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Chairman: Mr. Akamatsu (Vice-Chairman) . . . . . (Japan)
later: Mr. Prandler (Chairman) . . . . . (Hungary)

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In the absence of the Chairman, Mr. Akamatsu (Japan), Vice-Chairman, took the Chair.

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

Agenda item 156: Report of the International Law Commission on the work of its fifty-fourth session (*continued*) (A/57/10 and Corr.1)

1. **Mr. Ishigaki** (Japan) welcomed the progress made by the Commission in the first year of the current quinquennium. The draft articles on diplomatic protection adopted at the Commission's fifty-fourth session were a balanced reflection of customary international law yet incorporated some progressive developments. The Commission had rightly stressed the basic principle that it was for States and, in particular, the State of nationality, to exercise diplomatic protection. Only a limited number of exceptions to that principle should be permitted.

2. Draft article 7 struck a good balance between the discretionary nature of a State's right to exercise diplomatic protection and the need to ensure an effective remedy for citizens whose rights were infringed by a State. Rather than relaxing the conditions for the application of diplomatic protection, States should seek effective ways of protecting their nationals and other persons, depending on the circumstances. Thus, the increased call for States to protect their citizens overseas should be seen not as a change in the regime of diplomatic protection, but as an enhancement of the primary rules of human rights.

3. He commended the Special Rapporteur's intention to defer consideration of the scope of the draft articles in order to ensure their timely conclusion by the end of the current quinquennium and the Commission's decision not to refer the draft articles dealing with certain issues, including burden of proof and denial of justice, to the Drafting Committee.

4. Diplomatic protection was not necessary where a crew member of a ship or aircraft of the flag State or State of registry was injured by an internationally wrongful act of another State; the former State was deemed to have been injured and could bring a claim directly against the latter State. The question of whether the protection of non-national crew members was adequately covered by the United Nations Convention on the Law of the Sea and other relevant instruments was another matter and should be decided on its own merits.

5. In the case of diplomatic protection of corporations and shareholders, it was assumed that investors had sufficient knowledge to weigh the costs and benefits of their investment even if the company in question was incorporated abroad. It would therefore be natural to give the State of incorporation the right to protect its companies; although there might be cases where the shareholder's State of nationality could exercise protection, such exceptions must be clearly stipulated.

6. *Mr. Prandler (Hungary) took the Chair*.

7. **Mr. Winkler** (Austria) noted that the Special Rapporteur had expressed reluctance to tackle certain problems that he viewed as not being central to diplomatic protection, including the protection exercised by international organizations on behalf of their officials, the right of the State of nationality of a ship or aircraft to bring a claim on behalf of the crew and passengers, and delegation to other States of the right to exercise diplomatic protection. However, practice had shown that those problems could become major issues requiring clarification.

8. For example, international organizations played an increasing role in international relations. Even if called functional, rather than diplomatic, such protection exercised by international organizations on behalf of their officials was in fact related to diplomatic protection and might well be subject to the same general conditions.

9. With regard to vessels and crews, the United Nations Convention on the Law of the Sea did not provide a clear rule on diplomatic protection, since at the time the Convention had been negotiated the issue had been thought to be a matter of general international law. Article 292 of the Convention, on prompt release of vessels and crews, stipulated that only the flag State was competent to raise a claim, but that article dealt with a special case, subject to particular conditions not generally applicable. Article 295, on exhaustion of local remedies, referred explicitly to general international law.

10. Delegation of the right to exercise diplomatic protection to other States was another issue deserving attention; Austrian practice furnished two cases where the problem had arisen or could arise. It was not clear

whether the right of States members of the European Union to grant consular and diplomatic protection to nationals of another member State if the latter was not represented in a third country fell within the concept of diplomatic protection as defined by the Commission.

11. There were thus many good reasons for the Commission to address those issues, even if at a later phase of the work on diplomatic protection. On the other hand, his delegation shared the view that the "clean hands" principle should not be reflected in the draft articles.

12. His delegation agreed that articles 12 and 13 of the draft articles submitted by the Special Rapporteur were unnecessary. Article 12 raised a theoretical problem that did not contribute to the solution of practical problems. Article 13 dealt with denial of justice, which was a matter of primary law, whereas the draft articles should deal only with secondary law.

13. Draft article 14, on the other hand, was of prime importance because it defined the limits to the principle of exhaustion of local remedies, a notion well established in international law. Of the options offered for paragraph (a), his delegation favoured a combination of options 2 and 3. The provision on waiver in paragraph (b) should avoid an express mention of estoppel or similar legal concepts; such a waiver must be clear, attributable to the State and made known to the individual concerned. A general rule on territorial connection should not be included among the grounds for limitation, but it should be made clear that exhaustion of local remedies was not required if the effect of the injury fell outside the territory of the respondent State, as in the case of transboundary environmental harm. Although recent rules made it incumbent upon the State of origin of pollution to offer access to its local courts to aliens affected by the pollution, it might be unreasonable, given the far-reaching effects of transboundary harm, to expect an individual to resort to those courts, especially in view of the high costs entailed. A victim of such harm should be offered both options: resort to local courts or relief through diplomatic protection. Paragraphs (e) and (f) on undue delay and denial of access clearly reflected the principle of *nemo commodum capere potest ex iniuria propria*, so that the decision not to send them to the Drafting Committee seemed somewhat hasty.

