to which he had just referred might require further explanation, and their legal effects could perhaps be elaborated upon.

61. On the subject of unilateral acts of States, he said it seemed advisable to adopt the more restrictive approach proposed by the Special Rapporteur in his first and second reports. Such acts were the exception to the generally accepted rule that States were bound, internationally, only by the agreements and treaties which they concluded with other States and international organizations.

62. Unilateral acts should be those acts or statements which produced legal effects or gave rise to legal consequences. The work of the Commission on the topic should be limited to States alone as subjects of international law, thus excluding other subjects of international law such as international organizations. However, such exclusion should not affect the contemporary practice of addressing unilateral acts of States to both States and international organizations, without distinction. Thus, for the purposes of the study of the topic, while unilateral acts of States could be addressed to such organizations, their capacity to formulate them might not be recognized or dealt with. It was also generally agreed that such unilateral acts, the characteristics and effects of which were governed by the law of treaties, were to be excluded from the ambit of the topic. Similarly, unilateral acts whose normative effect arose from performance or existence of some other act or treaty should also be excluded.

63. Unilateral acts of States were autonomous and completely independent of any treaty regime. Unlike treaties, they did not require notification or acceptance by the States or other subjects of international law to which they were addressed. Accordingly, the study should deal strictly with those autonomous unilateral acts of States which had been formulated with the intention of creating, by themselves, international legal effects or international obligations for such States.

64. On the issue of the relationship between the unilateral acts of States and the subject of State responsibility, he said his delegation also shared the view that, in line with the principal objective of the study, which was to provide a strictly limited definition of what was meant by unilateral acts of States, unilateral acts giving rise to international responsibility should be excluded from the study. That approach would also help the Commission to avoid any possible duplication or repetition of the subject of State responsibility, which was being considered as a separate topic. The latter topic clearly dealt with international wrongful acts of States that gave rise to international responsibility. On the other hand, the topic of unilateral acts of States was essentially concerned with a different regime, that of autonomous unilateral acts that were being formulated by States with the intention of creating obligations for those States. Naturally, such obligations were not based on treaty obligations, as in the case of State responsibility.

65. The word “legal” was not needed to qualify the expression “unilateral act” as the definition clearly referred to unilateral acts that created “international legal effects”, and not merely statements of a political nature.

66. The expression “unequivocal” used to qualify the unilateral act was considered by the Working Group as unduly restricting the scope of the topic. However, that qualification was significant, as it was difficult to imagine the formulation of a unilateral act that was unclear or contained implied conditions or restrictions. There could be no binding force for such equivocal or qualified statements against their authors, especially when the latter could revoke them on the ground that the implied conditions or restrictions attached to the unilateral acts had not been met or acted upon by the States to which the unilateral acts were addressed.

67. The omission in the Commission’s report of the expression “formulated publicly” used in the Special Rapporteur’s definition and the replacement of that expression by the words “notified or otherwise made known” were justified on the ground that not all unilateral acts required the use of the mass media to make the act widely known to the international community.

68. Similarly, he agreed that the phrase “the international community as a whole” should be excluded from the definition. It was questionable that the international community as a whole could possibly be the addressee of a unilateral act.

69. The phrase “with the intention of acquiring international legal obligations” was also questioned in the report on the ground that unilateral acts could also “purport to acquire or maintain rights”. The alternative proposed wording, “intends to produce legal effects”, was not clear enough. The phrase contained in the Special Rapporteur’s definition was more definite, as the intention of the State author of the act was quite clear. However, the phrase could be reformulated to read “with the intention of acquiring legal obligations or maintaining rights”.

70. Finally, the word "autonomy" should be left without brackets, as a necessary element of the definition. He shared the view of other members of the Commission that the inclusion of that element in the definition was needed in order to "exclude unilateral acts which were subject to treaty regimes".

71. With regard to chapter IX, he noted that the Commission had decided to suspend work on the question of liability until the draft articles on the regime of prevention had been completed. The Sixth Committee had endorsed that decision, agreeing that attention should be focused on prevention. A number of delegations, however, including his own, had emphasized the need to continue work on the topic of liability as well: the principles governing prevention could not be isolated from those governing liability. Moreover, the topic of prevention would be incomplete without the development of rules governing liability arising from the consequences of harm or non-compliance in general. The Commission should therefore endeavour to find a generally accepted definition of the scope of a regime of liability for activities not prohibited by international law. Difficult though it might be to put in place such a regime, the topic should not be rejected. Indeed, it was both essential and complementary to the treatment of the regime of protection. Furthermore, it was clear from the Special Rapporteur's report that positive steps were being taken by the international community to evolve and formulate rules in relation to liability.

