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## Sixth Committee

**Summary record of the 9th meeting**
Held at Headquarters, New York, on Friday, 7 October 2016, at 3 p.m.

*Chair*: Mr. Ahmad (Vice-Chair) . . . . . (Pakistan)

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16-17403 (E)

*In the absence of Mr. Danon (Israel), Mr. Ahmad (Pakistan), Vice-Chair, took the Chair.*

*The meeting was called to order at 3.05 p.m.*

**Agenda item 75: Criminal accountability of United Nations officials and experts on mission** (*continued*) (A/71/167)

1. **Ms. Kanchaveli** (Georgia) said that Georgian nationals and resident stateless persons who had committed an act abroad that was prohibited by the Criminal Code were criminally liable, whether or not the act was also considered to be a crime in the State in which it had been committed. A perpetrator could also be held accountable if the crime was of a serious nature and was directed against the interests of Georgia or if criminal accountability for the crime had been established by a treaty to which Georgia was a party.

2. Georgia was a party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Geneva Conventions of 1949 and Additional Protocol I thereto, and the Statute of the International Criminal Court, as amended by the Kampala amendments. Georgia had considerable experience in providing military contingents for peacekeeping operations. Although 20 per cent of its territory remained under illegal foreign military occupation, it continued to support international peace efforts across the globe.

3. Georgia had adopted a zero-tolerance policy regarding sexual exploitation and abuse and was committed to holding perpetrators accountable. In that connection, the Government had set up an inter-agency team in 2016 to investigate allegations of sexual abuse of minors involving members of foreign military forces in the Central African Republic, as reported by the Office of the High Commissioner of Human Rights. It had also provided information to and established direct contact with the appropriate United Nations bodies and officials and other stakeholders to that end. The inter-agency team of eight experts, including a prosecutor, an investigator, a psychologist, a lawyer and an interpreter, had travelled to the Central African Republic in June 2016 to conduct its investigation. It had witnessed the questioning of the alleged victims and the identification of the perpetrators and had cooperated closely with local and international organizations.

4. According to preliminary data from the investigation, there had been no indication that Georgian soldiers had been involved in criminal acts. If, upon completion of the investigation, the allegations were found to be unsubstantiated and the servicemen in question were found not guilty, Georgia would welcome a public denunciation of the allegations in order to protect the national honour of the accused persons.

5. Her delegation hoped that the approach and measures taken by her Government would become a part of United Nations best practices and would trigger a systemic change in the way the Organization dealt with such allegations.

6. **Mr. Guragai** (Nepal), recalling that his country was the sixth-largest troop-contributing country, said that United Nations officials and experts on mission must conduct themselves in a manner which preserved the Organization's image, credibility, impartiality and integrity. Criminal accountability was a core element of the rule of law, and perpetrators must be prosecuted so as to put an end to impunity.

7. Nepal supported the policy of zero tolerance in addressing all cases of sexual exploitation committed by United Nations personnel. However, it would be unfair for an isolated criminal act to discredit an entire peacekeeping mission or a troop- and police-contributing country. Instead, States should establish jurisdiction over such crimes, investigate allegations and exchange information in order to bring the perpetrators to justice, and provide special protection to victims and witnesses, in particular women and children.

8. Nepal had demonstrated its commitment to the principles of a fair, impartial and accountable criminal justice system by enacting legislation on mutual legal assistance and extradition. Triangular cooperation between the United Nations Secretariat, peacekeeping missions and host States was also important to ensure that swift action was taken in response to such cases. His delegation stressed the importance of predeployment and in-mission induction training for peacekeeping personnel on codes of conduct and respect for the law of the host country, and appreciated

the efforts of the Department of Peacekeeping Operations and the Department of Field Support in that regard.

9. The increasing number of female peacekeepers, which would help protect women and children from sexual exploitation and abuse during peacekeeping operations, was commendable. Nepal had been deploying as many female peacekeepers as possible. It had been implementing Security Council resolutions 1325 (2000) and 1820 (2008) for the protection of women in conflict, and welcomed the Security Council resolution 2272 (2016) in that regard.

10. **Mr. Harun** (Malaysia), referring to General Assembly resolution 70/114, said that, pursuant to paragraph 7 thereof, Malaysia had established extraterritorial jurisdiction over offences under the Criminal Code and offences specified in the schedule to its Extra-Territorial Offences Act of 1976 and over any other act that affected the country's security.

11. His delegation supported the call, in paragraphs 8 and 9 of the resolution, for cooperation among States and the United Nations in the exchange of information and the facilitation of investigations and prosecutions to prevent impunity for serious crimes committed by United Nations officials and experts on mission. However, the current legal regime in Malaysia did not allow for the sharing of evidence between Malaysia and an international organization or tribunal. Practical issues might also arise in connection with such cooperation with the United Nations, for example, including the need to determine the central authority within the Organization that would act as the conduit in channelling the information and evidence. Further discussion on best practices was needed if cooperation between States and the United Nations was to be effective.

12. With regard to paragraph 12, if it was deemed timely and appropriate to consider the draft convention prepared by the Group of Legal Experts, further study was needed to clarify such issues as the definition of the terms used, especially in relation to serious crimes, the scope of application, the types of offences and the principle of double criminality. The draft convention sought to eliminate that principle, even though double criminality was a requirement under Malaysian domestic law, as in many other jurisdictions. If the proposal was to be considered, strong legal justification must be presented and all facets of the principle must be discussed.

