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Chairman: Mr. Prandler . . . . . (Hungary)

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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. **Ms. Geddis** (New Zealand) said that in 2001 her delegation had welcomed the completion of the Commission's second reading of the draft articles on prevention of transboundary harm from hazardous activities, since the establishment, implementation, constant review and improvement of best-practice prevention techniques provided the best guarantee against harm arising out of such activities. The next step would be to work on liability and compensation, since even the best attempts at prevention and response could never entirely eliminate the risk of accident. Her delegation therefore welcomed the Commission's decision to pursue that aspect of the topic, which was complementary to the valuable work completed on State responsibility. If loss occurred despite the fulfilment of obligations of prevention, there was no wrongful act upon which a claim could be founded; yet, exceptional though that situation might be, the Commission should develop provisions to ensure that innocent victims were not required to bear harm or loss. Moreover, it should not restrict its work to activities occurring within the territory of a State: such activities were increasingly undertaken in areas outside national jurisdiction. It should therefore address situations where harm as a result of activities outside national jurisdiction had effects within a State's territory. That was not identical with the question of harm to the global commons, which, although it might warrant attention at some point, would involve very different issues.

2. With regard to the question whether there should be a threshold for triggering the application of the regime on allocation of loss, her delegation saw no reason why there should be any difference between the threshold for liability and compensation and that for prevention, whether it was termed "significant" or "serious". All operators engaged in hazardous activities, whether State or private, would increasingly recognize that the overall costs associated with accidents were so high that it was in their own interest to institute state-of-the-art prevention techniques and follow continuous improvement procedures. Such self-interest would be more effective than any legal obligation. Moreover, the circumstances in which loss occurred despite prevention measures and could not be remedied or compensated under existing arrangements would be very unusual. The Commission should also bear in mind that loss could take a number of forms. If the scale of the possible physical consequences flowing from a particular activity was great enough, even though the probability of their occurring might be low, significant financial loss could result.

3. On the question whether particular regimes should be established for ultra-hazardous activities, her delegation believed that, although ultimately there was scope for developing a regime to establish loss-sharing schemes, for the time being the Commission should concentrate on developing general principles, which would constitute a foundation for more detailed and activity-specific schemes. To that end, it should examine existing models and procedures for the allocation of loss. Care would be needed in attempting to set limits on the operator's share, but there was merit in the Commission's suggestion that schemes should be developed to ensure that operators internalized the whole cost of their operations, thus obviating the need for compensation from public funds. If, despite such precautions, a loss could not be properly remedied or compensated, the relevant States should work out how it should be shared among all the parties. A number of factors would need to be taken into account, such as the extent to which the State suffering the loss had been consulted about or participated in the activity in question, or stood to benefit from it. Overall, her delegation agreed with the Commission's conclusions that the victim should not be left to bear the loss; that any regime on allocation of loss should ensure that effective incentives were in place for all involved in a hazardous activity to follow best practice in prevention, response and, indeed, compensation; and that such a regime should cover all the various actors, in addition to States.

4. **Ms. Miller** (Sweden), speaking on behalf of the Nordic countries, welcomed the fact that the Commission had resumed consideration of the issue of liability, following the second reading of the 19 draft articles on prevention of transboundary harm from hazardous activities. The work should be given priority, since it would constitute a significant contribution to the further codification and progressive development of international law. With regard to the questions posed by the Commission in paragraph 30 of the report, she endorsed the Working Group's view that the innocent

victim should not participate in an inter-State dispute, although that should not affect the right of private individuals to have their losses compensated. Moreover, environmental damage might not materialize until long after an incident had occurred. It would be a mistake to draw an automatic analogy with the traditional torts and compensation law that was standard in national laws. Non-economic loss and environmental damage should be included and the precautionary principle should also be borne in mind.

5. The operator who had direct control over the operation should ultimately bear the loss. However, that should in no way reduce any liability resting with the State concerned. The focus should be on ensuring that loss was compensated. In the environmental context, the strict liability of the operator reflected the "polluter pays" principle. The State, meanwhile, should be responsible for losses caused by any failure to apply the rules of prevention. As between two "innocent" States, the one responsible for the operator should bear the burden. As the Working Group had said, the issue of which State was responsible was a separate issue.

6. On the question whether particular regimes should be established for ultra-hazardous activities, such activities required particular care in prevention on the part of States. Where specific fields were involved, the issues were perhaps best dealt with under the applicable international agreements. In order to counter the increasing fragmentation of international law, it might be useful for the Commission to draw up an inventory of instruments under international law, including those currently under negotiation, relating to liability, insurance schemes and funds.

7. With regard to the threshold for triggering the application of the regime on allocation of loss, she said that, in national torts and compensation law, there was normally no general trigger in the form of a requirement of "significant harm" in order for compensation to be granted. It thus seemed unnecessary to establish any initial trigger, although, in the case of a State's liability, some trigger — although not higher than "significant harm" — might be appropriate.

8. As for harm caused to the global commons, it was an important issue that certainly needed consideration. At first glance, it appeared to lie outside the framework of the topic, particularly since global commons were not covered by the articles on prevention, but a State could be liable for damage beyond the limits of national jurisdiction, as stated in Principle 2 of the Rio Declaration on Environment and Development. In that context, the "polluter pays" principle should be kept in mind when discussing how to allocate the loss. The issue could probably best be dealt with under national law, in view of the variety of solutions found in different national legal systems and traditions.

