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Chairman: Mr. Politi. . . . . (Italy)

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The meeting was called to order at 10.10 a.m.

Agenda item 159: Report of the International Law Commission on the work of its fifty-second session (*continued*)

1. **Ms. Hallum** (New Zealand), referring to draft article 30, said that assurances of non-repetition were required not only where there was a pattern of repetition of the wrongful act, but also where there was a risk of repetition. Alternatively, assurances were appropriate where the breach was particularly grave, even if the risk of repetition was minimal.

2. The draft articles reflected the fundamental principle of full reparation for injury. Restitution should be recognized as the best means of reparation and should be understood as restitution in full in the general sense, rather than as a requirement to restore the exact situation which existed before the breach. There might, however, be occasions where restitution alone could not provide full reparation. As for compensation, it should be addressed by means of a flexible formula, allowing the rules on quantification to develop through practice and decisions; she therefore supported the approach adopted in draft article 37. It would not be helpful to set out detailed guidance on quantification, as that would not only make conclusion of the draft articles more difficult, but might also prove to be insufficiently flexible to meet all the circumstances that might arise.

3. Interest on any economic loss should be assessed from the date on which the damage occurred, although that date might not be appropriate in all cases; her delegation therefore supported the flexibility reflected in draft article 39, paragraph 2.

4. Satisfaction represented the corollary of a declaration by a court that an act was internationally wrongful; it should therefore be included as a separate form of reparation. Satisfaction also served to provide reparation for non-material injury and the reference to "injury" in draft article 38, paragraph 1, should be understood in that light. Her delegation supported the principle of proportionality so as to prevent excessive demands in respect of satisfaction.

5. The question of how to treat serious breaches of essential obligations to the international community had been the subject of considerable debate. The attempt to create a distinction between crimes and delicts had distracted attention from the shared concern with responding to such breaches. She therefore supported the deletion of former draft article 19 and welcomed the approach taken in the new Part Two, Chapter III. At the same time, she did not believe that the deletion of article 19 had any implications for the existence in law of the notion of international crimes.

6. The introduction of the new Part Two bis represented two useful developments: first, a conceptual shift from the responsible State to the right of a State to invoke responsibility, and second, the distinction between injured States and States with a legal interest in the performance of an obligation, as set out in draft articles 43 and 49. States which, although not injured, had a legal interest in the performance of the obligation breached should be entitled to invoke responsibility for the breach of the obligation but not to receive the range of remedies available to States which had suffered actual injury. She concurred also with the definition of "injured State" in draft article 43, which recognized the increasing diversity of international obligations.

7. She supported the inclusion of provisions relating to countermeasures in Part Two bis, Chapter II, while considering that countermeasures must be both necessary and proportionate. As a basic principle, countermeasures should not take the place of dispute settlement and should not be imposed if good-faith attempts to resolve the dispute were continuing.

8. She supported the description of the object and limits of countermeasures set out in draft article 50. In particular, she believed that countermeasures should not be limited to non-performance of a reciprocal obligation, and that States should be entitled to suspend the performance of an obligation unrelated to the obligation breached, provided that the principles of reversibility and proportionality were met.

9. **Mr. Giralda** (Spain) said that the International Law Commission should conclude its work with the adoption on second reading of a draft convention that would then be submitted to States for discussion and approval. While mindful of the difficulties involved, he believed that was a close connection between the presence in the draft of imprecise rules and the need for a dispute settlement system, led logically to the adoption of a binding instrument.

10. Draft article 45, relating to the rule of exhaustion of local remedies, did not specify the legal nature of

the remedies in question; however, the fact that the exhaustion of local remedies was one of the conditions for the admissibility of claims implied that the remedies were of a purely procedural nature. Accordingly, the rule should be included in Part One of the draft text, as in the 1996 version. The same applied to draft article 56, which was now a general provision applicable to the text as a whole, whereas in the earlier version its application had been limited to the draft articles in Part Two. His delegation believed that the article should be drafted in positive terms, in other words, that its application should be "without prejudice" to the application of other special rules of international law. The article should also contain a saving clause to the effect that specific regimes should not take precedence over peremptory norms of international law.

