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Chairman: Mr. Baja . . . . . (Philippines)

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

Agenda item 152: Report of the International Law Commission on the work of its fifty-fifth session (A/58/10)

1. **The Chairman** acknowledged the contribution of the International Law Commission (ILC) to the progressive development and codification of international law in accordance with Article 13 of the Charter of the United Nations and mentioned the progress made by the Commission on a number of topics on its agenda, including some new ones. He drew the attention of Committee members to a letter from the President of the General Assembly concerning the joint Austrian-Swedish initiative designed to focus the Sixth Committee debate on the ILC annual report. That initiative dovetailed with the ongoing efforts to revitalize the General Assembly, which had the full support of the President of the Assembly. In his letter, the President of the General Assembly welcomed the fact that the Committee had decided to take that initiative into account.

2. **Mr. Candioti** (Chairman of the International Law Commission) introduced Part One of the ILC report on the work of its fifty-fifth session (A/58/10). That part included the three preliminary chapters and chapter XI, dealing with other decisions and conclusions. His introduction would also cover one substantive chapter — chapter IV — on the topic of responsibility of international organizations. He emphasized that the Commission's success in the codification of international law largely depended on the support that it received from the Committee.

3. In chapter III, the Commission identified the issues on which comments by Governments would be more useful, although some could be meaningfully understood only in the context of the background of the topic and the ILC discussions, which were summarized in the substantive chapters. At its recent session, ILC had made additional efforts to elaborate further on the issues. Since the topics were complicated, it had encouraged Governments to submit comments in writing on them after having an opportunity to examine them more carefully. The Commission was prepared to cooperate fully with the Committee to enhance the relationship between the two bodies and, in that connection, the Austrian-Swedish initiative was stimulating and should be taken into consideration.

4. With regard to chapter XI, the Secretary-General's report entitled "Improving the performance of the Department of General Assembly Affairs and Conference Services" (A/57/289) and paragraph 15 of General Assembly resolution 57/21 recommended page limits for reports of subsidiary bodies. However, in accordance with its statute, ILC had to justify its proposals to the General Assembly and, ultimately, to States; that meant that the draft articles or other recommendations in the reports of the Special Rapporteurs and in the report of the Commission itself had to be supported by extensive references to State practice, doctrine and precedents and accompanied by extensive commentaries. It would therefore be entirely inappropriate to decide in advance and in abstracto the maximum length of the reports of Special Rapporteurs or of the Commission's own report or of the various research projects, studies and other working documents. As confirmed by various resolutions of the General Assembly, ILC documentation should continue to be exempt from page limitations, although the Commission itself and its Special Rapporteurs were fully conscious of the need to achieve economies wherever possible in the overall volume of documentation.

5. The decision adopted by the General Assembly on the honoraria traditionally paid to members of the Commission was inconsistent with the principle of fairness and with the spirit of service displayed by members, and could seriously affect Special Rapporteurs from developing countries in the conduct of their necessary research work.

6. Also in connection with chapter XI, mention should be made of the International Law Seminar, the thirty-ninth session of which had been held at the Palais des Nations in Geneva and attended by 24 participants of various nationalities, mostly from developing countries. The Commission expressed its appreciation to those Governments that had made contributions to the Seminar and urged Governments to make financial contributions as soon as possible. He also thanked the ILC secretariat, the Codification Division of the Office of Legal Affairs, for its competence, efficiency and valuable assistance to the Commission. The importance of the role of the Codification Division in the work of the Commission rested not only on the high quality of the members of the Division, their hard work and commitment to the Commission, but also on the fact that the members of

the Division were involved in dealing both with the content and substance of work as well as with the procedural and technical aspects of servicing. That provided continuous and useful interaction and feedback between the Commission and its Secretariat. The fact that the Codification Division served also as the Secretariat of the Sixth Committee provided an invaluable and irreplaceable link between the two bodies. The Codification Division was thus in a position to be a source of information and unique expertise mutually beneficial for both bodies. That quality of servicing must be preserved.

7. The topic of responsibility of international organizations, which was dealt with in chapter IV of the report, had been added to the Commission's work programme the previous year and Professor Giorgio Gaja had been appointed Special Rapporteur. In his first report, submitted to ILC in 2003, the Special Rapporteur had noted that certain difficult issues relating to responsibility of international organizations had already been discussed by the Commission in the context of its consideration of the topic of responsibility of States for internationally wrongful acts. After considering the first report of the Special Rapporteur, ILC had indeed agreed that the topic of responsibility of international organizations was a sequel to the draft articles on responsibility of States for internationally wrongful acts. That did not mean, however, that the Commission would have to mimic those articles but rather that it would follow the basic trend established for the topic and depart from it when necessary. Nor did that agreement mean that the structure of those draft articles had to be followed.