9. With regard to procedures for processing and settling claims of restitution and compensation, she said that injured persons and entities should, as a general principle, be able to sue the operator. The issue of jurisdiction was a matter for private international law, taking into account the legal domicile of the operator, the site of the operation and other relevant factors. For inter-State claims, the usual forums, such as courts of arbitration, would be appropriate. The Working Group should, at some stage, address the issue of the scope of liability: there should be a duty to take appropriate response action on environmental damage, including clean-up where possible. Consideration should also be given to allowing compensation to cover all damage to persons and property. Where the environment was concerned, thought should be given to whether and to what extent compensation should cover costs incurred by measures to mitigate or contain the harm and, where possible, restore the environment to the status quo ante.

10. At a more general level, the Nordic countries welcomed the suggestion that insurance schemes, which could have a major bearing on prevention, should be considered. On the other hand, the establishment of insurance schemes and funds should not result in too wide a distribution of liability; otherwise, the clarity needed for State liability, which should remain the fundamental principle, would be compromised. Operator liability would have useful supplementary importance, particularly where no State could be held liable.

11. **Ms. Rei** (Portugal) said that her Government was making a careful study of the specific issues on which the Commission had requested comments in chapter III of its report and would share its views with the Commission in due course. In the meantime, her delegation wished to make a number of general comments.

12. Although the progress made regarding the draft articles on diplomatic protection was welcome, her delegation believed, in relation to draft article 16, that it would be appropriate to include a provision — as

initially proposed by the Special Rapporteur — limiting the validity of the "Calvo clause" to disputes arising out of the contract containing the clause, without precluding the right of a State to exercise diplomatic protection on behalf of its nationals. As for the scope of the draft articles, her delegation understood the Special Rapporteur's concern that the work should not go beyond the traditional subjects covered by the topic, namely the nationality of claims and the exhaustion of local remedies and the Commission's desire to complete the second reading by the end of the current quinquennium. Due consideration should, however, be given to important issues such as the relationship between diplomatic protection and functional protection by international organizations of their officials and also to cases where a State or an international organization administered or controlled a territory. Her delegation's comments on the extension of diplomatic protection to crew members and passengers on ships and aircraft, and on circumstances in which the State of nationality of shareholders should be entitled to exercise diplomatic protection, would be made in due course.

13. With regard to the diplomatic protection of stateless persons and refugees, covered by draft article 7, she felt that the requirement of both lawful and habitual residence set a threshold that was too high and could lead to a lack of protection for the individuals involved. Their needs should be given further consideration, even though it constituted a departure from the traditional rule that only nationals could benefit from the exercise of diplomatic protection.

14. Her delegation welcomed the work done by the Special Rapporteur on reservations to treaties, an issue of great practical importance on which the Vienna Conventions and other instruments gave little guidance. Her delegation attached particular importance to the question of the admissibility or compatibility of reservations. The role played by treaty-monitoring bodies in that regard should be clarified. Consultations between the Commission and the Subcommission on the Promotion and Protection of Human Rights on reservations to treaties should be encouraged.

15. With regard to unilateral acts of States, her delegation encouraged the Commission to continue its consideration of the general and specific rules applicable to the various types of unilateral acts and to build on them in drafting a complete and coherent set of rules on the matter. As for international liability for injurious consequences arising out of acts not prohibited by international law, it was important to establish rules to deal with cases in which, despite prevention or where prevention was not possible, an accident occurred and produced transboundary harm. Her delegation would comment in greater detail at a later stage.

16. Turning to the question of fragmentation of international law, a topic of great current interest, she said she expected the Commission's work to result in a study of the topic, rather than a set of draft articles. International law had undergone considerable fragmentation in the past five decades, because legal regimes on the same subjects had emerged from different sources, notably treaty relations between States and the work of international organizations. The number of international jurisdictions had also multiplied, and sometimes their competence overlapped. The absence of a homogeneous system of international law could result in contradictory legal regimes and judicial decisions, creating instability in international relations. However, rules of international law could be found to solve problems of that nature. By studying the fragmentation of the system, the Commission would alert States to the issue, and could eventually adopt guidelines on the question, as it was doing for reservations to treaties. She welcomed the inclusion of the topic in the Commission's programme of work, and its decision to begin with a study of the function and scope of the *lex specialis* and the question of "self-contained regimes".

17. **Mr. Winkler** (Austria) emphasized the relevance of the question of liability for injurious consequences arising out of acts not prohibited by international law. His delegation would have preferred the draft articles on prevention to be finished before the issue of liability was embarked upon, but as the Commission had pointed out, a breach of the duty to prevent might entail State responsibility. Austria could therefore agree to the questions of liability and prevention being handled together. The Working Group had wisely decided, at the outset, to proceed from the assumption that damage could occur even where no breach of an international obligation was involved, and that some relief should be provided in such cases. However, the term "allocation of loss" could result in misunderstanding. Since the concept of liability reflected the duty to provide compensation for damage suffered by others which did not result from a breach of an international obligation, the real issue was not the allocation of loss, but the duty of compensation.