11. Draft articles 41 and 42 introduced the concept of "a serious breach by a State of an obligation owed to the international community as a whole", replacing the controversial former article 19. He supported the regulation in the draft articles of a heightened regime of international State responsibility. The name of such a regime was not as important as its content; however, it was not possible to avoid the opposition of many States to the criminal-law connotations of the term "international crime". He therefore had no objection to the use of the term proposed by the Drafting Committee in the heading of Part Two, Chapter III.

12. As regulated by draft article 41, the definition of wrongful acts could consist solely of a reference to the consensus established in the international community, as envisaged in article 53 of the 1969 Vienna Convention on the Law of Treaties. While such a definition might be criticized as tautological, there appeared to be no alternative at the current stage of development of the international legal order.

13. The greatest difficulty resided in the implementation of the heightened regime of international responsibility when a "serious breach" was committed. Such a regime could have various consequences. First, an express reference should be made to the international rules on individual criminal responsibility, such as the Rome Statute of the International Criminal Court. Second, he could accept, with certain exceptions, the inclusion of the concept of "damages reflecting the gravity of the breach" (art. 42, para. 1), as well as the proposal contained in article 54, paragraph 2. Nevertheless, both those consequences and the substantive ones contained in the draft article 42 remained largely imprecise. The Commission should clarify the obligations of all States as provided for in draft article 42, both in the text of the article and in the commentaries.

14. Even those steps, however, would not eliminate the imprecision of the wording, which his delegation believed could best be addressed through the inclusion of an institutional dispute settlement mechanism. It was regrettable that in the current draft, the Commission had neglected to include a Part Three on dispute settlement, especially given that such an omission, as implied in paragraph 311 of the report, was due to the Commission's apparent rejection of the possibility that the draft would become a legally binding convention. He would therefore support a system similar to the one contained in articles 54 to 60 and annex I of the 1996 draft, including resort to the International Court of Justice to hear disputes relating to new draft articles 41 and 42, once other dispute settlement procedures had been exhausted. That would allow for the formulation of reservations solely in relation to the provisions on resort to the Court and to the arbitral tribunal provided for in article 58, paragraph 2, of the 1996 draft.

15. With regard to satisfaction, as regulated by new draft article 38, he welcomed the deletion of the reference to punishment of those responsible for the wrongful act, as such a measure was not confirmed by State practice. The same applied to the "punitive damages" regulated by former article 45.

16. With regard to countermeasures, the proposal contained in new draft articles 50 to 55 was generally positive in that it sought to strike a balance between the rights and interests of the injured State and those of the responsible State, provided, of course, that a dispute settlement mechanism was included in the draft. He welcomed the deletion of the provision in the 1996 draft referring, under "prohibited countermeasures", to "extreme economic or political coercion". While such a prohibition appeared to be justified where such measures were designed to endanger the territorial integrity of the State, it was covered by the principle of proportionality provided for in draft article 52.

17. Lastly, with regard to draft article 51, subparagraphs (a) and (b), he believed that the fundamental human rights and obligations of a humanitarian character referred to were those designed to protect the life and physical integrity of the human

person, in accordance with article 60, paragraph 5, of the 1969 Vienna Convention on the Law of Treaties.

18. **Mr. Leanza** (Italy) said that he welcomed the amendments to Part One of the draft articles and, in particular, to draft article 23. As for the reorganization of Part Two, it had clarified the distinction between the legal consequences arising from the perpetration of an internationally wrongful act and the various ways in which such consequences could be implemented or suspended. Moreover, since the focus of the draft articles was on the responsible State, it was logical for all provisions relating to the conduct of the injured State to be dealt with in a separate section.