72. **Mr. Rogachev** (Russian Federation), speaking on chapter IX, said that the obligation of prevention of transboundary damage was an obligation of conduct not of result. Its violation therefore entailed international responsibility for the State concerned, regardless of the existence of damage. If there was damage, not only State responsibility was involved but also operator liability. The obligation of prevention naturally entailed due diligence, but he noted that such due diligence could not be identical for all countries: standards that were normal for developed countries might be unattainable for countries in economic difficulties. His delegation therefore endorsed the use in compliance procedures of the sunshine approach and incentives to comply, with the use of sanctions as a last resort. It was important to maintain a balance of interests between the acting State — in whose territory the hazardous activity took place — and the affected State. His delegation considered that the draft articles followed the correct approach and were in keeping with contemporary international law.

73. Discussions within the Commission and the Committee showed that progress on establishing a universal set of rules on liability for transboundary damage on objective grounds was virtually out of the question. His delegation, therefore, although fully persuaded of the close links between a regime of prevention and a regime of liability, agreed with the majority of the Commission — and, it seemed, of the Committee — that work on the topic of international liability should be suspended until the regime of prevention was finalized in its second reading.

74. The question of the settlement of disputes relating to the interpretation and implementation of the draft articles should be addressed at a later stage, when the final form of the draft articles became clear. Meanwhile, his delegation favoured the inclusion of "soft" procedures, such as consultation, negotiation, investigation and conciliation. It was also agreeable to the inclusion of provisions similar to those contained in the Convention on the Law of the Non-navigational Uses of International Watercourses.

75. **Mr. Morshed** (Bangladesh) expressed his appreciation of the suggestion that during the meetings of the Sixth Committee on the report of the International Law Commission delegations should be enabled to enter into dialogue with special rapporteurs on their topic. Such an arrangement would be particularly valuable for small delegations, such as his own.

76. With regard to chapter IV, his delegation particularly welcomed the fact that the structure of the draft articles on nationality in relation to the succession of States incorporated the right of option as an indispensable element, to some extent mitigating the difficulties posed by the notion of habitual residence, which, if applied automatically, could hit whole groups of people with the force of a diktat. His delegation was flexible on the final form that the draft articles should take. The proposal for the text to be a declaration of the General Assembly had the merit of achieving a speedy conclusion.

77. With regard to chapter V, he said that the topic of State responsibility was as fundamentally important as it was difficult and, although great progress had been achieved, much remained uncertain. His delegation could not address the points on which the Commission had sought views until the structure of the draft articles emerged more clearly. As for the questions posed in paragraph 29 of the Commission's report, his delegation offered some tentative answers which it would be happy to reconsider in the light of subsequent analysis by the Special Rapporteur and the Commission. With regard to paragraph

29 (a), the proposed distinction could be drawn if the legal consequences for the injuring State were shown to be different vis-à-vis the injured State from those vis-à-vis other States with only a legal interest in the performance of the obligations. His delegation endorsed paragraph 29 (b), and also (c), for the reasons given by the Special Rapporteur. On paragraph 29 (d), his delegation favoured excluding questions raised by the existence of a plurality of States until a self-contained set of articles based on the normal paradigm had been worked out. In brief, his delegation generally supported the Special Rapporteur's approach.

78. With regard to chapter IX, his delegation noted that the consideration of prevention had been separated from that of liability merely for the sake of convenience. The elaboration of a liability regime was at the core of the Commission's mandate and his delegation endorsed the approach outlined by the representative of New Zealand.

79. **Mr. Politi** (Italy), speaking on chapter VIII, expressed his delegation's satisfaction with the general definition of unilateral statements by a State, contained in paragraph 589 of the report, although it would have preferred the inclusion of a specific reference to the autonomous nature of the statement in order to make it clear that the scope of the topic was restricted to acts whose effectiveness in law was not conditional on the manifestation of any other will besides that of the issuing State. However, while in the current phase of the Commission's work the topic could be limited to acts which were also unilateral declarations, the Commission should not be deterred from considering at a later stage other less formal expressions of the will of the State.