13. In respect of paragraph 15, his delegation noted the Secretary-General's commitment to refer to Member States for appropriate action all credible allegations of sexual exploitation and abuse, corruption or other financial crimes by United Nations officials or experts on mission. If the allegations were substantiated, an investigation would be conducted and the accused might be prosecuted. In such cases, the Secretary-General or the official in question would be the supplier of such information and a possible witness in the proceedings in the Member State's courts. That possibility must be explored more closely, as other legal and administrative issues might arise, such as the immunity of the Secretary-General or the official and the protection of such persons before local courts.

14. With regard to paragraph 16, there should be clear limitations on what information could be provided to the Secretary-General regarding the status of the investigation or prosecution of credible allegations, since such information raised confidentiality issues which might be prejudicial to States' interests.

15. **Mr. Atlassi** (Morocco) said that, as a troop-contributing country since 1960, Morocco believed that any offence committed by a United Nations official or expert on mission must be prosecuted in a court of the State of which the accused person was a national, and that United Nations personnel must respect the law of the host State, notwithstanding their privileges and immunities. States should continue providing the Organization with information and facilitating investigations and criminal proceedings in response to allegations.

16. It was important to strengthen the measures introduced by the United Nations and Member States to combat impunity, in particular the parallel measures being taken to prevent misconduct by enhancing the legal training that military and civilian personnel received on their criminal accountability under their domestic law and international law when offences were committed.

17. The United Nations and Member States had a shared responsibility to take more concerted action to combat sexual abuse. In that connection, his delegation

welcomed the efforts made by the Department of Peacekeeping Operations and the Department of Field Support to establish a strategy to eliminate all forms of reprehensible conduct through preventive measures; strengthen compliance with the United Nations rules conduct and the relevant Secretary-General's bulletins and administrative instructions on the topic; and to impose corrective measures where necessary.

18. Morocco had adopted a zero-tolerance policy with regard to sexual exploitation or abuse, with its Criminal Code imposing harsh penalties for any such act, regardless of the status of the perpetrator. Its contingent commanders were required to order an investigation upon receiving a complaint, or on suspicion of, sexual exploitation or abuse against any of their troops. If the allegation or suspicion was proven, disciplinary action was taken against the accused, and the United Nations was informed accordingly.

19. Morocco welcomed the training and awareness-raising activities organized by the United Nations to educate its officials and experts on mission about their obligation to respect the Organization's rules of conduct, the laws of the host State and the consequences of failing to do so. Since the legitimacy of United Nations actions hinged on the trust that the Organization enjoyed, every effort must be made to ensure that offences committed by its officials and experts on mission did not cause prejudice to the victims, the host country or the international community. Member States must cooperate to ensure that the perpetrators of such actions were punished, in keeping with the universal principles of fair trial, including the presumption of innocence, respect of the rights of the defence and victims' right to redress.

20. Lastly, if, following an administrative investigation, the allegations against an official or expert proved to be unfounded, the United Nations should take steps to restore that person's reputation, in conformity with paragraph 18 of resolution 70/114.

21. **Mr. Kabir** (Bangladesh) said that any allegations made involving United Nations officials and experts on mission should be investigated and the outcome shared in a transparent manner in order to set precedents in promoting accountability and breaking with the culture of impunity. Allegations must, however, be proved beyond a reasonable doubt before punishment was imposed. Member States must therefore cooperate with the United Nations with regard to their nationals against whom such allegations were made.

22. As a troop-contributing country, Bangladesh recognized the need for a zero-tolerance approach in addressing the problem of sexual exploitation and abuse. If an allegation involving one of its nationals was substantiated, Bangladesh took the appropriate disciplinary and criminal action, which could include withholding of pay and allowances and repatriation with immediate effect, in line with its domestic law. It shared information with the Secretariat on investigations and sanctions involving accused and convicted individuals, and it regarded remedial action in support of victims as a non-derogable responsibility. Its contingent commanders were held accountable for allegations against any of their team members and were instructed to pay regular visits to all camp locations. They were also empowered to punish offenders in the mission area. National investigation officers were deployed as required.

23. The objective of combating sexual exploitation and abuse could be met through predeployment training, systematic screening and oversight, and an effective investigation and prosecution system, which all required inclusive dialogue with all concerned, clear standard-setting and sustained investment in capacity-building. It was important that the lessons learned from various contexts should be captured objectively and that consultations should be held at the field level with all concerned in order to devise an appropriate response to sexual exploitation and abuse. Such issues must be made part of triangular consultations involving the Security Council, troop- and police-contributing countries and the Secretariat.

24. Bangladesh, together with other troop-contributing countries, had proposed that regular meetings should be held under the purview of the General Assembly to discuss the subject and to share Secretariat documents and guidelines with a view to enhancing transparency and ownership across the board. It would be counterproductive to take an approach of collective punishment for the misconduct of a few individuals. The media and other partners must be made aware of the need to uphold the image and credibility of peacekeeping missions while demanding accountability. A policy of zero tolerance

must also cover allegations of corruption, fraud, theft or smuggling.

25. **Ms. Nguyen** Ta Ha Mi (Viet Nam) said that her Government supported the Secretary-General's policy of zero tolerance for serious crimes committed by United Nations officials and experts on mission. Viet Nam stood ready to cooperate with the United Nations and with other States in investigating allegations of serious crimes involving its nationals, in accordance with its domestic law and the international treaties to which it was a party, as well as the relevant rules and regulations of the United Nations.

26. There had never been an incident or allegation of crimes or misconduct involving any of its nationals since Viet Nam started contributing troops to peacekeeping missions in 2013. Nonetheless, her delegation appreciated the predeployment and in-mission training provided to troops by both the United Nations and Member States. Viet Nam had entered into an agreement in 2015 to regulate the exercise of jurisdiction over crimes committed by its nationals in other countries. It also continued to enter into treaty relations with other countries on extradition and mutual legal assistance in criminal matters which provided for cooperation in the areas of investigation, sharing of information, gathering of evidence and prosecution.