19. It was appropriate to combine the closely related concepts of cessation and non-repetition in draft article 30. Assurances and guarantees of non-repetition could be indispensable under certain circumstances, including cases of wrongful acts involving the use of force; their exact form could be determined on the basis of international practice.

20. Draft articles 31 to 34 satisfactorily established that the responsible State was under an obligation to make full reparation, defined the concept of damage and stressed the need for a causal link between the wrongful act and the resulting injury. The concern expressed at the use of the words "full reparation" seemed excessive, since international jurisprudence ensured that all circumstances would be taken into account in any specific case. He agreed that the draft articles should not deal with the issue of identification of the responsible State, which was covered by primary rules.

21. Owing to the wide variety of special circumstances to be considered by judges in cases involving reparation for injury, it would be best to provide only general guidelines on the matter. There should be no mention of the injured State's right to reparation, but only of the responsible State's obligation in that regard; such an approach would obviate the need to determine which State or States had been directly or indirectly injured.

22. Further explanations could be relegated to the commentary; he endorsed the decision not to mention the political independence or economic stability of the responsible State as factors affecting the obligation of reparation, since such factors were difficult to assess and lent themselves to abuse; moreover, under international law, domestic circumstances did not affect a State's obligations under international agreements. Furthermore, it would be preferable not to mention the principle of proportionality in draft article 38 in order not to imply that it applied only in cases of satisfaction.

23. He reiterated his Government's support for a definition of international crimes as distinct from international delicts. International law had already established the existence of *erga omnes* obligations; the draft articles should codify the existing variations in concepts of responsibility in order to increase the effectiveness of response to specially serious wrongful acts and to prevent abuses. A regime of responsibility for wrongful acts affecting the fundamental interests of the international community would in no way constitute a criminal code similar to those provided for under national legal systems. However, in light of the need to ensure the Commission's adoption of all the draft articles, his Government was prepared to accept the compromise of deleting the word "crime" while maintaining in draft article 41 the essence of former article 19: the concept of an obligation owed to the international community as a whole and essential for the protection of its fundamental interests and the definition of a "serious" breach of such an obligation, which, by implication, did not include mere negligence on the part of the responsible State.

24. Draft article 42 also represented an acceptable compromise; in-depth discussion of the issue of consequences, which should not necessarily be limited to punitive damages, could be postponed to a later date.

25. Turning to Part Two bis, he said that it was logical to make a clear distinction between the injured State and other States that were entitled to invoke responsibility. On the basis of past experience with other codification conventions, he agreed with the Commission's decision to give States flexibility in the establishment of criteria and procedures. He also welcomed the stipulation in draft article 45 that local remedies must be exhausted and the absence of any mention of a statute of limitations in article 46.

26. The section on countermeasures, while clearly the result of a compromise, was preferable to the text adopted on first reading and included a number of limitations designed to prevent abuse. He welcomed the elimination of a distinction between obligations not subject to countermeasures and prohibited countermeasures; the mention of obligations of a humanitarian character, which were not limited to the

protection of human rights; and the treatment of the issue of proportionality.

27. With respect to draft article 53, he stressed that international jurisprudence had not established that countermeasures could not be resorted to until every effort had been made to achieve a negotiated solution; thus, there was nothing to prevents States from taking immediate countermeasures in emergency situations.

28. In the case of draft article 54, he was surprised at the proposal to allow third States to take countermeasures on behalf of the State injured by the breach rather than in cases where no State was the victim of the breach, as the Special Rapporteur had proposed. However, in light of the rapid developments in international law and in the interests of proportionality, he welcomed the flexibility of paragraph 3, which called on States to cooperate in the implementation of countermeasures.

29. In Part Four of the draft articles, he agreed with the decision not to include draft article B, which the Special Rapporteur had proposed in his third report on State responsibility (A/CN.4/507/Add.4, para. 429); the content of international obligations of a State was a complex issue and could not be covered in so brief a provision. It was also important to clarify draft article 56, on *lex specialis*, which, in its current form, would appear to preclude even residual application of the draft articles in cases where the special rules of international law proved inadequate; such a position would excessively restrict implementation of the new instrument.