80. His delegation agreed with the suggestion that the Secretariat should prepare a typology of the various kinds of unilateral acts to be found in State practice. The information provided by States in response to the recently issued questionnaire would be most useful. Perhaps the questionnaire could also raise other issues, such as the relationship between unilateral acts and customary international law and the validity of those acts when contrary to General Assembly or Security Council resolutions. On the more general question of the extent to which the rules of the 1969 Vienna Convention on the Law of Treaties could be adapted to unilateral acts, the Convention contained helpful guidelines, but the type of act involved and the specific question at stake should be carefully examined to verify, in each case, the applicability of the solutions it contained.

81. With regard to chapter IX, he said that the work on the inherently difficult topic of international liability was at a crucial stage. His delegation agreed with the Commission's decision to defer consideration of the question of international liability pending completion of the second reading of the draft articles on the prevention of transboundary damage from hazardous activities. Once that was done, however, the work on international liability should resume promptly. State practice in that sphere was fairly developed in various specific sectors, which should make it possible for the Commission to devise a global regime. To develop international legislation on prevention and not on liability would leave the project incomplete.

82. He welcomed the closer dialogue between the Commission and the Committee. The presence of several special rapporteurs had also proved helpful. A positive development was the frequent requests for written comments and responses to questionnaires by Governments. The highest possible number of Governments should provide such comments, in order to make available a wide spectrum of opinions. He also underlined the importance of the prompt publication and distribution of the Commission's report, thus giving delegations sufficient time to make considered contributions to the debate on the report. The Commission's consultations with scientific institutions, individual experts and national or international organizations were also most significant. Such contacts served the important purpose of raising awareness of the Commission's work and intensifying the exchange of ideas.

83. His delegation welcomed the Commission's conclusion that a flexible, needs-based position on the duration and nature of its sessions should be maintained. He looked forward to an assessment of the outcome of the split session to be held in Geneva in 2000.

84. With regard to the long-term programme of work, while all the possible topics were of substantive interest, two — responsibility of international organizations and the effect of armed conflicts on treaties — were particularly appropriate for inclusion.

85. **Ms. Al-Naser** (Kuwait) said that chapter IV concerning nationality in the event of the succession of States was of great importance in resolving problems connected with the nationality, identity and legal status of natural persons. She commended the work and recommendations of the Commission on that issue.

86. With reference to State responsibility, which was covered by chapter V, her delegation, having heard the views expressed, wanted State responsibility in respect of

international obligations, as well as breaches thereof and the issue of conflicting international obligations, to be resolved by reference to the Vienna Convention on the Law of Treaties of 1969.

87. On the subject of reservations to treaties, dealt with in chapter VI of the report, her delegation considered that, because of the frequency with which States availed themselves of the right to formulate reservations, a right specified in the Vienna Convention on the Law of Treaties of 1969, it had become necessary to develop a new draft text to define practice in that respect. The Commission should address the issue in a flexible manner but without introducing any amendment to the Vienna Convention on the Law of Treaties. Her delegation was in favour of establishing a guide to practice in respect of reservations. In that connection, it was necessary to draw a distinction between a reservation, an interpretative declaration and a unilateral statement relating to the text of conventions because of their differing legal effects in international practice. Her delegation was therefore in favour of the draft guidelines that had been adopted at the fifty-first session of the Commission and endorsed the comments that had been made on it.

88. In connection with chapter VII of the report concerning jurisdictional immunities of States and their property, her delegation agreed with the suggestions of the working group contained in the report relating to the five main issues listed in paragraph 7 of the annex to the report and which had been a subject of disagreement between States. In that connection, her delegation affirmed the necessity of respecting the principle of State sovereignty and said that, because of differences between the internal legal systems of States, it was necessary to reach a unified formulation of those issues.

89. Turning to the subject of international liability for injurious consequences arising out of acts not prohibited by international law, which was the subject of chapter IX of the report, her delegation agreed that the Committee should postpone its consideration of that issue until the Commission had finalized its second reading of the draft articles on prevention of transboundary damage from hazardous activities.