**Agenda item 74: Responsibility of States for internationally wrongful acts** (A/71/79 and A/71/80)

27. **Mr. Ávila** (Dominican Republic), speaking on behalf of the Community of Latin American and Caribbean States (CELAC)), said that the working group established to consider the adoption of a convention on the basis of the articles on responsibility of States for internationally wrongful acts adopted by the International Law Commission was the right path to follow. Codifying the articles in a binding instrument could provide clarity and legal certainty by addressing existing gaps in international law, which would have a positive impact on the overall development of international law.

28. CELAC was pleased to note that the articles had been widely referred to by international and municipal courts and tribunals and that some of the articles had been regarded as reflecting customary international law. The adoption of a treaty on State responsibility would also have a positive impact on other priority topics, including diplomatic protection, which was linked to State responsibility.

29. Despite persisting differences of opinion, CELAC was convinced that a consensus agreement could be reached at a diplomatic conference and that the interests of the international community would prevail over the interests of individual States.

30. **Mr. Joyini** (South Africa), speaking on behalf of the African Group, said that the most recent debate on State responsibility in the Committee had revealed a strong plurality of States, across all regional groups, in favour of proceeding with the adoption of a convention on the topic. Those States argued that the articles had sufficiently consolidated the law on international responsibility to justify serving as the basis for an international convention.

31. A diplomatic conference to negotiate a treaty would allow for the participation of all States, further enhancing the political acceptance of the rules reflected in the articles, and provide a forum for reaching a consensus. It would not be necessary to renegotiate the provisions of the articles, which would serve as the "default" base text and many of the provisions would be accepted as part of the treaty. Any amendments to the basic text would have to be formally adopted through the established voting procedures.

32. Given that the articles enjoyed widespread recognition among Governments, tribunals and academic commentators as an authoritative restatement of existing customary international law, it was time for the Committee to start a process aimed at taking a decision on the question; further postponement would not change matters in any meaningful way.

33. A decision on the outcome of the articles on State responsibility would have an impact on the decision taken with respect to the articles on diplomatic protection. In 2013, the Committee had decided to await a decision on the articles on State responsibility before taking a decision on the articles on diplomatic protection. The two texts were linked in the sense that diplomatic protection embodied the discharge of State responsibility, and many States therefore wanted to tie the fate of the draft articles on diplomatic protection to that of the articles on State responsibility.

34. **Ms. Nyrhinen** (Finland), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that the articles presented a realistic way of codifying the current state of customary international law on the responsibility of States for internationally wrongful acts. The Nordic countries were pleased with the balance struck in the articles and commended the efforts to establish a public law enforcement system in the event of a breach of an international obligation.

35. The articles had become widely known and had been cited by lawyers, Governments and legal institutions, most notably the International Court of Justice, and had influenced both State practice and the jurisprudence of international courts and tribunals. Adopting the articles as an annex to a General Assembly resolution, as recommended by the International Law Commission, would make them the most authoritative statement available on questions of State responsibility. It would not be advisable to embark on negotiations on a convention at the current time.

36. The articles reflected a widely shared consensus about the international responsibility of States, even though there might be different views on specific details in that regard. Although a multilateral convention was in general an ideal instrument for guiding State action and creating legal certainty, the time was not ripe for a diplomatic conference. Reopening the articles might jeopardize their delicate balance. The articles also provided a framework within which the law could continue to develop. For the time being, there was no need for further action.

37. **Ms. Mackie** (New Zealand), speaking also on behalf of Australia and Canada, noted that international courts and tribunals increasingly used the articles on State responsibility as guidelines for their decisions and had ruled that many of the articles reflected international customary law. It would therefore be unhelpful to try to negotiate a convention on the basis of the articles. Should codification be attempted, there might be further disagreement over various aspects of the articles, which might dilute or undermine their influence.

38. The adoption of a resolution endorsing the articles, with the articles possibly attached as an annex, continued to be the most viable and most favourable approach. The debate must focus on ensuring that appropriate weight was given to the articles without undermining them.

39. **Ms. Diéguez La O** (Cuba) said that the topic of responsibility of States for internationally wrongful acts was of great importance for the progressive development of international law. Cuba supported all initiatives and proposals leading to negotiations on the adoption a convention on the basis of the articles adopted by the International Law Commission. Although the articles contained important norms of customary international law that enjoyed broad international recognition, efforts should still be made to elaborate a convention.

40. The reports of the Secretary-General (A/71/79 and A/71/80) and information and observations received from Member States showed that a number of States were reluctant to move ahead with codification of those norms, arguing that opening up the text to negotiation might jeopardize the current consensus on the binding nature and acceptance of the articles, and upset the delicate balance in the text. There was also a risk that some States would not ratify or see any benefit in adopting such a convention. However, certain States were delaying the adoption of a convention simply as a way of continuing to evade their responsibility and to act with impunity, owing to the absence of clear international obligations on the topic. Court rulings in those same States were often ambiguous and contradictory, because decisions on such a crucial issue were left in the hands of judges who were free to interpret the articles as they chose.

41. Cuba continued to support a biannual consideration of the topic by the Committee and the elaboration of a convention on the basis of the articles which did not affect the delicate balance of the current text. An international instrument would enhance the effectiveness of the legal institutions envisaged in the articles, establish binding criteria for States and help curb the dangerous trend towards unilateral action by certain States, in violation of the Charter and the principles of international law. It would also help to protect States that were the victims of wrongful acts committed by other States, including acts of aggression and genocide.