30. **Ms. Mekhemar** (Egypt) said that the outstanding issues noted by the Special Rapporteur, members of the Commission and Governments were matters which had not been settled in general international law, which was undergoing rapid change. No complete and accurate picture could be drawn of the state of international law on any particular topic. For that reason the Commission, which had invested over 40 years in its study of the topic of State responsibility, should not rush into adopting a set of rules which might not seem appropriate in a few years' time.

31. She agreed with the Special Rapporteur that the provisions of Part Two of the draft were without prejudice to any rights arising from the commission of internationally wrongful acts by a State which accrued to any person other than the State. Concerning the distinction, if any, to be drawn between a State or a number of States specifically injured by an internationally wrongful act, and other States which had a legal interest in the performance of the relevant obligations, it must be made clear that an "injured" party was the one to whom an international obligation was due. Referring to the Advisory Opinion of the International Court of Justice on *Reparation for injuries suffered in the service of the United Nations*, and the work of Willem Riphagen as Special Rapporteur, she pointed out that although all other States might be affected by the breach of the obligation, having a legal interest in its performance, they were not necessarily "injured". She believed a right to an obligation and an interest in its performance were two different notions with different consequences. In turn, they had a bearing on the responsibility of the State, and on the right to remedies or countermeasures, whereby certain States might request rights to which they were not entitled under the present international legal system.

32. The Commission had done well in revising the concept of "crimes". However, the reference to "serious breaches of essential obligations to the international community as a whole" posed a fresh problem, because the definition of "serious breaches" in draft article 41 was obscure: what were the "fundamental interests" to be protected? She agreed with the Special Rapporteur that there was a need for further consideration of obligations owed *erga omnes*, which were referred to in a variety of ways in Part Two and Part Two bis of the draft. The concept of *jus cogens* was likewise interpreted and applied in different ways. Paragraph 1 of draft article 41 used both concepts, resulting in considerable uncertainty. Obligations owed *erga omnes* were defined as being "owed to the international community as a whole", which seemed to suggest that some countries would carry more weight than others. States had different political, social and economic backgrounds, and it was necessary to look to common denominators, not the aspirations of a self-appointed elite. The notion of "the international community of States as a whole" had first appeared in article 53 of the 1969 Vienna Convention, but had been accepted by States only because safeguards had been incorporated into article 66, providing for referral to the International Court of Justice in the event of a dispute as to its interpretation or application. Moreover, the notion had been intended to regulate a primary, not a secondary rule, and

required adaptation in order to fit into the structure of the present draft.

33. Careful consideration should be given to the limits and conditions placed on countermeasures, which were designed to control recourse to actions which would otherwise be prohibited. There was apparently no rule under existing customary law to require either that the existence of an internationally wrongful act should be determined by a third party before such recourse, or that prior negotiations should be entered into. In the *Air Services Agreement* case of 1978, the Arbitral Tribunal had found that international law did not prevent a party from resorting to countermeasures before exhausting dispute settlement procedures or during negotiations with the wrongdoer. There was also the question of how countermeasures should be terminated. If they took the form of terminating an obligation towards a defaulting State, the injured State should not be expected to fulfil an obligation which it had lawfully chosen to terminate rather than suspend.

34. The draft articles showed a close relationship in the draft between the law of treaties, especially Articles 60 and 73 of the 1969 Vienna Convention, and the law on State responsibility. The draft should not blur the distinction between them with regard to breaches of contractual obligations. However, a reference to the parallelism between the Convention and the draft articles should be maintained, perhaps through a "non-prejudice" clause.

35. As for the ultimate form of the draft articles, like many other delegations she did not favour adopting them in the form of a binding agreement, because the negotiations leading to its conclusion would enable the less scrupulous representatives to water it down so that no new obligations were imposed on their Governments. Other alternatives should be considered.