14. His delegation could support a decision not to include draft article 15, concerning distribution of the burden of proof, in the draft articles: general rules on the burden of proof did not require the formulation of a special rule. Similarly, his delegation did not support the inclusion of a reference to the Calvo clause in the draft articles and would in fact favour eliminating the whole of article 16. The real effect of the current wording was merely that a State could exercise diplomatic protection whether or not an individual was bound by a Calvo clause. Moreover, reference to a situation in which the injury to the alien was of direct concern to the State seemed to remove the case from the realm of diplomatic protection.

15. Draft article 7, on stateless persons and refugees, stipulated that a State could only exercise diplomatic protection on behalf of a refugee if the State had recognized the person's refugee status and if the refugee was habitually resident in that State. Yet, it frequently happened that a person was granted refugee status in one State and emigrated to a second State to live, under the "safe third country" rule, without being granted refugee status there. In such cases, the current wording failed to consider that the second State could exercise diplomatic protection, and continuity of habitual residence thus seemed too strict a requirement. His delegation would favour deleting the requirement of recognition of refugee status, since the requirement of lawful presence should suffice to prevent abuse.

16. **Mr. Lammers** (Netherlands), referring to the seven draft articles provisionally adopted by the Commission, said that his comments made at the Committee's previous session were still valid. As to whether exhaustion of local remedies was a procedural or substantive precondition for the exercise of diplomatic protection, his delegation leaned towards the position advocated by the Special Rapporteur in draft articles 12 and 13, which drew a distinction between an injury to an alien under domestic law and an injury under international law. That distinction was relevant, and the third, "mixed", position clarified the legal intricacies of the issue. Accordingly, his delegation favoured further consideration of the proposed draft articles by the Commission.

17. He welcomed draft article 14, which dealt with situations in which there was no need to exhaust local remedies, and in particular paragraphs (c) and (d). It was not clear from the Commission's report what decision had been taken regarding those paragraphs; it

would be unfortunate if they had not been maintained in their present form, since they could serve a useful purpose.

18. The Special Rapporteur had proposed an interesting draft article 16 concerning the Calvo clause, by which an individual contractually waived the right to diplomatic protection. His delegation maintained that an individual did not have a right to diplomatic protection and that a State had discretionary power to grant or deny such protection. However, nothing in international law prevented an individual from exercising the right to seek diplomatic protection from his or her State of nationality. The proposed wording for draft article 16 accommodated that view. He saw no objection to including an article that viewed the contractual stipulation as a valid waiver of the right to request diplomatic protection in respect of matters pertaining to the contract, provided that the right of the State of nationality to exercise diplomatic protection irrespective of the waiver was not affected. His delegation regretted that paragraph 1 of article 16 had not been referred to the Drafting Committee.

19. **Mr. Bennouna** (Morocco) endorsed the final point raised by the representative of the Netherlands. As the first Special Rapporteur for the topic, he had advocated recognition of the right of an individual to diplomatic protection as a way of dispensing with the traditional fiction whereby the State was considered the injured party and the holder of the right. However, most members of the Commission had espoused the traditional view, upheld by the Permanent Court of International Justice, that the claimant State was simply asserting its right to ensure, in the person of its subjects, respect for the rules of international law. But diplomatic protection came into question only secondarily, after the injured nationals had exhausted local remedies. The issue of diplomatic protection was one of the last traditional law topics remaining on the Commission's agenda and could be seen as a necessary complement to the major work accomplished the year before on State responsibility.

20. With regard to the questions raised by the Special Rapporteur and the Commission about the scope of the draft articles, he did not think it useful to include the issue of protection afforded to crew members by the flag State of a ship, since that situation was clearly covered by the United Nations Convention on the Law of the Sea, in particular by article 94, which set out the duties of the flag State. Likewise the protection exercised by an international organization on behalf of its officials should be characterized as functional rather than diplomatic protection and did not fall within the scope of the draft articles. However, it would be necessary to address the question of competition between functional and diplomatic protection. States should have the right of diplomatic protection when their nationals suffered injury in their personal capacity, whereas an international organization should have the right of functional protection for injuries suffered by its officials in the exercise of their functions.

21. The Commission had sought the views of Governments as to whether it should go beyond the conclusions of the International Court of Justice in the *Barcelona Traction* case and recognize the right of the State of nationality of the majority of the stockholders to exercise diplomatic protection. Such a right could be contemplated if the State in which the company was incorporated refused or failed to exercise diplomatic protection. His delegation believed that the question should be considered in the context of international protection of foreign investors.

22. Rather than meriting their own separate articles, the "clean hands" and "denial of justice" issues should be treated in the commentary.

23. As he had said in his first report as Special Rapporteur, the Commission had deemed the exhaustion of local remedies rule, as set out in article 22 of the draft articles on State responsibility, to be a matter of substance and not of procedure. Accordingly, international responsibility arose only when local remedies had been exhausted, although the process was by no means clear. Now the current Special Rapporteur proposed to consider the issue as purely procedural. The difficulty lay in establishing at what point international law had been breached. If the territorial State was considered competent to make reparation and its failure to do so was considered to be a breach of international law, then the rule requiring exhaustion of local remedies must indeed be a rule of substance. The Special Rapporteur had been correct in not submitting articles 12 and 13 to the Drafting Committee, since there was no need to specify in the draft articles whether the exhaustion of local remedies was procedural or substantial. Such issues should be dealt with in the commentary, since the justification for the draft articles lay in their practical utility.