90. **Mr. Madureira** (Portugal), speaking on chapter VI, said that his delegation attached the utmost importance to the question of reservations to treaties. The 18 draft guidelines constituting the first chapter of the Guide to practice already gave an impressive idea of the importance and usefulness of the Commission's task. The next step was to deal with another aspect of the subject requiring urgent clarification: the effects of inadmissible reservations. Indeed, it was often unclear which reservations were acceptable and what effect objections had on reservations to treaties. The result was often that each State became the sole judge, in practical terms, of the compatibility of reservations with the object and purpose of the treaty, since there were no specific consequences attached to the formulation of objections by other parties, however numerous they were. Despite the fact that the increasing number of objections to reservations deemed contrary to the purpose or integrity of treaties had had a positive result in preventing or reducing the number of reservations of that nature, the problem remained. The Commission should address the task with urgency. Other issues to consider were modifications to reservations; and the denunciation of a treaty, followed by accession with reservations. Such questions had serious implications for the codification of international law.

91. Turning to international liability for injurious consequences arising out of acts not prohibited by international law, he said that his delegation welcomed the focus on the regime of prevention but also believed in the principle of compensation when transboundary harm occurred. It had therefore supported draft articles 4 and 5 on prevention and liability, respectively. The duty to pay compensation, which would require the elaboration and acceptance of an appropriate legal principle, should be honoured whether the harm occurred as the result of a breach of a due diligence duty, or despite the implementation of preventive measures; in the latter case, the type of liability and compensation must be determined. He expressed disappointment at the deletion of draft article 1 (b) on activities that did not entail risks under ordinary circumstances but could cause harm in specific instances. Consistent with the Commission's original approach, his delegation supported integral treatment of the whole range of issues relating to international liability for injurious consequences, including, *inter alia*, the question of effective liability. Thus, his delegation strongly favoured the first option offered by the Special Rapporteur with respect to the future course of action on the question of liability. Since the draft articles on prevention were acceptable to the majority of delegations, there was no reason to delay the treatment of other aspects of the topic, let alone to terminate the Commission's work.

92. His delegation urged Governments to respond to the questionnaires circulated by the Commission, which, together with the answers, could be included in the Commission's home page on the Internet. He also stressed the importance of contacts with other bodies, such as the

treaty monitoring bodies, particularly in the area of human rights, in order to exchange information on various matters, including reservations.

93. **Ms. Álvarez-Núñez** (Cuba) said that the Commission's work on State responsibility should culminate in the conclusion of an international convention. Her delegation believed that any amendments to the draft articles elaborated in 1996 should be carefully considered, since they were the product of several decades of erudite work. In that connection, she said that, regardless of the terminology used in article 19, a special regime of State responsibility for serious breaches of an international obligation was indispensable, since they constituted a violation of international law. Her delegation agreed in principle that the grounds for precluding State responsibility should be limited to the extent possible and clearly defined. Draft article 33, however, should be retained in its current form. Precluding State responsibility on the grounds of a state of necessity must never be invoked as a pretext for the breach of *jus cogens* norms, for example, the provisions of the Charter of the United Nations on the use of force. She feared that draft article 34 on self-defence could lead to a reinterpretation of that principle as set forth in the Charter of the United Nations.

94. Her delegation had repeatedly expressed concern at and rejected the concept of countermeasures. Legitimizing acts of reprisal for a wrongful act merely aggravated differences between States. Furthermore, in many cases small and developing countries would be unable to apply countermeasures against developed countries. The peaceful settlement of disputes should be linked to countermeasures only in the most general terms.

95. Concerning reservations to treaties, she said that calling into question the regime of reservations set out in the 1969 and 1986 Vienna Conventions on the Law of Treaties, far from promoting universality, would limit the participation of States in multilateral instruments. An integral approach must be taken to examining reservations to treaties; in that respect, reservations to human rights treaties were no different from reservations to other types of treaties. In determining the admissibility and effects of reservations, the treaty bodies, which had been established exclusively to monitor implementation, could not take the place of the States parties themselves.

96. Referring to international liability for injurious consequences arising out of acts not prohibited by international law, she said that States should take responsibility for injurious consequences that occurred within their territory, notwithstanding the civil liability incurred for any damage resulting from such acts. Her delegation agreed that it was also the State's responsibility to ensure that operators under its jurisdiction were taking preventive measures, and to assume subsidiary liability if they were not.

97. Nationality in relation to the succession of States dealt with a fundamental human right and entailed, as a corollary, the prevention of statelessness. Her delegation supported the Commission's recommendation to adopt the draft articles as a General Assembly declaration (A/54/10, para. 44). The norms they embodied were sufficiently flexible and would help States both to deal with the problems of nationality arising from the succession of States and to enact domestic legislation. She noted, however, that the draft articles departed from certain international practices with regard to the topic.