18. The decision of the Working Group to tackle the full range of activities covered by the draft articles on prevention would probably create difficulties, because it was not certain that a uniform regime could cover them all. He was surprised that in its approach to liability the Working Group had focused only on private operators and States, disregarding other possible agents of economic activity. Many complex legal problems remained to be addressed before the Commission's work on the topic was brought, as he expected it would be, to a successful conclusion.

19. Austria was aware of the practical problems which could arise for States from the fragmentation of international law. He welcomed the Commission's decision to address the question, and the manner in which it planned to do so. Its analysis would help States confronted with overlapping or contradictory norms and regimes, resulting from the increasing role of various international rule-making bodies. He hoped the Commission would act upon the proposal made by the Study Group (A/57/10, para. 508) that a seminar on the topic should be organized in order to gain an overview of State practice and provide a forum for dialogue. His delegation could agree to the question of the choice of judicial forum being set aside for the time being. However, the proliferation of international courts and tribunals could result in divergent and incompatible interpretations of international law, because of the need to take account of customary law. It would therefore be useful to shed light on both the advantages and the disadvantages of having a plurality of judicial bodies.

20. Turning to the topic of responsibility of international organizations, he welcomed the decision to establish a working group on the topic. He supported the decision to limit the topic to intergovernmental organizations, because it would be unrealistic to include non-governmental organizations. The topic should, however, cover the question of treaty bodies established to monitor the implementation of treaties, especially those on human rights and the environment. Those bodies were performing an increasingly important role in international relations, and there was a general tendency to regard them in the same light as international organizations. One of the most complex aspects of the topic was the question of responsibility of member States of an international organization for the conduct of the organization. He agreed that a start should be made by analysing relevant practice, although current practice was not always relevant. The cases concerning the International Tin Council, mentioned in paragraph 487 of the report, involved detailed discussion of the joint or subsidiary responsibility of member States of an international organization, if only as a question of national law. Other relevant instances included the decisions of human rights bodies concluding that States were responsible for human rights violations of international organizations of which they were members, even if the acts themselves were attributable to the international organization in question. He referred to the judgment in the *Matthews* case before the European Court of Human Rights, involving the voting rights of residents in Gibraltar, and findings of the United Nations Human Rights Committee to the effect that States Parties to the Covenant on Civil and Political Rights remained responsible in all circumstances for adherence to all articles of the Covenant. In view of the serious gaps in the responsibility regime for international organizations, consideration should be given to the possibility of filling them by appropriate provisions for dispute settlement.

21. As for the Commission's future programme of work, Austria welcomed the establishment of a Working Group on the topic of shared natural resources, and attached the greatest importance to the elaboration of a legal framework for those resources.

22. **Mr. Lavalle-Valdés** (Guatemala) expressed regret that relatively little progress had been made over the past year on the question of unilateral acts of States. Unilateral acts, although themselves giving rise to legal rules, were not amenable to regulation. They must, however, be governed by certain essential rules, of the kind called by Herbert Hart "power-conferring rules", by virtue of the fact that they were themselves sources of law. Likewise, there must be general rules for determining which unilateral acts could be binding. There appeared to be consensus on some of the categories into which unilateral acts could be placed: promise, protest, recognition and waiver. However, it was difficult to determine how far they could be governed by uniform rules, beyond those areas which could be regulated by transposing the relevant rules of treaty law. A transposition of that nature might be unduly artificial, especially if done in a mechanistic fashion. It was also difficult to decide which additional categories should be used for unilateral acts. It was therefore legitimate to ask whether they should be regarded as a *numerus clausus*, or treated in a manner

similar to contracts under civil law systems, which would leave the door open for the creation of innominate unilateral acts. Moreover, some unilateral acts, such as silence, consisted of mere abstention, and others, like estoppel, were completely fluid. He believed the Commission's treatment of the topic was too theoretical, and should focus more on the practical aspects. He noted with interest the view expressed in the Commission (A/57/10, para. 333) that it was trying to codify something which did not exist as a legal institution and was at a loss as to how to define it so as to make it a legal institution. What was at issue, however, was not so much codification as progressive development, taking account of the *lex ferenda* as well as the *lex lata*. Practice was worth studying, but might well prove too fluid to pin down. One difficulty was that States which carried out unilateral acts often preferred to leave it unclear whether they intended to contract obligations. Such ambiguity could be constructive, as in the case of States pledging contributions to voluntary funds of the United Nations. In some cases, it would be extremely inconvenient for States to raise the question whether particular unilateral acts created obligations for them.

23. **The Chairman** drew attention to a note addressed by the Legal Counsel to Permanent Representatives to the United Nations and Heads of international organizations, referring to the Action Plan "An Era of Application of International Law" and its implementation. The note mentioned that a directory of legal technical assistance was now available within the United Nations system, which would be a useful tool for delegations.

24. **Mr. Leanza** (Italy), commenting on chapter VIII of the report (Responsibility of international organizations), said that such organizations possessed legal personality and the capacity to participate in international legal relations. Third parties could invoke their responsibility for breaches of international obligations, under either customary or treaty law, and the same applied to the organizations themselves vis-à-vis third parties. Current legal theory applied to them the same rules as to States in respect of international responsibility. Article 74, paragraph 2, of the 1986 Vienna Convention appeared to endorse that position.