36. **Mr. Hussein** (Iraq) said that in his delegation's view, the provisions relating to countermeasures in draft article 50 were unsatisfactory in their current form, in that there was some risk that large States would be able to use them to serve their own interests. Any provisions on countermeasures must include adequate safeguards: the impact of the countermeasures on the responsible State should be taken into account; countermeasures should be taken only exceptionally; they should be commensurate with the injury suffered; and they should terminate with the cessation of the wrongful act. Moreover, countermeasures should not constitute an instrument of revenge or a means of interfering in the internal affairs of States or destabilizing them politically or economically. His delegation supported, in principle, draft article 51, especially paragraph 1 (a) to (e), article 52, and article 53.

37. Draft article 37, on compensation, required further clarification to bring the definition of compensation into line with the recognized principles of international law. His delegation reserved comment on draft article 38 for the moment, but would make its views known in writing in due course. Paragraph 3 of draft article 38, was particularly appropriate, stipulating as it did that satisfaction should not be out of proportion to the injury and might not take a form humiliating to the responsible State. Other limitations should be that compensation should not be so burdensome as to exceed the capacity of the responsible State, and that the basic needs and developmental requirements of that State and its people should be taken into account. Otherwise, measures taken to exact compensation might become an instrument of vengeance and punishment rather than a mechanism for strengthening the international rule of law and promoting stability in international relations.

38. It was to be hoped that it would be feasible to draft a comprehensive convention on State responsibility, one characterized by precision and clarity. Pending the drafting of such a convention, the General Assembly might adopt, by consensus, a declaration of principles in the matter.

39. **Ms. Steains** (Australia) expressed support for the Commission's treatment of former article 19, and the elimination of the distinction between "delictual" and "criminal" responsibility. She endorsed the new draft articles 41 and 42. The new chapter III successfully embodied the values underlying the former article 19, without referring to "crimes". However, she queried the nature of the "fundamental interests" referred to in paragraph 1 of draft article 41; were they any different from the "essential interest" mentioned in paragraph 1(b) of draft article 26? Furthermore, draft article 42, paragraph 2 (a) did not make clear whether implicit, as well as explicit, recognition was prohibited; and there was no reference in that paragraph to time-frames.

40. She welcomed the inclusion of a new draft article 39 on interest, reflecting the comments of her

delegation at the Committee's previous session. She also supported the new paragraph 2 of draft article 37, noting that the compensation specified would not cover purely environmental damage.

41. She accepted the reformulation, in the new draft articles 43 and 49, of the definition of an "injured State". The new articles drew an essential distinction between breaches of bilateral and of multilateral obligations, the latter including obligations towards the international community as a whole. However, the terms "collective interest" and "in the interest … of the beneficiaries" in draft article 49 ought to be clarified in order to elucidate the scope of that article and of draft article 54, on countermeasures by States other than the injured State.

42. She queried the apparently open-ended link established in draft article 10 between the conduct of an insurrectional movement and the responsibility of a new State which emerged from it. It would be useful to specify the degree of proximity or the time-frame required for the conduct of an insurrectional movement that became the new Government of a State to be considered an act of that State.

43. Australia accepted the treatment of necessity in draft article 26; the scope of necessity precluding wrongfulness must be kept very limited, however, in order to avoid abuse. She therefore welcomed the strict conditions laid down in that article, and especially in paragraph 2 (a). It would be useful to clarify the phrase "essential interest", as compared with "fundamental interests" in draft article 41, and the nature and scope of the interests in question.

44. As for the final form of the draft articles, which made a major contribution to the law on State responsibility, the preliminary view of her delegation was that it should be a code or declaration, rather than a multilateral convention.

45. **Mr. Kanu** (Sierra Leone) welcomed the progress made on the topic, and the decision by the Special Rapporteur to revise the texts. Eliminating the distinction between criminal and delictual breaches of international obligations was also a welcome move; however, the controversy surrounding it had not been removed by concentrating instead on the obligations of States towards the international community as a whole. The new category of "serious breaches" bore the imprint of the former notion of an "international crime". Moreover, the notion of the international community as a whole was too vague. It might be preferable to use language similar to that in article 53 of the Vienna Convention on the Law of Treaties.