8. The Special Rapporteur had proposed three draft articles that had been considered by ILC. Article 1 defined the scope of the draft and, while it covered all the issues to be addressed in the following articles, that was without prejudice to any solution that would be given to those issues. For instance, the reference in paragraph 2 to the international responsibility of a State for the internationally wrongful act of an international organization did not imply that such a responsibility would be held to exist. The reference to "international responsibility" made it clear that the draft articles examined the responsibility of international organizations solely from the perspective of international law. Issues of responsibility or liability under municipal law were not as such covered by the topic.

9. The definition of "international organization" in article 2 was not intended to be a general definition but was only for the purposes of the article. Although the term "international organization" had been defined in earlier conventions, the Commission had decided that those definitions were too limited, in view of the variety of organizations that considered themselves "international" and were operating across the globe carrying out various functions. Such organizations had a much broader membership, including non-State entities: clearly the topic could not cover them all, but it should also not be limited to intergovernmental organizations. The Commission had identified three elements as essential in order for an international organization to fall within the scope of the topic: the mode of establishment, the legal personality and the membership. As regards the first element, an "international organization" should be established by a "treaty" or "other instrument" governed by international law; that requirement emphasized the need for a clear expression of consent by the parties, since anything short of that clarity would make the definition too broad. The second element required that an international organization should possess "its own international legal personality", independent and distinct from that of its members. The third element, concerning membership, took account of the various forms of existing international organizations, while limiting the scope of the topic by requiring that among the members of an international organization there must be States. Article 3 stated the general principle governing the cases in which an international organization was responsible for its own internationally wrongful acts. The general principles in article 3 were modelled on those applicable to State responsibility.

10. The draft articles on State responsibility had eight articles (articles 4 to 11) on the question of attribution; some of the issues raised in those articles might also have to be dealt with in the context of responsibility of international organizations. In his 2004 report, the Special Rapporteur would deal with attribution, and it would be very useful to him and to the Commission to have the views of Governments on the following questions: (a) whether the general rule on attribution of conduct to international organizations should contain a reference to the "rules of the organization"; (b) if the answer was in the affirmative, whether the definition of "rules of the organization" appearing in article 2, paragraph 1 (j), of the 1986 Vienna Convention on the Law of Treaties between States and International

Organizations or between International Organizations was adequate; and (c) the extent to which the conduct of peacekeeping forces was attributable to the contributing State and the extent to which it was attributable to the United Nations. The Commission had decided to circulate its annual reports to some international organizations for their comments.

11. **Mr. Nesi** (Italy), speaking on behalf of the European Union, the acceding countries (Cyprus, Slovakia, Slovenia, Estonia, Hungary, Latvia, Lithuania, Malta, Poland and the Czech Republic) and the associated countries (Bulgaria, Romania and Turkey), said that ILC should take into account the diversity of international organizations when adapting the articles on State responsibility to the topic of responsibility of international organizations. In view of the specific nature of the discussion at the current meeting, it would be desirable for Mr. Ruijper, of the European Commission, to speak on the subject.

12. **The Chairman** invited Mr. Ruijper, of the European Commission, to address the Committee.

13. **Mr. Ruijper** (European Commission) said that the European Community was vitally interested in the question of responsibility of international organizations and realized that it could have special repercussions for its own activities. It was usually said that the European Community was not the "classic" type of international organization, for several reasons. Firstly, the European Community was not only a forum for member States to discuss and organize their mutual relations but also, in its own right, an actor on the international stage. For example, the European Community was a party to a number of international agreements with third countries within its areas of competence and often concluded such agreements together with its member States, with the peculiarity that both the Community and the member States assumed international responsibility in relation to their own areas of competence. In addition, the European Community intervened in international disputes, particularly within the framework of the World Trade Organization. Secondly, the European Community was governed by its own legal order. The rules adopted by virtue of the Treaty of the European Community were part of the national law of member States and were applied by their authorities and courts. In that respect, the European Community went beyond the normal parameters of classic international organizations, and it was therefore essential for the ILC draft articles fully to reflect the institutional and legal diversity of the structures existing in the international community. In that connection, he proposed that, when substantive issues were discussed and the relevant articles were being drafted, account should be taken of concepts such as that of "regional economic integration organizations", which were deeply rooted in modern treaty practice.

14. Although all international players, whether States or organizations, clearly had to assume international responsibility in the case of wrongful acts, that did not mean that the Commission's future work on responsibility of international organizations should not take into account diverse situations and structures such as that of the European Community, which to some extent was sui generis.