42. Her delegation urged States that were violating international law to sign an international convention on

the topic and to lend greater support to judges in their pursuit of international justice.

43. **Mr. Celarie Landaverde** (El Salvador) said that the articles on responsibility of States for internationally wrongful acts reflected the crystallization of the concept of State responsibility as a principle of international law and of the customary nature of a number of their provisions. The articles were the result of the arduous and methodical work of codification and progressive development undertaken by the International Law Commission, with the participation of important jurists and experts.

44. That work had demonstrated that the topic concerned the international community as a whole and that, under contemporary international law, all States, without exception, were bound by those norms. Given the limits inherent in the international context, it was not possible for a State to enter into a relationship with another subject of international law without any requirements as to its conduct or without its acts having any consequences. There was therefore a need to start building a balanced framework of international law comprising existing primary norms in all their diversity and new norms regulating the consequences of non-compliance with those norms; otherwise, a major normative system would continue to exist without any enforcement mechanism.

45. The adoption of an international instrument in this area would allow for safeguards and satisfactory outcomes, consistent with the rule of law, with respect to the commission of wrongful acts, thereby reducing the tendency to resort to the use of force to resolve international conflicts. In that connection, his delegation reaffirmed its support for the holding of an international conference aimed at drafting such an instrument, which would have more lasting and beneficial effects than a declaration or a resolution, and would provide greater uniformity and legal certainty on the topic. His delegation would do its utmost to ensure that concrete decisions were taken on the articles at the current session, especially with respect to their final and binding form.

46. **Ms. Morris-Sharma** (Singapore) said that her delegation continued to question the desirability of providing a legal regime for countermeasures within the framework of State responsibility because of their potentially negative implications. The issue of countermeasures was more appropriately addressed in a specialist forum. While working on the articles, the International Law Commission had considered the option of deleting the provision on countermeasures, but had ultimately decided not to do so. Minor changes from earlier drafts had not been sufficient to address the concerns that her delegation had raised.

47. As the articles addressed a complex area of law and principles underpinning the relationship between States in the international arena and formed the foundation of the Commission's work on the responsibility of international organizations, any decision on their future form must be taken by consensus of the international community as a whole, on the basis of informed and shared understandings.

48. **Ms. Melikbekyan** (Russian Federation) said that her delegation continued to favour the adoption of a convention based on the articles on responsibility of States for internationally wrongful acts, which could well assume the same importance as the Vienna Convention on the Law of Treaties. The articles were applied actively in practice as norms of customary international law and provided important guidance for international judicial bodies. By and large, they constituted a careful, balanced document which could provide a good basis for future consideration. Her delegation was ready to contribute to the goal of elaborating a convention on the subject.

49. **Mr. Medina Mejías** (Bolivarian Republic of Venezuela) said that the topic of State responsibility was of fundamental importance for preserving the international order, developing relations between States based on respect and equality, and strengthening the rule of law at the international level. The work of the International Law Commission on the articles on State responsibility should culminate in the adoption of a legally binding international instrument on the basis of the articles, which would become a basic pillar of contemporary international law.

50. Given the importance of the topic, his delegation was pleased that it remained on the agenda of the General Assembly and believed that it was ripe for codification. The Committee should take steps to adopt the articles in the form of a binding international convention, even if its final form and some of the articles required further negotiations.

51. **Ms. Sornarajah** (United Kingdom) said that the articles on State responsibility covered a range of sensitive and controversial topics and sought to reconcile the differing views of States. While some articles had codified existing customary international law, others represented progressive development. Courts and tribunals had chosen to draw on some of the articles to resolve issues arising in cases before them. It was not possible to identify the consensus view on certain key questions or to draw firm conclusions as to whether some aspects of the articles reflected customary international law — hardly surprising, given the breadth, complexity and controversy of many of the issues covered.

52. State practice in the area continued to evolve, and areas of uncertainty and disagreement remained. It would be dangerous to press ahead with a convention during the process of the natural development of customary international law. The very premise upon which codification was founded, namely that customary international law was settled, would be absent. The process of elaborating a convention would highlight and exacerbate the differences of approach, thereby threatening the very coherence that the articles sought to and did indeed instil.

53. The articles could not be said to capture the state of customary international law in its entirety at the current stage. A convention which adopted the articles would be premature and likely counterproductive. A better course of action would be to defer discussion once again until the remaining issues were resolved, and to return to the topic once customary international law was settled.

54. **Mr. Avraham** (Israel) said that negotiations on a convention based on the articles on State responsibility were currently inadvisable, since they were likely to unravel the fragile balance struck in the wording of the articles. As they stood, the articles provided effective guidance to Governments and international bodies seeking to resolve sensitive issues of international law. Like other States, Israel was in favour of the progressive development of that important body of law, but the articles should be permitted to develop organically, not through multilateral treaty negotiations or international conferences that were not likely to achieve universality, but through their affirmation in the marketplace of jurisprudential ideas.

55. In their non-binding form, the articles were gaining the respect of scholars and the imprimatur of judicial and arbitral courts and tribunals, and Governments were using them as a guide in formulating their legal views. It was therefore difficult to see what would be gained from the adoption of a convention at the current juncture.

56. **Mr. Remaoun** (Algeria) said that State responsibility for an internationally wrongful act was a fundamental principle of international law, arising from the principles set out in the Charter of the United Nations, such as the sovereign equality of States and the peaceful settlement of disputes, and from the legal concept of bona fide, which was particularly relevant in matters of equity.