46. With regard to the content of the international responsibility of a State, he agreed with the Special Rapporteur that the requirement in draft article 30 (b) to provide assurances and guarantees of non-repetition touched upon the relationship between municipal and international law, because if the breach stemmed from a domestic law the requirement could be a means of compelling a State to amend or repeal it.

47. In draft article 31, "injury" was defined as any damage arising as a consequence of the wrongful act. However, full reparation was only possible where the damage could be clearly quantified, which would not normally be the case with internationally wrongful acts. The rule on reparation was inadequate, and should be revisited by the Commission.

48. The notion of the international community in draft article 42 was too vague; he would prefer a form of words such as in article 53 of the Vienna Convention on the Law of Treaties. Defined in a broad sense, the international community would encompass non-governmental organizations and individuals as well as States, and in view of the practice of humanitarian intervention, it would be appropriate to enable victims of human rights abuses to invoke State responsibility.

49. Without going so far as to insist on a definition, he believed the concept of the injured State in draft article 43 was obscure and required some sort of generic language. It had also to be decided what should be considered as obligations *erga omnes*. With regard to the view that such obligations bore upon fundamental human rights deriving from international law, he sympathized with those who had criticized the attempt to distinguish between fundamental human rights and other rights. To create a hierarchy among human rights would run counter to the Universal Declaration of Human Rights and the recent developments in human rights law. However, he agreed with the Special Rapporteur that not all human rights gave rise to obligations *erga omnes*, since the international community gave priority to civil and political rights over economic rights.

50. The requirement in draft article 44 for the injured State to give notice of its claim went too far and would not succeed. In paragraph 2 (b), extra language was needed to clarify the right of the injured State to

choose a form of reparation which would not impose a disproportionate burden on the other State.

51. Countermeasures should be regulated to ensure that they would not be used by powerful States as political weapons against weaker ones, especially developing countries. He was concerned that draft articles 50 to 55 failed to state clearly that countermeasures were only legitimate as between two States in a relative sense. The wording of article 50, paragraph 2, raised some difficulty. Conduct inconsistent with the provisions of a treaty, if justified as countermeasures, should not be considered such as to suspend the treaty itself. The treaty would continue to apply, and non-compliance with it could be accepted only for as long as the criteria for adopting countermeasures existed. He welcomed the limitations placed on countermeasures in draft articles 51 to 55. They must not be used as a form of retaliation, punishment or sanction.

52. He concluded by welcoming the inclusion of draft article 56 on *lex specialis*, which restated a well-established principle of international law.

53. **Mr. Szénási** (Hungary) said that he welcomed the decision of the Commission to submit the draft articles on State responsibility for consideration by the Sixth Committee before adoption by the Commission. His delegation was flexible with regard to the eventual form the text might take. It could support a code of State responsibility, similar to a convention in content but taking the form of a General Assembly declaration. A set of rules on State responsibility could represent a major breakthrough in the codification of international law, even without the force of a legally binding instrument.

54. As for specific draft articles, he supported the new wording of article 31, which made it possible to claim reparation for moral as well as material injury. He also supported the new wording of article 33, which made reference to applicable rules of international law other than the draft articles. The new article 37 provided for full compensation including the loss of profits, an issue to which he attached special importance. Article 38, providing satisfaction for injuries which could not be made good by restitution or compensation, was the natural outgrowth of article 31. The list of the forms that satisfaction might take was non-exhaustive, leaving open the possibility that other forms of satisfaction might be devised as the case required. His delegation joined with others that had expressed their concerns about the possible inclusion of punitive damages.