15. **Ms. Ertman** (Finland), speaking on behalf of the five Nordic countries (Denmark, Iceland, Norway, Sweden and Finland) said that the completion in 2001 of the work on State responsibility, which was one of the last items from the 1949 long-term programme of work and one of the major codification projects pending in the area of general international law, seemed to have left on the Commission's agenda a void that was hard to fill. She hoped that future topics would not be dealt with within a similar time frame and that ILC would move in the direction of more flexible action and more multifaceted topics. In addition, she noted a certain tendency to maintain on the agenda all topics that had ever been included, regardless of the progress made in their development, codification or even clarification.

16. She expressed particular concern about the conclusions drawn with regard to the topic of unilateral acts of States, which would be the subject of a separate debate. The Commission was again asking States to give it examples of State practice related to unilateral acts. She believed that the lack of information, due partly to the lack of focus on the part of the Commission, was one of the main obstacles to progress on the topic. In addition, although the proposal to redefine the scope of the study on unilateral acts so as to cover concepts such as estoppel and legitimate expectations was a fair attempt to make the topic more viable, the Nordic countries remained sceptical: since the Commission's work had not contributed to increased legal clarity in that area, they proposed that the topic should be removed from the agenda.

17. The topic of responsibility of international organizations was an offshoot of the topic of State responsibility, and the topic of shared natural resources had arisen in the course of the Commission's work on non-navigational uses of international watercourses. The three remaining topics — diplomatic protection, international liability and reservations to treaties — formed the traditional core of the Commission's agenda. With regard to diplomatic protection, the Nordic countries were glad that the principles derived from the judgement of the International Court of Justice in the *Barcelona Traction* case were being applied. Concerning diplomatic protection of a vessel's crew members, it was important not to inadvertently undermine the principles of legal certainty and predictability with regard to the law of the sea and maritime affairs, and there was little added value in attempts to explore new rules of diplomatic protection not derived from the law of the sea and other relevant areas of the law.

18. The issue of protecting vulnerable populations in situations of internal conflict or victims of other man-made or natural disasters responded to a real need in the area of international cooperation and should be the subject of legal regulation. The Nordic countries had supported the initiative of the International Committee of the Red Cross to identify the existing legal and soft law instruments specific to disaster response situations in the context of the "International Disaster Response Law" project. The Commission was well placed to go further, focusing on situations that were not covered or were inadequately covered by existing conventions. In that regard, it should work in close consultation with the International Committee of the Red Cross and other relevant actors. There was no point in restating existing law in areas where legal rules were clear and sufficient. Accordingly, the theme of collective security would be best discussed in the Special Committee on the United Nations Charter; otherwise the result might be politicization of the Commission, which was a body of legal experts and as such lacked the political authority to elaborate genuine compromises. The Nordic countries also saw no practical usefulness in the study on "the principle of aut dedere aut judicare".

19. Together with the topics entailing serious codification, the Nordic countries would welcome other more restricted projects, such as the preparation of authoritative opinions or learned studies, provided that they addressed issues that were problematic or in need of clarification; a good example was the topic of fragmentation of international law, which was connected with treaty law and with the overall coherence of the international legal system. The Nordic countries endorsed the work plan proposed by the Commission and were looking forward to receiving a substantive report on the topic in 2004. The time appeared ripe for the Commission to introduce certain changes in its agenda, which might ultimately affect its modalities of work, including the length of its meetings.

20. The relevance of the work of ILC depended not only on the choice of the topics on its agenda but also on the dialogue with Governments. Although in most cases the comments of Governments contributed to the deliberations of the Commission and were reflected in the choices made by the special rapporteurs and the Commission, that was not always the case. The other side of the coin was the quality and focus of the debate on the ILC report in the Committee. The proposal by the Governments of Austria and Sweden concerning the scheduling and duration of the debate and the timing of the publication of the report was feasible. The traditional formal debate, with long oral statements in the form of a succession of monologues, was hardly conducive to a meaningful exchange of views; the holding of direct and informal consultations, as proposed by those two Governments, would in no way preclude serious, in-depth study and comments on the Commission's work. In that context, the in-depth comments should be circulated in written form and the oral statements should be short and focused. In conclusion, she stressed the important role of ILC in the international law-making process, as well as its contribution to the strengthening of the international legal order. Unless changes were made in the way the Commission operated, the result might be stagnation and marginalization.

21. **Mr. Klingenberg** (Denmark), speaking also on behalf of Finland, Iceland, Norway and Sweden, said that the complexity of the topic of responsibility of international organizations had already been recognized by ILC in the 1960s, when it had decided to separate the topic of State responsibility from that of responsibility of international organizations, despite certain similarities between the rules applicable to them. In the draft articles on State responsibility, the Commission had developed important principles on international responsibility and the same approach

should be followed to the extent that the two issues were parallel, even if the conclusions were not necessarily identical.