25. The Commission's own commentary to the draft articles for that Convention pointed to a number of examples from international judicial practice, beginning with the 1949 Advisory Opinion of the International Court of Justice in the case concerning *Reparation for Injuries Suffered in the Service of the United Nations*, showing that international organizations had the right to claim compensation for injuries sustained by their officials in the course of their duties. The United Nations had itself been the subject of such claims, for example for the actions of its forces in the Congo, and had entered into compensation agreements as a result. In view of the increasing role of international organizations, it would be useful for the Commission to develop the international law on the question, without forgetting the responsibility of other subjects of international law.

26. It was logical that the study should focus on the responsibility of international organizations for internationally wrongful acts, those which breached an international obligation of the organization in question. It should not deal with responsibility for acts not prohibited by international law, which should be handled separately and by analogy with State responsibility for those acts, once the Commission's work on that subject was complete. As for the definition of an international organization, his delegation believed that it should be confined to intergovernmental organizations. They were the subject of the definition found in the codification conventions, and moreover possessed international legal personality. Non-governmental organizations and organizations established by States under their own internal law should preferably be disregarded.

27. As for the relationship between the topic of responsibility of international organizations and the articles on State responsibility, he agreed with the conclusions of the Working Group. Although the two had much in common, the current study was independent and must necessarily be based on limited practice. Some of its aspects could be dealt with in the light of the articles on State responsibility or through progressive development, while yet others would have to be disregarded. One important aspect was to identify when the conduct of an organ of an international organization or other entity could be attributed to the organization. In many cases the rules for attribution would be similar to those in force for States, but there might be specific instances, such as peacekeeping operations, where a State was acting on behalf of an international organization. In other instances, authority might be conferred on the organization by its member States, or the conduct might be that of an official seconded to an international organization.

28. A debate was currently taking place in the literature as to whether member States could be responsible for the activities of international organizations. Attribution of conduct in that case would raise awkward problems with regard to whether there was a joint or a joint and several responsibility or whether the member States' responsibility was only subsidiary. The responsibility of member States in the case of dissolution of an international organization was also important in that context. Those situations should be examined by the Commission from the standpoint of progressive development of international law.

29. The draft articles on State responsibility could provide useful guidance with regard to other aspects of the topic, such as the responsibility of an organization in connection with the acts of another organization or a State and circumstances precluding wrongfulness. The same applied to questions of content and implementation of international responsibility.

30. Lastly, the Commission was called upon to consider who would be entitled to invoke responsibility on behalf of the organization and the question of countermeasures to be applied in areas not falling within the purview of the organization, when the breach was committed not against the organization, but against the member State. Given the complexity of those issues, his delegation believed that the Commission had acted wisely in deciding to leave open the possibility of considering matters relating to implementation of responsibility of international organizations.

31. A similar choice with regard to settlement of disputes also seemed to be timely. The autonomy of the study on responsibility of international organizations must not be influenced by the draft articles on State responsibility, particularly since the final form of the draft had not been decided upon.

32. **Mr. Guanjian** (China), referring to chapter IV of the report, and in particular to draft guideline 2.1.8, said that in accordance with article 77 of the Vienna Convention on the Law of Treaties, the functions of a depositary included keeping custody of the original text of the treaty. When it came to the question of reservations to treaties, paragraph 1 (d) of that article provided that a depositary should examine whether a reservation to the treaty was in due and proper form and if need be bring the matter to the attention of the State in question. As to whether a reservation was permissible or not, that was a matter for the contracting States themselves to decide. It was not for the depositary to interpret the text of the treaty or to judge the permissibility of a particular reservation. The draft guidelines on reservations to treaties should respect the letter and spirit of the relevant provisions of the law of treaties.

33. As to the review of a reservation by a body monitoring the implementation of a treaty, there were serious problems with the proposed draft guideline 2.5.X (A/57/10, para. 26). First, there was no clear definition of the concept of "a body monitoring the implementation of the treaty". Such a body could be a judicial organ or a committee. The decisions or conclusions of such a body might be binding on the parties concerned but they might also be recommendations only.

34. Second, the withdrawal of a reservation was a right of the contracting State. Review by a body monitoring the implementation of a treaty did not change the treaty relations among the contracting States, nor did it necessarily lead to the withdrawal of a reservation. For those reasons, his delegation supported the Commission's decision not to refer draft guideline 2.5.X to the drafting committee.

35. With regard to the partial withdrawal of reservations, the Special Rapporteur had drafted two separate provisions (A/57/10, footnote 42). The adoption of a more flexible approach to the question of partial withdrawal was in the interest of a more universal implementation of the treaty; at the same time, the whole question should be handled with care. As to the issue of communication of reservations by electronic mail and facsimile, his delegation believed that such modalities could be applied, but that a formal note in writing remained the valid form of notification.

36. Turning to chapter VI of the report, he said that States often performed unilateral acts. Some were purely political, while others produced legal effects, as in the *Nuclear Tests* case. Such unilateral acts binding on the actor States had become a source of international obligations in addition to treaties and customary law.

37. Nevertheless, the unilateral acts of a State were distinct from the conclusion of treaties, in that the subjective intention of the actor State and the act itself were sometimes at odds. In many cases, factors other than the State's intention came into play. Accordingly,

the topic was complex, and did not readily lend itself to the formulation of a regime. In order to make greater progress on the topic, it was desirable not only to study relevant State practice on the widest possible basis, but to begin to codify rules on certain unilateral acts whose nature and intended legal effects were easy to determine, such as protest, recognition, waiver and promise.