24. With regard to the three options offered for the text of draft article 14, paragraph (a), he shared the preference of the majority of the Commission. As for the question of waiver, his delegation saw no need to specify whether a waiver was express or implied, or whether estoppel was applied. It was for the courts to determine whether there had been a waiver or not. Waivers could, after all, be made in response to the access given to the national concerned to an international jurisdiction, as provided for in the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States. It was quite unnecessary to codify implied waiver and estoppel.

25. It also seemed unnecessary and inappropriate to attempt to codify the voluntary link between an injured individual and the respondent State, in view of the *Aerial Incident* case. That concept had not taken root in case law, and it would again be wiser to leave it to the courts to determine whether there was a sufficient link with the territorial State to give that State the first opportunity to provide reparation. On the other hand, the exception relating to undue delay, which might be intentional, should appear in the draft articles, since such delay amounted to a denial of justice. The question of burden of proof, dealt with in article 15, should also be dealt with in rules of procedure and individual decisions by the courts.

26. As for the famous Calvo clause, which was to be the subject of article 16, he considered the provision to be of no practical use, since the whole of the draft articles were built on the classic fiction that gave States the right to exercise diplomatic protection. A contractual undertaking by an injured national would therefore have no effect on diplomatic protection, unless the option of waiver was provided by an international agreement such as the 1965 Convention he had mentioned earlier. In point of fact, the Calvo clause was governed by the definition of diplomatic protection given in draft article 1.

27. He congratulated the Special Rapporteur on his imaginative efforts but cautioned against the quest for technical perfection. The Special Rapporteur should confine his attention to the major principles relating to the institution of diplomatic protection in order to provide a useful guide for States and practitioners of law.

28. **Mr. Mirzaee-Yengejeh** (Islamic Republic of Iran) said that his delegation largely supported the Special Rapporteur's conclusion that the draft articles should be confined to issues relating to the nationality of claims and the exhaustion of local remedies rule so that consideration of the topic could be finalized during the current quinquennium. His delegation also agreed that functional protection by international organizations of their officials was an exception to the nationality principle, being exercised solely in the interests of the organization concerned, and should therefore be excluded from the scope of the draft articles. The Commission might, however, wish to clarify the question of competing claims that might be made by an organization and by the State of nationality for an individual employed by that organization. In its advisory opinion of 11 April 1949, *Reparation for injuries suffered in the service of the United Nations*, the International Court of Justice had observed that the risk of competition between the Organization and the State of nationality could be reduced or eliminated either by a general convention or by agreements entered into in each particular case; however, competing claims should not result in two claims or two acts of reparation.

29. He shared the Special Rapporteur's view that the draft articles should not extend to diplomatic protection for crews and passengers on ships and aircraft. Any reference to the judgement of the International Tribunal for the Law of the Sea in the *M. V. Saiga* case should be viewed in the context of the United Nations Convention on the Law of the Sea, which had formed the basis of that judgement. The main thrust of article 292 of the Convention was to ensure the prompt release of vessels and their crews in cases of detention of a ship by a non-flag State upon the posting of a reasonable bond or other financial security, and to provide modalities for the submission of any dispute to a competent court. The article did not establish, expand or modify the institution of diplomatic protection. The argument that the Convention had expanded the scope of diplomatic protection did not, therefore, seem well founded. Moreover, the International Tribunal for the Law of the Sea had made no reference to diplomatic protection in its judgement in the *M. V. Saiga* case. Since there were also various mechanisms established by the law of the sea and international maritime law to protect the interests of crews, there was no need to extend the scope of the draft articles to the flag States of ships. Similarly, the legal principles relating to the

nationality of aircraft were already set out in various instruments in international law and thus had no place in any consideration of the topic of diplomatic protection.

30. He agreed with the Special Rapporteur's conclusion that cases in which one State delegated to another the right to exercise diplomatic protection seldom arose in practice. The discretionary right of a State to exercise diplomatic protection or to delegate such a right to another subject of international law could, however, be clarified in the commentaries. As for the exercise of diplomatic protection by an international organization that administered a territory, such situations were surely temporary in nature and ought to be considered in connection with the topic of the responsibility of international organizations. Nor should the draft articles cover situations in which a State that occupied, administered or controlled a territory other than its own sought to exercise diplomatic protection on behalf of the territory's inhabitants. Such occupation was illegitimate under international law, and there could therefore be no right to exercise diplomatic protection.

31. The question of whether the exhaustion of local remedies was a matter of substance or of procedure was largely academic. He agreed with the prevailing view in the Commission that draft articles 12 and 13 added nothing of substance to draft article 11 and should therefore be deleted. As for draft article 14, which dealt with exceptions to the exhaustion of local remedies rule, he saw more merit in some exceptions than in others. In draft article 14, paragraph (a), his delegation would favour wording based on the third option provided by the Special Rapporteur, namely that if local remedies provided no reasonable possibility of an effective remedy they should be considered futile. That express waivers should constitute an exception to the rule presented no difficulty for his delegation. Further consideration should, however, be given to the question of implied waiver and, for the sake of clarity, examples should be given.