98. Her delegation supported the elaboration of a convention on the jurisdictional immunities of States and their property that would be acceptable to all States and would take into account the commercial practices of the developing countries. The report of the Working Group on Jurisdictional Immunities of States and their Property formed a sound basis for future deliberations. The Commission's work on unilateral acts of States would facilitate the development of friendly relations and cooperation among States in an age of globalization. For obvious reasons, her delegation attached great importance to the topic and would submit its views to the Commission in writing.

99. **Mr. Edmond** (Haiti) said that article 1 of the draft articles on the nationality of natural persons in relation to the succession of States was firmly based on the Universal Declaration of Human Rights and other human rights instruments affirming the right of every individual to a nationality. The chief concern was to avoid having individuals left stateless under all the varied forms that succession might take. The articles reflected the principle of respect for the will of the persons concerned, while achieving a balance between the interests of the State and those of individuals. His delegation supported the adoption of the draft preamble and articles by the General Assembly in the form of a declaration, which would contribute towards harmonizing national laws on the subject. In view of the lack of interest on the part of States in the question of the nationality of legal persons, the Commission's decision not to proceed with the topic was justified.

100. The draft articles on jurisdictional immunities of States and their property formed a sound basis for future deliberation. His delegation shared the opinion of the

Algerian delegation that to reduce the State to the status of a private individual by according it the same treatment before a foreign jurisdiction undermined the principle of sovereignty, which was fundamental to international law. Notwithstanding, it was reasonable to apply measures of constraint to any property of the State used for economic and commercial activities; however, the notion of commercial transactions had to be defined very carefully, taking into account the purpose of an activity.

101. In the highly important work on State responsibility, his delegation was confident that the Special Rapporteur would take into account the comments of States on the articles provisionally adopted on first reading on the origin of international responsibility.

102. **Mr. Zellweger** (Observer for Switzerland), referring to reservations to treaties, said that the inclusion of examples of unilateral statements in draft guideline 1.1.1 would elucidate the concepts of across-the-board reservations and "specific aspects". While draft guideline 1.1.5 on statements purporting to limit the obligations of their author seemed merely to repeat an element of the definition of reservations already contained in draft guideline 1.1, it became more meaningful in the context of draft guideline 1.4.1 on statements purporting to undertake unilateral commitments. The hypothesis contained in draft guideline 1.1.6 on statements purporting to discharge an obligation by equivalent means did not really correspond to a widespread practice; however, the Commission could address it in the interest of promoting the progressive development of international law.

103. His delegation fully agreed that the silence of draft guideline 1.2 on the moment when an interpretative declaration could be formulated did not imply that it could be formulated at any time and under any circumstances. Perhaps that should be specified in the definition of interpretative declarations.

104. His delegation was of the view that a unilateral statement whereby a State or an international organization subordinated its consent to be bound by a treaty to a specific interpretation of that treaty or certain of its provisions correspond more closely to a reservation than an interpretative declaration. The purpose of an interpretative declaration, however, was not to produce a legal effect on the meaning and scope of treaty provisions as they applied to all contracting parties. It would be premature for the Commission to decide whether to view conditional interpretative declarations as reservations or draw a distinction between the two. A conclusive answer was likely to emerge from the Commission's consideration of the legal regime applicable to reservations and interpretative declarations. Draft guideline 1.3 on the distinction between reservations and interpretative declarations and draft guideline 1.3.2 on phrasing and names were inextricably linked and should be merged or, at least, appear in sequence, even if that meant placing draft guideline 1.3.1 on the method of implementation of the distinction between reservations and interpretative declarations after all the draft guidelines on legal effect.

105. There appeared to be a contradiction between paragraph (2) and paragraph (4) of the commentary on draft guideline 1.3.3 on formulation of a unilateral statement when a reservation is prohibited. On the one hand, the Commission automatically viewed statements made where reservations were prohibited as interpretative declarations and, on the other hand, maintained that it was not the guideline's purpose to determine what those statements constituted. Paragraph (4) seemed to be more in line with the Commission's real intentions and also reflected his delegation's interpretation of the draft guidelines. However, the inclusion of a refutable assumption was questionable; perhaps the draft guideline should simply indicate that, where reservations to certain of a treaty's provisions were prohibited, that prohibition did not extend to unilateral declarations which neither excluded nor modified the legal effect of those provisions.