57. The articles concerning reparation for injury enhanced the rule of law and access to justice at international level. Given the growing use and increasing acceptance of the articles by international courts, tribunals and other bodies and in State practice, the time was ripe to convene a diplomatic conference to adopt an international convention on State responsibility. Algeria fully supported the development of a universal instrument on that topic.

58. Although some delegations had doubts as to the need for a legally binding instrument, it was important to show flexibility and avoid prejudging the outcome of negotiations as part of a diplomatic conference. The working group would be an excellent forum for discussing the possibility of holding such an event.

59. **Ms. Pucarinho** (Portugal) said that the adoption of a convention on State responsibility would be the best way forward, as recommended by the International Law Commission itself, which would give States a leading role in international law-making on such a crucial topic. It was important to take an informed decision on whether to open negotiations on a convention. The adoption of a legal instrument on the topic would help to ensure respect for international law and promote peace and stability in international relations.

60. States must not be overcautious in that endeavour, since the only concern was to establish the consequences of international wrongful acts and not to provide a definition of the wrongful act itself. State responsibility pertained only to secondary rules and not

the primary rules that defined the obligations of States. Persuasive evidence of the appropriateness and fundamental need to move ahead could be seen in State practice and the decisions of international courts and tribunals, including the case law of the International Court of Justice, as well as in the reports of the Secretary-General. Moreover, it would be senseless not to proceed with the development and codification of State responsibility, as was the case with the topics of diplomatic protection and responsibility of international organizations, when the main principles that guided the development of those topics were the same as those that applied to State responsibility. The articles on State responsibility should therefore be adopted as a binding international convention.

61. Portugal remained open to discussing the intermediary steps that could be taken to help better identify the points of agreement and disagreement and to begin the process of drafting a convention. The Working Group on the topic could discuss such issues as the periodicity of its meetings, which could be on a yearly basis to allow a thorough and step-by-step discussion on whether to adopt a convention or to take other action; the possibility of requesting the Secretary-General to prepare an options paper on the different methods of work and procedures for structuring the discussions, based on the practice of previous codification processes, and without prejudice to any particular outcome; ways of identifying the main concerns of Member States regarding the substance of the articles; and ways of establishing a list of substantive issues to be put in the agenda of the Working Group for discussion, bearing in mind that the articles should serve as the basis for an international convention and that most of them reflected customary law and were accepted by States.

62. **Mr. Kolliopoulos** (Greece) said that the articles on State responsibility constituted a solidly reasoned and balanced text and had become the most authoritative statement available on the topic. They had gained considerable recognition and had been widely referred to in the decisions of the International Court of Justice and other international courts and tribunals. The articles codified customary rules on State responsibility, thus filling a large gap in existing international law. They strengthened the notion of the international community as a whole, promoted the notion of peremptory norms of international law, as envisaged in the Vienna Convention on the Law of Treaties, and the regime of responsibility for grave violations of such norms; they also dispensed with the notion of damage as a condition for the attribution of responsibility.

63. Those positive elements had been highlighted in State practice and international jurisprudence. As it stood, the text reflected a carefully achieved compromise and, ideally, it should take the form of an international convention in order to provide States with authoritative regulatory guidance. However, the elaboration of a convention should not jeopardize the delicate balance of the text, which must remain without any changes to its substantive provisions, some of which contained important compromises with regard to complex and at times controversial legal questions.

64. **Mr. Nasimfar** (Islamic Republic of Iran) said that State responsibility was the backbone of international law and a cornerstone of the rule of law in international relations and a very important topic for his delegation. Most of the provisions of the articles on the topic were an expression of customary international law. Article 50, paragraph 1 (a), for example, specified that countermeasures must not affect the obligation of States to refrain from the threat or use of force, a principle embodied in the Charter of the United Nations. That provision not only reflected existing international law but was also consistent with a number of authoritative pronouncements in international case law, including the judgments of the International Court of Justice concerning the *Corfu Channel* and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* cases. Article 50, paragraph 1 (b), which stipulated that countermeasures must not affect obligations of States to protect fundamental human rights, could bring more assurances concerning respect for the fundamental needs of individuals living in the State, including health care and education etc.

65. On the other hand, article 48, for instance, reflected the progressive development of international law. His delegation had taken note of the position of some countries which had challenged the customary nature of that provision. It had also taken note of the separate opinion of Judge Skotnikov in the 2012 judgment of the International Court of Justice in *Questions relating to the Obligation to Prosecute or*

*Extradite (Belgium v. Senegal)*, where he had noted that State practice in that regard was absent and that there was no precedent in which a State had instituted proceedings before the Court or any other international judicial body in respect of alleged violations of an *erga omnes partes* obligation simply on the basis of it being a party to an instrument similar to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In its judgment, the Court did not refer to the articles on State responsibility adopted by the International Law Commission. Article 48 therefore needed to be further clarified in light of State practice.

66. With regard to future action, the only way of ensuring that the rules of State responsibility were clear and known to all subjects of international law was by crystallizing the articles in the form of a legally binding treaty. A convention could contribute to legal certainty and better application and promotion of international law. The time was ripe to convene a diplomatic conference to negotiate and adopt such an instrument. A dispute settlement mechanism should also be included in the future convention, to bring certainty and predictability to the application of the convention and prevent abuse in the form of excessive or unjustified invocation of countermeasures against other countries.

67. **Mr. Horna** (Peru) said that State responsibility was a fundamental principle of international law stemming from the sovereign equality of States. States were equal in both their rights and their obligations. The articles on State responsibility reflected the relevant work of codification and progressive development carried out by the International Law Commission over many years. They had acquired considerable authority, as reflected in the growing number of decisions by international courts, tribunals and other bodies in which they had been cited. In fact, it could be said that some of the articles even reflected customary international law. His delegation would participate constructively in the efforts of the working group to decide whether to adopt a convention based on the articles or to take another measure.