32. Draft article 14, paragraph (c), which related to the voluntary link between an injured person and the respondent State, was consistent with existing practice; indeed, the lack of such a link could be considered an exception to the rule. However, the link had never been equated with residence and did not necessarily entail the physical presence of the injured party in the territory of the respondent State; it could also take the form of ownership of property or a contractual relationship with that State. The Commission should move away from the notion of the voluntary link, as understood a century earlier. In certain situations, such as the shooting down of an aircraft, it would be impracticable and even unfair to insist on the existence of a voluntary link, thus imposing on an injured alien the requirement that local remedies should be exhausted. The same applied to the infliction of transboundary environmental harm, although that aspect of the voluntary link would need further consideration in the light of developments in the law relating to transboundary harm.

33. Undue delay and the denial of justice, which were dealt with in paragraphs (e) and (f) of article 14, should be considered in conjunction with the question of the futility of local remedies, which was covered in paragraph (a). It should be noted that judicial proceedings were more protracted in some countries than in others, often unavoidably. Delays should therefore not be considered a violation of international law or a reason for making the exhaustion of local remedies rule an exception. A country's judicial authorities could not and should not treat foreign nationals differently from their own citizens when rendering justice.

34. His delegation shared the majority view in the Commission that article 15, which dealt with the burden of proof, did not belong in draft articles on diplomatic protection. The rules governing the inadmissibility of evidence were normally covered by national legislation or developed by international judicial bodies, and they should remain so.

35. In connection with draft article 16, he said that the contractual link embodied in the Calvo clause, which was described in paragraph 253 of the report, should be reflected in the draft articles dealing with the exhaustion of local remedies. Meanwhile, relevant developments in international relations should be studied carefully. In investment agreements between States, provisions whereby States agreed to submit to international arbitration in the event of a dispute had become more common. The Commission should therefore continue to consider how the Calvo clause might be incorporated in the draft articles.

36. Lastly, he drew attention to an ambiguity in draft article 4, which related to continuous nationality: paragraph 1 set out the basic principle, while paragraph

2 dealt with exceptions to the rule, namely cases of loss of nationality and the acquisition of new nationality, for a reason unrelated to the bringing of the claim, "in a manner not inconsistent with international law". The latter phrase required further clarification, since nationality could be voluntary as well as involuntary. The draft articles should take that fact expressly into account.

37. **Mr. Thirunavukkarasu** (India), after commending the progress made by the Commission, said that a State's entitlement to protect its subjects when they were injured by acts committed by another State and were unable to obtain satisfaction through the normal channels in that State was recognized as an elementary principle of international law. States were, however, free to accept or refuse to exercise diplomatic protection as they saw fit. His delegation believed that the Commission should limit its work on diplomatic protection to precedent and practice.

38. In view of the greatly increased speed of communications and transportation, which allowed individuals to make their claims directly in any forum, his delegation believed that diplomatic protection should, as far as possible, be limited to the interests of nationals. It should not become obligatory for a State of nationality to take up claims to the exclusion of political or other sensitivities. In that context, the diplomatic protection envisaged for stateless persons and refugees under draft article 7 was an undesirable extension of diplomatic protection which could be conducive to mischief by the State of habitual residence of a refugee. Nor could his delegation accept a watering down of the definition of the term "refugee" for such purposes.

39. Articles 10 and 11 appeared identical to articles 12 and 13. The latter two could therefore be eliminated without adversely affecting the draft articles as a whole, and their content could be integrated into the former two.

40. It was clear from the debate in the Commission that, whether the principle of the exhaustion of local remedies was procedural or substantive, the principle itself was part of customary international law and central to the triggering of diplomatic protection. It should therefore be stated as clearly and unambiguously as possible. Individuals should be required to exhaust the entire range of available legal remedies. Whether such remedies were effective or not would raise questions about the standard of justice in a given State, but so long as they conformed with the principles of natural justice, variations in standards should not call their effectiveness into question. The Commission should act with great caution in dealing with exceptions to the exhaustion of local remedies: any imbalance between the rule and the exception could undermine the domestic jurisdiction of the State where an alien was located. Of the three options referred to under draft article 14, paragraph (a), his delegation favoured the third. The Special Rapporteur should, however, find objective terminology to replace the expressions "effective remedies" and "undue delay"; they were relative concepts for which no universal standards were possible.

41. Great caution should be exercised in cases of implied waivers, since it would be difficult to devise any objective tests. The question of burden of proof, dealt with in draft article 15, was best included in the rules of procedure, and the article should be deleted.

42. The Commission's requests for delegations' views on the diplomatic protection of vessels, crews and passengers and on shareholders' interests, in the light of the *Barcelona Traction* case, required further consideration. The issue should be taken up separately at an appropriate time.

43. **Mr. Leanza** (Italy) said that draft article 14, paragraph (a), should be reworded to reflect the idea that a domestic remedy must be exhausted only if there were sound reasons for believing that there was a reasonable prospect of success. While the exception provided for in paragraph (e) was amply supported by case law, that provision should be worded more precisely in order to prevent a respondent State from unduly delaying a remedy and dragging out proceedings. Admittedly the current text of paragraph (f) was inconsistent with the contents of paragraphs 100 and 101 of the Special Rapporteur's third report (A/CN.4/52), but the two situations described there were rarely decisive in civil proceedings, where the physical presence of applicants in the territory of the State in which they wished to initiate action was seldom necessary. An exception might, however, be made when the presence of the person concerned proved essential for commencing proceedings, in which case the draft articles should expressly mention that possibility. The Italian Government had consistently held that the rule that domestic remedies must be exhausted was not a procedural requirement,

even when the circumstances of a given dispute might suggest otherwise.