55. Concerning contributory negligence, he agreed with the general thrust of article 40. While noting the view that the obligation of the injured State to mitigate the damage was not clearly supported by international law, he felt that the issue could only be decided on a case-by-case basis. A decision as to whether the contribution to the damage was the result of a negligent or a wilful action would depend on the circumstances and on the applicable legal instruments, some of which touched upon the issue of mitigation of damage. His delegation awaited the promised commentary with great interest.

56. Chapter III of Part Two of the draft articles, concerning serious breaches of essential obligations to the international community, should be retained; however, further refinement of the chapter and related articles was necessary. A clear definition of the breaches involved, a restrictive definition of the injured State, specific rules on how responsibility could be invoked, strong safeguards against the unlawful use of countermeasures and a clear enumeration of their limits would enable the international community to reach consensus on the issue.

57. The issue of countermeasures remained sensitive owing to their potential for abuse. The crucial point to bear in mind was that countermeasures must be proportionate to the injury suffered. The aim of countermeasures was to induce law-abiding behaviour on the part of the responsible State. That did not imply that the injured State could use any and all measures to induce such behaviour; it simply meant that countermeasures aimed at the attainment of any other goal were by definition unlawful. Moreover, countermeasures should be calibrated to avoid irreversible consequences, and a provision to that effect should be included in article 50. He fully agreed with the general thrust of article 51 on obligations not subject to countermeasures, although the text required some refinement.

58. Article 53 on conditions relating to resort to countermeasures also required refinement. Although the current wording of paragraph 3 made it clear that an injured State might resort to provisional and urgent countermeasures only in order to preserve its rights, there was no explanation of why such measures were

more provisional than other countermeasures, and no special rules were provided for their application. In addition, further light should be shed on the relationship between countermeasures and ongoing negotiations, an issue that could be revisited in connection with dispute settlement provisions.

59. The elaboration of an effective dispute settlement mechanism was a necessity for the proper functioning of a legal regime on State responsibility. He accepted the Commission's recommendation that dispute settlement should be considered after the adoption of the rest of the draft articles. However, he was convinced that a set of dispute settlement rules would have merit even if the text did not take the form of a legally binding convention.

60. **Mr. Varšo** (Slovakia) said that after almost 50 years of work on the topic the Commission and the Committee did not yet have a comprehensible and understandable set of draft articles on State responsibility, and it had even been questioned whether large segments of the draft articles such as those on countermeasures and settlement of disputes should be included. The architecture of Roman law might be helpful in clarifying the structure of the draft articles. First, the draft articles should be reviewed and the rules categorized as substantive rules, dealing with the substantive rights of subjects of law and their conduct in relation to one another, or procedural rules, intended to ensure the application of the substantive rules.

61. The substantive rules need not be numerous. They could be rationalized around the principle of *pacta sunt servanda*. As a minimum, the substantive rules should stipulate that a wrongful act must cease and the damage caused by the act must be repaired. In addition, the possibility of proportional countermeasures should be allowed in order to induce a wrongdoing State to comply with its international commitments. The draft articles on cessation and non-repetition, restitution, compensation and satisfaction, together with some of the draft articles on countermeasures, should form a good basis for the elaboration of the substantive rules. The question of whether or not to include articles on settlement of disputes as one of the obligations in the State responsibility regime would need to be studied carefully, particularly as it related to countermeasures. Overall, a general, simple and clear articulation should be preferred to a detailed elaboration which might give rise to controversy.

62. The procedural rules must make it clear who was entitled to declare the act of a State wrongful and under what circumstances. Most of those rules were contained in article 46 ter (Invocation of responsibility by an injured State), article 46 quater (Loss of the right to invoke responsibility) and article 46 quinquies (Plurality of injured States) proposed by the Special Rapporteur at the fifty-second session of the Commission; they needed clarification, however, particularly with respect to an obligation *erga omnes*. The starting assumption should be that the injured State was most aware which norms had been breached and which rights had been violated by a responsible State. The procedural rules must then deal with the sensitive matter of the invocation of State responsibility and the procedures for applying the rules of cessation, reparation and countermeasures. The procedures must take into account that the responsible State and the injured State were not in the same position and that the objective was to induce a responsible State to comply with its international obligations.