38. **Ms. Rivero** (Uruguay), referring to chapter V of the report, said that her delegation shared the view of the Special Rapporteur that the Commission should not overly extend the scope of the topic. The Commission should confine itself to questions that had traditionally been part of the topic, namely, nationality of claims and the exhaustion of local remedies. To add such questions as functional protection of international officials by their organizations would further complicate an already difficult task and delay the outcome. Such questions could be the subject of a codification effort at a later date.

39. On the other hand, it was important for the Commission to consider such questions as protection of legal entities and denial of justice, which her delegation believed fell within the traditional scope of diplomatic protection. Moreover, there was no reason to exclude the study of special situations that could arise within the topic, such as diplomatic protection of the inhabitants of a territory under the administration or control of a State. Her delegation believed that diplomatic protection could be exercised by the State in such a case, and therefore did not consider the waiver of diplomatic protection by individuals as acceptable.

40. With regard to chapter VII of the report, the topic was of fundamental importance to her country, which had very porous borders, and whose riparian waters originated in and flowed into the territories of other States. Uruguay was also situated between the two largest industrial and population centres of South America. Accordingly, her delegation noted with satisfaction that the Commission, having concluded its work on prevention, had begun consideration of the second part of the topic on international liability and had established a relevant Working Group.

41. With regard to the threshold for triggering the regime on allocation of loss caused, her Government hoped that the Commission would opt for a low threshold, or at any rate one below the perceptible level. There was no reason why the injured State should be responsible for the consequences of hazardous activities, however much damage was sustained. Her delegation trusted that the Commission would arrive at that conclusion, since the report stated that the Working Group agreed that the innocent victim should not be left to bear the loss (para. 450).

42. **Mr. Peersman** (Netherlands), referring to chapter VI of the report, said that two basic problems before the Commission were the definition of unilateral acts and whether a single set of rules would cover a wide range of acts. His delegation had no objections to the definition proposed by the Special Rapporteur and transmitted to the Drafting Committee; it should be noted, however, that the intention of a State to produce legal effects by means of a unilateral declaration might not suffice actually to produce such effects under international law. It was ultimately international law itself or a general principle of international law that could provide the binding force intended. It must be made clear in article 1 that unilateral legal acts could only be situated outside a treaty framework; his delegation therefore suggested the addition of the phrase “not constituting part of an agreement” or words to that effect.

43. With regard to the second problem, the Special Rapporteur had concluded that there was a significant tendency to consider that it was not possible to apply common rules to all unilateral acts. While his delegation had stated on previous occasions that the great diversity of unilateral acts made a general codification exercise difficult and that a step-by-step approach might be more appropriate, he agreed with the Special Rapporteur that all unilateral acts might be covered by some common rules. The general rules identified by the Special Rapporteur in document A/CN.4/525/Add.2 served a useful purpose in that regard.

44. The rule proposed by the Special Rapporteur in draft article 7 (A/CN.4/525/Add.2, para. 162) was of crucial importance and in keeping with the determination of the binding nature of unilateral acts by the International Court of Justice in the *Nuclear Tests* case. At the same time, the binding nature of unilateral acts was subject to conditions of validity and causes of invalidity, as identified by the Special Rapporteur in Part One of the draft articles.

45. As to the question of persons authorized to formulate unilateral acts on behalf of a State, his

delegation noted with satisfaction that its position had been taken into account by the Special Rapporteur in paragraph 2 of new draft article 3 contained in the third report of the Special Rapporteur (A/CN.4/505).

46. With a view to identifying more specific rules, the Special Rapporteur had grouped unilateral acts into two categories, namely, unilateral acts by which the State assumed obligations and unilateral acts by which the State reaffirmed its rights. His delegation took the position that such a twofold division was premature. A further investigation of State practice was needed in order to determine whether such a division was compatible with the interpretation of and legal consequences attributed to the various types of "classic" unilateral acts.

47. As to chapter VII of the report, his delegation agreed with the Working Group that the question of international liability for transboundary harm also arose in the event that a State had complied with its international obligations relating to an activity carried out under its jurisdiction or control. There seemed to be a gap in international law that merited attention in order to provide prompt, adequate and effective compensation to innocent victims.

48. With regard to the proposed scope of work on the topic, his delegation agreed that only activities included within the scope of the topic on prevention of transboundary harm from hazardous activities would be covered, and also that only loss to persons, property and environment within the national jurisdiction of a State would be covered. Nevertheless, his delegation remained of the view that the Commission should address prevention of and liability for harm caused to areas beyond the limits of national jurisdiction at a later stage. Furthermore, while accepting the wish of some members of the Commission to consider the threshold that triggered the application of the regime on allocation of loss caused, his delegation suggested that, as a benchmark, the threshold for liability should be the same as for prevention.

49. As for the role of the operator and of the State in the allocation of loss, his Government agreed with the Working Group that the operator should bear the primary liability in any regime. It also agreed that States played a crucial role in designing appropriate international and domestic liability schemes for the achievement of equitable loss allocation.