44. Turning to draft article 15, he noted that differences existed in common law and civil law systems with regard to the burden of proof. The rules of evidence did indeed vary greatly, depending on the type of international proceedings. It was questionable whether human rights jurisprudence developed on the basis of specific treaty provisions within the framework of a procedural system was relevant to the delineation of proof in general international law. Moreover, the same treaty body might have different rules of evidence at each stage of proceedings.

45. Article 16 expressed the traditional Calvo doctrine that disputes concerning the treatment of aliens came within the exclusive jurisdiction of the courts of the host State. Latin American States had always based contracts with foreign companies on that doctrine and had included in such contracts a clause whereby those companies waived the right to diplomatic protection. Undue emphasis should not be placed on the conflict between the institution of diplomatic protection and reliance on the Calvo doctrine, since no one could force a State accused of infringing the rules governing aliens to deal with the question at the international level or settle the dispute through arbitration if the State had not already freely accepted its treaty obligations in that respect. On the other hand, no one could prevent the State of which an injured alien was a national from proposing arbitration or other steps, even when a Calvo clause existed, since the State was exercising one of its rights in providing diplomatic protection. Such conduct pertained to the phases of taking evidence and implementing international law, which were characterized by the initiatives, actions and reactions of each State concerned.

46. It would also be wise to examine the validity of the rule of continuous nationality in the light of the numerous exceptions made to that principle in recent case law and the trend towards the recognition of individual rights in current international law. Neither State practice nor legal theory clearly indicated whether the person bringing a claim had to retain the nationality of the claimant State between the time of the injury and the official presentation of the claim. His Government took the position that, although it must be acknowledged that the continuous nationality rule was accepted in customary international law and State practice and applied by many international courts, it would be advisable to allow some exceptions to that principle in order to deal with possible situations in which persons were unable to obtain diplomatic protection from any State. Those exceptions could well be based on a distinction between voluntary changes in nationality at the individual's choice and involuntary changes of nationality deriving from a succession of States, marriage, descent or adoption. The version of the draft articles presented by the Drafting Committee was therefore quite acceptable.

47. As for the diplomatic protection of corporations and stockholders, it was unclear whether States could exercise diplomatic protection on behalf of a company registered or set up in their territory irrespective of the nationality of the members, or whether the majority of members had to have the nationality of the State concerned. It was also necessary to ascertain whether a State could offer diplomatic protection to members of its nationality when a company that had been registered or set up in another State was injured by an act of the latter State. In fact, diplomatic protection could be exercised by the defendant State of which either a natural or a legal person was a national, even though the nationality of legal persons was not a clearly defined notion, since domestic laws did not establish with sufficient clarity what links were of relevance in that respect. The Italian Government considered that the thesis upheld by the International Court of Justice in the *Barcelona Traction* case was not only consonant with general international law, but also had its own rationale, because when private individuals founded companies, they tended to locate the headquarters in States which were accommodating from the point of view of taxation and supervision of company management. It was, however, hard to deny that the State of nationality of shareholders could provide diplomatic protection when a company had gone out of business or when the company had the nationality of the State from which it was seeking protection.

48. It would seem that the State of nationality did not have the exclusive right to exercise diplomatic protection on behalf of the crew and passengers of a ship. The protection of a ship's crew was a matter mentioned not only in the United Nations Convention on the Law of the Sea, but in other, earlier international agreements. The topic therefore required further study.

49. **Mr. Petru** (Czech Republic) said that the exhaustion of local remedies was a generally accepted

precondition for the exercise of diplomatic protection; the topic was thus important, if controversial.

50. Draft articles 10 and 11 covered the provisions of draft articles 12 and 13, which were therefore superfluous. The Commission's deliberations on article 14 had demonstrated how difficult any attempt to define exceptions to the rule of the exhaustion of local remedies could be, in particular with regard to the requirement that local remedies should be effective. Option 3 for draft article 14, paragraph (a), offered a solid basis for further deliberations on exceptions to that rule. Paragraphs (e) and (f) of article 14 could be omitted, given the reference to effectiveness in paragraph (a) of that article.

51. While the Special Rapporteur's thorough review of the development of the Calvo clause would unquestionably serve as excellent study material for scholars, international lawyers and others interested in that controversial concept, draft article 16 should be deleted. The Calvo clause should not be dealt with under the heading of diplomatic protection because it did not constitute a rule of international law but was merely a contractual stipulation between a State and an individual.

52. His delegation was satisfied with the current wording of draft article 1; however, draft article 2 only reiterated the principle laid down in the preceding article. He endorsed the Commission's view that a limited duty of a State to exercise diplomatic protection did not amount to a progressive development of international law. He welcomed the Commission's decision to deal with the diplomatic protection exercised by a State on behalf of stateless persons and refugees. Article 7, which was an exception to the traditional notion of diplomatic protection as defined in article 1, was a laudable example of the progressive development of international law.