68. **Mr. Harun** (Malaysia) said that his delegation was concerned about some of the provisions of the articles on State responsibility, such as article 7 on ultra vires conduct. There did not seem to be any reference to the articles in any of the international cases to which Malaysia was a party. Nonetheless, opening up the text to negotiation at the current time might unravel the fragile balance in the wording of the articles. Such a convention was unlikely to attract universal participation, thus defeating the very purpose of such an instrument. The articles had proved to be useful in their current, non-binding form as a guide for States and international courts and tribunals, and they needed to be carefully examined before a decision was taken on whether to negotiate a convention.

69. As they stood, the articles could only be considered as guidelines, because the current formulation of their central provisions, such as article 2 (Elements of an internationally wrongful act of a State), article 28 (Legal consequences of an internationally wrongful act) and article 31 (Reparation), lacked the clarity and precision needed for them to be interpreted accurately. States should therefore continue to acquire wider experience with the application of the articles in practice.

70. **Ms. Pierce** (United States of America) said that her delegation continued to believe that the articles were most valuable in their current form and that the General Assembly should not take further action at the current time. The negotiation of a convention based on the articles would not bring additional authority or clarity. Although the Secretary General's report (A/71/80) demonstrated that the articles had already become a helpful guide for international courts and tribunals, States and legal experts on both the state of the law and how it might be progressively developed, the negotiation of a convention risked undermining the very important work undertaken by the International Law Commission in crafting the articles. Particularly worrisome was the prospect that such an instrument might deviate from important existing rules or ultimately not enjoy widespread acceptance by States. Consequently, the best option was to allow the articles to guide and settle the continuing development of the customary international law of State responsibility.

71. **Mr. Arrocha Olabuenaga** (Mexico) said that some of the provisions of the articles on State responsibility codified norms of customary international law and that their development as international custom should continue. However, given the shortcomings inherent in that process, including

legal uncertainty, a conference should be convened to adopt the articles in the form of an international treaty. Failure to codify those secondary norms could cause an imbalance when compared with the extensive codification that had taken place with regard to primary norms, ultimately hampering the coherency and effectiveness of international law.

72. Despite the differences of opinion on the fate of the articles, it should be possible to move ahead with the codification and progressive development of the topic. The Secretariat could make a useful contribution in that regard if it elaborated a document on possible options, bearing in mind past practice, and a document listing the issues that continued to be contentious; both documents could be discussed in the Working Group on State responsibility.

73. **Mr. Shi** Xiaobin (China) said that the responsibility of a State for its internationally wrongful acts was an essential component of the rule of law and a universally accepted norm of customary international law. A definition of the rules of international law on State responsibility was of great importance for preventing and deterring internationally wrongful acts, maintaining the rule of law at the international level and upholding equity and justice. The articles on State responsibility had comprehensively codified the rules on the topic. Over the years, they had been repeatedly invoked by such international judicial institutions as the International Court of Justice and had had a significant bearing on the diplomatic practice of States. The rules of international law that they embodied had been tested repeatedly in practice.

74. Although the articles seemed quite mature, Member States still had different understandings and concerns with regard to some of their provisions, such as those concerning serious breach of an obligation arising under a peremptory norm of general international law, countermeasures, and measures taken by States other than an injured State.

75. Further discussion on the articles should be encouraged in order to achieve a consensus. His delegation would view positively and with an open mind any efforts to that end, including the possibility of negotiating a convention.

**Agenda item 79: Diplomatic protection** (A/71/93 and A/71/93/Corr.1)

76. **Mr. Ávila** (Dominican Republic), speaking on behalf of the Community of Latin American and Caribbean States (CELAC)), said that diplomatic protection, as a well-established institution of international law, was of major importance in relations between States. The International Law Commission had made a permanent contribution to the codification and progressive development of international law with its articles on diplomatic protection. Many of those articles reflected State practice and were recognized as customary international law, hence the need to work towards the adoption of an international convention to harmonize State practice and jurisprudence on the topic.

77. A convention would address loopholes in international law and serve to promote legal certainty and predictability. It would also enhance the rule of law at all levels and contribute to the peaceful settlement of disputes, since the articles would not be applicable if they were inconsistent with special rules of international law, such as treaty provisions for the protection of investments. A convention would also contribute to the codification of international human rights law, including the protection of refugees and stateless persons, and guarantee the right of every State to protect its nationals by invoking the responsibility of other States for injuries caused by their internationally wrongful acts against its nationals.

78. CELAC recognized the link between the articles on diplomatic protection and the articles on State responsibility. Progress in the area of State responsibility would facilitate the work on diplomatic protection.

79. **Ms. Elmitt** (Australia), speaking also on behalf of Canada and New Zealand, said that, in their current form, the articles on diplomatic protection provided valuable guidance to States and international bodies. It would not be appropriate to adopt a convention at the current time. The process of negotiating such an instrument could undermine the influence and value of the articles by opening up debate on their content.

80. The articles on diplomatic protection were closely bound to the articles on State responsibility, as recognized by the International Law Commission in its

commentaries to the articles on diplomatic protection, where it had noted in particular the provisions dealing with the legal consequences of an internationally wrongful act.

81. In the absence of a clear consensus on the elaboration of a convention on the basis of the articles on State responsibility, it would be premature to commence negotiations on a convention based on the articles on diplomatic protection. Certain aspects of the articles on diplomatic protection went beyond existing customary international law on the topic, and there was unlikely to be an international consensus on whether those aspects should be made the subject of a convention.