63. Among the more controversial questions was whether or not to include articles referring to the primary responsibility of a State or to limit the draft articles to situations related to secondary responsibility. Determining secondary responsibility, however, required identifying which norms of primary responsibility had been violated. The interrelationship between the two types of responsibility led to the conclusion that the draft articles must have a basis in the principle of *pacta sunt servanda*. States must be aware that the principle mission of international law was to promote respect for international obligations.

64. Moreover, a general reference to that principle could avoid the need to make qualitative distinctions between international norms or to define controversial legal categories such as the "crime" or "delict" of a State. In addition, reference to the principle of *pacta sunt servanda* would have practical implications in three other areas: identifying the norm breached by a State; determining adequate and proportional countermeasures; and determining appropriate reparation to an injured State.

65. Procedural rules would have to deal with two key questions: who was authorized to decide that an international obligation had been breached and who was authorized to invoke State responsibility in the case of a breach? Those two decisions might not be difficult in the case of a breach of a bilateral agreement

but became more complex in the case of a breach of a multilateral obligation or an obligation *erga omnes*.

66. Countermeasures, another controversial issue, represented a necessary element within a regime of State responsibility as a legal means for inducing a wrongdoing State to change its behaviour. However, the articles on countermeasures must be drafted carefully to avoid abuses.

67. Although he would prefer that the draft articles on State responsibility should take the form of a convention, he was confident that, whatever form they took, they would serve as a practical guide to States and have a positive legal impact on the stability of the international order.

68. **Ms. Alejbeg** (Croatia) said that the adoption of the draft articles in the form of a convention should provide an appropriate legal framework for the strengthening of State responsibility in respect of international obligations.

69. With regard to the new structure of Part Two, Chapter I, she supported the proposed revisions, especially the inclusion of the cessation and non-repetition provision, as well as the obligation to make reparations, one of the general principles governing the international responsibility of States. While it was understandable that some might have second thoughts about the term "full reparation", given that reparation was often unable to make up fully for the consequences of the wrongful act, the concept of "full reparation" in principle expressed the only just way of remedying the damage caused. While draft article 31, paragraph 1, was generally acceptable, it should be rephrased for consistency with draft article 30 as follows: "The State responsible for the internationally wrongful act is under an obligation to make full reparation for the injury caused by that act."

70. She also supported the proposal to delete paragraph 4 of former article 42, given the general provision on the irrelevancy of internal law contained in new draft article 3. Since the relevancy of internal law was a general principle applicable to the whole of the draft articles, it should be placed in Part One, Chapter I.

71. She was also inclined to support the proposal to extend draft article 3 to make it unequivocally applicable to all cases. In that context, the provision concerning the general irrelevancy of internal law could be incorporated into a new paragraph 2 of draft article 3, in order to make international law universally applicable to all situations involving State responsibility. Accordingly, she suggested that the title of article 3 should be amended as follows: "Law applicable for characterization of an act of a State as internationally wrongful", or simply "The applicable law".

72. With regard to countermeasures, she welcomed the concept put forward by the Special Rapporteur, namely, that countermeasures should consist of the suspension by the injured State of the performance of an obligation towards the responsible State with the intention of inducing the latter to comply with its obligations of cessation and reparation. However, the fundamental precondition for taking countermeasures should be borne in mind, namely, being certain that an internationally wrongful act had indeed occurred. It was questionable whether it was justified in all cases to rely on the assessment by the injured State, which could be subjective, particularly with regard to the circumstances referred to in article 53, paragraphs 2, 3 and 4.

73. She welcomed the inclusion of Part Four in its proposed version, and supported the proposal by the Special Rapporteur on non-inclusion of the saving clause on diplomatic immunity, pending a consensus on its wording.

The meeting rose at 12.20 p.m.