22. Regarding the definition of international organizations, the rules on international responsibility had to be applicable to international organizations that were independent subjects of international law. An international organization existing only on paper or an organization that had not acquired sufficient independence from members in order to act as an organ common to those members would not objectively possess the personality necessary to incur responsibility; that question had been addressed in draft article 2, by the addition of the word "own" before the words "international legal personality".

23. The Commission correctly stated that it was probably not sufficient to rely on definitions from earlier treaties and that it was necessary to consider not only the legal nature of the constituent document but also the functions of the organizations to be covered by the rules on responsibility. Lastly, Denmark endorsed the ILC recommendation to exclude responsibility for acts not prohibited in international law from the draft rules under consideration.

24. The question of the attribution of conduct was perhaps legally the most difficult issue. Not only the scope of acts to be attributed to international organizations, but also the legal relationship between those organizations and their member States, would have to be established. In addition, no State or group of States should be permitted to hide behind an international organization in order to evade international responsibility.

25. A key element in defining which bodies acted on behalf of the organization was the "rules of the organization". The definition in article 2 of the Vienna Convention seemed to provide a reasonably concise and comprehensive delimitation, and it was important to emphasize that the reference to "established practice" would cover organs or entities acting de facto on behalf of the organization concerned.

26. The draft articles on State responsibility regulated in detail the question of attribution without specifically addressing the question of attribution to a State of an act of an international organization. The countries on whose behalf he was speaking believed that rules on responsibility of international organizations should also address the question of attribution of responsibility to an organization for member States' acts. Although State responsibility rules could provide some inspiration, new ground must be broken when defining to what extent a State or State organ could act as an organ of an international organization.

27. A more specific manifestation of the theoretical difficulties outlined was the question of attribution of conduct of peacekeeping forces; any answer to that question would have to be postponed until the Commission and member States had gathered sufficient information. In any case, the point of departure must be that the international responsibility of the United Nations for the activities of its forces was correlative to the legal personality of the Organization as bearer of international rights and obligations. Since the inception of peacekeeping operations, the United Nations had settled claims resulting from damage caused by members of the force in the performance of their official duties, which for reasons of the immunity enjoyed by the Organization and its members could not be submitted to local courts.

28. Similarly, when an operation authorized by Chapter VII was being conducted under national command and control, international responsibility for the activities of the force was borne by the State or States conducting the operation. On the other hand, in joint operations where one or more States provided forces in support of a United Nations operation, although not necessarily as an integral part thereof, it would be necessary to resort to the modalities of cooperation, including operational command and control arrangements between the States and the Organization, and to conduct an analysis of the activities that had led to the wrongful act. It would also be necessary to examine the possibility of regulating the question of concurrent responsibility in cases where the Organization assumed international responsibility vis-à-vis the host State but where the wrongful act was due to gross negligence or wilful misconduct by members of national contingents in the United Nations force.

29. Lastly, the definition of peacekeeping forces for the purpose of attribution of conduct must distinguish, for example, between the responsibility of an international organization when the peacekeeping force was deployed at the invitation of the host State and when the mission was deployed pursuant to a Security Council decision. In that connection, the question arose whether the issue of responsibility for the actions of

peacekeepers could be addressed through the establishment of procedural safeguards such as an ombudsman arrangement.

30. **Mr. Winkler** (Austria) said that Austria and Sweden had proposed some measures to make the Committee's discussions more interactive and stimulating, by making statements shorter and more focused and strictly relevant to the programme of work.

31. With regard to the definition of "international organization" for the purposes of the draft articles on responsibility of international organizations, he pointed out that the draft did not expressly define what was meant by international organizations but spoke of the "use of terms", which raised some questions. Firstly, it would be interesting to know whether entities created by international treaties but rather embryonic in nature would fall within the scope of the draft articles, and who would assume responsibility if one of those entities concluded headquarters agreements and failed to comply with them. Secondly, the requirement of "possessing its own international legal personality", rather than a precondition for being considered international seemed to be a legal consequence of being an organization. Opinions were divided: ILC seemed to consider that international organizations possessed international legal personality simply because they were such organizations, as confirmed by the preamble of the 1986 Vienna Convention on the Law of Treaties.

32. Thirdly, as host to several international organizations, Austria had closely examined several practical examples, such as that of the Organization for Security and Cooperation in Europe (OSCE). Although some authors maintained that OSCE was an international organization, negotiations to endow it with legal personality had as yet produced no results. Lastly, a further issue was the status of the European Union as distinct from that of the European Community — an issue that was still under discussion.