82. Nonetheless, the International Law Commission's work on the articles was valuable in clarifying and developing customary international law on diplomatic protection. The articles served a useful purpose in settling State practice in that important area.

83. **Ms. Diéguez La O** (Cuba) said that the adoption of a convention based on the articles on diplomatic protection would make it possible to harmonize existing practices and jurisprudence on the topic, including the decisions of the International Court of Justice. Cuba attached great importance to those articles, which would also reflect the norms and principles of customary State practice. Such a convention would contribute to the codification and progressive development of international law, in particular the consolidation of the norms concerning criteria that must be met before diplomatic protection could be requested.

84. Unfortunately, not all States used diplomatic protection appropriately as a subsidiary mechanism for protecting the rights of their nationals; indeed, some States sometimes used it as an instrument to apply pressure on certain specific States and to promote their transnational economic interests. The exercise of diplomatic protection was a sovereign right of States and a vital tool for promoting the rule of law at all levels and protecting human rights and fundamental freedoms more effectively. The recognized applicability of diplomatic protection to refugees and stateless persons was invaluable in protecting the rights of those vulnerable groups.

85. The articles on diplomatic protection helped in particular to strengthen the rule of law at the national level, since they stipulated that all local remedies must be exhausted before diplomatic protection could be exercised. An international convention on diplomatic protection would strengthen the right of a State to invoke, through diplomatic action or other means of peaceful settlement the responsibility of another State for an injury caused by internationally wrongful act.

86. The articles on diplomatic protection were closely linked to the articles on State responsibility. The purpose of diplomatic protection was to protect the rights of individuals in the event of an internationally wrongful act of another State, the latter being set out in the articles on State responsibility. Accordingly, both sets of articles were of equal importance in ensuring better compliance with international law.

87. The articles on diplomatic protection should be considered by the Working Group, which could meet during the current session of the Committee to work out the details of the future convention based on those articles, improve the text of the convention and ensure the broadest possible consensus among Member States.

88. **Mr. Celarie Landaverde** (El Salvador) said that diplomatic protection had evolved considerably due to changes in international law over the past century, but it had the merit of having been developed on the basis of the affirmation of the equality of States as a way of ensuring recognition of and reparation for injury caused to the nationals of another State.

89. Although diplomatic protection had emerged at a time — since past — when individual rights were not been recognized at the international level, it remained an effective tool for protecting the rights of both individuals and States in the contemporary legal context. In that connection, the norms on diplomatic protection were compatible with the norms on State responsibility and the jurisdiction of international tribunals.

90. Given the important safeguard function of diplomatic protection in international law, his delegation was prepared to make every effort to ensure that the articles could be adopted as a binding international instrument, provided that the need to strengthen the protection of human rights and to guarantee the right of States to protect their nationals

was recognized. Nonetheless, his delegation was amenable to adjustments being made to the text, to make it more effective, and had included a number of recommendations to that end in its written report. In particular, it was important to reflect the link between the discretional right to exercise diplomatic protection and the practice recommended in article 19. To achieve a proper balance between those elements, articles 2 and 19 should be connected either by placing them together elsewhere or by rewording them to make it clear that they were directly linked.

91. **Ms. Melikbekyan** (Russian Federation) said that the articles on diplomatic protection struck a good balance between codification and progressive development of international law. They clarified such issues as the definition and scope of diplomatic protection, the right of States to exercise diplomatic protection, the nationality of persons subject to diplomatic protection and the diplomatic protection of corporations. They were a good complement to the articles on State responsibility and could serve as a basis for the elaboration of an international convention. Her delegation was prepared to examine other ways of making the articles legally binding, including in the context of discussions on the fate of the articles on State responsibility.

92. **Ms. Sornarajah** (United Kingdom) said that the fate of the articles on diplomatic protection was closely bound up with that of the articles on State responsibility, an opinion shared by the Special Rapporteur on the topic.

93. Article 1 defined diplomatic protection in terms of the invocation of the responsibility of another State, and the provisions of the articles could be seen as giving content to the admissibility requirements of article 44 of the articles on State responsibility in the specific context of diplomatic protection. Given the absence of a consensus for a convention based on the articles on State responsibility, a decision to begin negotiating a convention in respect of the articles on diplomatic protection would be premature.

94. The articles on diplomatic protection went beyond codification of customary international law and contained elements which amounted to progressive development, some of which would conflict with current practice in her country and would not constitute a desirable change in the law. In particular, the apparently non-binding article 19 (Recommended practice) seemed inappropriate for inclusion in a treaty and risked undermining States' wide discretion to decide whether or not to exercise diplomatic protection.

95. The drafting of a convention should not be seen as the only possible outcome. The most appropriate final form of the articles was that which best served the development of the law, which would be best achieved by continuing to allow the articles to inform and influence State practice. Consideration of the agenda item should therefore be deferred until it was clear that the time was ripe for further action by the Committee.

96. **Mr. Colaço Pinto Machado** (Portugal) said that diplomatic protection had an important function as a last-resort mechanism for the protection of human rights and that its main rules were ripe for codification. Although there was a recognizable trend towards giving greater autonomy and capacity to individuals and groups to assure the protection of their own rights, diplomatic protection exercised by States continued to be an important remedy for individuals. The articles on diplomatic protection were suitable for an international convention, although certain aspects could still be improved. However, as there was a clear link between diplomatic protection and State responsibility, the two processes regarding both topics should be considered in tandem and should lead to the drafting of two parallel conventions, which would represent a major step for the consolidation of the law on international responsibility.

97. **Mr. Low** (Singapore) noted that several States continued to have reservations about adopting a convention based on the articles on diplomatic protection at the current time.