53. His delegation did not support the proposal to draw up articles allowing the flag State of a ship or aircraft to extend diplomatic protection to crew members and passengers who held a nationality different from that of the ship or aircraft. Inclusion of that question and the question of the principle of the nationality link reflected in draft article 3 in the Commission's consideration of diplomatic protection would prevent the Commission from concluding its work on the topic.

54. His delegation applauded the Commission's decision to embark on the consideration of the responsibility of international organizations, as the increase in the number of such organizations and the many questions that arose regarding their responsibility made the topic highly relevant in day-to-day practice.

55. **Mr. Dinstein** (Israel) said that that scope of the draft articles on diplomatic protection ought to be limited to the traditional boundaries of nationality of claims and exhaustion of local remedies. While it might be possible to address the question of whether the crew of vessels at sea were treated, for purposes of diplomatic protection, as if they were nationals of the flag State, any attempt on the part of that State to exercise diplomatic protection must be restricted to those crew members and should not include the vessel's passengers or the crews of aircraft and spaceships.

56. The danger of venturing into uncharted territory had been demonstrated by the fact that of the five draft articles proposed by the Special Rapporteur, only two had been referred to the Drafting Committee. Moreover, some of the clauses sent to the Committee had been accompanied by a recommendation to exercise caution or had called for a choice between alternative texts. It was understandable that the Commission should be reluctant to endorse formulations that might prove unpalatable to States, as the draft articles ultimately adopted by the Commission would be offered as guidelines to States in their practice. Those guidelines should shed light on existing customary international law, avoid unnecessary controversy and be conducive to the amicable settlement of disputes.

57. Turning to the topic of reservations to treaties (A/57/10, chap. IV) and referring to draft guideline 2.1.6 (Procedure for communication of reservations), he said that it would be anachronistic to ignore the current universal use of electronic mail and facsimile. To be sure, e-mail messages sometimes went astray, but that was equally true of regular mail. Moreover, any misgivings regarding possible loss of communications should be dispelled by the important caveat that a communication relating to a reservation to a treaty, if made by fax or e-mail, must be confirmed by a diplomatic note. The only lingering doubt was whether the communication should be deemed to have been made officially on the date of transmission and instant arrival of the e-mail or fax or on the later date of

arrival of the confirmation. On the whole, his delegation considered it fair to regard the earlier date as governing, provided that the confirming note arrived within a reasonable time. The Commission might wish to set up a time frame for the arrival of such confirmation.

58. His delegation fully supported the withdrawal of draft guideline 2.5.X, as there was no point in dealing with the substance of that provision at the current stage of the Commission's work. First, there was the issue of definition of the scope of the hypothetical bodies monitoring the implementation of a treaty. Whatever the role and powers of such bodies, it was difficult to see how their activities could affect the withdrawal of a reservation to a treaty. Second, it was possible for a reserving State to consent to be bound by a treaty only subject to the reservation. Should the reserving State be forced to withdraw its reservation for any reason, it might feel compelled to denounce the treaty altogether. Withdrawal of the reservation was a sovereign prerogative of the State, and no other entity could detract from its discretion in the matter.

59. With regard to new draft guideline 2.1.8 (Procedure in case of manifestly [impermissible] reservations), his delegation continued to believe that the range of powers of the depositary was authoritatively delineated in the Vienna Convention on the Law of Treaties. Only States and international organizations that were parties to a treaty, and not the depositary, could decide whether a given statement or instrument constituted a reservation and whether or not such a reservation was admissible. When confronted with a reservation, the sole mandate of the depositary was to communicate it to all contracting parties and signatory States. Any change in that mandate would turn the depositary into a monitoring body, and that would be wrong *de lege lata* and undesirable *de lege ferenda*.

60. Chapter VII of the report dealt with questions that deserved serious examination in the absence of clear-cut State practice. The Working Group had identified eight issues on which it sought guidance (para. 30). Concerning (a), the following criteria might prove helpful: the victim's contributory negligence, if any; measures taken by the victim to minimize the damage; advance knowledge on the victim's part of the likelihood of the damage; and, perhaps, the availability of insurance to the victim. Issues (b) and (c) represented two sides of the same coin, and their resolution should be left to the domestic legal system. Concerning (d), his delegation tended to believe that most cases would fall within the purview of existing regimes; the Commission should therefore consider carefully whether a gap existed that the international community needed to fill. As to (e), his delegation was not opposed to the idea of a higher threshold for allocation of loss caused than the one adopted in the draft articles on prevention. With regard to (f), he did not believe that the concept of the "global commons", which was insufficiently defined, should be introduced into the Commission's work on the topic under discussion. Issue (g) related to the answers to be given by the Commission to issues (a) to (c). Lastly was an issue that touched upon issue (d). There was no point in discussing special procedures for processing and settling claims unless and until it had been established that existing regimes were inadequate.

61. The new study of responsibility of international organizations (A/57/10, chap. VIII), like the study of State responsibility, should be limited to internationally wrongful acts. Thus the pre-eminent question would be the attribution of an internationally wrongful act to an international organization rather than to its member States. The answer to that question would be contingent upon the international legal personality of the organization. Not every international organization necessarily had an international legal personality and, in its absence, any international responsibility must devolve upon the member States. In that connection, he drew attention to the *Reparation for injuries* Advisory Opinion of the International Court of Justice (1949), in which the Court had held that the international personality of an international organization was determined both by its constitution and by its practice. The same considerations clearly applied when an internationally wrongful act was attributed to an international organization.