33. Austria agreed that a general rule on attribution of conduct to international organizations should contain a reference to the "rules of the organization" and even considered that the reference should possibly be included in a separate paragraph. In addition, Austria could accept the definition of "rules of the organization" as it appeared in the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. With regard to the extent to which the conduct of peacekeeping forces was attributable to the contributing State and to the United Nations, his delegation wondered whether it was wise to single out that issue, since there were significant differences between the various peacekeeping missions and their activities. Even if forces were considered to be subsidiary organs of the United Nations, some of their activities could not be attributable to the Organization. For that reason, it would be preferable for ILC to concentrate on elaborating general criteria for the definition of organs of an international organization, on the basis of which it could be decided, on a case-by-case basis, to which entity the activities of the peacekeeping forces were attributable.

34. Austria urged ILC to incorporate more substantive information in chapters II and III of its report. Chapter III should be a central part of the report, since it identified the issues on which the Commission requested the views of States. Finally, he recalled that, at the opening of the current session of the General Assembly, the Secretary-General had emphasized the need for a thorough reform of the structures and working methods of the United Nations. In that context, it was necessary to address the question whether the current structure of ILC and its working methods were still appropriate.

35. **Mr. Hayashi** (Japan) said that his delegation welcomed the initiative taken by Austria and Sweden concerning the improvement and revitalization of the discussions in the Sixth Committee, and would make more detailed and overall comments in writing on the subject of responsibility of international organizations.

36. The rules of international organizations varied from one organization to another. It was difficult to draw an analogy between the internal laws of a State and the rules of an international organization, as the Special Rapporteur had pointed out, so that rules of organizations could not be categorically transposed to internal law of a State. The rules of an organization included its internal decision-making process, its structure and relations among member States. Some of those rules governed relations between States and thus became part of international law. That was the case with the Charter of the United Nations, which was clearly a rule of the organization and at the same time an instrument of international law prescribing rights and obligations of Member States. It would therefore be too simplistic to compare the internal law of a State

and the rules of an organization. The Special Rapporteur had correctly emphasized the complexity of the rules of international organizations. It had rightly been decided not to use the relevant draft article as a model and not to replace the word "State" by "international organization" or the term "internal law" by "rules of the organization". It was evident that an act of any organ of an international organization should be regarded as that organization's act. In most cases, it was assumed that an organ of an international organization would be identified and defined by the rules of that organization. Therefore a certain reference to those "rules of the organization" could be useful in considering a general rule on the attribution of conducts to international organizations. It was important to make sure that the definition of such rules could be generally applied to international organizations, as there was a wide variety of bodies. In the case of organizations such as the United Nations, countries generally accepted the organization's legal personality, but others had often been questioned about their legal standing in international law, particularly when their legal personality was not clearly stipulated in their rules of organization. The definition of "rules of the organization" in the draft articles should encompass the wide variety of rules of the existing international organizations.

37. For the debate on the definition of "rules of the organization" in the context of responsibility of international organizations, a useful starting point would be to examine relevant provisions of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, adopted in 1986, and particularly article 2, paragraph 1 (j), giving careful consideration to the validity of its definitions in the current situation.

38. **Mr. Lammers** (Netherlands) said that the definition of "international organizations" as "intergovernmental organizations" was imprecise: unless a more precise definition was drafted, it would be unclear to which organizations the provisions on responsibility would apply and which organizations would be outside their scope. Since the proposed definition would be used in the future for different purposes, close attention should be paid both to the text of the definition and to the ILC commentary.

39. In the definition of "international organization", the word "organization" was repeated: "[…] the term 'international organization' refers to an organization […]". In order to remove that circularity, the definition should read: "[…] the term 'international organization' refers to a form of international cooperation […]", using the wording from paragraph (4) of the ILC commentary.

40. The proposed definition reflected reality because it was not limited to organizations established by treaty and included organizations created by other instruments governed by international law. The definition was too broad and raised the question whether any instrument governed by international law could be used to establish an international organization and whether there were other requirements to be met. More specifically, paragraph (4) of the commentary referred to resolutions adopted by the United Nations General Assembly but did not indicate which international organizations (as opposed to organs of the General Assembly) had been established in that way. International organizations could not be created by resolutions of the General Assembly, although the definition did not preclude the creation of international organizations through decisions of other international organizations. However, in the exceptional cases in which organizations could be created in that way, the relevant decisions must be binding and the creation of a new organization must be in accordance with the powers of the creating organization.

41. In paragraph (9) of its commentary, ILC referred to the 1949 advisory opinion of the International Court of Justice in the *Reparation for Injuries* case. The Commission observed that the Court appeared to favour the view that, when legal personality of an organization existed, it was an "objective" personality — in other words, recognition of such personality by an injured State was not necessary. At the same time, however, the Commission observed that "an organization merely existing on paper could not be considered as having an 'objective' legal personality under international law" and he wondered what an organization "merely existing on paper" was and how it could cause injury to States.