50. **Mr. Kanu** (Sierra Leone) observed that the rules governing the circumstances in which diplomatic protection might be afforded, as defined by the Commission, made the State the sole judge when deciding whether to grant protection, to what extent it was to be granted and for how long. The requirements that the injured person must have the nationality of the State offering protection and that diplomatic protection must be exercised by peaceful means would be crucial if a small, weak country had to contend with a situation where an internationally wrongful act had been committed against a national of a powerful State. The Commission should be commended for acknowledging that diplomatic protection must be given to stateless persons and refugees and for being willing to reconsider article 1, paragraph 2, should any other exceptions be brought to its notice, because such flexibility was needed in the modern world where people could lose their nationality by virtue of circumstances beyond their control and find themselves living in a State whose nationality they did not have. While recognition that stateless persons or refugees could be afforded diplomatic protection if they were lawfully and habitually resident in the State granting them that status was welcome, it was a matter of concern that, in some cases, people who fled from civil wars and sought refuge in safe States were neither stateless nor refugees within the meaning of the 1951 Geneva Convention relating to the Status of Refugees, although they had taken lawful and habitual residence in another State. His country was of the opinion that those people had the right to travel to third States. Perhaps the Commission could ponder the question of how they could obtain diplomatic protection if their rights were infringed. On the other hand, as the United Nations Convention on the Law of the Sea contained rules governing the status of ships and their crews, it was doubtful whether it was necessary to draft articles on the diplomatic protection of crew members who held the nationality of a third State, since that was a subject adequately covered by the Convention.

51. His country applauded the adoption of 11 draft guidelines on reservations to treaties and the referral of 15 others to the Drafting Committee. It supported paragraph 4 of draft guideline 2.1.6, because it believed that making a reservation by electronic mail or facsimile reflected usual practice. It would endeavour to provide the Commission with information on its practice with regard to unilateral acts of States in reply to the questionnaire of 31 August 2002 and was pleased with progress to date on the issue. Similarly it was gratified to note the headway made on the topics

of international liability for injurious consequences arising out of acts not prohibited by international law, the responsibility of international organizations, the fragmentation of international law and shared natural resources.

52. **Mr. Popkov** (Belarus) said that his delegation appreciated the progress achieved by the Commission at its fifty-fourth session, especially the work done on diplomatic protection, which would fill some gaps in customary international law. Although diplomatic protection was indeed a right, not an obligation of a State, in Belarus it was guaranteed by the Constitution. The prerequisite for diplomatic protection was normally that a person aspiring to such protection had to be a national of the State whose help it was requesting, yet the exception made for stateless persons and refugees was quite justified by modern trends in international law, which set out to provide stronger protection for injured persons who had lost their links with their home country and place of habitual residence.

53. The expediency and legitimacy of extending diplomatic protection to crew members of vessels, aircraft or spacecraft who held the nationality of a third State was doubtful, as that approach was not supported in practice and went beyond the framework of customary international law. If the Commission were to pursue that idea, it would have to find arguments proving that crew members holding the nationality of a third State had an effective link with the State of nationality of the vessel, aircraft or spacecraft. Similarly, a thorough analysis would have to be made of the proposal to allow the State of nationality of shareholders in a foreign company to exercise protection on their behalf. At all events, diplomatic protection of a company could be exercised solely on the basis of its nationality.

54. While it might be possible to permit some exceptions to the well-established norm of customary law that local remedies should first be exhausted before diplomatic protection could be offered, careful consideration would have to be given to the thesis that that rule might be waived when domestic remedies had proved to be ineffective, so as to limit the number of cases in which that argument could be relied on. Exemptions from the rule could be made in the event of transboundary harm or when the respondent State had expressly waived that requirement. In that connection, the Commission should study what opportunities States had of recourse to existing international courts or the feasibility of establishing ad hoc judicial bodies to which aliens often had access without first needing to exhaust domestic remedies. In that context, the possibility of allowing States to turn to such bodies in order to protect the rights and interests of their citizens who had been injured by the internationally wrongful act of another State might afford a practical means of exercising diplomatic protection.

55. As for the implementation of international liability for injurious consequences arising out of acts not prohibited by international law, his country was in favour of absolute liability covering the cost of restoration and compensation when harm had been caused innocently, although maximum limits should be set. Operators should bear primary liability for any loss caused by operations over which they had direct control and therefore insurance schemes covering operator liability had to be developed but, in exceptional circumstances, States would have to accept liability for loss not covered by the operator.

56. The Commission should initially limit its study of the responsibility of international organizations to the context of intergovernmental organizations and the question of their liability should be considered alongside responsibility for internationally wrongful acts under general international law. During that exercise, the Commission should pay special attention to the responsibility of member States of international organizations for internationally wrongful acts committed by those organizations. The joint commission of such acts by several member States should not exempt individual States from responsibility, even though international organizations were themselves subjects of international law.

57. The Guide to Practice with regard to reservations to treaties would fill some gaps in the Vienna Conventions of 1969 and 1986 and would thus make a valuable contribution to the progressive development of that law. The definitions of reservations and interpretative declarations were broad enough to cover all their distinguishing features. It was not, however, necessary to go beyond the bounds of the Vienna Convention of 1969 in respect of the late formulation of reservations. Any attempt to do so might give rise to abuses and violate the integrity of the norms of the Convention. Nevertheless, his country did support the inclusion of provisions to the effect that unilateral statements formulated after the signature of bilateral

treaties and deemed to be a condition for their entry into force could not be treated as reservations. The communication of a reservation by electronic mail or facsimile would not be a violation of article 23, paragraph 1, of the Vienna Convention of 1969, provided it was subsequently confirmed in writing; draft guideline 2.1.6 merely took account of technological progress. Draft guideline 2.5.X might be useful.