62. **Mr. Gómez-Roblado** (Mexico), referring to chapter V of the report, said that the study of the topic should be limited to diplomatic protection of natural persons, nationality of claims and exhaustion of local remedies. To extend it to diplomatic protection of legal persons would only delay completion of the study. His delegation encouraged the Commission to work on the topic in stages and welcomed its intention to adopt the draft articles on second reading by the end of the quinquennium.

63. His delegation did not support the Commission's decision not to refer articles 12 and 13 to the Drafting Committee. The determination of the nature of the local remedies rule could have a major impact in a large number of cases and would thus enrich the regime to be developed on the basis of the draft articles. On the other hand, the Commission was to be commended for having referred article 14 to the Drafting Committee.

64. The difficulties involved in defining the elements constituting options 1 and 2 of article 14, paragraph (a), were understandable. Nevertheless, the question merited further consideration, since in the end it would offer greater guarantees of access to international jurisdiction for the State exercising diplomatic protection. It would, of course, be difficult to identify the criteria for determining when a remedy was futile or when it offered no reasonable prospect of success. The fact remained, however, that States could not continue to resist the involvement of their international responsibility on the ground that local remedies existed. He invited the Special Rapporteur to examine the recent contributions made in that sphere by the European Court of Human Rights and the Inter-American Court of Human Rights. The traditional interpretation of exceptions to the exhaustion of local remedies rule must be reviewed in the light of the increasing protection of individual rights by international law. He drew attention in that connection to the decision of the International Court of Justice in the *LaGrand* case, in which the Court had stated that both the individual rights of the LaGrand brothers and the right of Germany to exercise diplomatic protection had been adversely affected.

65. Whatever option the Commission adopted in respect of article 14, paragraph (a), it should be accompanied by examples illustrating the scope and application of that provision. The draft articles should in fact guarantee States the primacy of their national legislation and courts, and should give them an opportunity to repair any damage suffered by a foreign national before being called to account at the international level — without, however, unduly limiting the recourse to international jurisdiction. It should be noted that the inclusion of paragraph (a) would also make it necessary to include rules dealing with the burden of proof, similar to those proposed in draft article 15.

66. His delegation greatly regretted the Commission's decision not to refer article 16 to the Drafting Committee. The Calvo clause was closely linked to the topic of diplomatic protection, and any study that did not deal with it would be incomplete. He urged the Commission to reconsider its decision and include an article recognizing the validity of the Calvo clause in contracts.

67. With regard to the draft articles adopted by the Commission on first reading, his delegation generally supported the thrust of articles 1 to 7, while believing that some of them required clarification. For instance, his delegation would prefer that article 1, paragraph 2, should be drafted in a way that made it clear that diplomatic protection in respect of non-nationals constituted an exception to the general nationality of claims rule. In article 2, it would be sufficient to indicate that a State which decided to exercise diplomatic protection should do so in accordance with the draft articles. In article 6, the term "effective nationality", which was well rooted in international terminology, would be preferable to "predominant" nationality.

68. The Commission had questioned whether the State of nationality of a vessel should be entitled to exercise diplomatic protection on behalf of the crew. His delegation believed that exceptions to the nationality of claims rule should be limited to cases where a genuine link existed between the individual to be protected and the State exercising such protection on his or her behalf; that was not always the case where crews were concerned.

69. His delegation took note of the Commission's decision to include in its programme of work the topic entitled "Fragmentation of international law: difficulties arising from the diversification and expansion of international law". While noting the change of approach to the topic, his delegation continued to have concerns relating to the scope of the study and the final form it might take. Certain aspects of the topic were highly complex, and it was doubtful that its consideration would lead to the codification and progressive development of international law. The Commission itself was unclear as to the possible outcome of its work, as indicated in paragraph 512 of the report. His delegation therefore suggested that the Study Group should prepare a concrete analysis of the rationale for the study and the specific aspects to be considered.

70. Lastly, his delegation believed that the time had come to review the Commission's Statute in the light of current needs. It was clear, for example, that the Statute contained some provisions that were no longer warranted, such as article 26, paragraph 3.

Statement by the President of the International Court of Justice

71. **Mr. Guillaume** (President of the International Court of Justice) said that by the end of 2002, the Court would have handed down three major substantive judgements and several procedural decisions; however, it had a heavy docket, with 24 cases still pending. It had been developing its jurisprudence in an increasingly wide variety of fields, including human rights law and environmental law.

72. In the period between the two World Wars, the Permanent Court of International Justice had addressed the question of the rights of minorities in the 1923 *German Settlers in Poland* case, the 1932 *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* case, the 1935 *Minority Schools in Albania* case and the 1935 *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City* case. It had held that there must be no discrimination in fact where the law ostensibly prescribed equality and that equality in fact might involve the necessity of different treatment in order to attain a result which established an equilibrium between different situations, thereby laying the foundation for the policy of positive discrimination in favour of minorities and, later, affirmative action. It had also maintained that individuals must know beforehand whether their acts were lawful or liable to punishment.