42. Lastly, paragraph (13) of the ILC commentary referred to entities other than States as members of international organizations and gave as an example the World Tourism Organization. In his view, that might lead to confusion. There was a need to define more precisely what was meant by "members" of an international organization, particularly because it was recognized that under certain circumstances members

of an organization could be held responsible for wrongful acts committed by "their" organization. That raised the question whether, in addition to full members of international organizations, other participants in their activities (such as associate or affiliate members) could also be held responsible. In his view, they could not. Responsibility for acts of the organization should be limited to full members — in other words, those that could participate with full rights (such as voting rights) in all activities of the organization and determine its acts and policies.

43. **Mr. Braguglia** (Italy) said that his delegation welcomed the fact that, following the submission of the first report, it had already been possible to adopt three articles. Those articles reflected the text approved on the international responsibility of States, and the Commission seemed to want to avoid the mistake made when the law of treaties had been codified of drafting a text that very closely followed the one adopted on the subject of States without taking sufficiently into account specific elements peculiar to international organizations.

44. The definition of international organization given in draft article 2 could have been worded differently. However, it did contain the essential elements. It was particularly important that the Commission was limiting its study to organizations of which States were members.

45. The Commission should formulate a general attribution rule mirroring the one in article 4 of the draft on State responsibility. The rule should indicate what should in principle be considered as organs of the organization, on the understanding that the issue was the status of organ for the purposes of attribution of the wrongful act and not in the sense of the internal law of the organization. The Commission could refer to the rules of the organization and would thus take into account not only the rules of internal law but also its established practice. Consequently, the Commission could reproduce, with a few changes, the definition given in article 2, paragraph 1 (j), of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. It would be desirable for the Commission to indicate clearly the extent to which established practice was decisive for the purposes of attribution, when it departed from the organization's constituent instrument.

46. Responsibility for wrongful acts by peacekeeping forces should in principle be attributable to the United Nations, except when the contingent remained under the control of the contributing State. It might happen that in certain cases a specific conduct should be attributed concurrently to the United Nations and to the contributing State. Once the question of attribution had been resolved, it remained to be determined whether it would not be necessary to consider the concurrent responsibility of the United Nations for actions attributed to the contributing State.

47. **Mr. Liu** Zhenmin (China) said that, with reference to the topic of responsibility of international organizations, China favoured redefining the term "international organization" and believed that the core element of that definition should be the concept of "intergovernmental" or "interstate".

48. States were the major actors in international relations: next to them, intergovernmental organizations also played a very important role in those relations and the various conventional instruments that had constituted the work of the Commission had always considered international organizations.

49. The statements made in the Committee during the fifty-seventh session of the General Assembly had widely acknowledged that the intergovernmental character of international organizations was the core element of the definition. Some believed that, since some international organizations included among their members not only States but also non-State entities, the definition should reflect those cases. In formulating the definition of "international organization", the Commission should follow general international practice and should not be concerned about a few special cases. China therefore believed that the definition should include the term "intergovernmental" or "interstate". The work on the topic of responsibility of international organizations should have as its main task the codification of the responsibility of intergovernmental international organizations.

50. With respect to the text of the definition, the commentary on draft article 2 referred to the view that the international legal personality of an organization was an "objective" personality. The problem with that reasoning was that it could be accepted only when a dispute arising from an injurious act by a certain organization against a certain State was settled through a third party, who could apply the draft article upon

confirmation of the international personality of the organization concerned without involving the injured State's recognition of the international legal personality of that organization. However, when the injured State requested the organization to assume responsibility directly through bilateral channels, and if it intended to invoke the draft article, it would be necessary to determine whether the organization was an international organization and whether it possessed international legal personality. The question then arose of recognition, or of subjective personality, and in that context it would be difficult to apply the argument of objective personality. After all, States had the fundamental right to determine whether an organization possessed international legal personality, on the basis of an analysis of all the objective facts relating to that organization.

51. The second sentence of draft article 2 ("International organizations may include as members, in addition to States, other entities") did not clearly set out the absolute supremacy of States in that type of organization and failed to guarantee the "intergovernmental" or "interstate" character of the organization or its possession of international legal capacity. The term "other entities" was also ambiguous: it could mean intergovernmental international organizations or non-governmental organizations, corporations, partnerships or even individuals. That not only unnecessarily expanded the scope of the study but also made it more difficult to determine the character of an organization. Since the first sentence of draft article 2 clearly defined "international organization", the Chinese delegation proposed the deletion of the second sentence.