58. The rapid completion of work on the topic of unilateral acts of States would help to establish universal practice, so that the use of those acts could become a means of regulating international relations. When codifying such acts only those producing legal effects should be taken into consideration. Precise criteria existed in international law for distinguishing between the legal and political elements of unilateral acts of States, because they contained both, although the political aspect often prevailed and hence many of the declarations forming part of such acts were of a declaratory rather than a binding nature. The Commission should therefore focus on identifying those distinguishing criteria through an analysis of international practice and scholarly writings.

59. Unilateral acts created the basis for international obligations and might serve as a starting point for formulating new norms of international law. The conduct of a State as expressed through a unilateral act could produce legal consequences only after recognition by other States and provided that the act was consistent with peremptory and other norms of international law. A careful study should be made of the possibility of ranking unilateral acts among the sources of international law. Although the Vienna Conventions of 1969 and 1986 had to guide the codification of the topic, automatic reference to them would be unwise, as unilateral acts were complex and so no analogy could be drawn with treaty norms. Unilateral acts had to be faithfully implemented by the declaring State and they could be terminated only with the agreement of subjects of international law which had taken them into account and modified their conduct accordingly. In the future, the Commission should focus on legal aspects of unilateral acts such as recognition and protest.

60. When investigating the fragmentation of international law, the Commission should avoid any reference to the establishment of international judicial bodies. The latter were furthering the supremacy of international law in relations between States and the advisability of developing and setting up such bodies should not be called in question. On the other hand, it was necessary to examine how closer cooperation among international courts might narrow divergences in their interpretation and application of the norms of international law. The International Court of Justice could play a useful role in establishing a uniform approach to the implementation of those norms by various international judicial organs. Possible ways of doing so might be studied by the Commission.

61. **Mr. Lwin** (Myanmar) welcomed the progress made on the topic of diplomatic protection and the fact that the Commission had embarked on four new topics. The codification of diplomatic protection was essential. The seven draft articles adopted on the subject struck a good balance between customary international law and progressive elements. Making nationality a condition for diplomatic protection was consonant with the theory and practice of customary international law and would also prevent abuses. The continuous nationality rule should be retained, but exceptions should be permitted in cases where its strict application would be unfair. The exhaustion of local remedies was a widely accepted rule of customary law and the domestic jurisdiction of States would be undermined if too many exceptions were allowed.

62. The growing number of international organizations meant that the question of their responsibility had become a highly relevant, albeit complex, subject. As a first stage, the Commission should focus its attention on the responsibility of intergovernmental organizations, because they were more similar in structure to state actors. The existence of articles on State responsibility would make it easier for the Commission to classify the concept of the responsibility of international organizations.

63. **Mr. Romeiro** (Brazil), referring to the topic of diplomatic protection, endorsed the definition in draft article 1 that established the peaceful settlement of disputes as its proper context. Also, since States exercised diplomatic action at their discretion, as established in draft article 2, it was not to be confused with action required in response to human rights issues. His delegation doubted the wisdom of expanding the scope of the draft articles; for example, enlarging it to encompass matters involving shareholders' rights, would pose considerable difficulties. However, with regard to the protection of crews at sea, although the United Nations Convention on the Law of the Sea,

taking a State-of-flag approach, covered some aspects of the question, other aspects might usefully be explored in the context of diplomatic protection. The welcome proposals on exhaustion of local remedies had quite properly made effectiveness the central criterion, setting it within the framework of reasonable possibility. Any exceptions should be very narrowly drawn, particularly where implicit waiver and the Calvo clause were concerned.

64. On the topic of unilateral acts of States, it was necessary not only to draw up a list of acts that qualified to be considered as unilateral acts but also to identify universally applicable general rules, and to specify which authorities could engage a State's responsibility. Specific rules should be adopted concerning the legal effects of such acts.

65. The topic of responsibility of international organizations provided a useful complement to the draft articles on State responsibility, and the choice of a definition geared to intergovernmental agencies was a positive start.

66. In connection with international liability for injurious consequences arising out of acts not prohibited by international law, the Commission had done well to take up the complementary issue of liability after completing the draft articles on prevention. Preventive measures were clearly insufficient once injurious consequences had occurred, nor did domestic civil liability legislation provide adequate guidance. Any regime covering losses must strike a fair balance between the rights and obligations of operator, beneficiary and victim, although the operator should bear the primary responsibility.

67. The work done on reservations to treaties should uphold the principle that reservations must not prejudice the integrity and spirit of the instrument in question, and should make the State the ultimate judge of the admissibility of a given reservation.

68. In its consideration of the fragmentation of international law, resulting from its recent diversification and expansion into new fields and the appearance of regional regimes catering to specificities, the Commission ought to focus on identifying existing structures and procedures for dealing with conflict of norms and determining how they could be adopted to fill the existing gap in the hierarchy of international norms. The topic did not lend itself to the draft article format and the approach to be taken in the proposed study should therefore be discussed further.