73. On various occasions, the International Court of Justice had had to rule on the substance and scope of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. In a 1951 advisory opinion it had maintained that the principles underlying the Convention were recognized by civilized nations as binding on States, even without any conventional obligation. More recently, in proceedings brought by Bosnia and Herzegovina against Yugoslavia, it had twice indicated provisional measures at the request of the Sarajevo Government and had held that it had jurisdiction in the case because, where the Convention was applicable, there was no need to ascertain whether the acts complained of had been committed in the course of an armed conflict. Although jurisdiction in prosecuting the alleged perpetrators of such crimes was restricted to the courts of the State in whose territory the act had been committed, the obligation of States parties to the Convention to prevent and punish the crime of genocide was not territorially limited. In a 1996 judgement the Court had ruled that the Convention envisaged State responsibility not only where the State had failed in its obligations of prevention and punishment, but also where it had itself committed the crime of genocide. However, in 2001 Yugoslavia had requested a revision of that judgement, and the Court would have to rule on that request before addressing the merits of the case.

74. The Court had also had occasion to rule on the rights of peoples. In its 1971 advisory opinion in the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution 276 (1970)* case, it had held that in respect of Namibia, South Africa had pledged itself to observe and respect human rights and fundamental freedoms for all without distinction as to race, that the policy of apartheid as applied by South Africa constituted a flagrant violation of the purposes and principles of the Charter of the United Nations and that South Africa's presence in Namibia was illegal. In its 1975 advisory opinion in the *Western Sahara* case, the Court had analysed the right of peoples to self-determination in the light of Article 1, paragraph 2, of the Charter and of the subsequent development of international law with regard to non-self-governing territories, and had concluded that the decolonization of Western Sahara must be carried out in accordance with the principle of self-determination through the free and genuine expression of the will of the peoples of that Territory.

75. The Court had also issued a number of rulings in the field of humanitarian law. In the 1949 *Corfu Channel* case, it had held that States could be bound by obligations not only under conventions, but also pursuant to certain general and well-recognized principles which constituted elementary considerations of humanity, even more exacting in peace than in war. It had clarified that position in the 1986 *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*) case, maintaining that common article 3 of the four Geneva Conventions of 1949 defined certain rules to be applied in non-international armed conflicts and that those

rules constituted a minimum yardstick in addition to the more elaborate rules which also applied to international conflicts. Finally, in its 1996 advisory opinion in the *Legality of the Use or Threat of Nuclear Weapons* case, issued at the request of the General Assembly, it had concluded that the use of nuclear weapons would generally be contrary to the humanitarian law applicable in armed conflicts but that, in view of the current state of international law and of the elements of fact at its disposal, it could not conclude definitively whether their use would be lawful in an extreme circumstance of self-defence in which the very survival of a State was at stake.

76. In other cases, the Court had taken a stance without being asked to do so. In the 1970 *Barcelona Traction* case, it had distinguished between a State's obligations *erga omnes* towards the international community as a whole and those arising with respect to another State in the field of diplomatic protection; examples of the former included the outlawing of acts of aggression and of genocide, protection from slavery and racial discrimination and the right of peoples to self-determination. And in the 2001 *LaGrand* case the Court had held that article 36, paragraphs 1 and 2, of the 1963 Vienna Convention on Consular Relations conferred rights not only on the sending State but also on the individual detainee.

77. Thus the Court had made a substantial contribution to the progress of human rights. Its positions on the scope of reservations to the Convention on the Prevention and Punishment of the Crime of Genocide had influenced the drafting of articles 19 et seq. of the 1969 Vienna Convention on the Law of Treaties; its opinions on apartheid and on the right of peoples to self-determination had finally achieved universal acceptance; the concept of an obligation *erga omnes* had become part of positive law; and it was widely accepted that common article 3 of the four Geneva Conventions laid down elementary rules applicable to all armed conflicts. By characterizing certain conventional obligations as customary and treating them as obligations *erga omnes*, it had sought to impose on all States minimum norms deriving from the elementary considerations of humanity invoked in the *Corfu Channel* case and had laid the foundations for a universal customary law which, without challenging conventional law, was binding on all.

78. The manner in which progress in the law could be secured in a specific domain through the application of more general concepts was seen not only in human rights law but also, more recently, in environmental law. As early as 1949, the Court had concluded in the *Corfu Channel* case that every State had an obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States, an obligation which would be particularly relevant to environmental matters. Similarly, in the *Barcelona Traction* case, it had stated that certain obligations regarding the preservation of the environment would probably constitute obligations of States towards the international community as a whole.

79. More recently, the Court had developed that position in detail. In its 1996 advisory opinion in the *Legality of the Threat or Use of Nuclear Weapons* case, it had stressed that current international law placed particular emphasis on important considerations of an ecological nature which were relevant to issues involving the law governing armed conflicts and the legality of self-defence. The environment represented the living space, the quality of life and the very health of human beings, including generations unborn. In the 1997 *Gabčikovo-Nagymaros Project* case it had stressed the need for vigilance and protection on account of the often irreversible character of damage to the environment. New norms and standards must be taken into consideration when States contemplated new activities and continued activities begun in the past; the need to reconcile economic development with environmental protection was aptly expressed in the concept of sustainable development.

80. New branches of international law had arisen during the twentieth century, and there had been a proliferation of specialized international courts. As the principal judicial organ of the United Nations, the International Court of Justice was the only such body that could address all areas of the law, giving them their proper place within an overall scheme, as evidenced by its jurisprudence in the fields of human rights and environmental law. It intended to pursue its efforts in that regard with the renewed confidence of States.

The meeting rose at 12.55 p.m.