52. In conclusion, even though the definition referred specifically to the topic of responsibility of international organizations, ILC should view the question from the perspective of the codification and progressive development of international law, with a view to enhancing the unity of international law.

53. **Mr. Abraham** (France) emphasized the usefulness of chapter II, concerning specific issues on which government comments would be of particular interest to the Commission. However, for delegations wishing to make detailed comments the existing situation was unsatisfactory, because of the late submission of the ILC report to States. Posting of documents on the Commission's web site, although practical, was also delayed and was no substitute for the rapid publication of the final documents in all the official languages of the Organization.

54. On the subject of the fragmentation of international law, the discussions in the Study Group had shown that the question could not be adequately debated without in-depth reflection on the machinery for dealing with the three patterns of conflict of existing norms. If the Commission had to create such coordination and harmonization machinery, it would be departing from its codification role; if, on the other hand, it limited itself to a descriptive analysis of the situation, that would be a purely academic exercise, extraneous to its mission. In addition, the provisional schedule of work on that topic was unrealistic, since it would be difficult to make a satisfactory analysis of the five subjects covered by the study and to formulate guidelines on their various aspects in the time allotted, in view of the sensitive nature of the issues raised.

55. The draft articles clearly delimited the responsibility of international organizations and established the general principles governing it. The definition of international organization was adequate for the purposes of the draft articles, although strictly speaking it should perhaps appear at the beginning of the text and not in article 2. The Commission had succeeded in striking the right balance between erroneous equation of international organization and intergovernmental organization and the desire to opt for a homogeneous definition of organization, even at the risk of excessively limiting the scope of the draft articles. The definition of organization included the two essential criteria: possession of its own international legal personality and inclusion of States among its members. However, that second criterion was confusing, and his delegation therefore suggested that that part of the definition should appear in a separate paragraph of the draft article, which could be worded in the following terms: "An international organization is composed of States and may, as the case may be, include among its members entities other than States".

56. With regard to relations between States and international organizations, France endorsed the approach adopted by ILC, which in article 1 provided that the draft would apply not only to the responsibility of an international organization, but also to the responsibility of a State for the internationally wrongful act of an international organization. In opting for a broad definition, ILC would have to deal with

extremely complex issues. In the first place, it would have to determine the cases in which conduct could be attributed to the international organization and not to the States and to consider the hypothesis of joint or concurrent attribution. At a later stage, ILC would have to decide whether the responsibility of the organization and of the State was joint, in solidum or secondary. Those issues were primarily, but not exclusively, the concern of the member States of the organization. That was perhaps why ILC had preferred to set aside all issues relating to the responsibility of a State for the conduct of an international organization in article 57 of the draft articles on responsibility of States for internationally wrongful acts.

57. Article 3 transposed to the responsibility of international organizations the general principles stated in articles 1 and 2 on responsibility of States for internationally wrongful acts — an analogy that was absolutely relevant in that case. It was to be hoped that ILC would continue to base its work on responsibility of international organizations on the draft articles adopted over the previous five years on responsibility of States. That did not mean that the solutions devised with regard to State responsibility should be systematically applied in the case of international organizations. Such organizations had their own institutional characteristics and very varied geographical scope and activities, whereas the text adopted in 2001 was based on a single concept of the State. When dealing with State responsibility for an internationally wrongful act, ILC had specified the essential features of the concept of responsibility in international law, and there was in principle no reason for it to change its stand.

58. Lastly, with regard to the issues on which the Commission wanted States to comment, ILC mainly wanted to know whether the general rule based on article 4 of the draft articles on State responsibility should include a reference to the "rules of the organization". The 1986 Vienna Convention had a definition of such rules that was a priori satisfactory, but ILC could consider the clarifications on the subject given by the Institute of International Law in the resolution adopted in Lisbon in 1995. France would have no objection to indicating that, for the purposes of attribution, the concept of organ included any person or entity which had that status in accordance with the rules of the organization. Such a provision, similar to the one included in article 4, paragraph 2, of the 2001 draft, would not exclude the possibility of a person or entity acting as an organ of the organization by virtue of international law, even if the person or entity did not possess that status under the rules of the organization. In that connection, the Commission had already referred, in the commentary to the articles adopted in the current year, to the complexity of the relations between international law and the internal law of an international organization, indicating more specifically that it had not yet decided whether its draft articles would apply to breaches of the law of the organization and, if so, to what extent. The scope of its work in that area would obviously be limited by the primacy of lex specialis. However, the internal law of international organizations depended on international law and could not be excluded a priori from the scope of the study undertaken by the Commission.