69. **Mr. Nguyen Duy Chien** (Viet Nam), welcoming the adoption of the draft guidelines on reservations to treaties, said that in its work on the topic the Commission should keep the reservations regime set out in the 1969 Vienna Convention and seek simply to clarify it. His delegation supported the Commission's position that reservations should be formally made and withdrawn in writing (draft guidelines 2.1.1 and 2.5.2); and that there should be a detailed wording concerning the competence to formulate and to withdraw a reservation (draft guidelines 2.1.3 and 2.5.5). It considered, however, that the depository of a treaty, being simply an impartial international custodian of reservations made or withdrawn, should not be entitled to assess whether they were submitted in due and proper form (draft guidelines 2.1.7, 2.1.8 and 2.5.2). Similarly, a State party to a treaty should not be obliged to take action on an inadmissible reservation based solely on the assessment of the treaty monitoring body concerned (draft guidelines 2.5.4 and 2.5.X).

70. With reference to international liability for injurious consequences arising out of acts not prohibited by international law, his delegation supported the principle of cooperative international action to prevent and minimize any transboundary harm caused to a State by activities carried out in the territory of another State. To the extent possible, the State in whose territory the hazardous activities were carried out had a responsibility to provide the State at risk with all the necessary information and technical data as to the possible transboundary harm that might occur.

71. **Ms. Dascalopoulou-Livada** (Greece) said that, among the possible issues connected with diplomatic protection, her delegation thought the Commission should indeed draft provisions to ensure that crew members were given diplomatic protection by the State of nationality of their ship, in view of the broad powers traditionally vested in flag States and the precedent established by the judgement of the International Tribunal for the Law of the Sea in the *M/V "Saiga"* case. On the other hand, the question of extending diplomatic protection to shareholders beyond the precedent established by the International Court of Justice in the *Barcelona Traction* case should, if only for practical reasons, not be included in the draft articles on the topic. Other questions that should be

excluded — because they belonged in another context, pertained to another branch of the law or were too minor — were the functional protection of their officials by international organizations; diplomatic protection by a State of the inhabitants of a territory it administered; and the delegation of the right to exercise diplomatic protection by one State to another State.

72. Regarding draft articles 1 to 7 on diplomatic protection which had been provisionally adopted by the Commission, Greece's only reservations concerned the overly broad exception established in article 4, paragraph 2, to the rule in the preceding paragraph, involuntary loss of nationality being the only acceptable condition. Also, it wondered whether article 6, which created an exception to article 5, should not be merged with it and, beyond that, whether the notion of predominant nationality, excluded elsewhere in the draft articles, should be upheld in that context.

73. Regarding draft articles 12 to 16 discussed by the Commission at its fifty-fourth session, her delegation was pleased that neither draft articles 12 or 13 on exhaustion of local remedies had been referred to the Drafting Committee, for they served no useful purpose. It agreed with the Special Rapporteur (A/57/10, para. 179 that in draft article 14, subparagraph (a), the third option was the most pertinent; conversely, unless the problems relating to implied waivers and estoppel could be solved, subparagraph (b) should be deleted. The voluntary link question dealt with in subparagraph (c) could probably also be deleted, while the territorial criterion in subparagraph (d) was useful, as was the reference to undue delay in subparagraph (e); subparagraph (f) should also be deleted since the issue it dealt with was adequately covered by subparagraph (a). Her delegation found draft article 15 redundant and believed that article 16, dealing with the problematical Calvo clause, should also be deleted in its entirety, because it considered that the clause violated the basic premise on which diplomatic protection rested, namely, that it could only be waived by the State, and because the text had failed to reconcile the rule with the exception represented by the clause.

74. The topic of unilateral acts of States, which was vast and complex, necessarily took the Commission into uncharted territory, although there was a considerable amount of relevant State practice. Unilateral acts of States undeniably generated international obligations for those States. In approaching the topic, the Commission should first study all the categories of unilateral acts, beginning with promise and recognition; then identify the common points and differences between the various categories; and only then proceed to identify the general rules that would be applicable. To attempt a reverse procedure would serve no purpose, and it would be premature to decide at the current stage on any international rule. Furthermore, at the end of the process, the general rules identified should be neither detailed nor exhaustive, but rather very basic, and open to completion at later stages.

75. **Mr. Dugard** (Special Rapporteur on Diplomatic Protection) said that the Committee's instructive comments, reflecting as they had the differences of opinion within the Commission as well, had highlighted the issues. He emphasized the importance of interaction between the Committee and the Commission, which must be guided by the Committee as to whether its assessment of State practice and *opinio juris* was accurate for the purposes of codification, and whether its proposals for progressive development accorded with the expectations of States.

76. He wished, however, to express one very serious concern: few comments, either in the Committee or in the written responses to the Commission, had come from the developing nations. Despite the constraints of smaller legal divisions within their Governments, their failure to express their views meant that the Commission was guided mainly by the developed nations, and especially the European nations. This would necessarily make its work dangerously one-sided. If the developing nations were unhappy with some of the Commission's interpretations they had a duty to say so, otherwise the Commission would assume that they acquiesced. A case in point was the contentious Calvo clause, once very important to the Latin American nations. The Commission would have liked to know if it was still seen as important, but only Mexico had spoken on the matter. Speaking as an African member of the Commission, he believed it was essential that the Commission should reflect widespread State practice from all regions.

The meeting rose at 1.05 p.m.