106. Since the Guide to practice was meant as a tool to assist States, it should not have the kind of legal scope implied by the phrase "outside the scope of the present Guide to practice". That phrase, which appeared in all six draft guidelines under section 1.4 on unilateral statements other than reservations and interpretative declarations, should be deleted.

107. **Mr. Mikulka** (Secretary of the Committee), responding to a question raised by the representative of Germany at a previous meeting, said that the additional expense of a split session of the Commission in 2000 would be a total of $105,230 ($90,000 for airfare for the members of the Commission, $8,000 for airfare for the secretariat and $7,230 for additional daily subsistence allowance payments for the secretariat). Shortening the session by one week would save $59,085 in daily subsistence allowance payments for the Commission members and secretariat.

108. **Ms. Fernández de Gurmendi** (Argentina) asked for a comparison of the costs of holding the session in Geneva and in New York.

109. **Mr. Mikulka** (Secretary of the Committee) said that if all or part of the session were held in New York the additional cost would be even higher.

110. **Mr. Díaz Paniagua** (Costa Rica) said that as a matter of principle his delegation believed that discussion of financial matters should be left to the Fifth Committee.

111. **Mr. Hanson-Hall** (Ghana) said that the Committee had a duty to discuss matters with budget implications before making decisions concerning bodies under its purview.

112. **Ms. Willson** (United States of America) said that the Committee should not make decisions without being fully informed. She would like to know the estimated savings to be achieved from devoting one week at the beginning or end of the Commission session to meetings requiring limited attendance, as suggested in the report.

113. **Mr. Mikulka** (Secretary of the Committee) said that, while the figures were somewhat speculative, he estimated that about $18,000 could be saved in daily subsistence allowance payments during a week of limited rather than full attendance.

114. **Mr. Gomaa** (Egypt) and **Ms. Álvarez Núñez** (Cuba) said that, at that level of financial detail, the discussion properly belonged in the Fifth Committee.

115. **Mr. Rodriguez Cedeño** (Special Rapporteur of the International Law Commission for unilateral acts) said that he concurred with the views expressed by many delegations that better, more direct communication between the Sixth Committee and the Commission's special rapporteurs was indispensable. It was to be hoped that more informal meetings could be arranged in parallel to the sessions of the two bodies. The debate he had heard on unilateral acts, the issue for which he was responsible, had been very complete and would be helpful to him in the preparation of his third report and to the Commission at its next session. He had particularly noted States' views on the elements of the definition of unilateral acts, on the suspension, modification and revocation of unilateral acts, and on the suitability of the 1969 Vienna Convention on the Law of Treaties as a frame of reference. Unilateral acts had special characteristics that distinguished them from conventional acts and made a *mutatis mutandis* application of the law of treaties inadvisable. Above all, he had noted the emphasis on the need for more research into State practice. In that regard, Governments' response to the draft questionnaire on State practice prepared at the request of the Commission's Working Group on Unilateral Acts of States would be invaluable.

116. **Mr. Galicki** (Chairman of the International Law Commission) said that without substantial input by Governments the work of the Commission would not be effective or useful. The Commission, as a body of experts, relied on existing case law, State practice and other sources of international law. But projecting law for the future required the consideration of political reality, and that was what States should bring to the work of the Commission. He therefore urged Governments to reply as quickly as possible to requests for information from the Commission. The comments made in the Committee would also be summarized by the secretariat and considered carefully by the special rapporteurs and the Commission at its next session. The observations of the legal adviser of the United Kingdom on the interaction between the Committee and the Commission had raised points worth further consideration.

117. The Committee's comments had shown that the work of the Commission at its past session had been well received. The credit went not only to the members of the Commission, but also to the Governments that had devoted time to answering questionnaires and to the Committee secretariat, which, among other things, had enabled the results of the session to be disseminated immediately on the Internet.

118. Many delegations had commented on how rapidly the Commission had completed its work and the importance of keeping up the momentum. The Commission would do everything in its power to satisfy all hopes, but the Committee should be aware that the following year's agenda was particularly heavy, including reports by special rapporteurs on nearly every topic. Moreover, the Commission wished to seize the opportunity to complete the work on State responsibility in the current quinquennium, perhaps in the year 2000, and that would mean a longer session and concentration on that topic. He hoped for the continued support of the Committee in that regard.

The meeting rose at 1.10 p.m.