59. **Mr. Laufer** (Germany), after expressing his country's strong support for the initiative of Austria and Sweden, said that he would deal briefly with four topics: responsibility of international organizations, diplomatic protection, fragmentation of international law and international liability.

60. With regard to the first topic, the Commission had to clarify the conditions for attributing acts of an international organization to its member States, especially in areas in which States had transferred competencies to that organization. The question was of particular relevance to member States of the European Union. In Germany's view, that and other general questions concerning the responsibility of international organizations should be decided in the first instance, while specific situations such as responsibility for activities undertaken within the framework of peacekeeping operations were not a matter of first priority.

61. On the topic of diplomatic protection, ILC had in principle followed the reasoning of the judgement in the *Barcelona Traction* case, in which the International Court of Justice had held that the unrestricted exercise of the right to diplomatic protection by the State of which shareholders were nationals could give rise to competing claims on the part of different States. Germany believed that, for reasons of equity, a State should be able to take up the protection of its nationals who were shareholders in a company and who had been victims of a violation of international law when the company's national State was unable to act. With regard to the diplomatic protection of the members of a

ship's crew by the flag State, Germany believed that the basis for the exercise of diplomatic protection should not be limited to the solution adopted in the Convention on the Law of the Sea, which granted the exclusive right to exercise such protection to the flag State or the State of registration. Concerning the diplomatic protection of nationals employed by an intergovernmental international organization, Germany believed that the International Court of Justice had given clear guidance in its judgement in the *Reparation for Injuries* case, where it had held that the agents of an organization must be afforded effective protection, because only under that condition would they be able to carry out their mission. Regarding the conflict of competing rights to diplomatic protection between the State of nationality of the agent and the organization, the decisive criterion should be whether the internationally wrongful act was predominantly directed against the organization or the State of nationality of the acting agent.

62. Germany expressed appreciation to the Special Rapporteur for his first report on the legal regime applicable in case of loss from transboundary harm arising out of hazardous activities. In that context, Germany considered it essential to strengthen the "polluter pays" principle. States were under an obligation to implement fully international environmental provisions regulating the conduct of the operator. The procedural and substantive requirements in that respect depended on the hazardous activities concerned and should be based on the existing treaty regimes. The focus should be on two aspects: the question of allocation of compensable loss or damage to the environment and the determination of an evidentiary requirement providing proof of causation. The effective application of liability provisions presupposed that the term "damage" was narrowly defined. Regarding the significance of harm, the same threshold as defined and agreed in the draft articles on prevention should be applied. Germany maintained that strict civil liability should be supplemented by the obligation of States to adopt measures to prevent environmental harm.

63. Lastly, despite the problems and conflicts which it might cause, the fragmentation of international law also had positive aspects, since it clearly confirmed the variety of instruments existing in the field of human rights law or international environmental law. The Commission had therefore been right to alter the title of the topic. Germany was convinced that it was precisely because of current developments in global relations, and not in spite of them, that the continuous strengthening of international law was indispensable. His delegation agreed to the distinction between the institutional and substantial perspective of fragmentation, welcomed the Commission's concentration on the latter and believed that ILC should not act as a mediator between different judicial institutions. It was confident that those institutions would seize the opportunity to promote the effectiveness of international law by taking into account each other's jurisprudence and enhancing their cooperation.

64. **Mr. Gaja** (Special Rapporteur of the International Law Commission on the topic of responsibility of international organizations), replying to questions raised during the discussion, said that the Commission's work drew great benefit from the fact that it was collective in nature and only to some extent did it reflect the personal opinion of its members. Article 2 departed from the traditional definition of an international organization as an intergovernmental organization. The aim was to provide a functional definition for the purposes of the draft articles on responsibility of international organizations, in view of the imprecise nature of the traditional definition, and not to provide a general definition that could be applied to other situations, since that would require a more wide-ranging study.

65. The delegation of Austria had referred to the question of the permanent secretariats of conferences which was difficult to resolve in general terms and had also raised the question of the European Union as a separate entity from the European Community. The fact that the Union had been recognized as an international organization raised the problem of the Union's relations with the Community, which the members of the two entities were addressing in the forthcoming Constitution for Europe. He thanked the Netherlands representative for the information provided, particularly that relating to the examples given in the report. The definition proposed by the French delegation seemed to be more elegant than the Commission's text; however, it read more like a general definition than a description of what was meant by international organization for the purposes of the draft articles.

Agenda item 155: Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization (*continued*)

Draft resolution A/C.6/58/L.18

66. **Mr. Samy** (Egypt), speaking as coordinator of the work on the report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, introduced draft resolution A/C.6/58/L.18, which was a revised version of the draft resolution submitted the previous year and asked that it should be adopted by consensus.

The meeting rose at 12.45 p.m.