98. A number of aspects of the articles suggested the need for caution. In its commentaries, the International Law Commission had recognized that several of the articles represented progressive development of the law rather than codification of existing customary international law, including parts of article 5 (Continuous nationality of a natural person), article 8 (Stateless persons and refugees) and article 15 (Exceptions to the local remedies rule). Some States had also expressed the view that parts of article 10 (Continuous nationality of a corporation), article 11 (Protection of shareholders) and article 16 (Actions or

procedures other than diplomatic protection) might not reflect customary international law.

99. The topic was closely interlinked with several other important areas of international law, such as responsibility of States for internationally wrongful acts, as explicitly acknowledged in the commentaries to the articles. The articles provided a useful reference point for further discussions. Ultimately, any legal framework on diplomatic protection must be constructed on the basis of an international consensus and mutual understanding for it to have a solid foundation and stand the test of time.

100. **Mr. Nasimfar** (Islamic Republic of Iran) said that any legal regime on diplomatic protection must observe a proper balance between the rights of individuals and those of States. It was doubtful that the current articles on diplomatic protection could allay those concerns.

101. Some of the articles could not be said to reflect customary international law. For instance, articles 7 (Multiple nationality and claim against a State of nationality) and 8 (Stateless persons and refugees) had been formulated either on the basis of the case law of regional tribunals or of sui generis tribunals, which could hardly reflect existing general international law. In its commentary to article 7, the International Law Commission explained why it used the word "predominant" instead of "dominant" or "effective" nationality to convey the element of relativity. However, it would be difficult to define a criterion for establishing the predominance of one nationality over another.

102. Thus, instead of proposing a normative solution, article 7 only increased the uncertainty and ambiguity around the topic. It was also contrary to the Constitutions of countries which did not accept dual nationality or did not recognize the legal effects arising from the secondary nationality of their citizens. In those cases, the exercise of diplomatic protection by one State of nationality against another State of nationality would create uncertainty and ambiguity about States' obligations. Furthermore, article 15 (b) and (d) were vague or hypothetical.

103. Although the Commission had pointed out in its commentaries that the articles would deal with primary rules, the wording of some provisions suggested otherwise. For instance, it was for each State to decide in accordance with its laws who its nationals were. In that context, the final phrase in article 4, pursuant to which the acquisition of nationality must not be inconsistent with international law, as well as the example cited in the commentary thereto, were not clear. More time was therefore needed to consider the content of the articles and decide on their future. A legally binding instrument could not be drafted until and unless certain concerns of Member States were addressed.

104. **Ms. Pierce** (United States of America) said that her delegation shared the view that, where the articles on diplomatic protection reflected State practice, they represented a substantial contribution to the law on the topic and were thus valuable to States in their current form. However, it was also concerned that a limited number of the articles were inconsistent with well-settled customary international law. As with the articles on State responsibility, the negotiation of a convention on diplomatic protection risked undermining the significant contributions already made by the articles. The best option was therefore to allow the articles more time to inform, influence and settle State practice in the area. The General Assembly should take no further action on the articles at the current time.

105. **Mr. Medina Mejías** (Bolivarian Republic of Venezuela) said that his delegation welcomed the work done by the International Law Commission to explain the differences and similarities between diplomatic protection and consular assistance, as well as the rule of continuous nationality, which required a State to prove that the injured national remained its national after the injury itself and up to the date of the presentation of the claim, without insisting that such requirement should continue to be met until the final resolution of the dispute. It was the Commission's understanding that doing so would place an undue restriction on an injured national who had acquired another nationality. The articles on diplomatic protection sought to codify the law on the topic based on international custom and the relevant case law and literature, clarifying not just the basic concept, scope and limitations of the exercise of diplomatic protection.

106. The articles distinguished between corporations and their shareholders with regard to who could

request diplomatic protection for an internationally wrongful act committed by a State against a corporation, without in principle putting in play the right of shareholders who had not incurred a direct injury from such act to request protection. The articles also established a prerequisite for an injured national to seek diplomatic protection, namely the exhaustion of the judicial and administrative remedies available in the State that committed the wrongful act.

107. In that connection, despite the argument that article 3 indicated that refugees and stateless persons could enjoy diplomatic protection, the failure to explicitly mention them in article 1 lent undue weight to nationality as the basis for the exercise of diplomatic protection. Thus, stateless persons and refugees were included only by way of an exception; that was incorrect and discriminatory.

108. Despite the definitional nature of article 1, it was regrettable that the proposal to include in that article a reference to persons mentioned in article 8 had not been adopted. Since article 8 referred specifically to stateless persons and refugees, his delegation proposed again that the words "or a person mentioned in article 8" should be inserted in article 1, between the words "the former State" and "with a view to".

109. Article 19 cited various forms of desirable practice in the exercise of diplomatic protection Such a provision was uncommon in an instrument which, by definition, aimed to codify international custom or case law and doctrine in a peremptory norm. It might distort custom as a source of law, because it clearly indicated which practice was considered desirable by the international community and which was not, and also restrict the progressive development of law by indicating the direction to be taken by the practice that would ultimately become custom.

110. In its 1924 judgment in *The Mavrommatis Palestine Concessions*, the Permanent Court of International Justice noted that "by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right", on the assumption that, in the exercise of that right, the State was asserting not only the particular interests of the victim but higher national interests. It was therefore entitled to determine what use was made of any compensation obtained, which might or might not include payment to the victim. Such was certainly the situation under the Constitution of his country. His delegation accordingly expressed reservations about article 19, in particular paragraph (c) and its reference to "desirable practices", which had not been recognized as part of international custom.

*The meeting rose at 6 p.m.*